Supreme Court No. 102603-0
(COA No. 83762-1-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TYNAN Q. SHORT,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Tynan Short, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review dated September 5, 2023, for which reconsideration was denied on November 1 2023, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). Copies of both decisions are attached.

B. ISSUES PRESENTED FOR REVIEW

1. Residential burglary requires a perpetrator to enter a dwelling, not remain outside of it. The State found Mr. Short's hand print on an outside window accessible from an outdoor wooden platform but no evidence documenting his presence inside the home. When the jury asked if the deck was part of the dwelling, the trial court ruled that as a matter of law, the deck could be part of the dwelling. The Court of Appeals agreed.

The Court of Appeals decision expands the scope of residential burglary beyond any existing case law. This Court should grant review because the decision conflicts with the

established definition of residential burglary requiring entry inside a home.

2. Business records are inadmissible if they were prepared for purposes of litigation or pursuant to specialized skills. They are also inadmissible if they are testimonial in violation of the Confrontation Clause. The prosecution relied on the substantive descriptions contained in a pawn shop record for testimonial purposes, without calling the witness who wrote it. The document was prepared pursuant to a statutory mandate that entitled the police to access the record at any time.

The Court of Appeals disregarded the statutory mandate governing the pawn shop record and the key role the absent witness's skill and judgment played in describing the pawned jewelry, which was the primary evidence connecting Mr. Short to the residential burglary. This Court should grant review of the constitutional question of whether a record prepared pursuant to a statutory mandate and automatically accessible to law enforcement is admissible without testimony from the

person who prepared the report, and the related issue of whether these descriptive document, used as testimony against the accused, violates the Confrontation Clause.

3. A trial court must ensure that all jurors remain qualified to serve. During trial, the prosecution informed the court that at least one juror was sleeping but the court took no steps to ensure the jurors were awake and listening to the testimony. The Court of Appeals disregarded the credible complaint presented that at least one juror was asleep during trial, and affirmed even though it acknowledged the trial court failed to adhere to its obligation to ensure all jurors receive the testimony in the case, meriting this Court's review.

C. STATEMENT OF THE CASE

On December 5, 2015, Christopher Noseck returned home and realized someone had been inside his home and taken

some belongings. 3RP 191-92, 195.[1] A tool that was on the outside deck was now inside the home. 3RP 193. The sliding glass door that led from the deck to the kitchen was open and someone had tampered with the latch. 3RP 202.

Mr. Noseck said many items were taken, including five of his wife's rings. 3RP 198-200. A metal safe had been broken into with a nearby screwdriver. 3RP 192. Someone left behind a coffee cup from an AM/PM store and two knives that did not belong to Mr. Noseck or his wife. 3RP 208.

On a deck outside the home, Officer Dennis Irwin noticed a palm print on a window. 3RP 229-33. This window was not the point of entry into the home. 3RP 269. Despite evidence someone entered the home through a sliding glass door, there were no prints on that door. 3RP 233.

[1] The trial transcripts from November 24 to December 2, 2022, are consecutively paginated and are referred to herein by the volume number on the cover page.

The police conducted no further investigation until two years later, in September 2017. 3RP 258. Detective Kerry Bernhard sent the palm print taken from the window for analysis. 3RP 258. She received Tynan Short's name as the possible person associated with this print. 3RP 262, 266.

Detective Bernhard used a police "pawn shop database" to search for Mr. Short's name. She found records he made pawn transactions in December 2015 at a Cash America shop. 3RP 262-63.

In 2018, Detective Bernhard requested information from a Cash America employee, Jonathan Bellman. 3RP 264. Mr. Bellman told the detective they did not have records from 2015 because they changed their record-keeping system in 2017. 3RP 297. Later, Mr. Bellman searched paper files and located a transaction receipt dated December 15, 2015. 3RP 289. Mr. Bellman had not worked at the store in 2015 when the record was made. 3RP 283. He only worked at the store in 2017 and 2018. 3RP 283.

According to the pawn shop's transaction report written by an unknown store employee, Mr. Short provided three rings to the pawn shop. Ex. 40. The report listed identifying information for Mr. Short taken from his driver's license. Ex. 40.

As Detective Bernard later told the jury, this report was "significant" because it was "very descriptive and matched so closely with" the complainant's description of the rings taken. 3RP 306.

The person who prepared the report described the rings after conducting certain specialized testing which revealed the karat of gold, employed special tools to measure the ring size, and used other tools to assure the authenticity of the gems. 3RP 284, 299-300. According to Mr. Bellman, the person preparing the report would have used "a testing procedure" with a "diamond tester, gold tester, and weight, scale" before completing the report. 3RP 284.

According to the report, each ring was a "ladies fashion ring." 3RP 299-300. The report described one ring as white gold, 14 karat, size 4, weighing 2.3 grams, with one larger princess diamond and two smaller princess shaped diamonds. 3RP 299. Each stone tested positive as a diamond. 3RP 299. The larger diamond was "24 points each" and the smaller ones were "12 points each." 3RP 406; Ex. 40.

The second ring was white gold, 18 karat, size four, with one round blue stone, weighing 2.3 grams. 3RP 300. The third ring was white gold, 14 karat, size six, oval shaped, with a green stone at 200 points and six round shaped blue stones at 10 points each. Ex. 40; 3RP 300.

Mr. Noseck's wife Susan Lee described three rings taken from her home at trial. One ring was her engagement ring, which was white gold, with a center diamond and two smaller diamonds, princess cut. 3RP 218. It was size 3.75. 3RP 221. Another ring had a blue topaz stone with a bunch of smaller stones and with a white gold band. 3RP 221. The third ring was

also white gold, with an oval jade stone in the middle and six smaller aquamarine stones. 3RP 219-20.

Detective Bernhard interviewed Mr. Short at his workplace. 3RP 264, 267. Mr. Short denied being at the house or pawning the items. 3RP 264-65.

