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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WESLEY WARD REICHMAND, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Karena Kirkendoll

No. 16-1-03407-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. When viewed in the light most favorable to the State, was sufficient evidence adduced for a rational jury to convict defendant of one count of first degree burglary, two counts of second degree burglary, and one count of theft of a firearm?
2. Has defendant failed to demonstrate that he received ineffective assistance of counsel for counsel's failure to object where defendant failed to show that any objection would have been sustained?

B. STATEMENT OF THE CASE.

1. Procedure

On August 24, 2016, the State charged Wesley Ward Reichmand ("defendant") with one count of first degree burglary, one count of theft of a firearm, two counts of second degree burglary, and one count of first degree unlawful possession of a firearm. CP 1-3. Jury trial commenced on June 1, 2017. RP 3.¹ The State presented eight witnesses at trial, including one of defendant's accomplices, four of his victims, and two police

¹ The Verbatim Report of Proceedings (RP) are contained in ten file folders with six trial volumes. All files have consecutive pagination and are referred to by page number.

officers. CP 208. Defendant rested without presenting any witnesses. RP 442.

The jury returned guilty verdicts on all counts except first degree unlawful possession of a firearm, for which the jury could not reach a verdict. CP 153, 155-57, 172-73. The State moved to dismiss without prejudice the first degree unlawful possession of a firearm count. CP 172-73. The trial court granted the State's motion. *Id.* Judgment and sentence were entered on July 7, 2017. CP 176-89. The court sentenced defendant to a total of 87 months confinement and 18 months of community custody. *Id.* Defendant filed a timely notice of appeal. CP 191.

2. Facts

In May 2016, defendant met Krystal Zinn through the online selling-and-buying platform, "OfferUp." RP 367-68. Defendant purchased bolt cutters from Zinn's then-fiancé, Travis Ash. *Id.* Thereafter, defendant moved into a shed behind Zinn's house with his girlfriend, Tonya. RP 368. In August 2016, defendant developed a plan to break into storage units at the Fife You Store It storage facility. RP 368. Both Zinn and Tonya agreed to participate in the break-ins. RP 369. Zinn testified that she participated in the burglaries to fund her crystal meth addiction. RP 369.

The storage facility is surrounded by a six-foot high fence wrapped in barbwire. RP 311-12. There are three gates. *Id.* Two are kept locked at

all times; one may be opened by a code. *Id.* Each unit is assigned a unique gate code, and that code must be entered every time an individual enters or exits the facility. RP 312-13. For security purposes, a log is kept of each time a gate code is entered. RP 313.

Defendant leased storage unit B-79. RP 305, 370. Defendant authorized Zinn to have access to the unit as well. RP 306. Leasing the storage unit aided defendant in two major ways. First, the only way defendant could obtain a gate code to the storage facility was by renting a unit; defendant needed the code if he wanted to break into other units. RP 370-71. Second, Zinn's home was being foreclosed on and she wanted to store some personal property in the unit, but the unit was also used for the specific purpose of storing stolen property from the neighboring units. RP 370.

Between August 19, 2016, and August 21, 2016, defendant, Zinn, and Tonya broke into three separate storage units. RP 263-64, 286, 307-08, 355-56, 373-75. Defendant used bolt cutters to pry open locks on the units. RP 371. Once defendant and his associates finished taking items out of a unit, they would put a new lock on the door to make it look like the unit had not been tampered with. RP 371-72. They did this because workers toured the facility daily to make sure that the units were secure, and they were unlikely to notice the new locks right away. RP 372.

Zinn went with defendant to the storage facility multiple times between August 19, 2016, and August 21, 2016. RP 373. Some of the times they would reorganize their own unit to fit more items, but every time they “would always break into another one to get more product[.]” *Id.* Zinn testified about the items she, defendant, and Tonya took from the other units. One of the units contained a washer and dryer as well as car tires. RP 374. Another unit contained old luggage and “some really cool map tubes with old maps.” RP 374. And another contained a gun safe approximately four or five feet tall. RP 255, 374-75.

The gun safe was locked when defendant first saw it. RP 375-76. Defendant removed it from the unit it was in, took it to his unit, and pried it open with a crowbar. RP 263-64, 375-77, 379-80. He then removed the guns, told Zinn to write down the model number from a handgun so he could later determine how much it was worth, and transported the guns in Zinn’s car back to his shed at the Zinn property. *Id.* There, defendant and Tonya had control of the guns. RP 379. The guns were ultimately traded in return for crystal meth. RP 380.

