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Division II
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

SARAH MARIE BROWNING,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-01355-4

BRIEF OF RESPONDENT

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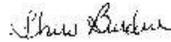
SERVICE	<p>John A. Hays 1402 Broadway Longview, Wa 98632 Email: jahays@3equitycourt.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED April 2, 2018, Port Orchard, WA </p> <p>Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the defendant is properly assigned the burden of proof of the defense to bail jumping of unavoidable circumstances, which does not negate any element of the offense, because our Courts have repeatedly declined to wade into the morass flowing from the theoretical concepts of mens rea and actus reus and instead adhere to the familiar and practical principle that the burden of proof for an affirmative defense may not be assigned to the defense if it negates an element?

2. Whether the trial court acted within its discretion in granting counsel's motion to withdraw where counsel averred that his communication with Browning had broken down to the point that he was unable to provide competent representation, and moreover, whether the defense in such circumstances may not claim a violation of CrR 3.3 based on the resulting continuance after its motion is granted?

3. Whether the evidence was sufficient to show that the burgled house was ordinarily used as a lodging where the owner testified that she lived in the house for 12 years but was spending a lot of time at her ex's home, she still received her mail there, went there everyday to listen to phone messages, maintained houseplants, kept up the yard, the power and water were connected and functional, her ID reflected the address of the house, and there were possessions, furniture, and even beverages in the

house?

4. Whether Browning fails to demonstrate ineffective assistance where counsel did not raise a frivolous objection to the admission as impeachment under ER 609(a)(2) of her prior convictions within the last ten years for crimes of dishonesty?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Sarah Marie Browning was charged by information filed in Kitsap County Superior Court with residential burglary and bail jumping. CP 68-69. A jury found her guilty and she was sentenced accordingly. CP 240.

B. FACTS

Shirley Cuccia went by Shirley Lewis for a time. RP (5/17) 149. She lived at a house at 321 Charlotte Avenue for 12 years. RP (5/17) 150. There was an interruption while she was staying at another house on Almira Drive, but she was there every day to collect her mail and listen to her messages. RP (5/17) 150. Her ID listed 321 Charlotte as her address. RP (5/17) 174.

Cuccia had bought the house and was living in it, but then she and her husband “kind of” got back together, so she was back and forth between the two houses. RP (5/17) 151. She had house plants and boxes of stuff she had gotten for her seven children in the house. RP (5/17) 151. She was not living there at the time of the burglary because she was getting a leak fixed.

RP (5/17) 152. She used a weed eater and tried to keep it decent. RP (5/17) 152. The power was on. RP (5/17) 182. The water and plumbing worked. RP (5/17) 182.

The house was two stories, with a carport and basement on the lower level. RP (5/17) 157. On the upper level there were two bedrooms, a bathroom, a living room and a kitchen. RP (5/17) 158. The bedrooms had double beds. RP (5/17) 158. There was a couch. RP (5/17) 165. She was a little bit of a hoarder or pack rat. RP (5/17) 158.

On the day of the burglary she had gone over to the house to dig up the dirt in the basement where the water main came in so she could get the leak fixed. RP (5/17) 154. She did that until around noon, and then went back to the other house to get some equipment to install some storage shelves. RP (5/17) 154-55. She got back around 1:00. RP (5/17) 155. After installing the shelves, she went back to her ex-husband's house. RP (5/17) 155. The mail had not come yet so after she went back around 11:00 p.m. to check the mail. RP (5/17) 156. When she got back to the house the gate was open, which was not how she left it. RP (5/17) 160. Then she noticed that the screen had been removed from one of the bedroom windows. RP (5/17) 160.

She became alarmed and called 911. RP (5/17) 162. But since all the lights were off, she did not think anyone was in the house and went in to put

some items in the basement. RP (5/17) 163. Then she heard a noise upstairs. RP (5/17) 163.

Cuccia ran up the stairs and saw Browning coming out of the bedroom door. RP (5/17) 163. Cuccia did not know Browning. RP (5/17) 163. She first saw her coming out of her bedroom in the house. RP (5/17) 163. Cuccia confronted her and Browning started throwing stuff at her, and taking jewelry out of her backpack. RP (5/17) 164. Cuccia hit Browning with her flashlight. RP (5/17) 166. Browning scuffled past her and managed to get out the door. RP (5/17) 168. At some point Browning had taken a Mountain Dew out of the refrigerator and drank half of it. RP (5/17) 169.

Deputy Joseph Hedstrom was dispatched to the reported burglary. RP (5/17) 87. While en route, he was notified that the suspect had fled the residence wearing only one shoe. RP (5/17) 87. As he arrived, he saw someone matching the suspect's description, subsequently identified as Browning, running down the road. RP (5/17) 88, 91. He activated his lights and she stopped and he arrested her. RP (5/17) 90-91.

