SUPREME COURT NO. _____
COA NO. 33933-5-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AMANDA TORRES,

Petitioner.

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

The Honorable Michael McCarthy, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Amanda Torres asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Torres requests review of the published decision in State v. Amanda Marie Torres, Court of Appeals No. 33933-5-III (slip op. filed May 9, 2017), attached as appendix A. The order denying Torres's motion to reconsider, entered June 27, 2017, is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the police officer's warrantless entry into the home and seizure of Torres violated the Fourth Amendment and article I, section 7 because no exception to the warrant requirement justified those actions, requiring suppression of the confession and reversal?

2. Whether defense counsel was ineffective in failing to move to suppress the confession based on the officer's warrantless entry and seizure because there is a reasonable probability that motion would have been granted?

3. If the record is insufficient, whether the case should be remanded to the trial court for an evidentiary hearing to enable an appellate court to reach the merits of these issues?

D. STATEMENT OF THE CASE

The State charged Amanda Torres with sabotaging rolling stock, malicious mischief and burglary. CP 6-7. A CrR 3.5 hearing was held before trial, but no CrR 3.6 hearing took place because defense counsel did not request one. At the 3.5 hearing, Sergio Reyna, deputy sheriff for Yakima County, testified that he investigated a claim of malicious mischief that occurred at a railroad yard. RP 5-6, 14. Torres's driver's license was found near a gate that was forced open. RP 7-9.

Reyna testified that he went to the address listed on Torres's license with the intention of asking if she knew where it was. RP 8-9. He knocked on the door of the house. RP 9, 17. A "young" female answered. RP 9, 17-18. He did not know how old she was. RP 16. Reyna asked if Torres was home. RP 9. The girl said she was. RP 9, 16. Reyna asked to speak to Torres. RP 17. The girl let him in and led him to a downstairs bedroom. RP 9, 16, 18. The girl identified Torres to the officer. RP 18. Torres and her boyfriend were sleeping on the bed in the room. RP 9, 24. Reyna knocked on a piece of wood. RP 9. Torres got up and Reyna "walked her out" to his patrol car. RP 9. Taking her outside was Reyna's decision. RP 24. He "escorted" her outside, and maybe did so "hands-on." RP 18-19. He agreed he "grabbed her elbow and led her out of the

house." RP 19. Reyna brought her outside because other people were inside; he "just figured we'd have one-on-one conversation." RP 12.

Torres also testified at the 3.5 hearing. According to Torres, she woke up to the sound of Reyna knocking at about 8 a.m. RP 27, 35. There was a curtain on the doorway. RP 36. Reyna announced "Sheriff's office. I need Amanda Torres to come out." RP 36. She stumbled out of bed in the clothes she slept in, without her shoes. RP 27. She came out of the bedroom because she was scared and didn't know what was going on. RP 36. She was "halfway asleep." RP 36. Reyna escorted her upstairs: "he had me by the arm, and he told me to go with him." RP 28. Torres thought she was under arrest, and felt she had no choice but to go with the officer. RP 28-29. He told her she had to go outside with him. RP 29. Torres's aunt arrived as Reyna was taking Torres from the house. RP 30. Her aunt wanted to know why the officer was in the house, who let him in, and where his warrant was. RP 30. It was her aunt's house. RP 29. The girl who answered the door was her aunt's daughter-in-law. RP 29. She was 13 or 14 years old. RP 30.

There was no dispute that Reyna interrogated Torres in his patrol car, although Reyna and Torres offered differing versions of whether

Miranda[1] rights were read and whether Torres requested a lawyer. RP 9-12, 41-43 (Reyna testimony), 31-34 (Torres testimony). The trial court ruled her statements were admissible, finding Reyna read the Miranda warnings and that Torres voluntarily spoke with him. RP 47-48.

At the ensuing jury trial, Torres's confession figured prominently. The locomotive, enclosed in a gated fence, was damaged. RP 65-66, 74-77, 105-11, 116-17. According to Reyna, Torres admitted she had "made a bad decision damaging the train," that "she was there with her friends drinking, and that she was going to take full responsibility for the damage." RP 159. Torres would not tell him the names of her friends, saying she wasn't "a snitch." RP 159-60. Torres took the stand in her own defense and denied telling Reyna that she had damaged the train. RP 191, 197. A jury found her guilty as charged. CP 32-34.

For the first time on appeal, Torres argued the police officer entered her home and seized her without a warrant, necessitating suppression of the confession. Brief of Appellant (BOA) at 1-2, 9-20; Reply Brief (RB) at 1-7. In the alternative, Torres argued her attorney provided ineffective assistance of counsel due to the failure to move to suppress evidence based on the Article I, section 7 and Fourth Amendment

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

violations. BOA at 21-22; RB at 7-8. The Court of Appeals believed the record was insufficiently developed to consider the issues. Slip op. at 13-16. It noted "the broad authority granted under RAP 12.2 and case law allows this court to remand to the trial court for an evidentiary hearing and factual findings if necessary to resolve an issue on appeal." Id. at 15. The Court of Appeals, however, did not consider "free to remand for an additional hearing on an issue not argued below when the defendant fails to show manifest constitutional error because of an insufficient record." Id. It opined "a personal restraint petition would better serve adjudication of her Fourth Amendment rights." Id.[2]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE POLICE OFFICER VIOLATED TORRES'S CONSTITUTIONAL RIGHT TO PRIVACY IN ENTERING HER RESIDENCE WITHOUT A WARRANT.

Deputy Reyna intruded into the home without a warrant to extract Torres, who was sleeping with her boyfriend in her downstairs bedroom. Reyna seized her in taking outside her home and placing her in his patrol car to interrogate her. The statements she made should have been suppressed because they are the result of an unlawful entry and seizure. No exception to the warrant requirement justified the officer's actions.

[2] The Court of Appeals reversed the sabotaging rolling stock conviction on other grounds. Slip op. at 1.

This manifest constitutional error can be raised for the first time on appeal. In the alternative, defense counsel was ineffective in failing to bring a suppression motion, which likely would have been granted based on prevailing law. Torres's case presents a significant question of constitutional law warranting review under RAP 13.4(b)(3).

a. The record shows the officer entered Torres's home and seized her without legal authority, and the girl's apparent consent to enter the home was non-binding on Torres under the common authority doctrine.

