

No. 441560

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXIS SCHLOTTMANN,

Appellant.

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STATE OF WASHINGTON
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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

The Honorable Lisa L. Sutton, Judge

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Schlottmann was denied her constitutional right to a fair trial, by an impartial and unbiased jury.

2. Schlottmann was denied her Sixth Amendment right to counsel.

3. Prosecutorial misconduct deprived Schlottmann of her constitutional due process right to a fair trial.

4. Cumulative error violated Schlottmann's constitutional due process right to a fair trial.

Issues Pertaining to Assignment of Error

1. During *voir dire*, the panel was asked if anyone had been a victim of a burglary or any kind of event similar to those alleged in the information. Juror # 1 said nothing. On the second day of trial, Juror # 1 announced, for the first time, that his home is located in close proximity to the victim residences, and that a week prior to the burglaries, someone tried to break into his home using a crowbar. The defense immediately moved to dismiss the juror. Was Schlottmann denied her right to a fair trial, by an impartial jury, when the trial court permitted Juror # 1 to remain on the jury, without considering whether he was impliedly biased?

2. Schlottmann pled not guilty to all of the counts alleged in the information. During opening statements, without Schlottmann's

consent, the defense counsel told the jury that the prosecution could satisfy its burden of proof for all of the allegations relating to the burglary of the Finely residence, including the charge of Burglary in the First Degree, while Armed with a Firearm - the highest crime charged - and those charges relating to possession of the items stolen from the Japhet and Winkelman residences. Did the defense attorney abandon his duty of loyalty, giving rise to a conflict of interest, when he admitted Schlottmann's guilt to these charges?

3. Is reversal based on prosecutorial misconduct required where the prosecutor (1) improperly suggested that Schlottmann participated in the burglaries in order to purchase drugs; (2) opined that Schlottmann had "no conscience" and "wanted to victimize people;" and (3) commented upon Schlottmann's right to maintain her innocence?

4. Does the cumulative error doctrine mandate reversal when the record shows (1) Schlottmann was denied her right to a fair trial by an impartial jury; (2) Schlottmann was denied her Sixth Amendment right to counsel when her defense attorney conceded her guilt to the highest level charge; and (3) Schlottmann was denied her due process right to a fair trial when the prosecutor made improper comments not supported by the record, and improperly commented upon Schlottmann's exercise of her constitutional rights?

B. STATEMENT OF THE CASE

1. Course of Proceedings and Disposition Below

On October 17, 2012, the State charged Ms. Schlottmann with Burglary of the First Degree, while Armed with a Firearm (count 1); Theft of a Firearm (count 2); Unlawful Possession of a Firearm in the Second Degree (count 3); Theft in the Second Degree (count 4); Malicious Mischief in the Third Degree (count 5); Burglary in the First Degree (count 6); Theft in the Second Degree (count 7); Malicious Mischief in the Second Degree (count 8); Residential Burglary (count 9); Malicious Mischief in the Second Degree (count 10); Theft in the Second Degree (count 11); Possessing Stolen Property in the Second Degree (count 12); and Possessing Stolen Property in the Second Degree (count 13). CP 34-37. The case proceeded to trial before the Honorable Lisa L. Sutton, from October 15, 2012 to October 19, 2012. 3RP.¹

During trial, the State filed a Second Amended Information to correct certain dates listed in the First Amended Information. 3RP 316. Schlottmann was arraigned on and pled not guilty to the Second Amended Information. 3RP 316-317.

¹ The verbatim report of proceedings will be referred to as follows: 1RP - 10/1/12; 2RP -10/10/12; 3RP - 10/15-19/12 and 10/30/12. The supplemental verbatim report of the *voir dire* examination and opening statements will be referred to as 4RP.

At the conclusion of trial, the jury found Schlottmann guilty of Burglary in the First Degree, Theft of a Firearm, three counts of Theft in the Second Degree, Malicious Mischief in the Third Degree, Burglary in the First Degree, two counts of Malicious Mischief in the Second Degree, Residential Burglary, two counts of Possessing Stolen Property in the Second Degree. CP 117. The trial court imposed a prison sentence of ninety-six (96) months, to be followed by eighteen (18) months of community custody. CP 122. The instant appeal follows.

2. Relevant Trial Testimony

On November 18, 2011, Emily McMason noticed an unfamiliar, dark green Mazda MVP pull into her neighbor, Marian Finely's, driveway. 3RP 77, 81. There had been a series of burglaries in her neighborhood recently, and so Ms. McMason "tracked" the minivan. 3RP 77. Ms. McMason saw a woman exit the vehicle, holding a piece of paper. 3RP 77. The woman knocked on Ms. Finely's door and then peered into the windows. 3RP 78. Ms. McMason observed the woman return to the vehicle and pull out a crowbar. 3RP 79. Ms. McMason called 911. 3RP 79. Ms. McMason testified that another woman then exited the minivan. 3RP 79. The two approached Ms. Finely's house and went inside. 3RP 79. 3RP 82-83. Ms. McMason described the scene, the vehicle, and the two women to the 911 operator. 3RP 83.

After about 10 minutes, the women exited Ms. Finely's home through the front door. 3RP 84. Ms. McMason stated that the woman in the passenger side of the car exited the home with a stack of papers in her hand. 3RP 84. The driver of the vehicle exited the home holding a large bag with an item protruding out of it. 3RP 84. The two then got back in the Mazda van and drove away. 3RP 85.

After about 10 to 15 minutes, several officers, including Deputy Brian Brennan, arrived at Ms. McMason's home. 3RP 87. While Deputy Brennan was interviewing Ms. McMason, an officer from the Olympia police department stopped a dark green Mazda MVP about three miles from the Finely residence. 3RP 33-34, 91. Deputy Clay Westby, a deputy with the Thurston County Sherriff's Office, was responding to the burglary when he was told to assist with the stop of the vehicle. 3RP 34. When he arrived at the scene, Deputy Westby identified the vehicle's occupants as Darlene Lockard and Alexis Schlottmann. 3RP 35-36. The vehicle belonged to Arron Davis, Lockard's husband. 3RP 272-273. Deputy Westby learned that Lockard's license was suspended and arrested her. 3RP 35.

Ms. McMason was escorted to the place where the vehicle was stopped. 3RP 37. Ms. McMason identified both women as the people who burglarized Ms. Finely's home. 3RP 38. Deputy Westby then

obtained a telephonic search warrant and searched the minivan. 3RP 39. He, along with another Thurston County deputy, took inventory of items found in the vehicle. 3RP 41. Forty-eight items were listed in the report, including, *inter alia*, a Savage Arms .32 caliber pistol², a crow bar, a set of six knives, a jar of coins, a piece of paper with the words, “The Dynamic Duo” written on it, and a checkbook with checks containing the name, “Japhet Bulkheading Incorporated, Floyd or Grace Japhet.” 3RP 41, 46.

