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NO. 52603-4-II consolidated with NO. 53963-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ERIC JACOB NEWMAN,

Appellant.

RESPONDENT'S BRIEF

AND

RESPONSE TO PERSONAL RESTRAINT PETITION

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The prosecutor did not commit misconduct in closing argument because the complained-of argument was not improper and there was not a substantial likelihood that the argument affected the jury verdict.
2. Newman cannot raise the trial court's alleged violation of court rules and constitutional rights during the pretrial release proceedings for the first time on appeal as it is not a manifest constitutional error.
3. The issue of pretrial release conditions and bail is moot; this Court should decline to issue an advisory opinion.

II. STATEMENT OF THE CASE

On January 21, 2018, Ryan Lorenzo lent his truck to his father-in-law. RP 187. At some point overnight between January 21 and January 22, somebody broke into the truck while it was parked at Lorenzo's father-in-law's house and stole various items out of it. RP 188. One of the items taken was Lorenzo's Ruger 1911 .45-caliber semiautomatic firearm. *Id.* This firearm has wooden handgrips that have been custom engraved. RP 205, 188. Only approximately 36 firearms were engraved in this way because they were ordered by Lorenzo's Army platoon to memorialize their tour in Afghanistan. RP 188–89. The gun's magazine had been left behind when the gun was taken. RP 188.

On February 9, 2018, officers with the Longview Police Department Street Crimes Unit served a search warrant at 1940 33rd

Avenue, Apartment number 10, in Longview, Washington. RP 197. Eric Newman was named in the search warrant, which allowed officers to search him and his apartment for illegal drugs. *Id.* Once officers gained entry into the apartment, they observed Newman standing in the space between the living room and kitchen. RP 200. He was detained, as were other individuals present in the residence. *Id.*

Detective Mortensen searched a room that he believed was Newman's. He based this belief on the presence of medical supplies and medical discharge papers with Newman's name on them in the room, knowing Newman had recently suffered a severe leg injury. RP 204, 275. Newman was allowed to change his the bandages on his leg injury prior to being taken to jail and the bandages came from the room officers believed to be Newman's. RP 275. Detective Mortensen found a small safe on the left side of the bed that he handed to Detective Sanders to open. RP 205.

Detective Sanders was initially unable to find a key to the safe so he dropped it on the sidewalk to open it. RP 218. The key was found later on, on the floor between the living room and the kitchen. RP 225. The key was found right where Newman was standing when officers initially opened the apartment door. RP 270. Once Detective Sanders opened the safe, he found Lorenzo's firearm without its magazine, a scale with drug residue, various pills, plastic with 5.9 grams of methamphetamine, a

coffee grinder with heroin residue, and lactose. RP 219–20, 255, 257.

Coffee grinders can be used to mix controlled substances with a cutting agent. RP 221, 273.

Newman had previously been convicted of a felony that qualifies as a serious offense, so is not allowed to own or possess firearms. RP 248.

The State charged Newman with possession of methamphetamine with intent to deliver with a firearm enhancement, possession of heroin, unlawful possession of a firearm, and possession of a stolen firearm. At his first appearance, the State requested bail in the amount of \$50,000 based on Newman's criminal history which includes convictions for assault in the second degree with a deadly weapon, assault in the third degree, felony no-contact order violations, residential burglary, and witness tampering. RP 4. Newman also had six prior bench warrants and a high offender score. *Id.* The attorney that represented Newman at the first appearance requested that Newman be released on his personal recognizance because he had a medical appointment the following Monday. *Id.* The court set bail at \$35,000.

At Newman's pretrial hearing, his attorney again requested a medical PR release so Newman could attend medical appointments and tend to his wounds. RP 7–11. The court declined to change the bail based on the nature of the charges and Newman's criminal history. RP 12. At

some point between that hearing on April 17, 2018, and August 20, 2018, Newman was able to post bail and be released from jail. RP 26, RP 52.

Trial commenced on August 21. RP 52. Newman was found guilty of all charges except the firearm enhancement on August 31, 2018. RP 390, CP 75.

III. ARGUMENT

A. **The prosecutor did not commit misconduct in closing argument because the complained-of argument was not improper and there was not a substantial likelihood that the argument affected the jury verdict.**

With all claims of misconduct, “the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), citing *State v. Luvene*, 132 Wn.2d 668, 701, 903 P.2d 960 (1995). When determining whether conduct was improper, the court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper, misconduct does not require reversal unless there is a substantial likelihood the misconduct affected the verdict. *State v. Wilson*, 20 Wn. App. 592, 595, 581 P.2d 592 (1978).

