

63144-6

63144-6

NO. 63144-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

LOA LANKHAAR,
Appellant.

2010 FEB 23 PM 4:46
FILED
CLERK OF COURT

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

The Honorable Charles R. Snyder

APPELLANT'S OPENING BRIEF

ELIZABETH ALBERTSON
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. <u>SUMMARY OF ARGUMENT</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	1
C. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	3
D. <u>STATEMENT OF THE CASE</u>	6
E. <u>ARGUMENT</u>	10
1. MS. LANKHAAR WAS CONVICTED OF A CRIME WITH WHICH SHE WAS NOT CHARGED	10
2. THE TRIAL COURT VIOLATED MS. LANKHAAR'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL AS WELL AS THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL WHEN IT CLOSED THE COURTROOM DURING JURY <u>VOIR DIRE</u>	13
a. <u>The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings</u>	14
b. <u>Washington courts must apply a five-part test when addressing a request to exclude the public from a trial</u>	15
c. <u>The trial court improperly closed the courtroom for questioning of two prospective jurors without first applying the <i>Bone-Club</i> test</u>	16
d. <u>Reversal of the conviction is required</u>	19
3. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT IN CLOSING ARGUMENT, PREJUDICING MS. LANKHAAR AND REQUIRING REVERSAL OF HER CONVICTION.....	19
a. <u>Additional facts related to this issue</u>	19

b. <u>The prosecutor committed misconduct by misstating the law regarding accomplice liability.....</u>	20
c. <u>The prosecutorial misconduct prejudiced Ms. Lankhaar and requires reversal of her conviction.....</u>	22
4. THE TRIAL COURT ERRED IN FAILING TO GIVE AN ADEQUATE SUPPLEMENTAL INSTRUCTION IN RESPONSE TO THE JURY'S QUESTIONS.....	26
a. <u>A trial court must exercise its discretion to supplement the original instructions if the meaning of an instruction is unclear or potentially misleading under the facts of a given case.....</u>	26
b. <u>The trial court erred in failing to adequately answer the jury's questions where they evidenced their confusion about the law and a need for guidance.....</u>	27
c. <u>The error prejudiced Ms. Lankhaar and requires reversal of the conviction.....</u>	29
5. ABSENT AN ELECTION BY THE STATE AS TO THE ACT RELIED ON FOR CONVICTION OR A UNANIMITY INSTRUCTION ISSUED BY THE TRIAL COURT, MS. LANKHAAR'S RIGHT TO A UNANIMOUS VERDICT WAS VIOLATED.....	29
a. <u>In a criminal case, the jury must be unanimous on all essential elements of the crime.....</u>	29
b. <u>The State failed to elect which distinct act it relied on as the basis for the charge, and the court failed to instruct the jury they must unanimously agree that the same act was proven beyond a reasonable doubt.....</u>	31
c. <u>The error requires reversal of the conviction.....</u>	32

6. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.....	33
a. <u>The State must prove each element of a crime beyond a reasonable doubt.</u>	33
b. <u>The State failed to prove beyond a reasonable doubt that Ms. Lankhaar possessed the stolen property.</u>	34
i. <u>There was insufficient evidence Ms. Lankhaar possessed the stolen property as a principal.</u>	34
ii. <u>There was insufficient evidence Ms. Lankhaar possessed the stolen property as an accomplice.</u>	37
c. <u>The State failed to prove beyond a reasonable doubt that the stolen property had a value in excess of \$1,500.</u>	39
d. <u>The failure of the State to prove all elements of the charge requires that the conviction be reversed and dismissed with prejudice.</u>	41
7. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR ARREST OF JUDGMENT OR A NEW TRIAL BASED ON JURY MISCONDUCT.....	41
a. <u>The jury considered extrinsic evidence during its deliberations</u>	41
b. <u>A jury's consideration of extrinsic evidence violates a defendant's constitutional right to trial by a fair and impartial jury</u>	42

c. <u>Prejudice is presumed, and since the extrinsic evidence could have affected the jury's determination, the conviction must be reversed</u>	44
8. THE CUMULATIVE EFFECT OF THE ABOVE ERRORS DENIED MS. LANKHAAR A FAIR TRIAL.....	46
F. <u>CONCLUSION</u>	47

TABLE OF AUTHORITIES

United States Supreme Court Decisions

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	33
<u>Chapman v. California</u> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1975).....	32
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	33
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61L.Ed.2d 560 (1979).....	34
<u>Presley v. Georgia</u> , __ U.S. __, 130 S.Ct. 721, __ L.Ed.2d __ (2010).....	15
<u>Smith v. Phillips</u> , 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).....	20

Washington Supreme Court Decisions

<u>Adkins v. Aluminum Co. of America</u> , 110 Wn.2d 128, 750 P.2d 1257 (1988).....	45
<u>Brown v. Spokane County Fire Protection Dist. No. 1</u> , 100 Wn.2d 188, 668 P.2d 571 (1983).....	44
<u>Halverson v. Anderson</u> , 82 Wn.2d 746, 513 P.2d 827 (1973).....	45
<u>In re Personal Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	15
<u>In re Wilson</u> , 91 Wn.2d 487, 588 P.2d 1161 (1979).....	38
<u>Seattle Times Co. v. Ishikawa</u> , 97 Wn.2d 30, 640 P.2d 716 (1982).....	17
<u>State v. Allen</u> , 89 Wn.2d 651, 574 P.2d 1182 (1978).....	26

<u>State v. Boast</u> , 87 Wn.2d 447, 553 P.2d 1322 (1976).....	38
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	2, 16, 17, 18, 19
<u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995), <u>cert. denied</u> , 516 U.S. 1121 (1996).....	12
<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	16, 18
<u>State v. Callahan</u> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	35, 36
<u>State v. Camarillo</u> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	30
<u>State v. Clausing</u> , 147 Wn.2d 620, 56 P.3d 550 (2002).....	27
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	46
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10, <u>cert. denied</u> , 501 U.S. 1237 (1991).....	30
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	20, 21, 22, 23, 24, 25, 27
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	16, 18
<u>State v. Gladstone</u> , 78 Wn.2d 306, 474 P.2d 274 (1970).....	38
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	34
<u>State v. Haner</u> , 95 Wn.2d 858, 631 P.2d 381 (1981).....	12
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	41
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	41
<u>State v. Irazarry</u> , 111 Wn.2d 591, 763 P.2d 432 (1988).....	12
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	30, 32
<u>State v. Kleist</u> , 126 Wn.2d 432, 895 P.2d 398 (1995).....	39

<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996).....	26
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	17, 18
<u>State v. Pelkey</u> , 109 Wn.2d 484, 745 P.2d 854 (1987).....	12
<u>State v. Pete</u> , 152 Wn.2d 546, 98 P.3d 803 (2004).....	43, 44
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	30
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).....	21
<u>State v. Redmond</u> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	29
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	22, 25
<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	15, 16, 18, 19
<u>State v. Zakel</u> , 119 Wn.2d 563, 834 P.2d 1046 (1992).....	35

