NO. 32873-2-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CECILY MCFARLAND, APPELLANT

BRIEF OF RESPONDENT

GARTH DANO
Grant County Prosecuting Attorney

Katharine W. Mathews, WSBA# 20805
Deputy Prosecuting Attorney
Attorneys for Respondent

P.O. Box 37
Ephrata, Washington 98823
PH: (509) 794-2011

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B. Was McFarland's offender score properly calculated when burglary and unlawful possession of a firearm have different victims and thus cannot encompass the same criminal conduct? (Assignment of Error No. 2).

C. Fred Legault woke one morning to find that during the night someone had taken from his house guns, a big-screen television, other electronics and tools, checkbooks and a wallet. Was it was proper to use the term "victim" when referring to Mr. Legault at trial where neither Deputy Fisher nor the State attributed guilt to McFarland with that reference? (Assignment of Error No. 3).

D. An officer's body camera video of McFarland's post-arrest statements showed her in handcuffs, argumentative and sarcastic, and apparently impaired. The officer can be heard reciting the elements of the crime of burglary, telling McFarland that "something" had led the investigation to her, and intimating that she could be a flight risk. Did the trial court abuse its discretion by admitting the video into evidence and publishing it to the jury when the probative value of the video outweighs its potential for unfair prejudice and any possible error was harmless? (Assignment of Error No. 4).

II. STATEMENT OF THE CASE.

The State adopts the Statement of the Case in Appellant's Opening Brief (Br. of Appellant), RAP 10.3, and supplements those facts as

follows.

Cecily McFarland (McFarland) had been dating Chad Faircloth (Chad)[1] about a week when the two of them moved in with Chad's father, Jeffrey Faircloth (Mr. Faircloth), and step-mother, Bobbi Jean Palma (Ms. Palma). 1RP 110.[2] McFarland's previous relationship with Derik Sterling had ended approximately six months earlier. 1RP 286. During that relationship, McFarland had lived for a while with Mr. Sterling and his parents, the Legaults. 1RP 222. At the time of the burglary, she had not lived with the Legaults, nor had they seen her, for approximately nine months. Id.

Fred Legault (Mr. Legault) was home alone on the evening of June 21, 2014. 1RP 222. He went to sleep around 10:00 o'clock p.m. and got up the next morning around 8:00. Id. Somewhere between 10:30 and 11:00 o'clock that night, his stepson Derik Sterling received a text from McFarland, telling him she was inside his mother's house. 1RP 287.

When Mr. Legault woke, he noticed his big-screen television was missing. 1 RP 223. He was missing eighteen firearms, approximately 2,000 rounds of ammunition, a Blu-ray player and other electronics

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[1] The senior Mr. Faircloth is referred to as Mr. Faircloth, while his son is referred to as Chad. The State means no disrespect.

[2] The verbatim transcript of proceedings consists of three volumes of consecutively paginated trial record, cited here as 1RP and a separately paginated volume of transcripts from hearings on August 13, August 18, and October 27, 2014. This is cited as 2RP.

including one or two DVD players, an iPod, hand tools, an electric sander, several bottles of liquor, four checkbooks, a wallet, and credit cards. 1RP 223-24.

Chad and McFarland left the Palma-Faircloth residence around 7:00 o'clock the evening of June 21st. Ms. Palma went to bed around 9:00. 1RP 129. Chad woke her around 3:00 o'clock in the morning, asking to be let into the house. 1RP 130. When Ms. Palma opened the door, McFarland carried "a whole bunch of guns" into the house. Id. Chad was right behind her, carrying a large television. 1RP 131. Ms. Palma saw boxes of miscellaneous items, including a laptop and tools and bottles of liquor. 1RP 133, 134. McFarland told Ms. Palma that all of the property belonged to her. 1RP 132. Chad took the television set back to the room he shared with McFarland. Id. The boxes of various items of property were also taken to that room. 1RP 133. McFarland put the guns on the living room floor. 1RP 132.

