

63144-6

63144-6

No. 63144-6-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**LOA MILLER-SHELTON (nka LOA LANKHAAR),  
Appellant.**

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**BRIEF OF RESPONDENT**

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**A. ASSIGNMENTS OF ERROR**

None.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether an appellant may raise an issue of violation of CrR 2.1(d) which calls for court approval to amend an information where appellant waited to raise the issue until after trial and was fully apprised of the charges before trial.
2. Whether a defendant's right to public trial is implicated by the in-chambers questioning of one venire member who expressed concerns that he knew about the case and was prejudiced and no one, including the defendant, objected when the judge inquired if anyone objected to the in-chambers questioning.
3. Whether the comment in closing that defendant's phone call was evidence of "helping the getaway" was prosecutorial misconduct where taken in context the prosecutor was arguing that the defendant's phone call was circumstantial evidence of her willingness to assist as an accomplice.
4. Whether the trial court abused its discretion in responding to the jury's questions about defendant's profiting from the crime when it referred the jury back to the instructions, where the instruction on accomplice liability was accurate and complete.
5. Whether a unanimity instruction was required where the prosecutor charged possession of stolen property under a continuing course of conduct theory over a period of time.
6. Whether there was sufficient evidence for a rational trier of fact to find the defendant guilty of possessing stolen property valued over \$1500 where, taken in the light most favorable to the State, the evidence showed the defendant knew about the stolen dairy equipment, demonstrated her

willingness to assist her husband in disposing of the equipment, and benefitted from the sale of it and where the victim received \$24,000 from the insurance company for the stolen equipment.

7. Whether the defendant demonstrated that the jury considered “extrinsic evidence” where the affidavits did not specify what information about scrap value and market value was shared with the jury and it was well within a juror’s personal experience that scrap value is less than market value.

## **C. FACTS**

### **1. Procedural Facts.**

On May 16<sup>th</sup>, 2007 Appellant Loa Miller-Shelton<sup>1</sup> was charged, along with her husband Wayne Lankhaar, with Theft in the First Degree, in violation of RCW 9A.56.030(1)(a) and 9A.56.020(1)(a) and Trafficking in Stolen Property, in violation of RCW 9A.82.050 for her acts on or about May 12<sup>th</sup>, 2007. CP 124-25. The information was amended before trial to charge Possession of Stolen Property in the First Degree in lieu of Trafficking in Stolen Property and to amend the charging period to April 1<sup>st</sup> to May 31<sup>st</sup>, 2007. CP 115-16. The State attempted to amend the charging period again at the start of trial and during trial, but the court denied the motions. 3RP 47-49, 4RP 152-55.<sup>2</sup>

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<sup>1</sup> Miller-Shelton’s married name at trial was Lankhaar. The State will refer to her as Lankhaar or Loa hereafter although she was charged as Miller-Shelton.

<sup>2</sup> The State will refer to the verbatim report of proceedings referenced as follows: Vol. I – March 31<sup>st</sup>, 2008; Vol. II – April 7<sup>th</sup>, 2008; Vol. III – April 8, 2008; Vol IV – April 9,

The jury convicted Lankhaar of Possession of Stolen Property in the First Degree, but acquitted her of the theft charge. CP 60. After trial defense counsel filed a motion to arrest judgment, alleging the jury committed misconduct and the court had never approved the amendment of the information. CP 42-59. At the hearing, defense counsel requested a continuance to supplement her affidavits and to respond to the State's memorandum regarding the alleged jury misconduct. 6RP 3-4, 15. The court granted her 10 days to supplement the affidavits. 6RP 16, 20. The court also requested counsel to research further the amendment issue. 6RP 15. The matter was never noted up again for a hearing to address those issues. 7RP 9, 12, 14.

At sentencing, upon defense request, the court imposed an exceptional sentence downward of 11 months on a standard range time of 12 to 14 months. 7RP 18, 28-29.

## **2. Substantive Facts<sup>3</sup>.**

Robert Dodge met Loa Lankhaar through her husband Wayne in the spring of 2006. 3RP 61. Dodge lived on his stepfather Gerald Hardy's property, which used to be a big dairy farm. 3RP 60, 90. Dodge lived in

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2008; Vol. V – April 10, 2008; Vol. VI – May 13, 2008; Vol. VII – Feb 17, 2009; VDRP – April 7<sup>th</sup>, 2008 (voir dire).

<sup>3</sup> Additional facts regarding the amendment, voir dire, unanimity issues, etc. are included within those arguments.

the farmhouse on the property about 100-150 yards from the milking parlor and about an eighth to a quarter of a mile from his mother and stepfather. 3RP 60-61, 91. After hearing about the Lankhaars' difficult living situation, Dodge started trying to help the Lankhaars to get a place of their own. 3RP 62. Dodge asked Hardy if the Lankhaars could put a trailer on his property. 3RP 63. Hardy agreed and didn't charge them any rent. RP 91-92.

In mid spring 2006 the Lankhaars put a trailer on the property right next to the milking house and just 15 feet from the milking parlor. 3RP 63-65; Ex. 1. Dodge gave the Lankhaars permission to put a washer and drier in the equipment room at the front of the milking parlor. 3RP 65. Some of the equipment in the room, the water tank and the pumps, had to be removed to make room for the washer and drier. 3RP 66.

Late fall of 2006 was the last time Dodge had a good look at the milking barns. 3RP 68. At one point Dodge did look in the equipment room and saw that the Lankhaars had put in a washer and drier and had removed the vacuum pumps, the stainless steel exhaust mufflers, the electrical switch board, the back flush system and the water tank. Dodge assumed that the Lankhaars had put those items elsewhere in the milking parlor, and he wanted those items there in case they decided to restart the milking process. 3RP 68-69, 71.

Hardy told the Lankhaars that he didn't want any of their stuff in the milking parlor. 3RP 94. Hardy allowed the Lankhaars to rent out an area in one of the milk buildings, which the Lankhaars proceeded to fill up with junk.<sup>4</sup> 3RP 94-96. The Lankhaars brought in so much junk that they ended up blocking another person's, Wally Bishop's, access to the area he was renting from Hardy. 3RP 95. It was difficult to tell what was in the milking parlor because the Lankhaars had brought in a lot of junk and stored it in the alleyways, where the cows were milked. 3RP 69. Dodge and his stepfather had spoken to the Lankhaars a number of times about cleaning up the property and removing the stuff they had brought in, but the Lankhaars didn't.<sup>5</sup> 3RP 73.

Dodge saw Loa Lankhaar helping Wayne with the stuff out in the milking room. Wayne and Loa did a lot of things around the trailer together. 3RP 86, 88. Around the middle of March Hardy told Loa Lankhaar that they had to leave, that he didn't have money to fix the septic tank. 3RP 98-99. Loa tried to talk him out of it. 3RP 98, 112. As they walked around the property, Loa told him that he could sell the metal and stuff in the buildings, his fence posts and all the iron in order to pay for the

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<sup>4</sup> The Lankhaars paid Hardy a few times and then told Hardy they couldn't pay. 3RP 96.

