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DIVISION II

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STATE OF WASHINGTON

No. 441560

BY [Signature]
DEPUTY
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ALEXIS SCHLOTTMANN,

Appellant.

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

The Honorable Lisa L. Sutton, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN RESPONSE

1. SCHLOTTMANN WAS DEPRIVED OF HER RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN JUROR # 1 WAS NOT DISMISSED FOR BIAS AFTER HE DISCLOSED THAT HE MAY HAVE BEEN A VICTIM OF THE SERIES OF BURGLARIES IN THIS CASE DURING *VOIR DIRE*.

The State argues that Juror # 1 did not “fail to disclose material information” for three reasons. Answer p. 3. First, because during *voir dire*, the jury venire was never informed about the specific facts of the case, such as the geographical location of the victim residences, their addresses or the manner in which the homes were broken into. Therefore, Juror # 1 could not have known, and did not know, whether the events which transpired at his home were akin to the crimes with which Schlottmann was charged.

The State’s argument is belied by the record. The Court provided sufficient information to put the venire panel on notice of the crimes charged. In fact, many other jurors came forward and revealed that they had been victims of burglaries, break-ins and theft. The trial court specifically informed the venire panel that Schlottmann was charged with, *inter alia*,

[...] theft in the second degree, in that [she], in the State of Washington, on or about November 18, 2011, as a principal or as an accomplice, did wrongfully obtain or exert control over property or services of another, Marian Finely, or the

value thereof with intent to deprive said person of such property or services, the value of which exceeds \$750.

4RP 4-5. Thus, the panel knew Schlottmann was charged with theft, the value of items stolen, as well as the date the alleged crimes occurred, and it was put in simple terms for the panel.

In addition, the trial court explained that residential property damage occurred during the incident: “[...] the defendant...in the state of Washington, on or about November 18, 2011, as principal or an accomplice, did knowingly and maliciously cause physical damage to property in an amount less than \$750, to wit, Marian Finely’s residence [...]” 4RP 5. This put the venire panel on notice that Schlottmann was charged with damaging someone’s residence, and put Juror # 1 on notice that the damage to his front door was similar to the property damage at issue in this case.

Furthermore, the State’s argument is foreclosed by case law instructing that that Court’s questions need not be overly specific to warrant a response from a particular juror. Rather, the entire transcript may be relied upon to determine bias. For example, in State v. Cho, the state argued a juror did not fail to disclose material information about his employment as a police officer because he was *only* asked whether he was currently employed as a police officer, not whether he had ever been so

employed *in the past*. State v. Cho, 108 Wash. App. 315, 327, 30 P.3d 496, 502 (Wash. Ct. App. 2001). Therefore, the State argued he was not bound to disclose his past employment.

Nonetheless, the appellate court found bias. Id. at 328, 503. Specifically, the court found it was likely that the juror “knew disclosure was the appropriate response to the court's questions, yet deliberately construed them as narrowly and subjectively as possible so as to avoid having to reveal that he was a former police officer. Id. (emphasis added). In sum, the court explained that it may consider the entire transcript in context to determine whether a juror failed to disclose material information.

Here, as in Cho, Juror # 1 must have understood that the trial court, as well as the defense attorney, were trying to discern whether any members of the venire panel had ever been the victim of a break in, or whether their residential property had ever been damaged, both of which Juror # 1 should have responded to affirmatively.

In fact, even if Juror # 1 was confused about the charges and the definition of “burglary,” as urged by the State, the responses from the other jurors should have put him on notice. Juror # 5 explained that he was broken into at Fort Bragg. 4RP 19. Juror # 7 explained that he had two misdemeanor theft charges. 4RP 20. Juror # 16’s daughter was held

at gunpoint. 4RP 20. Juror # 27 explained his or her home was broken into in the past three weeks. 4RP 21. Juror # 24 explained that there were two breaking and entering charges involving his automobile. 4RP 21. Juror # 34's house was burglarized six or eight months prior to the trial. 4RP 21-22. Juror # 36 explained that both his car and home were broken into. 4RP 22. Juror # 42 explained that a vehicle was stolen from his or her residence. 4RP 22. Juror # 40 explained that a person once pulled a gun on her husband and her. 4RP 22. Each of these jurors explained that they had been victims of break-ins, burglaries or gun crimes, and they interpreted the trial court's questions broadly. Thus, the State would have the Court believe that the trial court's goal in asking the questions and the sort of information sought by the court was apparent to all of the jurors except Juror #1. This is highly unlikely.