When a defendant fails to object to allegedly improper comments at trial, the error is considered waived unless the remark is so “flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), quoting *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn. App. 446, 458-59, 749 P.2d 683 (1987). If a defendant – who did not object at trial – can establish that misconduct occurred, then he must also show that “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Under this heightened standard, a reviewing court is to focus less on whether the prosecutor’s conduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. *Id.* at 762; *Russell*, 125 Wn.2d at 85 (“Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.”). The absence of an objection at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

In previous cases where a prosecutor's statements were so prejudicial as to warrant a reversal on appeal, the statements typically either violated a defendant's rights or appealed to the passions of the jury. For example, in *Belgarde*, the prosecutor argued in closing that the defendant was "strong in" a group of deadly madmen and butchers that kill indiscriminately. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). The Washington Supreme Court explained that these comments were improper, whether objected-to or not, because a curative instruction "could not have erased the fear and revulsion a juror would have felt" in response to the graphic statements. *Id.*

In *Reed*, the prosecutor called the defendant a liar four times, inserted his personal beliefs of the defendant's guilt into closing argument, stated the defense did not have a case, and implied the defense witnesses should not be believed because they were from out of town and drove expensive cars. *State v. Reed*, 102 Wn. 2d 140, 145, 684 P.2d 699 (1984). The Supreme Court explained that these comments violated the Code of Professional Responsibility as well as the responsibility of a prosecutor in a fair trial. *Id.* at 145–47. Additionally, the State's evidence was not overwhelming. When combined with the flagrant and ill-intentioned statements by the prosecutor, there was a substantial likelihood that the jury's decision was affected. *Id.* at 147–48.

Similarly, a new trial was ordered in *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005). In that case, the prosecutor mentioned law enforcement's belief that the defendant was guilty multiple times, even after an objection to the testimony had been sustained. *Id.* at 903. The prosecutor also continued to attempt to elicit credibility testimony, and her closing argument referred to the officer's stricken testimony. *Id.* at 905. In that case, there was improper testimony and argument about the State's belief in the credibility of a witness, as well as references to testimony that was not in the record. The Court of Appeals found that the cumulative effect of the prosecutor's improper conduct affected the jury. *Id.* at 907.

Here, the defense did not object to the prosecutor's statement at trial. Therefore, Newman must show that a curative instruction would not have ameliorated any prejudicial effect and that there was a substantial likelihood that the statement affected the jury verdict. That is not shown.

First, prosecutors have wide latitude in closing argument to draw reasonable inferences from the evidence and to express those inferences to the jury. *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). The Court reviews a prosecutor's comments during closing arguments in the context of the total argument, the issues and evidence in the case, and the jury instructions. *Id.* The evidence presented in this case included the

fact that Newman is a convicted felon and did not have permission from the owner of the firearm to have it. RP 190, 248. The firearm was stolen overnight between January 21 and January 22 and was located in Newman's safe on February 9, just over two weeks later. RP 191, 196, 205. Additionally, the firearm was particularly distinctive with custom engraving that the victim had gotten done as a memorial of his time with the Army in Afghanistan. RP 188–89. Only 36 of these firearms were engraved in this way. Finally, when the firearm was stolen, the thief left the magazine behind and, when officers found the gun on February 9, it did not have a magazine inserted. RP 188, 240. The jury was then instructed that direct and circumstantial evidence carry the same weight and that they were permitted to find that Newman acted with knowledge that the firearm was stolen if a reasonable person in the same situation would believe that it was stolen. RP 292, 296–97; CP 40, 53.

While simple possession of stolen property does not establish that a person knew it was stolen, that plus even slightly corroborative evidence of other inculpatory circumstances will support a conviction. *State v. Ford*, 33 Wn. App. 788, 790, 658 P.2d 36 (1983). Additionally, a short period between the theft and the possession strengthens the inference that the possession is unlawful. *State v. Rockett*, 6 Wn. App. 399, 402, 493 P.2d 321 (1972). In fact, possession of property recently stolen during a

burglary, plus other slightly corroborative evidence, can support a conviction for burglary even absent any direct evidence that the defendant entered the property. *State v. Ehrhardt*, 167 Wn. App. 934, 943, 276 P.3d 332 (2012). The reasonable inference in *Ehrhardt* is that, if a person is in possession of recently stolen items, that person is likely the thief.