Browning asserted she was being set up by "Vicki" Lewis. RP (5/17) 91. She said she was helping Lewis with moving boxes. RP (5/17) 92. Browning said she was running because Lewis was going to call the cops. RP (5/17) 92. She said Lewis took her shoe and kept it. RP (5/17) 92. She also asserted the Lewis had hit her in the head with a flashlight or a hammer.

RP (5/17) 92.

Deputy Donald Moszkowicz arrived and took Browning into custody. RP (5/17) 94. Moszkowicz searched Browning and recovered a small jewelry box and various pieces of jewelry in it from her pockets. RP (5/17) 136. Browning kept claiming that she had not broken into the house, and that she knew “Vicki” Lewis. RP (5/17) 137.

Hedstrom then proceeded to Lewis’s residence to speak with her. RP (5/17) 94. It was a two-story residence with stairs going up to a deck. RP (5/17) 95. When he first got there he walked around the exterior of the residence. RP (5/17) 95. Near the kitchen was a picnic table. RP (5/17) 95. The screen had been removed from the kitchen window. RP (5/17) 96. There were pry marks on the back door. RP (5/17) 97-98.

Inside there were boxes everywhere. RP (5/17) 100. There was a pink jewelry box spilled on the floor. RP (5/17) 102, 107.

Browning’s missing shoe was just inside the door. RP (5/17) 101. Browning’s backpack was also near the door. RP (5/17) 104. A MasterCard in Browning’s name and other items were on the floor near the backpack. RP (5/17) 104. There was also a brand new screwdriver with some paint that matched the door on it. RP (5/17) 105. There was a tire iron in the backpack. RP (5/17) 106.

After looking at the house, Hedstrom went back to talk to Browning. RP (5/17) 106. She asked him if her gold was still in the house. RP (5/17) 107. She said it was in a pink jewelry case. RP (5/17) 107.

He went back and asked Lewis about the jewelry case, and Lewis became agitated. RP (5/17) 107. He asked her if there would be anything in it with her initials on it and she said her class ring. RP (5/17) 179. In the case was a Class of 1974 high school ring. RP (5/17) 109. The initials on it were SAC.¹ RP (5/17) 112.

Hedstrom testified that if he were asked, he would think that a person was living there. RP (5/17) 127. He had “seen worse.” *Id.* He did not recall if they all worked, but there were functional lights in the house. RP (5/17) 128.

The State also presented evidence that Browning had been required to appear in court for a hearing regarding the burglary charge in the present case on November 30, 2016, and that she had failed to do so. RP (5/17) 194-201.

¹ The victim’s full name was Shirley Ann Cuccia. RP (5/17) 149.

III. ARGUMENT

- A. **THE DEFENDANT IS PROPERLY ASSIGNED THE BURDEN OF PROOF OF THE DEFENSE TO BAIL JUMPING OF UNAVOIDABLE CIRCUMSTANCES, WHICH DOES NOT NEGATE ANY ELEMENT OF THE OFFENSE, BECAUSE OUR COURTS HAVE REPEATEDLY DECLINED TO WADE INTO THE MORASS FLOWING FROM THE THEORETICAL CONCEPTS OF MENS REA AND ACTUS REUS AND INSTEAD ADHERE TO THE FAMILIAR AND PRACTICAL PRINCIPLE THAT THE BURDEN OF PROOF FOR AN AFFIRMATIVE DEFENSE MAY NOT BE ASSIGNED TO THE DEFENSE IF IT NEGATES AN ELEMENT.**

Browning argues that the unavoidable circumstances affirmative defense to bail jumping improperly shifts the State's burden of proof to the defense. However, Browning cites no case that has ever held that an affirmative defense like that provided in RCW 9A.76.170(2) violates due process based on an actus reus theory.

The Supreme Court's recent decision in *State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012), *cert. denied*, 568 U.S. 1148 (2013), is instructive. There, the Court considered whether the State must prove volition as an element of rape of a child in the third degree. *Deer*, 175 Wn.2d at 727-28. Deer argued that once she produced evidence of a lack of a voluntary action, the State had the burden of proving volition beyond a reasonable doubt. *Deer*, 175 Wn.2d at 731-32. Deer claimed she was sleeping during several

acts of intercourse and therefore could not be guilty of rape. The court held that Deer's claim was an affirmative defense that she was required to prove by a preponderance of the evidence:

We must reject Deer's contention that the State is required to prove as an element of child rape that she was awake during the alleged acts. While she is entitled to argue a lack of conscious action, her claim is properly treated as an affirmative defense, much like claims of involuntary intoxication, insanity, or unwitting possession

Deer, 175 Wn.2d at 733, 287 P.3d 539 (emphasis added).

Browning's contention is similar to Deer's. She essentially claims that the State was required to prove that she was capable of appearing at the required time. Brief of Appellant, at 16-18. She relies heavily on the notion that every crime must have an actus reus the State must prove.