Article I, section 7 commands "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 analysis begins "by determining whether the action complained of constitutes a disturbance of one's private affairs." State v. Miles, 160 Wn.2d 236, 243-44, 156 P.3d 864 (2007). If the government disturbs a valid privacy interest, the second step is to determine whether "authority of law" justifies the intrusion. Miles, 160 Wn.2d at 244. "In no area is a citizen more entitled to his privacy than in his or her home." State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994).

All warrantless entries of a home are presumptively unreasonable under article I, section 7 and the Fourth Amendment. State v. Hinshaw, 149 Wn. App. 747, 750, 753, 205 P.3d 178 (2009). Deputy Reyna entered Torres's home and went to her bedroom without a warrant so that he could

remove her from her home and interrogate her. Regardless of whether he seized her in so doing, the warrantless entry by itself constitutes a per se unlawful invasion of the home: "any intrusion into the home without a warrant is per se unreasonable." State v. Hatchie, 161 Wn.2d 390, 397, 166 P.3d 698 (2007).

Further, a warrantless seizure is per se unlawful under both the Fourth Amendment and article I, section 7 unless it falls within a specific exception to the warrant requirement. State v. Ross, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). A seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009) (quoting State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)).

Deputy Reyna's account differs from Torres's account in some respects, but the officer seized Torres from her home under his own version of events. Reyna acknowledged taking her outside the home was his decision, not hers. RP 24. He testified at trial that he asked Torres to get up, told her why he was there, and "escorted" her outside to his patrol vehicle. RP 158. He "walked her out" to his patrol car. RP 9. At the CrR 3.5 hearing, Reyna answered "okay" to the question "You grabbed her

elbow and led her out of the house?" RP 19; see State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (show of authority constituting seizure includes "some physical touching of the person of the citizen."). Torres was asleep in her bedroom with her boyfriend when Reyna showed up at the doorway, woke her up, physically escorted her out of the house, and placed her in his patrol car to interrogate her. RP 9, 18-19, 24, 42, 157-58. Reyna seized Torres.

The State argued "It is not a seizure where an officer *approaches an individual in public* and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away." Brief of Respondent (BOR) at 4 (emphasis added) (citing State v. Armenta, 134 Wn.2d 1, 11-12, 948 P.2d 1280 (1997)). Deputy Reyna did not approach Torres in public. He approached her inside her home and he took her out of it. Torres woke up to an officer on the threshold of her bedroom, directing her to come out. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (quoting United States v. United States District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)). "[S]earches and seizures in public places are treated differently than searches and seizures occurring in the home." Young, 123

Wn.2d at 189. "'[T]he closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" Id. at 185 (quoting State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)).

"The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the warrant requirement." State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). The State did not dispute the investigative stop exception to the warrant requirement does not apply inside the home and that the officer lacked reasonable suspicion to seize Torres. BOR at 14. Instead, the State relied on the consent exception to the warrant requirement. Id. at 6-8. In cases involving cohabitants, the Supreme Court has adopted the common authority rule: "One who has equal or lesser control over a premises does not have authority to consent for those who are present and have equal or greater control." Morse, 156 Wn.2d at 4-5. Consent based on apparent authority is not an exception to the warrant requirement under article I, section 7. Id. at 12. "When a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained." Id. at 15.

The consent exception does not justify the warrantless intrusion into the home. The record shows Torres lived there. Deputy Reyna went to Torres's home, using the address listed on her driver's license. RP 8-9,

119, 155. The driver's license listing Torres's address is sufficient by itself to show it was her residence. See RCW 46.20.161 (license must include "Washington residence address"). The State listed the residence as Torres's address in the charging document. CP 3, 6. Torres had a bedroom in the house in which she slept. RP 9, 27. At the CrR 3.5 hearing, Torres agreed with counsel's question that Deputy Reyna "came to your house on July 7th." RP 27. The record clearly shows the house into which Deputy Reyna intruded was Torres's residence.

A girl of about 13 years of age answered the door in response to the officer's knocking. RP 9, 17-18, 30. She was the aunt's daughter-in-law. RP 29. Reyna testified she let him into the house. RP 9, 16, 18. Assuming arguendo the girl was a cohabitant, and further assuming a minor can give lawful consent to enter and seize an adult, she still had no authority to consent to the officer's entry. Torres was present. But the officer made no attempt to obtain her consent prior to entering. Thus, even if the girl consented to the entry, the officer did not obtain Torres's consent, which is a prerequisite to a lawful, warrantless entry.

In the Court of Appeals, the State argued "the only conclusion that can be drawn from these facts is that [the girl] had at least co-equal rights in this residence." Brief of Respondent at 16. A cohabitant with common authority cannot give consent that is binding upon another cohabitant with

equal control over the premises when the nonconsenting cohabitant is actually present on the premises. Morse, 156 Wn.2d at 13. Torres was present in the home. Deputy Reyna did not get Torres's consent to enter. The girl's consent is not binding on Torres. The officer's intrusion into the house without a warrant cannot be justified under the consent exception to the warrant requirement.

The Court of Appeals held Torres did not establish manifest constitutional error under RAP 2.5(a)(3) because the record lacked "key facts" for determining the constitutionality of the officer's actions. The key facts, however, show a warrantless intrusion into the home, which is unconstitutional regardless of whether the deputy seized Torres. Furthermore, the key facts show an unconstitutional seizure even under Deputy Reyna's version of events.

Some "critical unresolved facts" identified by the Court of Appeals included "the identity of the young lady answering the knock on the front door, the youngish woman's role in the home, Amanda Torres' standing in the residence, [and] whether Torres and the young lady held equal rights to control the premises or whether the other girl possessed subordinate rights." Slip op. a 13. As argued, the record shows this was Torres's residence, so her standing is known. The identity of the young person who opened the door and her role in the home informs "whether Torres

and the young lady held equal rights to control the premises or whether the other girl possessed subordinate rights." Id. So even under the Court of Appeals' formulation, the girl at best possessed equal rights to control the premises. Under Morse, that is not good enough to render consent constitutionally valid.

But even if the consent to enter was valid, or the record is insufficient to determine its validity, there is no dispute Deputy Reyna lacked reasonable suspicion to seize Torres once he was inside. "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." State v. Doughty, 170 Wn.2d 57, 62, 239 P.3d 573 (2010) (quoting Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Hunches and innocuous facts do not warrant police intrusion into people's everyday lives. Doughty, 170 Wn.2d at 63; Armenta, 134 Wn.2d at 13. Reyna intruded into the home and seized Torres because her ID was found outside the railyard gate. Reyna acted on a hunch, not reasonable suspicion.

