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State of Washington  
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NO. 50590-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

WESLEY W. REICHMAND,  
Appellant.

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

The Honorable Karena Kirkendoll, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iv
<b>A. ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>C. STATEMENT OF THE CASE.....</b>	<b>2</b>
<b>1. <u>Procedural facts</u> .....</b>	<b>2</b>
<i>a. Verdict, pro se motion, and sentencing .....</i>	<i>3</i>
<i>b. Sentencing .....</i>	<i>4</i>
<i>c. Pro se motion .....</i>	<i>5</i>
<b>2. <u>Trial testimony</u> .....</b>	<b>5</b>
i. Unit B-81 .....	8
ii. Unit B-77.....	8
iii. Unit B-83.....	9
iv. Testimony of Krystal Zinn .....	11
<b>D. ARGUMENT .....</b>	<b>13</b>
<b>1. THE CONVICTIONS FOR BURGLARY AND THEFT OF A FIREARM MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE ALL THE ESSENTIAL ELEMENTS OF THE OFFENSE.....</b>	<b>13</b>
<i>a. Mr. Reichmand’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of first degree burglary.....</i>	<i>14</i>
<i>b. The convictions for burglary in Counts 1, 3 and 4 must be dismissed .....</i>	<i>19</i>

c.	<i>The State failed to prove beyond a reasonable doubt the elements of theft of a firearm.....</i>	23
d.	<i>Reversal and dismissal is the appropriate remedy.....</i>	24
2.	<b>TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE PREJUDICING MR. REICHMAND..</b>	24
E.	<b>CONCLUSION.....</b>	27

**TABLE OF AUTHORITIES**

<b><u>WASHINGTON CASES</u></b>	<b><u>Page</u></b>
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2D 512 (1999).....	25
<i>State v. Bockman</i> , 37 Wn. App. 474, 682 P.2d 925 (1984), rev. denied, 102 Wn.2d 1002 (1984).....	23
<i>State v. Brown</i> , 162 Wn.2d 422, 173 P.3d 245 (2007).....	16
<i>State v. Carlin</i> , 40 Wn.App. 698, 700 P.2d323 (1985).....	26
<i>State v. Castro</i> , 32 Wn. App. 559, 648 P.2d 485, rev. denied, 98 Wn.2d 1007 (1982).....	23
<i>State v. Craven</i> , 67 Wn. App. 921, 841 P.2d 774 (1992).....	14
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	13
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	14
<i>State v. Garrison</i> , 71 Wn.2d 312, 427 P.2d 1012 (1967).....	25
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 62,768 P.2d 470 (1989).....	19
<i>State v. Gladstone</i> , 78 Wn.2d 306, 474 P.2d 274 (1970).....	23
<i>State v. Gotcher</i> , 52 Wash.App. 350, 759 P.2d 1216 (1988).....	16
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980).....	19
<i>State v. Hall</i> , 46 Wash.App. 689, 732 P.2d 524 (1987).....	16
<i>State v. Hernandez</i> , 172 Wn. App 537, 290 P.3d 1052 (2012).....	16, 17
<i>State v. Hoffman</i> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	22
<i>State v. J-R Distribs., Inc.</i> , 82 Wn.2d 584, 512 P.2d 1049 (1973).....	22
<i>State v. Jones</i> ,183 wn.2d 327, 352 P.3d 776 (2015).....	
<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302 (1978), rev. denied, 90 Wn.2d 1006.....	
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	25
<i>State v. Luna</i> , 71 Wn. App. 755, 862 P.2d 620 (1993).....	22
<i>In re Restraint of Martinez</i> , 171 Wash.2d 354, 256 P.3d 277 (2011).....	16, 17
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	25
<i>State v. Randle</i> , 47 Wash.App. 232, 734 P.2d 51 (1987).....	16
<i>State v. Rotunno</i> , 95 Wn.2d 931, 631 P.2d 951 (1981).....	23
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	14
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	24
<i>State v. Visitacion</i> , 55 Wn. App. 166, 776 P.2d 986 (1989)), review denied, 123 Wn.2d 1022 (1994).....	
<i>State v. Weber</i> ,137 Wn.App. 852, 858, 155 p .3d 947 (2007), rev. denied, 163 Wn.2d 1001 (2008).....	