In *Deer*, however, the Court recognized there is a divergence between the importance of actus reus in "criminal law philosophy" and its relevance in practice, and explained why:

The law has "deviated" for good reason; theory and practice sometimes diverge. Breaking criminal responsibility into its component parts of actus reus and mens rea is fine in theory, but requiring the prosecution to establish volition—here consciousness—as an "element" in the strict sense is unreasonable.

Deer, 175 Wn.2d at 732-33. Moreover, in rejecting this contention, *Deer* cited to *State v. Utter*, 4 Wn. App. 137, 479 P.2d 946 (1971), on which Browning relies, for the principle that "unconsciousness does not, in all

cases provide a defense to a crime,” such as when it “is voluntarily induced through the use and consumption of alcohol or drugs.”⁶

The defense to bail jumping is very similar to the intoxication defense noted in *Deer* and *Utter*, in that the excuse cannot have been caused by the defendant’s own acts. RCW 9A.76.170(2) provides:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, *and that the person did not contribute to the creation of such circumstances* in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(Emphasis supplied).

As the Court in *Deer* observed, the defendant generally bears the burden of proving an affirmative defense by a preponderance of the evidence. *Deer*, 175 Wn.2d at 734. The sole exception is when a defense “negates” an element of the charged offense, in which case due process requires the State to bear the burden of disproving the defense. *Deer*, 175 Wn.2d at 734 (*citing State v. Lively*, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996)). In *Deer*, the Court compared the defendant’s proposed defense to unwitting possession, where the burden properly falls on the defendant because unwitting possession does not negate the fact of possession. Rather, “[t]his affirmative defense ameliorates the harshness of a strict liability crime.”⁶ *Deer*, 175 Wn.2d at 735 (*quoting State v. Bradshaw*, 152 Wn.2d

528, 538, 98 P.3d 1190 (2004)). The Court concluded that regardless of whether it was described as being part of the actus reus, the burden to prove a defense that does not negate an element should remain on the defendant:

It makes no sense to depart from this allocation of the burden of proof when the defendant claims to have been asleep during a strict liability crime. ... It does not take an overactive imagination to foresee the potential for confusion or even mischief. Beyond unwitting possession, it must be recognized that putting the burden on the State to disprove an assertion of unconsciousness may expand defenses in other areas.

Deer, 175 Wn.2d at 735-36.

Bail jumping is not technically a strict liability offense; it requires the State to prove that the defendant knew that she was required to appear. *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). But the affirmative defense does not negate that element. *Id.* To the contrary, the failure to appear element is essentially a strict liability element. The State only has to prove the defendant's absence, not the reason. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

Further, although “when a defense necessarily negates an element of an offense, it is *not* a true affirmative defense, and the legislature may not allocate to the defendant the burden of proving the defense” *State v. WR.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014) (emphasis the Court's). However, a plain reading of the statute here shows the defense does negate any element. Bail jumping requires proof that the defendant (1) was

admitted to bail or personal recognizance, (2) had knowledge of a requirement of a subsequent personal appearance, and (3) failed to appear as required. RCW 9A.76.170(1). On the other end, RCW 9A.76.170(2) requires proof (1) of an uncontrollable circumstance that prevented the appearance and (2) the defendant did not recklessly create or contribute to the uncontrollable circumstance.

Even if uncontrollable circumstances had prevented Browning from appearing, she nevertheless still failed to appear, she still had knowledge of the requirement of a subsequent personal appearance, and she was still admitted to bail. In other words, none of the elements of bail jumping would be negated by proof of the affirmative defense. There is simply nothing in RCW 9A.76.170(2) that required Browning to disprove any element of RCW 9A.76.170(1). All that RCW 9A.76.170(2) does is excuse conduct that would otherwise be punishable, which has, time and again, been held to not violate due process principles. *W.R.*, 181 Wn.2d at 762.

Indeed, it has been observed that this “statutory defense is a specific iteration of the principles underlying the necessity defense.” *State v. White*, 137 Wn. App. 227, 231, 152 P.3d 364 (2007). It is well-established that the burden of proof for the defense of necessity lies with the defense. *State v. Diana*, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979) (citing *Patterson v. New York*, 432 U.S. 197, 203 n.9, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)).

Moreover, the *Deer* Court went on to explain that “the reason for putting the burden of proof on the defendant in such cases is ‘because generally, affirmative defenses are uniquely within the defendant’s knowledge and ability to establish.’”⁶ *Deer*, 175 Wn.2d at 737 (quoting *State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994)). That rationale was entirely applicable here. Although she professed in closing argument that she was “not asserting the statutory defense,” RP (5/18) 357, she testified that she was not able to attend because she was in the hospital. RP (5/17) 217. She nevertheless did not present any documentation for her alleged hospital stay, asserting that her prior attorney had lost it. RP (3/2) 265, 268. She also asserted a friend drove her to the hospital, but there is no record explanation why this friend did not testify. RP (3/2) 268. This is precisely the type of evidence in the unique control of the defendant that justifies placing the burden on the defense.

