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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

NATHANIEL WILFRED BROUSSARD,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Judge James Orlando

No. 18-1-01165-7

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RESTATEMENT OF THE ISSUES 2

 A. Whether, viewing the evidence in the light most favorable to the State, sufficient evidence proves that Mr. Broussard possessed tools meant to assist him in burglarizing Ms. Mitrovich’s shed with the object of stealing her property. 2

 B. Whether the trial court properly exercised its discretion in denying Mr. Broussard’s motion to dismiss for governmental misconduct when Mr. Broussard failed to establish that the Pierce County Sheriff’s Department’s Facebook post actually prejudiced his right to receive a fair trial. 2

III. STATEMENT OF THE CASE..... 2

IV. ARGUMENT 10

 A. Viewing the evidence in the light most favorable to the State, sufficient evidence proves that Mr. Broussard carried tools meant to assist him in burglarizing Ms. Mitrovich’s shed with the object of stealing her property. 10

 1. Viewing the evidence in the light most favorable to the State, sufficient evidence proves that Mr. Broussard committed burglary in the second degree when he admitted that he entered Ms. Mitrovich’s shed to take property that did not belong to him, and Ms. Mitrovich’s deposit slip book was discovered concealed in his pocket upon his arrest. 11

2.	Viewing the evidence in the light most favorable to the State, sufficient evidence proves that Mr. Broussard unlawfully possessed burglary tools when he was found holding drills, drill bits, a screwdriver, and gloves along with Ms. Mitrovich's deposit slips, inside of Ms. Mitrovich's shed.	18
B.	The trial court properly exercised its discretion in denying Mr. Broussard's motion to dismiss for governmental misconduct, because Mr. Broussard failed to establish that the Facebook post actually prejudiced his right to receive a fair trial.	21
V.	CONCLUSION.....	33

TABLE OF AUTHORITIES

State Cases

<i>State v. Bajardi</i> , 3 Wn. App. 2d 726, 418 P.3d 164 (2018).....	11
<i>State v. Blizzard</i> , 195 Wn. App. 717, 381 P.2d 1241 (2016), <i>review denied</i> 187 Wn.2d 1012, 388 P.3d 485 (2017).....	30
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	11
<i>State v. Cardenas-Flores</i> , 189 Wn.2d 243, 401 P.3d 19 (2017).....	11
<i>State v. Collins</i> , 50 Wn.2d 740, 314 P.2d 660 (1957).....	32
<i>State v. Cory</i> , 62 Wn.2d 371, 382 P.2d 1019 (1963)	28, 29, 30
<i>State v. Ehrhardt</i> , 167 Wn. App. 934, 276 P.3d 332 (2012).....	15
<i>State v. Elmore</i> , 139 Wn.2d 250, 985 P.2d 289 (1999)	32
<i>State v. Farnsworth</i> , 185 Wn.2d 768, 374 P.3d 1152 (2016)	11
<i>State v. Fitzpatrick</i> , 141 Wash. 638, 251 P.875 (1927)	20
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	33
<i>State v. Granacki</i> , 90 Wn. App. 598, 959 P.2d 667 (1998)	28, 29, 30
<i>State v. Grayson</i> , 48 Wn. App. 667, 739 P.2d 1206 (1987)	15
<i>State v. Irby</i> , 3 Wn. App. 2d 247, 415 P.3d 611 (2018).....	28, 29, 30
<i>State v. Jensen</i> , 149 Wn. App. 393, 203 P.3d 393 (2009)	17
<i>State v. Joy</i> , 121 Wn.2d 333, 851 P.2d 654 (1993).....	11
<i>State v. Kone</i> , 165 Wn. App. 420, 266 P.3d 916 (2011).....	22, 23, 27

<i>State v. Mace</i> , 97 Wn.2d 840, 650 P.2d 217 (1982)	12
<i>State v. Martinez</i> , 121 Wn. App. 21, 86 P.3d 1210 (2004).....	27, 28
<i>State v. Michielli</i> , 132 Wn.2d 229, 937 P.2d 587 (1997).....	27, 28
<i>State v. Miller</i> , 90 Wn. App. 720, 954 P.2d 925 (1998)	20, 21
<i>State v Miller</i> , 92 Wn. App. 693, 964 P.2d 1196 (1998)	22
<i>State v. Momah</i> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	23
<i>State v. Munzanreder</i> , 199 Wn. App. 162, 398 P.3d 1160 (2017).....	23, 30, 31, 32
<i>State v. Norby</i> , 122 Wn.2d 258, 858 P.2d 210 (1993)	23
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	10
<i>State v. Olsen</i> , 43 Wn.2d 726, 263 P.2d 824 (1953).....	20
<i>State v. Olson</i> , 182 Wn. App. 362, 329 P.3d 121 (2014).....	17
<i>State v. Pena-Fuentes</i> , 179 Wn.2d 808, 318 P.3d 257 (2014).....	29, 30
<i>State v. Rich</i> , 184 Wn.2d 897, 365 P.3d 746 (2016).....	11
<i>State v. Salgado-Mendoza</i> , 189 Wn.2d 420, 403 P.3d 45 (2017).....	22
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	11
<i>State v. Sherman</i> , 59 Wn. App. 763, 801 P.2d 274 (1990).....	27, 28
<i>State v. Tharp</i> , 42 Wn.2d 494, 256 P.2d 482 (1953)	32
<i>State v. Walters</i> , 56 Wn.2d 79, 351 P.2d 147 (1960).....	15
<i>State v. Woods</i> , 63 Wn. App. 588, 821 P.2d 1235 (1991)	16

Statutes

RCW 9A.08.010(1)(a) 12

RCW 9A.52.030..... 11

RCW 9A.52.060(1)..... 18

Rules and Regulations

CrR 8.3(b) 1, 3, 4, 5, 21, 24, 27, 29, 30, 33

I. INTRODUCTION

Nathaniel Broussard was arrested by the Pierce County Sheriff's Department when he was found inside of Shirley Mitrovich's shed with a bag of drills, drill bits and gloves, a screwdriver, and Ms. Mitrovich's deposit slips in his pocket.