On August 22, 2016, the manager of the storage facility, Patricia Carter, performed a security check. RP 318-19. She noticed that the hasp on Unit B-81 had been cut, but the lock was still on the door. RP 319. Carter testified that this was “hard to see unless you’re going slow enough

and really pay[ing] attention.” *Id.* The cut hasp on B-81 was a “big red flag.” RP 320. Carter testified that she immediately called the customer of Unit B-81. *Id.*

Carter follows a specific procedure whenever she notices something suspicious about a unit. RP 321. First, she checks the gate log to see if the lessee of that unit has been on-site recently. RP 321-22. Carter saw that the B-81 lessee had not been. *Id.* Second, she searches the gate log to see who has entered the storage facility near that time period. RP 322. Defendant’s code was entered ten times between August 19, 2016, and August 21, 2016. RP 316-18, 322; Exh. 9A. Finally, Carter checks the security footage to see if there had been any suspicious activity near the unit in question. *Id.* When Carter did this, she saw a white car appear near units B-81 and B-79, and she saw defendant and Zinn exit the vehicle. RP 323-24. This information led Carter to determine that defendant and Zinn were the ones who cut the hasp on Unit B-81, so she proceeded to deactivate defendant’s gate code. *Id.*

Coincidentally, that same day, Carter saw the same white car she recognized from the video appear at the gate. RP 324, 326. Carter realized that the car could not get through the gate because she had already deactivated defendant’s code, so Carter opened up the gate herself. RP 324-25. After allowing the white car in, Carter called 911. RP 325.

Officer Goff was first to arrive. RP 237. When he saw the white car approach the gate, he flagged it to stop. RP 238. Officer Goff went up to the car and identified the driver as Zinn. RP 239. He noticed that the back seat was packed full. *Id.* Officer Goff placed Zinn under arrest. RP 242. In a search subsequent to arrest, Officer Goff found a meth pipe and a piece of paper with “P226” written on it in Zinn’s pant pocket. RP 242-43. Officer Goff recognized “P226” to be the model number for a type of pistol. RP 247.

Zinn had multiple stolen items in her car when she was arrested. RP 380, 404. These included old suitcases and map tubes, ceramic figurines, and DVDs. RP 308, 355-56, 380-81, 404, 406. Police obtained a search warrant to search Zinn’s car as well as defendant’s storage unit, B-79. RP 402. Police seized the items found in Zinn’s car and proceeded to search the storage unit. RP 406. Inside defendant’s unit, police found large plastic totes, multiple household items, speakers, a gas-powered water pump, and a large gun safe. RP 407.

When police first saw the gun safe, they noticed that its door was damaged, it appeared as though it had been pried open, and it was empty. RP 408. However, no actual firearms were found in the unit. *Id.* Zinn told the officers that everything that was stolen was located in her shed. RP 393-94.

Two of the burglary victims, Briallen Hopper and Carlos Andres, were present during the search of defendant's unit. RP 409. Police gave them the opportunity to look into the unit and identify any items belonging to them. *Id.* As a result, police were able to return some of the items belonging to Hopper and Andres. RP 410-11. The remainder of the items were taken to the police station where they were eventually claimed by their respective owners. RP 411-12.

At trial, Andres testified that he rented Unit B-83. RP 263. He stored many items in his unit, including accessories for his car and fishing gear. RP 263-64. He also stored a gun safe belonging to his coworker, Danielle Anderson. RP 264. Andres identified multiple items taken from his storage unit, including extension cords, a water pump, two boxes, an amplifier, and a car speaker. RP 268-69.

Anderson testified that there were approximately seven firearms contained in the safe. RP 274. Anderson used them to go hunting with her father before he passed away. RP 277-78. She testified that all of the firearms worked and that she planned to use them again to teach her children how to hunt. RP 278-80. She did not know defendant, and she never authorized defendant to have access to her guns or safe. RP 282-83. Anderson's firearms were never returned to her. RP 281.