Finally, because the burden of proof was properly placed on Browning, her contentions regarding the jury instruction are also without merit. Browning fails to show a violation of due process. This claim should be rejected.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING COUNSEL'S MOTION TO WITHDRAW WHERE COUNSEL AVERRED THAT HIS COMMUNICATION WITH BROWNING HAD BROKEN DOWN TO THE POINT THAT HE WAS UNABLE TO PROVIDE COMPETENT REPRESENTATION; MOREOVER, THE DEFENSE IN SUCH CIRCUMSTANCES MAY NOT CLAIM A VIOLATION OF CRR 3.3.

Browning next claims that the trial court's granting her counsel's motion to withdraw resulted in a violation of CrR 3.3 requiring dismissal. This claim is without merit because the trial court did not abuse its discretion in granting counsel's motion to withdraw where counsel averred that his communication with Browning had broken down to the point that he was unable to provide competent representation. Moreover, the defense in such circumstances may not claim a violation of CrR 3.3.

On November 30, 2016, Browning failed to appear for a previously scheduled omnibus hearing and a bench warrant was issued. CP 40. The return was filed on December 13, 2016. CP 48.

In the interim the State learned that Browning had contacted the burglary victim, and accordingly filed an amended information adding charges of bail jumping and attempted witness tampering. CP 41-47. Browning was arraigned on the new charges Supp. CP (Clerk's Minutes, Dec. 13, 2016). A new omnibus hearing was set for January 12, 2017, trial

was set for February 6, and it was noted that the time-for-trial expiration date was February 13.² Supp. CP (Order Setting, Dec. 13, 2016).

At the omnibus hearing, counsel moved to reset the trial and omnibus date. RP (1/12) 2. He explained that as a result of the amended information, he needed more time to prepare a *Knapstad*³ motion. RP (1/12) 2. The request was for a two-week continuance. RP (1/12) 3. Counsel indicated that he believed it was in Browning's best interest to continue the matter to prepare the potentially dispositive *Knapstad* motion. RP (1/12) 3. The trial court entered an order continuing, finding "that the administration of justice will be furthered and the presentation of the defense case will not be prejudiced by continuing the trial date to Feb. 20, 2017, pursuant to CrR 3.3(f)(2) to enable ... Adequate trial preparation for defense counsel [and to] Prepare Motion to Dismiss. CP 54.

CrR 3.3(f)(2) provides that a motion for continuance "by or on behalf of any party waives that party's objection to the requested delay." As such, counsel has authority under the rule "to make binding decisions to seek continuances ... to enable defense investigation and preparation for trial" even over the defendant's objection. *State v. Ollivier*, 178 Wn.2d 813,

² See CrR 3.3(c)(2)(ii) (providing for resetting of the commencement date on the defendant's failure to appear).

³ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986); now codified at CrR 8.3(c).

824, 825, 312 P.3d 1 (2013). As such the January 12 continuance was proper.⁴

CrR 3.3(e) provides that a continuance is an excluded period. The continuance to February 20⁵ moved the expiration date to March 22. CrR 3.3(b)(5) (time for trial expires 30 days after the end of an excluded period).

On February 13, counsel again moved for a continuance because the officer had surgery and had not been available to interview. CP 55. The trial was reset to March 6, 2017. *Id.* The trial court again found the continuance in the interest of justice to allow counsel to prepare for trial and for the availability of the witness for trial. CP 57. The continuance to March 6 moved the expiration date to April 5.

On March 1, counsel noted a motion to withdraw. CP 61. The next day, at the hearing on the motion, counsel asserted that there had been a “mutual” problem between him and Browning, and “that communication ha[d] been irretrievably broken.” RP (3/2) 6. Counsel further elaborated:

Your Honor, there has been issues with communication and working through those issues for quite some time. There have been incidents which have now -- prevent me from adequately preparing for trial because of new things that have been divulged to me by Ms. Browning that I would need to speak to you in confidence about.

⁴ It is not entirely clear whether Browning is arguing that this continuance was improper. *See* Brief of Appellant, at 23.

⁵ February 20 was President’s Day, so trial actually should have been reset to February 21, but the one-day difference does not affect the outcome.

RP (3/2) 7. As a result, counsel did not feel adequately prepared to go to trial. *Id.* Counsel denied that the issue was related to Browning's repeated failures to appear. *Id.*

The court indicated that absent prejudice to the State it was inclined to release counsel because the situation could compromise effective representation for Browning:

THE COURT: Well, I think my concern -- and this is a question for Mr. Peet -- is whether Mr. Peet feels continuing in this vein, as the attorney for Ms. Browning, would compromise his ethical obligations and position.