While all this was going on, Mr. Faircloth was asleep. 1RP 114. He had gone to bed sometime between 2:00 o'clock and 3:00 o'clock in the morning. 1RP 111. A few hours later, around 6:00 o'clock, Chad woke him and asked him to help move more of McFarland's property. 1RP 111. The three of them went to a house near a golf course. 1 RP 112. McFarland drove. 1RP 118. Before leaving his home, Mr. Faircloth saw

"about" eleven guns in the bedroom shared by McFarland and Chad. 1RP 121, 124. Because Chad's three younger brothers also lived at the house, Mr. Faircloth locked the guns outside in a carport storage unit for safety. Id.

McFarland filed a number of motions in limine, among them a motion for an order prohibiting any reference to the complaining witness as the "victim" on the grounds that use of the word was an improper opinion of that witness's credibility. CP 35. During argument, the trial court queried defense counsel: " * * * presumably we're going to have evidence which will be introduced * * * that will at least allow the inference that these folks are victims. And isn't the State allowed to do that, to argue – or make statements based upon legitimate inferences from the evidence? 1RP 36. Denying the motion, the court stated: "I looked at the cases you cited. I was unable to find any support for your position [that use of the word "victim" constitutes improper opinion testimony]." 1RP 61.

During trial, the State sought to introduce a body-camera video of McFarland's custodial statement to Grant County Sheriff's Deputy Corey Linscott in which she denied being involved in the burglary or that she had

left her house during the previous night.[3] 1RP 186-87, 192. Her custodial statements had previously been ruled admissible. CP 37-38. The State argued the jury could interpret McFarland's evasiveness "as going to her guilt[.]" 1RP 188. The court and counsel viewed the video outside the presence of the jury. 1RP 189. Defense counsel argued the jury should hear about the admissible statements from the officer instead of seeing and hearing McFarland on the video. 1RP 190. The State argued the video was the best evidence of McFarland's statements. Id. In response, the court noted the video (1) showed McFarland in handcuffs, (2) showed the officer intimating she was a flight risk, (3) contained McFarland's statement that she just got out of jail, (4) showed McFarland apparently under the influence of something, and (5) contained the officer's statement of the elements of burglary. 1RP 192-93. Noting that most of the material objected to occurred after McFarland's statement about just having gotten out of jail, the court instructed the State to produce a redacted copy that ended just before that statement. 1RP 194. In response to defense counsel's argument that the video should not come in unless his client testified and disavowed her statements, the court queried: "Why would she disavow those statements? She indicates she didn't participate in the

[3] Defense counsel had told the court during the limine hearing that there was no objection to admission of the video but apparently reconsidered and objected when it was offered during trial on the basis of relevance, and eventually prejudice. 1RP 55, 187, 191.

burglary. This is a gift to you, isn't it?" 1RP 195. Defense counsel repeated that the objection was to having the jury see the video, not to having her statements being testified to by the officer. 1RP 199. The court responded that the video would give the jury a chance to observe McFarland's demeanor while she was making the statement, and that courts "characteristically like juries to be able to do that when assessing statements, whether out of court or in court." Id. The State noted that the officer's statement concerning the elements of burglary, which could not be redacted from the video, assisted McFarland because it defined the crime more narrowly than its statutory definition. 1RP 200. The court responded that the jury would be given the instruction to follow the law as the court gave it to them. 1RP 201. The court went on: "I'm afraid that if we try somehow to extract that out, it's going to – it's going to be much more difficult for the jury to follow what's on there. And I just don't think given the instructions we're giving them, I don't think there's any danger that the jury is going to take [the officer's statement] as an instruction on the law. It does help the jury understand Ms. McFarland's responses and the things that she was saying." 1RP 201. The court offered a limiting instruction. "We can give [the jury] instructions saying that the officer's statements are simply in the context of any statements Ms. McFarland may have made and not – should not be construed by them as the law that they

should follow in this case. So I'd be happy to do that." Id. The record is silent as to why this instruction was not given. The jury was given standard definitional and "to-convict" burglary instructions. CP 144-45.