Washington Court of Appeals Decisions

<u>Fritsch v. J.J. Newberry's, Inc.</u> , 43 Wn. App. 904, 720 P.2d 845 (1986).....	45
<u>Richards v. Overlake Hosp. Med. Ctr.</u> , 59 Wn. App. 266, 796 P.2d 737 (1990), <u>rev. denied</u> , 116 Wn.2d 1014 (1991).....	43
<u>Ryan v. Westgard</u> , 12 Wn. App. 500, 530 P.2d 687 (1975).....	43
<u>State v. Alexander</u> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	46
<u>State v. Alvarado</u> , 73 Wn. App. 874, 871 P.2d 663 (1992).....	11, 12
<u>State v. Anderson</u> , 63 Wn. App. 257, 818 P.2d 40 (1991), <u>rev. denied</u> , 118 Wn.2d 1021 (1992).....	21, 39
<u>State v. Boling</u> , 131 Wn. App. 329, 127 P.3d 740, <u>rev.</u> <u>denied</u> , 158 Wn.2d 1011 (2006).....	44

<u>State v. Briggs</u> , 55 Wn. App. 44, 776 P.2d 1347 (1989).....	44, 45
<u>State v. Bryant</u> , 89 Wn. App. 857, 950 P.2d 1004 (1998), <u>rev. denied</u> , 137 Wn.2d 1017 (1999).....	21
<u>State v. Byrd</u> , 72 Wn. App. 774, 868 P.2d 158 (1994); <u>aff'd</u> , 125 Wn.2d 707 (1995).....	26
<u>State v. Casteneda-Perez</u> , 61 Wn. App. 354, 810 P.2d 74, <u>rev. denied</u> , 118 Wn.2d 1007 (1991).....	22
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>rev. denied</u> , 131 Wn.2d 1018 (1997).....	21
<u>State v. Fry</u> , 153 Wn. App. 235, 220 P.3d 1245 (2009).....	44
<u>State v. Gotcher</u> , 52 Wn. App. 350, 759 P.2d 1216 (1988).....	21, 24, 25, 27
<u>State v. Harris</u> , 14 Wn. App. 414, 542 P.2d 122 (1975), <u>rev. denied</u> , 86 Wn.2d 1010 (1976).....	36
<u>State v. Hutton</u> , 7 Wn.App. 726, 502 P.2d 1037 (1972).....	34
<u>State v. Johnson</u> , 137 Wn. App. 862, 155 P.3d 183 (2007).....	43-44
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993), <u>rev. denied</u> , 124 Wn.2d 1018 (1994).....	32
<u>State v. King</u> , 75 Wn. App. 899, 872 P.2d 1115 (1994), <u>rev. denied</u> , 125 Wn.2d 1021 (1995).....	32
<u>State v. Murphy</u> , 44 Wn. App. 290, 721 P.2d 30, <u>rev. denied</u> , 107 Wn.2d 1002 (1986).....	43
<u>State v. Plank</u> , 46 Wn. App. 728, 731 P.2d 1170 (1987).....	36
<u>State v. Ransom</u> , 56 Wn. App. 712, 785 P.2d 469 (1990).....	27
<u>State v. Robinson</u> , 73 Wn. App. 851, 872 P.2d 43 (1994).....	22, 39

<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	22
<u>State v. Summers</u> , 45 Wn. App. 761, 728 P.2d 613 (1986).....	36
<u>State v. Young</u> , 48 Wn. App. 406, 739 P.2d 1170 (1987).....	27, 28, 29

Constitutional Provisions

United States Constitution, Sixth Amendment.....	14, 30, 33, 42
United States Constitution, Fourteenth Amendment...	20, 33, 42, 46
Washington State Constitution, article 1, section 3.....	20, 33, 42, 46
Washington State Constitution, article 1, section 10.....	3, 15
Washington State Constitution, article 1, section 21.....	30, 33
Washington State Constitution, article 1, section 22.....	3, 12, 15, 20, 33, 42, 46

Statutes

RCW 9A.08.020.....	21, 29, 37, 38
RCW 9A.56.010.....	39
RCW 9A.56.140.....	34
RCW 9A.56.150.....	34, 45
RCW 9A.76.050.....	21, 29

Court Rules

CrR 2.1.....	3, 11
CrR 7.5.....	43

RAP 2.5.....30

A. SUMMARY OF ARGUMENT.

In this appeal of her conviction for possessing stolen property in the first degree, Loa Lankhaar asserts that (1) she was convicted of a crime with which she was not charged; (2) the trial court violated her constitutional right to a public trial as well as the public's right to an open trial when it closed the courtroom during jury selection; (3) the prosecuting attorney committed prejudicial misconduct in closing argument; (4) the trial court erred in failing to supplement the jury instructions in response to the jury's written questions; (5) the trial court erred in failing to provide the jury with a unanimity instruction; (6) there was insufficient evidence to prove all elements of the crime beyond a reasonable doubt; (7) the trial court erred in denying her motion for arrest of judgment or for a new trial based on jury misconduct; and (8) she was denied a fair trial given the cumulative effect of the above errors. These errors require reversal of the conviction.

B. ASSIGNMENTS OF ERROR.

1. Ms. Lankhaar was convicted of a crime with which she was not properly charged.
2. When the trial court conducted a portion of jury selection in the judge's chambers without first performing the required Bone-

Club analysis, it violated both Ms. Lankhaar's right to a public trial and the public's right to an open trial.¹

3. The prosecuting attorney committed prejudicial misconduct in closing argument.

4. The trial court erred in failing to sustain Ms. Lankhaar's objection during the State's closing rebuttal argument.

5. The trial court erred in failing to supplement its instructions to the jury in response to their written questions.

6. Absent an election by the State as to the act relied on for conviction or a unanimity instruction issued by the trial court, Ms. Lankhaar's right to a unanimous verdict was violated.

7. The State failed to prove all elements of the crime of possessing stolen property in the first degree beyond a reasonable doubt.

8. The trial court erred in denying Ms. Lankhaar's motion for arrest of judgment or a new trial based on jury misconduct.

9. The cumulative effect of the above errors denied Ms. Lankhaar a fair trial.

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Under CrR 2.1, the trial court must approve a proposed amendment of charges. In this case, the State filed an amended information charging possession of stolen property without first making a motion to amend, and the trial court never approved the amendment. Since the information was never properly amended and the original information did not charge Ms. Lankhaar with possession of stolen property, must the conviction be reversed?

2. A criminal defendant has both a federal and state constitutional right to a public trial. The public also has a constitutional right to an open and public trial. To comply with article 1, § 10 and 22, before closing the courtroom, the trial court is mandated to apply the five-part test set out in State v. Bone-Club. Where the trial court conducted a portion of jury selection in chambers without first considering the right to a public trial, articulating a compelling interest that justified closure, weighing the competing interests, or considering the availability of less restrictive alternatives, did it commit constitutional error requiring reversal of Ms. Lankhaar's conviction?

3. In closing argument, the prosecuting attorney misstated the law regarding accomplice liability, and the trial court failed to

sustain Ms. Lankhaar's objection to the improper argument. During their deliberations, the jury submitted questions which established their confusion over the law as it pertains to accomplice liability, but the trial court did not supplement its instructions. Was there a reasonable probability that the prosecutor's misconduct affected the jury's verdict such that the conviction must be reversed?

4. Merely referring jurors back to the original instructions in response to a jury question is not sufficient where the jurors have demonstrated confusion about the law and a need for guidance. In such a case, the trial court must exercise its discretion to supplement the original instructions, even where the original instructions are standard pattern jury instructions that correctly state the law. Where the prosecutor misstated the law concerning accomplice liability and the jury demonstrated their confusion about the law through their submission of written questions, did the trial court's failure to resolve the jury's misunderstanding and clarify the law by issuing a supplemental instruction require reversal of the conviction?