If he feels that whatever she's told him, whatever is going on, would leave him unprepared, and, therefore, he would ethically be compromising his duties as an attorney in trying to go forward with a trial, then I am inclined to release him.

* * *

If Mr. Peet is telling me he cannot meet his ethical obligations because of whatever has taken place between him and the client and is not prepared to go forward because of whatever has taken place, I will accept that.

MR. PEET: I do not believe that I can provide confident [sic] representation based upon that, Your Honor.

RP (3/2) 10-12.

The trial court's disqualification of counsel reset the commencement date to March 2. CrR 3.3(c)(2)(vii) ("The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification."). Time for trial expiration was thus extended

to May 1.⁶

Browning argues that the trial court's inquiry regarding the breakdown of communications between her and her attorney was inadequate. Citing *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139, 150 (2004), and *State v. Schaller*, 143 Wn. App. 258, 268, 177 P.3d 1139, 1144 (2007), he argues that the trial court abused its discretion because it did not make a determination "whether the case involve[d] [the] defendant's mere general dissatisfaction with his or her counsel," or whether the "breakdown in communication [was] not because of the defendant's own refusal to cooperate." Brief of Appellant, at 26. But these cases involved the *denial* of a motion for new counsel, not the *granting* of such a motion.

Browning correctly notes that the standard of review is for abuse of discretion. *Varga*, 151 Wn.2d at 200. However it does not follow that the factors relevant to the denial of the motion are necessarily relevant to whether the court acted within its discretion in granting the motion. For example, while the defendant's fault in causing the breakdown in

⁶ The trial court so noted. RP (3/2) 16, CP 71. New counsel was appointed at the same hearing and trial was reset for April 17. RP (3/2) 16; CP 71. New counsel filed his notice of appearance the same date. Supp. CP (Notice of Appearance, Mar. 3, 2017). On April 17, new counsel moved for continuance. The court granted the continuance due to the availability of counsel and to allow counsel time to prepare. CP 73. Trial was continued to May 15, CP 73, on which date trial commenced. RP (5/15) 3. Browning does not appear to contest the propriety of this final continuance. However, it had previously been noted that new counsel was also involved in the Kalac trial, a complex murder case. RP (3/2) 15-16; see also *State v. David Kalac*, No. 50362-0-II, pending in this Court.

communications might justify the denial of the motion, as in *Schaller*, it is not apparent that Browning's complicity, or not, in the breakdown is relevant where she is arguing that the motion should not have been granted.

The issue was whether the breakdown in communication is such that counsel could no longer effectively represent the defendant:

If the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel.

In re Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). Here, counsel represented, to the satisfaction of the court, that the communication difficulties he was having with Browning were long-standing and he had done his best to overcome them. Nevertheless, he felt that they had reached the point that he was no longer able to effectively represent here. Notably, regardless of any subsequent concerns Browning raised about the timing of her trial, Browning never argued that counsel's representations regarding their relationship were untrue. The ability to provide effective representation is the core concern of the Sixth Amendment, and the trial court did not abuse its discretion in granting counsel's motion to withdraw.

Even if the trial court's inquiry were inadequate, however, "in requesting withdrawal and acknowledging that this would require a continuance of his client's speedy trial date, [the defendant's] attorney made an implied waiver of the speedy trial rule." *State v. Vicuna*, 119 Wn. App.

26, 34, 79 P.3d 1, 5 (2003), *review denied*, 152 Wn.2d 1008 (2004). As such, an improvidently granted motion for withdrawal of counsel does not provide a basis for dismissal under CrR 3.3, as the Court explained:

Thomas also presented a situation where the trial court's erroneous grant of a motion to withdraw and the resulting continuance were invited by the defense. Under such circumstances, the *Thomas* court held that "a speedy trial waiver forced solely by defense counsel's conduct, and not in any way attributable to the State or the court, is not a violation of Criminal Rule 3.3, and does not justify a dismissal of charges." [*State v.*] *Thomas*, 95 Wn. App. 730, 976 P.2d 1264 (1999). This rule is applicable here. Requiring dismissal in such situations would inappropriately place the State in an adversarial position against withdrawal to protect its interest in preventing speedy trial violations. The State should not be forced to advocate against withdrawal when it has no factual basis for advancing such an argument, and those facts are uniquely in defense counsel's possession.

Vicuna, 119 Wn. App. at 34-35. Such was the case below, where the prosecutor observed that "from the State's perspective, I generally do not wish to interject in the attorney-client relationship. I think that's not the State's purview." RP (3/2) 10-11. Here, the State and the Court did their best to accommodate the right to counsel of a difficult defendant. Dismissal of the conviction would not be a just result. This claim should be rejected.