The deputies also escorted Ms. Finely to the scene after she returned and found her home burglarized. 3RP 164-165. When she arrived, the deputies on the scene asked Ms. Finely to view the items in the vehicle to see if she could identify any of them as her own. 3RP 165. Ms. Finely identified 45 items as belonging to her, including her Savage Arms .32 caliber pistol. 3RP 43, 170-171. Ms. Finely also informed the deputies that one of her neighbors stated he had been approached by two women at his house. 3RP 176.

Ms. Finely’s neighbor, Donald Davidson, also testified as to his encounter. 3RP 178. Mr. Davidson stated that a minivan pulled up to his driveway, and he approached the vehicle to see who was inside. 3RP 180. A tall woman exited the minivan with a piece of paper in her hand. 3RP

² Detective Rodney Gray test fired Ms. Finely’s pistol, and the weapon fired properly. 3RP 308-310.

181. She stated that “they” were looking for business to contribute to their cleaning service. 3RP 181. Mr. Davidson could not see the other person in the car and did not know if it was a man or woman. 3RP 185. Mr. Davidson told the tall woman that they did not need a cleaning service, but kept the piece of paper. 3RP 181. That paper contained the words, “The dynamic duo, your handyman alternative.” 3RP 182. At trial, Mr. Davidson could not identify Schlottmann as the woman who approached him that day. 3RP 185.

The State also called Donald and Lisa Japhet as witnesses. 3RP 193. Their home was burglarized on November 17, 2011. 3RP 197. Mr. Japhet and his three brothers own a construction company called Japhet Bulkheading. 3RP 194. When he arrived at his residence on November 17, 2011, Mr. Japhet noticed that his front door was “wide open,” and that the doorjamb was “all split and the deadbolt was broken and the door was wrecked,” and that he had been robbed. 3RP 197. Mr. Japhet explained that his son’s computer, a helmet camera and some jewelry were taken. 3RP 200. Mr. Japhet also stated that some of his mail was missing, including a bank statement from Smith and Barney for the Japhet Bulkheading account. Mrs. Japhet testified that a checkbook for Japhet Bulkheading was also taken. 3RP 202. In all, Mr. Japhet stated about \$2,736 worth of items were stolen from his home. 3RP 205. Mr. Japhet

stated that he did not see the burglars and that there was no one in his home when he arrived. 3RP 208.

Sergeant David Odegaard with the Thurston County Sheriff's Office learned that the officers who arrested Lockard and Schlottmann found a checkbook with Japhet Bulkheading Incorporated written on it, when they searched the minivan. 3RP 215. After hearing about the checkbook, Sergeant Odegaard contacted Mr. Japhet to confirm that this was one of the items taken from his home. 3RP 218.

Another member of the Thurston County Sheriff's Office, Detective Cameron Simper, obtained a search warrant for the minivan after he was asked to conduct a follow up investigation on the Finely burglary. Detective Simper did so after reviewing a supplemental report stating that a checkbook belonging to "Japhet Bulkheading" was found in the minivan associated with the Finely burglary, and after realizing that both burglaries were done by someone using a crowbar. 3RP 236-237.

Upon searching the vehicle, Detective Simper found the checkbook. 3RP 239. He also found a credit card with the last name "Winkelman" on it, a decorative knife set and a jar containing loose coins. 3RP 240-241. The detective then pulled a report from another burglary at the Winkelman residence, which occurred on same day as the Finely burglary, approximately 4 miles away. 3RP 241, 245. Detective Simper

contacted Mr. Winkelman, who explained that a jar with the word "Atlas" on the side, a large D-cell Maglite, and a decorative knife set were taken from his residence. 3RP 242, 246.

Based on this information, Detective Simper obtained another search warrant for the minivan. 3Rp 246. His second search yielded Winkelman's credit card, the flashlight, the decorative knife set, a jar with the word, "Atlas" on it, some fliers containing the name "The Dynamic Duo," and a bag containing a black folder with notes inside. 3RP 248-250. This black folder contained some information about coins and was labeled "Lexie's black book." 3RP 253. The coins listed in the notebook, however, were mostly foreign coins, while the coins in the jar were American. 3RP 280-281. Mr. Winkelman went to the police station and identified his items. 3RP 251-252.

Detective Simper also found a business license for the name "The Dynamic Duo" in the minivan. 3RP 248. That business license only contained Lockard's name. 3RP 283. Similarly, the Dynamic Duo flyer did not list Schlottmann's name. 3RP 283. Detective Simper eventually interviewed Mr. Davidson, who explained his encounter with the two women and showed him the Dynamic Duo flyer. 3RP 267.

Mr. Winkelman also testified regarding the burglary of his home. He stated that on November 18, 2011, he returned home from work and

noticed that the side door to his garage was pried open. 3RP 329. He also noticed that the lock on a box in the garage was removed and the contents of the box were missing. 3RP 329. One of his credit cards was also missing. 3RP 334. In total, Mr. Winkelman testified that he lost approximately \$7,000 worth of property. 3RP 334.

After Detective Simper found his items, Mr. Winkelman went to the police station and examined the evidence locker. 3RP 335-336. He identified several items as his, including boxes from Bali, foreign bills and coins, a set of knives, a flashlight, and several other items that he did not previously realize were missing. 3RP 335-336. Still, there were other items taken from Mr. Winkelman's house that were not found in the minivan. 3RP 339.

C. ARGUMENT

- I. SCHLOTTMANN WAS DEPRIVED OF HER RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN JUROR # 1 WAS NOT DISMISSED FOR BIAS AFTER HE DISCLOSED THAT HE WITHHELD MATERIAL INFORMATION DURING *VOIR DIRE* AND THAT HE MAY HAVE BEEN A VICTIM OF THE SERIES OF BURGLARIES IN THIS CASE.

During *voir dire* examination, the trial court instructed the prospective jurors, “[you] must not withhold information in order to be seated on this particular jury. You should be straightforward in your answers and not just answer in a way that you hope the lawyers or the

court might hope or expect you to answer.” 4RP 9 (emphasis added). The court then read the charges to the panel, including burglary in the first degree while armed with a firearm, malicious mischief in the third degree, in that Schlottmann caused physical damage to residential property, and residential burglary. Each of the charges allegedly occurred on either November 17, 2011 or November 18, 2011.