A jury properly convicted Mr. Broussard of burglary in the second degree and of making or having burglary tools. Sufficient evidence proved that Mr. Broussard possessed the drills, drill bits, gloves and screwdriver to burglarize Ms. Mitrovich's shed, and that Mr. Broussard entered the shed intending to steal Ms. Mitrovich's property. Additionally, the trial court properly held that Mr. Broussard's right to a fair trial was not actually prejudiced by the Pierce County Sheriff's Department's Facebook post announcing Mr. Broussard's arrest for burglary on Ms. Mitrovich's property. None of the empaneled jurors saw the post so their ability to be fair and impartial was not impacted.

Because sufficient evidence proves that Mr. Broussard committed the crimes of both making or possessing burglary tools and burglary in the second degree, and because Mr. Broussard cannot show that the trial court abused its discretion in denying his CrR 8.3(b) motion to dismiss when he

never suffered actual prejudice as a result of the Facebook post, this Court should affirm Mr. Broussard's convictions.

II. RESTATEMENT OF THE ISSUES

- A. Whether, viewing the evidence in the light most favorable to the State, sufficient evidence proves that Mr. Broussard possessed tools meant to assist him in burglarizing Ms. Mitrovich's shed with the object of stealing her property.
- B. Whether the trial court properly exercised its discretion in denying Mr. Broussard's motion to dismiss for governmental misconduct when Mr. Broussard failed to establish that the Pierce County Sheriff's Department's Facebook post actually prejudiced his right to receive a fair trial.

III. STATEMENT OF THE CASE

Procedural History

On March 26, 2018, the Pierce County Prosecutor's Office charged defendant Nathaniel Broussard with burglary in the first degree, unlawful possession of a firearm in the first degree, unlawful possession of a controlled substance – methamphetamine, identity theft in the second degree, and making or having burglary tools. CP 1-3. Three days later, the Pierce County Sheriff's Department made a Facebook post on the department's page entitled “Bad boys, bad boys, whatcha gonna do, whatcha gonna do when they come for you’; serial burglar caught in shed, deputies recognize him from COPS episode & arrest him for the 32nd time!” CP 77-79, 173-175. The Facebook post detailed the circumstances

surrounding the defendant's arrest and allowed commentary from the public. CP 77-92, 173-188.

Prior to trial, Mr. Broussard moved to dismiss his case pursuant to CrR 8.3(b) and claimed outrageous government misconduct, alleging the Pierce County Sheriff's Department's act of publishing the article on its Facebook page constituted government misconduct and that the Facebook post prejudiced his right to a fair trial. CP 58-133. The State contended that the Facebook post did not constitute government misconduct, and that even if it was misconduct, Mr. Broussard failed to show that his right to a fair trial had actually been prejudiced. CP 134-188.

The court denied Mr. Broussard's CrR 8.3(b) motion to dismiss without prejudice and also denied his motion to dismiss for outrageous government misconduct. CP 201-202. Even though the court found that the Pierce County Sheriff's Department committed misconduct by publishing the Facebook post and allowing comments to be viewed, the court ultimately held that Mr. Broussard failed to show that his right to a fair trial

was *actually* prejudiced.¹ CP 201. *See also*, 01/14/19 RP 40-48 (trial court’s oral ruling).² The court noted that actual prejudice could be “eviscerated or eliminated by voir dire.” 01/14/19 RP 46. In its order denying the defendant’s motion to dismiss, the court ordered that the Pierce County Sheriff’s Department delete the Facebook post and its associated comments within 48 hours; the court ordered a copy of the order be provided to Sheriff Paul Pastor. 01/04/19 RP 47; CP 201. The Pierce County Sheriff’s Department complied with the order and deleted the post. 06/18/19 RP 5.

The case proceeded to jury trial on amended charges of burglary in the second degree, unlawful possession of a controlled substance – methamphetamine, identity theft in the second degree, and making or having burglary tools. CP 191-193, 286-288. Prior to voir dire, Mr. Broussard’s counsel submitted a questionnaire specifically addressing whether the jurors had seen the Facebook post at issue and whether jurors were familiar with Mr. Broussard’s case. 06/18/19 RP 4-5; CP 289-293. During voir dire, the parties asked potential jurors about whether they had viewed any content pertaining to Mr. Broussard or his case. CP 289-293,

¹ At the CrR 8.3(b) hearing, the State argued that the Facebook post was not misconduct but the trial court disagreed, and the State did not cross-appeal that finding.

² The trial volumes of the verbatim report of proceedings are paginated consecutively, while other volumes are paginated separately. Therefore, the verbatim report of proceedings will be referred to by the relevant date followed by “RP” and the page number (e.g. 06/24/19 RP 135).

435-675. Those who had seen or heard about Mr. Broussard's case were excused.³ *See* 06/19/19 RP 97-100, 107-10; CP 306-309.

Mr. Broussard did not exercise all available peremptory challenges available to him; he only made two challenges out of the six available. CP 310. He accepted the panel of twelve with juror numbers 33 and 35 as alternates. CP 310. Ultimately, no jurors seated on Mr. Broussard's case saw the Facebook post or were familiar with Mr. Broussard's case. CP 306-309, 311, 436-439, 444-447, 448-451, 472-475, 476-479, 480-483, 496-99, 512-515, 516-519, 528-531, 536-539, 540-543, 564-567, 572-575. The defense never renewed its CrR 8.3(b) motion to dismiss.