5. Criminal defendants have a constitutional right under the constitutions of the United States and Washington to a unanimous jury verdict. Where evidence is presented of multiple distinct acts,

any of which could be the basis of a criminal conviction, either (1) the State must elect which act it is relying on, or (2) the trial court must instruct the jury that they must unanimously agree that the same act has been proved beyond a reasonable doubt. In this case, there was evidence of two distinct acts of possession – one on May 12, 2007, and another four to six weeks earlier. Where the charging period in the information encompassed both dates, the prosecutor failed to elect which act it was relying on as the basis for conviction, and the trial court failed to provide a unanimity instruction, is reversal of the conviction required?

6. All elements of the crime charged must be proved beyond a reasonable doubt. Proof of possessing stolen property in the first degree requires proof of “possession,” as well as proof that the value of the stolen property exceeds \$1,500. Where the State failed to prove one or both of these essential elements of the crime beyond a reasonable doubt, must the conviction be reversed and dismissed?

7. Affidavits from two jurors established that they introduced and considered extrinsic evidence of the scrap value of metal during their deliberations. Once juror misconduct is established, prejudice is presumed. Where the extrinsic evidence could have

affected the jury's decision regarding the value of the stolen property, an element of the offense, did the trial court err in denying Ms. Lankhaar's motion for arrest of judgment or a new trial?

8. The cumulative effects of trial court errors may deny a criminal defendant the right to a fair trial, even if each error examined on its own would otherwise be considered harmless. Did the combination of errors in Ms. Lankhaar's trial deny her a fair trial, requiring reversal of the conviction?

D. STATEMENT OF THE CASE.

Loa and Wayne Lankhaar met Robert Dodge in 2006 through church activities. 4/8/08RP 61-62. Mr. Dodge assisted the Lankhaars in obtaining a trailer and moving them onto property owned by his mother and step-father, Shirley and Gerald Hardy. 4/8/08RP 60, 63. The agreement was that the Lankhaars would not pay to park their trailer on the property, but would pay their utility bills and also pay to rent storage space from Mr. Hardy. 4/8/08RP 105-06, 204. Mr. Hardy had at one time run a dairy farm on the property, but had quit operating the farm in 2003 because it was no longer profitable to do so. 4/8/08RP 89-90. The equipment from the dairy remained on the property, and the Lankhaar's trailer was next to the milking parlor. 4/8/08RP 64.

Mr. Lankhaar ran a salvage business. 4/8/08RP 184. He would haul away other people's "junk" and scrap it. 4/8/08RP 185. Mr. Hardy became irritated at the amount of "stuff" that had been hauled in onto his property. 4/8/08RP 95. He also claimed that the Lankhaars were behind on their payments, and the Lankhaars were asked to move off the property. 4/8/08RP 72-73, 96-97.

On May 12, 2007, Mr. Hardy discovered Mr. Lankhaar dismantling some of his dairy farm equipment. 4/8/08RP 108, 114. Ms. Lankhaar was not present. 4/8/08RP 109, 114. Lots of the equipment was missing. 4/8/08RP 109. Mr. Lankhaar admitted that he was salvaging metal from the dairy farm "to get even with Bob" for money he felt was owed to him by Mr. Dodge. 4/8/08RP 109. Mr. Hardy announced he was going to his house to call the police. 4/8/08RP 109.

Right after Mr. Hardy called police, Ms. Hardy received a phone call from Ms. Lankhaar. 4/8/08RP 116. Ms. Lankhaar begged Ms. Hardy, "please don't let Jerry let the sheriff take Wayne." 4/8/08RP 123, 207. According to Ms. Hardy, Ms. Lankhaar admitted that they sold a load of metal previously and agreed to return the unspent money that they received. 4/8/08RP 123.

Deputy Brian Oswalt from the Whatcom County Sheriff's Office responded to the scene. 4/8/08RP 138. After speaking with Mr. Hardy, he contacted both Mr. and Ms. Lankhaar in the trailer. 4/8/08RP 139-41. He testified that he asked Ms. Lankhaar if she knew the property was stolen, and she stated "I knew, but I didn't ask." 4/8/08RP 141, 149. The deputy testified that Ms. Lankhaar admitted that about four to six weeks earlier, she and her husband took a load of metal down to a recycler and received \$400 for it. 4/8/08RP 141-42. They used some of the money to buy gas and supplies. 4/8/08RP 142. Both Mr. and Ms. Lankhaar were arrested and charged with theft in the first degree and trafficking in stolen property. CP 124-25.

Wally Bishop rented part of the Hardy's property. 4/8/08RP 130. Mr. Bishop later spoke with Mr. and Ms. Lankhaar and learned of their arrest. 4/8/08RP 131-33. Mr. Lankhaar said he would be pleading guilty and was hopeful that charges would be dismissed against his wife. 4/8/08RP 133. Mr. Bishop said that the Lankhaars claimed to have permission from the Hardys to remove

property from the milk parlor. 4/8/08RP 134.² From “the way that the conversation went,” Mr. Hardy assumed that “they did it together.” 4/8/08RP 134. However, he did not testify as to any specific facts that led him to this conclusion. 4/8/08RP 129-37.

Mr. Lankhaar pled guilty to trafficking in stolen property and was sentenced to prison. 4/8/08RP 180-81. At Ms. Lankhaar’s trial on charges of theft and possessing stolen property, Mr. Lankhaar testified that he was solely responsible for the wrongdoing, and that his wife did nothing to help him steal or sell any of the property. 4/8/08RP 192-93. Mr. Lankhaar was in business for himself scrapping metal, and Ms. Lankhaar often accompanied him to the recycler. 4/8/08RP 184, 186. According to Mr. Lankhaar, his wife’s only involvement regarding the trip to the recycler was the mere fact that she accompanied him, which she did because they were going out to dinner afterwards. 4/8/08RP 189, 200. He did not tell Ms. Lankhaar that there was

² At trial, Mr. Lankhaar explained that he had permission from Mr. Dodge to remove some items from the pump room in order to use it as a laundry room. 4/8/08RP 191. Mr. Lankhaar testified that he got rid of the “junk” with Mr. Dodge’s permission, and that this is what he was referring to when he spoke with Mr. Bishop. 4/8/08RP 191-92. Mr. Dodge denied giving permission to get rid of anything. 4/8/08RP 209-10.

stolen property in the truck, and even attempted to hide the dairy equipment by placing other items on top. 4/8/08RP 187-88.

As to the events of May 12th, Mr. Lankhaar testified that Ms. Lankhaar was in the shower while he was dismantling the dairy equipment. 4/8/08RP 203, 206. She did not know what he had done until after he was discovered by Mr. Hardy. 4/8/08RP 183-84.

The jury was instructed on accomplice liability, and the State maintained that Ms. Lankhaar was guilty both as a principal and as an accomplice. CP 72; 4/9/08RP 246-47. Ms. Lankhaar was found not guilty of theft in the first degree and guilty of possessing stolen property in the first degree. CP 60; 4/10/08RP 255-56. Finding that Ms. Lankhaar was not “in any way actively involved” in the criminal activity, the trial court imposed an exceptional sentence below the standard sentence range. 2/17/09RP 26-30.

This appeal timely follows on Ms. Lankhaar’s behalf. CP 5-14.