The court next asked, “[h]ave any of you personally had an experience that is similar to the type of incident or events that were described to you? About what this case is about.” 4RP 19. Juror # 2, who eventually became Juror # 1, did not raise his hand.

The court then clarified, “[s]o again, we’re just trying to determine if it’s too close to something that maybe that you have some personal experience or someone in your family close to you.” 4RP 19 (emphasis added). The trial court then inquired of those jurors who raised their hands and made the following, broad inquiry: “Is there anyone here that for whatever reason you feel that you just simply should not be on this case from what you know so far? Other than those who have already indicated some question.” 4RP 28. There was no response from Juror #1.

The defense further inquired of the venire panel:

What [Judge Sutton] wanted to know is specifically if these type of instances are either so fresh in your recollection or so fresh or that made such an impact on you

that it would...interfere with your ability to listen to the evidence, interfere with your ability to give each side...a fair trial.

4RP 49-50. Of the jurors ultimately chosen to serve, only Juror # 5 answered that he had personally been a victim of a robbery. 4RP 83. That robbery, however, occurred in either 1989 or 1990.

Long after the conclusion of *voir dire*, on the second day of trial, Juror # 1 disclosed the following to the court:

Okay. So my - - it was just kind of a concern I'm willing to bring up and just expose because it's concerned me. It's just that...I...had a[n] event where my door was damaged, and I live near the area of some of the events that have been occurring, and it happened around the same time.

3RP 109. Juror # 1 also explained that his house was located "maybe" a mile and a half from one of the homes in this case, and that this occurred the week before these burglaries. 3RP 109. Juror # 1 stated that he called the police because of this incident. 3RP 111. Juror # 1 also explained that he believed the perpetrator used a crowbar: "There was just around the doorknob it...did look like they used some sort of instrument to pry it open...I would have guessed it to be a crowbar." 3RP 112. The evidence at Schlottmann's trial showed a series of burglaries using a crowbar. 3RP 113. The counts of the information charging malicious mischief dealt with damage to residential property.

After Juror # 1 made these disclosures, the defense moved to dismiss him: “I think the similarities here are substantial. I can tell the court without equivocation that if this information had been made available, I would have made a challenge for cause, and if that had not been successful, I would have used a preemptory challenge.” 3RP 114

The trial court found the facts disclosed by Juror # 1 did not rise to the level of the facts disclosed by the jurors who were challenged for cause during *voir dire*. 3RP 115. The trial court’s ruling was an abuse of discretion.

a. Standard of Review.

A trial court’s decision not to remove a juror for bias is reviewed for an abuse of discretion. State v. Rafay, 168 Wn. App. 734, 821, 285 P.3d 83, 127 (2012) review denied, 299 P.3d 1171 (Wash. 2013) and review denied, 176 Wn.2d 1023, 299 P.3d 1171 (2013). Whether a trial court utilized the proper legal analysis to determine whether a juror should have been dismissed for bias, however, is a legal question and is subject to *de novo* review.

b. Argument on the Merits

“It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias...or by reason of conduct or practices incompatible

with proper and efficient jury service.” RCWA 2.36.110 (2013) (emphasis added). “A presumption of bias arises when a juror deliberately withholds material information in order to be seated on a jury...Unless the trial court finds facts refuting the implication of bias, the defendant is entitled to a new trial.” State v. Cho, 108 Wn. App. 315, 317, 30 P.3d 496, 497 (2001). On this point, Washington courts have adopted the holding of McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (plurality opinion). See Cho, 108 Wn. App. at 321, 323, 30 P.3d at 499 (2001). According to McDonough, a juror’s material nondisclosure will only be the basis for a new trial “if the correct response would have provided a valid basis for a challenge for cause.” Id. This determination requires the satisfaction of a two-part test: “[A] party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.” Id. (emphasis added).

Therefore, the trial court used an incorrect analysis when it denied the motion solely because it did not believe the facts disclosed by Juror # 1 were “as bad” as the facts disclosed by the jurors originally challenged for cause. The trial court should have considered whether this material information was withheld during *voir dire*; and whether this information

would have provided a valid basis for a challenge for cause. Furthermore, the trial court should have inquired as to the reason Juror # 1 failed to disclose this information during *voir dire*. The response to such an inquiry is critical to a determination of whether the juror is biased.

i. The First Prong of the McDonough Test

First, there can be no doubt that Juror # 1 withheld this material information during *voir dire*. Juror # 1 did not raise his hand or respond affirmatively when the trial court asked, “[h]ave any of you personally had an experience that is similar to the type of incident or events that were described to you?” 4RP 19. Nor did Juror # 1 raise his hand or respond in any way when the trial court explained, “we’re just trying to determine if it’s too close to something that maybe that you have some personal experience or someone in your family close to you.” 4RP (emphasis added). The defense attorney then explained that, in particular, he wanted to know if any instance such as those alleged in this case happened to any juror recently. 4RP 49-50. Juror # 1 said nothing.

“A presumption of bias arises when a juror deliberately withholds material information in order to be seated on a jury.” See Cho, 108 Wn. App. at 317, 30 P.3d at 497. Thus, Juror # 1’s reason for not disclosing this information during *voir dire* was critical. Moreover, Juror # 1’s mere failure to disclose a material fact, even when that failure was

unintentional, can amount to misconduct. See Kuhn v. Schnall, 155 Wn. App. 560, 573, 228 P.3d 828, 835 (2010).

For instance, in Kuhn, former patients and parents of patients sued a pediatrician and clinic, alleging the pediatrician sexually abused patients. Id. at 564-565, 830-831. During *voir dire*, one of the jurors failed to disclose that she was sexually abused as a child. Id. at 573, 835. The trial court found that the juror's failure to make this disclosure was honest and inadvertent. Id. Nonetheless, the trial court found these facts would have provided a basis for a challenge for cause and that the nondisclosure of these facts warranted new trial. Id. at 573, 835.

The appellate court affirmed. Id. It noted that whether the defense challenged other jurors for similar reasons was “irrelevant.” Id. at 574, 835 (emphasis added) The court explained, “[v]oir dire examination serves to protect the parties' rights to a fair trial by exposing possible biases, both known and unknown, on the part of potential jurors.” Id.