Mr. Broussard elected not to testify at trial. 06/25/19 RP 298-99. The jury found Mr. Broussard guilty of Count I, burglary in the second degree; Count II, unlawful possession of a controlled substance; and Count IV, making or possessing burglary tools. CP 422, 424-425. The Court dismissed Count III, identity theft in the second degree. 06/25/19 RP 294-95; CP 686. The court sentenced Mr. Broussard to 60 months in the Department of Corrections for Count I and 24 months for Count II, with both counts to run concurrently. CP 688. For Count IV, the court sentenced

³ When discussing juror challenges for cause, defense counsel informed the court, "Then I think the hardships took out everybody else who had seen or heard about the case. I have no further motions. I'm ready to continue." 06/19/19 RP 108. The State did not oppose defense's motions for cause. 06/19/19 RP 110.

him to 364 days in jail to run concurrently with his felony sentence. CP 699-703. Additionally, the court ordered 12 months of community custody for Count II and imposed a \$500 crime victim assessment. CP 686, 688. Mr. Broussard timely appealed. CP 839.

Statement of Facts

On March 24, 2018, Pierce County Sheriff's Deputy Bradley Crawford was dispatched to a residential burglary in progress at 13721 6th Avenue South in Parkland, Washington. 06/24/19 RP 135-36. The reporting party, neighbor Norma Jean Spencer, described the burglar as a thin male, about 5'11", wearing dark clothing and carrying a backpack. 06/24/19 RP 136, 249. Ms. Spencer saw the burglar approach the front door of her neighbor's house across the street and try to get into the front door without knocking; he stood there "long enough to shake it and try to open it when it wouldn't open." 06/24/19 RP 254-255. The owner of the property, Shirley Mitrovich, had not lived there for a while due to some health issues. 06/24/19 RP 247-248. Ms. Mitrovich left her personal belongings in the house, and she had asked Ms. Spencer to keep an eye on the property, because "people started breaking in" even after Ms. Mitrovich had installed an alarm system. 06/24/19 RP 247.

When he arrived at the residence, Deputy Crawford noticed the home was surrounded by a chain link fence, and the gate to the fence was ajar. 06/24/19 RP 136. Deputy Crawford learned that the suspect might have slipped into the backyard. 06/24/19 RP 136. Deputy Crawford observed a shed in the backyard, and as he drew closer to the shed, he saw the door move. 06/24/19 RP 136-37. A person was clearly inside of the shed. 06/24/19 RP 136-37. When Deputy Crawford ordered the person to come out of the shed, a man emerged into the doorway and dropped a black bag in the threshold of the door. 06/24/19 RP 137. Immediately, Deputy Crawford recognized the man – defendant Nathaniel Broussard -- from “numerous prior contacts.” 06/24/19 RP 137. While he detained Mr. Broussard in handcuffs, Deputy Crawford asked him if he had any weapons. 06/24/19 RP 138. Mr. Broussard admitted that he had a knife, and Deputy Crawford observed an empty knife sheath affixed to Mr. Broussard’s belt. 06/24/19 RP 138. Deputy Crawford quickly cleared the shed to make sure no one else was left inside and returned to inform Mr. Broussard of his *Miranda* rights. 06/24/19 RP 138. Deputy Crawford then frisked Mr. Broussard for weapons and found a concealed pistol in his left pants pocket.⁴ 06/24/19 RP 139. After finding the pistol, Deputy Crawford further

⁴ The firearm was later determined to have a cracked slide and missing firing pin assembly. *See* 06/24/19 RP 164, 166-69.

searched Mr. Broussard and located a screwdriver, which he noted was a “possible burglary tool,” along with a blowtorch lighter that Deputy Crawford recognized to be used to “heat up glass pipes which are used to smoke methamphetamine.” 06/24/19 RP 140. Finally, in Mr. Broussard’s left jacket pocket, Deputy Crawford recovered a red leather wallet containing deposit slips from the Employees Educational Credit Union. 06/24/19 RP 140. The deposit slips had Shirley Mitrovich’s name on them. 06/24/19 RP 140. Mr. Broussard admitted he did not know Shirley Mitrovich. 06/24/19 RP 142, 215.

After clearing the home with another police officer, Deputy Crawford returned to the shed and retrieved the bag that Mr. Broussard had dropped in the doorway. 06/24/19 RP 141. Inside of the reusable shopping bag, Deputy Crawford found a DeWalt tool bag containing two cordless DeWalt drills and several drill bits that Deputy Crawford recognized as “potential burglary tools that could be used to force entry into a residence, or, say, shed.” 06/24/19 RP 141. Along with the collection of tools, Mr. Broussard’s bag contained a pair of black gloves that Deputy Crawford noted “could potentially be used to prevent from leaving fingerprints at the scene of a burglary.” 06/24/19 RP 141.

Deputy Crawford then searched the shed and found a “throwing dart-style” double-edged dagger. 06/24/19 RP 141. The actual blade on the

dagger was “approximately a few inches in length.” 06/24/19 RP 141. After Deputy Crawford recovered Mr. Broussard’s dagger and his bag containing the two DeWalt drills, drill bits and gloves, Deputy Crawford returned to his patrol car to speak with Mr. Broussard. 06/24/19 RP 142.

When he was asked why he was at the residence, Mr. Broussard told Deputy Crawford that he “believed the residence was vacant and that he went into the shed to take items from it.” 06/24/19 RP 177. Mr. Broussard also claimed to have forgotten that he had the gun on him, which he said he acquired from a “black male with the street name Shorty.” 06/24/19 RP 178. He later said he obtained the gun “from someone who was throwing it away.” 06/24/19 RP 178.

When Deputy Crawford asked Mr. Broussard about the book of deposit slips recovered from his pocket, Mr. Broussard confessed that he had taken it from the shed. 06/24/19 RP 178. He also admitted that he did not know Shirley Mitrovich. 06/24/19 RP 178. Deputy Crawford asked Mr. Broussard “if he knew about whether or not it was illegal to enter buildings and take things that didn’t belong to him.” 06/24/19 RP 178-79. Mr. Broussard admitted he knew it was. 06/24/19 RP 179. Mr. Broussard added that “it was a mistake what he did.” 06/24/19 RP 179.