E. ARGUMENT.

1. MS. LANKHAAR WAS CONVICTED OF A CRIME WITH WHICH SHE WAS NOT CHARGED.

The original information charged Mr. and Ms. Lankhaar with theft in the first degree (count I) and trafficking in stolen property

(count II), both alleged to have occurred “on or about the 12th day of May, 2007.” CP 124-25. On March 28, 2008, the State filed a first amended information. CP 115-16. The amended information charged Ms. Lankhaar with theft in the first degree (count I) and possession of stolen property in the first degree (count II), both occurring “between the dates of April 1st, 2007 and May 31, 2007.” CP 115-16. The State did not seek court approval to amend the information, and no court authorized the amendment. CP 40, 42.³

4

Under CrR 2.1, an information cannot be amended without prior approval by the trial court. CrR 2.1(d) provides:

The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

Under this rule, the prosecution may not amend an information “absent leave of court.” State v. Alvarado, 73 Wn. App. 874, 876,

³ Ms. Lankhaar filed a motion for arrest of judgment on April 15, 2008, arguing in part that the information was never properly amended to charge possession of stolen property. CP 46-47. In its response to the motion, the State did not deny that it failed to seek court approval of the amendment. CP 37-41. The court denied the motion under the apparent belief that the State could file an amended information without first obtaining judicial approval. 5/13/08RP 2.

⁴ The State did seek to file a second amended information further broadening the charging period. The trial court denied this motion. 4/8/08RP 47-48, 152, 155.

871 P.2d 663 (1994). Rather, “court approval is a requisite to amending an information.” Id. When a motion to amend is made by the State, the trial court has discretion to allow or refuse the amendment of charges. State v. Brett, 126 Wn.2d 136, 155, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996); State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381 (1981).

In the case at hand, the prosecutor usurped the court’s role by simply filing an amended information without making a motion to amend. The trial court was never given an opportunity to exercise its discretion in allowing or refusing the amendment. The amended information is invalid. Haner, 95 Wn.2d at 864; Alvarado, 73 Wn. App. at 876.

A party cannot be convicted for an offense with which he or she was not charged. Wash. Const. art. 1, § 22; State v. Irazarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). Since Ms. Lankhaar was convicted of possession of stolen property, a crime she was not charged with in the original information, the conviction must be reversed.

2. THE TRIAL COURT VIOLATED MS. LANKHAAR'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL AS WELL AS THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL WHEN IT CLOSED THE COURTROOM DURING JURY VOIR DIRE.

During jury selection, a prospective juror, juror number five, spoke up to say that he believed he had heard about the case before. Supp. 4/7/08RP 48.⁵ He requested to discuss the matter in private. Supp. 4/7/08P 49. The trial court responded:

Okay. Is there anybody in the room that would have any objection to juror number five joining counsel and me in my chambers for a couple of moments so we can find out what's happening here?

Supp. 4/7/08RP 49. The court reporter then noted that there was no objection, and the juror was questioned in the Court's chambers outside the presence of the remaining prospective jurors. Supp. 4/7/08RP 49.⁶ The trial judge never stated his reasons for closing the courtroom, and never mentioned the constitutional right to a public trial. Supp. 4/7/08RP 49.

⁵ A transcript dated 4/7/08 contains pre-trial motions. Voir dire was later transcribed in a separate volume and is also dated 4/7/08. To distinguish between the two volumes, the report of proceedings for voir dire shall be referred to as a supplemental RP.

⁶ Ms. Lankhaar also went into chambers. 4/7/08RP 33.

In chambers, the trial court and the prosecutor asked juror number five a series of questions. Supp. 4/7/08RP 49-51. Ms. Lankhaar's counsel did not ask any questions of the juror, but did move that he be excused from the jury panel for cause. Supp. 4/7/08RP 51-52. The court granted the request. Supp. 4/7/08RP 52.

The court reporter then noted, "Whereupon Juror Number 5 left the Court's chambers, and Juror Number 15 entered." Supp. 4/7/08RP 52. A conversation ensued between this potential juror and the trial judge in the judge's chambers. Supp. 4/7/08RP 53. Again, the trial judge never mentioned the constitutional right to a public trial, and gave no reasons for closing the courtroom. Supp. 4/7/08RP 52-53. Jury selection then continued in the courtroom.

a. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings. A criminal defendant has a constitutional right to a public trial under both the Sixth Amendment to the United States Constitution, as well as the Washington Constitution, article 1, §

22.⁷ In addition, the public has the right to an open and public trial under article 1, §10 of the Washington Constitution. The constitutional guarantee of a public trial extends to “the process of juror selection.” In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). Whether the constitutional right to a public trial has been violated is a question of law, subject to de novo review. State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).

b. Washington courts must apply a five-part test when addressing a request to exclude the public from a trial. Article 1, § 10 and article 1, § 22 require that before conducting closed courtroom proceedings, the trial court is “mandated” to perform a weighing test consisting of the following five criteria:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

⁷ The United States Supreme Court recently held that a criminal defendant's Sixth Amendment right to a public trial was violated when the public was excluded from jury voir dire. Presley v. Georgia, ___ U.S. ___, 130 S.Ct. 721, ___ L.Ed.2d ___ (2010). The Court held that before a trial court may close the courtroom, it must first identify the overriding interest that justifies closure and consider possible alternatives. Id. at 724-25.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

In addition, the trial court must enter specific findings justifying the closure order. State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006).

c. The trial court improperly closed the courtroom for questioning of two prospective jurors without first applying the *Bone-Club* test. The right to a public trial is not waived by a failure of the defendant or a member of the public to object, but may be raised for the first time on appeal. Strode, 167 Wn.2d at 229; Easterling, 157 Wn.2d at 176 n.8; State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

In the case at hand, juror number five was questioned in chambers pursuant to his request for privacy. Supp. 4/7/08P 49. It is not clear what prompted the questioning of juror number 15 in chambers. Supp. 4/7/08RP 52. No one objected to the procedure.

However, under Bone-Club, for the right to object to a courtroom closure to have “practical meaning,” the compelling interest sought to be protected by the courtroom closure must first be identified. Bone-Club, 128 Wn.2d at 261 (citing Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 39, 640 P.2d 716 (1982)). Here, the trial court failed to articulate both the rights at stake and the compelling interest sought to be protected by a courtroom closure. Supp. 4/7/08RP 48-53.⁸

In any event, the presence of an objection is only one of the five factors the trial court must consider before closing the proceedings. Whether or not there is an objection, before closing the courtroom, the trial court has the affirmative duty to determine the compelling interest justifying closure, weigh the competing interests, and consider the availability of less restrictive

⁸ In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), the Washington Supreme Court upheld the defendant’s conviction. In that case, the defendant not only failed to object to the courtroom closure, he “affirmatively assented to the closure, argued for its expansion,” and “actively participated in it.” Id. at 151. In addition, the trial court consulted with both the defense and prosecution about the defendant’s public trial right, and identified the compelling interests justifying the closure. Id. at 145.

alternatives. Strode, 167 Wn.2d at 228-30; Easterling, 157 Wn.2d at 514-15. When the record “lacks any hint” that the trial court considered the right to a public trial before closing the courtroom, an appellate court cannot determine whether the closure was warranted. Strode, 167 Wn.2d at 228 (citing to Brightman, 155 Wn.2d at 518 and Bone-Club, 128 Wn.2d at 260-61); Easterling, 157 Wn.2d 179.⁹

In Strode, the limited questioning of some prospective jurors in the judge’s chambers constituted a courtroom closure. Strode, 167 Wn.2d at 227. Furthermore, in the absence of a Bone-Club analysis conducted on the record prior to the closure, the defendant was denied the right to a public trial. Id. at 224, 227.