<i>In re Wilson</i> , 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) .....	23
---	----

<u>UNITED STATES CASES</u>	<u>Page</u>
<i>Jackson v. Virginia</i> , 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	19
<i>Sanders v. Ratelle</i> , 21 F.3d 1446, 1456-57 (9th Cir. 1994) .....	
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	25
<i>In re Winship</i> , 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970) .....	13, 19

<u>REVISED CODE OF WASHINGTON</u>	<u>Page</u>
RCW 9A.04.110(5).....	15
RCW 9A.52.010 .....	20
RCW 9A.52.020(1).....	15
RCW 9A.52.030 .....	20
RCW 9.73.030.....	5, 7, 36
RCW 9.73.030(1) .....	33
RCW 9.73.030(2).....	33
RCW 9.73.030(2)(b) .....	33
RCW 9.73.050 .....	34, 37, 39

<u>CONSTITUTIONAL PROVISIONS</u>	<u>Page</u>
U.S. Const. Amend VI .....	1
U.S. Const. Amend XIV .....	14
Wash. Const. art. I, § 3.....	14
Wash. Const. art. I, § 21.....	
Wash. Const. art. I, § 22.....	1

<u>COURT RULE</u>	<u>Page</u>
CrR 3.5.....	5
CrR 6.15(f)(2).....	67
CrR 7.5.....	
CrR 7.5(a) .....	

CrR 7.5(a)(5).....  
CrR 7.5(a)(8).....

<b><u>EVIDENCE RULE</u></b>	<b><u>Page</u></b>
ER 401 .....	50
ER 403 .....	46, 49, 50, 51
ER 404(b) .....	9, 40, 41, 42

**A. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to convict appellant of first degree burglary as alleged in Count 1.

2. The evidence was insufficient to convict appellant of theft of a firearm as alleged in Count 2.

3. The evidence was insufficient to convict appellant of second degree burglary as alleged in Counts 3 and 4.

4. Trial counsel's failure to object to the admission of a witness's opinion of guilt denied the appellant of his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

5. The appellant was prejudiced by his attorney's deficient performance.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. In order to prove Mr. Reichmand guilty of first-degree burglary as charged, the prosecution had to show that he was "armed" with a deadly weapon either during the crime or in immediate flight therefrom. A person is not "armed" with a firearm simply because there is a firearm present at a crime and instead there must be evidence that the weapon was accessible. Was the evidence insufficient to convict the appellant of first-degree burglary where the only evidence was that the appellant or an accomplice was "armed" was

that the perpetrator took a locked gun safe from a storage locker but did not open the gun safe nor remove any weapon from the safe during or in immediate flight from the crime? Assignment of Error 1.

2. With no evidence to link Mr. Reichmand to the burglaries alleged in Counts 1, 3 and 4, and the theft of a firearm alleged in Count 2, was his right right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the burglaries charged in Counts 1, 3, and 4, and the theft of a firearm charged in Count 2? Assignments of Error 2 and 3.

3. Defense counsel provides ineffective assistance by failing to object to inadmissible opinion evidence absent a valid tactical reason. Here, Mr. Reichmand's attorney failed to object to testimony in which a witness stated her opinion that Mr. Reichmand was the perpetrator of the offenses. Was Mr. Reichmand denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel? Assignments of Error 4 and 5.

## **C. STATEMENT OF THE CASE**

### **1. Procedural facts:**

Westly Reichmand was charged by information filed in Pierce County Superior Court filed August 24, 2016 with first degree burglary (Count 1), theft of a firearm (Count 2), two counts of second degree burglary (Counts 3 and 4), and first degree unlawful possession of a firearm (Count 5). Clerk's

Papers (CP) 1-3. The State alleged that on August 22, 2016, Mr. Reichmand or an accomplice burglarized three storage units at You Store It in Fife, Washington, and that that among the items taken was a firearm. CP 1-3.

Prior to trial, Mr. Reichmand gave notice of his intent to assert an alibi defense and to call Tonya Routt, who was an inmate at the Pierce County Jail, as a witness at trial. CP 27.

*a. Verdict, pro se motion, and sentencing:*

The matter came on for jury trial on June 1, 5, 6, 7, and 8, 2017, the Honorable Karena Kirkendoll presiding. 1Report of Proceedings (RP) at 1-70, 1 2RP at 73-240, and 3RP at 243-356. The jury was instructed as to accomplice liability regarding Counts 1 through 4. CP 123 (Instruction No. 9, defining accomplice); CP 125 (Instruction No. 11, "... that on or about the period between the 21<sup>st</sup> day of August, and the 22<sup>nd</sup> day of August, 2016, the Defendant or an accomplice entered or remained unlawfully in a building;"); CP 127 (Instruction No. 13), CP 134 (Instruction No. 20); CP 139 (Instruction No. 25) and CP 140 (Instruction No. 26). A limiting instruction and stipulation that Mr. Reichmand was convicted of a prior serious offense was submitted to the jury. CP 121 (Instruction No. 7).

