Supreme Court No. 97988-0
COA No. 52231-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DERRICK LYONS,

Petitioner.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner, Derrick Lyons, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Lyons seeks review of the unpublished opinion of the Court of Appeals in *State v. Lyons*, cause number 52231-4-II, filed November 19, 2019. A copy of the decision is contained in Appendix A at pages A-1 through A-14.

C. ISSUE PRESENTED FOR REVIEW

1. The failure of counsel to move for mistrial prejudiced Lyons, when there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Was Lyons denied his due process right to effective assistance of counsel by counsel's failure to move for a mistrial where evidence of bolt cutters admitted in connection with the offense of attempted second degree burglary charged in Count IV became unfairly prejudicial and irrelevant evidence regarding the remaining three counts after the trial court dismissed Count IV?

D. STATEMENT OF THE CASE

1. Procedural history:

Derrick Lyons was charged with second degree burglary, attempted first degree theft, and attempted theft of a motor vehicle. The State also

alleged one count of attempted second degree burglary of Dietrich Trucking, a business in Lewis County, Washington in Count IV. Clerk's Papers (CP) 1-4. The State alleged that the offenses took place on December 25, 2017 at two separate businesses. *State v. Lyons*, No. 52231-4-II, 2019 WL 6131242, (Wash. Ct. App. Nov. 19, 2019) (unpublished).

While investigating a suspected burglary of B & M Logging, police located a truck parked in a turnout on a nearby road. 1RP at 154. Exhibit 33 was a photograph of the bed of the truck showing a large set of bolt cutters located in the back of the truck. 1RP at 156. The court admitted evidence of bolt cutters found by police during a search of the truck over defense objection. 2RP at 226. The trial judge ruled that the bolt cutters are "pretty relevant" and that the tool was found in the pickup truck and that there were "tracks leading to and from the pickup." 2RP at 227.

No evidence showed that access to B & M Logging property was gained by use of bolt cutters. A deputy sheriff investigated the north end of B & M Logging, staying outside the fence, and then back towards the south end of the building, noticing that both gates to the property were closed and secure. 2RP at 171-72. A deputy sheriff went to the back-door entrance of B & M Logging and noted it was slightly ajar. 2RP at 282-83.

The court allowed admission of the bolt cutters based on the footprints to and from the truck and on the basis of testimony that a lock at Dietrich Trucking was cut. 2RP at 227. The trial court stated, "there's

testimony that the lock on Dietrich Logging was cut." 2RP at 227. However, at the conclusion of the State's case in chief the defense moved for dismissal of Count IV, the attempted second degree burglary of Dietrich Trucking at 159 Labree Road. 2RP at 321. The State conceded that the testimony did not show that the equipment yard at 159 Labree Road was fully enclosed by a fence. 2RP at 322. The court granted the defense motion to dismiss attempted second degree burglary charged in Count IV. 2RP at 322-23.

The Court of Appeals affirmed the three convictions, finding that (1) the State produced sufficient evidence to support Lyons' convictions, (2) that the prosecutor's statements were not improper, (3) the trial court did not err in admitting bolt cutters found in a pickup truck parked near the scene of the crimes or failing to *sua sponte* order a mistrial following dismissal of the charge for which the bolt cutters were relevant, (4) and that Lyons did not receive ineffective assistance of counsel based on the failure to move for a mistrial,. Slip. op. at *1.

Lyons now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and

(2)).

1. INEFFECTIVE ASSISTANCE OF COUNSEL DENIED LYONS HIS RIGHT TO A FAIR TRIAL

Lyons was denied effective assistance of counsel when his attorney failed to failed to move for a mistrial after the jury was exposed to a picture of bolt cutters that was entered in the context of Count IV, the attempted burglary of a building or yard separate from Count I. Count IV was subsequently dismissed.

Defendants in criminal proceedings have a constitutional right to effective assistance of counsel. See U.S. Const. amend. VI; Const. art. I, §22. A claim of ineffective assistance of counsel presents a mixed question of fact and law that is reviewed de novo. ***State v. Sutherby***, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); ***Strickland v. Washington***, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

To prevail on a claim of ineffective assistance of counsel, Lyons must show that (1) his trial counsel's representation was deficient and (2) his trial counsel's deficient representation prejudiced him. ***Strickland***, 466 U.S. at 687; ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The defendant bears the burden of showing both deficient performance and resulting prejudice. ***State v. Grier***, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011); ***Strickland***, 466 U.S. at 687.

