

33599-2-III
(consolidated with 33608-5-III)

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RYAN ROBERT BRONOWSKI, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The court erred by convicting Mr. Bronowski of theft of a motor vehicle where he did not receive effective assistance of counsel and the jury was never instructed on the lesser included offense of taking a motor vehicle without permission.

2. The court erred by failing to instruct the jury on the offense of taking a motor vehicle without permission and defense counsel was ineffective for failing to request an instruction on the same.

3. The court erred by convicting Mr. Bronowski of second degree possession of stolen property where there is no guarantee that the jury unanimously convicted him of this offense.

4. The court erred by failing to give a unanimity instruction on the charge of second degree possession of stolen property.

5. The court erred by imposing a five-year no contact order on the gross misdemeanor offense that carries a maximum term of 364 days.

II. ISSUES PRESENTED

1. Whether the defendant was entitled to a lesser included instruction where second degree taking a motor vehicle without permission meets neither the legal nor the factual prong of the *Workman* test, and whether, in any event, counsel's decision to not propose such an instruction was a sound trial tactic?

2. Whether the defendant was entitled to a *Petrich* instruction where the State did not admit any evidence of multiple acts of possession of a stolen access device?

3. Whether the trial court erred in imposing a five-year no contact sentencing provision protecting the listed victim of a gross misdemeanor charge where the victim testified in the defendant's felony trial?

4. Whether defendant has made any credible showing that his allegations of sexual misconduct against his attorney have any factual basis to sustain his consolidated personal restraint petition?

III. STATEMENT OF THE CASE

On March 1, 2015, Lonnie O'Bannan's schnauzer started barking at approximately 5:30 a.m. while Mr. O'Bannan enjoyed his early morning cup of coffee. 1RP 59-60. When Mr. O'Bannan was unable to calm the watchdog, he looked outside to see what the commotion was about. 1RP 59. Mr. O'Bannan saw his 1999 Dodge Neon backing out of his driveway and head north on Harvard Road. 1RP 59-60. The Dodge Neon was registered to Mr. O'Bannan's pet sitting business, Tickle My Pets. 1RP 59-60. Mr. O'Bannan was unable to see who was driving his vehicle, and he did not give anyone permission to drive his vehicle.

1RP 60-61. Mr. O'Bannan reported the theft of his car to police and learned that police located his vehicle approximately a half an hour later, a little over a mile away from his home. 1RP 61.

That same morning, Alicia Aldendorf got into her car to go to church. 1RP 52. She discovered that her glove box was open and her belongings were spread out on the seat. 1RP 52. She called her neighbors and learned that their cars had also been rifled through. 1RP 52. She discovered her debit card, checkbook, and some coffee cards were missing. 1RP 53. Fortunately for Ms. Aldendorf, no charges were made to her missing debit card. 1RP 57.

James Adams' dogs¹ also began barking in the middle of the night on March 1, 2015. 1RP 73. However, he did not discover that his car had been prowled until March 3, 2015, because he did not regularly use the vehicle that was prowled. 1RP 74. Items were strewn about his car, and he found that his iPod, CD visor, cords, a window breaker, a pair of sunglasses, and an access card to the parking garage at Sacred Heart were missing. 1RP 74-75. He never gave anyone permission to enter his car. 1RP 75.

¹ Mr. Adams "mutts" were a large Irish Wolfhound mix and a hyperactive Airedale mix who barks when he hears anything. 1RP 77.

Officer Bogenrief was working the early morning hours of March 1, 2015, when dispatch put out a call of a vehicle theft that had just occurred. 1RP 120. It took the officer only fifteen to twenty minutes to locate the vehicle.² 1RP 123. The officer saw the vehicle with one occupant in the passenger seat. 1RP 123. Officer Bogenrief turned around to contact the vehicle, and as he exited his patrol car, he saw a male open the driver's door. 1RP 123. When the officer ordered the male subject, later identified as the defendant, to get on the ground, the defendant took off running. 1RP 123. As the officer began to give chase, he realized that there was another person in the passenger seat, so rather than chasing the defendant, he took the passenger into custody. 1RP 123.