The prosecution charged Mr. Short with residential burglary. CP 225.

During the trial, the prosecution informed the court that at least one juror was sleeping. 4RP 347. The court did not inquire further. 4RP 348.

During deliberations, the jury asked the court to clarify whether the deck was part of the dwelling for residential burglary. CP 152. The prosecution had not argued to the jury that it could convict Mr. Short based on his presence on the deck. Mr. Short asked the court to explain the deck was not part of the dwelling, consistent with case law and the party's arguments. 5RP 452. The court disagreed, reasoning the jury

was free to treat the deck as part of the dwelling. 5RP 453. It told the jury to re-read its instructions. 5RP 453.

Mr. Short was convicted of residential burglary. CP 56, 135.

D. ARGUMENT

1. The Court of Appeals erroneously construed residential burglary to include a person's presence on an unenclosed, unfenced deck outside a home, without requiring entry into the home.

a. As a matter of law, residential burglary requires entry inside the home and not mere presence in the backyard.

To commit residential burglary, a person must enter or remain *inside* a dwelling. RCW 9A.52.025. A "dwelling" is defined as a "building or structure that is used or ordinarily used for lodging." RCW 9.04.110(7); *see* CP 147 (Instruction 9). Entry into the dwelling is required; being present outside the dwelling is insufficient to establish burglary. *See State v. Garcia*, 179 Wn.2d 828, 849, 318 P.3d 266 (2014) (explaining

a person must be "*inside* the burglarized building" to commit burglary (emphasis in original)).

Unlike residential burglary, second degree burglary involves entry into "any building other than a vehicle or dwelling." RCW 9A.52.030(2). A "building" for purposes of second degree burglary includes a padlocked storage locker in a common area of an apartment building. *See State v. Miller*, 91 Wn. App. 869, 872-74, 960 P.2d 464 (1998). A "building" could also be a fenced area protecting donkeys. *State v. Gans*, 76 Wn. App. 445, 450, 886 P.2d 578 (1994).

But Mr. Short was charged with residential burglary, not second degree burglary. Residential burglary is a more serious offense than burglary of another type of building. RCW 9A.52.025(2). The prosecution was required to prove the heightened requirements of residential burglary, including entry into a dwelling.

The deck at issue was outdoors and unenclosed. Ex. 5; 3RP 193. The prosecutor called items on the deck as being

"outside his house," and the homeowner called this area the "backyard." 3RP 193, 4RP 404. The wooden platform had no railing or fence at all. Ex. 5. The outside area provided direct access to a public greenbelt that people frequented and even used to sleep. 3RP 210. Neighbors' yards were close and accessible enough that Mr. Noseck contacted a neighbor two houses away to see if their security camera contained footage of anyone entering his home. 3RP 209.

No case law supports the notion that an outdoor, open-air platform is part of a dwelling for purposes of residential burglary. A garage may be part of a dwelling when it is a contingent part of the house. *State v. Murbach*, 68 Wn. App. 509, 513, 843 P.2d 551 (1993). But the garage in *Murbach* was connected to the house by a door. *Id*. at 511. This the attached garage was part of the dwelling because it was "a 'portion' of the building used for living quarters." *Id*. at 513.

Like a garage, an enclosed basement area may be part of the dwelling. *State v. Moran*, 181 Wn. App. 316, 322, 324 P.3d

808 (2014). The basement in *Moran* was accessed by an outside door and was unfinished, but it was lit with electricity, was tall enough to stand in, and it was the only access point for the home's utilities. *Id*. The reason the defendant went into this basement space was to tamper with the home's toilet and shower and upset his ex-wife. *Id*. at 319.

But an open-air platform that has no fence, no rails, and no measure of privacy is not a portion of the building used for living quarters.

The Court of Appeals ruled that the jury was free to decide whether the dwelling includes the outside area of the home. Slip op. at 6. But the court's role is to decide this legal question.

The court "shall declare the law." Const. art. IV, § 16. "Construction of a statute is a question of law" for courts to resolve. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). "This court has the ultimate authority to say what a statute means." *Id*.

In *Wentz,* this Court determined whether the statutory definition of building included a fenced area to decide whether the allegations could establish burglary. 149 Wn.2d at 345-52.

But here, the trial court and Court of Appeals disregarded the rules of statutory construction and instead ruled the jury was free to decide whether an outside unfenced platform next to a home and treated as the back yard is part of the dwelling for purposes of residential burglary. This legal issue is not a discretionary decision for jurors to decide. This Court should grant review to resolve the legal question of whether this type of deck may be treated as part of a dwelling for purposes of residential burglary.

b. The court failed to accurately instruct the jury and instead allowed the jurors to define the legal scope of the crime.

This issue arose when the jury asked the court to clarify whether "the deck is considered part of the dwelling." CP 152. Mr. Short asked the trial court to explain that legally, the deck is not part of the dwelling. 5RP 452. But the court disagreed

and said the jury was free to treat the deck as part of the dwelling. 5RP 453. It refused to provide any further direction other than telling the jury to read the instructions, purposefully leaving to the jury the legal question of the whether being outside the home satisfies the elements of residential burglary. *Id*. The Court of Appeals agreed this was the correct approach. Slip op. at 7.

When instructions are not clear and a deliberating jury seeks clarification, "[t]he judge should respond to the question in open court or in writing (if the question relates to a point of law, the answer should be written)." Comment to WPIC 151.00; CrR 6.16(f)(1) (similarly providing that court "shall respond to all questions from a deliberating jury" and "additional instruction upon any point of law shall be given in writing").