The first prong is met by a defendant showing that the performance falls " 'below an objective standard of reasonableness.' " ***Grier***, 171 Wn.2d at 33 (quoting ***Strickland***, 466 U.S. at 688). A defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). " 'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.' " ***Grier,*** 171 Wn.2d at 33 (quoting ***Kyllo***, 166 Wn.2d at 862-63).

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. ***Sutherby***, 165 Wn.2d at 883; ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. ***State v. Hawkins***, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), review denied, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." ***Grier***, 171 Wn.2d at 33 (citing ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); ***State v. Aho***, 137

Wn.2d 736, 745-46, 975 P.2d 512 (1999)).

Trial strategies and tactics are thus not immune from attack on grounds of ineffective assistance of counsel. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." ***Roe v. Flores-Ortega***, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Regarding the second ***Strickland*** prong, prejudice is established if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." ***State v. Nichols***, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). A failure to make either showing terminates review of the claim. ***Thomas***, 109 Wn.2d at 225-26.

As noted by the Court in its unpublished opinion, Lyons does not contend that the photos of the bolt cutters were improperly admitted when Count IV was pending. *Lyons*, slip op. at 10. However, Lyons argues that no nexus was demonstrated by the State between the bolt cutters and the remaining burglary and theft charges, which involved B & M Logging, and that by failing to move for mistrial after Count IV was dismissed, the State was able to "get in through the back door" evidence of bolt cutters—ostensibly entered as a burglary tool—regarding a burglary in which no

evidence of use of burglary tools, including bolt cutters, was offered. A deputy sheriff testified that a door to B & M was ajar, but no evidence of the use of tools, including bolt cutters, was submitted. Moreover, the trial court judge explicitly noted that the picture of the bolt cutters was entered because "there's testimony that the lock on Dietrich Trucking was cut." 2RP at 227.

A trial court should grant a mistrial when, viewed in light of all the evidence, the defendant has suffered prejudice such that nothing short of a new trial will insure that the defendant receives a fair trial. ***State v. Rodriguez***, 146 Wn.2d 260, 270, 45 P.3d 541 (2002); ***State v. Thompson***, 90 Wn.App. 41, 47, 950 P.2d 977 (1998).

Failure to move for a mistrial does not constitute ineffective assistance where it is clear that counsel's motion would have been denied. "A mistrial should be granted when the defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant will be tried fairly." ***State v. Gamble***, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). "'The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" ***State v. Johnson***, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (quoting ***State v. Hopson***, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

Three factors are necessary to consider when assessing whether an

error warrants a new trial: the seriousness of the alleged error, whether erroneously admitted evidence was cumulative, and whether a proper curative instruction was given to the jury. ***State v. Emery***, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). "In determining the effect of an irregular occurrence during trial, we examine '(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.' " ***Johnson***, 124 Wn.2d at 76 (quoting ***Hopson***, 113 Wn.2d at 284). See also ***State v. Weber***, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

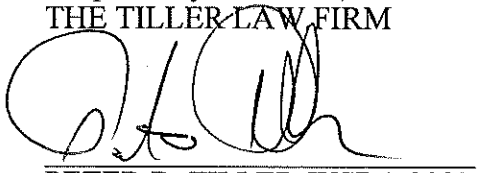
Here, the trial irregularity was serious. The bolt cutters were relevant solely to a dismissed charge and had no relevance to the burglary and theft charged in the remaining counts. No curative instruction was given. 2RP at 340-51. In addition, there was little if any evidence linking Lyons to the burglary and theft at B & M other than the footprints found in the area and the fact that Lyons was found in the area of the building. 1RP at 140-41. Due to the lack of physical evidence linking Lyons to the burglary of B & M, it is reasonable to conclude that the jury attached significance to the bolt cutters. Accordingly, if Lyon's attorney had moved for a mistrial, the court would have abused its discretion in refusing to grant the motion; Lyons was therefore prejudiced by his counsel's failure to move for mistrial.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced error in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: December 18, 2019.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on December 18, 2019, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 18, 2019.

PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 19, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DERRICK LEE LYONS, Appellant.	No. 52231-4-II UNPUBLISHED OPINION

MAXA, C.J. – Derrick Lyons appeals his convictions for second degree burglary, attempted first degree theft, and attempted theft of a motor vehicle and the imposition of certain legal financial obligations (LFOs).