Deputy Edelbrock arrived about ten minutes later. 1RP 125. The officers searched the backyard where Officer Bogenrief had seen the defendant run. 1RP 125. The officers located the defendant in the southwest corner of the yard, between an outbuilding and a fence, crouched in the bushes, looking at a map on his cell phone. 1RP 125. Deputy Edelbrock located a backpack in the bushes near the defendant. 1RP 141. A "Visa access card," a Sacred Heart access card, an iPod, an emergency glass breaking tool and an adapter cord were located in the backpack. 1RP 146, 148. Also located was a tan glove with a brown palm

² The officer testified it was a Neon Plymouth or Dodge Neon. 1RP 121.

belonging to Mr. O'Bannan. 1RP 62-63, 142. Mail belonging to Lila Zander³ was located during the investigation. 1RP 148.

Defendant was charged with theft of a motor vehicle as an actor or accomplice,⁴ second degree possession of stolen property – access device (specifically a Visa Debit card), and three counts of second degree vehicle prowling as an actor or accomplice.⁵ CP 49-50. A jury convicted him of all charges. CP 84-88. After planning an escape from custody after the verdict, and then refusing to come to his sentencing hearing, defendant was ultimately sentenced to 57 months on the motor vehicle theft (high end) with all other sentences to run concurrently. 2RP 217, 227, 247; CP 126. He timely appealed.

³ Lila Zander testified that on or about the date in question, she discovered she had missing mail from her residence at 4605 Harvard Road, which was very near to Mr. O'Bannan's residence at 4609 Harvard Road. 1RP 44, 59, 207.

⁴ No accomplice instruction was given at trial and the State did not argue accomplice liability. 1RP 164, 188-193, 205-207.

⁵ The original information, CP 7, charged the defendant with only theft of a motor vehicle. An amended information, CP 22-23, charged him with possession of stolen mail, unlawful possession of payment instruments, two counts of second degree stolen property (access device), theft of a motor vehicle and four counts of second degree vehicle prowling. At the time of trial, the state opted to proceed only on the theft of a motor vehicle, second degree possession of stolen property, and three counts of second degree vehicle prowling. CP 49-50.

IV. ARGUMENT

A. DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL; DEFENDANT WAS NOT ENTITLED TO A LESSER INCLUDED INSTRUCTION AND THE DECISION TO NOT REQUEST SUCH AN INSTRUCTION IS ATTRIBUTABLE TO TRIAL TACTICS.

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 80 L.Ed.2d 674, 104 S.Ct 2052 (1984). "To prevail on this claim, the defendant must show his attorneys were 'not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' and their errors were 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998), citing *Strickland*, 466 U.S. at 687. Judicial scrutiny of counsel's performance is highly deferential and requires that every effort be made to eliminate the "distorting effects of hindsight" to evaluate the conduct from "counsel's perspective at the time"; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

The first element is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

Washington's Rules of Professional Conduct, as well as standards promulgated by the American Bar Association, indicate that the decision to exclude or include lesser included offense instructions is a decision that ultimately rests with defense counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

The question, therefore, is whether the defendant was entitled to a lesser included instruction, and whether this decision was within the capable hands of his attorney as a legitimate trial strategy.

1. The defendant was not entitled to a lesser included instruction for taking a motor vehicle without permission second degree because the elements of that charge are not all necessary elements for the crime of theft of a motor vehicle.

A defendant is entitled to a lesser included instruction if two conditions are met:

- (1) each element of the lesser offense is a necessary element of the offense charged (legal prong) and (2) the evidence, viewed most favorably to the defendant, supports

an inference that **only the lesser crime was committed** (factual prong).” *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d 892 (2012). Under the legal prong, an offense is not lesser included “if it is possible to commit the greater offense without committing the lesser offense.” *State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993).

State v. Sharkey, 172 Wn. App. 386, 390, 289 P.3d 763 (2012) (emphasis added); *see also*, *State v. Workman*, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978).

A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle. RCW 9A.56.065. “Theft” means to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services. RCW 9A.56.020. “Deprive” is given its common meaning. RCW 9A.56.010(6). The common meaning of deprive is “to take something away from; to withhold something from.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 335 (11th Ed. 2003); *see also*, *State v. Komok*, 113 Wn.2d 810, 815, 783 P.2d 1061 (1989).