McFarland objected to the newly-redacted video, asking that the video be turned off and only the audio be played for the jury, because McFarland was shown in handcuffs at the very beginning and again later in a place that could not be redacted. Id. at 212-13. The court responded that, while there was prejudicial impact in showing McFarland in handcuffs, playing only the audio would deprive the jury of the full benefit of observing her demeanor. Id. at 213. The court reviewed the video one final time before announcing: "obviously, it's going to be impossible to sanitize this completely." Id. at 213-14. The court offered a limiting instruction concerning the handcuffs. Id. at 214. The instruction was not given and here, too, the record is silent.

Defense counsel did not argue that showing an impaired, argumentative McFarland in handcuffs was inadmissible "other acts" evidence under ER 404(b).

McFarland did not testify at trial. She argued in closing that she was a mere bystander. 1RP 337.

McFarland was convicted of Burglary in the First Degree, ten counts of theft of a firearm and three counts of unlawful possession of a

firearm. At sentencing, the State argued for high-end consecutive sentences on the firearms charges. CP 189-90. The court asked: "And – these – these counts all essentially have to run consecutively?" 2RP 22. After the State clarified that the thirteen gun counts ran consecutively to one another but concurrently with the burglary, the court asked: "Total range is 237 to 306 months in prison?" 2RP 23. Defense counsel responded: "Yes, your Honor." Id. The State recommended 306 months, based on the victim impact statement and the large amount of property taken. Id. Defense counsel reminded the court that the co-defendant, who had less criminal history but who was arguably equally culpable, had accepted a prison-DOSA plea settlement. Id. Counsel then stated: "unfortunately the burglary in the first degree conviction makes her legally ineligible for [a prison-DOSA], but based on the lack of sophistication of the crime, we believe – a sentence at the low end of the standard range is appropriate." Id. Counsel mentioned "lack of proportionality," pointing out that had McFarland stolen toasters her range would be 9 to 12 months. Id. Counsel then asked for 237 months, the low end of the standard range. 2RP at 24. After a brief discussion of community custody, the court asked defense counsel if he wanted to say anything else. Counsel responded: "No, your Honor." Id.

McFarland then addressed the court, apologizing for taking the

time of the court and the State, and apologizing to the victims and the community. 2RP 25. She told the court she had sincerely learned a lesson and that she was positively going to change her life for the better. Id. She stated her hopes for a better future, for an education and for a family. Id. She thanked the court. Id. The court imposed the low-end standard range sentence requested by McFarland and her attorney. Id.

III. ARGUMENT.

A. RESENTENCING IS NOT APPROPRIATE WHEN MCFARLAND FAILED TO REQUEST AN EXCEPTIONAL DOWNWARD DEPARTURE, DID NOT RAISE INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL, AND FAILED TO POINT TO ANY EVIDENCE IN THE RECORD OF SUBSTANTIAL AND COMPELLING CIRCUMSTANCES JUSTIFYING SUCH A SENTENCE.

Every defendant is entitled to ask the court for an exceptional sentence downward and to have the sentencing court actually consider that alternative. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (citing State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 36 Wn.2d 1002 (1998)). This holds true regardless of whether the statutory scheme mandates consecutive sentences. In re Personal Restraint of Mulholland, 161 Wn.2d 322, 329-31, 166 P.3d 677 (2007). The sentencing court's incorrect understanding of applicable sentencing laws is a fundamental defect. Id. at 333.

McFarland failed to request an exceptional, downward departure from the standard range. Failure to request an exceptional sentence is not necessarily fatal. See, e.g. Mulholland, supra, where the sentencing challenge came in a personal restraint petition alleging ineffective assistance of counsel. Mulholland, 161 Wn.2d at 326-27. Here, however, McFarland has not encompassed her sentencing challenge within a claim that her trial counsel was ineffective.