We hold that (1) the State produced sufficient evidence to support Lyons' convictions, (2) Lyons's prosecutorial misconduct claim fails because the prosecutor's statements were not improper, (3) the trial court did not err in admitting bolt cutters found in a pickup truck parked near the scene of the crimes or failing to sua sponte order a mistrial following dismissal of the charge for which the bolt cutters were relevant, (4) Lyons did not establish ineffective assistance of counsel based on the failure to move for a mistrial, and (5) the criminal filing fee imposed as an LFO and the interest accrual provision for nonrestitution LFOs must be stricken, but the DNA collection fee was properly imposed.

Accordingly, we affirm Lyons' convictions, but we remand for the trial court to strike the criminal filing fee and interest accrual provision for nonrestitution LFOs from the judgment and sentence.

FACTS

Initial Incident

On December 25, 2017 at approximately 6:00 A.M., Lewis County Sheriff's Special Services Chief Dustin Breen was patrolling Hamilton Road in Chehalis when he saw a small pickup truck with Oregon license plates parked at a turnout. Breen observed fresh tire tracks in the snow behind the vehicle, indicating that the vehicle had not been there long. After speaking with a woman in the passenger's seat, he believed that at least one other person was in the area. Breen left to check on nearby businesses.

Breen saw a person later identified as Donald Emery walking along the road. Emery was clothed, but was not wearing any shoes and was walking in the snow and slush in socks. Breen apprehended Emery, turned him over to a fellow officer, and began to track Emery's footprints. Breen eventually located a pair of shoes, coveralls, and a key fob behind a Conex container in the same area as a UPS vehicle. These items appeared to belong to Emery.

Other officers arrived on the scene and identified two sets of footprints going behind B&M Logging, a nearby business. Deputy Emmet Woods tracked the prints. Near the B&M building, Woods saw a person later identified as Lyons hiding in the brush. Lyons ran away after Woods announced himself, but Woods ultimately apprehended him. Lyons was wearing shoes, and had a torn black latex glove on one hand.

Deputy Jason Mauermann tracked the footprints in and around B&M. Mauermann identified prints consistent with Emery's and Lyons's shoes by a fire hydrant outside of the property, between some of the vehicles in front of the building, and near the back entrance. The back door to the building appeared to be damaged and slightly ajar. Mauermann saw Emery's

and Lyons's prints in close proximity to the door. He also identified Lyons's shoe prints inside the building.

Inside of B&M, a number of items had been moved. Two shop trucks and a forklift had been moved forward, and the key fob to one of the trucks had been removed. A large oxygen tank had been put in the back of one truck and a blue toolbox weighing approximately 2,000 pounds had been moved from one side of the building to the other. Other items had been placed in the back of the trucks, including power tools, grinders and a radio, CB radios, and a wire feed welder. These items had not been in the trucks the night before.

Breen also saw footprints outside the fence of another business, Dietrich Trucking. Mauermann identified a print outside the front window of Dietrich Trucking that he believed was consistent with Lyons's shoes. In addition, a lock at Dietrich Trucking had been cut.

Later, officers found Lyons's Oregon driver's license in the pickup truck parked near the scene of the crimes. In addition, on the driver's side floorboard officers found a rubber glove matching the one Lyons was wearing when he was apprehended. Finally, officers found a set of bolt cutters in the bed of the truck.

Regarding B&M, the State charged Lyons with second degree burglary (count I), attempted theft in the first degree (count II), and attempted theft of a motor vehicle (count III). Regarding Dietrich Trucking, the State charged Lyons with attempted second degree burglary (count IV).[1]

[1] The State also charged Emery with the same offenses. Before trial, the court severed Lyons's and Emery's cases.

Trial

At trial, Breen, Woods, and Mauermann testified to the facts stated above. The State also introduced Lyons's shoes into evidence, and Mauermann described distinct aspects of the tread that he used in tracking Lyons's footprints.

The owner of B&M, Brandon Smith testified about the items that had been moved. He observed that it would probably take a couple of people to move either the tank or the toolbox. He also testified that no one had permission to be on the property, go into building, or move the trucks.