Veneza Tena rented Unit B-81. RP 307-08. She stored clothing items, shoes, a washer and dryer, two sets of tires, academic books, a space heater, and other miscellaneous items. RP 286. Tena learned that someone may have broken into her unit when a Fife police officer showed up at her apartment complex. RP 287. Tena went down to the facility herself and saw that her unit was “completely empty.” RP 289. Her clothes, shoes, books, washer and dryer, tires, space heater, and a few boxes were all gone. RP 289.

Briallen Hopper rented Unit B-77. RP 308. Hopper stored personal items she had collected while growing up before she moved to the East Coast. RP 351-53. When Hopper arrived at her unit, she noticed that everything was “kind of mixed up and rearranged, and there was a lot of stuff missing.” RP 355. A toy chest filled with stuffed animals from her grandma, various suitcases filled with clothing and quilts, tubes of old maps and posters, and trunks containing household china were all missing. RP 355-56.

Zinn also testified about the day she was arrested. RP 371-72. She had driven her white Subaru sedan to the storage facility. RP 366-67, 372. She came by herself, but defendant was across the street in a U-Haul. RP 372. Zinn recalled having stolen items in her car the day she was arrested. RP 380. She testified that she, Tonya, and defendant decided as a group

what to do with the stolen items, and many of the items were traded for crystal meth. RP 378. Zinn recalled other items that they had stolen from storage units. These included “the guns, the car tires, the washer, dryer, the map tubes.” RP 377.

Video surveillance footage of the area of the storage facility where the break-ins occurred was played for the jury. RP 326, 386; Exh. 33. When shown stills from the footage during trial, Zinn identified herself, Tonya, and defendant as the individuals depicted in the footage. RP 381-87; Exh. 17-32. Zinn identified the white sedan as her car. RP 382-83, 385; Exh. 20-21, 32.

The video footage depicts Zinn’s car at the storage facility. Exh. 33. Oftentimes, the car was parked so close to a storage unit that while a unit door was open, it was difficult to see what was being transported from the unit to the car. *Id.* The videos showed ongoing activity. Defendant, Zinn, and other individuals actively moved around the car, went in and out of the storage unit, and placed and rearranged items in Zinn’s car and in a U-Haul truck. *Id.* At one point, defendant is seen closing the door to one of the units, getting into Zinn’s car, driving to another unit, and opening up the door to that unit. *Id.*

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS ADDUCED FOR A RATIONAL JURY TO CONVICT DEFENDANT OF ONE COUNT OF FIRST DEGREE BURGLARY, TWO COUNTS OF SECOND DEGREE BURGLARY, AND ONE COUNT OF THEFT OF A FIREARM.

The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Verdicts “in either criminal or civil cases may be based entirely upon circumstantial evidence.” *State v. Evans*, 32 Wn.2d 278, 280, 201 P.2d 513 (1949).

“Credibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Conflicting evidence is judged solely by the jury. *Welliever v. MacNulty*, 50 Wn.2d 224, 310 P.2d 531 (1957). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the jury should be upheld. *Camarillo*, 115 Wn.2d at 71.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Camarillo*, 115 Wn.2d at 71. (*citing State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from conduct where "it is plainly indicated as a matter of logical probability." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed *de novo*. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

- a. Evidence was sufficient for a rational trier of fact to conclude that defendant was armed with a deadly weapon while in the building or in immediate flight therefrom.

By convicting defendant of first degree burglary, the jury found, beyond a reasonable doubt, that (1) on or about the period between August 21, 2016, and August 22, 2016, the defendant or an accomplice entered or remained unlawfully in a building; (2) the entering or remaining was with

intent to commit a crime against a person or property therein; (3) in so entering or while in the building or in immediate flight from the building the defendant or an accomplice was armed with a deadly weapon; (4) any of these acts occurred in the State of Washington. CP 112-146; RCW 9A.52.020.

“Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory.” *State v. Brown*, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). A term is not a technical term if its meaning is synonymous with its common usage. *Id.* at 611. The trial court here did not include a definition of “armed” in the jury instructions. CP 112-46. The “common definition” of “armed” is “furnished with weapons of offense or defense: fortified, equipped.” Webster’s Third New International Dictionary 119 (1969). In the context of first degree burglary, a defendant is “armed with a deadly weapon” if a weapon is “easily accessible and readily available for use, either for offensive or defensive purposes.” *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993); *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). Here, evidence was sufficient for the jury to find that defendant was “armed with a deadly weapon” based on its common understanding of the term “armed.”