C. THE EVIDENCE WAS SUFFICIENT TO SHOW THAT THE BURGLER HOUSE WAS ORDINARILY USED AS A LODGING WHERE THE OWNER TESTIFIED THAT SHE LIVED IN THE HOUSE FOR 12 YEARS BUT WAS SPENDING A LOT OF TIME AT HER EX'S HOME, SHE STILL RECEIVED HER MAIL THERE, WENT THERE EVERYDAY TO LISTEN TO PHONE MESSAGES, MAINTAINED HOUSEPLANTS, KEPT UP THE YARD, THE POWER AND WATER WERE CONNECTED AND FUNCTIONAL, HER ID REFLECTED THE ADDRESS OF THE HOUSE, AND THERE WERE POSSESSIONS, FURNITURE, AND EVEN BEVERAGES IN THE HOUSE.

Browning argues that the State failed to prove that Cuccia's house was a dwelling. This claim is without merit because the evidence was more than sufficient to allow a jury to conclude that the house was ordinarily used as a lodging.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court

examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution’s evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving “conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

To prove residential burglary, the State had to prove that Browning entered or remained in a “dwelling.” RCW 9A.52.025(1). The trial court instructed the jury that the term “dwelling” meant “any building or structure that is used or ordinarily used by a person for lodging.”⁷ CP 129. The use of the phrase “used or ordinarily used” in the definition of dwelling, demonstrates that a building or structure need not be currently used for lodging in order to be considered a dwelling.

⁷ This instruction tracks the statutory definition of dwelling set forth at RCW 9A.04.110(7).

Whether a vacant residence is a “dwelling” for the purposes of the residential burglary statute is a question of fact for the jury. *State v. McDonald*, 123 Wn. App. 85, 91, 96 P.3d 468 (2004). The question of whether a building is a residence turns on all relevant factors. *McDonald*, 123 Wn. App. at 91. The *McDonald* court cited several cases from other jurisdictions to identify a number of factors to consider in deciding if a house is a dwelling, including whether “the occupant deemed the house to be her place of abode and whether she treated it as such,” whether it is furnished and rented out periodically, if it was inhabited, whether it was maintained as a dwelling, and how long it was vacant. *McDonald*, 123 Wn. App. at 91 n.18 (quoting *State v. Black*, 627 So.2d 741, 745 (La. App. 1993)).

Here, Cuccia testified that she lived in the house for 12 years but that at the time of the burglary, she was attempting a reconciliation with her husband and was spending a lot of time at his home. RP (5/17) 150. Nevertheless, she still received her mail there, went there everyday to listen to phone messages (which indicates that the house had both phone and electrical service), maintained houseplants, and kept up the yard. RP (5/17) 151-52. The power and water were connected and functional. RP (5/17) 182. Her ID reflected the address of the house. RP (5/17) 174. There were possessions, furniture, and even beverages in the house. RP (5/17) 158, 165,

169.

In support of her claim, Browning appears to turn the standard of review of review on its head, casting the evidence in the light most favorable to the defense. She contends:

Cuccia admitted in her testimony she had not lived in the house for many months, the electricity had been turned off, and there had been a substantial water leak months prior to the defendant's unlawful entry. The two deputies who testified confirmed this testimony in their description of the building as so full of boxes and detritus as to make it difficult to move from room to room.

Brief of Appellant, at 30. This contention at best reads the evidence liberally in Browning's favor. Browning provides no record cite for the claim that he electricity was off. In fact, Cuccia testified that the power was on and Hedstrom testified that the lights were on. RP (5/17) 128, 182. The water leak Cuccia described was at the main in the basement. RP (5/17) 154. And although the witnesses did describe a scene like something from a TV reality show, Cuccia herself admitted she was a "hoarder" or "pack rat," RP (5/17) 158, and Hedstrom opined that it did look like someone lived there and that he had "seen worse." RP (5/17) 127.

The only record cite to these claims in Browning's brief is the following passage from her factual history:

At around 11:00 pm on the evening of November 28, 2015, Shirley Cuccia went to the house she owns at 321 Charlotte Avenue West in Bremerton to do some work. RP 151-152. She had not lived at that location for many months and was

then in the process of cleaning out the many boxes of items that filled each room and lined the hallways. *Id.*

Brief of Appellant, at 3. Browning reads cited testimony extremely broadly.

Cuccia actually testified as follows:

Q. So tell us a little bit about the 321 Charlotte Avenue house.

A. I had bought it and I was living in it, and my husband and I kind of got back together, and so I was back and forth because the family was at the other one. And I was back and forth between the two houses.

Q. So describe your house there on Charlotte.

A. Well, I got my mail there every day. I had house plants. And any time I would come up and try to do something at my house, he would make me feel like I was doing something guilty.