In the instant case, the trial court only considered the reason for defense counsel's prior challenges for cause. The trial court should have asked Juror # 1 why he failed to disclose this information during *voir dire*. This is particularly true in light of the presumption of bias which arises from a juror's deliberate withholding of information during *voir dire*.

ii. The Second Prong of the McDonough Test

Second, this information would have provided a valid basis for a challenge for cause had it been disclosed during *voir dire*. “Bias, either actual or implied, is a recognized basis for a challenge for cause.” Cho, 108 Wn. App. At 324, 30 P.3d at 501. In fact, if a juror is impliedly biased, he or she must be excused. Carle v. McChord Credit Union, 65 Wn. App. 93, 108, 827 P.2d 1070, (1992). Whether a juror is impliedly biased is resolved by a two-step analysis: “First, the trial judge must ascertain the facts...Second, the trial judge must ascertain whether those facts constitute an interest of the type described in RCW 4.44.180(4).” Id. at 108, 1081. An implied bias is one that “arises when a juror has some relationship with either party; with the case itself; or has served as a juror in the same or a related action.” State v. Latham, 100 Wn.2d 59, 63, 667 P.2d 56, 58 (1983) (citing RCW 4.44.180). Finally, this Court has explained that a good rule of thumb is for the trial judge to err in favor of honoring a challenge whenever circumstances arise that may create an appearance of bias. Carle, 65 Wn. App. at 108, 827 P.2d at 1081.

Here, Juror # 1’s implied bias provided a basis for a challenge for cause because he deliberately withheld information during the *voir dire* examination, he may have been a victim of the series of burglaries in this case, and his property was damaged in the same manner described in

counts 5, 8 and 10 of the information. This made Juror # 1 adverse to Schlottmann and established a relationship between him and the case.

As explained above, Juror # 1 withheld information as to whether he had been a victim of a burglary or whether his residence had ever been damaged by a perpetrator. The trial court reiterated that the parties were trying to discern whether any member of the panel had an experience that was “too close” to the incidents outlined in the information. Surely, these questions were sufficient to encompass an attempted burglary and damage to a front door around the same time, same place and same manner as the crimes charged. Juror #1’s failure to answer strongly suggests implied bias. Nevertheless, the trial court never asked Juror # 1 why he failed to make these disclosures during *voir dire*. 3RP 109-113.

In Cho, a juror failed to disclose that he was a retired police officer until after the verdict was rendered. During *voir dire*, the trial court emphasized that it was crucial for the members of the panel not to withhold any information. Cho, 108 Wash.App. at 318, 30 P.3d at 497. The court also asked questions designed to elicit connections with and attitudes toward police officers. Id. at 319, 498. Juror # 8 did not disclose that he was a retired police officer. Id. One of the defense’s preemptory challenges pertained to a juror who worked as a technician for the FBI and whose stepbrother was a police officer. Id.

After trial, Juror # 8 approached Cho's counsel, asked why he struck certain jurors, and told him that he was a retired police officer. Id. at 320, 499. Cho's counsel moved for a mistrial based on misconduct. Id. Cho's counsel argued that a law enforcement background was the "number one reason" why he struck jurors. Id. The trial court denied Cho's motion, finding the nondisclosure would not have provided a basis for a challenge for cause and that there was no evidence of Juror # 8 injecting the withheld information into the jury deliberations. Id.

The court of appeals reversed. Id. While the appellate court found Juror # 8's past employment as a police officer did not give rise to a showing of bias, it found the trial court erred in failing to consider implied bias in light of the juror's failure to disclose the material information. Id. In so doing, the court interpreted the *voir dire* questions broadly, acknowledging that the court never specifically asked about past employment as a police officer. Id. The appellate court found that this failure to disclose, along with the juror's statements to Cho's counsel, gave rise to a presumption of implied bias. Id.

Moreover, because the trial court failed to consider bias, the appellate court found the order denying the motion for new trial may have been based on an erroneous interpretation of the law. Id. The appellate court remanded for an evidentiary hearing at which the parties could

present additional testimony from Juror # 8. Id. Finally, the appellate court noted that if the record demonstrated Juror # 8 concealed his past employment to earn a place on the jury, “the presumption of bias would not be changed by the juror’s later protestations of impartiality, however sincere.” Id.

Furthermore, the United States Supreme Court and the Fifth Circuit have explained that the factual circumstances similar to those in this case amount to an “extreme situation,” justifying a finding of implied bias. In that regard, the Fifth Circuit cited Justice O’Connor’s concurrence with approval, stating:

...in certain instances a hearing may be inadequate for uncovering a juror's biases...there are *some extreme situations that would justify a finding of implied bias*. Some examples might include a revelation that the juror...was a witness or somehow involved in the criminal transaction.

United States v. Scott, 854 F.2d 697, 699 (5th Cir. 1988) (emphasis added) (italicized text in original) (citing Smith v. Phillips, 455 U.S. at 222, 102 S.Ct. at 948, 71 L.Ed.2d 89 (1982) (O’Connor, J., concurring)).

In this case, Juror # 1 may have been adverse to Schlottmann, he may have had a relationship to the case, and his home may have been involved in this series of criminal transactions. Under Cho, the trial court should have found Juror #1 had an implied bias because he withheld this pertinent information during *voir dire*. These factual circumstances are

sufficient to warrant a new trial, especially considering that “[d]oubts regarding bias must be resolved against the juror.” Cho, 108 Wn. App. at 329-30, 30 P.3d at 503 (2001).

At the very least, these facts are sufficient to warrant an evidentiary hearing, at which the trial court may inquire as to: (1) why Juror # 1 withheld this material information; (2) whether Juror # 1 believed Schlottmann was involved in the attempted break-in at his house; (3) whether he considered the trial an opportunity to hold a person accountable for the attempted break-in; and/or (4) whether he took the timing of the incident at his house, the manner in which it was done, and the close proximity of his home to the other victim homes into account during deliberations. The burden of making such an inquiry is slight considering the constitutional rights at stake.

2. SCHLOTTMANN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER DEFENSE ATTORNEY ADMITTED HER GUILT TO 7 OF THE 13 COUNTS, INCLUDING THE OFFENSE WHICH CARRIED THE HIGHEST SENTENCE.

Schlottmann received ineffective assistance of counsel when, during opening statements, her defense attorney unequivocally admitted her guilt to 7 of the 13 counts, including the highest level charge - Burglary in the First Degree, while Armed with a Firearm - a Class A Felony. CP 12. This was not an excusable trial strategy. This concession

of guilt did not pertain to a lesser charge, in an attempt to secure an acquittal on a higher charge. Worse yet, defense counsel made this concession without Schlottmann's consent, and in contravention of her earlier plea of not guilty. This violated defense counsel's duty of loyalty and resulted in a conflict of interest.

a: Standard of Review

"Whether a defendant received ineffective assistance of counsel is a legal question reviewed de novo." United States v. Swanson, 943 F.2d 1070, 1072 (9th Cir. 1991). An appellate court may consider a claim of ineffective assistance of counsel on direct appeal if the record is sufficiently complete to permit the appellate court to decide the issue. Id.