Deputy Crawford searched some inner pockets on Mr. Broussard’s clothing, and he located a glass pipe with a “long stem with a bulbous end

containing white residue” which he knew to be “used to smoke only methamphetamine.” 06/24/19 RP 179. Along with the pipe, Deputy Crawford also found a “baggie containing what [he] recognized immediately to be methamphetamine.” 06/24/19 RP 179. Mr. Broussard admitted that the substance was methamphetamine, and that he last used the pipe to ingest methamphetamine “sometime between several hours to a day ago.” 06/24/19 RP 181. The substance found in the baggie was later tested and found to be methamphetamine. 06/24/19 RP 266. After contacting the owner of the shed – Ms. Mitrovich – Deputy Crawford transported Mr. Broussard to the Pierce County Jail. 06/24/19 RP 142-43, 188.

IV. ARGUMENT

A. Viewing the evidence in the light most favorable to the State, sufficient evidence proves that Mr. Broussard carried tools meant to assist him in burglarizing Ms. Mitrovich’s shed with the object of stealing her property.

Viewing the evidence in the light most favorable to the State, sufficient evidence proves that Mr. Broussard carried tools meant to assist him in burglarizing Ms. Mitrovich’s shed to steal her property. Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. O’Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). The applicable standard of review for sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt.” *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

When considering evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Bajardi*, 3 Wn. App. 2d 726, 733, 418 P.3d 164 (2018) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). A challenge to the sufficiency of the evidence admits the truth of all of the State’s evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). All reasonable inferences are drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Direct and circumstantial evidence are to be considered equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016). Sufficiency of the evidence is reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

- 1. Viewing the evidence in the light most favorable to the State, sufficient evidence proves that Mr. Broussard committed burglary in the second degree when he admitted that he entered Ms. Mitrovich’s shed to take property that did not belong to him, and Ms. Mitrovich’s deposit slip book was discovered concealed in his pocket upon his arrest.**

RCW 9A.52.030 defines burglary in the second degree: A person is guilty of burglary in the second degree if, with the intent to commit a crime

against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or dwelling.

To convict Mr. Broussard of burglary in the second degree as charged in Count I, the State had to prove each of the following elements beyond a reasonable doubt:

1. That on or about the 24th day of March 2018, [Mr. Broussard] entered or remained unlawfully in a building;
2. That the entering or remaining was with the intent to commit a crime against a person or property therein; and
3. That this act occurred in the State of Washington.

CP 399.

A person acts with intent or intentionally when acting with the object or purpose to accomplish a result that constitutes a crime. RCW 9A.08.010(1)(a); CP 397. It is well established that proof of possession of recently stolen property, when accompanied by other evidence of guilt, is sufficient to support a conviction for burglary. *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). Along with possession of recently stolen property, even slight corroborative evidence of other inculpatory circumstances tending to demonstrate guilt will support a conviction for burglary in the second degree; other corroborative evidence may include the mere “presence of the accused near the scene of the crime.” *Id.*

Mr. Broussard only challenges the element of entering or remaining with the intent to commit a crime against a person or property therein. Brief of Appellant at 16. Here, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved beyond a reasonable doubt that Mr. Broussard entered or remained in Ms. Mitrovich's shed with the intent to commit a crime therein. Mr. Broussard's possession and concealment of Ms. Mitrovich's deposit slips, combined with the inculpatory circumstances of his suspicious appearance and behavior upon entering the property, his admissions at the scene, and his possession of burglary tools demonstrate that Mr. Broussard entered the shed to commit a crime therein – to steal items from the shed.

It is undisputed that Mr. Broussard was concealing Ms. Mitrovich's deposit slips on his person when he was arrested. 06/24/19 RP 140, 170; Brf. App. at 4, 5. Mr. Broussard admitted to Deputy Crawford that the deposit slips came from the shed. 06/24/19 RP 199.

Furthermore, Mr. Broussard's appearance and behavior raised suspicions about his motives. Ms. Spencer saw Mr. Broussard, clad in dark clothing and carrying a backpack, attempt to enter the front door of the residence without knocking. 06/24/19 RP 148, 255. She noticed he stood at the front door "long enough to shake it and try to open it when it wouldn't open." 06/24/19 RP 254. When the front door defeated Mr. Broussard's

attempt to enter the residence, Ms. Spencer saw him slip “through a gate to her backyard where a shed was back there...” 06/24/19 RP 249.

What is more, Mr. Broussard admitted to intending to commit a crime. He explicitly told Deputy Crawford that he thought the house was vacant, and that he entered the shed “to take items.” 06/24/19 RP 161. Mr. Broussard admitted that he did not know Shirley Mitrovich, the owner of the property and the owner of the deposit slips later discovered concealed inside of his pocket. 06/24/19 RP 178, 215. Indeed, Mr. Broussard admitted that he knew it was illegal to enter buildings and take things that did not belong to him. 06/24/19 RP 178-79. He confessed that “it was a mistake what he did.” 06/24/19 RP 179.

Finally, police recovered various tools commonly used to commit burglary from Mr. Broussard’s person and the bag he was holding in the shed, evincing his intent to commit a crime on Ms. Mitrovich’s property. He concealed two cordless DeWalt drills and several drill bits in a reusable grocery bag. 06/24/19 RP 141. Deputy Crawford believed that the drills were “potential burglary tools that could be used to force entry into a residence, or, say, shed.” 06/24/19 RP 141. The bag also contained gloves that Deputy Crawford noted “could potentially be used to prevent from leaving fingerprints at the scene.” 06/24/19 RP 141. Finally, Deputy Crawford located a screwdriver in Mr. Broussard’s right pocket, which

Deputy Crawford also believed to be “a possible burglary tool.” 06/24/19 RP 140.