Q. What did your house look like? Describe it.

A. Packed full of boxes because I had -- I had seven kids. And I bought stuff for all of them, and none of them want it. And I have my own stuff and my grandmother's stuff.

Q. You keep it all at that house?

A. Um-hmm.

THE COURT: Is that "yes"?

THE WITNESS: Pardon?

THE COURT: Is that "yes"? You said "um-hmm."

THE WITNESS: Yes.

THE COURT: Okay. We needs words.

THE WITNESS: Sorry.

Q. (By Mr. Purves) Are you a little nervous today?

A. A little bit.

Q. First time testifying?

- A. Yes.
- Q. Just let us know if you need any water or need to take a break or anything. Okay?
- A. Okay.
- Q. So in November of 2015, were you living at the 321 Charlotte address?
- A. No. Because I was working on trying to get the water leak that I had had seven years before, the rest of that taken care of.
- Q. Were you at a El Mira address at that time?
- A. Yes.
- Q. Tell me about the care of the 321 Charlotte house. What would you do to care for it?
- A. I used to weed eat it and keep it sort of decent, I tried to, and then I got sick. I was sick for a while, and so I wasn't able to. And I used to go there every, you know, like I said, every day to listen to my messages and water my house plants.
- Q. Would you still receive mail there?
- A. Yep. Every day.
- Q. And would you go get the mail?
- A. Every day.

RP (5/17) 151-52.

But again, the jury could convict if it found the house was “*ordinarily* used by a person for lodging.” Regardless of whether Cuccia was staying in the house the night of the burglary, she had lived there in the past, and resided there at the time of trial. RP (5/17) 150. The house was clearly a structure ordinarily used for habitation. This claim should be rejected.

D. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO FRIVOLOUSLY OBJECT TO THE ADMISSION AS IMPEACHMENT UNDER ER 609(A)(2) OF BROWNING'S PRIOR CONVICTIONS WITHIN THE LAST TEN YEARS FOR CRIMES OF DISHONESTY.

Browning next claims that counsel was ineffective for failing to object to impeachment of Browning with a prior burglary conviction. This claim is without merit because **.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992).

“Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687. Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Browning had 22 prior convictions for crimes of dishonesty, including thefts, possession of stolen property and a prior burglary. CP 78-79. The State only sought to introduce those from the last 10 years. RP (5/15) 12-13. Counsel did not object to these, but this was not deficient performance.⁸

ER 609(a) establishes two categories of prior convictions committed within the past 10 years that may be admitted to impeach the defendant’s credibility as a witness. *State v. Jones*, 101 Wn.2d 113, 117–18, 677 P.2d 131 (1984), *overruled on other grounds*, *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). ER 609(a)(2) provides:

⁸ It should first be noted that the State did not first introduce Browning’s convictions into the record. Rather, they were brought out on direct examination, no doubt to “draw the sting.” RP (5/17) 219-20. The mentions included the prior second-degree burglary. RP (5/17) 220.

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if ... the crime ... (2) involved dishonesty or false statement, regardless of the punishment.

In contrast, under ER 609(a)(1), to admit crimes punishable by a year or more of imprisonment, the court must determine whether the “probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered.” Thus, as the plain words of ER 609(a)(2) make clear, a defendant’s crimes of dishonesty committed within the past ten years shall be admitted if the defendant testifies. “A trial court *is neither permitted nor required to balance* [the probative versus prejudicial nature of a past crime] when a conviction that involves dishonesty or false statement is not more than 10 years old.” *State v. Russell*, 104 Wn. App. 422, 434, 16 P.3d 664 (2001) (emphasis added); *see also Jones*, 101 Wn.2d at 117-18; *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 525, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989) (reaching same conclusion with regard to federal rule).

Here, there was thus no basis to object to the convictions that the State sought to admit. Because those crimes occurred within the past ten years, the court properly looked to ER 609(a). And, because those convictions were for crimes of dishonesty, under ER 609(a)(2), the trial court was “neither permitted nor required “ to balance the prejudicial versus

probative nature of admission of these crimes. *Russell*, 104 Wn. App. at 434. Counsel was not deficient for not arguing a frivolous objection.

Browning, apparently recognizing this controlling precedent, Brief of Appellant, at 36-37, nevertheless argues that the per se rule set forth in ER 609(a)(2) violates her right to due process. Notably, she cites no case that has ever so held. The State's research has disclosed none.

To the contrary, the Washington Supreme Court has implied that such a claim would not be well taken:

However, as hard as this choice may be for a defendant, requiring such choices is not inconsistent with the criminal process, as we discussed elsewhere in this opinion. Further, we do not lose sight of the principle that a defendant has no right to testify free of impeachment, and that the purpose of ER 609(a)(2) is to permit admission of evidence affecting the credibility of the witness. Society has an interest here in evaluating the credibility of defendants with criminal convictions affecting their credibility and in preventing a defendant with a criminal past from presenting himself or herself as an "innocent among thieves." *See State v. Koloske*, 100 Wash.2d 889, 897, 676 P.2d 456 (1984).

