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Supreme Court No. RECEIVED BY E-MAIL
Court of Appeals No. 32873-2-III

IN THE SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CECILY MCFARLAND

Appellant/Petitioner.

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable Judge John Knodell

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Cecily McFarland asks this Court to accept review of the Court of Appeals' decision that affirmed her judgment and sentence.

B. COURT OF APPEALS DECISION

On March 8, 2016, Division III of the Court of Appeals affirmed Ms. McFarland's judgment and sentence for first-degree burglary, ten counts of theft of a firearm, and three counts of unlawful possession of a firearm. A copy of the Court's unpublished opinion is attached as Appendix A. Ms. McFarland now timely seeks review of that decision.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether Division III's decision, refusing to remand for resentencing where the trial court believed it did not have discretion to consider an exceptional downward sentence and where defense counsel failed to request the downward departure, conflicts with decisions of this and other courts of appeal so that review is warranted pursuant to RAP 13.4(b)(1) or (2).

Issue 2: Whether Division III's decision to affirm Ms. McFarland's convictions warrants review under RAP 13.4(b)(1)-(3) where the trial court admitted an irrelevant and unduly prejudicial video that showed Ms. McFarland denying involvement in the burglary while in handcuffs, in an impaired state, and being belligerent, and included the officer's opinion on guilt and reference to non-existent evidence.

D. STATEMENT OF THE CASE

During the night of June 21-22, 2015, Cecily McFarland and her boyfriend, Chad Faircloth, went to Fred and Loretta Legault's home where Ms. McFarland previously lived with her prior boyfriend, apparently to

gather Ms. McFarland's belongings. (1RP 75-75, 110, 119-24, 132-33, 221-22, 286-88) Mr. Legault and his wife were asleep when the items were taken that night. (1RP 222-23, 236, 240)

When he woke up on June 22nd, Mr. Legault contacted law enforcement after noticing many things missing from his home, including a big-screen television, electronics, tools, checkbooks, guns, ammunition, alcohol and other household items. (1RP 217, 222-35, 241-43) A search warrant was executed that afternoon at the Alderwood residence where Ms. McFarland and Mr. Faircloth were staying, at which time several of the Legault's missing items were located, including 10 guns. (1RP 80, 89, 92-94, 97-99, 100-05, 178-81, 185, 217, 238-43, 247-48; Exhibits 1-15, 22-26, 28, 29, 31-42)

While the warrant was executed, Ms. McFarland was taken into custody. (1RP 180) During this time, she was filmed by a sheriff deputy's body camera. (RP 7-8, 185; Exhibit 44) On video, she denied having left home that night. (1RP 187-88, 191-93, 213, Exhibit 44) The video showed Ms. McFarland in handcuffs and, as the trial court found, under the influence of something. (*Id.*; 1RP 192) The video was admitted over defense counsel's numerous objections (1RP 214), including that it was irrelevant (1RP 187-88), lacked probative value (1RP 191-92, 213), was unduly prejudicial (1RP 191, 194, 200, 213), invaded the province of

the jury when an officer discussed the elements of burglary (1RP 191-93, 201), and constituted an improper use of Ms. McFarland's prior statements since Ms. McFarland had not taken the witness stand or disavowed those statements (1RP 195). (Exhibit 44)

A jury convicted Ms. McFarland as charged with first-degree burglary, ten counts of theft of a firearm, and three counts of unlawful possession of a firearm. (1RP 351; CP 173-86) The court and parties noted that the firearm counts were required by the legislature to run consecutively, so Ms. McFarland's standard sentencing range was calculated as 237 to 306 months. (2RP 23, 26) The State filed a sentencing memorandum with the trial court, explaining that concurrent sentences for the firearm charges must run consecutively. (CP 190) At sentencing, defense counsel expressed concern with the standard range, noting that there was a "certain degree of --lack of proportionality in the ---in the punishment based on the consecutive sentences that are required by the legislature." (RP 24) Defense counsel did not request any exceptional downward sentence on Ms. McFarland's behalf.[1] (2RP 24)

Ms. McFarland did not have any history of violent offenses, she was 25-years-old, she apologized to the court for taking its and the State's time, she apologized to the victims and community, she said that she had

[1] There does not appear to be any sentencing memorandum filed on behalf of the defendant in this case. (*See* CP 1-254; and see court docket for No. 14-1-00413-6)

sincerely learned her lesson, she said she did not intend to hurt or harm anybody with her actions, and she looked forward to making positive and rehabilitative changes in her life. (2RP 24-25)[2]

The court was concerned that Ms. McFarland's standard range was typical of that faced by someone who was convicted of murder, but said:

> I don't have --apparently don't have much discretion, here. Given the fact that these charges are going to be stacked one on top of another, I don't think -- I don't think high end is called for, here.

(2RP 24-25)

Ms. McFarland received the low end of the standard range, which was nearly 20 years due to the consecutive firearm sentences. (2RP 26) Division III affirmed. (Appendix A) This petition for review follows.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

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[2] Chad Faircloth happened to enter a plea agreement with the State for his involvement in these same events and received a three-year prison-based DOSA sentence. (2RP 23)

Issue 1: Whether Division III's decision, refusing to remand for resentencing where the trial court believed it did not have discretion to consider an exceptional downward sentence, and where defense counsel failed to request the downward departure, conflicts with decisions of this and other courts of appeal so that review is warranted pursuant to RAP 13.4(b)(1) or (2).

The trial court expressed concern with Ms. McFarland's standard range sentence that resulted from her multiple, consecutive sentences for 13 firearm convictions. But the court commented it did not have much discretion and, thus, sentenced her to the low end of the standard range, which was still nearly 20 years. The trial court erred by misinterpreting the law to the extent that it believed it had no discretion to order a sentence below the standard range. Additionally, defense counsel was ineffective for failing to request an exceptional sentence downward.

As a threshold matter, Division III correctly pointed out that a sentence within the standard range is generally not appealable. Appendix A, pg. 15; *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, a standard range sentence is reviewable in "circumstances where the court refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. McGill*, 112 Wn. App. 95, 99, 47 P.3d 173 (2002). A sentencing court errs when it operates under the "mistaken belief that it did not have the discretion to impose a mitigated exceptional

sentence for which [a defendant] may have been eligible." *In re Pers. Rest. of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007).