The exclusionary rule mandates suppression of evidence obtained via the government's illegality. Harrington, 167 Wn.2d at 664; Hinshaw, 149 Wn. App. at 756. Such evidence includes inculpatory statements of the defendant. Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S. Ct.

407, 9 L. Ed. 2d 441 (1963). Torres's statements to the police officer must be suppressed. They are the direct result of the officer's unlawful entry and seizure. The convictions must be reversed and the charges dismissed with prejudice because there is insufficient evidence to prove guilt once the unlawfully obtained evidence is excluded. See State v. Valdez, 167 Wn.2d 761, 778-79, 224 P.3d 751 (2009) (no basis remained for conviction where motion to suppress evidence should have been granted).

b. The record shows defense counsel was ineffective in failing to bring a suppression motion.

Torres is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I, § 22. "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where the attorney's performance was deficient and the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. To determine whether counsel was ineffective, "we look at the record and assess the chances that a suppression motion would have succeeded." State v. Horton, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006).

Reasonable attorney conduct includes a duty to research the relevant law. Kyllo, 166 Wn.2d at 862. The relevant law is that "a citizen's privacy is most protected in his or her home, and any intrusion into the home without a warrant is per se unreasonable." Hatchie, 161 Wn.2d at 397. As argued, the officer's actions were not justified by an exception to the warrant requirement. Torres's statements to the officer formed the centerpiece of the State's case yet counsel did not challenge their admissibility despite the per se illegality of the officer's actions in securing those statements.

"A criminal defendant receives constitutionally ineffective assistance of counsel where no legitimate strategic or tactical explanation can be found for a particular trial decision." State v. Meckelson, 133 Wn. App. 431, 433, 135 P.3d 991 (2006), review denied, 159 Wn.2d 1013, 154 P.3d 919 (2007). "Failure to bring a plausible motion to suppress potentially unlawfully obtained evidence is one such decision." Meckelson, 133 Wn. App. at 433; see also State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (defense counsel's failure to move for suppression of drugs abandoned in vehicle after defendant was unlawfully seized was both deficient and prejudicial). Torres has established deficient performance because there is no legitimate reason for failing to bring the suppression motion.

To establish prejudice, Torres need only show "a reasonable probability that a motion to suppress would have been granted." State v. Klinger, 96 Wn. App. 619, 629, 980 P.2d 282 (1999). A motion to suppress evidence based on the illegality of the warrantless entry and seizure would likely have succeeded for the reasons set forth above. "[B]oth Strickland prongs will be satisfied if counsel fails to seek suppression where the record suggests that a motion likely would have succeeded." Horton, 136 Wn. App. at 36. Contrary to the Court of Appeals' decision, Torres has established both deficient performance and prejudice based on the available record.

2. APPELLATE COURTS HAVE THE AUTHORITY TO REMAND FOR AN EVIDENTIARY HEARING TO REACH THE MERITS OF A CONSTITUTIONAL ISSUE RAISED FOR THE FIRST TIME ON APPEAL.

If the Court of Appeals is correct in deeming the record insufficient to show manifest constitutional error, then remand for an evidentiary hearing is appropriate. RAP 12.2 provides "[t]he appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." The Court of Appeals noted "the broad authority granted under RAP 12.2 and case law allows this court to remand to the trial court for an evidentiary hearing and factual findings if necessary to resolve an issue on

appeal." Slip op. at 15. The Court of Appeals nonetheless did not consider itself "free to remand for an additional hearing on an issue not argued below when the defendant fails to show manifest constitutional error because of an insufficient record." Id.

The question of substantial public interest presented by this appeal is under what circumstances the reviewing court may remand for an evidentiary hearing to develop the factual record for a constitutional issue not raised at the trial level. Review is warranted under RAP 13.4(b)(4).

The rules of appellate procedure are "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). But RAP 2.5 "never operates as an absolute bar to review." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). The rule is discretionary. Ford, 137 Wn.2d at 477. Appellate courts thus retain the discretion to reach an issue even if it does not meet the manifest constitutional error exception. The Court of Appeals in Torres's case, in complaining it was not "free" to remand for an evidentiary hearing because Torres did not establish a manifest constitutional error, mistakenly believed it lacked the discretion to do just that. See State v. O'Dell, 183 Wn.2d 680, 697, 358 P.3d 359 (2015) (the failure to exercise discretion is itself an abuse of discretion).

In State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995), this Court held a personal restraint petition (PRP) is the appropriate vehicle for bringing matters outside the record before the reviewing court. In that case, the petitioners could not establish the deficiency or prejudice prongs of their claim that trial counsel was ineffective in failing to bring a suppression motion because the facts needed to make the requisite showing were outside the record. The Court said "remanding for expansion of the record is not an appropriate remedy." McFarland, 127 Wn.2d at 338. It did not explain why. There was no discussion of RAP 12.2.

Torres asks this Court to take certain realities into account. The PRP option is often more illusory than real. First, Torres faces a heightened burden in a PRP. She must "establish either a violation of constitutional rights resulting in actual prejudice or a nonconstitutional error that 'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" In re Pers. Restraint of Nichols, 171 Wn.2d 370, 373, 256 P.3d 1131 (2011) (quoting In re Pers. Restraint of Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004)). That burden is thrust upon her because her trial attorney was ineffective in failing to raise the suppression issue, causing her appeal on the issue to be cast aside.

Second, there is no constitutional right to counsel in post-conviction proceedings. State v. Forest, 125 Wn. App. 702, 707, 105 P.3d 1045 (2005).

Counsel may be appointed in a PRP proceeding, but only after a judge determines the PRP establishes grounds for relief. RCW 10.73.150(4); State v. Robinson, 153 Wn.2d 689, 696, 107 P.3d 90 (2005). And to get to that point, the PRP, supported by proper evidence, needs to first be filed. Torres finds herself in the position of having to file a PRP without the assistance of counsel. Those untrained in the law often have difficulty presenting a cogent legal argument on their own behalf. Most indigent persons lack the ability to file a competent pro se PRP. If her suppression claim is not decided as part of the appeal process, it is likely never to be decided at all.

The interest of justice under RAP 12.2 is especially suited to cases where trial counsel is ineffective in failing to raise a meritorious issue. Defense counsel's job is to represent the client's interests. Meckelson, 133 Wn. App. at 438. The reality is that "ultimately the client has little choice but to rely on the skill, expertise, and diligence of counsel." Peters v. Simmons, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976). When counsel fails to raise a dispositive issue, the client suffers through no fault of her own.