The State requested an instruction for second degree burglary in Count

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<sup>4</sup>The record of proceedings are designated as follows: March 19, 2016 (arraignment); February 23, 2017; March 28, 2017; May 23, 2017; 1RP - June 1, 2017; 2RP - June 5, 2017, (*voir dire*, jury trial); 3RP - June 6, 2017, (jury trial); 4RP - June 7, 2017 (jury trial); 5RP - June 8, 2017, (jury trial); 6RP -

1. 3RP at 420-21. CP 126 (Instruction 12).

The jury found Mr. Reichmand guilty of first degree burglary, theft of a firearm and two counts of second degree burglary as charged. 5RP at 522; CP 153, 155, 156, 157. The jury was deadlocked on Count 5 and the court declared a mistrial as to that count. 5RP at 519-20; CP 158.

*b. Sentencing*

The matter came on for sentencing on July 7, 2017. 6RP at 529. Mr. Reichmand had an offender score of "9+" and a standard range of 87 to 116 months for Count 1, 77 to 102 months for Count 2, and 51 to 68 months for Counts 3 and 4. 6RP at 530-31. The State recommended a sentence of 100 months for Count 1, 90 months for Count 2, and 68 months for Count 3 and 4. 6RP at 531.

Defense counsel requested a sentence of 87 months. 6RP at 532-33. In his allocution, Mr. Reichmand stated that he was hanging out with drug addicts and that he is a drug addict himself. 6RP at 537. The court imposed a sentence of 87 months for Count 1, 87 months for Count 2, and 68 months for Counts 3 and 4, to be served concurrently, with 18 months of community custody. 6RP at 538. The court imposed legal financial obligations including a \$500.00 crime victim penalty assessment, \$200.00 filing fee, and \$100.00 DNA collection fee. CP 176-189.

*c. Pro se motion*

Prior to sentencing, Mr. Reichmand filed a pro se motion in which he requested imposition of “conviction of the lowest degree,” and cited RCW 10.58.020. In his motion, Mr. Reichmand argued that there was reasonable doubt that he committed first degree burglary and this was shown by the prosecution’s request for an instruction for second degree burglary. CP 159-164, 165-169. Mr. Reichmand argued that under RCW 10.58.020, “when an offense has been proven against the defendant and there exists reasonable doubt as to which two or more degrees the defendant is guilty of the defendant shall be convicted only of the lowest degree.” CP 161. An identical motion was filed on June 28, 2017. CP 165-169.

The court entered an order denying the motion on July 12, 2017. CP 195-196.

Timely notice of appeal was filed on July 7, 2017. CP 191. This appeal follows.

**2. Trial testimony:**

Patricia Carter, manager of Fife You Store It, a rental storage space facility, testified that Westley Reichmand rented Unit B-79 on August 19, 2016. 2RP at 305. Mr. Reichmand was listed as the lessee of Unit B-79 and Krystal Zinn was authorized to have access to the unit. 2RP at 305. Exhibits 10 and 12.

A code is assigned to each unit, and a code which must be entered on a keypad by a renter when entering and exiting the facility. 2RP at 316.

The lockers are inspected by You Store It staff each day. Ms. Carter testified that while performing an inspection of units on August 22, 2016 she noticed that the hasp on Unit B-81 was cut and that the lock was still on the door, leaving the lock appearing to be intact but allowing the door of the unit to be opened. 2RP at 319-20. An activity log showed that the entry code assigned to Unit B-79 was used to enter and exit the facility multiple times on August 19, 20, 21, and 22nd, 2016. 2RP at 317-18. Exhibit 9A. She testified that she checked the log to see if the code assigned to B-81 had come to the facility in the past 24 hours and been locked out of the unit and cut the hasp. 2RP at 322. After determining that the lessee had not entered the facility, she determined that the code assigned to B-79 had been coded in during the 24-hour period, and she then reviewed surveillance video that focuses on the area of around Unit B-81. 2RP at 322. Ms. Carter testified that she contacted police and then looked at the surveillance footage and saw a white car in the area of B-81 and B-79. 2RP at 323.

Fife Police Officer Daniel Goff responded to the report of a possible burglary at the Fife You Store It storage facility on the afternoon of August 22, 2016. While driving to the call, Ms. Carter called police a second time to report that a white sedan driven by a white female associated with the alleged offense had returned to the storage facility. 2RP at 236. Ms. Carter testified that while waiting for police, she deactivated the entry code to B-79. 2RP at 324. The driver of the white car attempted to enter the facility by using the

keypad, and Ms. Carter, recognizing the car from the video surveillance, opened the gate from the office to let the car enter. 2RP at 325.