In *McGill*, like here, the trial court's "comments indicate[d] it would have considered an exceptional sentence had it known it could." 112 Wn. App. at 100. The Court of Appeals remanded for resentencing so that the trial court could exercise its discretion, explaining, "We...cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option." *Id.* at 101. *And see State v. Bonisisio*, 92 Wn. App. 783, 797, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999) (remanded where it was "likely the trial court would have imposed a sentence within the standard range had it correctly interpreted the statute to allow concurrent [firearm] enhancements]"). Division III's decision conflicts with these authorities.

"Under the SRA, a sentencing court generally must impose a sentence within the standard sentencing range." *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014) (citing RCW 9.94A.505(2)(a)(i)). For unlawful possession of a firearm and/or theft of a firearm, a standard range sentence means consecutive sentences for each of these convictions. RCW 9.94A.589(1)(c); RCW 9.41.040(6); *State v. Murphy*, 98 Wn. App. 42, 48-49, 988 P.2d 1018 (1999); *State v. McReynolds*, 117 Wn. App. 309, 343, 71 P.3d 663 (2003).

However, the exceptional sentence statue, RCW 9.94A.535, authorizes a departure from the standard sentencing range:

> The court may impose a sentence outside the standard range for an offense if it finds, considering the purposes of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence... A departure from the standards in RCW 9.94A.589(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585(2) through (6).

RCW 9.94A.535; *Graham*, 181 Wn.2d at 882.

An exceptional sentence downward may be imposed pursuant to the above statute even where consecutive sentences have been mandated by the legislature. *Mulholland*, 161 Wn.2d at 326, 329-30 (citing RCW 9.94A.589(1)(b) (exceptional sentence downward permitted for otherwise mandatory consecutive sentences for serious violent offenses). In *Mulholland*, this Court pointed out that the exceptional sentence statute, RCW 9.94A.535, applies to RCW 9.94A.589(1) as a whole and does not limit its application among the multiple subsections of that statute. *Id.* at 328-30. The Court held, RCW 9.94A.535 "leads inescapably to a conclusion that exceptional sentences may be imposed under either subsection of RCW 9.94A.589(1)." *Id.* at 329-30.

In other words, even where the Legislature sets forth that sentences shall run consecutively, as in RCW 9.94A.589(1)(b) (for serious violent offenses) (or presumably subsection (c) as well (for firearm offenses), a

trial court has discretion to impose an exceptional sentence. *See Mulholland*, 161 Wn.2d at 331; *See e.g. State v. Stevens*, 137 Wn. App. 460, 469-70, 153 P.3d 903 (2007), *review denied,* 162 Wn.2d 1012 (2008) (exceptional sentence downward for four counts of first-degree unlawful possession of a firearm affirmed). RCW 9.94A.535 does not differentiate between the subsections of RCW 9.94A.589(1) and thus has equal application to allow exceptional sentences for those that would otherwise be required to run consecutively as serious violent offenses (RCW 9.94A.589(1)(b)) or as firearm offenses (RCW 9.94A.589(1)(c)). *See Mulholland,* 161 Wn.2d at 331; *Stevens*, 137 Wn. App. at 469-70; *Graham*, 181 Wn.2d at 883-85.

Division III disagreed that an exceptional sentence downward may be imposed following multiple firearm convictions and distinguished *Mulholland, supra*, because no published authority likens .589(1)(c) (consecutive sentences for weapons offenses) to .589(b) (consecutive sentences for serious violent offenses). (Appendix A, pg. 17) But Division III's decision conflicts with the broader holding of this Court in *Mulholland*. This Court held in *Mulholland* that a downward exceptional sentence was permitted for multiple convictions of serious violent offenses, but this Court also explained that RCW 9.94A.535 "leads inescapably to a conclusion that exceptional sentences may be imposed

under either subsection of RCW 9.94A.589(1)." *Id.* at 329-30. Although this Court did not specifically address subsection .589(1)(c) since that subsection was not at issue in that case, the Court indicated that exceptional sentences downward may be imposed under either subsection of RCW 9.94A.589(1), which of course includes subsection (1)(c). *Id.*

Division III's decision is in conflict with this Court's decision in *Mulholland, supra,* such that review is warranted. Where, as here, the trial court appeared to believe it did not have discretion to impose an exceptional sentence downward, the remedy is to remand for resentencing. *Mulholland,* 161 Wn.2d at 334 ("[W]hile no defendant is entitled to an exceptional sentence ..., every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.")

Mandatory consecutive sentences may be run concurrently[3] as an exceptional sentence downward "if [the sentencing court] finds there are mitigating factors justifying such a sentence." *Mulholland*, 161 Wn.2d at 327-28; RCW 9.94A.535(1)(a)-(j). For example, a downward departure may be appropriate based on a particular defendant's mitigated culpability for the crime, that the defendant had no predisposition to break the law, or

[3] The sentencing court may order a downward departure from the standard sentencing range instead of, or in addition to, ordering concurrent sentences. *Graham*, 181 Wn.2d at 885, 887. RCW 9.94A.535(1)(g) "empowers a sentencing judge to reduce a 'clearly excessive' sentence by lessening sentences for the offenses and/or by imposing concurrent sentences." *Id.* at 886. "[D]ownward departures from the standard range can[] accomplish the same goal [as ordering consecutive sentences to run concurrently]." Id.

that the defendant did not conceal the possession of firearms. *See, e.g., Stevens*, 137 Wn. App. at 470.

Additionally, a mitigated sentence may be appropriate where "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010."[4] RCW 9.94A.535(1)(g); *Graham*, 181 Wn.2d at 883. "[C]oncurrent sentences are sometimes necessary to remedy injustices caused by the mechanical application of grids and ranges..." *Graham*, 181 Wn.2d at 886.

Ms. McFarland did not receive her constitutionally-guaranteed right to effective assistance of counsel when her attorney failed to argue these relevant bases for a mitigated sentence.