State v. Brown, 113 Wn.2d 520, 553–54, 782 P.2d 1013, 787 P.2d 906 (1990).

Further, the few state and federal courts that appear to have directly addressed the issue have uniformly held that a per se rule of admissibility does not violate due process. *E.g.*, *United States v. Belt*, 514 F.2d 837, 849 (D.C. Cir. 1975) (interpreting *Spencer v. Texas*, 385 U.S. 554, 87 S. Ct. 648,

17 L. Ed. 2d 606 (1967), and concluding that mandatory admission of defendant's prior convictions did not violate due process); *Hill v. United States*, 434 A.2d 422, 429 (D.C. 1981) (reaffirming that mandatory D.C. evidence rule "did not violate either the Fifth or Sixth Amendment rights to a fair trial by an impartial jury."); *State v. Minniweather*, 99 Or. App. 166, 781 P.2d 401, 402-03 (1989) (rejecting claims that per se admissibility under Or. R. Evid. 609 violated defendant's rights to an impartial jury and to testify in his own behalf). The *Minniweather* court explained its rationale:

Instead of having a judge "balance" in the context of a specific case, the people, as legislators, have resolved the policy issues involved in the use of evidence of previous convictions and have established general rules for the courts to follow. For example, convictions over 15 years old and convictions for misdemeanors not involving false statements or dishonesty are now inadmissible, OEC 609, and a defendant may request a limiting instruction. OEC 105. That decision by the people is no less constitutionally adequate than the balancing that trial judges performed before the 1986 amendment to OEC 609. See *State v. Ruzicka, supra*, 89 Wn.2d [217,] 226, 570 P.2d 1208 [(1977)]. The fact that defendant found himself on the horns of a strategic dilemma does not mean that he was denied the right to be heard in his own defense. Even under his approach, he would have been on the horns of the same dilemma if the trial court had admitted the evidence after balancing under OEC 403.

Minniweather, 781 P.2d at 403.

Regardless of the merits of Browning's contention, it remains that no court has ever held that per se admissibility under ER 609(a)(2) or any

similar rule violates the Washington or federal constitutions. Counsel cannot be considered ineffective for failing to forecast changes or advances in the law. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); *In re Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998). Current law holds that Browning's convictions were properly admissible. Counsel acted competently in conceding that point. Browning fails to show deficient performance. This claim should therefore be denied.

Even if counsel were deficient for not objecting to the burglary prior, Browning fails to show prejudice. Contrary to her claims, the evidence was overwhelming. Cuccia, the homeowner, interrupted the burglary in progress and called 911. RP (5/17) 162-63. Browning was pilfering Cuccia's jewelry box when she was interrupted. RP (5/17) 163. Cuccia's keys had been taken from a spittoon and were in Browning's backpack. RP (5/17) 105-06, 169-70.

Browning was caught fleeing the scene with one shoe on. RP (5/17) 87-89, 91. Her remaining shoe, backpack and credit card were found inside the house at the scene. RP (5/17) 101, 104. When she was apprehended, she had the Cuccia's jewelry and Cuccia's stepson's watch in her jacket pocket. RP (5/17) 136.

At trial she admitted breaking and entering and admitted to lying to the police about what she was doing in the house. RP (5/18) 217. She

claimed to have been at the house for two days, but Cuccia had spent the better part of the day at the house. RP (5/17) 154-55, 214.

Browning concedes that her 13 prior theft convictions were properly admitted. Brief of Appellant, at 38. In short, she had no credibility with or without evidence of the burglary, and her testimony was contrary to that of both the victim and the deputy.

The court instructed the jury that the convictions were only to be used to evaluate the witness's credibility:

You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 124. The jury is presumed to have followed this instruction. *In re Phelps*, ___ Wn.2d ___, 410 P.3d 1142, 1150 (2018).

Finally, the State did not even mention the priors until its rebuttal argument, and even then the mention was brief and in no way emphasized the burglary conviction. RP (5/18) 362-63. Moreover, the prosecutor specifically cautioned the jury that it could only use them to weigh her credibility:

I want to be very clear about her history. There's 14 more reasons why you ought not to believe her. And you can fully consider this for this purpose. So I just want to caution all of you. *If you're going back there and saying, Good Lord, she's*

been convicted of theft or burglary or whatever the case, 14 fricking times. She had to have done it this time. Those jury instructions tell you do not do that, and I'm telling you do not do that.

RP (5/18) 362. Even if counsel had been deficient, Browning would be unable to show prejudice. This claim should be rejected.

IV. CONCLUSION

For the foregoing reasons, Browning's conviction and sentence should be affirmed.

DATED April 2, 2018.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal line extending to the right.

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KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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