Officer Goff stated that the lock on Unit B-81 appeared undisturbed, but the latch had been cut or pried open. 2RP at 247. He opened the storage unit, which was empty. 2RP at 235.

After Officer Goff arrived and spoke to Ms. Carter, he went to the driveway leading to the storage unit complex and waited inside the gated area for additional officers. 2RP at 237. As he was waiting inside the fenced area, a white 2004 Subaru Impreza began driving toward him from one of the aisles between the storage unit buildings. 2RP at 237. Ms. Carter had previously deactivated the code to Unit B-79. 2RP at 237. Officer Goff motioned for the driver to stop and she complied. 2RP at 238. Officer Goff spoke with the driver, identified as Krystal Zinn, and noted the back seat of the car was packed with items. 2RP at 239.

Officer Goff arrested Ms. Zinn and after conducting a search incident to arrest, found a suspected meth pipe in her pants pocket. 2RP at 242-43. The officer also found a piece of paper with "P 226" written on it. Over defense objection, Officer Goff testified that he recognized it as the model of a SIG Sauer P226 handgun. 2RP at 244-47.

Several other Fife officers responded to the scene. 2RP at 240. The Subaru was sealed and impounded. 2RP at 248. Unit B-79 was also sealed and secured with a lock while police applied for a search warrant. 2RP at 248-

49. After obtaining a search warrant, police opened Unit B-79. 2RP at 255. Among the items found in the unit was an empty gun locker that Officer Goff said was “pried open.” 2RP at 255. The gun safe was approximately four to five feet tall. 2RP at 255.

Police also looked at the locks of other units near B-79 to see if any locks other than B-81 had been broken or otherwise disturbed, and found that the locks to units B-77 and B-83 had been cut or broken. 2RP at 249-51.

**i. Unit B-81**

Veneza Tena, who leased Unit B-81, was notified by police regarding her locker and she later arrived at the storage business. 2RP at 242, 287-89, 307. The unit no longer contained many of the items she had stored in it, including appliances. 2RP at 287.

**ii. Unit B-77**

Briallen Hopper leased unit B-77. 2RP at 306. She stated that she stored items including suitcases and artwork while she teaches writing at Yale University in New Haven, Connecticut. 3RP at 351-52.

Officer Goff called Ms. Hopper, and asked her to describe the lock she used to secure the unit, and determined that the lock on the unit was inconsistent with the lock described by Ms. Hopper. 2RP at 256, 3RP at 354.

Ms. Hopper, who had returned from Connecticut to visit family, went to the storage facility and determined that the lock on B-77 was not the lock she put

on the unit. 2RP at 258, 3RP at 354. The police opened the unit and she saw the items were missing including a toy chest of stuffed animals, suitcases and other boxes including a tube of rolled maps and posters. 3RP at 356.

Ms. Hopper identified several of her possessions, including a trunk and quilts, in Unit B-79, which was located next to her unit. 3RP at 358. She stated that some items of sentimental value from childhood and college were not recovered. 3RP at 358. Later she went to the Fife Police Department and claimed additional items from her unit, including a tube of rolled maps and posters and several suitcases. 3RP at 359. Exhibit 38, 39, 40, 41, 50, 51, 52, 53, 54, 55, 56, 56, and 73.

### **iii. Unit B-83**

Carlos Andres rented Unit B-83, which is located near Unit B-79. 2RP at 307. He used it to store items such as car accessories, speakers and amplifiers, a compressor, tents for outdoor parties. 2RP at 263-64. He stated that he also stored a gun safe that belonged to Danielle Anderson, a coworker who asked him to keep it in his storage unit because she had a housemate that she did not trust. 2RP at 264.

Mr. Andres stated that he went to the storage facility and noted that it had a different lock than the one he had used to secure the unit. 2RP at 266. After checking with management, he determined that they had not changed the lock, and they then cut the lock open. 2RP at 267.

Police later contacted Mr. Andres, who returned to the storage facility.

2RP at 251. Once inside the unit, he saw that a compressor and the gun safe were not there and that it was “obvious that things were missing.” 2RP at 267.

Mr. Andres identified items recovered by police depicted in Exhibits 45, 46, 48, 49, 58, 59, 60, 61, 65, 66, 67, and 72 as being items from his storage unit. 2RP at 268-70.