A criminal defendant has the constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is ineffective where (1) the representation was deficient, i.e., fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) counsel's deficient representation prejudiced the defendant, i.e., there is

[4] Policy goals of the SRA include: (1) ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; (2) promoting respect for the law by providing punishment which is just; (3) being commensurate with the punishment imposed on others committing similar offenses, (4) protecting the public, (5) offering the offender an opportunity to improve himself or herself, (6) making frugal use of the state's and local government's resources, and (7) reducing the risk of reoffending by the offenders in the community. *Graham*, 181 Wn.2d at 887 (citing RCW 9.94A.010).

reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

A defense attorney's failure to argue for an exceptional sentence below the standard range, such as one based on the multiple offense policy in RCW 9.94A.535(1)(g), may constitute ineffective assistance of counsel. *McGill*, 112 Wn.2d at 97, 101 (internal citations omitted). The Court in *McGill* explained the importance of defense counsel citing appropriate authority for a downward departure request, stating: "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise." *McGill*, 112 Wn.2d at 102.

Here, Ms. McFarland received a nearly 20-year sentence after she took boxes of personal property and additional property that belonged to her ex-boyfriend's parents from a home where she used to live. Ms. McFarland's new boyfriend, Chad Faircloth (along with his father), participated in the events with Ms. McFarland and thereafter received only a three-year prison-based DOSA sentence. Both defense counsel and the court expressed concern with the "proportionality" (2RP 24) of the crime and punishment due to the resulting standard range sentence. The trial

court commented that Ms. McFarland's standard range sentence was equivalent to that imposed on persons convicted of murder. (2RP 24-25) This lack of proportionality could have supported a mitigated sentence. *See Graham*, 181 Wn.2d at 887 (citing RCW 9.94A.010) (multiple offense policy basis for mitigated sentence where resulting standard range lacks proportionality to standard range resulting from consecutive sentences).

Ms. McFarland was not a career criminal and did not have any history of violent crime. When she was given the opportunity to address the court, she apologized to the court, the State, the Legaults and the community for her actions. She expressed remorse and hoped to one day go to college, rehabilitate and experience a brighter future. In response, the court questioned its own discretion to sentence Ms. McFarland to anything but the mandatory consecutive sentences. (2RP 24-25)

There were arguable bases for requesting the trial court depart from the standard range with an exceptional sentence downward, none of which were presented by defense counsel. For instance, Ms. McFarland lacked a predisposition to commit violent crime, she had no violent criminal history, she had mitigated culpability given the nature of the events and relationships of those involved, she did not conceal the weapons when she brought them to the Faircloths' home, and the multiple offense policy would have supported a request below the standard range

because the resulting standard range sentence was "clearly excessive" in light of the purposes of the SRA. Like in *McGill*, defense counsel's failure to alert the trial court to its ability to sentence below the standard range or to present those bases for a downward departure constituted ineffective assistance of counsel. *McGill*, 112 Wn.2d at 97, 101.

Division III rejected the argument that defense counsel was ineffective for failing to request an exceptional sentence downward, claiming there is no history of any other counsel successfully making a similar argument. (Appendix A, pg. 18) First, Ms. McFarland disagrees that other defense counselors have not successfully made the argument for an exceptional sentence downward based on the multiple offense policy or other mitigating factors when a defendant faces a particularly lengthy consecutive sentence for multiple firearm convictions. Such information of what other trial attorneys have successfully argued in other trial courts was not before the Court of Appeals.

Regardless, Division III's reasoning is directly at odds with at least another case where an exceptional downward sentence for four counts of first-degree unlawful possession of a firearm was affirmed. *See e.g. Stevens*, 137 Wn. App. at 469-70. The *Stevens* case demonstrates that a reasonable, effective practitioner could have made the argument for a mitigated sentence on Ms. McFarland's behalf; contrary to Division III's

suggestion in this case, presenting the case for a mitigated sentence would not have constituted a novel argument.

In addition, this Court recently held that *Mulholland* did not constitute a significant change in the law. *State v. Miller*, _Wn.2d__, __ P.3d __, 2016 WL 544706 *2 (Wash. Feb. 11, 2016). This Court held that its decision in *Mulholland* did not change the arguments previously available to defendants for mitigated sentences, explaining:

> In *Mulholland,* this court held that RCW 9.94A.589(1)(b)'s plain meaning gives the trial court discretion—upon finding mitigating factors— to impose concurrent sentences for serious violent offenses as an exceptional downward sentence. 161 Wash.2d at 329–31, 166 P.3d 677. The court further held that the trial court's erroneous belief that it lacked discretion to impose concurrent sentences constituted a fundamental defect justifying collateral relief in that case. *Id.* at 332–33, 166 P.3d 677.
>
> ...A 'significant change in the law' requires that the law, not counsels' understanding of the law on an unsettled question, has changed... Nothing prevented Miller from arguing at sentencing that the trial court had discretion to impose concurrent sentences. Indeed, the fact that the petitioner in *Mulholland* successfully argued that concurrent sentences are permissible under RCW 9.94A.589(1)(b) demonstrates that the argument was not previously "unavailable" to him.

State v. Miller, No. 91065-1, 2016 WL 544706, at *2 (Wash. Feb. 11, 2016). Thus, a prudent practitioner, even before *Mulholland* was announced, could have argued for a mitigated sentence downward, despite the consecutive sentences policy of RCW 9.94A.589(1). *Mulholland* did not change the arguments available to practitioners.

Ultimately, the existing precedent of *Mulholland, supra, Stevens, supra,* and *McGill, supra*, as discussed above, should have prompted defense counsel to make the pertinent arguments. In doing so, counsel would not have been making novel arguments to the trial court (which are generally never the basis for ineffective assistance claims, *see e.g., State v. Brown*, 159 Wn. App. 366, 371-72, 245 P.3d 776 (2011)). Counsel's failure to file any sentencing memorandum or request an exceptional downward sentence, particularly where the trial court expressed reluctance over the resulting standard range, cannot be excused in this case.

Issue 2: Whether Division III's decision to affirm Ms. McFarland's convictions warrants review under RAP 13.4(b)(1)-(3) where the trial court admitted an irrelevant and unduly prejudicial video that showed Ms. McFarland denying involvement in the burglary while in handcuffs, in an impaired state, and being belligerent, and included the officer's opinion on guilt and reference to non-existent evidence.