An appellant alleging ineffective assistance of counsel is subject to the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 689-91 (1984). State v. White, 132 Wn. App. 1056 (2006). The appellant must demonstrate both that her counsel's performance was deficient and that she was prejudiced by such deficient performance. Id. Prejudice is shown by demonstrating a reasonable probability that the outcome of the trial would have been different, but for the deficient performance. Id. "[D]eficient performance is not shown by matters that go to trial strategy or tactics." Id.

b. Argument on the Merits

A defense attorney's concession of guilt will not be deemed ineffective assistance of counsel when it is a legitimate trial strategy. This is because conceding guilt on a lesser charge, when evidence of guilt on that charge is overwhelming, may help to win the jury's confidence. See State v. Silva, 106 Wn. App. 586, 596, 24 P.3d 477 (2001) ("such acknowledgment can be a sound tactic when the evidence is indeed overwhelming...and when the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury.") (quoting Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991)). Courts of this state, however, are consistent in finding a concession of guilt to be a reasonable trial strategy only when that concession pertains to a lesser charge. See, e.g., State v. Hermann, 138 Wn. App. 596, 604-06, 158 P.3d 96, 100-01 (2007) ("Conceding guilt to the jury can be a sound trial tactic when the evidence of guilt overwhelms...Such an approach may help the defendant gain credibility with the jury when a more serious charge is at stake.").

Barring a situation where an attorney concedes guilt to a lesser charge to secure an acquittal on a greater charge, however, the following rule applies: "[A]n attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of 'not guilty' unless the

defendant unequivocally understands the consequences of the admission.” Wiley v. Sowders, 647 F.2d 642, 649 (6th Cir. 1981) (citations omitted). An attorney is not permitted to stipulate to facts that amount to the “functional equivalent of a guilty plea.” Id. (citations omitted).

Courts recognize two dimensions of a not guilty plea. Id. at 650-651. First, a not guilty plea reserves those constitutional rights which are fundamental to a fair trial, including the right to a trial by jury, the privilege against self-incrimination, and the right to confront one’s accusers. Id. Second, a not guilty plea is a statement by the defendant that she intends to hold the government to its strict burden of proof beyond a reasonable doubt. Id. One’s attorney has a duty to structure a defendant’s trial around her plea. Id. Where counsel fails to do so, he provides ineffective assistance, because a concession of guilt amounts to both a breach of the duty of loyalty and a conflict of interest. Matter of Pers. Restraint of Benn, 134 Wn.2d 868, 891, 952 P.2d 116, 128 (1998) (emphasis added). “A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest.” Id.

Swanson is instructive. There, the defendant received ineffective assistance of counsel when his defense attorney conceded guilt during closing arguments. Swanson, 943 F.2d at 1071. Swanson was indicted on

one count of bank robbery and faced a sentence as a career offender if convicted. Id. Swanson pled not guilty. Id. Notwithstanding his plea, the defense attorney stated that the “evidence against Swanson was overwhelming and that he was not going to insult the jurors' intelligence.” Id. at 1071. The defense attorney continued, “[a]gain in this case, I don't think it really overall comes to the level of raising reasonable doubt.” Id. Counsel then noted some inconsistency in the witnesses' testimony and stated, “the only reason I point this out, not because I am trying to raise reasonable doubt now, because again I don't want to insult your intelligence....” Id. He concluded by telling the jury that if they find Swanson guilty they should “never look back.” Id.

On appeal, Swanson argued this was ineffective assistance of counsel, and the Ninth Circuit agreed. Id. at 1076. Regarding the duty prong of the Strickland test, the court found the attorney's argument lessened the government's burden of persuading the jury that Swanson committed the bank robbery. Id. at 1074. This was not mere negligence or a strategy that misfired. Id. Rather, the attorney's conduct “tainted the integrity of the trial,” because it was an abandonment of the client's defense at a critical stage of the proceedings. Id. The court instructed, “even when no theory of defense is available, if the decision to stand trial

has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt.” Id. at 1075 (emphasis added).

As regards the prejudice prong of the Strickland test, the appellate court explained that these circumstances amounted to a constructive absence of counsel and that, in such cases, the prejudice prong is presumed. Id. Moreover, the attorney’s abandonment of his duty of loyalty to Swanson created a conflict of interest. Id. The Ninth Circuit then reversed Swanson’s conviction and ordered that a copy of its opinion be sent to the State Bar of Arizona. Id. at 1076.

The Sixth Circuit Court of Appeals reviewed a similar issue in Wiley, supra. The two co-defendants there pled not guilty to first degree burglary, theft over \$100, and being a persistent felony offender. Id. at 644. Defense counsel conceded the guilt of each co-defendant during closing arguments. Id. at 645-46. One co-defendant alleged this concession amounted to ineffective assistance of counsel in a petition for writ of habeas corpus. Id. at 644. The district court denied the petition, but the appellate court reversed. Id. at 651.

In finding the petitioner received ineffective assistance of counsel, the Sixth Circuit explained, “an attorney may not stipulate to facts which amount to the ‘functional equivalent’ of a guilty plea” when a defendant has pled not guilty. Id. at 649. By pleading not guilty, the defendant “was

entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue. Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue." Id. at 650.

The defense attorney's words in the instant case are even more egregious than those in Swanson. During opening statements, before the presentation of any evidence, and in contravention of Schlottmann's not guilty plea, the defense attorney stated:

[T]his is not one of those cases where the defendant is going to throw up her hands in the air and say, "I didn't do anything. Make the prosecutor prove it." There's going to be some acknowledgment here. There's going to be an admission that in some instances, yes, the state can prove some of these charges. The state will be able to prove some of these charges beyond a reasonable doubt [...]

[...] we'll tell you right up front they will be able to prove some of these charges, and some of the charges involving Ms. Finely's home [...]

[...] And regrettably, Ms. Schlottmann used some very poor judgment, that's in fact criminal judgment, and that she went into a home where she did not have permission to be inside, and she went with Darlene Lockard.

[...] And yes, while inside Ms. Finely's house, many items were taken, but Ms. Schlottmann didn't have a right to...And unfortunately for Ms. Schlottmann, she happened to be inside of the vehicle...where Ms. Lockard had other items that didn't belong to Ms. Lockard that had come from Mr. Winkelman's residence and Mr. and Mrs. Japhet's residence.