This case presents the opportunity for this Court to clarify that McFarland does not operate as an absolute bar to remand for an evidentiary hearing on a constitutional issue that was not raised at the trial level. Torres asks this Court to adopt a rule that the reviewing court, in its discretion, may remand for an evidentiary hearing to develop the record where the appellant

has substantial, factual evidence to support the need for an evidentiary hearing. The rule Torres proposes is consistent with the discretionary authority found in RAP 12.2 and this Court's precedent.

The Supreme Court has remanded for an evidentiary hearing so that an ineffective assistance claim could be factually developed. In State v. Jones, 183 Wn.2d 327, 336-37, 352 P.3d 776 (2015), the Supreme Court sua sponte ordered a RAP 9.11 hearing and directed the trial court "to take additional evidence and to make factual findings based on that evidence, to enable this court to determine whether defense counsel provided ineffective assistance" for failing to interview witnesses and call a certain witness to the stand. Following the evidentiary hearing and entry of factual findings, the Supreme Court reversed the conviction. Jones, 183 Wn.2d at 331.

In State v. Robinson, 138 Wn.2d 753, 755, 982 P.2d 590 (1999), the appellant argued he was deprived of his constitutionally protected right to testify because his counsel prevented him from testifying at trial. The Supreme Court, framing the issue as an ineffective assistance of counsel claim, held Robinson presented substantial, factual evidence to entitle him to an evidentiary hearing on the issue of whether Robinson's waiver of his right to testify was knowing and voluntary. Robinson, 138 Wn.2d at 755, 760, 769-70. Torres's claim is likewise grounded in substantial, factual evidence. The Court of Appeals did not feel there was enough of it to reach the merits

of the issue, but there is at least enough to justify remand for an evidentiary hearing. The standard enunciated in Robinson ameliorates the harsh outcomes that flow from a rigid reading of McFarland. There is flexibility here, and Torres asks this Court to exercise its discretion in her favor.

F. CONCLUSION

For the reasons stated above, Torres requests that this Court (1) grant review and (2) review the merits of the claim or, if the record is deemed insufficient to review the claim, remand to the trial court to conduct an evidentiary hearing and then decide the merits of the claim.

DATED this 27th day of July 2017.

Respectfully submitted,

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APPENDIX A

FILED
MAY 9, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 33933-5-III
Respondent,	)	
	)	
v.	)	
	)	
AMANDA MARIE TORRES,	)	PUBLISHED OPINION
	)	
Appellant.	)	

FEARING, C.J. — Are special glass locomotive windows, whose composition must meet federal railroad regulations, locomotive "operating mechanisms?" We ask this question in the context of RCW 81.60.080, a fallow statute that criminalizes sabotaging rolling stock. After declining to entertain Amanda Torres' Fourth Amendment challenge to her arrest and confession, we hold that locomotive windows are not operating mechanisms and reverse her conviction for sabotaging rolling stock. We remand for a new trial on this one charge since Torres also damaged air brakes in addition to windows. We affirm other convictions for burglary and malicious mischief.

FACTS

This appeal arises from the prosecution of Amanda Torres for entry into a fenced railroad yard and vandalism to a locomotive inside the yard. This statement of facts

comes from the trial and a CrR 3.5 confession hearing. We start with some trial testimony.

Between runs, the Yakima Central Railroad parks locomotives inside a locked fence at its Wapato yard. On July 7, 2014, railroad employee Jake Shreves discovered a ransacked locomotive at the Wapato railroad yard. Shreves found the fence bent to allow access for an intruder, garbage strewn about the locomotive, four or five broken windows, and a discharged fire extinguisher. Further investigation revealed shattered glass tops of air gauges.

The Yakima Central locomotive windows housed strong ballistic bullet proof, optically transparent glass that must meet federal regulations. The locomotive air gauges displayed the amount of air applied to engine brakes and measured the air in reserve tanks. Destroyed air gauges render a train unsafe by restricting the operator from determining if the brake system contains sufficient air for braking purposes. The law prohibits the operation of a train that lacks functioning air gauges. At trial, Yakima Central employee Jack Shreves identified the air gauge as part of the operating mechanism of the locomotive. Nevertheless, the gauge may work if the only damage is harm to the glass top. At trial, Shreves recalled no damage to the gauge needles. No witness identified the locomotive windows as operating mechanisms.

After discovering vandalism at the Yakima Central Railroad yard, Jake Shreves contacted law enforcement. Yakima County Deputy Sheriff Sergio Reyna responded to

the scene on July 7 at 8:00 a.m. Reyna reviewed and photographed the damage and unsuccessfully combed for latent fingerprints. With Deputy Reyna present, Shreves retrieved from the ground an identification card belonging to appellant Amanda Torres. Shreves handed the card to Deputy Reyna, who drove to the address listed on the card.

An important question on appeal is whether a confession purportedly spoken by Amanda Torres to Sheriff Deputy Sergio Reyna should be suppressed. The remainder of the statement of facts comes from a confession suppression hearing.

At 8:30 a.m., on July 7, Sheriff Deputy Sergio Reyna arrived at the Wapato address on Amanda Torres' identification card. Torres' aunt owned the house. Deputy Reyna knocked on the residence front door, a young female answered the knock, Reyna asked the young lady if he could speak to Amanda Torres, and the young female escorted Reyna to a downstairs bedroom. The identity of the young female and her relationship to the house looms important in resolving the legality of Deputy Reyna's entry inside the residence and seizure of Amanda Torres. During the suppression hearing, Torres identified the female as Isabel Batista, Torres' aunt's daughter-in-law. Torres averred that Batista was age 13 or 14 on July 7, 2014.

The State presented no testimony to identify the young female who allowed Sheriff Deputy Sergio Reyna entrance to the Wapato home. Sergio Reyna did not know the age of the woman, although he recognized her as being "younger." Report of Proceedings (RP) at 17. Reyna described the youngish woman as being 5'3" or 5'4" in

height.

A curtain, rather than a door, separated the downstairs bedroom from the remainder of the basement, so Deputy Sergio Reyna knocked on a wooden stud and asked to speak to Amanda Torres. A male and female lay on a bed. Torres identified herself and rose from the bed. Amanda Torres and Sergio Reyna's testimony differs as to events thereafter.

According to Amanda Torres, she awoke to Deputy Reyna's knocking and his telling her that he was a sheriff and was looking for Amanda Torres. Torres stumbled out of bed without shoes. She wore basketball shorts and a tank top, an outfit in which she slept.