The State offered for admission into evidence the bolt cutters found in the back of the pickup truck. Lyons objected because there was no nexus between the bolt cutters and the B&M charges and the foundation had not been laid for a connection between the bolt cutters and the Dietrich Trucking charge. The court overruled the objection, ruling that the bolt cutters were relevant. Lyons did not argue that the bolt cutters were inadmissible under ER 403 or ER 404(b).

After the close of evidence, the trial court granted Lyons's motion to dismiss count IV, the charge regarding Dietrich Trucking. Lyons did not move to strike evidence admitted only regarding count IV, request a limiting instruction to the jury, or move for a mistrial regarding the evidence admitted in support of that charge.

Closing Argument

During closing argument, the prosecutor argued that Lyons drove the pickup truck parked near the scene of the crime. The prosecutor stated, (1) "How did Mr. Lyons aid Mr. Emery? One, drove him there," 3 Report of Proceedings (RP) at 360; (2) Lyons was "right outside and he drove Mr. Emery there," 3 RP at 364; (3) "Mr. Lyons drove him there. The two of them drove

there together," 3 RP at 366; and (4) "We know Emery was there and we know [Lyons] drove him there," 3 RP at 367. The prosecutor also suggested that the truck was Lyons's truck.

The State did not make reference to the bolt cutters at any time during closing argument.

Verdict and Sentencing

The jury found Lyons guilty of second degree burglary, attempted first degree theft, and attempted theft of a motor vehicle. The trial court imposed three LFOs, including a $500 crime victim penalty assessment, $200 criminal filing fee, and $100 DNA collection fee. The judgment and sentence also provided that the financial obligations imposed would bear interest until paid in full. The court entered an order of indigence for purposes of Lyons's appeal.

Lyons appeals his convictions and the imposition of the criminal filing fee, DNA collection fee, and interest on LFOs.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Lyons argues that the State failed to produce sufficient evidence to prove that he committed the crimes of second degree burglary, attempted first degree theft, and attempted theft of a motor vehicle. We disagree.

1. Standard of Review

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence and the court views the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *Id.* at 265-66. Credibility determinations are made by the trier of

fact and are not subject to review. *Id.* at 266. Circumstantial and direct evidence are equally reliable. *Id.*

2. Second Degree Burglary

The elements of second degree burglary are (1) entering or remaining unlawfully in a building other than a vehicle or a dwelling, and (2) doing so with intent to commit a crime against a person or property therein. RCW 9A.52.030(1). RCW 9A.52.010(2) defines the phrase "[e]nters or remains unlawfully" as "[a] person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."

Lyons argues that the State failed to produce sufficient evidence that he entered or remained in a building. He claims that the evidence at trial only established that he was present in the area surrounding B&M, and no physical evidence or eyewitness testimony placed him inside the building.

However, the State produced direct evidence that Lyons entered the B&M building. Mauermann testified that he saw a print inside B&M that appeared to be consistent with Lyons's shoe. He used a photograph of Lyons's shoes to make a positive identification. The State also introduced Lyons's shoes into evidence and had Mauermann describe distinct aspects of the tread that he used in tracking Lyons's shoe prints.

In addition, the State produced circumstantial evidence from which the jury could infer that Lyons entered B&M. Mauermann found Lyons's shoe prints "in between some of the vehicles" outside of the building. 2 RP at 205. The door to B&M appeared to be damaged and slightly ajar, and Mauermann identified two sets of shoe prints belonging to Emery and Lyons in

close proximity to the door. Further, a number of items had been moved inside the B&M building.

Viewing this evidence in the light most favorable to the State, we hold that the evidence was sufficient for a reasonable jury to find beyond a reasonable doubt that Lyons entered or remained in the B&M building. Accordingly, we hold that there was sufficient evidence to support Lyons's conviction of second degree burglary.[2]

3. Attempted First Degree Theft and Attempted Theft of a Motor Vehicle

RCW 9A.56.020(1)(a) defines "theft" as "[t]o 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." First degree theft involves theft of property or services exceeding $5,000 in value. RCW 9A.56.030(1)(a). And under RCW 9A.56.065(1), "[a] person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle." Attempt is defined under RCW 9A.28.020(1), which provides: "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime."

Lyons claims that the evidence showed only that he was present when Emery committed the crime of theft. He points out that he had no items in his possession when he was arrested.