In the case at hand, the trial court never conducted the five-part inquiry mandated by Bone-Club prior to closing the courtroom. Supp. 4/7/08RP 48-53. In fact, the record contains no hint that the trial court considered either Ms. Lankhaar’s right to a public trial or

⁹ In Momah, the Washington Supreme Court upheld the defendant’s conviction despite the trial court’s failure to conduct a complete Bone-Club analysis on the record. However, in that case, the trial court “carefully considered the defendant’s article 1, section 22 rights, closed the courtroom to preserve his right to an impartial jury, and narrowly tailored the closure to secure that right.” Momah, 167 Wn.2d at 145.

the public's right to open proceedings, much less engaged in the detailed review required in order to protect those rights.

d. Reversal of the conviction is required. The denial of the constitutional right to a public trial is not subject to harmless error analysis. Strode, 167 Wn.2d at 231. "Prejudice is presumed where a violation of the public trial right occurs." Bone-Club, 128 Wn.2d at 261-62. The Washington Supreme Court has never found a public trial right violation to be trivial or de minimis. Strode, 167 Wn.2d at 230. Reversal is required. Id. at 231; Bone-Club, 128 Wn.2d at 261-62.

3. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT IN CLOSING ARGUMENT, PREJUDICING MS. LANKHAAR AND REQUIRING REVERSAL OF HER CONVICTION.

a. Additional facts related to this issue. In his rebuttal portion of closing argument, the prosecutor argued that Ms. Lankhaar was guilty as an accomplice for calling Ms. Hardy and asking her not to have Wayne arrested: "That's aiding in committing a crime. Helping the getaway." 4/9/08RP 246-47. Counsel for Ms. Lankhaar objected, stating this was not a proper statement of the law because Ms. Lankhaar's act would be "aiding after the fact." 4/9/09RP 247. The court failed to sustain counsel's

objection, and merely reiterated that the jury should rely on the law as given in the instructions. 4/9/09RP 247.

During deliberations, the jury submitted the following written questions to the court:

Is “knowingly received, retained, possessed [,] concealed or disposed of stolen property” the same as receiving/spending the money? Is receiving or spending the money “more than mere presence and knowledge”?

CP 61. Defense counsel argued that “[t]he answer is no, they’re not the same thing.” 4/9/09RP 251. The court, however, merely told the jury to re-read the instructions:

The jury is instructed to read the instructions carefully, rely on your memories for the testimony, and decide the case on that basis.

CP 61.

b. The prosecutor committed misconduct by misstating the law regarding accomplice liability. A criminal defendant's right to due process of law ensures the right to a fair trial. U.S. Const. amend. 14; Wash. Const. art. I, § 3, 22. Prosecutorial misconduct which prejudices a defendant denies him a fair trial guaranteed by the due process clause. Smith v. Phillips, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). To prevail on a claim of

prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

Allegedly improper comments made during closing argument are to be reviewed "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998), rev. denied, 137 Wn.2d 1017 (1999).

It is improper for a prosecutor to misstate the law.

Davenport, 100 Wn.2d at 761; State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997); State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988).

Here, the prosecutor misstated the law by arguing that Ms. Lankhaar was guilty as an accomplice based on her actions after the crime was already complete. Someone who aids the criminal enterprise of another after the fact may be guilty of rendering criminal assistance under RCW 9A.76.050, but is not an accomplice to the crime. State v. Anderson, 63 Wn. App. 257, 261, 818 P.2d 40 (1991), rev. denied, 118 Wn.2d 1021 (1992). This is because an accomplice must knowingly "promote or facilitate the commission of the crime." RCW 9A.08.020. It is not possible to

act as an accomplice if the crime has already been completed.

State v. Robinson, 73 Wn. App. 851, 857, 872 P.2d 43 (1994).

c. The prosecutorial misconduct prejudiced Ms. Lankhaar and requires reversal of her conviction. Prosecutorial misconduct requires a new trial where the misconduct was prejudicial. State v. Stith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993). Misconduct is prejudicial when there is a "substantial likelihood" that the misconduct affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the defense objects to comments made by the prosecutor during closing argument, prejudice is established if the misconduct was "sufficiently damaging that we can say there is a reasonable probability it affected the outcome of the trial." State v. Casteneda-Perez, 61 Wn. App. 354, 364, 810 P.2d 74, rev. denied, 118 Wn.2d 1007 (1991).

In Davenport, the prosecutor did not charge the defendant as an accomplice, nor was a jury instruction on accomplice liability offered. Davenport, 100 Wn.2d at 760. Nevertheless, the prosecutor stated in rebuttal closing argument that the jury could convict the defendant as an accomplice. Id. at 761. An objection by defense counsel was overruled. Id. at 759. During

deliberations, the jury asked for a definition of “accomplice.” Id. at 759. The trial court directed the jury to rely on their existing instructions, and they found the defendant guilty. Id.

On appeal, the court held it was improper for the prosecutor to argue the defendant was an accomplice where the jury had not been instructed on accomplice liability. Id. at 761. The State argued that there was no prejudice, since the jury was instructed to disregard statements of counsel not supported by the law or evidence, the jury was not instructed on accomplice liability, and the law presumes that the jury followed the instructions they were given. Id. at 763-64.

The court disagreed. First, the failure of the trial court to sustain the objection “lent an aura of legitimacy” to the improper argument. Id. at 764. The jury’s subsequent question established that they not only considered the improper comment, but that they considered the prosecutor’s comment to be a proper statement of the law. Id. The court reversed the conviction, noting that “[t]he prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” Id. at 763. Although the jury may have been implicitly directed not to consider accomplice liability, the trial court nevertheless “failed

to inform the jury that the State's comment was improper and not to be considered." Id. at 764.

In Gotcher, the defendant was charged with first degree burglary, which required proof that he was armed with a deadly weapon. The prosecutor misstated the law by arguing that Gotcher's guilt was established by his mere possession of a deadly weapon. Gotcher, 52 Wn. App at 354-55. Defense counsel objected to the argument, but the trial court overruled the objection, stating, "The jury has been instructed. They can read the instructions again if they have any doubt about it." Id. at 352. During deliberations, the jury asked whether "armed with" was synonymous with "in possession of." Id. The court refused to answer the question, and instead referred the jury back to their original instructions. Id.

On appeal, the court noted that the influence of the improper argument was demonstrated by the jury's questions. Id. at 355. The court found a substantial likelihood that the misconduct affected the verdict based on the failure of the trial court to sustain the objection, correct the prosecutor's misstatement of the law, and clarify the law for the jury. Id. at 355-56. The jury instructions, although standard Washington pattern instructions, were

nevertheless confusing in light of the prosecutor's improper argument. Id. at 356. Since it was unknown whether the jury applied the proper law in finding the defendant guilty, the conviction was reversed. Id.

Here, the trial court's failure to sustain Ms. Lankhaar's objection "lent an aura of legitimacy" to the improper argument. Davenport, 100 Wn.2d at 764. As in Davenport and Gotcher, the influence of the improper argument is demonstrated by the jury's questions. Their questions establish not only that they took into consideration the improper argument, but considered the prosecutor's statements to be proper statements of the law.