According to Amanda Torres, Deputy Sergio Reyna took her arm and told her to follow him. Reyna did not allow Torres to completely dress. Torres immediately deemed herself under arrest since Reyna gave her no choice but to obey him. Reyna neither told Torres that she was under arrest or not under arrest. Reyna concedes he possibly grabbed Torres' elbow and escorted her upstairs.

According to Amanda Torres, when the two reached upstairs, Deputy Sergio Reyna asked Torres if the identification card in his possession was Torres' card. Torres responded in the affirmative. Reyna next asked where Torres lost the card. Torres did not respond because of the distraction of Torres' aunt returning home. The aunt asked the reason for Deputy Reyna being inside the home, inquired about who permitted

Reyna's entrance, and questioned whether the deputy held a warrant. In response, Reyna escorted an unshod Torres outside.

According to Sheriff Deputy Sergio Reyna, he sat Amanda Torres in the back of his patrol car. He then delivered *Miranda* warnings to Torres and questioned her about damage to the locomotive. Reyna remained outside the car and spoke to Torres with the car door open.

According to Sergio Reyna, after he read the *Miranda* warnings, Amanda Torres admitted to being present at the railroad yard with friends and conceded that she and her friends had imbibed strong drink. Torres refused to be a snitch on her friends. Torres did not expressly admit to damaging the locomotive, but volunteered to take responsibility for the damage. Torres never cried and never asked for assistance of a lawyer. Reyna's patrol car contained a voice recorder, but Reyna chose not to record the conversation. During the conversation, Amanda Torres' boyfriend walked toward the car with Torres' shoes in hand. Reyna closed the car door to prevent the boyfriend access to Torres.

According to Amanda Torres, Deputy Sergio Reyna questioned her for ten minutes as she sat in the patrol car. Reyna stood outside the car, and the two spoke with the door closed and locked, but the window halfway down. Reyna never read Torres the *Miranda* warnings. The deputy spoke to her as if she was guilty.

According to Amanda Torres, Sergio Reyna claimed a videotape showed Torres damaging the locomotive and asserted that he gathered Torres' fingerprints at the scene.

Reyna also declared that Torres' identification card lay inside the locomotive. Reyna asked Torres why she wreaked the damage. Torres responded that she knew not about any damage to a train. Torres cried and asked for a lawyer. She never confessed to drinking alcohol or volunteered responsibility for damage to the locomotive. She never uttered that she wished not to be a snitch.

PROCEDURE

The State of Washington charged Amanda Torres with sabotage of rolling stock, second degree malicious mischief, and second degree burglary. The trial court conducted a CrR 3.5 hearing to determine whether to suppress Amanda Torres' purported inculpatory statements to Yakima Sheriff Deputy Sergio Reyna. During the hearing, Deputy Reyna and Amanda Torres testified.

After the testimony at the CrR 3.5 hearing, Amanda Torres argued that she received no *Miranda* warnings before speaking to Sheriff Deputy Sergio Reyna in the patrol car. Torres did not assert any violation of her Fourth Amendment rights. After the hearing, the trial court adjudged Amanda Torres' statements admissible. The court found Deputy Reyna more credible than Amanda Torres, Reyna provided *Miranda* warnings, and Torres spoke voluntarily to Reyna. Our record lacks any written findings of fact resulting from the CrR 3.5 hearing.

During trial, Amanda Torres testified that, as she lay in bed incompletely asleep, Sheriff Deputy Sergio Reyna grasped her arm and ushered her to the deputy's patrol car.

Torres did not know where Reyna found her identification card. Torres denied damaging the train. She repudiated telling Reyna that she vandalized the train and that she drank with friends at the rail yard.

Amanda Torres requested a jury instruction defining the term "operating mechanism" as used in RCW 81.60.080, a term found in the crime of sabotaging rolling stock. Torres wished to argue that windows do not constitute an "operating mechanism." The trial court responded:

> I think that the term operating mechanism is testimony as to the gages [sic] being operating mechanism. There's also testimony that the windows are in a—a necessary part of the locomotive and—and I think you are right, I don't think the jury's going to decide this case on the basis of whether the windows are an operating mechanism or not. But—all right, do you have other exceptions?

RP at 214-15. The court instructed the jury:

> A person commits the crime of Sabotaging Rolling Stock when he or she willfully or maliciously, with intent to injure the owner thereof, in any manner interferes with any part of the operating mechanism of any locomotive used or capable of being used by any railroad or railway company in this state.

Clerk's Papers (CP) at 14.

During closing argument, the State mentioned that someone destroyed the gauges as well as the "special windows." RP at 232-33. Later in the State's argument, the parties and court interchanged:

> [State]: In any manner interfere with any part of the operating mechanism. You heard testimony from Mr. Shreves and Mr. Didelius that the glass of the window are special glass or window. These are glass and windows that you cannot just go to a Home Depot or a Lowe's to find a replacement.
>
> [Torres' Attorney]: I'm sorry, I thought the Court ruled that operating mechanism meant something different from what Counsel's talking about.
>
> THE COURT: Oh, I didn't rule.
>
> [Torres' Attorney]: Okay. I'm sorry, I misunderstood. Thank you.

RP at 234-35.

Defense counsel, in his closing argument, reasoned that windows were not an operating mechanism. In rebuttal argument, the prosecutor stressed that the windows were an operating mechanism.

The jury found Amanda Torres guilty on all three counts: sabotaging rolling stock, second degree malicious mischief, and second degree burglary. The trial court sentenced her to 13 days' incarceration for each count, running concurrently. Torres' sentence also required, as a condition of community custody, that she:

> Report no later than the next business day after sentencing or release from jail to a Washington State approved alcohol/drug assessment facility for evaluation. Cooperate fully with the facility and immediately enter into and complete any recommended treat program by the end of supervision.
>
> . . . If a treatment program is not recommended, promptly complete Alcohol/Drug Information School.

CP at 46. The judgment and sentence imposed $15,471.22 in legal financial obligations, including $14,671.22 in restitution. The amount of restitution, however, is crossed out

with an accompanying handwritten message: "To be set at restitution hearing." CP at 46. At the later hearing, the court ordered Amanda Torres to pay $9,943.01 in restitution.

LAW AND ANALYSIS

Issue 1: Whether Amanda Torres' inculpatory comments to Deputy Sergio Reyna should have been suppressed because Reyna violated Torres' constitutional right to privacy by entering the house without a warrant and seizing her?

Answer 1: We refuse to address this question because Torres did not assert Fourth Amendment rights before the trial court and any error is not manifest constitutional error because we lack a sufficient factual record to address the merits of Torres' argument.