Sufficient evidence proved second degree burglary in *State v. Ehrhardt*, 167 Wn. App. 934, 943-44, 276 P.3d 332 (2012), where Ehrhardt was present near the scene of the crime, he was later discovered with a gas can recently stolen from the victim’s property, and items from the victim’s property had been removed from a shed and piled nearby. *See also, State v. Grayson*, 48 Wn. App. 667, 739 P.2d 1206 (1987) (finding evidence that Grayson knocked on the victim’s door the morning of the crime, that he was aware the house was occupied by a person he did not know, and that he forced open the kitchen door and fled immediately upon being discovered by the victim was sufficient to support a burglary conviction); *State v. Walters*, 56 Wn.2d 79, 351 P.2d 147 (1960) (holding that sufficient evidence supported submission to a jury the question of whether Walters entered the apartment with the intent of committing a crime therein, when Walters was apprehended inside of an apartment building, the entrances to which were locked, and gave a false reason for being there, and where police officer testified that strips of celluloid, a pencil flashlight and fishhook found in Walters’ possession in his vehicle and in possession of person accompanying him were burglary tools). Indeed, sufficient evidence proves Mr. Broussard committed second degree burglary where he was not only

located *near* the scene of the crime but was found *inside* of the shed and was discovered concealing Ms. Mitrovich's deposit slips and a screwdriver in his pocket along while he possessed a bag containing drills, drill bits and gloves.

Mr. Broussard incorrectly relies on *State v. Woods*, 63 Wn. App. 588, 821 P.2d 1235 (1991), to argue his lack of intent to commit a crime inside of Ms. Mitrovich's shed. The facts of *Woods* are easily distinguishable from this case. The court held that because Woods' *own possessions* remained locked inside of his mother's house and he kicked in the door to retrieve his *own property*, he did not possess the requisite intent to commit a crime by procuring the property "of another." 63 Wn. App. at 591-92. Here, Mr. Broussard entered Ms. Mitrovich's shed to retrieve property that *did not belong to him*; indeed, Ms. Mitrovich's deposit slip was located inside of Mr. Broussard's pocket. Moreover, Mr. Broussard admitted that he entered Ms. Mitrovich's shed to "take items," that he knew it was illegal to "enter buildings and take things that didn't belong to him," and that what he did was "a mistake." 06/24/19 RP 161, 178-79.

Additionally, Mr. Broussard erroneously claims that he did not commit theft because he believed the property to be abandoned. Brf. App. at 19. Mr. Broussard's claim fails because the defense of abandonment does not apply to burglary. *See State v. Jensen*, 149 Wn. App. 393, 203 P.3d 393

(2009); *State v. Olson*, 182 Wn. App. 362, 329 P.3d 121 (2014).

Furthermore, the trial court denied Mr. Broussard's request for an abandonment instruction:

I wouldn't be inclined to give the proposed number two...there was property that was stored in the shed. There was property in the house that was just moved out the other day. I don't think there is a sufficient showing that the property was abandoned in a technical sense to justify giving that instruction....

06/25/19 RP 301. Mr. Broussard does not claim error on appeal for the trial court's failure to give the proposed abandonment instruction. Accordingly, Mr. Broussard's claim that he could not have committed theft because the property was abandoned fails.

Mr. Broussard unequivocally demonstrated intent to commit a crime when he was found with Ms. Mitrovich's deposit slips on his person as well as his admission that he knew it was illegal to take items from the shed not belonging to him. These circumstances constitute the requisite inculpatory corroborative evidence of guilt sufficient to find that Mr. Broussard entered and remained in Ms. Mitrovich's shed with the intent to commit a crime against a person or property therein. Accordingly, this Court should affirm Mr. Broussard's conviction for burglary in the second degree.

2. **Viewing the evidence in the light most favorable to the State, sufficient evidence proves that Mr. Broussard unlawfully possessed burglary tools when he was found holding drills, drill bits, a screwdriver, and gloves along with Ms. Mitrovich's deposit slips, inside of Ms. Mitrovich's shed.**

RCW 9A.52.060(1) defines the crime of making or having burglar

tools as:

Every person who shall make or mend or use to be made or mended, or have in his or her possession, any engine, machine, tool, false key, pick lock, bit, nippers, or implement adapted, designed, or commonly used for the commission of burglary under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of burglary, or knowing the same is intended to be used, shall be guilty of making or having burglar tools.

To convict Mr. Broussard of making or having burglary tools, the State had to prove each of the following elements beyond a reasonable doubt:

1. That on or about the 24th day of March 2018, [Mr. Broussard] possessed a tool, bit, or implement adapted, designed, or commonly used for the commission of burglary;
2. That [Mr. Broussard's] actions were under circumstances evincing an intent to use or employ the tool, bit, or implement in the commission of a burglary; and
3. That this act occurred in the State of Washington.

CP 414.

As discussed above, a person acts with intent or intentionally when acting with the object or purpose to accomplish a result that constitutes a

crime. CP 397. And a person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. CP 396. It is not necessary that the person know the fact, circumstance, or result is defined by law as being unlawful or an element of a crime. CP 396. Furthermore, if a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact. CP 396.

Here, Mr. Broussard challenges only the element that his actions were under circumstances evincing an intent to use or employ the tool, bit, or implement in the commission of a burglary. Brf. App. at 21.

Again, an examination of the circumstances surrounding Mr. Broussard's possession of the drills, drill bits, screwdriver and gloves easily reveals his intent to employ those items to burglarize Ms. Mitrovich's shed. When police discovered him inside Ms. Mitrovich's shed, he was holding a reusable shopping bag. 06/24/19 RP 141. Concealed inside of the reusable shopping bag, Deputy Crawford found a "DeWalt tube of tool bags" containing the "two cordless DeWalt drills, several drill bits...and a pair of black gloves." 06/24/19 RP 141. Upon a search of Mr. Broussard's person, Deputy Crawford located a screwdriver inside of Mr. Broussard's left pocket. 06/24/19 RP 140. Deputy Crawford "recognized [these tools] ...as

potential burglary tools,” and noted that the pair of black gloves “could potentially be used to prevent from leaving fingerprints at the scene of the burglary.” 06/24/19 RP 140-41.