RCW 9A.56.075 provides:

A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

The theft of a motor vehicle requires intent to deprive, whereas taking a motor vehicle without permission statute requires only that a defendant take or drive away a motor vehicle without the owner's permission. Thus, a person who takes a car for a brief joyride or spin around the block has taken a motor vehicle without permission, but has not committed theft of a motor vehicle due to the lack of intent to deprive as shown by the brevity of the taking and intent to return it without the taking being discovered. The intent to deprive that is required to commit theft, that is, the intent to withhold property from its true owner, is significantly greater than the intent to take and use, without the intent to withhold, that is required by the taking motor vehicle statute. Therefore, second degree taking a motor vehicle does not meet the legal prong of the *Workman* test to be a lesser included to theft of a motor vehicle.

Furthermore, one can commit the crime of theft of a motor vehicle without actually driving or riding in the vehicle, such as by an embezzlement or a misappropriation of goods. RCW 9A.56.020.⁶ Thus, the element of second degree taking a motor vehicle that requires a defendant to actually take or ride in a vehicle knowing it has been taken without permission are not necessary elements of theft of a motor vehicle.

⁶ The State of Washington recognizes three different types of theft; all are theft. *State v. Linehan*, 147 Wn.2d 638, 654, 56 P.3d 542 (2002).

Additionally, the two crimes do not meet the factual prong of the test in this case. Here, defendant was not “taking and driving away” the vehicle as would be required for second degree taking a motor vehicle without permission; instead, he was caught, in a stolen car, with shaved keys and other stolen property, all facts manifesting his intent to steal the car, not merely joyride in it. There is no evidence that only the lesser offense was committed.

Under a *Workman* analysis, second degree taking motor vehicle without permission is not a lesser included offense of theft of a motor vehicle; therefore, there was no basis upon which defense counsel could request a lesser included instruction be given to the jury.

2. Defense counsel made a tactical decision to not request an instruction for taking motor vehicle without permission.

Even assuming that taking motor vehicle without permission second degree could be a lesser included offense of theft of a motor vehicle, defense counsel was not deficient in failing to request such a jury instruction. In closing, defense counsel argued that insufficient evidence had been presented by the State to convict the defendant of theft of a motor vehicle. The defense attorney argued that defendant was never in

control of the stolen vehicle, and that no one actually saw him sitting in the driver's seat of the vehicle, or driving the vehicle:

This case is really not about direct evidence. Nobody saw Mr. Bronowski take Lonnie O'Bannan's car... At the beginning of trial, we talked about the presumption of innocence and the State's obligation to prove the case beyond a reasonable doubt... In a criminal trial Mr. Bronowski is presumed innocent as we talked about when he walked into the courtroom... The State had not proven anything...

2RP 198-199.

[W]hat the State showed was that Mr. Bronowski was in a car that had recently been stolen. There is no evidence of how the car was driven to that location. There is no evidence before of even why that location... Officer Bogenrief initially only saw one person in the passenger seat... **Nobody saw Mr. Bronowski in the driver's seat.** And I would submit to you that you've seen that vehicle, that vehicle was a two door coupe. And just because **Mr. Bronowski was seen leaving the driver's side of the vehicle does not mean that he was in the driver's seat of the vehicle...**

2RP 202-203 (emphasis added).

There's no showing that Mr. Bronowski was ever in control of that vehicle...

2RP 203 (emphasis added).

Each of the following elements must be proved beyond a reasonable doubt; that on or about March 1, 2015, the defendant wrongfully obtained or exerted unauthorized control over a motor vehicle. You may have him in the vehicle or have him leaving the vehicle, but there's **no indication that he exerted any unauthorized control over that motor vehicle...**

Again as I stated, he was seen leaving the car, but nobody saw him in the front seat. **Nobody saw him driving the vehicle** ... there's no indication that any of those shaved keys were ever used in that vehicle...

2RP 203 (emphasis added).

Nobody saw Mr. Bronowski drive the car away from Mr. O'Bannan's house. Nobody saw him park the car; no direct evidence of – of Mr. Bronowski driving the car.

2RP 204.

Defendant's theory of the case was that the State did not prove, beyond a reasonable doubt, that he ever drove the motor vehicle away from Mr. O'Bannan's house, and that he was never in control of the vehicle. This was a legitimate "all or nothing" trial strategy. *See, Grier*, 171 Wn.2d at 43. Where a lesser included offense instruction would weaken the defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy. *State v. Breitung*, 173 Wn.2d 393, 399, 267 P.3d 1012 (2011).