Here, the evidence showed that Newman was in possession of the stolen firearm a mere 18 days after the theft occurred. Just as in *Ehrhardt*, this raises the reasonable inference that Newman was the person who actually stole the gun and further strengthens the inference that Newman knew the gun was stolen. Additionally, there was other corroborative evidence of Newman's knowledge that the gun was stolen. The firearm at issue is highly distinctive with custom engraving and is not an item that is likely to be sold or transferred by its original owner, given the sentimental value connected with it. Finally, a reasonable person would know that a lawfully acquired firearm would come with a magazine, since a firearm cannot be fully operable without a magazine. If a person comes into possession of a distinctive firearm with no magazine included, a reasonable inference is that it is stolen, especially when that person is ineligible to possess firearms. In this case, sufficient evidence was presented to support the inference that Newman had knowledge the gun

was stolen and there was no prosecutorial misconduct in arguing that inference.

This case is distinguishable from *United States v. Howard*. First, the only evidence presented in *Howard* to establish the knowledge requirement was the fact that the defendant was a convicted felon and the fact that the gun at issue was found next to a different gun with an obliterated serial number. *United States v. Howard*, 214 F.3d 361, 364 (2nd Cir. 2000). The Second Circuit Court of Appeals found that this was insufficient evidence to prove that the defendant knew the gun was stolen. However, the State in this case had substantially more evidence to support the inference that the gun was stolen. Second, *Howard* involved a challenge to the sufficiency of the evidence. It was not argued, and the Court did not find, that the prosecutor committed misconduct in making the argument that the evidence was sufficient. It simply does not constitute misconduct to argue a fact, in concert with other facts, that a different court has said would be insufficient on its own to prove an element of the crime.

Even if this argument was improper, this error could easily have been ameliorated by a curative instruction referring jurors to the instructions that tell them the prosecutor's statements are not evidence, that they are to disregard anything the lawyers say that is not supported by

the evidence, that circumstantial evidence carries the same weight as direct evidence, and that the evidence they are to consider is the testimony and exhibits only. The prosecutor's statement in the case as bar was not so egregious that a curative instruction would have been ineffective. Jurors are presumed to follow instructions. Therefore, an instruction from the court would have cured any potential prejudice.

Newman also fails to show that the prosecutor's argument (that Newman was a convicted felon who could not purchase a firearm legally) affected the jury's verdict. As discussed above, there was other evidence to support the inference that Newman knew the gun was stolen, including the unique nature of the firearm itself, its missing magazine, and how close in time the gun was found in Newman's possession after it was stolen. The jury could infer from this information that the knowledge element had been met.

The argument in this case simply pointed out a reasonable inference from the evidence that had been presented and did not misstate the law or the burden of proof. It in no way rises to the level of the statements made in *Reed* and *Belgarde*. Therefore, Newman does not show that prosecutorial misconduct occurred. His conviction should be affirmed.

Finally, Newman fails to show that trial counsel was ineffective. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). When the claim of ineffective assistance of counsel is based on a failure to object, the defendant must show that an objection to the evidence would likely have been sustained and that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998), *citing State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996). As discussed above, an objection to the prosecutor's argument would not have been sustained, since the argument did not misstate the law or the burden of proof. Therefore, Newman's trial counsel was not ineffective.

B. Newman cannot raise the trial court's alleged violation of court rules and constitutional rights during the pretrial release proceedings for the first time on appeal as it is not a manifest constitutional error.

For the first time on appeal, Newman argues the trial court violated the court rule and his constitutional rights during the pretrial release proceedings when it set his bail and conditions of release. Brief of Appellant 12-24. Newman does not cite RAP 2.5(a) anywhere in his

briefing or explain how this is a manifest constitutional error. This Court should decline to review the matter.

While Newman did request a lower bail or release on his personal recognizance due to medical issues, he did not claim violations of his constitutional rights or the court rule during his pretrial hearings. *See* RP 3–18. An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O’Hara*, 167 Wn.2d 91, 97–98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333–34, 899 P.2d 1251 (1995). This rule is based on the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O’Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two-part test to determine whether the assigned error may be raised for the first time on appeal – “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.*

An error is manifest if the appellant can show actual prejudice. *O’Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* No prejudice is shown if the necessary facts to

adjudicate the alleged error are not part of the record on appeal.