Division III held that a person's denial of participation in a crime is relevant to show consciousness of guilt, citing *State v. Bruton*, 66 Wn.2d 111, 112-13, 401 P.3d 340 (1965). But, as Judge Fearing wrote in his concurrence, it is questionable how one's denial of presence during a crime can show consciousness of guilt. Appendix A, Fearing, J. (concurring) pg. 1. Indeed, while *Bruton* and its progeny establish that flight from a scene can evidence consciousness of guilt, *Bruton* did not address whether a person's denial of presence at the scene of a crime when questioned by officers shows consciousness of guilt. *See id.* Division III

relied on authority that does not actually state the position for which it is relied upon, thus calling for review as its decision is in conflict with the actual holding in *State v. Bruton, supra.* The decision also conflicts with *State v. Fuller*, which states that evidence of one's denying participation in the crime is irrelevant, inadmissible and not helpful to prove any of the charged crimes. *See State v. Fuller*, 169 Wn. App. 797, 805, 828-29, 832, 282 P.3d126 (2012), *review denied*, 176 Wn.2d 1006 (2013) (defendant denied knowledge of the crime when confronted by officers, which the Court said was inadmissible to show knowledge of the crime or to properly impeach the defendant). Ms. McFarland's denial of presence at the Legault home was not relevant to prove any element of the crimes.

Division III further held that the trial court did not abuse its discretion by admitting the video, even though an officer could be heard telling Ms. McFarland that a burglary had occurred and explaining its elements.[5] (Appendix A, pg. 10-11) But Division III's decision conflicts with settled constitutional and case law regarding opinion testimony that

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[5] During her arrest, the officer told Ms. McFarland that a burglary had occurred the night before, and the officer explained to her what burglary was:

> [Officer]: Do you understand what burglary is?... You don't have to break in... it means being--being anyplace or entering or remaining unlawfully in a building while committing another crime... That's burglary.
>
> ...As far as I know there was a burglary that occurred last night and apparently...something came up that's leading us back to you.

(Exhibit P44, 3:20-3:33, 5:23-5:34)

invades the province of the jury. *See e.g. State v. Quaale*, 182 Wn.2d 191, 200-02, 340 P.3d 213 (2014) (trooper testified that the defendant was impaired, which went to the core issue of whether the defendant was "under the influence" and, therefore, was an unconstitutionally improper opinion on guilt.) *And see State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (internal quotations omitted) ("A law enforcement officer's opinion testimony may be especially prejudicial because the officer's testimony often carries a special aura of reliability.") Here, the officer spoke to an ultimate guilt determination (that a burglary had, in fact, occurred). And, the officer impermissibly opined as to those elements that would satisfy a burglary, which is reversible error. *See Quaale*, 182 Wn.2d at 200-01. The statements denied Ms. McFarland her constitutional right to have an independent jury determine her guilt or innocence.

Next, Division III did question the value of the video evidence in light of the prejudice of showing Ms. McFarland in handcuffs, acting belligerent and/or appearing under the influence, though Division III ultimately concluded that the trial court did not abuse its discretion in admitting the evidence. Appendix A, pg. 12. Division III's decision is in conflict with Wash. Const. Art. I, §22; U.S. Const. Amend. VI and XIV; and *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999) ("well

settled that a defendant in a criminal case is entitled to appear at trial free from bonds or shackles except in extraordinary cases.") It is also in conflict with ER 403 and related case law. ER 403; *State v. Mee*, 168 Wn. App. 144, 157, 275 P.3d 1192 (2012) ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013) ("The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response.")

Here, the jury was more likely to convict based on the misleading nature of the video or an improper emotional response to what they saw and heard on the video, including Ms. McFarland cursing and arguing with the officer while handcuffed, appearing under the influence, sarcastically mimicking her *Miranda* rights back to the officer, being told repeatedly to sit down so she wouldn't "get any brazen idea to take off running or anything like that...", and the officer falsely suggesting that there was some other evidence such as fingerprints that connected her with the crime. (Exhibit P44) Admitting the video violated Ms. McFarland's constitutional right to a fair trial and conflicted with ER 403 cases.

F. **CONCLUSION**

Based on the foregoing, Ms. McFarland requests this Court grant discretionary review.

Respectfully submitted this 31st day of March, 2016.

/s/ Kristina M. Nichols
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APPENDIX A

FILED
March 8, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CECILY ZORADA MC FARLAND, Appellant.	)	No. 32873-2-III UNPUBLISHED OPINION

KORSMO, J. — Cecily McFarland challenges her convictions and sentences for first degree burglary, ten counts of theft of a firearm, and three counts of unlawful possession of a firearm. We conclude that the trial court did not abuse its discretion in the trial rulings and did not err at sentencing. Likewise, the record does not support a contention that trial counsel erred. Therefore, we affirm.

FACTS

Ms. McFarland once dated and lived with Derek Sterling at the home of his parents, the Legaults. That relationship ended and she began dating Chad Faircloth. On the evening of the day she moved in with the Faircloth family, June 21, 2014, Ms. McFarland and Chad Faircloth went to the Legault home. Over multiple vehicle trips extending to the early morning of June 22, the two took a number of items from the

home, including firearms.[1] Ms. McFarland told the Faircloths that she was retrieving her personal property. She also texted Derek Sterling that evening and told him she was at his parents' home.

When he awoke on the 22nd, Mr. Legault discovered that his television, Blu-ray player, eighteen weapons, ammunition, alcohol, and numerous other items, including checkbooks belonging to the Legaults, were missing. Around 8:00 a.m. that morning, a deputy sheriff stopped a vehicle driven by Ms. McFarland on suspicion of DUI. Chad Faircloth was her passenger. She took a portable breath test that reported she had no alcohol on her breath; she was released after a blood sample was taken to check for suspected narcotics impairment.

Later that day law enforcement searched the Faircloth home and retrieved property taken from the Legault home, including ten firearms. Chad Faircloth and Ms. McFarland were arrested and charged with various offenses. In addition to the previously mentioned 14 felonies, the State also charged Ms. McFarland with one count of second degree trafficking in stolen property. Her case proceeded to jury trial.