Amanda Torres contends Yakima County Sheriff Deputy Sergio Reyna's warrantless entry into her home violated her rights under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. She argues that under the common authority doctrine the young female's consent did not legitimize Deputy Reyna's warrantless entry into Torres' home. Torres also argues that the deputy violated her constitutional right against warrantless seizure when he physically escorted her from her home and placed her in his patrol car for interrogation. Although trial counsel did not raise unlawful entry and seizure as a basis for excluding Torres' statements, she argues the error is reviewable as manifest constitutional error or proves ineffective assistance of her counsel. If we agreed with Amanda Torres, we would suppress all evidence gathered after the arrest.

The State justifies Sheriff Deputy Sergio Reyna's warrantless entry into the residence on the invitation and consent of the young female. The State also denies that Deputy Reyna seized Amanda Torres when touching her elbow and escorting her from her bedroom to his patrol car. The State further asks that we refuse to entertain the Fourth Amendment argument because of Torres' failure to assert the argument before the trial court.

As Amanda Torres admits in her brief, she did not raise a Fourth Amendment challenge below. The trial court held a CrR 3.5 hearing to determine whether to suppress Torres' statements to Sheriff Deputy Sergio Reyna. Her closing statement at the hearing focused on whether Reyna read Torres her *Miranda* rights, not the constitutionality of the entry into the home and the detainment of Torres.

A party may not generally raise a new argument on appeal that the party did not present to the trial court. RAP 2.5; *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007). A party must inform the court of the rules of law it wishes the court to apply and afford the trial court an opportunity to correct any error. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). We may decline to consider an issue inadequately argued below. *International Association of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 36-37, 42 P.3d 1265 (2002).

RAP 2.5(a) formalizes a fundamental principle of appellate review. The first sentence of the rule reads:

> **(a) Errors Raised for First Time on Review**. The appellate court may refuse to review any claim of error which was not raised in the trial court.

No procedural principle is more familiar than that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

Sound reasoning lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006); *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The theory of preservation by timely objection also addresses several other concerns. The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to

address. *State v. Strine*, 176 Wn.2d at 749-50 (2013); *see State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

Countervailing policies support allowing an argument to be raised for the first time on appeal. For this reason, RAP 2.5(a) contains a number of exceptions. RAP 2.5(a)(3) allows an appellant to raise for the first time "manifest error affecting a constitutional right," an exception on which a criminal appellant commonly relies. Constitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *State v. Scott*, 110 Wn.2d at 686-87. Prohibiting all constitutional errors from being raised for the first time on appeal would result in unjust imprisonment. 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.5 at 218 (8th ed. 2014).

Amanda Torres' warrantless entry and warrantless seizure issues implicate constitutional rights. We must, therefore, determine whether her arguments address a manifest error.

Washington courts and even decisions internally have announced differing formulations for "manifest error." First, a manifest error is one "truly of constitutional magnitude." *State v. Scott*, 110 Wn.2d at 688 (1988). Second, perhaps perverting the term "manifest," some decisions emphasize prejudice, not obviousness. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged

error actually affected the defendant's rights. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *State v. Scott*, 110 Wn.2d at 688; *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). A third and important formulation for purposes of this appeal is the facts necessary to adjudicate the claimed error must be in the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *State v. Riley*, 121 Wn.2d at 31.

Our record lacks key facts for determining the constitutionality of Deputy Sergio Reyna's entrance into the Wapato residence. Also, Amanda Torres' version of events sometimes diverges from Reyna's account of events and no trier of fact has resolved this inconsistency in stories. The trial court entered no findings of fact relevant to the question of whether Deputy Reyna violated Torres' Fourth Amendment privileges. Critical unresolved facts include the identity of the young lady answering the knock on the front door, the youngish woman's role in the home, Amanda Torres' standing in the residence, whether Torres and the young lady held equal rights to control the premises or whether the other girl possessed subordinate rights, the words spoken by Sergio Reyna to Amanda Torres before escorting Torres from her bedroom, the manner and extent to which Reyna touched the body of Torres, the degree of force asserted by Reyna in his

interaction with Torres, and whether a reasonable person would consider herself free to disobey Reyna's instructions to follow him.

Resolution of some of the factual questions posed looms important under the pertinent law. In search and seizure cases involving cohabitants, courts apply the common authority rule. *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). This rule provides the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared. *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974); *State v. Leach*, 113 Wn.2d 735, 738-39, 782 P.2d 1035 (1989). One with equal or lesser control over premises does not have authority to consent for those who are present and have equal or greater control. *State v. Morse*, 156 Wn.2d at 4-5. A temporary guest does not have authority to consent to a search of private areas of a host's home while the host is present. *State v. Morse*, 156 Wn.2d at 8.

Whether a law enforcement officer seized a person under the Fourth Amendment is a mixed question of law and fact. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). What the police said and did and what the defendant said and did are questions of fact. *State v. Howerton*, 187 Wn. App. 357, 364, 348 P.3d 781, *review denied*, 184 Wn.2d 1011, 360 P.3d 818 (2015). A warrantless seizure is presumed unconstitutional under the Fourth Amendment. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003). A seizure occurs when, in view of all the circumstances surrounding the incident, a

reasonable person would have believed that he was not free to leave. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

We note that the broad authority granted under RAP 12.2 and case law allows this court to remand to the trial court for an evidentiary hearing and factual findings if necessary to resolve an issue on appeal. *State v. Brown*, 30 Wn. App. 344, 633 P.2d 1351 (1981), *overruled on other grounds by State v. Commodore*, 38 Wn. App. 244, 684 P.2d 1364 (1984); *State v. Mitchell*, 2 Wn. App. 943, 472 P.2d 629 (1970), *overruled on other grounds in State v. Braithwaite*, 92 Wn.2d 624, 600 P.2d 1260 (1979), which in turn was *overruled by State v. Hennings*, 100 Wn.2d 379, 670 P.2d 256 (1983). Nevertheless, the State in *Brown* or *Mitchell* did not question the presence of manifest constitutional error because of a failure to assert a contention before the respective trial courts. We do not consider ourselves free to remand for an additional hearing on an issue not argued below when the defendant fails to show manifest constitutional error because of an insufficient record. Amanda Torres' filing of a personal restraint petition would better serve adjudication of her Fourth Amendment rights.

Amanda Torres also argues that her trial counsel was ineffective for failure to seek suppression of any confession on Fourth Amendment grounds. A claim of ineffective assistance of counsel requires a showing that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's

performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). This court presumes that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 335.