More problematic for McFarland is lack of evidentiary support in the record. A downward departure must be supported by facts proved by a preponderance of the evidence. RCW 9.94A.535(1). The circumstances enumerated in the statutory list, while not exclusive, "tend to establish defenses to criminal liability but fail. In all these situations, if the defense were established, the conduct would be justified or excused, and thus would not constitute a crime at all." State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325, 1330 (1993) (quoting D. Boerner, Sentencing in Washington 9-23 (1985)). The statutory mitigation examples show the legislature's intent to allow "variations from the presumptive sentence range where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in the crime[.]" Id.

Appellate analysis of the appropriateness of an exceptional

sentence requires reasons justifying a departure from the standard range and evidentiary support in the record for those reasons. State v. Ha'Mim, 132 Wn.2d 834, 840, 940 P.2d 633, 636 (1997). The trial court does not have unfettered discretion to impose a downward departure. The court must enter written findings of fact and conclusions of law reciting the facts supporting the sentence. Id. McFarland has failed to point to any evidence in the record, "substantial and compelling" or otherwise, indicating her circumstances distinguish her blameworthiness from that normally present in a burglary case in which firearms were stolen. Resentencing is not required, nor appropriate.

B. MCFARLAND'S OFFENDER SCORE WAS PROPERLY CALCULATED BECAUSE BURGLARY AND UNLAWFUL POSSESSION OF A FIREARM HAVE DIFFERENT VICTIMS AND THUS CANNOT ENCOMPASS THE SAME CRIMINAL CONDUCT.

When sentencing a person for two or more current offenses, the offender score and sentence range for each offense is calculated by using all other current convictions as though they were prior convictions unless the court finds two or more offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). Offenses encompassing the same criminal conduct are counted as one offense, one "point." Id.

Same criminal conduct is found when crimes require the same criminal intent, are committed at the same time and place, and involve the

same victim. Id. The requirements for same criminal conduct are construed narrowly. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). All three elements—unity of time and place, intent, and victim—must be satisfied. State v. Lessley, 118 Wn.2d 773, 778, 872 P.2d 996 (1992). Here, they are not. The victims of the burglary are Mr. and Mrs. Legault. The "victim of the offense of unlawful possession of a firearm is the general public." State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733, 736 (2000). Because the crimes do not involve the same victim, they cannot encompass the same criminal conduct. Ms. McFarland's offender score was properly calculated.

C. BECAUSE MR. LEGAULT WAS A VICTIM, IT WAS PROPER TO USE THAT TERM WHEN REFERRING TO HIM AT TRIAL WHERE NEITHER DEPUTY FISHER NOR THE STATE ATTRIBUTED GUILT TO MCFARLAND WITH THAT REFERENCE.

McFarland asserts use of the term "victim" is improper opinion testimony because whether Mr. Legault is a victim is an ultimate fact to be decided solely by the jury. Br. of Appellant at 21. "Opinion testimony" is evidence given under oath at trial and is based on the witness's belief or idea instead of on direct knowledge of facts at issue. State v. Demery, 144 Wn.2d 753, 759-60, 30 P.3d 1278 (2001). Testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of a defendant is unfairly prejudicial "because it invades

the exclusive province of the jury." City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). However, Washington courts have "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." Heatley, 70 Wn. App. at 579.

> Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an "ultimate issue" will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.

Id. at 579. In Heatley, the charges were driving under the influence and reckless driving. Id. at 576. The arresting officer testified to his opinion that Mr. Heatley was "obviously intoxicated" and unable to drive a vehicle in a safe manner. Id. Rejecting the argument that opinions on ultimate issues of fact were inadmissible, the Court quoted ER 704: "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Id. at 578. The Court concluded that the officer's testimony "contained no direct opinion on Heatley's guilt or on the credibility of a witness." Id. at 579. "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion

testimony." Heatley at 578.