In *State v. Fitzpatrick*, 141 Wash. 638, 640, 251 P.875 (1927), the court clarified that “it cannot be said that there is no rational connection between the possession of false keys and picklocks and the presumed intent to use them in the commission of a crime.” The *Fitzpatrick* court affirmed Fitzpatrick’s conviction for possession of burglary tools when seven false telephone keys and two “pick” keys commonly used by burglars for the purpose of picking locks were found in his pockets. *Id.* at 639-40. Likewise, in *State v. Olsen*, 43 Wn.2d 726, 730-31, 263 P.2d 824 (1953), sufficient evidence supported a conviction for possession of burglary tools where the defendant was found with a bag of tools, commonly used by safe burglars, hidden in his car’s engine and fruits of the burglary were found in his car. Here, Mr. Broussard possessed burglary tools when police found him holding the bag of drills, drill bits and gloves inside of Ms. Mitrovich’s shed and police recovered a screwdriver in his pocket; Deputy Crawford recognized these tools as the type commonly used to commit burglary.

Furthermore, Mr. Broussard incorrectly relies on *State v. Miller*, 90 Wn. App. 720, 954 P.2d 925 (1998), as the facts of that case are not akin to what transpired here. In *Miller*, the court found insufficient evidence of

burglary and therefore insufficient evidence to support possession of burglary tools, where Miller used bolt cutters to open a publicly accessible coin box at a 24-hour car wash. *Id.* at 725, 730. *Miller* is easily distinguished from the instant case because overwhelming evidence supports Mr. Broussard's conviction for burglary: Mr. Broussard entered Ms. Mitrovich's shed in the back yard of her private residence after he first attempted to enter her home through the front door, and he admitted that he did not know Ms. Mitrovich and that he knew it was illegal for him to enter her property to take things belonging to her. 06/24/19 RP 178-79.

Viewing the evidence in the light most favorable to the State, sufficient evidence therefore proves that Mr. Broussard possessed the drills, drill bits, gloves and screwdriver with the intent to employ them to facilitate his burglary of Ms. Mitrovich's property. Accordingly, this Court should affirm Mr. Broussard's conviction for possessing burglar tools.

B. The trial court properly exercised its discretion in denying Mr. Broussard's motion to dismiss for governmental misconduct, because Mr. Broussard failed to establish that the Facebook post actually prejudiced his right to receive a fair trial.

A court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b). Before charges can be dismissed under CrR 8.3(b), the defendant must show arbitrary action or governmental misconduct as well

as prejudice that affects the defendant's right to a fair trial. *State v Miller*, 92 Wn. App. 693, 702, 964 P.2d 1196 (1998). Dismissal is an extraordinary remedy, not warranted unless the defendant shows prejudice. *Id.* at 702-03.

Moreover, an appellate court uses the deferential abuse of discretion standard to review a trial court's ruling on a motion to dismiss for governmental misconduct. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). A trial court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." *Id.* A trial court's discretionary decision is manifestly unreasonable or based on untenable grounds only if it results from applying the wrong legal standard or is unsupported by the record. *Id.* Finally, a reviewing court may not find abuse of discretion merely because it would have decided the case differently – "it must be convinced that 'no reasonable person would take the view adopted by the trial court.'" *Id.* Accordingly, when the trial court has applied the correct legal standard and its decision is well supported by the record, the trial court's decision must remain undisturbed.

For an action to warrant dismissal due to arbitrary action or governmental misconduct, a defendant must show that "*actual* prejudice, not merely speculative prejudice affected his right to a fair trial." *State v. Kone*, 165 Wn. App. 420, 433, 266 P.3d 916 (2011) (emphasis added). "The mere *possibility* of prejudice is not sufficient to meet the burden of showing

actual prejudice.” *State v. Norby*, 122 Wn.2d 258, 264, 858 P.2d 210 (1993) (emphasis in original). The defendant must show that his right to fair trial was actually prejudiced by a preponderance of the evidence. *Kone*, 165 Wn. App. at 430-33. The right to a fair trial includes the right to an impartial jury. *See State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). A party claiming juror bias must establish it by proof, with more than a possibility of prejudice in order to overcome the presumption that each juror sworn is impartial and qualified to sit on a particular case. *State v. Munzanreder*, 199 Wn. App. 162, 176, 398 P.3d 1160 (2017). “[T]he question is whether a juror with preconceived ideas can set them aside.” *Id.*

In order to demonstrate that the Pierce County Sheriff’s Department’s Facebook post actually prejudiced him, Mr. Broussard must establish that the jurors seated on his case could not be fair or impartial because of the Facebook post. However, none of the empaneled jurors on his case ever saw the Facebook post, so the post could not have impacted the jury’s ability to be fair and impartial.

Mr. Broussard cannot establish the existence of actual prejudice in this case. He instead provides a speculative argument that any prejudice caused by the Facebook post cannot be cured upon voir dire merely because the Facebook post is so widely distributed. Brf. App. at 14. However, the mere fact that Facebook has an extensive capability to widely share

information is irrelevant to the prejudice analysis in this case. Instead, the prejudice analysis should be guided by determining whether the sitting jurors on his case viewed the Facebook post and the extent to which the post therefore influenced the empaneled jurors' ability to be fair and impartial.

This prejudice analysis should be informed by examining the remedial measures taken to protect Mr. Broussard from any prejudice that the Facebook post might have caused. Mr. Broussard fails to acknowledge that the trial court ordered the Pierce County Sheriff's Department to remove the post within 48 hours and the Sheriff's office complied, that a detailed questionnaire was administered during voir dire to ferret out those potential jurors who saw the post, that the potential jurors who saw the post were excused for cause, and that none of the jurors empaneled on his case saw the post.