We decline to address whether Amanda Torres' trial counsel violated the standard of care because we can decide the appeal based on the failure to show prejudice. If one prong of the test fails, we need not address the remaining prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); *McFarland*, 127 Wn.2d at 337. In order to establish actual prejudice, Torres must show that the trial court likely would have granted a motion to suppress her confession based on an unlawful entry into the home and seizure of her person. *State v. Hamilton*, 179 Wn. App. 870, 882, 320 P.3d 142 (2014). As analyzed previously, we lack sufficient facts to determine whether the trial court would have granted a motion to suppress.

Issue 2: Did the trial court err in refusing to instruct the jury that windows were not part of the operating mechanism of the locomotive?

Answer 2: Yes.

Amanda Torres contends that the trial court erred in denying her request for a clarifying instruction that locomotive windows do not qualify as part of the operating mechanism of a locomotive under RCW 81.60.080(1). She also argues that the prosecutor committed misconduct by misleading the jury to believe windows constitute operating mechanisms. The State responds that the trial court committed no error because the trial court provided sufficient instructions. According to the State, windows qualify as an operating mechanism since the train cannot legally operate without the window mechanisms. Amanda Torres' assignment of error concerns only one of her three convictions, sabotaging rolling stock.

Amanda Torres' assignment of error raises a legal question of statutory construction. We must decide as a matter of law whether a jury may convict one for sabotaging rolling stock if one shatters locomotive windows.

RCW 81.60.080(1) criminalizes sabotaging rolling stock. The statute declares:

> Any person or persons who shall willfully or maliciously, with intent to injure or deprive the owner thereof, *take, steal, remove, change, add to, alter, or in any manner interfere* with any journal bearing, brass, waste, packing, triple valve, pressure cock, brake, air hose, *or any other part of the operating mechanism of any locomotive*, engine, tender, coach, car, caboose, or motor car *used or capable of being used* by any railroad or railway company in this state, is guilty of a class C felony, and upon conviction thereof shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.

(Emphasis added.) We must decide whether ballistic windows fall within the category of "operating mechanisms" within the meaning of the statute. This court faces a novel issue involving an obscure criminal statute never before cited in a court opinion. We compliment the State for unearthing the archaeological find catalogued in a title other than Titles 9 or 9A RCW. We cannot find guidance in foreign law because no other state criminalizes "sabotaging rolling stock." No criminal case discusses the definition of a train's or locomotive's "operating mechanism." So we go boldly forward where no man or woman has gone before.

Amanda Torres wishes this court to interpret "operating mechanism" to mean locomotive parts that make the train move, or, with braking features, slow down and stop. The State interprets "operating mechanism" to mean any portion of a train that, when damaged, prevents the owner from operating the train in compliance with federal regulations. After dissecting and magnifying RCW 81.60.080(1), we agree with Amanda Torres that windows, as a matter of law, are not operating mechanisms. Therefore, the trial court should have instructed the jury that the jury could not consider windows as operating mechanisms. We doubt that a prosecutor engages in misconduct when he or she argues an interpretation of a statute consistent with a trial court ruling. Nevertheless, because we vacate the conviction on inadequate jury instructions, we do not address whether the prosecution engaged in misconduct when arguing that windows are operating mechanisms.

The court's duty in statutory interpretation is to discern and implement the legislature's intent. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). In so doing, we rely on many tested, commonsensical, and intelligent principles to divine the meaning of the statute, principles employed when interpreting other important and even sacred texts. We rely on legislative history, a lay dictionary, a technical railroad dictionary, other words in the statute, and the whole of the statute.

The Washington Legislature adopted RCW 81.60.080 in 1941. S.B. 201, 27th Leg., Reg. Sess. (Wash. 1941). The proposed bill initially read: "Any person or persons who shall willfully or maliciously, with intent to injure or deprive the owner thereof, take, steal, remove, change, add to, alter, or in any manner interfere with any journal bearing, brass, waste, packing, triple valve, pressure cock, brake, air hose *or any other part or attachment* . . . ." (Emphasis added.) During the legislative process, the Senate Standing Committee recommended substituting the language "any other part of the operating mechanism" in lieu of "any other part or attachment." SENATE JOURNAL, 27th Leg., Reg. Sess., at 213 (Wash. 1941). The Washington Senate incorporated the recommended amendment and the bill became law with the new "operating mechanism" language. S.B. 201, 27th Leg., Reg. Sess. (Wash. 1941). With this history, we know that the legislature did not intend the statute to apply broadly to any locomotive part or attachment.

To determine the meaning of a two-word phrase, such as "operating mechanism," this court may examine the dictionary definition of each individual word. *State v. Kintz*, 169 Wn.2d 537, 548, 238 P.3d 470 (2010). The dictionary defines "operating" as engaged in some form of operation. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1581 (1993). The same dictionary defines "mechanism" as a piece of machinery, a structure of working parts functioning together to produce an effect. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1401 (1993). These broad definitions suggest a locomotive's operating mechanisms work together to accomplish the purpose of the locomotive, to propel and stop movement of the train. Even if a window is a mechanism, a window is not used to operate a train. Even if a window is necessary for the safe operation of a train, it is not used to run a train. The locomotive may still move if one removes its windows.

The parts of a train catalogued in RCW 81.60.080 are: "journal bearing, brass, waste, packing, triple valve, pressure cock, brake, air hose, or any other part of the operating mechanism of any locomotive." A classic rule of statutory construction, expressio unius est exclusio alterius, is Latin for when a statute specifically designates the things on which it operates, there is an inference that the legislature intended all omissions. *State v. LG Electronics, Inc.*, 186 Wn.2d 1, 9, 375 P.3d 636 (2016). Thus, we must assume that the legislature meant to exclude portions of the locomotive covered under RCW 81.60.080. Under the principle of noscitur a sociis, the meaning of words

may be indicated or controlled by those with which they are associated. *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999); *In re Marriage of Tahat*, 182 Wn. App. 655, 671, 334 P.3d 1131 (2014). Thus, an operating mechanism within the meaning of the statute should echo the nature of the discrete portions of the locomotive enumerated.

Terms used in the statute for train parts are unique to railroading and may also be unique to the date of the statute's adoption. When a technical term is used in its technical field, the term should be given its technical meaning by using a technical rather than a general purpose dictionary to resolve the term's definition. *Tingey v. Haisch*, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007). A Google search for locomotive terms brings one first to the American Railway Association's *Locomotive Cyclopedia of American Practice* (6th ed. 1922). Amanda Torres also discovered this cyclopedia of terms. In her brief, she lists the definitions of terms, listed in RCW 81.60.080, as found in the cyclopedia.