Danielle Anderson asked Mr. Andres to store a locked gun safe, which she believe had either seven or eight guns in it. 2RP at 275. Danielle Anderson testified that she stored eight firearms in Mr. Andres’ storage unit. 2RP at 275. She testified that she put the guns in a gun safe, and that the safe was locked and the key was in the possession of Ms. Anderson and later given to Mr. Andres so he could get some paperwork from the gun safe. 2RP at 275.

She described the guns, which included a .243 Savage rifle, two .22 rifles, a .30-30 lever action Winchester rifle, a Ruger .22 handgun, and a .25 Bauer handgun. 2RP at 276. She stated that the guns were inherited from her father in February 2016. 2RP at 277. She stated that she and her father were hunters and that every hunting season they would “take them out right before hunting” and clean them. 2RP at 278. She stated that they went out every year, and that she [d]idn’t really get a chance to shoot them,” but that they went out every year since she was four or five. 2RP at 278. She said that they were real firearms but had not shot any of them with the exception of one of the .22 rifles and the .22 Ruger. 2RP at 279.

#### **iv. Testimony of Krystal Zinn**

Krystal Zinn testified for the prosecution. Ms. Zinn, the former fiancé of Travis Ash, testified that she met Mr. Reichmand through Mr. Ash, who sold a pair of bolt cutters to Mr. Reichmand through Offer Up. 3RP at 367. She testified the Mr. Reichmand and Tonya Routt lived in a shed behind her house for about a month. 3RP at 368. She stated that she and Mr. Reichmand rented unit B-79 in the complex because her house was being foreclosed on and she needed a place for storage. 3RP at 370. She stated that she and Mr. Reichmand broke into adjoining storage units and used their storage unit to store the stolen items stolen from neighboring units. 3RP at 369. She stated that she did this because she was addicted to methamphetamine and she was doing it for drugs. 3RP at 369. She stated that she testified in exchange to pleading to theft of a firearm and burglary, and that she anticipated a 25-month sentence. 3RP at 370. Ms. Zinn stated that she and Mr. Reichmand rented the unit a few days before she was arrested on August 22. 3RP at 371. She stated that they cut the locks off approximately five units using bolt cutters, and that they broke into units on both sides of Unit B-79. 3RP at 371. She said that they brought new locks with them to put on the units because the facility employees inspected the unit doors to make sure there was nothing wrong with the units, and they would not notice right away that “there was something out of place.” 3RP at 372. Ms. Zinn alleged that when she was arrested at the facility in her Subaru, Mr. Reichmand was across the street in a U Haul that she had rented. 3RP at 373. She testified that that she needed to

move belongings out of her foreclosed house, and said that she was “asked by Mr. Reichmand to rent it.” 3RP at 373. She stated that she went to the storage facility approximately five times and that Mr. Reichmand was with her every time except when she was arrested. 3RP at 373. She said that at the unit, they would sometimes reorganize it to fit in more items, and “we would always break into another one to get more product to put into ours[.]” 3RP at 373. She stated that she, Mr. Reichmand and Tonya Routt were involved in opening one unit. 3RP at 374. She stated that one unit on the right of B-79 had luggage and map tubes containing maps, and another unit to the left had a gun safe. 3RP at 375. Ms. Zinn stated that the gun safe was left in their storage unit, and that Mr. Reichmand broke it open in B-79 it open using a pry bar. 3RP at 377. She stated the safe contained roughly five rifles and a handgun. 3RP at 377. She stated that Mr. Reichmand asked to write down a model number of the handgun so they could see what it was worth. 3RP at 377. She stated that she did so, and the paper was in her pocket when she was arrested. 3RP at 377. Ms. Zinn said that the items were divided “as a group” and it “depended on who was involved.” 3RP at 378. She stated that a lot of the items were traded for drugs. She said that she transported the guns in her car to her house, and that “Mr. Reichmand and Tonya had them in the shed[.]” she said that Mr. Reichmand and Tonya lived in the shed at that time. 3RP at 379 She said that when she was released from jail, “everything was gone that was in the shed.” 3RP at 378-79.

Surveillance videos from August 19, 20, 21, 2016 were played the jury. 2RP at 326. Video number 6 from August 21 showed two men and a woman near a U Haul truck parked near unit B-79. The door to the unit was open and the video shows a second storage door open when the truck pulls away. 2RP at 333.

Ms. Zinn identified Mr. Reichmand in Exhibit 18 and 19. She identified her Subaru parked in front of the storage unit in Exhibit 20, and she identified Mr. Reichmand other pictures. Exhibits 27, 28. 3RP at 383.

The defense rested without calling witnesses. 4RP at 442.

#### **D. ARGUMENT**

##### **1. THE CONVICTIONS FOR BURGLARY AND THEFT OF A FIREARM MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE ALL THE ESSENTIAL ELEMENTS OF THE OFFENSES**

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of

fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928.