If the deliberating jury indicates an erroneous understanding of the law, it is "incumbent upon the trial court to issue a corrective instruction" when the deliberating jury

indicates an erroneous understanding of the law that applies in a case. *State v. Campbell*, 163 Wn. App. 394, 402, 260 P.3d 235 (2011), *rev'd on other grounds on reconsideration*, noted at 172 Wn. App. 1009, 2012 WL 5897625 (2012); *see also State v. Sanjurjo-Bloom*, 16 Wn. App. 2d 120, 128, 479 P.3d 1195 (2021) (court "obligated" to correct deliberating jury's misunderstanding of law).

When the jury's question identifies a deficiency in the instructions the court has provided, the court abuses its discretion "by not issuing a clarifying instruction." *Campbell*, 163 Wn. App. at 402.

While judges may resolve ambiguous words in a statute by applying principles of statutory construction, "a jury lacks such interpretive tools and thus requires a manifestly clear instruction." *State v. Weaver*, 198 Wn.2d 459, 466, 496 P.3d 1183 (2021) (quoting *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996)). A manifestly clear instruction means one using language that is "unmistakable, evident, or indisputable."

Id. (quoting *inter alia State v. Ackerman*, 11 Wn. App. 2d 304, 312-13, 453 P.3d 749 (2019)).

The Court of Appeals ruled the trial court correctly answered the jury's question by letting them decide whether they believe a deck is part of a dwelling. Slip op. at 6. But the legal scope of a criminal offense is not a question of fact for jurors, but a legal determination for the court to make. *See Wentz*, 149 Wn.2d at 346. The Court of Appeals incorrectly interpreted the residential burglary statute to include an outside, unfenced wooden platform, and erroneously ruled the jury is free to decide the scope of a criminal offense. This Court should grant review.

2. The prosecution's case relied on testimonial records prepared pursuant to a statutory mandate, violating hearsay rules and Mr. Short's right to confront the witnesses against him.

a. The prosecution's case rested on records prepared pursuant to a statutory mandate without witness testimony.

Business records are admissible at a criminal trial without violating the Confrontation Clause only when they are "created for the administration of an entity's affairs" and not for purposes of "proving some fact" in a future criminal investigation. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); U.S. Const. amend. VI; Const. art. I, § 22.

Written reports are not admissible as business records when created in conjunction with law enforcement for purposes of a criminal investigation. *Melendez-Diaz*, 557 U.S. at 324. Likewise, records created in anticipation of litigation are not admissible as business records. *State v. Jasper*, 174 Wn.2d 96, 112, 271 P.3d 876 (2012). When an office's "regularly

conducted business activity" includes producing evidence available for use at a trial, its records do not fall within the business record exception. *Id*.

The business record exception does not include records that use a person's "skill, judgment, or discretion" to complete. *In re Coe*, 175 Wn.2d 484, 505, 286 P.3d 29 (2012). When the record contains "subjective analyses," the accuracy of the preparer's conclusions should be tested in court, "subject to cross-examination." *In the Matter of the Welfare of: M.R.*, 200 Wn.3d 363, 380, 518 P.3d 214 (2022).

By law, pawn shops have a "duty to record" certain information from each transaction and must provide these records to law enforcement whenever requested. RCW 19.60.020; RCW 19.60.025. The record must include a signature from the person making the transaction; the person's name, date of birth, sex, height, weight, race, address, and telephone number; the date; the name or identification number of the store employee preparing the report; a current

government issued identification card number for the person offering the jewelry; and a complete description of the property offered, including the size, pattern, and color of stones for jewelry. RCW 19.60.025(1). Similar requirements apply to items that are not jewelry. RCW 19.60.020. This record must be maintained and made available to the police. RCW 19.60.025(2).

The prosecution relied on a written report from a pawn shop as the sole evidence connecting Mr. Short to the burglary. Ex. 40. This record was located by a police database and provided to law enforcement as RCW 19.60.025(2) demands.

The content of this record precisely adhered to the mandate of RCW 19.60.025(1), mirroring the statutorily required information.

The trial court admitted this pawn shop report as a business record, over Mr. Short's objection. CP 193-94; 2RP 32-37; 4RP 292, 298. The prosecution relied on this report for

the content of the jewelry analysis completed by an unknown employee. 3RP 306; 4RP 406-07.

Here, an unknown employee did not merely track the name of the person making a transaction, but, as the detective told the jury, "significant[ly]" offered "very descriptive" information about the jewelry that "matched so closely with" the complainant's description of the rings taken. 3RP 306. This descriptive information was the result of special equipment and analysis, using a "diamond tester, gold tester, and weight, scale" before completing the report. 3RP 284.

This report was inadmissible as a business record.

b. This testimonial record violated the Confrontation Clause.

The written report on which the prosecution's case hinged was created under the precise terms dictated by statute and provided to law enforcement as that statute mandates, rendering it testimonial. *Melendez-Diaz*, 557 U.S. at 324. The prosecution used this evidence as a witness against Mr. Short.

See Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

This substantive information should have been subject to adversarial testing, as the Sixth Amendment commands. *Crawford*, 541 U.S. at 50-51. The "principal evil at which the Confrontation Clause was directed" was the use of ex parte statements as evidence against the accused. *Id*. at 50.

The Court of Appeals skirted the constitutional flaw by treating the absent jewelry examiner as simply offering a generic information, involving no skill or judgment. Slip op. at 15. But this analysis subverts the right of cross-examination. Mr. Short was not able to probe the reliability of the jewelry descriptions and testing. *See Melendez-Diaz*, 557 U.S. at 316-18. He did not even know who prepared the report and this report served as the functional equivalent of live, in-court testimony. *Id*. at 311, 313.

The Court of Appeals also incorrectly claimed the jewelry descriptions did not matter to the case. Slip op. at 16.

But the prosecution centered its case on this descriptive evidence, eliciting its "significant" importance to the investigation due to the quality of the descriptive information and its close match with the rings taken. 3RP 306. It insisted the record's descriptions of the jewelry proved the case "beyond a reasonable doubt" and recited the report's detailed analysis of the jewels in its closing argument. 3RP 306; 4RP 406-07, 435. It insisted this evidence corroborated the complainant's allegations about their stolen jewelry. 4RP 406.