However, the State produced direct and circumstantial evidence from which a jury could infer that Lyons exercised unauthorized control over property in the building exceeding $5,000 as well a motor vehicle. As noted above, a number of items had been moved around inside

[2] Lyons also argues that there was insufficient evidence to convict him of being an accomplice to Emery's crime of second degree burglary. Because there is sufficient evidence to support Lyons's conviction as a principal regarding this crime, we need not address accomplice liability.

B&M. Two shop trucks and a forklift had been moved, and the key fob to one of the trucks had been removed. A large oxygen tank had been put in the back of one truck. A blue toolbox weighing approximately 2,000 pounds had also been moved. The owner of B&M testified that it would probably take a couple of people to move either the tank or the toolbox. And other items had been moved around and placed in the back of the trucks.

We hold that there was sufficient evidence to support Lyons's convictions of attempted first degree theft and attempted theft of a motor vehicle.[3]

B. ALLEGED PROSECUTORIAL MISCONDUCT

Lyons argues that the prosecutor committed misconduct in his closing argument when he argued that Lyons drove Emery in the truck found near the scene of the crimes and implied that Lyons owned the truck. Lyons claims that these facts were not in evidence. We disagree.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). A prosecutor commits misconduct during oral argument by arguing facts not in evidence. *See In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012). However, during closing argument the prosecutor is given wide latitude to assert reasonable inferences from the evidence. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

[3] Lyons also argues that there was insufficient evidence to convict him of being an accomplice to Emery's crimes. Because there is sufficient evidence to support Lyons's convictions as a principal regarding these crimes, we need not address accomplice liability.

Here, Lyons did not object to the challenged statements. When the defendant fails to object to the challenged portions of the prosecutor's argument, he or she is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012).

2. Analysis

Lyons asserts that the prosecutor improperly argued that Lyons drove the pickup truck located near the scene of the crimes. But the evidence supports an inference that Lyons drove the truck. Mauermann testified that he found Lyons's driver's license on the driver's side top visor above the driver's seat. He also found a black latex glove on the driver's side floor, which was the same kind of glove Lyons was wearing on one hand when he was apprehended. And two sets of footprints in the snow led from the truck to B&M, where Lyons's footprints were found. We conclude that the prosecutor's argument that Lyons drove the truck was not improper.

Lyons also asserts that the prosecutor improperly argued that the pickup truck belonged to Lyons when there was no evidence of ownership. Lyons bases his claim on the following statement: "And they searched *his* truck, found Mr. Lyons's driver's license, showing he was actually in that vehicle." 3 RP at 358 (emphasis added). But the prosecutor did not argue that Lyons owned the truck. The reference to "his" truck is consistent with the argument that Lyons was driving the truck. The same evidence supporting the inference that Lyons drove the truck supports an inference that the truck was "his."

Finally, Lyons states without explanation that the prosecutor attempted to bolster the credibility of witnesses with facts not in evidence. To the extent that this statement refers to

some additional comments by the prosecutor not referenced above, we do not consider this statement because Lyons provides no cite to the record on this issue. RAP 10.3(a)(6); *State v. Reeder*, 181 Wn. App. 897, 910 n.15, 330 P.3d 786 (2014).

We reject Lyons's prosecutorial misconduct claim.

C. ADMISSION OF BOLT CUTTERS

Lyons assigns error to the trial court's admission of the bolt cutters found in the bed of the pickup truck located near the scene of the crimes because they were relevant only to the Dietrich Trucking charge that ultimately was dismissed and were not relevant to the B&M charges. But Lyons's real argument is that once the Dietrich Trucking charge was dismissed, the bolt cutters became ER 404(b) bad acts evidence regarding the B&M charges and the trial court should have ordered a mistrial. We reject both arguments.

First, Lyons does not argue that the bolt cutters were inadmissible *at the time they were offered into evidence*, before the Dietrich Trucking charge had been dismissed. Specifically, he does not challenge the trial court's ruling that the evidence was relevant in part because a lock had been cut at Dietrich Trucking. And that ruling was correct – the bolt cutters were relevant to show how Lyons entered Dietrich Trucking by unlawful means.[4] Therefore, we hold that the trial court did not err in making its evidentiary ruling.