Here, the proposal of a lesser included instruction would weaken the defense's argument. The argument essentially was that no one saw defendant driving the car, and no one saw the defendant actually sitting in the driver's seat. It would have been entirely unreasonable for the defense attorney to propose a lesser included instruction for second degree taking motor vehicle without permission where the likelihood of conviction

would be greater, than to simply argue that the defendant was not guilty beyond a reasonable doubt of the greater offense because of the circumstantial and speculative nature of the State's case. Furthermore, the intent to deprive that is required by the theft of the motor vehicle statute is more difficult for the State to prove than the intent required by the joyriding statute.

While mere knowledge and presence in the unlawful riding would be enough to commit joyriding,⁷ it would not be sufficient to establish a defendant's culpability or complicity in the crime of theft. *See, In Re Wilson*, 91 Wn.2d 487, 588 P.2d 1161 (1979) (mere presence and knowledge is not enough to establish accomplice liability).

Under the second degree taking motor vehicle statute, however, mere *presence*, i.e., "riding in or upon," the vehicle with *knowledge* that it was unlawfully taken is sufficient to support a conviction for the crime.

⁷ A person commits the crime of taking a motor vehicle without permission in the second degree when, without permission of the owner or person entitled to possession, he or she intentionally takes or drives away any automobile or motor vehicle, [whether propelled by steam, electricity, or internal combustion engine] that is the property of another.

[A person [also] commits the crime of taking a motor vehicle without permission in the second degree when he or she voluntarily rides in or upon an automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken.]

WPIC 74.01, *see also* WPIC 74.02.

Clearly the State's burden to prove all of the elements of second degree taking motor vehicle without permission would have been significantly easier under the facts of this case than what was required to prove theft of a motor vehicle. It was a tactical and logical decision by the defense attorney to not request a lesser included instruction for a crime which is significantly easier for the State to prove, in order to give his client the best chance at acquittal. Had counsel actually proposed a lesser included instruction, defendant would likely argue ineffective assistance for denying him the chance to an outright acquittal given the difficulty with showing actual intent to deprive required to prove theft. Even though the defense strategy was ultimately unsuccessful here, it gave the defendant the best chance for an acquittal of the charge.

B. THE DEFENDANT, ALLEGING FOR THE FIRST TIME ON APPEAL THAT HE WAS ENTITLED TO A *PETRICH* INSTRUCTION, HAS NEITHER DEMONSTRATED THE EXISTENCE OF A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT, NOR THAT HIS RIGHT TO A UNANIMOUS VERDICT WAS ACTUALLY VIOLATED.

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). RAP 2.5 “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749, quoting

New Meadows Holding Co. v. Wash. Water Power Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process and prevents defendants from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict. *Strine*, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.⁸ Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Here, Defendant alleges that the trial court erred by failing to give a *Petrich* instruction even though such an instruction was neither proposed by the defendant nor was any exception to the instructions taken. 1RP 162-171. *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), requires in cases presenting evidence of several acts, any of which could

⁸ An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

form the basis of one count charged, the State must either tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *Petrich*, 101 Wn.2d at 570, 683 P.2d 173). The failure to assert this issue at the trial court is not reviewable on appeal because there is not a showing that the alleged error is manifest, nor that any error actually occurred.

To establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.” Here, any error relating to the trial court’s failure to *sua sponte* supply a *Petrich* instruction was not manifest or obvious, as is required by RAP 2.5.

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O’Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756, 761 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant’s claim of manifest error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge hearing the case should have clearly noted a *Petrich* violation and remedied it. Contrary to defendant’s claims, no election or unanimity instruction was necessary, where, as here, the state did not rely on multiple acts to prove one criminal charge. The fact that the defendant attempts to argue that this case is a “multiple acts” case demonstrates that the issue is *debatable* and therefore not *manifest* – not obvious or flagrant as is required by RAP 2.5 for this court to grant review absent preservation of the issue for appeal by timely objection at trial.⁹

Contrary to the defendant’s assertions, the State did not rely upon the defendant’s possession of the purloined checkbook or Ms. Zander’s

⁹ See also, *State v. Knutz*, 161 Wn. App. 395, 408, 253 P.3d 437 (2011) (holding manifest error test is applicable to cases analyzed for the necessity of a *Petrich* instruction: “We hold that because no additional *Petrich* unanimity instruction was required for this continuing course of conduct, there was no ‘manifest error affecting a constitutional right.’ Therefore, not only is Knutz precluded from raising this issue for the first time on appeal, but also, even were we to address her argument, she would fail to establish reversible error on this ground.”)

stolen access device¹⁰ to prove that the defendant committed the crime of second degree possession of stolen property.