The testimonial nature of this report renders it inadmissible without affording Mr. Short his right of confrontation. This Court should grant review to address whether the Confrontation Clause applies to a statutorily mandated report that contains subjective, descriptive analysis of evidence that forms the linchpin of the prosecution's case connecting the accused to the offense.

3. The court violated its obligation to ensure a fair trial by not conducting any inquiry into a sleeping juror.

a. Mr. Short has the right to a fair trial by a qualified jury.

People accused of a crime have a federal and state constitutional right to a fair and impartial trial by qualified jurors. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22; *State v. Irby*, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015); *United States v. Kechedzian*, 902 F.3d 1023, 1027 (9th Cir. 2018).

A constitutionally valid jury trial must be free of disqualifying jury misconduct. *State v. Tigano*, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991). Sleeping during trial is a form of juror misconduct warranting removal. *State v. Jorden*, 103 Wn. App. 221, 226, 230, 11 P.3d 866 (2000); *see People v. Valerio*, 141 A.D.2d 585, 586, 529 N.Y.S.2d 350 (N.Y. App. Div. 1988).

A juror must take an oath that promises to "well, and truly try, the matter in issue . . . and a true verdict give, *according to the law and evidence as given them on the trial."* RCW 4.44.260 (emphasis added).

Under RCW 2.36.110, the judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of ... *inattention* . . . or by reason of conduct or practices incompatible with proper and efficient jury service." (emphasis added). CrR 6.5 states that "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." RCW 2.36.110 and CrR 6.5 place a "continuous obligation" on the trial judge to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit. *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005).

b. The prosecution alerted the court that at least one juror was sleeping during trial but the court conducted no inquiry.

The prosecutor told the court that "at least one juror had fallen asleep." 4RP 347. The prosecutor specifically named Juror 4 and did not identify other jurors who might have been asleep. *Id*. Defense counsel did not comment on whether the juror was sleeping. 4RP 348. But the court took no action. *Id*. It did not question the juror to ascertain what the juror missed. It did not inquire into the reasons the juror fell asleep. It did not ask about other jurors who may have been asleep.

It is misconduct for a juror to sleep through any part of the presentation of evidence. *Jorden*, 103 Wn. App. at 226, 230. Juror misconduct is presumed prejudicial. *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740 (2006). The prosecution has the burden to demonstrate "it is unreasonable to believe the misconduct could have affected the verdict." *Id*. "Any doubt that the misconduct affected the verdict must be resolved

against the verdict." *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989).

"A trial judge has an independent obligation to protect" the accused's right to be tried by qualified jurors, "regardless of inaction by counsel or the defendant." *Irby*, 187 Wn. App. at 193; *see State v. Guevara Diaz*, 11 Wn. App. 2d 843, 855, 456 P.3d 869, *rev. denied*, 195 Wn.2d 1025 (2020) (explaining trial court's "obligation to excuse a juror where grounds for a challenge for cause exist, even if neither party challenges the juror.").

By failing to engage in any inquiry whatsoever despite the prosecution alerting the court that at least one juror was asleep during the prosecution's case, the court violated its continuing obligation to ensure the jurors heard the evidence, remained impartial, and were qualified to render a verdict.

c. The court's untenable response to the prosecution's concern about a sleeping juror undermines the fairness of the trial.

The court untenably disregarded the prosecution's report of at least one juror sleeping during the trial testimony, contrary to its obligation to protect the right to qualified jurors. *Irby*, 187 Wn. App. at 193. The court may not simply defer all aspects of juror qualifications to the parties, because seating an unqualified juror is not a discretionary or strategic decision. *Id*. (citing *Hughes v. United States*, 258 F.3d 453, 464 (6th Cir 2001)). Defense "counsel cannot so waive a criminal defendant's basic Sixth Amendment right to an impartial jury." *Hughes*, 258 F.3d at 463. Just as seating a biased juror is manifest constitutional error and cannot be harmless, seating a juror who has not heard all of the evidence presented due to inattention cannot be harmless. *See Irby*, 187 Wn.2d at 193.

By failing to inquire into the prosecution's concern about at least one sleeping juror, the trial court did not fulfill its obligation to ensure all jurors remained qualified to serve. The

Court of Appeals affirmed simply because it did not have enough information proving the prejudicial nature of the information the sleeping juror missed, even though the trial court neglected its duty to ensure the jurors were qualified to serve. This Court should grant review.

E. CONCLUSION

Based on the foregoing, Petitioner Tynan Short respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 4333 words and complies with RAP 18.17(b).

DATED this 30th day of November 2023.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. SHORT, TYNAN QUADE, Appellant.	No. 83762-1-I UNPUBLISHED OPINION

BOWMAN, J. — Tynan Quade Short appeals his jury conviction for residential burglary. Short argues the trial court erred by refusing to instruct the jury that an attached deck is not a "dwelling" under the residential burglary statute, by failing to sufficiently investigate whether a juror was sleeping, and by admitting a pawnshop transaction receipt under the business records exception to hearsay. Short also claims ineffective assistance of counsel and cumulative error entitle him to a new trial. We affirm.

FACTS

On December 7, 2015, Christopher Noseck returned home to find his house burglarized and the sliding glass door leading to his back deck "pried wide open." He found his strongbox, which he kept in the master bedroom closet, in the garage. Someone had forced open the strongbox and strewn his personal documents on the ground. He also found several items missing from the home,

including his wedding band, his wife's wedding band, and three of his wife's gemstone rings.

Noseck called the police, and two officers responded. While inspecting the crime scene, an officer noticed a palm print on the outside surface of a window next to the sliding glass door. The officer dusted the palm print and collected an impression.