Second, Lyons now argues that the trial court should have ordered a mistrial once the Dietrich Trucking charge was dismissed because *at that point* the bolt cutters became ER 404(b)

[4] Lyons states without discussion that the bolt cutters were highly prejudicial, and later cites ER 403. But he did not argue in the trial court that the bolt cutters should have been excluded under ER 403. Therefore, he waived this argument. *State v. Scherf*, 192 Wn.2d 350, 387, 429 P.3d 776 (2018).

bad act evidence with regard to the B&M charges. But Lyons did not move for a mistrial in the trial court. Nor did he move to strike the evidence that was relevant only to the Dietrich Trucking charge or ask for a limiting instruction.

Lyons seems to suggest that the trial court had an obligation to order a mistrial sua sponte once the Dietrich Trucking charge was dismissed. But he cites no authority for the proposition that a trial court automatically must order a mistrial on the remaining charges following dismissal of a charge after evidence has been submitted on that charge.

We hold that the trial court did not err in admitting the bolt cutters or in failing to order a mistrial sua sponte once the Dietrich Trucking charge was dismissed.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Lyons argues that he received ineffective assistance of counsel because his defense counsel failed to move for a mistrial after the trial court dismissed the charge against him for attempted burglary of Dietrich Logging. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). We review ineffective assistance of counsel claims de novo. *Id.*

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *Id.* at 457-58. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 458. Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Id.* Reasonable probability in this context means a probability

sufficient to undermine confidence in the outcome. *Id.* If the alleged ineffective assistance of counsel is defense counsel's failure to file a motion, a defendant must show that the trial court would have granted the motion. *See State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

Here, Lyons fails to show that the trial court would have granted a motion for a mistrial. "The court should grant a mistrial 'only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.' " *State v. Wade*, 186 Wn. App. 749, 773, 346 P.3d 838 (2015) (quoting *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)). Lyons has cited no authority for the proposition that a trial court should order a mistrial on the remaining charges following dismissal of a charge after evidence has been submitted on that charge. Further, admission of the bolt cutters was not so prejudicial to the B&M charges that the trial court would have no choice but to order a mistrial once the Dietrich Trucking charge was dismissed.

We hold that Lyons did not establish ineffective assistance of counsel.

E. IMPOSITION OF LFOS AND INTEREST ACCRUAL PROVISION

Lyons argues that under the 2018 amendments to the LFO statutes, we should strike the criminal filing fee, DNA collection fee, and interest accrual provision imposed in his judgment and sentence. The State concedes that Lyons is indigent and that the criminal filing fee and interest accrual provision should be stricken, but argues that imposition of the DNA collection fee was proper. We agree with the State.

In 2018, the legislature amended (1) RCW 36.18.020(2)(h), which now prohibits imposition of the criminal filing fee on a defendant who is indigent as defined in RCW 10.101.010(3)(a)-(c); (2) RCW 43.43.7541, which establishes that the DNA collection fee no longer is mandatory if the offender's DNA previously had been collected because of a prior

conviction; and (3) RCW 10.82.090, which now states that no interest will accrue on nonrestitution LFOs after June 7, 2018, and that the trial court shall waive nonrestitution interest that had accrued before June 7, 2018. RCW 10.82.090(1), (2)(a). These amendments apply prospectively to cases pending on direct appeal. *State v. Ramirez*, 191 Wn.2d 732, 749-50, 426 P.3d 714 (2018).

At sentencing, the trial court found Lyons to be indigent. Therefore, we accept the State's concession and agree that the criminal filing fee should be stricken. In addition, the interest accrual provision regarding nonrestitution LFOs must be stricken under existing law.

Lyons also argues that his DNA collection fee must be stricken because his DNA was collected before trial in this case as the result of multiple felony convictions in Oregon. However, RCW 43.43.7541 provides that a DNA collection fee is mandatory "unless *the state* has previously collected the offender's DNA as a result of a prior conviction." The term "the state" plainly refers to the state of Washington, not any state. The record does not reflect that Lyons had a previous felony conviction in Washington, and therefore there is no indication that the State previously had collected his DNA. Therefore, we affirm the imposition of the DNA collection fee.

We remand for the trial court to strike the criminal filing fee and interest accrual provision for nonrestitution LFOs, but affirm the imposition of the DNA collection fee.

CONCLUSION

We affirm Lyons's convictions, but we remand for the trial court to strike the criminal filing fee and interest accrual provision for nonrestitution LFOs from the judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, C.J.
MAXA, C.J.

We concur:

J.
LEE, J.

Melnick, J.
MELNICK, J.

THE TILLER LAW FIRM

December 18, 2019 - 3:01 PM

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