Prior to jury selection, Ms. McFarland made a number of motions in limine, including one prohibiting the State or its witnesses from referring to the complaining witness as the victim. The court denied this motion. During the trial one of the deputies

[1] On one trip around 6:00 a.m., Jeffrey Faircloth drove the younger couple to the house and waited in his vehicle while the two retrieved some items.

referred to Mr. Legault as the victim. The prosecutor also used the word victim when questioning the deputy. In sum, the word "victim" was used in front of the jury around six times.

The State offered a "bodycam" video of Ms. McFarland's arrest into evidence. Ms. McFarland made a number of objections to the video based on relevancy and prejudice, including that it showed her in handcuffs, referenced that she had served time in jail, included a portion where the deputy was defining the crime of burglary, and included a discussion about Ms. McFarland's drug use. She argued that the only thing probative in the whole ten-minute video was her denial of involvement in any burglary. The State conceded that "some of the stuff probably shouldn't come in," including what constitutes burglary, and the fact that she just got out of jail.

Originally, the prosecutor sought to admit about ten minutes of the video.[2] The trial court, however, ordered that a five minute portion of the video be cut to remove any reference to the fact that she had been in jail. The remaining video was a little less than six minutes in length. Ex. 44. Ms. McFarland still objected on the grounds that it was prejudicial and mostly lacking in probative value. The trial court, however, felt that it was important to show her demeanor. Believing that it was "impossible to sanitize this

[2] The original video is not part of the record on appeal.

completely," the trial court admitted this truncated video and played it for the jury. Verbatim Report of Proceedings (VRP) at 213-214, 216.[3]

The video begins with a handcuffed Ms. McFarland in the house. Ex. 44 at 11 sec. to 15 sec. Then, a deputy took her outside and asked her to sit down in front of the house. *Id.* at 15 sec. to 35 sec. Ms. McFarland was belligerent and appeared possibly intoxicated or under the influence of a drug. *Id.* at 43 sec. to 1 min., 3 sec. ("I want to know what the hell is going on," and "this is fucking crazy and bullshit"). Then, Ms. McFarland asked about burglary. *Id.* at 1 min., 14 sec. to 1 min., 17 sec. ("I don't know why it's a burglary, burglary for what? I didn't burglary [sic] anything"). The deputy responded that another officer soon would explain that to her. *Id.*

About two minutes went by where nothing happened other than occasional disgruntled comments from Ms. McFarland. *Id.* at 1 min., 17 sec. to 3 min., 13 sec. Then the conversation turned back to burglary. *Id.* at 3 min., 12 sec. to 3 min., 21 sec. ("Burglary, what the fuck you mean burglary, I was here the whole time except when I went out to go get my clothes.") The deputy then explained what burglary means. *Id.* at 3 min., 21 sec. to 3 min., 32 sec. (correcting Ms. McFarland "you don't have to break in . . . it means being any place, or entering or remaining unlawfully in a building while committing another crime.") Ms. McFarland asked where this burglary happened, and the

[3] VRP denotes the consecutively numbered transcripts covering the trial, while VTP will be used to denote the transcript of the pretrial and posttrial proceedings.

deputy said he did not know. *Id.* at 3 min., 33 sec. to 3 min., 37 sec. Ms. McFarland then reiterated that she did not leave at all last night except to go get her clothes. *Id.* at 3 min., 37 sec. to 3 min., 41 sec. The deputy then said, they're "probably talking about last night, where were you last night?" and Ms. McFarland states, "I was here." *Id.* at 3 min., 41 sec. to 3 min., 48 sec.

In the final portion of the video, the deputy explained to Ms. McFarland that she was detained. He then asked her if her rights had been read to her, and when she did not respond, he proceeded to read the *Miranda*[4] rights. *Id.* at 4 min. to 5 min., 8 sec. Ms. McFarland was belligerent while the deputy read the *Miranda* rights, quoting the right to remain silent back to him. *Id.* at 4 min., 30 sec. to 4 min., 45 sec. At the end, she said she understood the rights he read to her. *Id.* at 5 min., 5 sec. to 5 min., 10 sec.

The deputy then explained the situation to her as he saw it. *Id.* at 5 min., 23 sec. to 5 min., 33 sec. ("As far as I know there was a burglary that occurred last night, and apparently somehow your name or some video or fingerprints or . . . I don't know, something came up that's leading us back to you"). Ms. McFarland responded, "What the hell, I was here the whole fucking all last night." *Id.* at 5 min., 35 sec. Right after that statement, the video ended.

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[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The State dismissed the trafficking charge during trial. The defense did not put on a case. During closing arguments, both the State and defense referenced the video. The defense theory of the case was that small, weak Ms. McFarland was a bystander to the theft of the guns by the Faircloths. Nonetheless, the jury ultimately found Ms. McFarland guilty of all 14 remaining charges: three counts of unlawful possession of a firearm, ten counts of theft of a firearm, and the first degree burglary count.

At sentencing, the court calculated Ms. McFarland's offender score at two on the ten firearm theft counts based on her two prior adult felony convictions.[5] The offender score was calculated at three on the remaining four counts, with the burglary offense counting as one point on the unlawful possession charges and the unlawful possession charges collectively adding one point to the burglary scoring. Clerk's Papers (CP) at 214-215. The defense agreed with the calculation of the standard ranges and did not dispute the scoring. VTP at 22-23. Defense counsel asked for low end sentences, noting the harshness of the resulting sentence. VTP at 24. The trial court agreed that the sentence was harsh, but stated that judges "apparently don't have much discretion here." VTP at 25. The court then imposed a mid-range term on the burglary count and consecutive low-end sentences totaling 237 months on the remaining charges. VTP at 25-26; CP at 216.

[5] Ms. McFarland actually had three prior convictions, but two of them were considered the same criminal conduct and counted as one offense. Clerk's Papers at 214.

Ms. McFarland timely appealed to this court.

ARGUMENT

This appeal challenges the trial court's ruling on the "victim" nomenclature and the admission of the bodycam video of the defendant, as well as the calculation of the offender score and the standard range sentence. We address those four matters in the order stated.

"Victim" Reference

Ms. McFarland challenges the court's denial of her pre-trial motion to prohibit witnesses from referring to the Legaults as victims. While we believe that there are situations where such testimony would be erroneous, this was not one of those cases. The trial court did not abuse its discretion.