In September 2017, the Lake Stevens Police Department assigned Detective Kerry Bernhard to the case. Detective Bernhard sent the palm print to the Washington State Patrol Crime Laboratory (WSPCL) for analysis. The WSPCL entered the print in a database that returned as a match for Short.

Detective Bernhard looked up Short's name in a "database associated with the secondhand sale of items." The search revealed that Short engaged in a transaction with Cash America Pawn in North Seattle soon after the Noseck burglary. In early 2018, Detective Bernhard contacted Cash America and spoke to employee Jonathan Bellman. Bellman gave Detective Bernhard a transaction receipt showing that Short sold three women's gemstone rings to Cash America on December 15, 2015. The receipt's description of the rings was similar to those stolen from the Noseck home a week earlier.

On February 20, 2018, the State charged Short with one count of residential burglary committed while on community custody.[1] On December 6, 2019, Detective Bernhard collected palm prints from Short to compare as a

[1] On November 7, 2019, the State amended the information to add one count of first degree trafficking in stolen property committed while on community custody. The State dismissed that count before trial.

known reference to the print found at the Noseck house on December 7, 2015. She then sent them to the WSPCL for analysis. WSPCL "indicated the prints were a match" and again confirmed they belonged to Short.

In November 2021, the case proceeded to a jury trial. The State called Bellman as the custodian of the pawnshop transaction receipt, which it offered under the business record exception to hearsay.[2] Short objected and argued that "Bellman is not [a] proper custodian of records to be able to admit [the] document." Short argued that the receipt was created in 2015, before Bellman worked at Cash America. The court overruled the objection.

On the second day of trial, the State asked for an early break. The prosecutor told the court that juror 4 had possibly fallen asleep during testimony. Defense counsel had no response, so the court resumed trial after the break. Short called no witnesses and denied entering the Noseck home or selling any rings to Cash America Pawn.

At the close of trial, the court instructed the jury on residential burglary:

> To convict the defendant of the crime of residential burglary, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about December 7, 2015, the defendant entered or remained unlawfully in a dwelling;
> (2) That the entering or remaining was with intent to commit a crime of theft against a person or property therein; and
> (3) That this act occurred in the State of Washington.

The court defined "dwelling" as "any building or structure that is used or ordinarily used by a person for lodging."

[2] Before trial, Short moved to exclude the transaction receipt, arguing that it is "not relevant." The court denied the motion. That ruling is not at issue here.

During deliberations, the jury asked the court, "Is the deck considered part of the dwelling?" Short urged the court to answer "no." The State suggested that the court refer the jury to their instructions. The court determined:

> The standard pattern instruction defines dwelling as any building or structure that is used or ordinarily used by a person for lodging. There has been case law that found a garage, for example, or an area underneath that is ordinarily used for lodging as sufficient, so that would be a comment on the evidence. It's up to the jury to decide whether or not they believe it was Mr. Short on the deck, leaving a palm print, whether or not the deck was ordinarily used by a person as lodging or not.

The court told the jury to "[p]lease refer to your jury instructions."

The jury found Short guilty of residential burglary. The court determined he committed the crime while on community custody and sentenced Short to 72 months of confinement.

Short appeals.

ANALYSIS

Short argues the trial court erred by refusing to instruct the jury that a deck is not a dwelling, failing to investigate whether a juror was sleeping during testimony, and admitting the pawnshop transaction receipt under the business record exception to hearsay. Short also argues ineffective assistance of counsel and cumulative error entitle him to a new trial. We address each argument in turn.

1. Jury Question

Short argues the trial court erred by refusing to instruct the jury that a deck is not a dwelling based on "a misapprehension of the law." We disagree.

We review a trial court's response to a jury question for an abuse of discretion. See State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998) (we review a trial court's refusal to give a jury instruction based on a factual dispute for abuse of discretion; de novo if based on a ruling of the law). A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable grounds or reasons. State v. Chichester, 141 Wn. App. 446, 453, 170 P.3d 583 (2007). A ruling based on an erroneous view of the law is an abuse of discretion. State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006).

Article I, sections 3 and 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee defendants the right to a fair trial. A fair trial requires that jury instructions accurately inform the jury of the relevant law. State v. Henderson, 192 Wn.2d 508, 512, 430 P.3d 637 (2018). After a jury begins deliberating, a trial court has discretion whether to provide additional instructions to the jury. State v. Ng, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). Generally, a court has no duty to further instruct the jury after it begins deliberating. See State v. Langdon, 42 Wn. App. 715, 718, 713 P.2d 120 (1986). Nor does the court need to further instruct the jury when the given instructions accurately state the law. State v. Campbell, 163 Wn. App. 394, 402, 260 P.3d 235 (2011), rev'd on other grounds, 172 Wn. App. 1009 (2012). But when "a jury's question to the court indicates an erroneous understanding of the applicable law, it is incumbent upon the trial court to issue a corrective instruction." Id.

Here, the trial court accurately instructed the jury that "[d]welling means any building or structure that is used or ordinarily used by a person for lodging." See RCW 9A.04.110(7) (" 'Dwelling' means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging."). And the jury's question did not reflect a misunderstanding of that instruction. Instead, asking if "the deck [is] considered part of the dwelling" called for the court to assess whether the evidence adduced at trial satisfied that definition of "dwelling." The question was one of fact for the jury to decide. See State v. McDonald, 123 Wn. App. 85, 90-91, 96 P.3d 468 (2004)[3] ("whether a building is a [dwelling] turns on all relevant factors and is generally a matter for the jury to decide").

Short argues that the court's refusal to answer the jury's question amounts to an erroneous understanding of the law. Citing State v. Garcia, 179 Wn.2d 828, 318 P.3d 266 (2014), he claims that "[a]s a matter of law, the unenclosed deck in a yard is not part of the dwelling for purposes of residential burglary." In Garcia, our Supreme Court determined that a defendant standing in a commercial parking lot was not "inside" a building as contemplated by the burglary statute. Id. at 833, 849. But Short was not standing in a parking lot outside a commercial business. The record shows that Short was standing on a deck attached to the back door of the house.