A person is guilty of possessing stolen property in the second degree if:

(a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value; or

¹⁰ No such access device belonging to Ms. Zander was admitted at trial or even existed. The reference to Ms. Zander's access device occurred during Deputy Edelbrock's testimony:

Ms. Zappone: Your Honor, if I may approach with State's exhibit admitted No. 23?

...

Q: (By Ms. Zappone) What is that?

A: It's a VISA access card.

Q: Can you read who it belongs to?

A: It belongs to Zella – Lila Zander, I believe.

Q: Can you look closer at that?

A: I see – I – This photograph is –

Q: That's okay. Where was this found?

1RP 146.

The State had previously asked Ms. Aldendorf to identify Exhibit P23. Ms. Aldendorf identified it as her debit card. 1RP 54. The State then argued in closing:

Deputy Edelbrock said the blue – this blue Banner card came from the black backpack. The black backpack was found next to Mr. Bronowski when he was found. He may not have been able to read the name, but we had Alicia come in and verify that that was hers.

RP 191.

- (b) He or she possesses a stolen public record, writing or instrument kept, filed, or deposited according to law; or
- (c) He or she possesses a stolen access device.

RCW 9A.56.160.

The defendant was charged with possession of stolen property second degree, access device, under RCW 9A.56.160(1)(c). CP 49. An access device “means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.” RCW 9A.56.010(1).

Here, the State did not introduce any evidence or make any argument that the defendant’s possession of a stolen “checkbook” meant that he actually possessed checks, account numbers, routing numbers, or any other information that would qualify an article as an “access device.”¹¹ The evidence admitted consisted of the victim’s testimony she was

¹¹ While Washington law would sustain a conviction for possession of a stolen access device based on the possession of stolen checks, no such evidence was presented here. In *State v. Chang*, 147 Wn. App. 490, 195 P.3d 1008 (2008), the court held that mere possession of stolen account numbers located on stolen checks was sufficient to establish possession of an “access device” where the State charged the defendant with possession of the stolen account numbers located on the checks, introduced the checks at trial, and introduced testimony from the checks’ owners that defendant did not have permission to possess the checks or the account numbers.

missing a blue checkbook,¹² 1RP 53-54, and that it was found in the defendant's possession. 1RP 155-160. Only a photograph of a closed checkbook cover was admitted as State's Exhibit P23. No statute or case law would suggest a checkbook cover is an access device. The State never inquired as to any account numbers, whether there were any checks in the checkbook, whether the checkbook could access an active bank account, and never made any argument that the checkbook was, in fact, an access device:

Let's go on to possession of stolen property, the access device. That's March 1, 2015, I have to show that Mr. Bronowski knowingly possessed stolen property, withheld to the use of someone other than the true owner. And I have to show it's an access device and that's defined for you in the jury instruction. And based on Alicia Aldendorf's testimony, who you heard yesterday, she – her testimony was that a debit card from Banner Bank, blue in color, along with her checkbook, was taken from her car at the time period of March 1st... She identified the blue

¹² A thorough search of the record reveals that only once were individual checks ever mentioned. 1RP 155. Defense counsel inquired on cross examination of one of the officers if he located a checkbook and checks in a gray pack in the stolen Neon and attempted to impeach the officer on his report writing skills by pointing out an inconsistency in his testimony that the checkbook was actually located in a black backpack. 1RP 155-160. The remainder of the record never mentions whether individual checks were located in the checkbook, or whether an account number for the checking account was in the checkbook. 1RP 53, 54, 57, 81, 82, 155-160, 191-192.

If any error occurred by the *mere* mention of checks, it was invited error by the defense, because the defense was the only party to actually mention individual checks, as opposed to the State's references to the "checkbook" as a unit.