Together, the failure of the trial court to sustain the objection, correct the misstatement, or clarify the law for the jury creates a substantial likelihood that the misconduct affected the verdict. Throughout trial, Ms. Lankhaar maintained that the evidence was insufficient to prove she was guilty as an accomplice. By misstating the law regarding accomplice liability, the State's argument prejudiced her because it went to the heart of her defense. Reed, 102 Wn.2d at 147. Reversal is required.

4. THE TRIAL COURT ERRED IN FAILING TO GIVE AN ADEQUATE SUPPLEMENTAL INSTRUCTION IN RESPONSE TO THE JURY'S QUESTIONS.

Regardless of whether the prosecuting attorney committed misconduct, the trial court committed error by failing to adequately instruct the jury in response to their questions. The court's answer, in merely referring the jury back to their original instructions, misled the jury concerning the law of accomplice liability and allowed the jury to convict Ms. Lankhaar on an improper basis.

a. A trial court must exercise its discretion to supplement the original instructions if the meaning of an instruction is unclear or potentially misleading under the facts of a given case. The purpose of jury instructions is to "furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict." State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). Jury instructions must be "manifestly clear" because an ambiguous instruction that permits an erroneous interpretation of the law is improper. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). Jurors should not have to speculate about what the law is. State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994); aff'd, 125 Wn.2d 707 (1995).

The trial court has discretion to give further jury instructions after deliberations have begun. State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990). A court must exercise its discretion if the meaning of an original instruction is unclear and potentially misleading under the facts of a given case. State v. Young, 48 Wn. App. 406, 415, 417, 739 P.2d 1170 (1987). The adequacy of a challenged jury instruction is reviewed de novo. State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002).

b. The trial court erred in failing to adequately answer the jury's questions where they evidenced their confusion about the law and a need for guidance. Even where the original instructions are standard Washington pattern instructions that correctly state the law, merely referring jurors back to their original instructions in response to a jury question is not sufficient where the jurors have demonstrated they are confused about the law and in need of guidance. Davenport, 100 Wn.2d at 764; Gotcher, 52 Wn. App. at 356.

In Young, one of the jury instructions referred to a "person not a party to this case." Young, 48 Wn. App. at 413. The jury submitted a question asking if a certain person was a party to the case. Id. at 414. The trial court merely referred them back to their

instructions, despite the fact that the instructions did not define the term “party.” Id. at 414, 417. On appeal, the conviction was reversed because the trial court failed to clarify the instruction and resolve the jury’s confusion. Id. at 417.

Here, the jury heard the testimony of Deputy Oswald. He commented that although he originally considered Mr. Lankhaar to be the sole suspect in the case, he also arrested Ms. Lankhaar after she admitted to him that she had gone with her husband to take a load of stolen metal to the recycler, knowing that the items were stolen, and had “profited from the proceeds.” 4/8/08RP 151.

In closing argument, the prosecuting attorney referred to the telephone call Ms. Lankhaar made to Ms. Hardy on May 12, 2007, after her husband had been caught trying to steal dairy equipment. Ms. Hardy testified that Ms. Lankhaar asked, “please don’t let Jerry let the sheriff take Wayne.” 4/8/08RP 123. In closing argument, the prosecuting attorney asserted that by making the telephone call, Ms. Lankhaar was guilty as an accomplice. 4/9/08RP 246-47. The defense attorney objected to the argument on the grounds that it was not a proper statement of the law. 4/9/08RP 247. However, the court failed to sustain the objection and the defense had no opportunity to respond since the prosecutor’s statements were

made during its rebuttal portion of closing argument. 4/9/08RP
247.

c. The error prejudiced Ms. Lankhaar and requires reversal of the conviction. While the jury instruction regarding accomplice liability was a correct statement of the law, the jury's questions establish that they were clearly confused about the distinction between being an accomplice in the commission of a crime and rendering criminal assistance after a crime has already been committed. CP 61; RCW 9A.08.020; RCW 9A.76.050. Jury instructions must adequately inform the jury of the applicable law. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). By failing to sustain the objection and instruct the jury to disregard the improper argument, and then by failing to adequately answer the jury's questions, the trial court did nothing to resolve the jury's misunderstanding and clarify the law regarding accomplice liability. Reversal of the conviction is required. Young, 48 Wn. App. at 417.

5. ABSENT AN ELECTION BY THE STATE AS TO THE ACT RELIED ON FOR CONVICTION OR A UNANIMITY INSTRUCTION ISSUED BY THE TRIAL COURT, MS. LANKHAAR'S RIGHT TO A UNANIMOUS VERDICT WAS VIOLATED.

a. In a criminal case, the jury must be unanimous on all essential elements of the crime. The federal constitutional right to

trial by jury and the state constitutional right to conviction only upon a unanimous jury verdict require jury unanimity on all essential elements of the crime charged. State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); U.S. Const. amend. 6; Wash. Const. art. I, § 21.

When the evidence indicates multiple distinct acts, any one of which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jury that it must unanimously agree that the same act has been proven beyond a reasonable doubt. Camarillo, 115 Wn.2d at 64; Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Where neither alternative is followed, constitutional error “stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all elements necessary for a conviction.” Kitchen, 110 Wn.2d at 411. Such an error is a manifest error affecting a constitutional right that can be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991); RAP 2.5(a).

b. The State failed to elect which distinct act it relied on as the basis for the charge, and the court failed to instruct the jury they must unanimously agree that the same act was proved beyond a reasonable doubt. During the course of the trial, the defense attorney expressed her concern that a jury instruction regarding unanimity was needed: "If half of the jury thinks she was involved on May the 12th, and half the jurors think it was some other time, I think there's a problem with unanimity." 4/8/08RP 155, 174. The court indicated that a unanimity instruction was not needed since the evidence showing Ms. Lankhaar's involvement was limited to the one event when property was taken to the recycler. 4/8/08RP 177-78. However, defense counsel pointed out that the charging period under the amended information encompassed both the incident on May 12, 2007, as well as the trip to the recycler that occurred four to six weeks earlier. 4/8/08RP 155, 178.

The evidence in this case established two distinct events. One concerned Mr. Hardy's discovery on May 12, 2007, and the other concerned the incident four to six weeks earlier. The "to-convict" instruction for the possessing stolen property charge encompassed both events ("between the dates of April 1, 2007 and May 31, 2007"). CP 82. The prosecutor did not elect which act it

relied on for conviction, but maintained in closing argument that Ms. Lankhaar was guilty based on both the act of taking the load of stolen metal to the recycler, and for her actions on May 12, 2007 when she called Ms. Hardy and asked that they not have Wayne arrested. 4/9/08RP 246-47. Nowhere in the instructions was the jury informed that they must unanimously agree that the same act had been proven beyond a reasonable doubt in order to find Ms. Lankhaar guilty. CP 62-85.

c. The error requires reversal of the conviction. The failure to require a unanimous verdict is an error of constitutional magnitude, and as such, is reversible unless it is “harmless beyond a reasonable doubt.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1975); State v. King, 75 Wn. App. 899, 903, 872 P.2d 1115 (1994), rev. denied, 125 Wn.2d 1021 (1995). Prejudice is presumed, and the error is harmless “only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 406; State v. Jones, 71 Wn. App. 798, 822, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994).

The trial court believed there was insufficient evidence to establish Ms. Lankhaar’s involvement in the events on May 12th.