Further, we have held that the definition of "dwelling" includes any building, structure, "or a portion thereof" used by a person for lodging. See State

[3] Footnote omitted.

v. Neal, 161 Wn. App. 111, 114, 249 P.3d 211 (2011); RCW 9A.04.110(7). Applying that definition, we have concluded that a dwelling can include an attached garage, State v. Murbach, 68 Wn. App. 509, 513, 843 P.2d 551 (1993), a tool room in an apartment building, Neal, 161 Wn. App. at 112-14, and an "enclosed area beneath [a] living space," State v. Moran, 181 Wn. App. 316, 322, 324 P.3d 808 (2014). Indeed, Division Three of our court concluded that a deck, given its description and surroundings, amounted to "an extension of the dwelling and therefore a part of the abode." State v. Haley, 35 Wn. App. 96, 98, 665 P.2d 1375 (1983).[4]

Short fails to show that a deck is not part of a dwelling as a matter of law, and the trial court did not abuse its discretion by refusing to so instruct the jury.

2. Sleeping Juror

Short argues that the trial court "violated its obligation to ensure a fair trial by not conducting any inquiry into a sleeping juror." We disagree.

We review a trial court's investigation of juror misconduct for abuse of discretion. State v. Gaines, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). Under RCW 2.36.110, "[i]t shall be the duty of a judge to excuse . . . any juror, who in the opinion of the judge, has manifested unfitness . . . by reason of . . . inattention." The statute "place[s] a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). But there is no

[4] In an unpublished opinion, we later questioned the holding in Haley. See State v. Hribar, noted at 119 Wn. App. 1001, 2003 WL 22476191, at *3. But we determined that the insufficient description of the "patio" in that case did not warrant disagreement with the holding in Haley. Id.

mandatory format for establishing a record of alleged juror misconduct. Id. at 229. A trial judge has broad discretion to investigate jury problems and accusations of juror misconduct in the manner most appropriate for a particular case. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). "If at any time before submission of the case to the jury" the court finds a juror unable to perform their duties, "the court shall order the juror discharged." CrR 6.5.

A juror who sleeps during trial is not fit to serve. See Jorden, 103 Wn. App. at 224-26, 230. A sleeping juror may prejudice a defendant's due process rights and the right to an impartial jury. See State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986). But to establish prejudice, the defendant must at least show "how long the jurors slept or what specific testimony they missed by sleeping." See In re Pers. Restraint of Caldellis, 187 Wn.2d 127, 146, 385 P.3d 145 (2016).

Here, the State called the officer who found the palm print on the sliding glass door to explain the print collection process and a WSPCL forensic scientist to explain the analysis and identification process. During the forensic scientist's testimony, the State asked for the midmorning break and addressed the court outside the jury's presence. The prosecutor told the court that "[i]t was brought to my attention that at least one juror had fallen asleep" and identified that person as juror 4. The court said it "saw that Mr. Short looks tired" but was "not aware that a juror looked like they were sleeping." The court then asked defense counsel if he would "like to be heard." Defense counsel responded, "No, your Honor," and the court resumed the trial after the midmorning recess.

Short argues:

> By failing to engage in any inquiry whatsoever despite the prosecution alerting the court that at least one juror was asleep during the prosecution's case, the court violated its continuing obligation to ensure the jurors heard the evidence, remained impartial, and were qualified to render a verdict.

But the information before the court was tenuous. The court knew that someone perceived juror 4 to be sleeping, but neither the prosecutor, defense counsel, nor the court saw the juror sleeping. Indeed, defense counsel had no additional information to offer. On these facts, it was not untenable for the court to conclude that the report did not warrant further investigation.

Nonetheless, even if the trial court erred, Short fails to establish prejudice. The record is silent on how long the juror may have been sleeping or what specific testimony they may have missed. We reject Short's argument that he is entitled to a new trial based on the court's failure to further inquire about a sleeping juror.[5]

3. Pawnshop Receipt

Short argues the trial court improperly admitted a pawnshop transaction receipt under the business record exception to hearsay. Short says the court erred by ruling that pawnshop employee Bellman was a qualified custodian of the transaction receipt. Further, he claims his attorney was ineffective for failing to argue that creating the transaction receipt required the use of "skill, judgment, or discretion" and that the pawnshop created the receipt for the sole purpose of litigation.

[5] Because we conclude that the trial court did not abuse its discretion, we do not address the State's argument that Short invited the error.

We review a trial court's evidentiary rulings for an abuse of discretion and will reverse only if the court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is not admissible unless a court rule or statute allows it. ER 802.

RCW 5.45.020 provides one such exception to the hearsay rule for business records. Evidence is admissible under the business records exception when (1) the evidence is in "record" form; (2) the record is of an "act, condition or event"; (3) the record was made in the regular course of business; (4) it was made "at or near the time of the act, condition or event"; and (5) the court is satisfied that "the sources of information, method and time of preparation were such as to justify its admission." RCW 5.45.020; State v. Kreck, 86 Wn.2d 112, 118-19, 542 P.2d 782 (1975).

A. Records Custodian

Short argues the trial court erred by determining that Bellman was qualified to testify as a custodian of the pawnshop transaction receipt. We disagree.

Hearsay is admissible as a business record so long as a "custodian or other qualified witness testifies to its identity and the mode of its preparation." RCW 5.45.020; State v. Quincy, 122 Wn. App. 395, 399, 95 P.3d 353 (2004).

We broadly interpret the statutory terms "custodian" and "other qualified witness." Quincy, 122 Wn. App. at 399.