Banner Bank ID – or, debit card as hers. And that’s been admitted, Exhibit No. 23.¹³

Deputy Edelbrock said the blue—this blue Banner card came from the black backpack. The black backpack was found next to Mr. Bronowski when he was found. He may not have been able to read the name, but we had Alicia come in and verify that that was hers. He did testify it came from the black backpack. It was placed on evidence. You heard the Detective state that he returned the Banner Bank card to Alicia Aldendorf, and he testified that was the only blue Banner Bank [sic] on evidence.

Let’s talk about the vehicle prowling. There are three separate counts for vehicle prowling... Let’s talk about Alicia Aldendorf. She had her checkbook, her debit card taken from her car, again at the same time, March 1st. These were found in Mr. Bronowski’s possession within a short time period.

1RP 191-192.

It is clear that the State did not rely on the possession of the checkbook cover to prove Count II.

The State alleged the defendant possessed one stolen Visa card, and only proved the existence of one stolen card.¹⁴ Defendant’s allegation that there was any debit card belonging to Ms. Zander that was ever

¹³ The “Banner” debit card is a Visa Debit card issued by Banner Bank. Ex. P23.

¹⁴ Defendant concedes that the State “seems to have tried to elect” against the use of Ms. Zander’s Visa debit card during its closing argument, but earlier states “the State presented evidence that Mr. Bronowski possessed Ms. Zander’s Visa debit card” and thus the jury should have been instructed that it could only return a verdict of guilty if it unanimously believed that Mr. Bronowski unlawfully possessed Ms. Aldendorf’s Visa debit card. Appellant Br. at 19.

introduced at trial is factually incorrect. *See*, n. 9, *supra*. Plaintiff's Exhibit P23 depicts the only debit card introduced in this case. Ms. Aldendorf testified the card belonged to her. The jury could not have inferred that a second card existed at all, let alone relied upon it to convict the defendant. No error was preserved for appeal, and no error occurred here.

C. THE COURT COULD IMPOSE A FIVE-YEAR NO CONTACT ORDER WHERE THE VICTIM OF A MISDEMEANOR CRIME TESTIFIED AGAINST THE DEFENDANT AT HIS FELONY TRIAL.

Defendant additionally alleges that the trial court erred by imposing a five-year no contact sentencing provision prohibiting any contact with Mr. Adams because second degree vehicle prowling only carries with it a maximum penalty of 364 days incarceration. Defendant would be correct, but for the fact that Mr. Adams testified against Mr. Bronowski in a trial that included two felony charges, and his testimony was used to establish defendant's proximity to the location, as well as time and date, of the felony crimes.¹⁵

RCW 9.94A.505(8), authorizes the trial court to impose "crime-related prohibitions." Trial courts may impose crime-related prohibitions

¹⁵ The State used a map to demonstrate where each of the victims, Mr. O'Bannan, Ms. Aldendorf, Ms. Zander and Mr. Adams, resides. Each resides in close proximity to the other victims and all testified that they were victimized on or about the same date. 1RP 44, 52, 59-60, 73, 188.

for a term of the maximum sentence to a crime, independent of conditions of community custody. *State v. Armendariz*, 160 Wn.2d 106, 112, 120, 156 P.3d 201 (2007). “Crime-related prohibitions” are orders directly related to “the circumstances of the crime.” RCW 9.94A.030(13). This court reviews sentencing conditions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Such conditions are usually upheld if reasonably crime related. *Id.* at 36–37. In *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008), the Court upheld a sentencing provision prohibiting the defendant from having contact with the mother of his minor child victims, even though she, herself, had never been victimized by him, simply because she was their mother and had testified against the defendant. *See also, Armendariz, supra* (where defendant was charged with third degree assault on a law enforcement officer and a misdemeanor violation of a no contact order, he was properly ordered to have no contact with female victim of no contact order violation as a part of the sentence for third degree assault).

Here, because Mr. Adams testified against Mr. Bronowski and was also a victim of Mr. Bronowski’s charged crimes, the court properly imposed a five-year no contact provision, that provides Mr. Adams the same protections from the defendant that were afforded to Mr. O’Bannan

and Ms. Aldendorf. The court did not abuse its discretion in imposing this provision.

D. DEFENDANT’S BARE ASSERTIONS OF HIS ATTORNEY’S MISCONDUCT ARE INSUFFICIENT TO MAKE ANY SHOWING HE IS ENTITLED TO RELIEF ON A PERSONAL RESTRAINT PETITION.