4/8/08RP 177-78. Ms. Lankhaar agrees. However, in closing argument the State asserted that Ms. Lankhaar was guilty as an accomplice for the May 12th events by calling the Hardys and asking them not to have her husband arrested. 4/9/08RP 246-47. As pointed out earlier, Ms. Lankhaar objected, but the trial court did not sustain the objection or clarify the law of accomplice liability to the jurors, despite their obvious confusion. 4/9/09RP 247; CP 61. For this reason, some jurors may have found Ms. Lankhaar guilty for what happened on May 12th, and some may have convicted her for the incident that took place several weeks earlier. The error was not harmless beyond a reasonable doubt, and the conviction must be reversed.

6. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

a. The State must prove each element of a crime beyond a reasonable doubt. The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art 1, § 3, 21, 22. Where

the sufficiency of the evidence is challenged on appeal, the critical inquiry is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The existence of a fact cannot rest upon “guess, speculation, or conjecture.” State v. Hutton, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

Under RCW 9A.56.140, “possessing stolen property”

means:

knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

A person is guilty of possessing stolen property in the first degree when he or she possesses stolen property exceeding one thousand five hundred dollars in value. RCW 9A.56.150.

b. The State failed to prove beyond a reasonable doubt that Ms. Lankhaar possessed the stolen property.

i. There was insufficient evidence Ms. Lankhaar possessed the stolen property as a principal. Possession is an

essential element of the crime of possessing stolen property. State v. Zakei, 119 Wn.2d 563, 569, 834 P.2d 1046 (1992). Possession may be actual or constructive. Actual possession means that the property is “in the personal custody of the person charged with possession.” State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession means that the property is not in the person’s actual possession, but that the person charged “has dominion and control” over either the items themselves or the premises where the items are found. Id.

There was no evidence that Ms. Lankhaar ever had the stolen property in her personal custody. 4/8/08RP 83, 109, 114. There must be proof, then, that she had dominion and control. This is not an easy burden to meet. In Callahan, the defendant was on a houseboat when police executed a search warrant and found drugs. He was found in close proximity to the drugs and admitted to handling the drugs earlier that day. Callahan, 77 Wn.2d at 28. Additionally, the defendant had stayed at the houseboat for the past two or three nights and had personal belongings in the houseboat. Id. Nevertheless, his conviction for possessing the drugs was reversed because there was insufficient evidence to establish his dominion and control over the drugs or

the premises where the drugs were found. Id. at 32. Significantly, another individual claimed ownership of the drugs. Id. at 31.

Thus, neither mere proximity to the stolen property nor mere presence at a place where the stolen property is seen establishes dominion and control. State v. Summers, 45 Wn. App. 761, 763-64, 728 P.2d 613 (1986). In State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975), rev. denied, 86 Wn.2d 1010 (1976), police searched a car and found marijuana in the trunk. The car was driven by Mr. Harris and Ms. Harris was a passenger in the vehicle. Id. at 416. The officer obtained the keys to the trunk from either Mr. or Ms. Harris. Id. The car was registered to Mr. Harris, but Ms. Harris sometimes drove it. Id. On appeal, the conviction for possession of marijuana was reversed as to the wife because the evidence was insufficient to establish her dominion and control over either the drugs or the car. Id. at 417-18; see also State v. Plank, 46 Wn. App. 728, 733, 731 P.2d 1170 (1987) (passenger's presence in stolen vehicle insufficient to prove his dominion and control over the vehicle).

In the case at hand, there was no evidence that Ms. Lankhaar in any way possessed stolen property on May 12, 2007. The only evidence involving her possible possession of the metal

concerned the incident four to six weeks prior where she accompanied her husband to the recycler. Mr. Lankhaar testified that he alone stole the metal, and that it was solely his idea to take the metal to the recycler. 4/8/08RP 181, 188, 192-93. The vehicle used to transport the metal belonged to Mr. Lankhaar's brother-in-law. 4/8/08RP 187-88. Mr. Lankhaar alone loaded the metal into the truck, and he alone unloaded the metal at the recycling facility. 4/8/08RP 188-89. He drove the truck to the recycler, and he went inside and spoke with the recycler and received payment for the metal while his wife remained in the vehicle. 4/8/08RP 189-90. There was no evidence admitted by the State to contradict this testimony. Ms. Lankhaar's mere presence in the truck was insufficient to establish her dominion and control over either the truck or the stolen property.

ii. There was insufficient evidence Ms. Lankhaar possessed the stolen property as an accomplice. RCW 9A.08.020 provides that a person is guilty of a crime when he or she is an accomplice of another person in the commission of the crime. A person is an accomplice if:

- (a) With knowledge that it will promote or facilitate the commission of the crime, he
 - (i) solicits, commands, encourages, or requests

- such other person to commit it; or
(ii) aids or agrees to aid such other person in
planning or committing it.

RCW 9A.08.020(3). Even when an individual has knowledge of the criminal activity and is personally acquainted with the participants in the crime, his or her mere presence at the scene of the crime is insufficient to establish accomplice liability. In re Wilson, 91 Wn.2d 487, 490-92, 588 P.2d 1161 (1979). An accomplice must share in the criminal intent of the principal, and there must be a “community of unlawful purpose.” State v. Boast, 87 Wn.2d 447, 456, 553 P.2d 1322 (1976). The accomplice must participate “in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed,” and “seek by his action to make it succeed.” State v. Gladstone, 78 Wn.2d 306, 312-13, 474 P.2d 274 (1970).

There was absolutely no evidence that Ms. Lankhaar was involved in any way in possessing stolen property on May 12, 2007. As to the earlier incident, considering the evidence in the light most favorable to the State, Ms. Lankhaar could be said to have accompanied her husband to the recycler with the stolen property, knowing that the property was stolen. However, there was no evidence that she encouraged or aided in the commission of the

crime, or that she in any way participated in the venture. Mr. Lankhaar took full responsibility for the crime, and testified that his wife's sole involvement was her presence in the truck. 4/8/08RP 187-190, 200. This testimony was not contradicted by any other witness. Deputy Oswalt testified that although Ms. Lankhaar admitted to accompanying her husband to the recycler, she said nothing about assisting or encouraging him in any way. 4/8/08RP 150. The fact that she may have profited from the proceeds is irrelevant, as is her asking Ms. Hardy not to have her husband arrested, because by that time the crime had already been completed. Robinson, 73 Wn. App. at 857; Anderson, 63 Wn. App. at 261.

c. The State failed to prove beyond a reasonable doubt that the stolen property had a value in excess of \$1,500. Value is the "market value of the property or services at the time and in the approximate area of the criminal act." RCW 9A.56.010(18). Market value is the "price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." State v. Kleist, 126 Wn.2d 432, 435, 895 P.2d 398 (1995). It is based on an objective standard, not on the value to any particular person. Id. at 438.

Mr. Hardy testified that he purchased the milking equipment in 1980 for \$50,000. 4/8/08RP 111-12. He received approximately \$24,000 from his insurance company (with a \$1,000 deductible) to compensate for the theft. 4/8/08RP 111, 115. However, Mr. Hardy also testified that he quit operating the dairy farm in 2003 because it was no longer profitable to do so. 4/8/08RP 90.

Mr. Lankhaar testified he sold the metal as scrap and received \$321 for the stolen property. 4/8/08RP 190.¹⁰ He acknowledged that if the metal were to be used in a dairy farm again, it would have more value than merely as scrap. 4/8/08RP 194. However, the value of the metal is no more than a well-informed buyer would pay for it, and given that a dairy farm was not profitable, it cannot simply be assumed that there existed a well-informed buyer willing to purchase the equipment for use in a dairy farm. There was no evidence presented that a well-informed buyer would want the metal for any use other than for scrap, and in this way the State failed to prove that the value of the stolen property exceeded \$1,500.