From the outset, the trial court ordered the Pierce County Sheriff's Department to delete the Facebook post within 48 hours of the conclusion of the CrR 8.3(b) hearing. 01/04/19 RP 47; CP 201. The court directed the order be sent to Pierce County Sheriff Paul Pastor. 01/04/19 RP 47; CP 201. The Pierce County Sheriff's Department complied with the order and deleted the post. 06/18/19 RP 5.

Additionally, a detailed jury questionnaire – submitted and requested by the defense – was employed to protect Mr. Broussard against

any possible influence the Facebook post might have had on the potential jurors for Mr. Broussard's trial. The questionnaire was both specific and searching. It not only explored the panel's general exposure to news and social media, but it also specifically inquired about the potential juror's viewership of particular social media community group pages on which Mr. Broussard's case may have appeared. For example, the questionnaire asked, "Have you seen, heard, or read anything in the news media or on social media about this case?" and "Do you follow the Pierce County Sheriff's Department's Facebook page or ever view posts from this page? *Note: this may include posts shared by your friends that appear in your News Feed.*" CP 291 (italics in original). It inquired whether the jurors ever read "online news articles on the Tacoma News Tribune's website," and how often they visited the Tacoma News Tribune's website and if they read articles about crimes in Tacoma. CP 291.

The questionnaire specifically asked whether and how often the jurors followed or viewed posts from any of the following Facebook pages: "Tacompton Files," "Washington State Proud of the Blue," "Parkland Bulletin Board," or the "Spanaway/Elk Plain/Graham Community Blotter." CP 292-93. Finally, the questionnaire examined if the jurors had "liked" or frequently viewed any pages or posts for any local community groups or law enforcement agencies on Facebook, and if so, which groups. CP 293.

This questionnaire was sufficiently tailored to determine whether potential jurors were familiar with Mr. Broussard's case, and whether their prior knowledge about Mr. Broussard would influence their ability to be fair and impartial.

In fact, potential jurors who indicated that they saw the Facebook post or were aware of the case were removed. For example, potential juror number five was removed when he responded that he had heard, seen or read something in the news media or on social media about this case. CP 306, 452-455; 06/19/19 99-100. Juror number 13 was removed when she indicated she was familiar with the case and responded that she had "either read or heard on the news about something happening in this area with a garage or shed involved." CP 306, 485; 06/19/19 RP 107-08. Defense counsel was satisfied that no remaining jurors had seen or heard about the case. 06/19/19 RP 108.

Indeed, Mr. Broussard fails to demonstrate that any sitting juror on his case was unable to be fair or impartial because of viewing the Facebook post precisely because no jurors sitting on his ever saw the Facebook post or were previously aware of Mr. Broussard's case. *See* CP 306-309, 311, 436-439, 444-447, 448-451, 472-475, 476-479, 480-483, 496-99, 512-515, 516-519, 528-531, 536-539, 540-543, 564-567, 572-575.

Thus, Mr. Broussard fails to prove requisite *actual prejudice* because he cannot demonstrate that the empaneled jury for his trial was unable to be fair and impartial because of exposure to the Facebook post. A defendant must show that “actual prejudice, not merely speculative prejudice affected his right to a fair trial.” *Kone*, 165 Wn. App. at 433. Mr. Broussard relies on speculation to assert that the mere existence of the Facebook post somehow actually prejudiced his right to a fair trial. The mere existence of the Facebook post alone is not enough to prove actual prejudice if no empaneled jurors on Mr. Broussard’s case ever saw the post and therefore their ability to be fair and impartial was not impacted.

Moreover, Mr. Broussard fails to cite to the record to give any examples of actual prejudice and instead claims that speculative prejudice supports his argument for the extreme remedy of dismissal. Accordingly, because he cannot establish actual prejudice from the Facebook post, Mr. Broussard cannot demonstrate that the trial court abused its discretion in denying his CrR 8.3(b) motion to dismiss.

Mr. Broussard relies on *State v. Sherman*, 59 Wn. App. 763, 801 P.2d 274 (1990); *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997); and *State v. Martinez*, 121 Wn. App. 21, 35-36, 86 P.3d 1210 (2004), to argue that the misconduct resulting from the Facebook post was somehow more egregious than the misconduct in existing caselaw that resulted in

dismissal. *See* Brf. App. at 11-12. But in *Sherman*, the court found actual prejudice when the State failed to perform due diligence to locate otherwise available records, which forced the defendant to choose between his right to speedy trial and right to be represented by well-prepared counsel. 59 Wn. App. at 769. In *Michielli*, the court found actual prejudice where the State's last minute amendment of charges only three business days before trial forced the defendant to waive his right to speedy trial and proceed unprepared. 132 Wn.2d at 245-46. And in *Martinez*, the court found the "State prosecutor's withholding of exculpatory evidence until the middle of criminal jury trial... so repugnant to principles of fundamental fairness" that it constituted a violation of due process and demonstrated actual prejudice. 121 Wn. App. at 35-36. In each case, the prejudice materially affected the rights of the accused to a fair trial. Here, on the other hand, the trial court never made a finding of actual prejudice resulting from the Facebook post, because there was none. *Sherman*, *Michielli*, and *Martinez* are therefore distinguishable.

Next, Mr. Broussard relies on *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963); *State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1998); and *State v. Irby*, 3 Wn. App. 2d 247, 415 P.3d 611 (2018), to argue that the Facebook post caused prejudice akin to that encountered by defendants who were denied the right to counsel. Brf. App. at 12.

In *Cory*, a sheriff's deputy listened to phone calls between prisoners and their attorneys, and the court found that there was no way to isolate the prejudice from eavesdropping when one could assume that the information gained by the sheriff was transmitted to the prosecutor. 62 Wn.2d at 372, 377. In *Granacki*, prejudice was presumed when, during a recess, a detective assisting the prosecutor read legal pads containing notes on the defendant's privileged communications with his attorneys. 90 Wn. App. at 600, 604. And in *Irby*, prejudice was presumed when jail guards opened outgoing mail from Irby containing privileged legal communication meant for Irby's attorney. 3 Wn. App. 2d at 251, 259.