The State's second argument that Juror # 1 did not fail to disclose material information is that the trial took place 11 months after the crimes at issue and approximately the same amount of time after the incident at the home of Juror # 1. Answer p. 4. The State argues that the reasonable inference was that Juror # 1 did not remember the time frame that the crime at his house took place. The State speculates "[Juror # 1] probably consulted his own records when he went home after the first day of trial". Answer p. 5. There is absolutely nothing in the record to support this

assertion. There is absolutely nothing in the record to support the suggestion that Juror # 1 did not remember the date his front door was damaged. The record reflects that, when the trial court read the charges aloud, it indicated the date that each act was allegedly committed - on either November 17, 2011 or November 18, 2011. 4RP 5-6. Juror # 1's front door was damaged the week before the burglaries alleged in this case. 3RP 109. Thus, it is hard to imagine what more the trial court could have said to put the venire panel on notice of the charges and the time frame during which the criminal acts allegedly occurred. Asking this Court to speculate that Juror #1 had to consult his notes at home in order to remember when the attempted break-in took place, without any support in the record, is preposterous.

Third, the State argues that Schlottmann cannot show Juror # 1 could have been dismissed "for cause" had he disclosed his withheld information during *voir dire*. But it is not necessary for Schlottmann to show she was guaranteed a successful show cause challenge if she learned of this information during the *voir dire* examination. Rather, the test is "whether the movant can demonstrate that information a juror failed to disclose in *voir dire* was material, and also that a truthful disclosure would have provided a basis for a challenge for cause." *Cho*, 108 Wash. App. at 321, 30 P.3d at 499. It is indisputable that implied bias provides, at least,

a valid basis for a challenge for cause. See id at 324, 501. Moreover, the trial judge should err in favor of honoring a challenge whenever circumstances arise that may create an appearance of bias. Carle v. McChord Credit Union, 65 Wash. App. 93, 108, 827 P.2d 1070, 1081 (Wash Ct. App. 1992). Here, Schlottmann alleged, and showed, Juror # 1 was impliedly biased. This provided a valid basis for a show cause challenge.

More importantly, as argued in the Initial Brief, the legal standard utilized by the trial court when determining whether to dismiss Juror # 1 was erroneous. Here, the trial court determined Juror # 1 should not be dismissed because the facts that he revealed were not as egregious as the facts disclosed by the other jurors who were challenged for cause. But the other jurors timely disclosed their circumstances, which immediately distinguishes them from Juror # 1. Furthermore, the reasons for challenging the other jurors are simply not the test. The test is whether the facts provided by Juror # 1 would have established a valid basis for a challenge for cause.

The State argues the trial court used the correct standard to determine whether to dismiss Juror # 1. The State explained, “[t]he court was not necessarily saying that the bench mark was the other potential jurors who were excused.” Answer p. 10. But that is exactly what the

judge said. Moreover, the State urges that “[a]n inartfully worded ruling is not per se an incorrect ruling” Answer p. 10. It may not be a per se incorrect ruling, but it is a pretty strong indicator of an incorrect ruling.

The State’s assertions seem to recognize that the Court never openly considered whether Juror # 1 could truly be fair and impartial: “While the court failed to use the words ‘can be fair and impartial,’ its statement is essentially a way of saying there were reasons to believe that those other people could not be fair and impartial, but the circumstances here are different and there is not a reason to think that this juror cannot.” Answer p. 10. This is a tacit admission that the court never made a determination of whether Juror #1 could be fair and impartial. The court, therefore, used the incorrect legal standard. Further, the State’s suggestion about what the court “may have meant” by its statement should not be given any weight by this Court, as it is, like the majority of the State’s responses to this argument, pure speculation.

2. SCHLOTTMANN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER DEFENSE ATTORNEY ADMITTED HER GUILT TO 7 OF THE 13 COUNTS, INCLUDING THE OFFENSE WHICH CARRIED THE HIGHEST SENTENCE.

Schlottmann received ineffective assistance of counsel when, during opening statements, her defense attorney unequivocally admitted her guilt to 7 of the 13 counts, including the highest level charge - Burglary in the First Degree, while Armed with a Firearm - a Class A Felony - a charge which carried a life sentence. CP 12; RCW 9a20.021(1)(a) (2011). This was not an excusable trial strategy. This concession of guilt did not pertain to a lesser charge, in an attempt to secure an acquittal on a higher charge. Worse yet, defense counsel made this concession at the beginning of trial, prior to the presentation of any evidence, without Schlottmann's consent, and in contravention of her earlier plea of not guilty. This violated defense counsel's duty of loyalty and resulted in a conflict of interest. This was ineffective assistance of counsel.