The evidence adduced at trial established that (1) defendant stole a loaded gun safe, RP 375-76; (2) all of the guns inside the safe were in working condition, RP 278-80; and (3) defendant opened the gun safe with a simple crowbar, RP 376. Defendant does not dispute that the gun safe contained firearms. Based on this evidence, a rational juror could infer that defendant was able to access the guns with ease, that the guns were accessible while defendant was in unit B-83 and in immediate flight therefrom, and that defendant could have used the guns for offensive or defensive purposes.

Washington case law also supports the jury's decision. In *State v. Valdobinos*, our Supreme Court held that evidence of cocaine and an unloaded rifle found under a bed in a defendant's house, without more, is insufficient to qualify the defendant as "armed with a deadly weapon." 122 Wn.2d 270, 282, 858 P.2d 199 (1993). In that case, the defendant was arrested at his home after offering to sell drugs to an undercover agent. *Id.* at 273. During a search of the home, officers found an unloaded rifle under a bed in the bedroom. *Id.* at 273-73, 281. However, "the defendant was not in close proximity to the weapon when it was discovered," and there was no evidence that he had been at a time when the availability of the weapon for offensive or defensive purposes was important or related to the incident involving drugs. *State v. Gurske*, 155 Wn.2d 134, 141, 118

P.3d 333 (2005) (discussing *Valdobinos*, 122 Wn.2d 270). The court held that the mere presence of a deadly weapon at the crime scene, without evidence that the defendant was in close proximity to the weapon, is insufficient to show that the defendant was “armed” in the sense of having a weapon accessible and readily available for offensive or defensive purposes. *Id.*

In *State v. Gurske*, the Supreme Court held that physical proximity of the defendant to the weapon, alone, is not enough to support a finding that the defendant was “armed.” 155 Wn.2d 134, 143, 118 P.3d 333 (2005). The weapon must also be “easily accessible and readily available for use [by the defendant] for offensive or defensive purposes[.]” *Id.* In *Gurske*, the defendant had a pistol in his backpack when he was pulled over in his car. *Id.* “The backpack was zipped, and a torch was on top of the pistol.” *Id.* The backpack was not removeable by the driver unless he exited the vehicle or moved into the passenger seat. *Id.* Although there was close physical proximity between the defendant and the weapon, the evidence was insufficient to show whether the defendant could actually access the weapon during the commission of the crime. *Id.* Thus, evidence was insufficient to establish that the defendant was armed. *Id.*

In contrast, in *State v. Sabala*, the defendant was stopped in his car after he was seen purchasing heroin. 44 Wn. App. 444, 723 P.2d 5 (1986).

In a search of his car, police found a loaded gun under the driver's seat with the grip easily accessible to the driver. *Id.* at 445, 448. The court held that there was sufficient evidence to support the finding that the defendant was "armed" because the gun was "easily accessible and readily available for use by the defendant for either offensive or defensive purposes." *Id.* at 448.

Although the precise term "nexus" need not be used, courts require the fact finder to "find a relationship between the defendant, the crime, and the deadly weapon" in order to conclude that a defendant was armed. *State v. Willis*, 153 Wn.2d 366, 374, 103 P.3d 1213 (2005). In *State v. Johnson*, while conducting a search of the defendant's apartment, police discovered heroin and arrested the defendant. 94 Wn. App. 882, 887-88, 974 P.2d 855 (1999). After he was arrested, the defendant told the officers there was a gun in a coffee table drawer. *Id.* at 888. The Court of Appeals reversed the defendant's conviction, holding that a nexus between the crime and the weapon is required. *Id.* at 896-97. No nexus existed where the defendant was handcuffed and the gun was "well outside his reach." *Id.* The court also pointed out that without such a nexus, courts "run the risk of convicting a defendant under the deadly weapon enhancement for having a weapon unrelated to the crime." *Id.* at 895.