Mr. Broussard is not entitled to the same presumption of prejudice. His attempt to analogize these cases fails, because a presumption of prejudice is limited to cases involving intrusion into privileged communications. *See Irby*, 3 Wn. App. 2d at 257-58. Certainly, a presumption of prejudice cannot be applied in every CrR 8.3(b) claim. Additionally, even in the limited cases where a presumption does apply, "[t]he presumption of prejudice arising from a determination that the State intruded into privileged attorney-client communications is rebuttable." *Irby*, 3 Wn. App. 2d at 259 (citing *State v. Pena-Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257 (2014)). Dismissal of a prosecution is such an extraordinary remedy that even improper intrusion into attorney-client communications

does not warrant dismissal if there is no possibility of prejudice to the defendant. *State v. Blizzard*, 195 Wn. App. 717, 732-33, 381 P.2d 1241 (2016), review denied 187 Wn.2d 1012, 388 P.3d 485 (2017) (citing *Pena-Fuentes*, 179 Wn.2d at 819).

Mr. Broussard's reliance on *Irby*, *Cory* and *Granacki* to establish that he is entitled to a presumption of prejudice fails, because his claim does not involve intrusion into privileged communications or actual prejudice to similarly support dismissal.

Furthermore, Mr. Broussard relies on *Munzanreder* to argue that the Facebook post constituted pretrial publicity that created a presumption that the jury could not be impartial. Brf. App. at 15. But unlike Mr. Broussard's case, *Munzanreder* did not involve a CrR 8.3(b) motion to dismiss for governmental misconduct. Instead, *Munzanreder* involved a motion for a change of venue where the defendant claimed that his right to an impartial jury was jeopardized because of media coverage that saturated the county before his high-profile murder trial. 199 Wn. App. at 167-69. And notably in *Munzanreder*, the court did not find actual prejudice even when two empaneled jurors had seen publicity surrounding the high-profile murder of *Munzanreder's* wife; it held that the jurors could still be fair and impartial despite seeing the news coverage. *Id.* at 170-71, 183.

Furthermore, the *Munzanreder* court explained that when there has been substantial media attention surrounding a case, the court should employ “strong measures” to ensure that an accused receives a fair trial. 199 Wn. App. at 182-83. Those measures may include granting the accused’s request for additional peremptory challenges, or more readily granting a defendant’s challenge for cause to those potential jurors who admit to previously holding an adverse opinion of the accused. *Id.* at 183. Because Munzanreder could have used two of his six peremptory challenges to remove the jurors he suspected had seen the pretrial publicity, the trial court’s process for seating the jury was “very satisfactory.” *Id.* Munzanreder’s failure to use all of his available peremptory challenges or request any additional peremptory challenges suggested that even Munzanreder believed the empaneled jury was fair and impartial. *Id.* at 183-84.

Here, the trial court granted Mr. Broussard’s challenges for cause for those potential jurors familiar with his case, and Mr. Broussard elected not to exercise all of his peremptory challenges. These facts suggest that Mr. Broussard, like Munzanreder, believed the empaneled jury was fair and impartial.

Moreover, unlike *Munzanreder*, Mr. Broussard never argued that venue was improper in Pierce County.⁵ And unlike the jurors in *Munzanreder*, the empaneled jurors on Mr. Broussard's case never saw the publicity or were previously aware of his case. Therefore, Mr. Broussard is not entitled to a presumption that the empaneled jury could not be impartial based on the existence Facebook post.

To the extent to which Mr. Broussard argues his constitutional right to an impartial jury was violated, Mr. Broussard's argument also fails because he waived that claim when he failed to exercise all available peremptory challenges and accepted the jury as constituted. A defendant who accepts a jury as constituted and does not exhaust his peremptory challenges cannot show prejudice based on the jury's composition. *State v. Elmore*, 139 Wn.2d 250, 277-78, 985 P.2d 289 (1999) (citing *State v. Tharp*, 42 Wn.2d 494, 500, 256 P.2d 482 (1953)) (defendant must show the use of all his peremptory challenges or he can show no prejudice arising from the selection and retention of a particular juror and is barred from any claim of error in this regard); *State v. Collins*, 50 Wn.2d 740, 744, 314 P.2d 660 (1957) (no prejudicial error regarding prosecutor's questioning of panel where defendant accepted the jury while having available four peremptory

⁵ Defense did not move for a change of venue below, and Mr. Broussard does not claim ineffective assistance of counsel on appeal for failure to bring such a motion.

challenges; nor did he challenge the panel); *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995) (where defendant participated in selecting and ultimately accepted jury panel, his constitutional right to an impartial jury selected by him was not violated)). Mr. Broussard only made two peremptory challenges out of the six available to him, thereby waiving any claim for violation of his right to an impartial jury. CP 310. Ultimately, again, no jurors seated on Mr. Broussard's case saw the Facebook post or were familiar with Mr. Broussard's case. Mr. Broussard waived his claim of prejudice based on the jury's composition when he failed to exhaust his available peremptory challenges and accepted the jury as composed.

Accordingly, this Court should affirm Mr. Broussard's convictions, because the trial court properly exercised its discretion in denying Mr. Broussard's CrR 8.3(b) motion to dismiss as he was never actually prejudiced by the Facebook post.

V. CONCLUSION

Sufficient evidence supports Mr. Broussard's convictions for burglary in the second degree and possession of burglary tools, and the trial court properly exercised its discretion in denying Mr. Broussard's CrR 8.3(b) motion to dismiss because his case was not actually prejudiced by

the Facebook post. Accordingly, this Court should affirm Mr. Broussard's convictions.

RESPECTFULLY SUBMITTED this 18th day of June, 2020.

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06/18/20 s/Aeriele Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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