The State's first argument in response is that during closing arguments, Schlottmann's counsel argued she could not be guilty of burglary in the first degree because she did not know Lockard stole the weapon from the Finely home. Answer p. 12. The problem with this statement is two-fold. First, Schlottmann's attorney already conceded her

guilt to every element of this crime during his opening statements. Second, whether Schlottmann knew that Lockard stole the weapon during the robbery does not absolve her of any wrongdoing. The defense attorney should have known as much.

In this regard, Schlottmann was charged with Burglary in the First Degree, as a principal or as an accomplice. Count I charged as follows:

[...] SCHLOTTMANN, in the State of Washington, on or about November 18, 2011, as a principal or as an accomplice, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a building and in entering such building or while in such building or in immediate flight therefrom, the actor or another participant in the crime was armed with a deadly weapon [...]

CP 12 (emphasis added).

Next, during opening statements, Schlottmann's counsel conceded the State was going to be able to prove some of the charges related to the Finely burglary beyond a reasonable doubt. 4RP 97. Her attorney stated:

[...] we'll tell you right up front they will be able to prove some of these charges, and some of the charges involving Ms. Finely's home [...] And regrettably, Ms. Schlottmann used some very poor judgment, that's in fact criminal judgment, and that she went into a home where she did not have permission to be inside, and she went with Darlene Lockard [...] And yes, while inside Ms. Finely's house, many items were taken [...]

4RP 98 (emphasis added). Thus, when her counsel admitted Schlottmann entered the residence and participated in the burglary, he admitted to the majority of the elements of the crime of Burglary in the First Degree.

Finally, during closing arguments, as the State points out, the defense attorney asserted that although Schlottmann committed some crimes in the Finely residence, she was not armed while doing so, and did not realize Lockard was armed. These statements were insufficient to cure the already damning confession made by the defense. During closing arguments, the defense attorney stated,

Certainly she did that in the burglary of Ms. Finely's home. Certainly she did that with the stealing of many expensive items. But there hasn't been proof beyond a reasonable doubt that she knowingly assisted in the crime of theft of a firearm. And given the absence of proof, it would be...inappropriate to find her guilty of the more serious offense of burglary in the first degree.

3RP 410 (emphasis added).

Admitting to these facts and then arguing that Lockard, and not Schlottmann, left the residence with the firearm conceded Schlottmann's guilt on this charge. There is no requirement that Schlottmann *knew* Lockard had a weapon at any point during the burglary. According to the Washington Supreme Court, "the State is not required to prove that the accomplice had knowledge that the principal was armed... the law has long recognized that an accomplice, having agreed to participate in a criminal

act, runs the risk of having the primary actor exceed the scope of the preplanned illegality.” State v. Davis, 101 Wash. 2d 654, 655, 658, 682 P.2d 883, 884, 886 (1984) (emphasis added). Clearly, here, the criminal act was burglary. The concession that Schlottmann participated in the burglary and his admission that Lockard, Schlottmann’s cohort, stole the weapon, admitted Schlottmann’s guilt on this charge.

Therefore, her counsel’s statement during closing arguments - that Schlottmann did not know that a weapon was taken or that she never touched a weapon - was unhelpful. The State never had to prove these elements once the defense admitted Schlottmann exercised “criminal judgment” and knowingly participated in the crime of burglary. Defense counsel admitted her guilt on this charge and rendered ineffective assistance of counsel.

3. PROSECUTORIAL MISCONDUCT VIOLATED SCHLOTTMANN’S RIGHT TO A FAIR TRIAL

For ease of reference, Schlottmann notes that she claimed the prosecutor committed misconduct in this case by stating: (1) Schlottmann committed the burglaries in order to buy drugs; (2) Schlottmann had “no conscience” and wanted to victimize people; and (3) Schlottmann had a duty to take responsibility for the crimes.

a. The Comment That Schlottmann Committed The Burglaries In Order To Buy Drugs.

As to this point, the State concedes that there was no evidence of either Schlottmann or Lockard stealing property in an effort to obtain drugs. Answer p. 25. Incredibly, the State maintains that drugs are a problem of epic proportions, and it is no surprise to anyone that stealing small, valuable items is a common way to raise money. Answer p. 25. Because of this, and because Schlottmann was not actually charged with a drug crime, the State contends the prosecutor's comments were neither improper nor prejudicial.

There can be no doubt that the prosecutor's comments were improper, regardless of the purported drug problem in the United States. Indeed, it is well-settled that it is improper for the prosecutor to refer to any evidence outside the record. State v. Fisher, 165 Wash. 2d 727, 747, 202 P.3d 937, 947 (2009). The sole purpose of making this statement could have only been to inflame the passion and prejudice of the jury. Here, the State has admitted there is absolutely no evidence that either Schlottmann or Lockard were involved with drugs or that either of the women committed the robberies to get money to buy drugs. Thus, the statement was indubitably improper.