<sup>5</sup> At one point after having asked the Lankhaars a number of times to remove a Ford van that had been on the property in front of Hardy's house for 7-8 months, Dodge arranged to have the vehicles towed when he and his stepfather were having some other vehicles towed off the property. 3RP 84-85, 97-98.

taxes and insurance. 3RP 99. Hardy told Loa he didn't want to sell the stuff. Hardy had been considering selling the property to some people who wanted the milk parlor intact. Id. Loa told him they could be out by the end of April. Id.

In mid-April, after seeing another pick-up with garbage in it driving up towards the trailer, Hardy went up to the milk barn area to see what was going on. 3RP 100, 104. Wayne and Loa came out quickly and Loa went up to Hardy and told him that the persons with the pickup truck were friends of theirs, that they were just reloading stuff there and tying it down. 3RP 100, 104. A big door to the milk parlor was open and two people were in there. 3RP 104. Loa said that they would be out by the end of April and that they wouldn't take anything of Hardy's. 3RP 100. Wayne didn't say anything. 3RP100. Hardy then noticed a fertilizer spreader that had previously been in the barn, and he told them he didn't want the spreader outside in the rain. 3RP 100-01.

Sometime around May 10-12<sup>th</sup>, Dodge went on a five day trip. 3RP 72. Before he left for the trip and while Wayne was in prison, Dodge told Loa Lankhaar that she might have to leave. 3RP 72. When Dodge found out that the Lankhaars had been burning garbage near the milk parlor, Dodge became fed up and told them they had to leave that night and come back in the morning to get their stuff. 3RP 72-73.

On May 12<sup>th</sup>, 2007 when the Lankhaars weren't living there anymore, Hardy saw Wayne and Loa in a truck drive up towards the milking area when it was getting dark. 3RP 106, 114. Although the Lankhaars were supposed to have been out by the end of April, they needed another two weeks to remove their stuff. 3RP 107. When he got up to the parlor house, he heard hammering and banging from inside and saw that the roll door was open. 3RP 108. When he entered he saw Wayne hammering on a butt plate to remove it. 3RP 108. All of the butt plates, most of the pipe and all of the milking equipment from one room were gone. 3RP 108. When Hardy asked Wayne what he was doing, Wayne told him he was salvaging the metal or iron and that he was doing it to get even with Dodge<sup>6</sup>. 3RP 109. Hardy told Wayne he was calling the sheriff. 3RP 109.

Hardy went home and called the sheriff. Then the phone rang. His wife Shirley answered it and it was Loa. 3RP 110, 123. Loa asked Shirley not to hang up and asked her not to let Hardy let the Sheriff take Wayne away, that she needed Wayne to move all the stuff. 3RP 123. She told Shirley that "we" did sell a load of things and that "we" spent some of the money, but not all of it. 3RP 123. Loa offered to bring the money that hadn't been spent along with a receipt showing how much they had gotten

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<sup>6</sup> Wayne felt Dodge owed him for the Ford van and also for some work he had done for a

for it. 3RP 123-24. She said that she would pay Hardy on the first of the month. 3RP 124.

Dep. Oswalt arrived at the property around 8 p.m. and after speaking with Hardy, went to the dairy area. 3RP 139-40. He first spoke with Wayne outside the mobile home and then spoke with Loa inside the trailer. 3RP 141. Loa told him that she knew the metal was stolen, but she didn't ask, and that she and Wayne had transported the metal to the recycler within the past four to six weeks and gotten \$400 for it. 3RP 141-42. She said the recycler's name was Sean<sup>7</sup> and she gave the deputy his number off the top of her head. 3RP 142. She said they used the \$400 to buy gas and supplies to move off the property. 3RP 142.

After the Lankhaars left, Dodge discovered that a lot of the milking equipment was gone from the parlor, including large stainless steel butt plates, stainless steel panels for the front gate, copper water lines, pipes, wiring, big stainless steel sinks, stainless steel pipeline, vacuum pumps, an automatic washer system and electrical boxes. 3RP 74-80. Later in May Hardy inspected things and saw that all his fence posts were gone, all of the nice wheels on a car located near one of the milk barns were gone, which had been on the car in April. 3RP 102, 104-05.

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cousin of Dodge's. 3RP 181-82, 203.

<sup>7</sup> The deputy was unable to get a hold of or find the recycler. 3RP 212.

Wally Bishop, the other person who had been renting space in one of Hardy's buildings, said that he was not aware that things were missing until the Lankhaars moved out. 3RP 130-31. When he spoke to Wayne and Loa later, they told him they had been arrested for theft of things at the property. Wayne said that he was going to plead guilty and hoped that the charges against Loa would be dismissed. 3RP 132-33. It was Bishop's understanding from his conversation with them that Loa and Wayne had taken the stuff together, claiming that they had permission from family members to take the stuff from the milking parlor. 3RP 134.

Hardy testified that the cost for the main part of what had been taken was \$50,000. 3RP 110-11. He received about \$24,000 from the insurance company for the items that were taken, but testified he wouldn't be able to replace them for that amount. 3RP 111.

In his testimony Wayne admitted taking the stainless steel panels, part of the milking parlor, and that when Hardy caught him on May 12<sup>th</sup> he was in the process of removing more in order to sell it. 3RP 181. He had pleaded guilty to trafficking in stolen property. RP 180. Wayne made money selling scrap metal, that was why he brought all that junk onto the property. 3RP 184-85. He testified that different metals got different prices and that prices were pretty good for stainless steel and copper. 3RP 186, 193. He said that if an item still had more use in it that it would be

worth more than scrap metal, and that would be true for the dairy equipment as well. 3RP 194.

Wayne claimed that he had told Loa right after Hardy left that the metal they had taken to the recycler had been from Hardy's barn and that she hadn't known before that day. 3RP 187, 190. He testified that the trip to the recycler happened a couple weeks before he was caught, when Dodge had been on vacation. 3RP 187. Wayne testified that he got \$321 for the stainless steel from that trip and that he sold the other metal to another recycler. 3RP 190.

#### **D. ARGUMENT**

- 1. Lankhaar cannot now contest the charging document based on the court's failure explicitly to grant the State's amendment of the information under CrR 2.1(d)**

Lankhaar asserts that she was convicted of a crime with which she was not charged. She specifically contends that because the trial court did not explicitly grant the State's amendment of the information that occurred before trial, she was never charged with the offense of possession of stolen property. Lankhaar first raised this issue in a motion to arrest judgment which she subsequently abandoned. As Lankhaar was fully aware of the charges before trial and the alleged time period, there was no due process

violation. She may not now raise the court's failure to grant the motion under a court rule where she abandoned her motion below.

A motion for arrest of judgment must be based on allegations of (1) lack of jurisdiction over the person or offense, (2) the insufficiency of the information to charge a crime, or (3) insufficiency of proof regarding a material element of the crime. CrR 7.4(a). An appellate court engages in the same inquiry that the trial court did in reviewing a decision regarding a motion for arrest of judgment. State v. Longshore, 141 Wn.2d 414, 5 P.3d 1256 (2000).