McFarland, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

1. *The alleged error is not of constitutional magnitude.*

The State acknowledges the Washington State Constitution mandates a criminal defendant has a right, except in capital cases, to be bailable by sufficient sureties. Const. art. I, § 20. Therefore, a person who is wrongly denied bail would have a constitutional claim. That is not the case here. The question here is whether the trial court failed to properly follow Criminal Court Rule 3.2 when setting Newman's pretrial release conditions. See Brief of Appellant 12–28. Newman argues his due process right was violated, but fails to make a clear argument as to how that occurred when trial counsel's only objection to the State's bail recommendation was based on Newman's medical concerns, the fact that Newman remained out of custody for much of the pendency of the case, and the fact that the trial court did consider the factors listed in CrR 3.2. RP 4, 8–10, 52. Therefore, the alleged error of improperly imposing pretrial conditions of release without following CrR 3.2 is not an error of constitutional magnitude. However, if this Court finds the error is of constitutional magnitude, Newman must still show the error is manifest. *State v. Knutz*, 161 Wn. App. 395, 406-07, 253 P.3d 437 (2011).

2. *The alleged error is not manifest because no error occurred and the record is not sufficient to determine the merits of the alleged error. Therefore, Newman was not prejudiced.*

Assuming, arguendo, the alleged error is of constitutional magnitude, Newman cannot meet the necessary burden of showing that the alleged error prejudiced him. An error is manifest if a defendant can show actual prejudice. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a “plausible showing...that the asserted error had practical and identifiable consequences in the trial of the case.” *O’Hara*, 167 Wn.2d at 99.

The asserted error has no practicable or identifiable consequence in the trial on the case. Newman has not shown in his briefing what the identifiable consequence was of having bail set in the amount of \$35,000. Newman ultimately did bail out of jail prior to his trial date and cannot show actual prejudice on this record. This Court should find there was not a manifest constitutional error that can be raised for the first time on appeal.

C. Newman’s argument regarding pretrial release conditions is moot and the Court should decline his invitation to render an advisory opinion.

An issue on appeal is moot if the reviewing court can no longer provide the party effective relief. *State v. Harris*, 148 Wn. App. 22, 26, 197 P.3d 1206 (2006), *citing State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d

1225 (2004). An issue that is moot will not be considered unless “it involves matters of continuing and substantial public interest.” *In re Eaton*, 110 Wn.2d 892, 895, 757 P.3d 961 (1988). In *Harris*, the court found Harris’s appellate claim regarding the calculation of his offender score moot because Harris had served all of his incarceration time and was not sentenced to serve community custody. *Harris*, 148 Wn. App. at 26. Harris would have had cause for relief if he had been sentenced to community custody that would have ended earlier if he had been sentenced under the appropriate offender score. *Id.* at 27. There was no relief that could be offered to Harris because he had already served all of his time. *Id.* at 26–27.

Here, Newman acknowledges that the issue of the trial court’s imposition of pretrial release conditions is moot but invites the court to address it regardless. Brief of Appellant 27–28. While courts have addressed moot issues when they constitute a matter of continuing and substantial public interest, that is not shown here. *See State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). Newman complains the superior court in this case refused to apply CrR 3.2. Brief of Appellant 14. However, the trial court did consider the relevant facts listed in CrR 3.2(c) and (e). The trial court considered Newman’s criminal record, the nature of the charge, Newman’s past record of threats to victims or interference

with witnesses, as well as Newman's past record of deadly weapons. RP 3-5. While the trial court did not explicitly state the reasons for the bail amount he set, the inference is that he based his decision on the information provided by the State and defense counsel, which covered the relevant portions of CrR 3.2.

Newman makes the broad, sweeping assertion that this is a continuing issue and of substantial interest. Brief of Appellant 14. A trial court who considered the relevant factors listed in CrR 3.2 is hardly proof of a matter of continuing and substantial public interest. This Court does not give advisory opinions, which in essence is what Newman is requesting this Court render. *Commonwealth Ins. v. Grays Harbor Cty.*, 120 Wn. App. 232, 245, 84 P.3d 304 (2004).

The trial court's determination of Newman's pretrial conditions of release is moot. This Court should decline his invitation to issue an opinion that would have no bearing on his case. The trial court in Newman's case adhered to the rule, and this Court should affirm his convictions.

D. Response to Newman’s personal restraint petition, case number 53963-3-II, which has been consolidated with his direct appeal.

1. *Answer to petition*

Newman’s conviction is lawful and his petition should be denied.

2. *Authority for restraint*

Newman is being restrained pursuant to the judgement and sentence entered on October 1, 2018, in Cowlitz County Superior Court Cause No. 18-1-00326-08. Newman was found guilty after jury trial of one count each of possession of methamphetamine with intent to deliver, possession of heroin, unlawful possession of a firearm in the first degree, and possession of a stolen firearm. The Cowlitz County Superior Court imposed sentences of 108 months, 24 months, 87 months, and 72 months, respectively. All counts were ordered to be run concurrent except the unlawful possession of a firearm and the possession of a stolen firearm. RP 421, CP 81.