¹⁰ Detective Oswald testified that Ms. Lankhaar told him the metal was sold for \$400. 4/8/08RP 141.

d. The failure of the State to prove all elements of the charge requires that the conviction be reversed and dismissed with prejudice. The evidence was insufficient to prove all elements of the crime of possessing stolen property in the first degree. Reversal of the conviction is required, and double jeopardy prohibits retrial. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

7. THE TRIAL COURT ABUSED ITS DISCRETION
IN DENYING THE MOTION FOR ARREST OF
JUDGMENT OR A NEW TRIAL BASED ON JURY
MISCONDUCT.

a. The jury considered extrinsic evidence during its deliberations. After the jury's verdict, Ms. Lankhaar filed a motion for arrest of judgment, or in the alternative, a motion for a new trial. CP 42-59. This motion was based on affidavits from jurors establishing that they used extrinsic evidence to determine the value of the stolen property, an essential element of the crime of possessing stolen property in the first degree. The affidavit signed by Mabel Vigor states that "several of the jurors in the case had personal experience with the value of scrap metal or stainless steel which was shared with the other jurors during deliberations." CP

52. Similarly, the affidavit from John Hulbert, the foreperson of the jury, states that “there were four jurors on this case with prior personal experience regarding the value of scrap metal.” CP 50.

He goes on to state:

I have several years of experience in the insurance industry and I am personally knowledgeable about the difference between the scrap value of metal and the market value of metal. I shared this knowledge with other jurors during deliberations.

CP 50.

The court was willing to allow the defense additional time to respond to the State’s brief as well as to obtain additional affidavits, but ruled that the affidavits submitted with the motion were not specific enough regarding the extrinsic information that jurors brought to their deliberations. 5/13/08RP 2-8.

b. A jury’s consideration of extrinsic evidence violates a defendant’s constitutional right to trial by a fair and impartial jury. A criminal defendant has a constitutional right to trial by an impartial jury. U.S. Const., amend. 6; Wash. Const. art. 1, § 22. He or she also has a constitutional right to a fair trial. U.S. Const. amend. 14; Wash. Const. art 1, § 3, 22. Where the jury considers material extrinsic evidence during the deliberations process, the jury commits misconduct and the defendant’s constitutional right to trial

by a fair and impartial jury is compromised. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); see also CrR 7.5(a)(2) (juror misconduct is grounds for a new trial).

Extrinsic evidence is “information that is outside all the evidence admitted at trial.” Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990), rev. denied, 116 Wn.2d 1014 (1991). Such evidence is improper because it is not subject to objection, cross-examination, rebuttal, or explanation. Pete, 152 Wn.2d at 553. Here, the jurors committed misconduct by introducing into the jury deliberations their “own unsworn testimony about matters that bear directly upon the material facts of the case at issue.” Ryan v. Westgard, 12 Wn. App. 500, 503-04, 530 P.2d 687 (1975).

A trial court’s denial of a motion for a new trial or a motion to vacate judgment must be reversed on appeal if there is a showing of abuse of discretion. Pete, 152 Wn.2d at 552; State v. Murphy, 44 Wn. App. 290, 297, 721 P.2d 30, rev. denied, 107 Wn.2d 1002 (1986). An abuse of discretion occurs when no reasonable judge would have reached the same conclusion. Pete, 152 Wn.2d at 552. Greater deference is owed to a decision to grant a new trial than a decision not to grant a new trial. State v. Johnson, 137 Wn.

App. 862, 871, 155 P.3d 183 (2007). If the record on appeal reflects that juror misconduct occurred and there is a “reasonable ground to believe that the defendant may have been prejudiced,” an abuse of discretion is established. Pete, 152 Wn.2d at 555 n.4.

c. Prejudice is presumed, and since the extrinsic evidence could have affected the jury’s determination, the conviction must be reversed. In determining whether the jury’s consideration of extrinsic evidence was prejudicial, the court must make an objective inquiry, asking whether the extrinsic evidence could have affected the jury’s decision. State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740, rev. denied, 158 Wn.2d 1011 (2006). “Once juror misconduct is established, prejudice is presumed.” Id. at 333. Any doubt as to prejudice must be resolved against the verdict. Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 198, 668 P.2d 571 (1983). In fact, a new trial must be granted unless it can be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. State v. Fry, 153 Wn. App. 235, 220 P.3d 1245, 1246 (2009); State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989).

In Briggs, the defendant, whose defense was based on the victim’s failure to identify him as a stutterer, was prejudiced by a

juror's discussion during deliberations of his own stuttering and how it could be controlled. Briggs, 55 Wn. App. at 55. In Halverson v. Anderson, 82 Wn.2d 746, 752, 513 P.2d 827 (1973), a juror committed misconduct by discussing information not admitted at trial (pilot's wages) during deliberations. The evidence was prejudicial because it left the defense with no opportunity to rebut the evidence or challenge its relevance, and it could have affected the jury's award of damages to the victim, who aspired to be a pilot. Id. at 748. In Fritsch v. J.J. Newberry's, Inc., 43 Wn. App. 904, 906, 720 P.2d 845 (1986), during their deliberations concerning damages, a juror discussed his own previous accident and statements his attorney made regarding what would be a reasonable award for pain and suffering. This information was held to constitute prejudicial extraneous evidence. Id. at 907. Finally, in Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 135-38, 750 P.2d 1257 (1988), the jury's use of a law dictionary during deliberations was held to constitute prejudicial misconduct justifying the granting of a mistrial.

Proof that the value of the stolen property exceeds \$1,500 is an essential element of the charge of possessing stolen property in the first degree. RCW 9A.56.150. However, as discussed earlier

regarding the insufficiency of the evidence, the evidence at trial establishing value was slim. The only evidence admitted at trial regarding the value of the metal as scrap came from Ms. Lankhaar's statement to the police and the testimony of Mr. Lankhaar. Ms. Lankhaar told the police that the metal was sold to the recycler for \$400. 4/8/08RP 141. Mr. Lankhaar testified that he received \$321 for the metal. 4/8/08RP 190.

Because the extrinsic evidence could have affected the jury's decision, the presumption of prejudice has not been rebutted. Ms. Lankhaar's conviction must be reversed and the case remanded for a new trial.

8. THE CUMULATIVE EFFECT OF THE ABOVE ERRORS DENIED MS. LANKHAAR A FAIR TRIAL.

The due process clauses of the federal and state constitutions provide that a criminal defendant receive a fair trial. U.S. Const. amend. 14; Wash. Const. art. 1, § 3, 22. Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992).

If this Court concludes none of the above errors alone require reversal of Ms. Lankhaar's convictions, the combination of the errors do require a new trial. Cumulatively, the errors cannot be deemed harmless since they affected Ms. Lankhaar's ability to have a fair trial. This Court cannot be convinced beyond a reasonable doubt the combined errors did not affect the jury verdict. Ms. Lankhaar's conviction must be reversed.

F. CONCLUSION.

For the reasons stated above, Ms. Lankhaar's conviction for possessing stolen property in the first degree must be reversed.

DATED this 23rd day of February, 2010.

Respectfully submitted,


ELIZABETH ALBERTSON (17071)
Washington Appellate Project (91052)
Attorneys for Appellant