RCW 5.45.020 does not require examination of the person who actually made the business record. Quincy, 122 Wn. App. at 399. " 'Testimony by one who has custody of the record as a regular part of his work or has supervision of its creation ("other qualified witness" under the statute) will suffice.' " Id. (quoting State v. Ben-Neth, 34 Wn. App. 600, 603, 663 P.2d 156 (1983) (quoting RCW 5.45.020)). When the trial court " 'is satisfied that sufficient testimony has been adduced regarding the manner in which certain records have been kept and that their identity has been properly established in compliance with' " chapter 5.45 RCW, the record is admissible. State v. Iverson, 126 Wn. App. 329, 338, 108 P.3d 799 (2005) (quoting Cantrill v. Am. Mail Line, Ltd., 42 Wn.2d 590, 607-08, 257 P.2d 179 (1953)).

At trial, Short objected to admitting the pawnshop receipt, arguing that he had "new information" to show "Bellman is not [a] proper custodian of records." So, the court allowed Short to inquire into Bellman's qualifications:

> Q. Mr. Bellman, when in 2017 did you start working at Cash America?
> A. I'm not quite familiar with that, but I know — I believe it was around May or June.
> Q. And when you started — do you remember discussing this case with Kerry Bernhard? That's the detective that you eventually gave this document to.
> A. (No response.)
> Q. If you don't remember her name, a police officer?
> A. Yes.
> Q. Do you remember telling her that the computer record system had been completely changed in June of 2017 and that you were unable to provide a record of the transaction at that time? Do you remember telling her that at first?

A. Yes.
Q. And then at some point a couple days later, you went back and looked through some boxes, and you produced this slip; is that correct?
A. Yes.
Q. So is it fair to say that at the time that you were working at the Cash America, the computer system and recordkeeping had completely changed, it was not the same as in 2015 when this document was made; is that correct?
A. Yes.

Short then argued that Bellman "is not familiar with the records as they were kept in 2015 when [the transaction receipt] was made; therefore, he is not the witness that can lay the foundation to admit it." In response, the State asked Bellman:

Q. So, you joined Cash America in 2017, right?
A. Yes.
Q. Were you present for the change in the system?
A. Yes.
Q. So were you there when the old system was there?
A. Yes.
Q. You were aware of how that system operated?
A. Yes.
Q. You were there when the new system was implemented?
A. Yes.

After a brief colloquy with the court, Short tried to clarify Bellman's prior testimony:

Q. When you told Detective Bernhard that the system had changed in 2017, what did you mean specifically by that?
A. What I was telling her I couldn't look it up when I believe she called me I couldn't look it up on the computer because the system didn't go back that far, I would have to find the document to refer back to her inquiry because I couldn't find her inquiry on the computer.
Q. And when did you leave Cash America?
A. I believe — I would be just guessing — I believe it was late 2018 or early 2019.
Q. So your testimony to the Court today is that the computer system changed in June of 2017, but the hardcopy — the

way the physical records were kept, you're saying that that did not change?
A. Correct.

Short then withdrew his objection, but after a discussion with the court, withdrew his withdrawal. Ultimately, the court overruled Short's objection.

Bellman's testimony showed that he was familiar with both the record keeping system in place during 2015 when Short pawned the rings and the current record keeping system. Bellman explained that both systems kept physical records. He clarified that he had to manually search for hard copy records made before 2017, while he could use a computer to search for records made after 2017. And he identified the December 15, 2015 transaction receipt as a document kept under the old system. The trial court did not abuse its discretion by allowing Bellman to testify as a custodian of the receipt.

B. Ineffective Assistance of Counsel

Short argues his attorney was ineffective for failing to argue that the transaction receipt was inadmissible as a business record because its creation required the use of skill, judgment, or discretion and that it was prepared for the purpose of litigation.

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To succeed on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and prejudice. Strickland, 466 U.S. at 687. We need not "address

both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697.

We view a claim of ineffective assistance of counsel with a strong presumption of effective representation. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Representation is deficient when it falls below an objective standard of reasonableness. Id. at 334-35. Prejudice occurs when there is a reasonable probability that but for counsel's error, the result of the trial would have been different. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). When a claim of ineffective assistance rests on trial counsel's failure to challenge the admission of evidence, the defendant must show that the trial court would likely have sustained an objection. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

i. Use of Skill, Judgment, or Discretion

Short argues that the business records exception to hearsay does not apply to the pawnshop transaction receipt because it contains subjective descriptions of the pawned rings, which required the use of Bellman's "skill, judgment, or discretion." We disagree.

The business records exception generally applies to objective records of regularly recorded activities. In re Det. of Coe, 175 Wn.2d 482, 505, 286 P.3d 29 (2012). The exception does not apply to those records created through the declarant's skill, judgment, or discretion. Id.

Short says the transaction receipt here is like the document rejected in Coe. In that case, over the defendant's objections, the trial court admitted into

evidence data from an investigative database that law enforcement maintained to gather information about sexual assaults. Coe, 175 Wn.2d at 501-02. The State argued the evidence was admissible under the business records exception to hearsay. Id. at 504-05. Our Supreme Court disagreed, explaining that the business records exception generally applies to objective records of a regularly recorded activity and not those " 'reflecting the exercise of skill, judgment, and discretion.' " Id. at 505 (quoting 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 803.37 (5th ed. 2007)). It determined that the information from the database relied on "police reports [that] are a subjective summary of the officer's investigation" and "victims' [subjective] statements . . . based on judgment or discretion." Id.

The transaction receipt here is not like the evidence in Coe. Cash America's receipt requires the "employee/lender" to include information about the "borrower/seller" engaging in the transaction, including the customer's name, date of birth, height, weight, eye color, race, and gender. It also clarifies whether the "transaction type" is a purchase or a loan. And it contains a section asking for the "description of property" being pawned. The employee who created Short's transaction receipt listed "Tynan Short" as the "seller" of the items and described the property as three "[ladies] fashion rings." The transaction receipt identifies the color, size, and stones of each ring. None of this information requires the use of skill, judgment, or discretion.