*a. Mr. Reichmand’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of first degree burglary*

The prosecution alleged in Count 1 that Mr. Reichmand or an accomplice burglarized Unit B-83. insufficient evidence supported the first degree burglary conviction because the State did not provide sufficient evidence that the crime was committed while the preparator was armed; the firearms in the safe were not accessible to the perpetrator, even assuming the perpetrator knew that the gun safe contained firearms until it was later opened

in Unit B-79.

First degree burglary requires the State to prove, among other elements, that the defendants were armed with a deadly weapon or assaulted another person. RCW 9A.52.020(1) defines the offense as follows:

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

In this case, Mr. Reichmand was convicted of first-degree burglary of Unit B-83 based upon the theory that he or another was “armed with a deadly weapon” in “immediate flight” from the burglary. See CP 1; 124. The statutory definition for “deadly weapon” provides:

“Deadly weapon” means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a “vehicle” as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6).

When first degree burglary involves deadly weapons per se, specifically firearms taken in the course of a burglary, “ ‘no analysis of willingness or present ability to use a firearm as a deadly weapon’ ” is necessary. In re

*Restraint of Martinez*, 171 Wash.2d 354, 367, 256 P.3d 277 (2011) (quoting *State v. Hall*, 46 Wash.App. 689, 695, 732 P.2d 524 (1987)). However, a person is not “armed with a deadly weapon” for the purposes of a charge of first-degree burglary unless and until the firearm is “easily accessible and readily available for use by the defendant for either offensive or defensive purposes.” See *Hall*, 46 Wn. App. at 695. See also, *State v. Gotcher*, 52 Wash.App. 350, 353, 759 P.2d 1216 (1988) (citing *State v. Randle*, 47 Wash.App. 232, 235, 734 P.2d 51 (1987), review denied, 110 Wash.2d 1008 (1988)). In the context of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes. *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007).

Here, there was no evidence that anyone involved in the burglary of B-81 intended or was willing to use the stolen firearms in furtherance of the crime, or that the perpetrator or perpetrators even knew the safe contained guns until it opened after it was put in unit B-89. In *State v. Hernandez*, 172 Wn. App 537, 290 P.3d 1052 (2012) this Court held that the defendants were armed for the purposes of the first degree burglary conviction because one of the defendants carried the gun they were stealing to the waiting vehicle. *Hernandez*, 172 Wn. App. at 542. The Court examined the statutory definition

of “deadly weapon,” noting that there are two categories of deadly weapons: deadly weapons per se, and deadly weapons in fact. By statute, a firearm is a deadly weapon per se, while other weapons are considered deadly based on the circumstances under which they are used, attempted to be used, or threatened to be used. *Id.* at 543.

Thus, when the first degree burglary involves a firearm, there is no need to analyze the willingness or present ability to use the firearm in determining whether the deadly weapon element is established. *Hernandez*, 172 Wn. App. at 543 (citing *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 367, 256 P.3d 277 (2011)). In *Hernandez*, relying on the fact that the case involved a firearm, a deadly weapon per se, this Court concluded that because the defendants had actual possession of a firearm when one of them carried it out of the house to their vehicle, there was sufficient evidence to support the first degree burglary conviction, even though there was no evidence that they intended to use the gun. *Hernandez*, 172 Wn.2d at 544.

But even determining that the weapon was present at the scene (albeit in a locked gun safe) was in fact a deadly weapon does not answer the question posed here: whether the perpetrator or perpetrators were armed with that weapon.

Here, the person or persons who entered Unit B-83 moved the locked

gun safe to Unit B-79. Ms. Zinn testified that the safe was opened in B-79 and no evidence was presented that the gun safe was opened while in B-83 or in the “immediate flight” from the unit, which in this case was to transport of the gun safe outside the building several feet to unit B-79. Once the gun safe was opened, which could have been hours or days after it was put in B-79, the person responsible was no longer in “immediate flight” from the crime.

While in immediate flight from B-83, the guns were inaccessible to the perpetrator or an accomplice, and therefore the offender was not “armed.” Mr. Reichmand or accomplice would have been unable to have access to any guns in which safe; Ms. Anderson stated that she initially had the key to the safe, and that it was later given to Mr. Andres. The person committing the burglary, after having reached B-79 with the safe, was no longer in “immediate flight.” The person, who Mr. Reichmand argues is Ms. Zinn acting on her own, authorized to be in the unit, and therefore the burglary of the neighboring unit was “completed” because the safe was no longer in the “building.”