Rulings pertaining to motions in limine "rest[ ] within the trial court's discretion, subject to review for abuse of that discretion."[4] Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 91, 549 P.2d 483, 487 (1976). Rulings on admissibility of evidence will not be disturbed on appeal absent an abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615, 624 (1995). The trial court abuses its discretion only when its exercise of discretion is manifestly unreasonable or based upon untenable grounds. Id. That is, evidentiary rulings should be affirmed unless no reasonable person would have decided the issue as the trial court did. State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

Here, McFarland bears the burden of proving abuse of discretion. State v. Hentz, 32 Wn. App. 186, 190, 647 P.2d 39, rev'd on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983).

McFarland complains of the following exchanges between the deputy prosecuting attorney and Grant County Sheriff's Deputy Fisher:

Q: And where did Sergeant Hallatt direct you to go?

A. He asked me to respond to I believe it's 1217 Fairway Drive –

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[4] McFarland does not claim the trial court improperly interpreted the rules of evidence as they relate to opinion or ultimate issue testimony. Therefore, the court's decision to allow use of the term "victim" should be reviewed only for abuse of discretion.

Q. Okay.

A. – to contact a victim of his in this case.

* * *

Q. Okay, and what's the victim's name?

A. Fred, I think it's pronounced Legault.

* * *

Q. Okay. Why did you contact Mr. Legault?

A. I was asked to go there to collect a specific list of items that were taken from his residence from a burglary the night prior.

Q. Okay. And did you get that list from him?

A. I did.

Q. Okay.

A. In the form of a written statement.

Q. Okay. After meeting with the victim where did you go next?

A. I responded back to Sergeant Hallatt's location.

* * *

Q. Can you just describe some of the items that were found in that same bedroom? You don't have to describe all of them.

A. I know for a fact there were multiple checkbooks. There

was a leather engraved wallet and like a checkbook cover case, one of which had a – the victim's name engraved on it.

1 RP 76-77, 93. The term "victim" applies to anyone who suffers either as a result of ruthless design or incidentally or accidentally. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2550 (1993). McFarland fails to point to any authority supporting her proposition that use of the term "victim," as it was used at trial, is inherently prejudicial or is an impermissible opinion concerning guilt. The foreign-jurisdiction cases to which she cites[5] do not assist her. Both the Delaware case, State v. Jackson, 600 A.2d 21 (Del. 1991), and the Texas case, Veteto v. State, 8 S.W. 3d 805 (Tex. App. 2000), abrogated on other grounds by State v. Crook, 248 S.W. 3d 172 (2008), involved sexual assault charges. In Jackson, the issue was whether a sexual act was consensual, that is, whether a crime had been committed. Jackson, 600 A.2d at 24. In Veteto, the issue of whether the defendant committed the alleged assaults included the predicate sub-issue of whether the alleged assaults had, in fact, occurred. Veteto, 8 S.W. 3d at 816. The Veteto court held that when the issue was whether a sexual assault had or had not occurred, the term "victim" implied that an unwanted sexual encounter had, in fact, occurred

[5] These are two of the foreign-jurisdiction cases cited in McFarland's limine motion that the trial court declined to read.

"and was thus an improper comment on the weight of the evidence by the court." Id. The Jackson court likewise held that "the word 'victim' should not be used in a case where the commission of a crime is in dispute * * * [and] the term should be avoided in the questioning of witnesses in situations where consent is an issue[.]" Id. at 24-25. The Jackson court clarified: "[t]he term 'victim' is used appropriately during trial when there is no doubt that a crime was committed and simply the identity of the perpetrator is in issue." Id. at 24. This is consistent with Heatley's holding that admissibility of "ultimate issue" opinion testimony depends, in part, on the nature of the charges and the circumstances of the case. Heatley, 70 Wn. App. at 579.