*a. Lankhaar waived this issue by abandoning her motion to arrest judgment below.*

An appellant can waive a motion for arrest of judgment by failing to properly preserve the issue below. *See, State v. Bruton*, 66 Wn.2d 111, 114, 401 P.2d 340 (1965) (“Appellant did not, however, preserve by appropriate trial motions her challenge to the sufficiency of the evidence.”) “[C]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.” State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Lankhaar does not allege on appeal, and specifically stated below that her argument did not rest on, an assertion that her due process rights

were violated by the failure to arraign her on the amended information. 6RP 7. Thus her argument relies solely upon an allegation of a violation of a court rule, as opposed to a constitutional issue. To wait to assert a violation of the court rule regarding amendment of the information days after the trial, where both parties and the court proceeded based on the allegations within the amended information is the type of dilatory objection this Court should not countenance. Moreover, Lankhaar failed to obtain a ruling on this issue. Lankhaar waived this issue by not asserting it prior to trial and by failing to pursue it post-trial.

*b. Even if Lankhaar didn't waive this issue, she has failed to prove any prejudice from the amendment and the court gave its tacit approval by permitting the trial to proceed on the amended information.*

Even assuming this issue is properly before this Court, Lankhaar has failed to demonstrate any prejudice from the amendment. Furthermore, the court tacitly approved the amendment by permitting the trial to proceed on the amended information, with both parties and the court specifically understanding that the trial would proceed on the amended information.

The court rules contemplate obtaining the approval of the court in order to properly amend an information. CrR 2.1(e) states:

The court may permit an information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

The State should obtain approval of the court before filing an amended information. State v. Alvarado, 73 Wn. App. 874, 876, 871 P.2d 663 (1994). Failure to obtain approval of the court before filing is cured once the court's approval has been obtained. *Id.* A trial court's decision regarding amendment of an information is reviewed for abuse of discretion. State v. Collins, 45 Wn. App. 541, 551, 726 P.2d 491 (1986) *rev. den.*, 107 Wn.2d 1028 (1987).

A defendant cannot claim error from the amendment of an information without showing prejudice. Collins, 45 Wn. App. at 551. "Where the principal element of the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial." State v. Brown, 55 Wn. App. 738, 743, 780 P.2d 880 (1989), *rev. den.*, 114 Wn.2d 1014 (1990) (*quoting State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982)). Failure to seek a continuance in light of an amended information demonstrates lack of prejudice. State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

Here the trial court gave its tacit approval by permitting the trial to go forward on amended information. Lankhaar was originally charged

with Theft in the First Degree and Trafficking in Stolen Property. On March 10, 2008 defense counsel filed a Knapstad motion to dismiss. CP 117-19, Supp CP, Sub Nom 35. In response on March 28<sup>th</sup>, the State filed the amended information alleging Possession of Stolen Property instead of the trafficking charge and expanding the time period for both counts to April 1<sup>st</sup>, 2007 to May 31<sup>st</sup>, 2007. 1RP 4. At the hearing on March 31<sup>st</sup>, defense counsel acknowledged that the State had filed an amended information, specifically acknowledging that the State had amended the charges to possession of stolen property. 1RP 3. Judge Mura then inquired of the State regarding the time period, stating “[t]he theft in the first degree and possession of stolen property *that the defendant’s currently charged with...*” 1RP 4 (emphasis added).<sup>8</sup>

Later on April 7<sup>th</sup>, upon defense motion for a bill of particulars, defense counsel again acknowledged that Lankhaar was charged with first degree possession of stolen property. 2RP 11. In response to argument from defense counsel, the court stated there was probable cause for the theft and possession charges. 2RP 18. The next day on April 8<sup>th</sup>, the prosecutor moved orally to amend the time frame to September 1<sup>st</sup>, 2006 to May 31<sup>st</sup>, 2007, to which defense objected. 3RP 46-48. The court inquired as to what the dates currently were in the information to which

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<sup>8</sup> The judge denied the motion, informing counsel that depending upon the evidence at

the prosecutor stated April 1<sup>st</sup> 2007 to May 31<sup>st</sup> 2007. 3RP 47. Defense counsel responded there was no evidence to support further broadening the time period. 3RP 48. During trial, the prosecutor again moved to amend the information to broaden the charging period. 3RP 152. The court responded, “Well, you’ve got it now from the 1<sup>st</sup> of April, don’t you?” 3RP 153.

This record demonstrates that both parties and the court were operating on the amended information that had been filed. By proceeding on the amended information with full knowledge of the amendment the court gave its tacit approval of the amendment. Lankhaar made no showing of prejudice from the amendment of the information below and has made none on appeal. The Court should reject this untimely challenge to the information.

**2. Lankhaar’s right to public trial was not implicated by the court’s closing the courtroom to question one juror in chambers regarding his prejudices.**

Lankhaar asserts that her right to public trial under the state and federal constitutions was violated when the trial court heard two venire member’s concerns in chambers. Lankhaar cannot demonstrate manifest error of constitutional magnitude or that her constitutional right to a public

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trial, she could renew her motion then. 1RP 7.

trial was implicated here where the court ordered closure to hear only one juror's concerns in chambers and no one, including the defense, objected to the closure. The record is devoid of why or how the other venire member appeared in chambers. Even if Lankhaar could demonstrate that her right to public trial was implicated by this very limited closure, under Momah reversal would not be appropriate because the closure did not render her trial fundamentally unfair.

In alleging a violation of the right to public trial, the reviewing court first determines whether the trial court's ruling implicates the defendant's right to public trial, and if so, whether the trial court properly considered the Bone-Club<sup>9</sup> factors. State v. Lormor, 154 Wn. App. 386, 391, 224 P.3d 857 (2010). In determining whether there was an order closing the courtroom, the court looks at the plain language of the trial court's ruling. State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005). A trial court's decision to close courtroom proceedings is subject to de novo review. Brightman, 155 Wn.2d at 514.

The right to public trial extends to jury selection. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). That right is not absolute, however, and the presumption for an open courtroom may be overcome by

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<sup>9</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

an overriding interest if the court finds that a closure is necessary to preserve higher values and is narrowly tailored to serve that interest. *Id.* To protect a defendant's right to public trial, a court should address and make specific findings regarding five factors:

"1. The proponent of closure ... must make some showing [of a compelling interest], and where that need is based on a right *other than an accused's right to a fair trial*, the proponent must show a "serious and imminent threat" to that right.

"2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

"3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

"4. The court must weigh the competing interests of the proponent of closure and the public.

"5. The order must be no broader in its application or duration than necessary to serve its purpose."

*Id.* at 149 (*quoting Bone-Club*, 128 Wn.2d at 258-59). A court should do the balancing and make findings before closing the courtroom. *Id.* at 152 n.2. The court's failure to balance the factors on the record, however, does not always necessitate reversal. *Id.* at 150.