Short argues that creating the receipt required the use of skill because Cash America tests the rings for the authenticity of their metal and gems. But

nothing in the document requires that level of detail in the description, and the information about the authenticity of the metal and gems in the rings was not at issue here. Instead, the State admitted the document to show the general description of the rings and the name of the person selling them. Short fails to show that the court would have likely sustained an objection to the transaction receipt on this basis.

ii. Created for Sole Purpose of Litigation

Short also argues that the receipt is not a business record because pawnshop records are "prepared to establish past events potentially relevant to a later criminal investigation, rendering them testimonial under the Confrontation Clause."[6] We disagree.

Business records are presumptively admissible if made in the regular course of business with no apparent motive to falsify. In re Welfare of M.R., 200 Wn.2d 363, 378, 518 P.3d 214 (2022). We assume that a business creates such records for clerical purposes and not in anticipation of litigation. Id. at 378-79. But courts may not admit facially valid business records " 'if the regularly conducted business activity is the production of evidence for use at trial.' " State v. Jasper, 174 Wn.2d 96, 112, 271 P.3d 876 (2012) (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)).

Short argues that Cash America creates transaction receipts for the sole purpose of litigation much like those in Melendez-Diaz. In that case, the United States Supreme Court considered whether "certificates of analysis" fell under the

[6] U.S. CONST. amend. IV; WASH. CONST. art. I, § 22.

business records exception to hearsay. Melendez-Diaz, 557 U.S. at 308-09, 321. The prosecution offered the certificates as evidence that the results of a forensic analysis established that a seized substance was cocaine. Id. at 308. It argued the certificates were " 'akin to the types of official and business records admissible at common law.' " Id. at 321. The Supreme Court disagreed, reasoning that while the certificates were kept in the regular course of business, they were " 'calculated for use essentially in the court, not in the business.' " Id. (quoting Palmer v. Hoffman, 318 U.S. 109, 114, 63 S. Ct. 477, 87 L. Ed. 645 (1943)). The Court held that the business records exception did not apply when "regularly conducted business activity is the production of evidence for use at trial." Id.

The transaction receipt here is unlike the certificates in Melendez-Diaz. Cash America creates the transaction receipts to identify whether the "transaction type" is a "purchase," as it was here, or a loan. The receipt identifies the person selling items and describes the items the customer sold with particularity. Cash America retains a copy of the receipt and provides a copy to the customer. The receipt is a clerical document used by Cash America to record the sale of items.[7]

Still, Short claims that Cash America created the receipt for the purpose of litigation because RCW 19.60.020 requires pawnbrokers to record transactions and make them available to law enforcement for inspection.

[7] The receipt also serves as a contract between Cash America and the customer if the transaction type is a loan.

Under RCW 19.60.020, pawnbrokers must maintain a record of information for each transaction. Among other details, pawnbrokers must record the date of the transaction; the customer's name, date of birth, gender, height, weight, race, address, and telephone number; and a "complete description of the property pledged, bought, or consigned." RCW 19.60.020(1). The business record "shall at all times during the ordinary hours of business . . . be open to the inspection of any commissioned law enforcement officer." RCW 19.60.020(2).

That pawnbrokers must keep certain records and make them available to law enforcement for inspection does not mean that they create the records solely for the purpose of litigation.[8] Indeed, the receipts have an obvious record-keeping clerical function.[9] Short fails to show that the trial court would have sustained an objection to the admission of the transaction receipt as a record prepared solely for the purpose of litigation.

4. Cumulative Error

Short argues that cumulative error deprived him of a fair trial. The cumulative error doctrine entitles a defendant to a new trial "when cumulative errors produce a trial that is fundamentally unfair." State v. Emery, 174 Wn.2d

[8] We note we have held that even some police records may qualify as business records under RCW 5.45.020. See, e.g., Iverson, 126 Wn. App. at 332-33, 337-39 (victim's jail booking record constituted business record to prove her identity as victim named in protection order); State v. Bradley, 17 Wn. App. 916, 918, 567 P.2d 650 (1977) (police computer printout used as evidence of all phone calls requesting police assistance on specific date admissible as business record); State v. Bellerouche, 129 Wn. App. 912, 917, 120 P.3d 971 (2005) (trespass notice issued by police constituted admissible business record).

[9] At least one out-of-state case reached a similar result. See Gonzalez v. State, 965 So.2d 273, 276 (Fla. Dist. Ct. App. 2007) (a pawnshop transaction form "is not prepared primarily to be used in a criminal prosecution with the purpose of bearing witness against the customer" when "it has other record-keeping purposes").

741, 766, 278 P.3d 653 (2012). Reversal is not required where the errors are few and have little to no effect on the outcome of the trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because no trial error occurred here, the cumulative error doctrine does not apply.

We conclude the trial court did not err by refusing to instruct the jury that a deck is not a "dwelling," deciding not to inquire further of a potentially sleeping juror, and admitting the pawnshop transaction receipt under the business record exception to the hearsay rule. We also conclude Short cannot show ineffective assistance of counsel or cumulative error. We affirm.

Brennan, J.

WE CONCUR:

Díaz, J.

Hazelrigg, ACJ

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. SHORT, TYNAN QUADE, Appellant.	No. 83762-1-I ORDER DENYING MOTION FOR RECONSIDERATION AND REMANDING TO STRIKE VPA

Appellant Tynan Quade Short filed a motion for reconsideration of the opinion filed on September 5, 2023 in the above case. Respondent State of Washington filed an answer to the motion. A majority of the panel has determined that the motion should be denied but remand to the trial court to strike the victim penalty assessment (VPA) under RCW 7.68.035. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied and the case is remanded to strike the VPA.

FOR THE COURT:

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83762-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: November 30, 2023

WASHINGTON APPELLATE PROJECT

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