The logic of Heatley and Jackson applies in this case. In this case, there is no doubt a crime was committed. Mr. Legault testified that on the morning of June 22, 2014 he woke to discover various items missing from his residence. Among the missing items were a 60-inch television, a Blu-ray player, eighteen firearms, approximately 2,000 rounds of ammunition, hand tools, an electric sander, bottles of liquor, four checkbooks, a wallet, and credit cards. Mr. Legault's testimony supported an inference that he was the victim of a burglary. Referring to him as a "victim" was not equivalent to expressing an opinion concerning the identity of the person who entered his home and removed his property. "The fact that an opinion

encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. 'It is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.'" Heatley, 70 Wn. App. at 579 (quoting State v. Wilber, 55 Wn. App. 294, 298, n. 1, 777 P.2d 36 (1989)) (emphasis in the original).

The trial court must be afforded broad discretion to determine the admissibility of ultimate issue testimony. State v. Jones, 59 Wn. App. 744, 751, 801 P.2d 263 (1990). The trial court's decision is presumed correct and will be reversed only if the appellant makes "an affirmative showing of error." State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). During the limine motion hearing, the trial court correctly reasoned the State would introduce evidence sufficient to allow at least the inference that Mr. and Mrs. Legault are victims, and that it is proper for the State to make statements based upon legitimate inferences from the evidence. 1RP 36.

Deputy Fisher's testimony concerning retrieval of Mr. Legault's written list of missing property and of seeing matching property with Mr. Legault's name on it in McFarland's bedroom never directly referred to McFarland's guilt, nor was this testimony directly about McFarland. See Heatley, 70 Wn. App. at 578.

The trial court properly exercised discretion in allowing the State and Deputy Fisher to use the term "victim" as the deputy recounted his activities and observations the day following the burglary.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING INTO EVIDENCE AN OFFICER BODY CAMERA VIDEO OF MCFARLAND'S STATEMENTS DURING ARREST BECAUSE ITS PROBATIVE VALUE OUTWEIGHS ITS POTENTIAL FOR UNFAIR PREJUDICE AND ANY POSSIBLE ERROR WAS HARMLESS.

McFarland did not testify at trial. She stipulated to her entry into the Legault residence on the night of the burglary and argued she had gone only to retrieve property she left behind when she moved from that residence some nine months earlier. This was contrary to the statement she made to Deputy Linscott during her arrest. She told him repeatedly that she had not left her residence on the night of the burglary. The video shows her handcuffed and apparently under the influence of something. She argues that the video of her post-arrest statements and demeanor lacks any probative value and was unduly prejudicial. At trial, McFarland argued in closing that she was a mere bystander as others took property from the Legault residence. She had told Ms. Palma and Mr. Faircloth that all the property she and Chad hauled into their house the night of the burglary belonged to her.

1. McFarland's post-arrest denial of having been to the

Legault residence the night of the burglary was relevant and probative evidence of her consciousness of guilt and not offered merely to show she had a propensity for lying or for impeachment.

McFarland's first objection to the video is that evidence of her initial lie was admitted to show she had a propensity for lying and for impeachment and is thus irrelevant because she did not testify. But McFarland's assertion that she had never left her residence the night of the burglary was probative of culpability in that it went to her consciousness of guilt at the time of her arrest. "[E]vidence of resistance to arrest, concealment, assumption of a false name, and related conduct are admissible if they allow a reasonable inference of consciousness of guilt of the charged crime." State v. Freeburg, 105 Wn. App. 492, 497-98, 20 P.3d 984, 987 (2001); see. also State v. Chase, 59 Wn. App. 501, 507-08, 799 P.2d 272 (1990) (evidence that defendants gave false names when first contacted by police admissible to show consciousness of guilt). This type of evidence, sometimes collectively referred to as evidence of "flight," is relevant because "flight is an instinctive or impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340, 341-42 (1965).