If the court on appeal "determines that the defendant's right to public trial has been violated, it devises a remedy appropriate to the violation." *Momah*, 167 Wn.2d at 149. If the error is structural, automatic

reversal is warranted. Id. at 149. An error is only structural though if the error ““necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”” Id. (*quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). In previous cases where a new trial has been ordered on appeal, prejudice was sufficiently clear from the record, the closures impacted the fairness of the proceedings and were ordered without seeking input from the defendant. Id. at 151.

- a. *Lankhaar must demonstrate how this very brief closure constitutes a manifest error of constitutional magnitude*

Lankhaar must demonstrate that the extremely limited in chambers questioning here constitutes a manifest error of constitutional magnitude given her failure to object when the court inquired of all the persons in the courtroom if anyone had an objection. Under RAP 2.5(a), an error is waived if not preserved below unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). It is the defendant's burden to show how the alleged constitutional error was manifest, i.e., how it actually prejudiced his rights. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). While some assertions of violations of the right to public trial have been

permitted for the first time on appeal,<sup>10</sup> and most recently in Momah and Strode, the Supreme Court has also held that a defendant can waive the right to public trial issue by failing to assert it below. *See, State v. Collins*, 50 Wn.2d 740, 314 P.2d 660 (1957). The court in Collins held that the defendant could not raise the court's closure of the courtroom due to overcrowding for the first time on appeal, noting that "a trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling." *Id.* at 748.

Lankhaar should be required to demonstrate that any constitutional error was *manifest*, i.e., prejudicial, particularly given the holding in Momah that not all errors regarding a defendant's right to public trial result in structural error and automatic reversal. In State v. Strode the plurality opinion relied on Orange for the proposition that the right to public trial was an issue of "such constitutional magnitude" that it could be raised for the first time on appeal. State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). In Orange, the court assumed that the constitutional error would have been prejudicial per se and therefore it could be raised for the first time on appeal. *See, In re Orange*, 152 Wn.2d 795, 800, 100 P.3d 291 (2004). Now, however, post-Momah, violations of

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<sup>10</sup> *See, e.g., Bone-Club, supra, In re Orange*, 152 Wn.2d 75, 100 P.3d 291 (2004), State v.

the right to public trial are not always structural error and prejudicial per se. Therefore, Lankhaar must demonstrate that the court's in chambers questioning of one venire member constituted a manifest error in the context of her case.

During voir dire juror number 5 interrupted, informed the court that he thought he'd heard of the case before and asked to speak in private. VDRP 48-49. The prosecutor then asked him to state generally what he knew about the case, and the juror stated "It's true," that he knew someone who knew one of the witnesses. When asked if he felt comfortable talking about it in front of the rest of the venire, he stated "Well, I'm – I don't want to prejudice or anything, because at this point now that know that, I have some prejudices." VDRP 49.

The judge then inquired whether there was anyone in the courtroom who would object to them going into chambers to find out "what's happening here." There was no objection from either counsel or from anyone else in the courtroom. VDRP 49. Once in chambers, the judge questioned the juror, but both counsel declined to ask any questions.<sup>11</sup> VDRP 50-51. Upon request from defense counsel, and with agreement of the prosecutor, the juror was excused for cause. VDRP 52.

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Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006).

<sup>11</sup> The transcript reflects that Mr. Richey asked some questions, but it's clear from the context and flow of questioning that it was the court asking those questions.

At that point apparently juror 15 entered chambers, and without prompting informed the judge that he had heard her husband's criminal case and wasn't sure if the judge should know that. VDRP 53. The judge thanked her for her mentioning it and directed that they go back into the courtroom. Id.

First, the judge only ordered a closure with respect to juror number 5's concerns. The record does not demonstrate that there was any order of closure regarding juror number 15 or how she ended up in the judge's chambers. Second, the closure regarding juror number 5 was for obvious reasons, a desire not to taint the rest of the jury with what the juror knew or believed, and no one objected when specifically asked by the judge, including defense counsel. The juror was excused for cause. On this record Lankhaar cannot demonstrate a manifest error of constitutional magnitude.

*b. Hearing one juror's concern in chambers about his prejudice in the case did not implicate the defendant's right to a public trial.*

The closure that occurred here was so minimal that it did not implicate Lankhaar's right to public trial. Closures that have a de minimis effect on a proceeding do not necessarily violate the right to public trial. Brightman, 155 Wn.2d at 515; *see also*, Lormor, 154 Wn. App. at 391,

394 (assuming trial court's actions constituted a closure, the closure did not implicate the defendant's right to public trial). In order to determine whether the right to a public trial is implicated by a closure, courts have looked to whether the principles underlying the right to public trial are negatively impacted by the closure.

“... [W]hether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether the closure has infringed the ‘values that the Supreme Court has said are advanced by the public trial guarantee...’ ... This analysis tends to safeguard the right at stake without requiring new trials where these values have not been infringed by a trivial closure.”

State v. Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring); *see also*, State v. Rivera, 108 Wn. App. 645, 653, 32 P.3d 292 (2001), *rev. den.*, 146 Wn.2d 1006 (2002) (opening a chambers conference regarding a juror's complaint to the public would not further the goals of the right to public trial). “[T]he requirement of a public trial is primarily for the benefit of the accused: that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of the responsibility and to the importance of their functions.” Momah, 167 Wn.2d at 148. In the context of a closure of voir dire, the public nature of the proceeding permits the defendant's family to contribute their

knowledge or insight to jury selection and permits the venire to see the interested individuals. Brightman, 155 Wash.2d at 515.

In addition to considering the values guaranteed by the public trial right in determining whether a closure is de minimis, courts have also considered the duration of the closure. U.S. v. Ivester, 316 F.3d 955, 960 (9<sup>th</sup> Cir. 2003); *see also*, Peterson v. Williams, 85 F.3d 39 (2<sup>nd</sup> Cir. 1996), *cert. den.*, 519 U.S. 878 (1996) (inadvertent closure of courtroom during defendant's testimony for 20 minutes met de minimis standard); Snyder v. Coiner, 510 F.2d 224, 230 (4<sup>th</sup> Cir. 1975) (short closure of courtroom during closing arguments was too trivial to implicate right to public trial). The de minimis standard has been applied in cases where closure was purposeful as well as unintentional. Easterling, 157 Wn.2d at 184-85 (J. Madsen concurring).

In State v. Lormor, decided post Momah and Strode, Division II acknowledged that a courtroom closure error allegation can be so minimal as not to implicate the defendant's right to a public trial. In that case the trial court ordered the defendant's young child who required a ventilator removed from the courtroom mainly because it was concerned that her presence, particularly given her medical condition, could distract the jury. Lormer, 154 Wn. App. at 389. The court noted that the first step in analyzing a claim of a violation of the right to public trial is to determine

if the trial court's ruling implicated that constitutional right. *Id.* at 391. It found that even if a closure is determined to have occurred, it can be such that the right to public trial is not implicated. *Id.* In determining that exclusion of the defendant's daughter did not implicate his right to public trial, the court considered whether her presence would have served the purposes of the right to public trial, to ensure that the prosecutor and the judge carried out their duties responsibly, to encourage witnesses to come forward, and to assist the defendant in selecting a jury. *Id.* at 394.