As a general rule, trial judges have broad discretion in their evidentiary rulings. *State v. Sharp*, 80 Wn. App. 457, 460, 909 P.2d 1333 (1996). Accordingly, we review rulings on motions in limine for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

It is improper for a witness to testify that a defendant is guilty. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Ms. McFarland argues that use of the word "victim" is the equivalent of expressing the opinion that she is guilty. It is not. As with

many words, "victim" has several connotations that are dependent on the context in which the word is used. Someone who has been shot is regularly referred to as a victim by law enforcement and medical professionals without regard to whether the shooting is justified. A person who has been swindled of all her savings is a victim of theft or fraud. Law enforcement frequently refers to the complainant in a criminal case as the victim. The word simply serves as a designation that places a person in a particular category.

Nonetheless, the word could on some occasions serve as an opinion. Other states have held in certain circumstances that using the term victim is not permissible. The Vermont Supreme Court explained that "where the commission of a crime is in dispute and the core issue is one of the complainant's credibility, it is error for a trial court to permit a police detective to refer to the complainant as the 'victim.'" *State v. Wigg*, 2005 VT 91, 179 Vt. 65, 889 A.2d 233, 236. Other jurisdictions agree with this determination. *See State v. Devey*, 2006 UT App. 219, 138 P.3d 90, 95-96 (holding it may have been error to deny a motion in limine prohibiting the State and witnesses from referring to the complaining witness as a "victim" when the existence of a crime was at issue); *State v. Albino*, 130 Conn. App. 745, 762, 24 A.3d 602 (2011) (holding that "in a case where there is a challenge as to whether a crime occurred, the repeated use of the words victim, murder and murder weapon is improper"); *Jackson v. State*, 600 A.2d 21 (Del. 1991) (recognizing that "victim" may be appropriate when there is no doubt that a crime was committed and identity was at issue); *Veteto v. State*, 8 S.W.3d 805, 816-817 (Tex. App.

2000), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (2008) (reference to child as "the victim" instead of "the alleged victim" could lend credence to her testimony that the assaults occurred).

The only Washington case to address this issue in a published opinion did so in an entirely different context. *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44 (1982). *Alger* was a prosecution for statutory rape. The court read the jury a stipulation of the parties concerning the defendant's age and the fact that he had not been married to "the victim." *Id.* at 248-249. On appeal, the defendant challenged the reference as a judicial comment on the evidence in violation of our state constitution. *Id.* at 249. Without deciding whether it was error, the court determined that the single reference did not prejudice the defendant. *Id.*

We believe that in some circumstances it could be error for a witness to use the word "victim" to express an opinion or for a judge to use the word to refer to a disputed fact. That does not justify a blanket prohibition on use of the word. More to the point, there was no error in using the word in this case. There was no dispute that the Legaults were burglarized. The defense theory simply was that Ms. McFarland was not actively involved. Use of the word "victim" to refer to the Legaults was not error in this context.

The trial court did not abuse its discretion by denying the motion in limine.

Video of Defendant

Ms. McFarland contends that the trial court erred in permitting use of the reduced six minute video of her arrest. While we share her concerns that more of the video was shown than was necessary, we again conclude that the trial court did not abuse its discretion in allowing the exhibit into evidence.

As mentioned previously, trial courts have broad discretion in admitting evidence. *Sharp*, 80 Wn. App. at 460. Accordingly, we review those rulings for abuse of discretion. *State v. Slocum*, 183 Wn. App. 438, 449, 333 P.3d 541 (2014).

Ms. McFarland challenges the video exhibit on three grounds. She argues that it was not relevant, a deputy's discussion of the elements of the crime of burglary was improper, and the exhibit was unduly prejudicial. We look at those arguments in the order stated.

The video was relevant because it included Ms. McFarland's denial of involvement in the crime, a facet of the recording that she agreed was relevant. The State offered that evidence to show her consciousness of guilt. That type of evidence long has been admissible. *State v. Bruton*, 66 Wn.2d 111, 112-113, 401 P.2d 340 (1965). The statement also tied the defense down to theories consistent with her alleged non-involvement with the incident. Thus, that aspect of the video was relevant and admissible. ER 401, 402.

More problematic is Ms. McFarland's second complaint that the discussion of the elements of burglary discussion was improper. The prosecutor conceded at trial that it

should not be admitted. Nonetheless, the discussion was part and parcel of the defendant's discussion and denial of involvement in the crime. Statements she made prompted the deputy to correct her understanding of what constituted a burglary.[6] As the trial court acknowledged, it was not possible to completely sanitize the video. VRP 213-214.

The record does not establish abuse of discretion. The deputy's discussion of the elements of the offense was limited and also was consistent with the court's later instruction to the jury. The discussion was not offered to the jury as a statement of law for their consideration. It simply put the denial of involvement in its proper context. Finally, the court's written instructions repeatedly reminded jurors that it must accept the law as contained in the written instructions. CP at 135, 136. Given all, we cannot say the court erred in its decision. There was minimal prejudice from this discussion and it did relate to relevant statements made by the defendant.

Finally, Ms. McFarland does complain that the redacted video was unduly prejudicial by showing her in handcuffs[7] and showing her demeanor over several minutes

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[6] The exchange in question began with Ms. McFarland, stating: "Burglary, what the f--- actually you mean burglary. I've been here the whole time except when I went out to go get my clothes." Deputy Linscott asks if she understood "what burglary actually is?" She responded, "Yeah, when you're breaking and entering." The deputy answered back: "Eh, you don't have to break in. It means being in any place, or entering or remaining unlawfully in a building while committing another crime." Ex. 44 at 3 min., 13 sec. to 3 min., 34 sec.

[7] The trial court offered to give a limiting instruction concerning the handcuffs. However, no limiting instruction was requested. VRP at 214.

while she was not being questioned or making any statements relevant to the proceedings. The trial court excised nearly six minutes of the video, but left in this evidence of her demeanor, believing it to be important for the jury to consider. While we question whether the value of that evidence was outweighed by its prejudice, we acknowledge that this was the trial court's decision to make. In large part the demeanor evidence was cumulative to that shown in the admittedly relevant portions of the video. "The admission of evidence which is merely cumulative is not prejudicial error." *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970). We conclude that Ms. McFarland has not shown that the court abused its discretion in its editing of the video.