The threshold to admit relevant evidence is low. Even minimally

relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Here, McFarland's defense strategy was to assert an innocent purpose for being at the Legault residence the night of the burglary. Evidence that when she was arrested she did not want law enforcement to know she had been there is probative of a guilty conscience. The jury could reasonably infer that she would not have lied about her whereabouts in the middle of the night if she simply had been retrieving her own possessions. The evidence is relevant, regardless of whether McFarland later stipulated to her presence that night at the Legault residence.

2. Any confusion resulting from the officer's on-camera recitation of the elements of burglary was harmless because the trial court instructed the jury on the elements and McFarland did not take the trial court up on its offer of a special jury instruction.

The trial court determined that it would be confusing to the jury to try to extract the officer's truncated recitation of the elements of burglary from the video. The court also concluded that "given the instructions we're giving them, I don't think there's any danger that the jury is going to take [the officer's statement] as an instruction on the law. It does help the jury understand Ms. McFarland's responses and the things that she was saying." 1RP 201. The court offered a limiting instruction to the effect that the officer's statements were made in the

context of statements made by Ms. McFarland and should not be construed as the law they should follow. For whatever reason, McFarland did not request such an instruction. The jury was given standard definitional and "to-convict" burglary instructions. "Juries are presumed to follow instructions absent evidence to the contrary." State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46, 51 (2014) (internal quotation and citations omitted). Here, there is no evidence that the jury was influenced in any way by the officer's explanation that "burglary" does not necessarily mean "breaking and entering."

Likewise, there is scant prejudice from the officer's bare statement "As far as I know, there was a burglary that occurred last night and apparently * * * something came up that's leading us back to you." In general terms, the officer could have directly testified that he had received a report of a burglary and, in the course of his investigation, had interviewed McFarland.

In the video, the officer couched this statement in terms of what he understood the situation to be in response to McFarland's objection to being arrested. The jury could have reasonably concluded, with or without this particular statement, that McFarland would not have been arrested had law enforcement not had "something" leading back to her. The jury was instructed at the start of trial that it was the State's burden to prove guilt

beyond a reasonable doubt. It could not have prejudiced the jury to hear the officer tell McFarland that "something" had "come up" which generated their initial contact with her.

3. Admission of the video was not unduly prejudicial because the jury was entitled to see the facts and circumstances surrounding McFarland's statements and the trial court took precautions to minimize presentation of harmful evidence.

McFarland argues admission and publication of the video was unduly prejudicial because it allowed the jury to see her in handcuffs, cursing, arguing with a law enforcement officer, refusing to follow instructions, and apparently impaired.[6] Br. of Appellant at 40. She also claims unfair prejudice because it includes the officer intimating she was a flight risk and referring to unproven "facts" not in evidence. Id. Specifically, the video shows the officer repeatedly telling McFarland to sit so she "wouldn't get any brazen idea to take off running or anything like that[,]" (ex. P44, 1:05-1:10), and telling her that "something [had] come up" that tied her to the burglary.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

[6] McFarland did not argue ER 404(b) below, basing her mid-trial objections on relevance and prejudice. 1RP at 190. A prejudice objection under ER 403 is sufficient to preserve an ER 404(b) issue for appeal.

"The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006).

Relevant evidence may be excluded, however, if its probative value is *substantially* outweighed by the danger of unfair prejudice[.]" ER 403 (emphasis added). The linchpin word in this determination is "unfair." State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). Unfair prejudice does not mean that evidence is harmful to the defendant. "Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another." Id. Instead, unfair prejudice is "caused by evidence of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." Wilson v. Olivetti N. Am. Inc., 85 Wn. App. 804, 813, 934 P.2d 1231 (1997). Evidence may also be unfairly prejudicial when it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or 'triggers other mainsprings of human action.'" Id. (quoting 1 J. Weinstein & M. Berger, Evidence §403[03] at 403-36 (1985)).