Next, that Schlottmann was not charged with a drug offense is precisely her point. It is more prejudicial for the prosecutor to refer to alleged drug activity when she was not even charged with a drug offense, particularly since this also insinuates Schlottmann is guilty of even more crimes.

Importantly, because Schlottmann objected to each of the prosecutor's comments, once she demonstrates the prosecutor's comment was improper, she need only demonstrate that the comment was reasonably likely to affect the verdict. See State v. Walker, 164 Wash. App. 724, 730, 265 P.3d 191, 195 (Wash. Ct. App. 2011), as amended (Nov. 18, 2011), (review granted, cause remanded, 164 Wash. 724, 295 P.3d 728 (2012) (emphasis added).

The comment about Schlottmann's purported drug use was reasonably likely to affect the verdict. The defense was never put on notice that it needed to voir dire the jury as to its feelings toward drug offenses and/or drug users. Clearly, any member of the jury may very well have been particularly sensitive to drug issues. However, because there was no reason for the defense to *voir dire* any of the jurors on this subject, and since there was no evidence of the drugs in the record, there is a reasonable likelihood that the prosecutor's comments fell on particularly sensitive ears. For instance, one member of the jury could very well have

been victimized by a drug-related crime. Another could have lost substantial home value due to neighborhood drug use and associated activity. A juror may simply have very strong biases against those that use drugs. This improper comment was prejudicial and cast with intent to inflame the passion and prejudice of the jury. Washington courts have condemned such comments in the past and should do so again here.

b. The Comment That Schlottmann Had “No Conscience”
And Wanted To Victimize People

The prosecutor also improperly opined that Schlottmann committed the burglaries because she wanted to victimize people. 3RP 432. Yet, there was absolutely no evidence of Schlottmann wanting to victimize people. In a similar vein, the prosecutor remarked that Schlottmann was a burglar and a thief with no conscience. Even if the evidence suggested Schlottmann was a burglar and a thief, there was no evidence to suggest Schlottmann had no conscience. In fact, contrary to the repeated suggestions of the prosecutor, there was no evidence as to any motive for participating in the alleged burglaries.

The State responds to this argument by urging that the defense never objected to this comment and, therefore, waived this argument. Answer p. 28. A close examination of the record, however, reveals otherwise. In fact, in the motion for mistrial, the defense attorney stated,

Moments later the prosecutor put on the stand - - or put on his projector and then also stated Alexis Schlottmann and Darlene Lockard are burglars and thieves with no conscience. Though standing alone I probably wouldn't have objected to that, but I made an objection to that because taken together with the earlier comment about drugs and money which were inflammatory, I believe that further inflames the jury's passions [...]

3RP 439. Then, at the time the prosecutor put the problematic notation on the projector, and immediately before he made the statement that the two were burglars and thieves, the defense attorney stated, "Your Honor, for the record, I'm making an objection to the state's visual presentation at this point on circumstantial evidence, particularly the first notation." 3RP 400-401. When the objection was not ruled upon, the prosecutor immediately stated, "Again, Ms. Lockard and Schlottmann are two burglars and thieves with no conscience." 3RP 401. Although the side bar conferences were held off the record, the defense attorney's objection, followed by his statement during the motion for mistrial - that he did object to this notation and comment - reveal that an objection was made. Quite simply, the State's waiver argument is betrayed by the record.

c. The Comment That Schlottmann Had A Duty To Take Responsibility For The Crimes.

Here, the prosecutor improperly commented upon Schlottmann's privilege against self-incrimination and right to present a defense, and then made this a theme of his argument. The prosecutor suggested that

Schlottmann had a duty to accept responsibility for the crimes and that her failure to do so somehow imputed an obligation on the jury to convict. 3RP 400 (emphasis added). Specifically, the prosecutor told the jury that it had to find her guilty, that its job was to find her guilty, and that the court instructed them to find her guilty. He then immediately linked the duty to find Schlottmann guilty to her failure to take responsibility for the crimes. 3RP 400.

The State first responds that Schlottmann took the prosecutor's comments out of context. She did not. The prosecutor made it very clear he believed Schlottmann had some affirmative duty to take responsibility for these crimes and that her failure to do so should be held against her. The prosecutor stated, "She never pled guilty to those charges. You still have to find her guilty of those charges, don't you? That's one of your jobs. It's what the court has instructed you to do. She didn't take responsibility for it." 3RP 400 (emphasis added). The prosecutor next stated, "[a]gain, Ms. Schlottmann surrounds herself with these things, but she wants to deny all of them. As I said, she's never taken responsibility for any of it." 3RP 433. He continued, "[s]he's never taken responsibility for any of these crimes, but for [her defense attorney] doing that for her now. But again, she wants to limit what her responsibility is, for obvious reasons." 3RP 433. Taken in context, the prosecutor's remarks were quite

clearly a comment upon Schlottmann's failure to take responsibility for all of the crimes charged, and this was the theme of the prosecutor's closing argument.