Similarly, in *State v. Mills*, this division of the Court of Appeals reversed a deadly weapon enhancement on the basis that “the required nexus between the defendant and the weapon was not present[,] and there was no physical proximity to the weapon at a time when availability for use for offensive or defensive purposes was critical.” *Gurske*, 155 Wn.2d 134, 141, 118 P.3d 333 (2005) (discussing *State v. Mills*, 80 Wn. App. 231, 237, 907, P.2d 316 (1995)). In *Mills*, an officer arrested the defendant after finding methamphetamine in his car. 80 Wn. App. at 233. After placing the defendant in the patrol car, officers discovered a motel key. *Id.* Pursuant to a search warrant, police searched the motel room to which the key belonged and found more methamphetamine and a pistol in a pouch beside the drugs. *Id.* The defendant was convicted of possession with intent to deliver while armed with a deadly weapon. *Id.* Division II reversed the deadly weapon enhancement, finding that the defendant was not “armed” where he “would have needed to travel several miles to retrieve his weapon.” *Id.* at 237.

Here, the evidence sufficiently showed that (1) defendant was in close physical proximity to the weapons during the commission of the burglary; (2) the guns were accessible to defendant and within his reach; and (3) there was a direct relationship or nexus between the defendant, the weapons, and the crime. Unlike in *Valdobinos* and *Mills*, where the

weapons were either under a bed or in a motel room far away, here, the loaded gun safe was in the same storage unit that defendant was in, and, inferring that defendant had to pick up the safe to move it, defendant bore the loaded safe in his own hands. Defendant was in close physical proximity to the guns while in the unit and in immediate flight therefrom.

This case is also distinguishable from *Gurske*, where the court found that although the defendant was in close physical proximity to the weapon (it was in his car), he could not be considered “armed” because there was no evidence that defendant could actually reach the weapon during the commission of the crime. 155 Wn.2d at 143. Here, defendant was both in close physical proximity to the guns, and the guns were easily accessible with a crowbar. RP 376. There was no evidence that he could not have opened the safe in unit B-83.

This case is more like *Sabala*, where the gun was located underneath the driver’s seat, reachable by the defendant. 44 Wn. App. at 445, 448. The guns here were located in a safe, the defendant was able to open the safe and access the guns, and the evidence supports the inference that defendant could have opened the safe during the commission of the burglary.

Moreover, the guns here were directly involved in and connected to the crime. See *Johnson*, 94 Wn. App. at 895. The *Johnson* court was

ultimately concerned with finding a defendant armed merely because a weapon happened to be on the premises at some point “during the entire period of illegal activity.” *Id.* The nexus requirement demands that the weapon be related to the crime. *Id.* Because defendant (1) broke into unit B-83 and stole an obvious gun safe, (2) had the gun safe presumably in his hands during the burglary and in immediate flight therefrom, and (3) accessed the guns with a simple crowbar, evidence was sufficient for a rational jury to conclude that defendant was armed during the commission of the crime or in immediate flight therefrom.

Defendant argues on appeal that his conduct could not constitute first degree burglary because the guns were locked in a safe when he broke into unit B-83, and the guns were still locked in the safe when he took the safe to his own unit. Accordingly, defendant argues that he was not armed with a deadly weapon while inside of the unit or in “immediate flight therefrom,” because the guns were not “easily accessible or readily available” while they were locked in the safe. Brief of Appellant at 14-19. Defendant’s claim fails because, as argued above, the evidence presented at trial was sufficient for a rational jury to conclude that defendant was armed with a deadly weapon while inside of the building or in immediate flight therefrom.

- b. In the alternative, evidence was sufficient for a rational trier of fact to conclude that defendant was still in immediate flight after he opened the safe.

In the alternative, the jury could have found that defendant was still in “immediate flight” from the building after he broke the safe open and left the storage facility. “Immediate flight” is not statutorily defined in Washington State. Because it is an expression of common understanding, however, it is “to be given meaning from [its] common usage.” *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 546 (1997).

In *State v. Manchester*, the defendant argued there was insufficient evidence to support his first degree robbery conviction because he had completed the taking before using “immediate force, violence, or fear of injury[.]” 57 Wn. App. 765, 768-69, 790 P.2d 217 (1990). There, the defendant was charged with two counts of first degree robbery when he took items from grocery stores unaware he was being observed, exited the buildings, and then displayed a weapon only when employees tried to recover the property or detain him at the store. *Id.* at 767. The defendant argued that even if he took property in the presence of another, he did not use immediate force, violence, or fear of injury against that person because the crimes were completed once he left the stores. *Id.* at 768. The court, by adopting a broader “transactional view that does not consider the robbery complete until the assailant has effected his escape[.]” held that

the robbery statute includes “violence during flight immediately following the taking” and affirmed defendant’s convictions. *Id.* at 770-71.