[...] yes, the state can prove some of the charges that were brought here. Certainly they can. And we're not going to deny that to you, and we're not going to insult your intelligence.

4RP 97-101 (emphasis added).

Defense counsel conceded guilt as to all five charges involving the Finely residence. CP 12-13. Further, Defense counsel admitted Schlottmann was found in an automobile with the items stolen from the Winkelman and Japhet residences. Count 12 charged Schlottmann with Possession of Stolen Property from the Japhet residence. CP 14. Count 13 charged Schlottmann with Possession of Stolen Property from the Winkelman's residence. CP 15.

As in Swanson, Schlottmann's attorney stated that the prosecution can "certainly" prove these charges and that the defense was not "going to insult [their] intelligence." 4RP 101. Also in Swanson, Schlottmann's attorney explained that the State could prove these charges beyond a reasonable doubt. He then exceeded the bounds of statements made by the attorney in Swanson and stated Schlottmann exercised "criminal judgment." 4RP 98.

These are not minor concessions. One of the items stolen from the Finely residence was a Savage Arms .32 caliber handgun, giving rise to the charge of Burglary in the First Degree, while Armed with a Firearm, a

Class A Felony. CP 12. For this offense, Schlottmann could have been imprisoned for a term not exceeding life. RCW 9a20.021(1)(a) (2011). Thus, although Swanson's attorney was ineffective for admitting guilt to the only crime charged, the actions of Schlottmann's attorney are equally intolerable - he admitted Schlottmann's guilt to the highest level offense, which carried a possible sentence of life imprisonment.

Furthermore, Schlottmann's defense attorney conceded guilt at the beginning of the trial, prior to the presentation of any evidence. Worse yet, the attorney's statements contradicted Schlottmann's earlier plea of not guilty, which entitled her to an adversarial process, regardless of the strength of the evidence against her. For this "strategy" to have been permissible, Schlottmann's consent should have been placed on the record. See Wiley, 647 F.2d at 650-51 ("In those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with Boykin, supra.").

Finally, defense counsel's actions constituted a breach of the duty of loyalty and resulted in a conflict of interest. See Benn, 134 Wn.2d at 891, 952 P.2d at 128 ("Courts have found conflicts of interests and violations of the duty of loyalty based on counsel's nonstrategic concessions of guilt or expressions of disdain for the defendant."). Where

such an actual conflict exists, prejudice is presumed. Id. at 128. Again, at the outset of trial, the defense told the jury Schlottmann was guilty. Because her counsel abandoned her at the outset of the case, Schlottmann was prejudiced by defense counsel's actions.

3. PROSECUTORIAL MISCONDUCT VIOLATED SCHLOTTMANN'S RIGHT TO A FAIR TRIAL

"Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial." State v. Jones, 144 Wash. App. 284, 290, 183 P.3d 307, 311 (2008). With that tenant in mind, the prosecutor here engaged in misconduct by suggesting: (1) Schlottmann committed the burglaries in order to buy drugs; (2) Schlottmann had "no conscience" and wanted to victimize people; and (3) Schlottmann had a duty to take responsibility for the crimes. After each comment, Schlottmann objected, but the trial court did not enter a ruling. At the close of all arguments, Schlottmann moved for a mistrial:

There was no evidence about drugs whatsoever entered into this trial...I believe it was highly inflammatory and prejudicial to my client. The court did not make a ruling one way or the other...Moments later the prosecutor... put on his projector and...also stated Alexis Schlottmann and Darlene Lockard are burglars and thieves with no conscience...taken together with the earlier comment about drugs and money which were inflammatory, I believe that further inflames the jury's passions and has nothing to do with the case. And further I made an objection when Mr. Jackson said...Schlottmann has never taken responsibility for this...The court did not either sustain or overrule the

objection...the defense believes...that does implicate... her right to testify or not testify...It also...goes to the burden of proof here, and...it's an impingement and a completely inappropriate impingement of her indicating that she had a responsibility during this trial or at some time earlier to take personal responsibility, and it's highly prejudicial if an officer of the court makes that assertion [...]

3RP 439-440 (emphasis added). The trial court denied Schlottmann's motion in error.

a. Standard Of Review

This Court reviews the denial of a motion for mistrial, which asserts a prosecutorial misconduct claim, under the abuse of discretion standard. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). A trial court abuses its discretion in denying a motion for mistrial when “there is a ‘substantial likelihood’ the prejudice affected the jury's verdict.” State v. Russell, 125 Wash. 2d 24, 84-85, 882 P.2d 747, 784 (1994) (citations omitted).

Because Schlottmann objected to each of the prosecutor's comments, she need only demonstrate that the comments were improper and were reasonably likely to affect the verdict. State v. Pierce; see also, State v. Walker, 164 Wash. App. 724, 730, 265 P.3d 191, 195 (2011), as amended (Nov. 18, 2011), (review granted, cause remanded, 164 Wash. 724, 295 P.3d 728 (2012)) (“Appellant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice.”).

On review of such a claim, an appellate court must consider the prosecutor's comments during closing arguments "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." *Id.* (citations omitted).

b. Argument On The Merits

i. The Prosecutor Engaged In Misconduct By Stating That Schlottmann And Her Co-Defendant Committed The Charged Burglaries In Order To Purchase Drugs, When That Contention Was Wholly Unsupported By The Evidence

While a prosecutor enjoys wide latitude to draw reasonable inferences from the evidence during closing arguments, a prosecutor "may not refer to evidence not presented at trial." *State v. Magers*, 164 Wash. 2d 174, 192, 189 P.3d 126, 135-36 (2008) (citation omitted). "[W]hile he may strike hard blows, he is not at liberty to strike foul ones...improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). As this Court has instructed, "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158, 1169 (2012) review denied, 175 Wn.2d 1025, 291 P.3d 253 (2012) (citation omitted). "References to evidence outside

of the record and bald appeals to passion and prejudice constitute misconduct.” State v. Fisher, 165 Wash. 2d 727, 747, 202 P.3d 937, 947 (2009).

The prosecutor in this case made the following, unsupported and improper insinuation regarding Schlottmann’s motive for allegedly participating in the burglaries.

Why do people burglarize houses? I mean, this probably isn’t too hard of a concept. They want drugs and they want money. And money equals drugs or drugs equals money, one of the two.

3RP 396 (emphasis added).

The defense attorney immediately challenged the statement: “Your Honor, I’m going to object to that previous comment. It’s inflammatory, and ask the court to strike.” 3RP 396. After a side-bar conference, the trial court did not rule on the objection. The prosecutor continued: “Again, so you know why people commit burglaries.” 3RP 396.