Another recent Division II decision, *State v. Paumier*, \_\_\_ Wn. App. \_\_\_, 230 P.3d 2112 (2010),<sup>12</sup> does not dictate a different result. While the court in that case held that a court errs in closing a courtroom without first considering reasonable alternatives and making appropriate findings to support closure under the Sixth Amendment, the court did not address the issue of a de minimis violation or whether the defendant's right to public trial was implicated by the in chambers voir dire in that case. *Paumier*, 230 P.3d at ¶23.

*Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 721 (2010), relied on by the *Paumier* decision, also does not preclude a de minimis analysis. *See, People v. Bui*, 107 Cal. Rptr. 3d 585 (Cal. App. 1 Dist. 2010) ("But

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<sup>12</sup> *Paumier* was decided after Appellant's brief was filed.

*Presley* did not consider or address, either expressly or implicitly, the “de minimus (sic) rationale” or “triviality standard” recognized by both the California Supreme Court and several federal courts). Nothing in Strode or Momah likewise precludes this Court from finding that the closure had a de minimis effect on the proceedings and therefore Lankhaar’s right to a public trial was not implicated or violated.

Here none of the values underlying the right to a public trial is implicated by the brief in-chambers colloquy with one prospective juror. None of the public expressed any objection to the in chambers questioning. Whatever the venire member had to say about the case could have tainted the rest of the panel. Requiring the one juror to state his concerns in public would not have encouraged any witnesses to come forward, would not have assisted the defendant in selecting a jury, and could potentially have prejudiced the venire. Such a de minimis closure did not implicate Lankhaar’s right to public trial.

*c. Even if Lankhaar’s right to public trial was implicated by the in chambers questioning of one juror, under Momah reversal of her conviction is not warranted.*

Although the trial court did not make specific findings regarding the Bone-Club factors, Lankhaar’s counsel did not object when the court inquired if anyone objected to the in chambers questioning and there is no

showing of prejudice to the defendant here as there was in Orange and Easterling. As such, no structural error warranting reversal occurred. As the court summarized in Momah:

... courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

217 P.3d at 155-56.

The Paumier majority recently held that the U.S. Supreme Court decision in Presley v. Georgia, resolved the issue left open by Momah and Strode, *i.e.*, what remedy, if any, is appropriate when the trial court does not specifically address the Bone-Club guidelines before ordering a closure of the courtroom. Paumier, 230 P.3d at ¶19, 23. The majority held that, under Presley, the appropriate remedy when a defendant's right to a public trial is violated is automatic reversal in all cases where the trial court failed to consider reasonable alternatives or makes findings appropriately justifying the closure. *Id.* at ¶23-24. The majority's analysis of the impact of Presley upon Momah was flawed, as recognized by the dissent. *Id.* at ¶34-36 (J. Quinn-Brintnall dissenting). Presley was a per curiam decision in which the Supreme Court held the Georgia trial court violated the defendant's right to a public trial by excluding the

public from the voir dire proceedings *over the defendant's objection*. Presley, 130 S.Ct. at 722 (emphasis added); *see also*, Reid v. State, 690 S.E.2d 177, 180-81 (Georgia 2010) (Presley, which held that trial courts are required to consider alternatives to closure even when they are not offered by the parties, was distinguishable because the defendant in Presley had objected to the closure of voir dire). It was only in the face of the defendant's objections that the Presley court summarily determined the defendant's right to a public trial had been violated by the exclusion of the defendant's uncle. As a per curiam decision, Presley did not announce any new law and did not redefine the scope of the right to public trial beyond that which had previously existed. *See*, People v. Bui, *supra* ("As indicated by its summary per curiam disposition, we do not read *Presley* as defining any greater scope to the public trial right under either the First or Sixth Amendments than that already articulated in *Press-Enterprise* and *Waller*."). Therefore, Paumier's conclusion that Presley superseded Momah's analysis and that a trial court's failure to address the closure factors will always result in automatic reversal, *even where there was no objection below*, is mistaken.

Here, the reason for the court going into chambers, to address the juror's concern that he had knowledge about the case and would be prejudiced against the defense, was obvious from the juror's statements.

Defense counsel did not object. While the court did not make the recommended specific findings, it is obvious its primary concern was the defendant's right to fair trial and the possibility of tainting the jury. The court's inquiry as to whether anyone objected demonstrates that it was cognizant of the defendant's right to public trial and the public's right to open proceedings. A new trial would not be an appropriate remedy because Lankhaar was not prejudiced by the brief closure and it did not render Lankhaar's trial fundamentally unfair.

**3. The prosecutor's comment in closing that Lankhaar demonstrated her willingness to assist her husband in illegally possessing the dairy farm equipment by "helping the getaway" did not constitute misconduct.**

Lankhaar next asserts that the prosecutor committed misconduct in closing argument by misstating the law of accomplice liability by arguing guilt based on her actions after the crime was complete. She claims she was prejudiced because the judge failed to sustain defense counsel's objection to the prosecutor's argument and the jury considered the prosecutor's statements to be the law. The prosecutor's comments, taken within their proper context, did not misstate the law. To the extent that there was a misstatement of the law, the judge's response to the objection alleviated any prejudice from the comments.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defers to the trial court's ruling on the matter because the "trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. den.*, 523 U.S. 1008 (1998).

Washington law provides that a person is guilty as an accomplice in the commission of a crime if:

With knowledge that it will promote or facilitate the commission of the crime, he

- (i) solicits, commands, encourages, or requests such other person to commit it; or
- (ii) aids or agrees to aid such other person in planning or committing it.

RCW 9A.08.020(3)(a). “Aid” means “all assistance, whether given by words, acts, encouragement, support or presence.” State v. Galisia, 63 Wn. App. 833, 839, 822 P.2d 303, *rev. den.*, 119 Wn.2d 1003 (1992), *overruled on other grounds*, State v. Trujillo, 75 Wn. App. 713, 883 P.2d 329 (1994). While mere presence and knowledge of the criminal activity is insufficient to convict someone as an accomplice, a person who is present and is ready to assist by their presence is an accomplice. *Id.* A person is liable as an accomplice if he intended to facilitate the commission of the crime through his presence or actions. *Id.* at 840. A person is also guilty as an accomplice if he “associated with the criminal venture and participated in it expecting success...” State v. Gallagher, 112 Wn.App. 601, 614, 51 P.3d 100 (2002), *rev. den.*, 148 Wn.2d 1023 (2003).