Similarly, here, the jury could have determined that defendant had not “effected his escape” until he pried the safe open, accessed the guns, and drove away with them. The jury heard testimony from defendant’s accomplice, Zinn, and it observed video and photographic evidence of defendant actively participating in the burglaries. The videos showed people, including defendant, actively moving around Zinn’s car and the storage facility. Exh. 33. Zinn’s car doors were frequently open, her car was on, and she moved it regularly. *Id.*

Nothing about Zinn’s testimony or the video evidence suggests that defendant spent any more time than necessary at the storage facility. The evidence rather indicates that defendant spent only the amount of time required to break into a storage unit, take items from that unit, place them in his unit or in Zinn’s car, rearranging if necessary, and driving away. Likewise, nothing about the evidence suggests any significant time lapse between the taking of the gun safe and the driving of the guns back to defendant’s shed. The fact that defendant left unit B-83 before opening the gun safe does not render the crime completed. Leaving a building where a taking occurs does not establish a completed escape. *See Manchester*, 57 Wn. App. 765, 766, 790 P.2d 217 (1990).

Considering all of the evidence and reasonable inferences drawn in the light most favorable to the State, a rational jury could conclude that defendant was still in “immediate flight” from the building after he opened the safe and accessed the guns. The evidence was sufficient to support defendant’s first degree burglary conviction.

- c. Should this Court determine that insufficient evidence supports defendant’s first degree burglary conviction, the appropriate remedy is to remand for resentencing on the lesser included second degree burglary instruction.

Remand for resentencing on a lesser included offense is generally permissible where the jury has been explicitly instructed on the lesser included offense. *State v. Green*, 94 Wn.2d 216, 234, 616 P.2d 628 (1980). “[I]t is clear a case may be remanded for resentencing on a ‘lesser included offense’ only if the record discloses that the trier of fact expressly found each of the elements of the lesser offense. *Id.* at 234-35.

Here, the jury was instructed that the lesser included offense to the first degree burglary charge was second degree burglary. CP 126-27. Further, because the jury convicted defendant of two separate counts of second degree burglary, CP 156-57, the record is sufficient to show that the jury expressly found each of the elements of second degree burglary. Therefore, should this Court find insufficient evidence to sustain

defendant's first degree burglary conviction, remand for resentencing on second degree burglary is appropriate in this case.

- d. Zinn's testimony, corroborated by video and photographic evidence, was sufficient for a rational jury to find that defendant committed both first and second degree burglary and theft of a firearm.

When viewed in the light most favorable to the State, evidence was sufficient for a rational jury to find defendant guilty of first degree burglary, second degree burglary, and theft of a firearm beyond a reasonable doubt. In viewing the evidence, "circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "[C]ircumstantial evidence is sufficient to prove any element of a crime[.]" and verdicts "in either criminal or civil cases may be based entirely upon circumstantial evidence." *State v. Garcia*, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978) (citing *State v. Lewis*, 69 Wn.2d 120, 417 P.2d 618 (1966)); *State v. Evans*, 32 Wn.2d 278, 280, 201 P.2d 513 (1949).

As stated above, to convict defendant of first degree burglary, the jury had to find, beyond a reasonable doubt, that (1) on or about the period between August 21, 2016, and August 22, 2016, the defendant or an accomplice entered or remained unlawfully in a building; (2) the entering or remaining was with intent to commit a crime against a person or

property therein; (3) in so entering or while in the building or in immediate flight from the building the defendant or an accomplice was armed with a deadly weapon; (4) any of these acts occurred in the State of Washington. CP 112-146; RCW 9A.52.020.

Similarly, by convicting defendant of two counts of second degree burglary, the jury necessarily found, beyond a reasonable doubt, that (1) on or about the period between August 21, 2016, and August 22, 2016, the defendant or an accomplice entered or remained unlawfully in a building; (2) the entering or remaining was with intent to commit a crime against a person or property therein; and (3) this act occurred in the State of Washington. CP 25-26; RCW 9A.52.030.