A personal restraint petition is not a substitute for direct appeal and availability of collateral relief is limited. *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328–29, 823 P.2d 492 (1992). RAP 16.4(c)(2) provides relief may be granted on a personal restraint petition if the petitioner is under unlawful restraint because “the conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or the laws of the State of Washington.”¹⁶ Mr. Bronowski does not indicate whether his plea for relief is based on another ground.

¹⁶ Additional grounds for relief include: lack of personal or subject matter jurisdiction; material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order; other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding the conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or other grounds exist to challenge the legality of the restraint of petitioner. RAP 16.4(c). None of these grounds appears to be alleged by defendant here.

In order to successfully argue a claim on a personal restraint petition, a petitioner must demonstrate by a preponderance of the evidence either a constitutional error that worked to his actual and substantial prejudice, or a nonconstitutional error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice. *St. Pierre*, 118 Wn.2d at 328. A petitioner must support his claim with facts or evidence of unlawful restraint, and not merely conclusory allegations. *See, In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). And, “a petitioner must show that more likely than not he was prejudiced by the error.” *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986). “Bare allegations unsupported by citation of authority, references to the record, or persuasive reasoning cannot sustain this burden of proof.” *Id.* If a petition is based on matters outside the appellate record, a petitioner must show that he has “competent, admissible evidence” to support his arguments. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

Defendant argues that “mistreatment by [his] attorney in a sexual manner” gives him the right to a new trial. Pet. at 3. He alleges that he was “pressured and forced into doing things against [his] will that have affected his case.” Pet. at 3. Defendant has made no showing, other than his bare assertions that any misconduct occurred or that it prejudiced him

in any way.^{17, 18} This court should reject his petition for failing to allege any factual basis evidencing unlawful restraint, and dismiss his petition.

V. CONCLUSION

The crime of second degree taking a motor vehicle is not legally nor factually a lesser included offense to theft of a motor vehicle in this case. Furthermore, defense counsel's failure to request a lesser included instruction, even if one could have been given, was due to counsel's sound tactical decision to argue for an outright acquittal. Defense counsel's performance, although unsuccessful, was not deficient. Additionally, no *Petrich* instruction needed to be given where the State did not provide evidence of multiple acts of possession of a stolen access device. A five-year no contact provision on protecting a victim of a gross misdemeanor crime was not improper where the victim testified at defendant's felony trial.

Defendant's personal restraint petition should be dismissed because he has not demonstrated any credible evidence that his attorney

¹⁷ In a personal restraint petition, a defendant claiming ineffective assistance of appellate counsel must establish that (1) counsel's performance was deficient and (2) the deficient performance actually prejudiced the defendant. *See, e.g., In Re Morris*, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012).

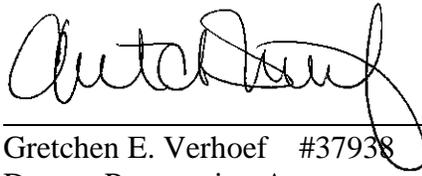
¹⁸ Even assuming there was some sort of sexual misconduct by the defense attorney, defendant has not shown how that misconduct actually affected the quality of the representation he received.

engaged in misconduct, nor that it resulted in any actual prejudice to the defendant.

The State respectfully requests this court affirm the lower court and jury verdicts, and dismiss the defendant's personal restraint petition.

Dated this 30 day of November, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", written over a horizontal line.

Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN ROBERT BRONOWSKI,

Appellant,

NO. 33599-2-III
(Consolidated with 33608-5-III)

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on November 30, 2015, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kristina M. Nichols and Jill S. Reuter
wa.appeals@gmail.com

11/30/2015

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)

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

STATE OF WASHINGTON, Respondent, v. RYAN ROBERT BRONOWSKI, Appellant,	NO. 33599-2-III (Consolidated with 33608-5-III) CERTIFICATE OF MAILING
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I certify under penalty of perjury under the laws of the State of Washington, that on November 30, 2015, I mailed a copy of the Brief of Respondent in this matter:

Ryan Robert Bronowski, DOC #374086
Airway Heights Correction Center
PO Box 1899
Airway Heights, WA 99001-1899

<u>11/30/2015</u> (Date)	<u>Spokane, WA</u> (Place)	<u>Kim Cornelius</u> (Signature)
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