During initial argument the prosecutor argued the circumstantial evidence showed that Lankhaar acted as an accomplice to the crime by planning to commit the crime and by being present and ready to assist. 4RP 226-27. He explained that her knowledge that the items were stolen along with her presence was not enough, that there had to be evidence that she was ready to assist. 4RP 227. During her closing defense counsel argued that Lankhaar’s presence when the metal was taken to the recycler was not sufficient evidence of accomplice liability and that “Even profiting is not accomplice liability.” 4RP 236. In rebuttal, the prosecutor

argued all the circumstantial evidence that showed she had the requisite knowledge. 4RP 244-46. He then argued accomplice liability:

Here's another thing, when [Hardy] drove up there in April, she hurried out of the parlor, and she said, "Don't worry, Jerry. We won't take anything of yours." Concealing what was going on, aiding? Certainly circumstantial evidence of that. Truck full of scrap out in front. Gerald asking what's going on? We wouldn't take anything of yours, Jerry.

Here's another thing, she called Shirley trying to get her to have Gerald not call the police, aiding. *It will be, helping the getaway. That's aiding in committing a crime. Helping the getaway.*

MS. GROCHMAL: Your honor, I would object to that last comment. That's not a clear statement of the law, aiding after the fact is not –

The COURT: It would be a legal conclusion, and as the instruction to the jury says, you're not to consider the statements or argument of counsel as evidence. The law comes from the instructions. The evidence comes from the testimony.

4RP 246-47 (emphasis added). The prosecutor then proceeded to argue the case based on her liability as a principal. 4RP 247.

The record shows that the prosecutor attempted to analogize Lankhaar's actions as helping the getaway, as in the "getaway driver." Certainly a person can be guilty as an accomplice for their assistance in providing the means of the "getaway." *See, e.g., State v. McDaniel*, \_\_\_ Wn. App. \_\_\_, 230 P.3d 245, 264 (2010) (reasonable inferences from evidence that the driver positioned the vehicle for a quick getaway and

allowed time for the shooter to draw his gun to confront the victim supported finding of accomplice liability). Also, evidence of what occurs after the crime can be used as circumstantial evidence that the defendant intended his presence to aid or assist in commission of the crime. *See, Galisia*, 63 Wn. App. at 840 (defendant's presence at the time of the drug transaction along with his desire to obtain the drugs and money he was to receive if the transaction was successful were sufficient evidence of the defendant's accomplice liability for unlawful possession of controlled substance).

The Davenport and Gotcher cases cited by Lankhaar are distinguishable. In Davenport the appellate court reversed the conviction because the prosecutor's misstatement of the law that applied to the case was a "serious irregularity" that could have misled the jury. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). However, the prosecutor's misstatement, a statement made in rebuttal that the defendant could be found guilty as an accomplice, was a "serious irregularity" because the State had provided no notice that it was proceeding upon an accomplice liability theory. *Id.* at 763. The court found the misstatement prejudicial because it concluded that the jury had considered the misstatement during deliberations based on a jury note requesting a definition of "accomplice" specifically regarding the charge at issue. *Id.* at

759. The prosecutor's comments here do not constitute a "serious irregularity," because Lankhaar was aware the prosecutor was proceeding based on accomplice liability and the jury was properly instructed on the definition of accomplice liability.

In Gotcher, the court found that the prosecutor's statement in closing, that the mere fact of possessing a switchblade made the difference between first and second degree burglary, was a misstatement of the law, one that was obvious and should have been corrected by the trial court at the time of the defendant's objection. State v. Gotcher, 52 Wn. App. 350, 354-56, 759 P.2d 1216 (1988). The court concluded that the misstatement had affected the jury because the jury had inquired during deliberations as to what constituted a deadly weapon and whether "armed with" was synonymous with "in possession of." *Id.* 355. In determining that the prosecutor's misstatement was prejudicial, the court noted that the instructions regarding the deadly weapon were confusing and insufficient to clarify as to whether merely possessing a switchblade was sufficient to find that the defendant had been armed with a deadly weapon. *Id.* at 356. Here, the instructions were clear and sufficient to advise the jury of the applicable law, and the judge clarified at the time of the objection that the jury was to rely upon the law as provided in the instructions.

Under State v. Scott, 48 Wn. App. 561, 739 P.2d 742 (1987), *aff'd on other grounds*, 110 Wn.2d 682 (1988) misstatements regarding the law can be harmless. In that case the prosecutor made an inaccurate statement regarding the law of accomplice liability during closing argument, arguing that merely directing someone to drive to get out of the area would be sufficient to prove that the defendant acted as an accomplice. *Id.* at 569. In that case, the jury had been instructed appropriately on the law of accomplice liability. In finding that the prosecutor's comment was not an accurate statement of the law, it noted that "directing someone where to drive would tend to support a finding of accomplice liability if accompanied by evidence that it was done to facilitate the commission of the crime." *Id.* at 570. The court found that any confusion could have been cleared up by a careful reading of the accomplice liability instruction and that the prosecutor's comment did not influence the outcome of the trial and therefore was harmless. *Id.* at 570-71.

The prosecutor's argument, when taken in its appropriate context, did not misstate the law of the case. To the extent that it may have misled the jury, the judge orally instructed the jury to rely upon the written instructions for the law, which clearly and correctly stated the law on accomplice liability. The jury's questions were not directed to whether the phone call Lankhaar made, the subject of the prosecutor's comment, was

sufficient evidence of accomplice liability, but rather concerned the receipt or spending of the money. Moreover, the judge's written response to read the instructions directed the jury back to the applicable law, and Lankhaar has failed to demonstrate that the prosecutor's comments affected the verdict.

**4. The trial court did not abuse its discretion in failing to give a supplemental instruction.**

Lankhaar next contends that even if the prosecutor didn't commit misconduct, the trial court erred in answering the jury's questions by directing them back to the instructions. It is within the trial judge's discretion to decide how and whether to answer a jury's question. The judge did not abuse his discretion by referring them back to the instructions and directing the jury to read them carefully.

Under the court rules, a jury may ask the judge questions during its deliberations and the judge may in its discretion answer them. CrR 6.15(f)(1). A trial judge has discretion to decide whether to give supplemental instructions after the jury has begun deliberating. State v. Ng, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). Even where the answer to the question may be an accurate statement of the law, the judge still has discretion whether to answer the question. *Id.* at 43. A judge may supplement the instructions after deliberations have begun if the language

of an instruction is unclear or might be misleading. State v. Young, 48 Wn. App. 406, 415, 739 P.2d 1170 (1987). On the other hand, “[w]ords which have ordinary and accepted meanings are not subject to clarification.” *Id.* It is up to the discretion of the judge as to whether words used in an instruction require further definition. *Id.*

“[Q]uestions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict.” Ng, 110 Wn.2d at 43 (*quoting State v. Miller*, 40 Wn. App. 483, 489, 698 P.2d 1123, *rev. den.*, 104 Wn.2d 1010 (1985)). A question from the jury does not create an inference that the entire jury was confused or that it did not resolve any confusion before its verdict. *Id.*

Here, Lankhaar did not challenge the accomplice instruction below and has not on appeal. The instruction was an accurate statement of the law. This is not the situation, as it was in Young, where the instructions did not define a legal term that appeared elsewhere in the instructions. The court explained that it wasn’t going to give the answer requested by defense counsel because it believed that it would take too long to properly answer the questions. 4RP 251. Moreover, it is questionable whether defense counsel preserved this issue for appeal because while she believed the answer was “no,” apparently to one or both of the questions, she didn’t object and agreed that “read the instructions” would be an appropriate

response. 4RP 251. The court did not abuse its discretion in referring the jury back to the instructions.