Finally, when the jury found defendant guilty of theft of a firearm beyond a reasonable doubt, it found that (1) on or about the period between August 21, 2016, and August 22, 2016, the defendant or an accomplice wrongfully obtained or exerted unauthorized control over a firearm belonging to another; (2) the defendant or an accomplice intended to deprive the other person of the firearm; and (3) this act occurred in the State of Washington. CP 20; RCW 9A.56.300.

Viewed in the light most favorable to the State, sufficient evidence was adduced for a rational jury to find defendant guilty of all of the above crimes beyond a reasonable doubt. Zinn testified that (1) defendant came

up with the idea to break into storage units, RP 369; (2) the break-ins occurred prior to and near August 22, 2016, RP 369, 371; (3) both Zinn and defendant rented a storage unit for the specific purpose of breaking into other units, RP 370-71; (4) aside from the day Zinn was arrested, every time Zinn went to the storage facility defendant went with her, and every time they would break into another unit “to get more product to put into” their own unit, RP 373; (5) Zinn, Tonya, and defendant were “all involved in the break-in to the unit” containing the gun safe, RP 375; (6) defendant took the gun safe to his unit where he pried it open with a crowbar, RP 376; (7) defendant told Zinn to write down the model number from a handgun so they could determine “how much it was worth,” RP 377; (8) defendant transported the guns to his shed on the Zinn property and took control of the guns, RP 379. Anderson testified that the guns and safe belonged to her and that she never authorized defendant to take control of the guns. RP 374-83.

The testimony was further corroborated by video and photographic evidence. Zinn identified herself, her car, and defendant in multiple photographs taken at the storage facility. Exh. 18-20, 24-25, 27, 30-32, 36. Zinn identified herself and defendant at what appears to be the front counter of Fife You Store It. Exh. 18-19. Another photograph depicts

Zinn's car with its trunk open and defendant standing in front of a storage unit. Exh. 27.

Zinn's photo identifications matched the individuals depicted in the videos. Video footage shows Zinn's car inside of the storage facility on multiple days. Exh. 33. Zinn frequently kept the car on and drove it around. *Id.* The trunk and car doors were often open as people moved between the car and an open storage unit. *Id.* At one point, defendant is seen closing the door to one of the units, getting into Zinn's car, driving to another unit, and opening up the door to that unit. *Id.* Defendant was authorized to have access only to unit B-79. RP 305, 370. Video footage of defendant opening up two separate storage units necessarily indicates that defendant entered at least one of the units unlawfully.

The testimony, combined with corroborating video footage of defendant opening two separate storage units, was sufficient for a rational jury to find defendant guilty of the above crimes beyond a reasonable doubt. The jury was correctly instructed that circumstantial evidence is equally as reliable as direct evidence. CP 112-46; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Viewed in the light most favorable to the State, sufficient evidence was provided for each element of every crime for a rational jury to conclude defendant was guilty beyond a reasonable doubt. The decisions of the jury should be upheld.

2. DEFENDANT FAILS TO DEMONSTRATE
INEFFECTIVE ASSISTANCE OF COUNSEL
FOR COUNSEL'S FAILURE TO OBJECT
BECAUSE NO OBJECTION COULD BE
SUSTAINED WHERE THE STATE'S WITNESS
DID NOT GIVE IMPROPER OPINION
TESTIMONY.

Criminal defendants have a constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Const art. I, §22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063-64, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). The defendant bears the burden of showing that counsel's assistance was "so defective as to require reversal of conviction." *Strickland*, 466 U.S. at 687. To succeed on an ineffective assistance of counsel claim, a defendant must first show that counsel's performance was deficient. *Id.* "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* Second, a defendant must show that the deficient performance was prejudicial to the defense. *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

The threshold for deficient performance is high. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Defense counsel is afforded significant deference in decisions regarding the course of representation.

Id. Thus, there is a strong presumption that counsel's performance was effective. ***State v. Kylo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In order to rebut the presumption that counsel's performance was effective, defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance[.]" ***Grier***, 171 Wn.2d at 33 (quoting ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, then counsel's performance is not deficient. *Id.* The court must judge the reasonableness of counsel's actions on the facts of the particular case, viewed as of the time of counsel's conduct. ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

If the defendant proves that counsel's performance was deficient, he must also show that deficient performance prejudiced the defense. ***Mierz***, 127 Wn.2d at 471 (citing ***Strickland***, 466 U.S. at 687). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. ***Strickland***, 466 U.S. at 694.