We note, as Amanda Torres observes, that all of the terms named in RCW 81.60.080 involve a moving mechanism that facilitates train movement or stopping. The cyclopedia awkwardly defines a "journal bearing" as a "block of metal, usually some kind of Brass or Bronze, which see, in contact with a journal, on which the load rests. In locomotive building the term when unqualified means an engine or truck axle journal bearing." *Locomotive Cyclopedia of American Practice* at 56. A "journal" is "[t]hat part of an axle or shaft on which the journal bearing or brass rests." Locomotive Cyclopedia of American Practice at 56. "Brass" means an "alloy of copper and zinc, commonly used

to designate a journal bearing." *Locomotive Cyclopedia of American Practice* at 23. "Waste" is defined as "[t]he spoiled bobbins of cotton or woolen mills, used for wiping machinery and for JOURNAL PACKING." *Locomotive Cyclopedia of American Practice* at 96. "Packing" is a "device or arrangement for making a steam-tight fitting on the piston rod and valve stem where they pass through their stuffing boxes on cylinder and steam chest, respectively. Also used on air pump piston rods and throttle rods." *Locomotive Cyclopedia of American Practice* at 64. "Journal packing" is "[w]aste, wool or other fibrous material saturated with oil or grease, with which a journal box is filled to lubricate the journal." *Locomotive Cyclopedia of American Practice* at 57. A "triple valve" is an "air brake." *Locomotive Cyclopedia of American Practice* at 91. The cyclopedia does not define a "pressure cock" but defines a "cock" as "rotary valve." *Locomotive Cyclopedia of American Practice* at 29. Thus, a "pressure cock" should be a "pressure valve." An "air hose" is an "air brake hose," which is "[f]lexible tubes made of alternate layers of rubber and canvas or metal." *Locomotive Cyclopedia of American Practice* at 11. All of these parts are critical to the movement of the locomotive.

The State criticizes 21st century use of a 1922 cyclopedia of locomotive terms. Nevertheless, to discern the intent of an early 20th century legislature, we best use a 1922 cyclopedia. When consulting a dictionary, a court should use a dictionary in use at the time of the enactment. *Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 559 (9th Cir. 2010); *State v. Leslie*, 204 Or. App. 715, 719, 132 P.3d 37 (2006): *Asbury v. Lombardi*,

846 S.W.2d 196, 201 (Mo. 1993) (en banc). Also, the State presents no contravening definitions of the terms used in RCW 81.60.080.

We ascertain the legislature's intent using the plain meaning imparted by the text of the provision and that of any related provisions. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). So we focus briefly on the verbs used in RCW 81.60.080. The statute punishes persons who "*take, steal, remove, change, add to, alter, or in any manner interfere* with any journal bearing, brass, waste, packing, triple valve, pressure cock, brake, air hose, *or any other part of the operating mechanism of any locomotive*." The statute does not focus on damage to the locomotive but with removal or altering a part so as to interfere with an operating mechanism. These verbs suggest that the legislature sought to prohibit vandalism that impedes movement of the train.

The State argues that the legislature intended "operating mechanisms" in RCW 81.60.080 to refer to parts needed to operate the train in a legal manner so as to benefit the owner. We find no hint in the statute that suggests the legislature meant legal operation of the locomotive. We are unsure if the federal regulations that the State cites existed in 1941 when the Washington Legislature enacted the criminal statute. We do not know all of the parts of the train now required by federal regulations to be present. We worry that an extensive list of such compulsory parts would in effect render vandalism to

any part of the train a violation of the statute, when the legislature did not wish such a broad interpretation.

Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010). In determining whether a trial was fair and whether the defendant suffered prejudice, the court should look to the trial irregularity and determine whether it may have influenced the jury. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Amanda Torres requested a jury instruction to fully inform the jury of the applicable law. The windows and pressure gauges were the only damaged parts of the train that the State argued as operating mechanisms. As windows are not operating mechanisms, the trial court's failure to properly instruct the jury likely misled the jury in a manner prejudicial to Torres. Thus, we reverse Torres' conviction for sabotage of rolling stock.

The State presented testimony of damage to the glass tops of air gauges. One witness testified that an air gauge is an operating mechanism. The testimony was unclear as to whether the damage precluded the functioning of the gauge and the operation of the train. Nevertheless, the jury could have found that, based on the testimony, Amanda

Torres changed or interfered in an operating mechanism by reason of vandalizing the gauge. Therefore, we remand for a new trial with proper jury instructions.

Issue 3: Whether the trial court erred when sentencing Amanda Torres?

Answer 3: We need not answer this question because we remand for other reasons and a new sentencing hearing will be needed.

Amanda Torres requests a remand to the trial court for clarification that the sentence's community custody condition and any recommended treatment must be limited to alcohol and not include drug assessment or treatment. Although the State concedes no error, the State, in the interest of judicial economy, agrees that the most expeditious method to address this question is to remand this to the trial court for clarification. Since we remand for resentencing anyway, we direct the court to clarify the community custody condition.

Amanda Torres requests this court remand for correction of the judgment and sentence to reflect the correct amount of legal financial obligations. Torres' judgment and sentence, entered at the sentencing hearing, lists a total of $15,471.22 in financial obligations, including $14,671.22 in restitution. Nevertheless, the trial court did not determine restitution at sentencing, but rather set a later restitution hearing. The subsequent hearing resulted in an order for $9,943.01 in restitution. The $15,471.22 judgment thus needs correction. The State agrees that the judgment and sentence requires correction.

Since Amanda Torres prevails in part on appeal, we deny the State an award of costs on appeal.

CONCLUSIONS

We decline to address Amanda Torres' Fourth Amendment challenges to the entry of her home and her seizure because of a lack of manifest constitutional error. Therefore, we affirm Torres' convictions for second degree malicious mischief and second degree burglary. Because of misleading jury instructions, we reverse Torres' conviction for sabotage of rolling stock and remand for a new trial on this charge. At the completion of proceedings regarding the sabotage charge, the trial court shall resentence Torres in light of instructions in this opinion.

Fearing, C.J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, J.

APPENDIX B

FILED
JUNE 27, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. AMANDA MARIE TORRES, Appellant.	)	No. 33933-5-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 9, 2017 is hereby denied.

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:

George Fearing

GEORGE B. FEARING, Chief Judge

NIELSEN, BROMAN & KOCH P.L.L.C.

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