Because a trial court's rulings on relevance and its balancing of probative evidence against its prejudicial effect is reviewed for abuse of discretion, McFarland must show that no reasonable person would have found that the relevance of the totality of circumstances surrounding

McFarland's post-arrest statements was substantially outweighed by the likelihood of an unthinking, emotional response from the jury. She cannot carry this burden.

Evidence of a defendant's statements and conduct during an interview with law enforcement is relevant and admissible if it tends to reveal consciousness of guilt. State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021, 1025 (1988). McFarland's behavior during her arrest was relevant. The video provided the full context of McFarland's statements and also allowed the jury to view her demeanor when making the statements, which a recounting of her statements by the deputy could not provide. Her combativeness and sarcasm, like her denial of having left her residence on the night of the burglary, were probative of a guilty conscience. Further, the probative value of the evidence was high because it involved defendant's own statements concerning the charged crimes. While the evidence was damaging, it was not unfairly prejudicial.

Moreover, any concern for unfair prejudice here is ameliorated by the trial court's careful redaction and offers of limiting instructions. The original video was excised to remove all but McFarland's verbal and physical responses to her custodial interrogation. Although it would have been preferable to have redacted all of the footage of McFarland in handcuffs, the trial court correctly noted that complete sanitization was

impossible. McFarland chose not to take the court up on its offer of a limiting instruction on the handcuff issue.

The trial court properly balanced the probative value of McFarland's statements with the inescapable prejudice brought about by the handcuffs, by her impaired behavior, and by the officer's instructions and explanations during her arrest. The court properly exercised its discretion in admitting the redacted video.

4. Admission of the body camera video could not have affected the jury's verdicts because untainted evidence of McFarland's participation in the burglary is overwhelming.

Even if this Court finds admission of the video was error, evidentiary errors under ER 404(b) are not of constitutional magnitude. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Such error is prejudicial only if, "within reasonable probabilities, the outcome of the trial would have been different if the error had not occurred." Id. That is, an evidentiary error is harmless "if the evidence is of minor significance compared to the overall evidence as a whole." State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002).

Here, there is overwhelming, untainted evidence of McFarland's guilt. She had lived in the Legault residence about nine months before it was burgled but had not been involved with their son for at least six

months. Their son received a text message from her cell phone number on the night of the burglary, telling him she was inside his mother's house. Property stolen from the Legault residence was found in the bedroom McFarland shared with Chad. Chad's father and step-mother testified to having seen McFarland and Chad hauling the property into the house in the wee small morning hours. Mr. Faircloth testified to going to the Legault residence with McFarland and Chad and helping them load a car with property from the house. He testified that McFarland drove. Ten of Mr. Legault's guns were recovered from the Faircloth residence, along with his 60-inch television and a number of other items. McFarland had carried the guns into the house and had been seen going through the various boxes of the Legault's property by Ms. Palma. Mr. Legault identified as his the property found in McFarland's room and at her house.

The quantity and weight of this evidence makes it highly improbable that the jury's guilty verdicts were affected in any way by the poor light in which McFarland appeared in the video. Because McFarland's participation in the burglary is established by overwhelming evidence, admission of the video was harmless.

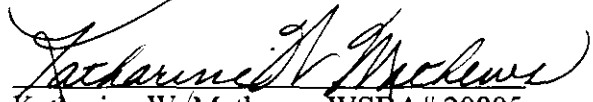
V. CONCLUSION.

For these reasons, the State respectfully requests this court to affirm McFarland's convictions and decline to remand for resentencing.

DATED this 4th day of August, 2015.

Respectfully submitted,

GARTH DANO
Grant County Prosecuting Attorney



Katharine W. Mathews, WSBA# 20805
Deputy Prosecuting Attorney
Attorneys for Respondent

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32873-2-III
	)	
vs.	)	
	)	
CECILY McFARLAND,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kristina M. Nichols
Wa.Appeals@gmail.com

Dated: August 4, 2015.

Kaye Burns