Ineffective assistance of counsel claims are reviewed *de novo*. ***State v. Clark***, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). The burden is on the defendant to show from the record a sufficient basis to rebut the strong presumption counsel's representation was effective. ***State v.***

McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Defendant here fails to satisfy either prong of *Strickland*.

- a. Defendant's fails to show deficient performance because an objection to Carter's testimony would have been overruled.

“Counsel’s decisions regarding whether and when to object fall squarely within the category of strategic or tactical decisions.” *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007). To show that counsel was ineffective for failing to object, defendant must show that the objection would have been sustained. *See Johnston*, 143 Wn. App. at 19; *see In re Davis*, 152 Wn.2d 647, 748, 101 P.3d 1 (2004). “Only in egregious circumstances, on testimony central to the State’s case, will failure to object constitute incompetence of counsel justifying reversal.” *Johnston*, 143 Wn. App. at 19 (*quoting State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)). Failure to make a losing objection will not amount to deficient performance. *See Johnston*, 143 Wn. App. at 19. Here, defendant has not shown that had defense counsel objected to the testimony, the objection would have been sustained.

During the State’s direct examination of the Fife You Store It manager, Patricia Carter, the following series of questions and answers ensued:

State: Now, when you saw the white car and, in particular, the lady, what did you do in order to secure the facility until the police could get there?

Carter: Are you - - you're referring to the day the police came?

State: Yes. On the 22nd of August.

Carter: Okay, 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.

RP 324.

Lay and expert witnesses may not testify as to the guilt of defendants, either directly or by inference. *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002). However, an opinion is not improper merely because it involves an ultimate factual issue. *Id.* at 531. Whether testimony constitutes an impermissible opinion on the defendant's guilt is determined from the circumstances of each case. *State v. Cruz*, 77 Wn. App. 811, 814-15, 894 P.2d 573 (1995). "Evidence is not improper when the testimony is not a direct comment on the defendant's guilt, is helpful to the jury, and [is] based on inferences from the evidence." *Olmedo*, 112 Wn. App. at 531. "[A] lay witness may testify as to observations gleaned from his or her senses as well as to inferences arising from those perceptions." *State v Blake*, 172 Wn. App. 515, 519, 298 P.3d 769 (2012). ER 701 limits opinion testimony by lay witnesses to that which is "(a)

rationality based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702." Carter's testimony was proper under ER 701.

Carter's challenged testimony was based on video surveillance footage she had personally seen. RP 324. Read in context, her testimony explained why she chose to deactivate defendant's gate code and contact police. Because Carter's testimony was based on her personal observations, it did not rely on any scientific, technical, or specialized knowledge.

In sum, Carter's challenged testimony only explained why she took the course of action that she did when she deactivated defendant's gate code and called 911. Carter's testimony was rationally based on her own perceptions, helpful to a clear understanding of her testimony, and not based on scientific, technical, or other specialized knowledge. Accordingly, Carter's testimony was not improper; any objection under ER 701 could not have been sustained.

b. No prejudice resulted from trial counsel's failure to make a losing objection.

To show prejudice, defendant must show that but for defense counsel's failure to object, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant here fails to show that any prejudice resulted from counsel's failure to object to Carter's testimony. The jury would have reached the same verdict regardless of Carter's challenged testimony. Zinn's testimony, combined with the video and photographic evidence, was more than enough for a jury to find defendant guilty beyond a reasonable doubt.

Trial counsel's failure to make a losing objection could not have resulted in any prejudice to defendant. Defendant's ineffective assistance of counsel claim fails.

D. CONCLUSION.

When viewed in the light most favorable to the State, evidence was sufficient for a rational jury to find defendant guilty of one count of first degree burglary, two counts of second degree burglary, and one count of theft of a firearm beyond a reasonable doubt. Defendant's claim that he was denied the right to effective assistance of counsel fails where defendant cannot show that any objection to Carter's testimony would

have been sustained. For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions.

DATED: June 25, 2018

MARK LINDQUIST
Pierce County
Prosecuting Attorney

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WSB # 47838

Madeline Anderson
Rule 9 Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{EFile} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/25/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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