“Building”, in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building[.] RCW 9A.04.110(5).

No evidence was presented that anyone - including Mr. Reichmand - used or handled the guns taken from the unit during that burglary or in “flight” therefrom. Therefore, the perpetrator or perpetrators were not “armed” at the time the burglary. Because the evidence did not establish that the weapon was accessible while the perpetrator was in flight from the “building,” the conviction for first degree burglary must be vacated.

*b. The convictions for burglary counts 1, 3 and 4 must be dismissed<sup>2</sup>*

As argued in section 1(a), sufficient evidence must be presented to support each element of the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Seattle v. Gellein*, 112 Wn.2d 58, 62,768 P.2d 470 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all 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).

To convict Mr. Reichmand of burglary in the second degree, the State is

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<sup>2</sup>Mr. Reichmand touched on this argument in his pro se motion, arguing that the State presented insufficient evidence for first degree burglary and therefore the court must enter a finding for the lesser degree charge of second

required to prove that he or an accomplice entered or remained unlawfully in a building, with intent to commit a crime against a person or property therein.

RCW 9A.52.030(1). "Enter" is defined as follows:

The word "enter" when constituting an element or part of a crime, shall include the entrance of the person, or the insertion of any part of his body, or any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person or to detach or remove property.

RCW 9A.52.010(2).

The elements of burglary in the second degree are thus that the defendant (1) unlawfully entered or remained (2) in a building (3) with the intent to commit a crime against a person or property therein.

RCW 9A.52.030.

The State did not and could not prove that Mr. Reichmand ever entered or remained in any of the three storage units. The State offered evidence that at some point someone had entered the units in the building and took property from them the units that ended up in Ms. Zinn's car and the storage unit leased by Mr. Reichmand and Ms. Zinn. Ms. Zinn accused Mr. Reichmand of participating in the burglaries, but no physical evidence supports her contention. The photos and video are innocuous, showing Mr. Reichmand's presence in the vicinity of the storage unit. No evidence showed him inside any

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degree burglary in Count 1.

of the other units and no stolen property was found in his possession. Despite her claim that he was across the street in a U Haul, no evidence was presented to support her allegation that he was there or that he directed her to perform the crimes.

Ms. Zinn stated that the burglaries were a “group effort,” but the evidence shows only her involvement. The State did not call Tonya Routt to testify. It was Ms. Zinn’s car that contained the stolen items. She was the one arrested on August 22. She was the one who transported guns in her car, to be stored at her house or in a shed behind. No evidence was presented to show Mr. Reichmand lived at her house, or lived in a shed behind a house. No evidence showed him carrying weapons. She identified him as a person in the photograph; that was to be expected—Mr. Reichmand rented unit B-79 and therefore it was reasonable for him to be at the storage facility.

A rational trier of fact could infer from the evidence that someone with access to Mr. Reichman and Ms. Zinn’s storage unit entered the units, but there was no proof of entry by Mr. Reichmand. Evidence of Ms. Zinn’s participation, on the other hand, is overwhelming. Looking at the evidence in the light most favorable to the State, there is no proof that Mr. Reichmand committed burglary, either as a principal or accomplice.

Even in light of Ms. Zinn’s convictions, the State could not prove that

Mr. Reichmand had any knowledge of her crime, or was ready to assist her. The jury is not required to unanimously decide whether the defendant acted as a principal or an accomplice, as long as they agree that the defendant knowingly participated in the crime. *State v. Hoffman*, 116 Wn.2d 51, 103, 804 P.2d 577 (1991).

However, where, as here, the State presented insufficient evidence to convict the defendant as a principal, it logically follows that the State must prove beyond a reasonable doubt that he was an accomplice. A person is an accomplice of another person in the commission of a crime 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).

The State offered no evidence suggesting how Mr. Reichmand might have acted as an accomplice other than Ms. Zinn's identification of Mr. Reichmand in the video and still photographs outside the storage unit and her accusations. "A defendant is not guilty as an accomplice unless he has associated with and participated in the venture as something he wished to happen and which he sought by his acts to make succeed." *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993), citing *State v. J-R Distributions, Inc.*, 82

Wn.2d 584, 593, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974); *State v. Castro*, 32 Wn. App. 559, 563, 648 P.2d 485, rev. denied, 98 Wn.2d 1007 (1982). To establish accomplice liability, the State must prove the alleged accomplice was ready to assist in the commission of the crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); see also *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (mere presence at the scene of the crime and knowledge of the crime are insufficient to establish accomplice liability); *State v. Gladstone*, 78 Wn.2d 306, 312, 474 P.2d 274 (1970) (mere statement of opinion, without encouragement, is not enough).