**5. A jury unanimity instruction was not required where the State's theory was that Lankhaar's unlawful possession of stolen property was a continuing offense over a period of time.**

Lankhaar asserts that the State was required to elect an act it was relying upon or the court to provide a unanimity instruction in order to ensure that the jury's verdict was unanimous. The State, however, was relying upon a course of conduct, despite defense's attempts to limit it to the one recycling incident, therefore there was no need for a unanimity instruction or election.

A criminal defendant has a right to a unanimous jury verdict. State v. Kitchen, 110 Wn. 2d 403, 409, 756 P2 105 (1988). When the State presents evidence of multiple acts, any of which could form the basis of the crime charged, the State must elect which act it is relying upon or the court must instruct the jury that it must be unanimous as to which act has been proven beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), *cert. den.*, 501 U.S. 1237 (1991). The rule, however, only applies where there is evidence of several distinct acts, and does not apply where the evidence implicates a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

“[E]vidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts.” State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995). In determining whether conduct constitutes a continuing course of conduct, the court reviews the evidence in a common sense manner. Handran, 113 Wn.2d at 17. The fact that a crime can be charged as a continuing course of conduct is also relevant in determining whether a unanimity instruction was required.<sup>13</sup> Fiallo-Lopez, 78 Wn. App. at 725; *see*, State v. Love, 80 Wn. App. 357, 908 P.2d 395, *rev. den.*, 129 Wn.2d 1016 (1996) (defendant’s possession of drugs on his person as well as at his residence when considered with other evidence of drug trafficking reflected single objective of trafficking in drugs and therefore unanimity instruction was not required regarding charge of possession of a controlled substance with intent to deliver).

Here, the prosecutor repeatedly indicated that he was relying upon a continuing course of conduct, a “continuous plan” to take the dairy equipment. 2RP 12, 3RP 118, 174, 176. Although he couldn’t specify when it happened, it was his “position that she was involved in the planning and participated in the removal and had her hands on the

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<sup>13</sup> Under RCW 9.94A.56.010(18)(d) the State may aggregate the value of all the property

property to get to the recyclers.” 2 RP 13. In denying a defense motion the court stated that a prima facie case had been established because Wayne had been caught trying to remove the items on May 12<sup>th</sup>, that more items were removed than what he had been caught with, so the other items had to have been removed at another time and therefore there was a theft over a course of time. 3RP 121-22. When jury instructions were discussed the prosecutor explained he was opposed to a unanimity instruction because it could reduce the State’s ability to prove value. 3RP 176.

The State’s case, possession or theft of over \$1500 in property was premised on a continuing course of conduct. Lankhaar was not charged with just the scrap metal that was taken to the recyclers the one time, but with all of the missing dairy equipment that had a value of at least \$24,000. A unanimity instruction would have been improper and would have seriously undermined the State’s ability to pursue its theory that Lankhaar stole or was in unlawful possession of all of the dairy equipment that had a value of over \$1500.

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a defendant is charged with possessing even if the owners of the property are different.

**6. There was sufficient evidence of possession and value to support the jury's finding of guilt on possession of stolen property in the first degree.**

Lankhaar next asserts that there was insufficient evidence to find that she possessed stolen property in excess of \$1500 beyond a reasonable doubt. Specifically she asserts there was insufficient evidence of possession and value. In her argument Lankhaar relies significantly upon her husband's testimony. *Taking the evidence in the light most favorable to the State* there was sufficient evidence, albeit circumstantial, for a rational trier of fact to find her guilty beyond a reasonable doubt of possessing the stolen dairy equipment with a value over \$1500.

Under a sufficiency of the evidence analysis, the test is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 339. Such a challenge admits the truth of the State's evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court defers to the trier of fact on issues of credibility of witnesses and

persuasiveness of evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

Under the statute in effect at the time, the State was required to prove that Lankhaar possessed stolen property that had a value over \$1500. RCW 9A.56.150 (2007). “Possessing stolen property” is defined as

knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140. “Value” in this context means “means the market value of the property or services at the time and in the approximate area of the criminal act.” RCW 9A.56.010(17)(a).

Here, the testimony was that the dairy equipment in the milking parlor and other buildings was all intact before the Lankhaars moved onto the property but was missing after they left. The Lankhaars had access to the milking buildings which were right by their trailer. Loa was seen helping Wayne with things in the milking room. Wayne pleaded guilty to trafficking in stolen property regarding the dairy equipment.

Loa was with Wayne when he attempted to remove the butt plates. While Wayne claimed that Loa was taking a shower, the trailer was within 15 feet of the area where Wayne was loudly banging, the roll door was

open, and there appears to have been no other purpose for their return to the property except to remove additional dairy equipment from the buildings.

Loa had knowledge of the scrap metal business. She knew the name of the recycler and his number off the top of her head. In addition to encouraging Hardy to sell some of the metal and iron in the buildings, she specifically told him that the fence posts were worth something, the same fence posts that were later discovered missing.

In mid April Loa was the one who came out quickly from one of the buildings to talk to Hardy when he came to investigate. She assured him that they wouldn't take anything of his. However, the door to the milk parlor was open, two of their friends were inside and a fertilizer spreader was outside when it should have been in the barn.

Loa told Shirley that "we" had sold a load of stuff and that "we" had spent some of the money. Loa told the deputy that she had known that the metal was stolen and that she and Wayne had transported scrap metal to the recyclers four to six weeks earlier and gotten \$400 for it. It was Bishop's impression from his conversation with Wayne and Loa that they had taken the equipment together.

Hardy testified that the cost for the main part of what had been stolen was \$50,000. He received \$24,000 from the insurance companies

for the items that were taken, but it would have cost him more to replace the equipment. Hardy had a prospective buyer for the property who was interested in buying the property with the dairy intact. Wayne testified that the property would be worth more as dairy equipment than it would be as scrap metal.

Taking this testimony in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find Loa Lankhaar guilty of unlawfully possessing or being an accomplice to Wayne's unlawful possession of the dairy equipment. Knowing the metal was stolen, she assisted in transporting the metal to the recycler and benefitted from its sale. More equipment than just one load was missing. She had knowledge regarding scrap metal and was there for the last attempt to remove metal from the buildings. Even if not guilty as a principal, the evidence demonstrates that she knew what was going on, that she was a willing participant by either transporting the items to the recycler and/or attempting to conceal that equipment was being removed. Her actions demonstrate more than mere knowledge and presence, but a willingness to assist in the receipt and disposal of the stolen dairy equipment. Loa's asking Shirley not to have the police arrest Wayne was circumstantial evidence of her willingness to assist Wayne in this criminal enterprise. Loa's profiting from the one load that was taken to the recycler can be

considered in determining her accomplice liability because the criminal enterprise was not complete at that point in time. She and Wayne still went up to the property four to six weeks later to remove additional equipment.