After the jury left to deliberate, the defense attorney motioned for mistrial, reiterating his earlier objection: “There was no evidence about drugs whatsoever entered into this trial, and I believe it was highly inflammatory and prejudicial to my client. The court did not make a ruling one way or the other either sustaining or overruling the objection.” 3RP 439. The prosecutor did not dispute the lack of evidence pertaining

to drugs in this case. Instead, the prosecutor argued, “[...] it certainly is within the jury’s knowledge as to why people commit burglaries. That’s based on their common sense experience [...]” 3RP 440-441. That burglaries are committed exclusively to pay for drugs is untrue, inflammatory, and wholly unsupported by the record in this case.

References to drug related offenses have been deemed prejudicial misconduct. See State v. Stith, 71 Wash. App. 14, 21-23, 856 P.2d 415, 420-21 (1993). In Stith, the court reviewed a claim of prosecutorial misconduct, wherein the prosecutor stated, *inter alia*, that Stith “knew exactly what he was doing. He knew what was up...He was out of jail for a week and he basically was just resuming his criminal ways. He was just coming back and he was dealing again.” Id. at 16. Stith was convicted of delivery of cocaine. Id. at 15.

On review, the appellate court found this and a later statement during the prosecutor’s rebuttal were improper and prejudicial. “Of far greater concern are the prosecutor’s comment in closing argument that the appellant ‘was just coming back and he was dealing again’ [...]” Id. at 21. The court reasoned that the comment indicated to the jury that the prior crime, for which appellate was convicted, was drug related and that such a fact had not previously been entered into evidence. Further, the court found this was impermissible opinion testimony that the defendant was

selling drugs again and was guilty of both the previous and current charge. Id. at 22. Furthermore, the court found that the comment struck at the very heart of Stith's right to a fair trial before an impartial jury.

Notably, the trial court provided a curative instruction after the prosecutor's improper statements were made, but the appellate court found such remarks could not be cured. Id. at 23. The court reasoned, "the 'remarks were flagrant, highly prejudicial and introduced 'facts' not in evidence.' Instructions to the jury to disregard the comments cannot cure such prejudice." Id. (emphasis added) (citation omitted)

Similarly, in State v. Ramos, the Court of Appeals found that, notwithstanding the strength of the evidence against the defendant, the prosecutor's improper argument, implying the defendant was part of the drug world and drug business, was prejudicial misconduct. State v. Ramos, 164 Wn.App. 327, 330, 263 P.3d 1268, 1270 (2011). At Ramos' trial, an informant testified that he paid Ramos \$400, in exchange for an ounce of cocaine. Id. at 331. A videotape of the controlled buy revealed Ramos arriving at a grocery store, and while walking into the store, greeting a man and woman standing outside. Id. One detective who testified at trial stated that he recognized Ramos in the video and also recognized the two individuals he greeted outside from "an investigation."

Id. Ramos admitted that he used drugs, but denied selling them to the informant. Id. at 332.

During closing arguments, the prosecutor argued, “Mr. Ramos acknowledges that he ran into two people on the way to the store. He wouldn’t say their names, but Detective Hanger knows who they are...two people that he had opened investigations upon and he recognized them and knew exactly who they were.” Id. at 341.

On review of Ramos’ conviction, the appellate court noted that the testimony did not establish the two people were targets of a drug investigation and found: “While a prosecutor has ‘some latitude to argue facts and inferences from the evidence,’ a prosecutor is not ‘permitted to make prejudicial statements unsupported by the record.’” Id. The court then reversed Ramos’ conviction for prosecutorial misconduct during both cross-examination and closing arguments. Id. at 342.

First, as in Stith, the prosecutor’s comments in this case were highly prejudicial and introduced facts not in evidence. There is no evidence in the record that the burglaries were committed so that the co-defendants could buy drugs. There was no evidence in the record that either co-defendant, let alone Schlottmann, used drugs. Thus, the prosecutor’s statement was unsupported by the facts in evidence. The comment was baseless.

Second, as in Stith, the comment was predicated on the prosecutor's opinion that, like others, Schlottmann burglarized the homes in order to buy drugs. He even surmised that it was "within the jury's knowledge as to why people commit burglaries." But there was no evidence to support any motive to buy drugs. Had the prosecutor not made such an unsupported statement, any one of the jurors could have believed that at least some burglaries are committed by desperate people, not drug addicts. A robbery committed by a desperate person is likely to incite the jury less than a burglary committed to support a drug addiction. Worse still, the prosecutor's comments suggested Schlottmann was also guilty of other uncharged crimes.

ii. The Prosecutor Engaged In Misconduct By Improperly Opining That Schlottmann Had "No Conscience" And That She "Wanted To Victimize Other People"

Referencing Schlottmann and Lockard during closing arguments, the prosecutor stated, "again, Ms. Lockard and Schlottmann are two burglars and thieves with no conscience." 3RP 401 (emphasis added). The prosecutor then leapt to the conclusion that "[Schlottmann] wanted to victimize other people." 3RP 432 (emphasis added). In arguing these points, the prosecutor exceeded the bounds of a logical inference from the

evidence and inserted his own opinion as to Schlottmann's motive for allegedly committing the crimes. This was impermissible.

“[T]here is a distinction between *the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.*” See State v. McKenzie, 157 Wash. 2d 44, 53-54, 134 P.3d 221, 226 (2006) (italicized text in original). In order to determine the propriety of the prosecutor's comments, an appellate court must review them in context. Id. “Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*” Id. (italicized text in original).

Washington courts have held that, if the evidence indicates that a defendant is a killer or a murderer, then “it is not prejudicial to so designate him.” State v. Buttry, 199 Wash. 228, 250, 90 P.2d 1026, 1035 (1939). However, a prosecutor is not “permitted to make prejudicial statements unsupported by the record.” Ramos, 164 Wn. App. at 341, 263 P.3d at 1275. In Ramos, the prosecutor improperly alleged the defendant was part of the “drug world” and “drug business.” Id. Because these statements were not supported by the record, the appellate court reversed. Id.

Likewise, in State v. Jones, 144 Wn. App. 284, 296-97, 183 P.3d 307, 314-15 (2008), this Court reviewed a claim of prosecutorial misconduct surrounding the prosecutor's closing argument which bolstered the credibility of a confidential informant and prejudiced the defendant. This Court explained that the prosecutor made many statements of "fact" which were not supported by the evidence, including: that (1) the CI did not testify because his identity would be revealed, (2) the CI was credible and trustworthy because he had been friends with Officer Elliott for 15 years, (3) the CI did not testify because he was afraid of Jones, (4) Jones had discovered that the CI provided police with evidence against him, (5) Jones was "dangerous," and (6) Jones was a threat to the CI and his family. Id. (emphasis added). This Court found the arguments highly improper and inflammatory. Id. The Court then noted the defense attorney's objection and found the misconduct was so prejudicial that a curative instruction would be ineffective. Id. at 299, 316.