At the most basic level, the State must prove that the alleged accomplice had general knowledge of the crime. *State v. Bockman*, 37 Wn. App. 474, 491, 682 P.2d 925 (1984), rev. denied, 102 Wn.2d 1002 (1984).

Here, the State could not prove that Mr. Reichmand knew of the burglaries or theft of the firearm. Moreover, there was no evidence to connect Mr. Reichmand to the inside of any of the storage units.

*c. The State failed to prove beyond a reasonable doubt theft of a firearm*

The elements of theft of a firearm RCW 9A.56.300 are as follows:

- (1) A person is guilty of theft of a firearm if he or she commits a theft of any firearm.
- (2) This section applies regardless of the value of the firearm taken in the theft.

- (3) Each firearm taken in the theft under this section is a separate offense.
- (4) The definition of “theft” and the defense allowed against the prosecution for theft under RCW 9A.56.020 shall apply to the crime of theft of a firearm.
- (5) As used in this section, “firearm” means any firearm as defined in RCW 9.41.010.
- (6) Theft of a firearm is a class B felony.

For the same reasons stated in section 1(b), there was no direct evidence other than Ms. Zinn’s accusation that Mr. Reichmand stole a firearm in the commission of burglaries.

*d. Reversal and dismissal is the appropriate remedy.*

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Reichmand participated in the burglaries, the judgment may not stand. The convictions for first and second degree burglary, and theft of a firearm should therefore be reversed and the charges dismissed.

**2. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE PREJUDICING MR. REICHMAND.**

A defendant has the constitutional right to the effective assistance of counsel under Wash. Const. art. 1, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The standard for evaluating effectiveness of counsel is set

forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The court must decide (1) whether counsel's conduct constituted deficient performance and (2) whether the conduct resulted in prejudice. to prevail, appellant must show (1) that his lawyer's representation was deficient and (2) that the deficient conduct affected the outcome of the trial. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2D 512 (1999); *Strickland*, 466 U.S. at 693-94. Performance is deficient if it falls "below an objective standard of Reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defendant need show only a reasonable probability the outcome would have differed in order to undermine confidence in the outcome and demonstrate prejudice. *Strickland*, 466 U.S. at 693-94. Representation that falls sufficiently below an objective reasonableness standard overcomes the strong presumption of reasonableness. *Thomas*, 109 Wn.2d at 226.

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object to improper opinion evidence. Under Washington Constitution, Article 1, § 3, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt, either directly or inferentially,

“because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.” *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

In the case at bar, storage facility manager Patricia Carter gave improper opinion testimony when she stated on direct examination that, after discovering the hasp was cut on B-81, she looked at the video of the area in which B-81 is located. She stated, in apparent reference to the video, that she recognized one of the persons getting out of the white car as Mr. Reichmand, whom she identified in court as “the fellow sitting right over here.” 2RP at 324. When it was clarified that the prosecutor was asking about the arrest of Ms. Zinn on August 22, 2016, Ms. Carter stated: “So when I had determined by the video that I actually saw who had done this, because it’s very clear on the video, I deactivated the code to B-79.” 2RP at 324.

The testimony in an improper comment on the evidence and there was no tactical reason for the defendant’s trial attorney to fail to object. Consequently, trial counsel’s failure to object to this evidence fell below the standard of a reasonably prudent attorney.

Mr. Reichmand was prejudiced by counsel’s deficient performance. The State had no direct evidence that the defendant was the person who perpetrated the burglaries—the evidence consisted almost entirely of Ms. Zinn’s accusation.

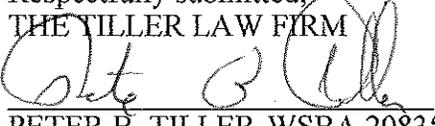
In such a case, it takes relatively little improper evidence to change what would be a verdict of acquittal to a verdict of guilty. In this case, trial counsel’s failure

to object to Ms. Carter's improper opinion evidence (1) fell below the standard of a reasonably prudent attorney, and (2) caused prejudice. As a result, the defendant is entitled to a new trial.

**E. CONCLUSION**

For the foregoing reasons, Mr. Reichmand respectfully requests this Court reverse his convictions and dismiss, or, in the alternative, reverse and remand for a new trial.

DATED: March 22, 2018.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

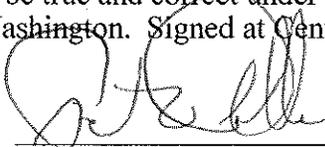
The undersigned certifies that on March 22, 2018, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 22, 2018



PETER B. TILLER

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