The admission of the redacted video in exhibit 44 was not error.

Offender Score Calculation

Ms. McFarland also challenges the offender score calculation, arguing that all of the offenses should have been considered the same criminal conduct. Because this argument fails for several reasons, it is discussed summarily.

The governing principle is found in RCW 9.94A.589(1)(a). When imposing sentence under that subsection, courts are required to include each other current offense in the offender score unless one or more of those offenses constitute the same criminal conduct, in which case they shall be "counted as one crime." The statute then defines that particular exception to the scoring rule: "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are

committed at the same time and place, and involve the same victim." *Id.* It is the defendant's burden to establish that offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 540-541, 295 P.3d 219 (2013).

Ms. McFarland did not raise this claim to the trial court. In fact, her counsel, under questioning by the trial judge, conceded that the score and range were correct. Since she failed to raise this challenge in the trial court, it is waived. *State v. Nitsch*, 100 Wn. App. 512, 520-521, 997 P.2d 1000 (2000). She never attempted to meet her burden under *Graciano*.

A second reason that the argument fails is that it does not satisfy the statutory test. Among the statutory factors is a requirement that the offenses involve the same victim. While the burglary and theft counts could constitute the same criminal conduct, and were in fact so treated by the trial court, the unlawful possession counts could not constitute the same conduct with the burglary charge because the victims were different. The Legaults were the victims of the burglary and theft counts. However, the public at large is the victim of an unlawful firearm possession charge. *See State v. Haddock*, 141 Wn.2d 103, 110-111, 3 P.3d 733 (2000).

A third reason that the argument could fail is the burglary anti-merger statute, RCW 9A.52.050. This statute gives trial courts the authority to treat burglary offenses separately even when the underlying crime would otherwise constitute the same criminal conduct. *State v. Lessley*, 118 Wn.2d 773, 781-782, 827 P.2d 996 (1992).

Finally, application of the same criminal conduct standard is problematic with respect to the scoring of the theft and firearm offenses. The same criminal conduct exception is found in RCW 9.94A.589(1)(a) and by its terms applies only to offenses scored under that subsection. *See* first sentence (expressly exempting subsections (b) and (c) from its application). In this case, the only offense to which the same criminal conduct exception could have been applied was to the burglary count. However, that standard has no application to the scoring of the theft and unlawful possession counts that were sentenced under subsection (c). Thus, while the theft counts could be the same criminal conduct as the burglary, the burglary could not be the same criminal conduct as the theft counts.[8]

For all of these reasons, the offender score argument is without merit.

Exceptional Sentence

Lastly, Ms. McFarland contends that the trial court erred in imposing a standard range sentence because it did not recognize it had any discretion to do otherwise. She attacks this issue on both statutory and ineffective assistance rationales. For differing reasons, both of them fail.

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[8] It appears the scoring of the theft counts as "2" instead of "3" was error, although it inured to the benefit of Ms. McFarland. As the State committed the same error in its briefing to the trial court, it cannot complain here.

For over three decades since its original enactment, the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, has always stated that a "sentence within the standard sentence range . . . shall not be appealed." RCW 9.94A.585(1). Accordingly, an offender who receives a standard range sentence, such as Ms. McFarland, cannot challenge the sentence on appeal. Instead, any challenge that might exist is to the process by which the sentence was imposed. A challenger must show that the judge failed to consider something he was required to consider or otherwise refused to follow a mandatory process. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). For instance, the categorical refusal to consider an alternative sentence is a failure to comply with the procedural requirements of the SRA. *State v. Grayson*, 154 Wn.2d 333, 342-343, 111 P.3d 1183 (2005). Ms. McFarland argues that the trial court failed to recognize that it had power to impose an exceptional sentence, likening the case to *In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007) (reversing trial court for failure to consider an exceptional sentence when sentencing multiple serious violent felonies under RCW 9.94A.589(1)(b)).

Ms. McFarland's initial problem here is that she never asked the trial judge to impose an exceptional sentence. Her counsel made no such request at sentencing and there is no sentencing memorandum or other writing suggesting the possibility. Likewise, the prosecutor's sentencing brief does not address the topic. It simply was not

before the court. Accordingly, the judge cannot have erred for failing to do something he was never asked to do.[9]

Alternatively, Ms. McFarland argues that her counsel rendered ineffective assistance by failing to seek an exceptional sentence. Again, very familiar standards govern review of this contention. The Sixth Amendment to the United States Constitution guarantees the effective assistance of counsel. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts apply a two-prong test, evaluating whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

[9] It is in this context that we read the judge's "no discretion" comment to mean that there was nothing presented to him other than a standard range sentence, leaving the judge little room to maneuver.

The first *Strickland* prong is dispositive here as Ms. McFarland has not demonstrated that her counsel erred. Specifically, she has not shown that a basis existed for an exceptional sentence in her case that counsel unreasonably failed to pursue. For instance, there was evidence in the record that Ms. McFarland had used narcotics around the time of the burglary. This record does not reflect whether she was sufficiently impaired that she was unable to appreciate the wrongfulness of her actions. *See* RCW 9.94A.535(1)(e). We simply do not know what efforts the defense made to investigate that mitigating factor or some other mitigating factor that might have been applicable.