Hardy's testimony in and of itself is sufficient evidence for the jury to have found a value of greater than \$1500. Certainly if the replacement cost would be greater than the \$24,000 that he received from the insurance company in compensation for his loss, the equipment had a market value greater than \$1500. While Hardy had quit operating the dairy himself, it doesn't mean there wasn't a market for the dairy as a unit or for the individual equipment pieces. Hardy testified that he had someone interested in buying the property who specifically wanted the dairy intact.

Lankhaar knowingly associated herself with Wayne's criminal venture and participated in it expecting success. Therefore there is sufficient evidence of her liability as an accomplice.

**7. Defense failed to carry its burden to demonstrate that the jury considered extrinsic evidence in its reaching its verdict.**

Finally Lankhaar asserts that the trial court erred in denying her motion for arrest of judgment based on jury misconduct. First, Lankhaar abandoned this issue by failing to pursue her motion for arrest of judgment below. Second, while the affidavits of the two jurors show that the some

of the jurors had some personal knowledge of scrap metal values, they do not contain any specific extrinsic evidence that was injected in the jury discussions. Therefore, there is no way to determine whether such information was more than the jury was entitled to rely on based on their own personal experiences and no way to determine if it had an effect on the verdict. To the extent that the information that was shared regarded scrap metal values, that would have no prejudicial effect on the verdict as there was sufficient evidence of value over \$1500 in the record, which value was *not* based upon the value of the equipment as scrap. The equipment's value as scrap metal was irrelevant to the issue of the value of the equipment as intact, marketable dairy equipment.

Motions for arrest of judgment must be brought within 10 days unless the court grants an extension. CrR 7.4(b).<sup>14</sup> A trial court does not abuse its discretion in denying an untimely motion for arrest of judgment. State v. Wilson, 113 Wn. App. 122, 135, 52 P.3d 545 (2002), *rev. den.*, 149 Wn.2d 1006 (2003). An appellant can waive a motion for arrest of judgment by failing to properly preserve the issue below. *See, State v. Bruton*, 66 Wn.2d at 114.

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<sup>14</sup> Lankhaar's motion regarding this issue really falls under CrR 7.5.

At the time of the hearing, defense counsel requested a continuance if the court were going to consider anything in the State's response to her motion. 6RP 3. She requested that the court hear argument and then determine if the matter needed to be set over. 6RP 3-4. When the court offered her a continuance, she requested to be able to submit supplemental affidavits, since the court was concerned that the affidavits weren't detailed enough. 6RP 15. The court granted her an additional ten days to submit more detailed affidavits from those jurors who had submitted ones and left it to the parties to renote the matter, which never occurred. 6RP 15-16, 20. Lankhaar abandoned this issue by failing to pursue it and obtain a ruling from the court.

Where an allegation of juror misconduct is made based on the jury's consideration of extrinsic evidence, the test to determine whether a new trial may be granted is whether the alleged information constituted actual misconduct and, if it did, whether it affected the verdict. Richards v. Overlake Hospital Medical Center, 59 Wn. App. 266, 270, 796 P.2d 737 (1990), *rev. den*, 116 Wn.2d 1014 (1991). A trial court's decision regarding whether juror misconduct occurred and whether the alleged misconduct affected the verdict is reviewed for abuse of discretion. Breckenridge v. Valley General Hosp., 150 Wn.2d 197, 203, 75 P.3d 944

(2003). A court abuses its discretion if its decision was manifestly unreasonable or based on untenable grounds. Id.

“A strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” Id. (*quoting State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994)). If it is determined that extrinsic evidence was injected into the jury discussions, then prejudice is presumed. *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740, *rev. den.*, 158 Wn.2d 1011 (2006). This presumption may be overcome, however, by the State satisfying the “trial court that, viewed objectively, it is unreasonable to believe the misconduct could have affected the verdict.” Id.

Extrinsic evidence is “information that is outside all the evidence admitted at trial, either orally or by document.” ... It is jury misconduct for jurors to interject extrinsic evidence into the jury deliberations, as such evidence is not subject to objection, cross examination, explanation, or rebuttal. ... *Jurors may, however, rely on their personal life experience to evaluate the evidence presented at trial during the deliberations. ... In determining whether a juror's comments constitute extrinsic evidence rather than personal life experience, courts examine whether the comments impart the kind of specialized knowledge that is provided by experts at trial. ...*

*Breckenridge*, 150 Wn.2d at 199 n.3 (citations omitted, emphasis added).

In considering an allegation of misconduct, a court may not consider statements or discussions that inhere in the verdict. “The individual or collective thought processes leading to a verdict “inhere in the verdict” and cannot be used to impeach a jury verdict.” Ng, 110 Wn.2d at 43. “[J]urors’ post-verdict statements regarding matters which inhere in the verdict cannot be used to attack the jury’s verdict.” *Id* at 44.

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Breckenridge, 150 Wn.2d at 205 (*quoting Cox v. Charles Wright Academy*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967)). In determining whether a jury considered extrinsic evidence, a court considers only those facts regarding the alleged misconduct of the juror, and discards those portions of the affidavits that inhere in the verdict. Overlake Hospital, 59 Wn. App. at 272. Then it is up to the court to determine whether the juror’s comments or misconduct had a prejudicial effect on the rest of the jurors. *Id*.

Here, the one juror’s affidavit stated that he was personally knowledgeable about the differences in value between scrap metal values

and market values and that he shared this knowledge. CP 50. The other juror's affidavit states that several of the jurors had personal experience with the value of scrap metal which they shared with the jury. CP 52. Everything else in those two affidavits inheres in the verdict and cannot be considered in determining whether misconduct occurred. The first juror does not specify what his knowledge was and/or what he specifically conveyed to the jury. As is clear from the second juror's affidavit, a number of the jurors had personal experience with scrap metal values, and as personal experiences they do not constitute "extrinsic evidence." The difference in value between scrap metal and the original item was within the evidence presented at trial because Wayne specifically testified concerning that difference and that the original item would be worth more. No expert testimony was presented, or was needed to be presented, to establish that the value was over \$1500. As the trial court noted, "I think all the jurors could probably determine from their personal experience that scrap metal is going to be worth less and get a lower value than brand-new material." 6RP 13. No extrinsic evidence was injected into the jury's deliberations.

To the extent that any "extrinsic evidence" was injected, thus resulting in a presumption of prejudice, it is unreasonable to believe that the evidence affected the verdict because the issue was not what the value

of the dairy equipment was as scrap metal, but what the value of the equipment was as dairy equipment.

**E. CONCLUSION**

For the foregoing reasons, the State requests that Lankhaar's appeal be denied and her convictions affirmed.

Respectfully submitted this 14<sup>th</sup> day of June, 2010.



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