3. *Argument*

A petitioner may request relief through a personal restraint petition when he is under unlawful restraint. RAP 16.4(a)–(c). A personal restraint petition is not a substitute for an appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823–24, 650 P.2d 1103 (1982). Our Supreme Court has limited collateral relief available through a PRP because “it

undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992)).

To obtain relief, a personal restraint petitioner must prove either (1) a constitutional error that results in actual and substantial prejudice or (2) a non-constitutional error that “constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” *Davis*, 152 Wn.2d at 672, 101 P.3d 1 (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). The petitioner must prove any such error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). Any inferences must be drawn in favor of the validity of the judgment and sentence. *Hagler*, 97 Wn.2d at 825. A petitioner must present evidence showing his factual allegations are based on more than mere speculation, conjecture, or inadmissible hearsay. *In re Pers. Restraint of Rice*, 118 Wash.2d 876, 886, 828 P.2d 1086 (1992). Bald assertions and conclusory allegations are insufficient. *Id.* Even if a petitioner shows a constitutional error, he must then meet the burden of showing actual prejudice. If he fails to do so, the petition must be dismissed. *Hews v. Evans*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

A petition must include a statement of facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 759 P.2d 436 (1988). Personal restraint petition claims must be supported by affidavits stating particular facts, certified documents, transcripts, and the like. *Williams*, 111 Wn.2d at 364; *see also In re Pers. Restraint of Connick*, 144 Wn.2d 442, 28 P.3d 729 (2001). “If [a] petitioner’s allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief.” *In re Connick*, 144 Wn.2d at 451.

Arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant); RAP 10.3(a).

In this case, Newman fails to show any constitutional error, and also fails to show actual prejudice. No analysis was provided to support

his assertions and only limited case law citations were included.

Therefore, this Court should decline to address these claims.

In his petition, Newman first asserts that he was restrained without a proper restraint order, that there were officers within five feet of him during trial, and that he was unlawfully arrested by Department of Corrections officers in front of jury members. He provides no evidence to support these assertions and none appears in the record. The record does indicate that Newman was arrested by DOC officers after the second day of trial, RP 333, but there is no indication that jurors were present or observed this interaction. There is no evidence in the record that he was restrained or the position of any corrections officers in relation to him. Without this information, Newman's claims are merely bald assertions and conclusory allegations, which are insufficient to prove any error occurred.

Newman also argues that the State erred in eliciting testimony and arguing the existence of the key to the safe, which was located on the floor where Newman was standing when officers entered his residence. RP 225, 270. He provides no authority to support the proposition that all items of evidence must be seized and introduced at trial, as opposed to witnesses testifying about the items. He similarly provided no authority or explanation for how the State's case failed to prove the *corpus delicti* of the crimes charged. Therefore, he fails to prove error occurred.

Finally, Newman fails to prove ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). To prove that counsel was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995).

Even if a defendant can show that counsel was deficient, he must also show he was prejudiced by the deficiency. Prejudice is shown when "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* Therefore, even if, he or she also must show that the deficiency caused prejudice. In this case, Newman cannot show that trial counsel was deficient or that he suffered prejudice.

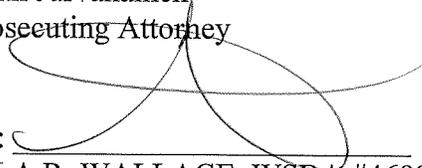
As argued above, when no meaningful analysis is provided, the claim should not be considered. Newman does not address this claim in the body of his brief and therefore it should be considered abandoned.

IV. CONCLUSION

Newman's convictions for possession of methamphetamine with intent to deliver, possession of heroin, unlawful possession of a firearm, and possession of a stolen firearm should be affirmed as the prosecutor did not commit misconduct, trial counsel was effective, and pretrial release or bail are not issues properly before this Court.

Respectfully submitted this 28 day of February, 2020.

Ryan Jurvakainen
Prosecuting Attorney

By: 
AILA R. WALLACE, WSBA #46898
Deputy Prosecuting Attorney

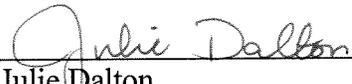
CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that the opposing counsel listed below was served RESPONDENT'S BRIEF AND RESPONSE TO PERSONAL RESTRAINT PETITION electronically via the Division II portal:

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

Signed at Kelso, Washington on February 28, 2020 .



Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

February 28, 2020 - 2:46 PM

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