Ms. McFarland suggests now that an exceptional sentence was appropriate under RCW 9.94A.535(1)(g). That provision allows an exceptional sentence when the "operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter." She likens this case to *Mulholland* where the court applied the mitigating factor to a sentence imposed under RCW 9.94A.589(1)(b). However, there are two factual differences between this case and *Mulholland.*

First, sentencing here was under subsection .589(1)(c), not (1)(b) as in that case. While the reasoning in *Mulholland* might well also apply to subsection (1)(c), Ms. McFarland has presented no published authority indicating that any court has ever done so before, thus suggesting that her counsel did not err by failing to make the argument. A problem with comparing the two subsections is that RCW 9.41.040(6) expressly states

that "notwithstanding any other law," an offender committing unlawful possession of a firearm or theft of a firearm "shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection." On its face, that provision appears to prohibit any exceptional sentence that would alter the consecutive *ordering* of the sentences, but does not otherwise prohibit use of the exceptional sentence power in these cases. Thus, it would not prohibit the *reduction* of each of the consecutive terms in the event an exceptional sentence is appropriate. We need not resolve the question of whether the rationale of *Mulholland* would authorize an exceptional sentence here due to the second critical factual difference between that case and this one.[10]

That critical difference is that there was no request for an exceptional sentence here, although there was one in *Mulholland.* 161 Wn.2d at 326. That means that to raise this issue at all, Ms. McFarland has to attack her counsel's performance and show that her representation fell below professional norms. In light of the lack of any history of other counsel successfully making a similar argument, we cannot conclude as a matter of law that counsel failed to meet professional standards. Nonetheless, it is still possible for Ms. McFarland to prevail on this point if she can present evidence that her counsel erred

[10] An argument on this point should involve any legislative history materials that would shed light on the meaning of RCW 9.41.040(6). *See State v. Murphy*, 98 Wn. App. 42, 47-49, 988 P.2d 1018 (1999) (discussing legislative intent).

because he did not pursue an exceptional sentence that was in fact available to her.[11] To do so, however, she will have to marshal that evidence and argument in a personal restraint petition (PRP) since the necessary evidence is not in the record of this appeal. *See McFarland*, 127 Wn.2d at 338 (PRP appropriate vehicle for establishing counsel ineffectiveness when necessary facts are not in the record).

Accordingly, we conclude that Ms. McFarland has not established that her counsel rendered ineffective assistance at sentencing. The convictions are therefore affirmed.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

I CONCUR:

Siddoway, C.J.

[11] Mere disagreement with a standard sentence range is not a basis for an exceptional sentence. *State v. Freitag*, 127 Wn.2d 141, 144-145, 896 P.2d 1254, 905 P.2d 355 (1995). Sentencing for this type of offense is harsh by legislative design. *Murphy*, 98 Wn. App. at 49 n.8.

No. 32873-2-III

FEARING, J. (concurring) — I concur in the majority's affirmation of the convictions of Cecily McFarland. I write separately because I disagree with one of the rulings of the majority. I would rule that the trial court abused its discretion when allowing the State to show the jury large portions of the five-minute, thirty-nine seconds arrest video.

The majority writes that the State offered that portion of the video, in which Cecily McFarland denies being present at the Legault home, as evidence to show McFarland's consciousness of guilt. Majority at 10. I question how one's denial of being present during a crime shows consciousness of guilt. Perhaps the tone of voice or mannerism accompanying the denial could tend to show a guilty conscience, but the State does not base a claim of relevance on these airy considerations. Nevertheless, at trial, defense counsel agreed that these portions of the video may be shown.

The majority writes that "[t]hat type of evidence long has been admissible," citing *State v. Bruton*, 66 Wn.2d 111, 112-13, 401 P.2d 340 (1965). Majority at 10. Our high court wrote, in *Bruton*, that evidence of flight is admissible. The high court reversed the conviction of Virgie Washington, nonetheless, because of lack of evidence of flight.

More importantly, the *Bruton* court did not address whether one's denial of guilt tends to establish one's guilt.

During the video, Cecily McFarland occasionally denied being present at the Legault home during the theft. Because of the prejudicial nature of the video, the trial court should have limited the State to playing one instance of the denial. The cumulative nature of evidence is a basis for excluding evidence. ER 403. Nevertheless, again, defense counsel agreed that the denial could be shown to the jury and counsel did not object to repetitive showing of the denial.

The video was highly prejudicial to Cecily McFarland. The video showed her slovenly dressed and in handcuffs, included a discussion of her drug use, contained a discussion of the legal nature of burglary, captured the reading of the *Miranda* rights during which McFarland quoted some of the rights, and recorded her repeated use of the "f" word. A perceptive viewer might conclude McFarland to be intoxicated or under the influence of drugs while videotaped. During the video, the arresting officer suggested that McFarland was a flight risk and falsely suggested that fingerprints might link McFarland to the crime. None of this video material tended to prove that McFarland committed any crime. A jury should not see an accused in handcuffs at trial. *State v. Finch*, 137 Wn.2d 792, 859, 975 P.2d 967 (1999). No purpose serves to not extending this rule to a video. McFarland's potty mouth could lead a juror with a stereotypical view of a criminal to regard such language to imply guilt. McFarland's quoting of *Miranda* rights would signal to jurors that she had been arrested before.

Despite an abuse of discretion in playing the entire video to the jury, I would affirm the conviction because the error was harmless. Erroneous evidentiary rulings that do not impact a constitutional right are not reversible error unless, within reasonable probabilities, the outcome of the trial would have been materially affected if the error had not occurred. *State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013, 787 P.2d 906 (1989). Cecily McFarland does not claim constitutional error.

At trial, Cecily McFarland admitted to being present at the Legault home during the burglary. She previously lived at the home and would have knowledge as to the location inside the residence of the pilfered property. Her codefendant would not have sought to burglarize the home without input from McFarland. The portions of the video admitted with the consent of McFarland also showed her handcuffed and broadcasted her use of the "f" word. Therefore, showing the permissible portion of the video already caused harm.

I CONCUR:

Fearing, J.

Fearing, J.

IN THE SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON Respondent	)	Supreme Court No. _____ COA No. 32873-2-III
vs.	)	No. 14-1-00413-6
CECILY MCFARLAND	)	PROOF OF SERVICE
Appellant/Petitioner	)	

I, Kristina M. Nichols, assigned counsel for the Appellant/Petitioner herein, do hereby certify under penalty of perjury that on March 31, 2016, having obtained prior permission, I served a true and correct copy of the attached petition for review on the Respondent via email at kburns@grantcountywa.gov. I also mailed by first-class mail with the U.S. Postal Service, postage prepaid, a true and correct copy of the same to the Appellant/Petitioner at:

Cecily McFarland, DOC #320691
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

Dated this 31st day of March, 2016.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
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PO Box 19203
Spokane, WA 99219
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Subject: State v. Cecily McFarland, 32873-2-III

Please find attached for filing Ms. McFarland's petition for discretionary review with proof of service. Thank you,

Kristina M. Nichols, Attorney at Law
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