The comment upon the exercise of her right to a trial, rather than a decision to enter a plea, was an improper comment on her constitutional right. As argued in the Initial Brief, it is improper to comment on a defendant's failure to plead guilty and to exercise her right to a trial. See, e.g., United States v. Piperi, 101 F.3d 697 (5th Cir. 1996) (prosecutor's comment on defendant's failure to plead guilty was "clearly improper"); United States v. Smith, 934 F.2d 270, 275 (11th Cir. 1991) (prosecutor's remark that the defendant "has not taken responsibility for his actions" were improper). These comments alone are sufficient to warrant reversal.

The State next responds in the same manner as the prosecutor during trial and posits that these comments were made in rebuttal to the defense attorney's opening statement, wherein he conceded Schlottmann's guilt to many of the charges. 4RP 97-101 (emphasis added). But again, the prosecutor's "rebuttal" went well beyond what was necessary to respond to the defense and was both improper and prejudicial.¹

¹ If the State is correct on this point, it only augments Schlottmann's Ineffective Assistance of Counsel argument.

Specifically, the prosecutor asked the jury to draw an adverse inference from Schlottmann's exercise of her constitutional rights. Schlottmann had a constitutional right to plead not guilty and to present her theory of the case to the jury. See Walker, 164 Wn. App. at 734, 265 P.3d at 197. The prosecutor told the jury members it was their job to find Schlottmann guilty because she failed to take responsibility for the crimes. This certainly exceeded the scope of the defense attorney's simple statement that the State could prove many of the charges beyond a reasonable doubt. 4RP 97-101 (emphasis added).

Finally, the State argues that, in any event, there is "no reasonable likelihood that, had the prosecutor not made these remarks, the outcome of the trial would have been different." Answer p. 32. This statement overlooks three factors: (1) the persistence of these comments throughout the prosecutor's closing arguments; (2) the fact that no curative instruction was given; and (3) that a prosecutor's improper comments on a constitutional right is subject to the strict standard of constitutional harmless error - "Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." State v. Johnson, 80 Wash. App. 337, 341, 908 P.2d 900, 903 (Wash. Ct. App. 1996). In light of these factors, the Court should find the prosecutor's comments were both improper and prejudicial.

4. CUMULATIVE ERROR DEPRIVED SCHLOTTMANN OF A FAIR TRIAL.

Finally, the State asserts there is no cumulative error in this case because, at worst, there was one improper comment made by the prosecutor which was harmless error. Schlottmann argues otherwise. Her trial was fraught with error which called into question the actions of the jury, the defense attorney and the prosecutor.

Again, at Schlottmann's trial, (1) a juror withheld material information, relating to his being a potential victim of the series of burglaries in this case during *voir dire*; (2) the defense attorney conceded the defendant's guilt to the highest level charge, at the outset of trial, without Schlottmann's consent, and before the presentation of any evidence; and (3) the prosecutor argued Schlottman had no conscience, alleged she committed the burglaries in order to buy drugs, and argued she should be penalized for not taking responsibility for these crimes. This Court should hold Washington trials to a higher standard than this. At the very least, the cumulative effect of these errors warrants a new trial.

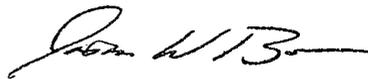
B. CONCLUSION

For the foregoing reasons, this Court should reverse Schlottmann's conviction and sentence and remand this case for a new trial.

DATED this 8th day of November, 2013.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by United States Mail, in properly stamped and addressed envelopes, and by electronic mail, a copy of Appellant's reply brief, to which this declaration is attached, to Carol La Verne, Esquire, Deputy Prosecuting Attorney, Thurston County Prosecutor's Office, 2000 Lakeridge Drive S.W., Bldg 2, Olympia, WA 98502-6045, lavernc@co.thurston.wa.us and, by United States Mail to the Defendant/Appellant, Alexis Schlottmann at Washington Corrections Center for Women, 9601 Bujacich Road North West, Gig Harbor, WA 98332-8300.

I SWEAR AND AFFIRM, UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 8th day of November, 2013.



Paetra T. Brownlee, Esquire
Attorney for Defendant/Appellant

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