Similar to Ramos and Jones, the prosecutor here made several improper and unsupported comments. The prosecutor opined that Schlottmann committed the burglaries because she wanted to victimize people. 3RP 432. Yet, there was absolutely no evidence of Schlottmann wanting to victimize people. In a similar vein, the prosecutor remarked that Schlottmann was a burglar and a thief with no conscience. Even if the

evidence suggested Schlottmann was a burglar and a thief, there was no evidence to suggest Schlottmann had no conscience. In fact, there was no evidence as to any motive for participating in the alleged burglaries.

Each of the statements alleges something inflammatory about Schlottmann's character with absolutely no evidentiary support. Therefore, the purpose of such comments can only be to inflame the passion and prejudice of the jury. This Court should follow Ramos and Jones and determine the prosecutor's comments constitute misconduct.

- iii. The Prosecutor's Comment On Schlottmann's Failure To Take Responsibility For The Crimes Exceeded The Scope Of The Defense Attorney's Statements, Improperly Drew Upon Schlottmann's Exercise Of Her Right To A Fair Trial, Diminished The State's Burden Of Proof And Misstated The Jury's Duty.

It is well-settled that "[t]he State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Gregory, 158 Wash. 2d 759, 806-07, 147 P.3d 1201, 1227 (2006) (citing State v. Rupe, 101 Wash.2d 664, 705, 683 P.2d 571 (1984)). But not all arguments "touching upon" a defendant's constitutional rights are proscribed. A reviewing court must consider "whether the prosecutor manifestly intended the remarks to be a comment on that right." Id. (citation omitted). "[S]o long as the focus of the

questioning or argument "is not upon the exercise of the constitutional right itself," the inquiry or argument does not infringe upon a constitutional right. Id. (citation omitted).

In this case, the prosecutor not only improperly commented upon Schlottmann's privilege against self-incrimination and right to present a defense, he made this a theme of his argument. Worse still, the prosecutor suggested that Schlottmann had a duty to accept responsibility for the crimes and that her failure to do so somehow imputed an obligation on the jury to convict:

If she's not contesting it, why are we here talking about those particular charges? She never pled guilty to those charges. You still have to find her guilty of those charges, don't you? That's one of your jobs. It's what the court has instructed you to do. She didn't take responsibility for it. She's going to try to now - -

3RP 400 (emphasis added). Thus, the prosecutor told the jury that it had to find her guilty, that its job was to find her guilty, and that the court instructed them to find her guilty. He then immediately linked the duty to find Schlottmann guilty to her failure to take responsibility for the crimes. 3RP 400. Schlottmann's objection followed. 3RP 400.

As stated above, this became a theme of the prosecutor's closing argument. During rebuttal, the prosecutor reiterated, "[a]gain, Ms. Schlottmann surrounds herself with these things, but she wants to deny all

of them. As I said, she's never taken responsibility for any of it." 3RP 433. He continued, "[s]he's never taken responsibility for any of these crimes, but for [her defense attorney] doing that for her now. But again, she wants to limit what her responsibility is, for obvious reasons." 3RP 433.

The prosecutor's statements surrounding his comments - that Schlottmann should be punished for pleading not guilty - illustrate their impropriety. 3RP 400. Indeed, Schlottmann had a constitutional right to plead not guilty and to present her theory of the case to the jury. See State v. Walker, 164 Wn. App. 724, 734, 265 P.3d 191, 197 (2011), as amended (Nov. 18, 2011), review granted, cause remanded, 164 Wash. 724, 295 P.3d 728 (2012). It is improper for a prosecutor to ask the jury to draw an adverse inference from Schlottmann's exercise of this constitutional right. See Gregory, 158 Wash. 2d at 806-07, 147 P.3d at 1227.

In response to the defense's motion for mistrial, the prosecutor argued his statement was made in rebuttal to the defense attorney's opening statement. But that rebuttal exceeded the scope of defense attorney's comments and, as such, was both improper and prejudicial.

This Court has held that, "even if improper, a prosecutor's remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not 'go beyond what is necessary to

respond to the defense and must not... be so prejudicial that an instruction cannot cure them.' ” State v. Dixon, 150 Wash. App. 46, 56, 207 P.3d 459, 465 (2009) (emphasis added) (citations omitted). In Dixon, the defendant was stopped by the police for driving with a suspended or revoked license. Id. at 50, 462. When the police searched Dixon’s purse upon arrest, they found methamphetamine. Id. During closing arguments, Dixon’s defense attorney argued she did not have dominion or control over her purse because there was another person in the car: “I would say that you cannot find beyond a reasonable doubt that she is guilty of the crime of possession of a controlled substance...There was an unknown person in the car...the officer...did not get enough information about this person [...]” Id. at 56, 465. The prosecutor then argued Dixon should have produced the second passenger to testify. Id.

On appeal, Dixon argued the prosecutor’s statement was an improper comment on her failure to call a witness. Id. This Court agreed that the argument went beyond what was necessary to rebut Dixon's counsel's statements and, when coupled with the argument that Dixon should have testified, was so prejudicial that a jury instruction could not have cured the prejudice. Id. at 57, 465.

Similar to Dixon, the prosecutor’s comments here: (1) were an improper comment on Schlottmann’s exercise of a constitutional right; (2)

exceeded the scope of the defense counsel's statements; and (3) were so prejudicial that a jury instruction could not have cured the prejudice. *First*, it is improper to comment on a defendant's failure to plead guilty and to exercise her right to a trial. See, e.g., United States v. Piperi, 101 F.3d 697 (5th Cir. 1996) (prosecutor's comment on defendant's failure to plead guilty was "clearly improper"); United States v. Smith, 934 F.2d 270, 275 (11th Cir. 1991) (prosecutors remarks that Smith "has not taken responsibility for his actions" were improper).

Second, Schlottmann's defense attorney conceded that the State could prove the 7 counts beyond a reasonable doubt, that Schlottmann exercised "criminal judgment," and that he would not "insult the jury's intelligence" by challenging these counts. This comment did not warrant any response because his statement favored the prosecution. Nonetheless, the prosecutor took the comments a step further. He asked the jury to draw an adverse inference from Schlottmann's exercise of her right constitutional rights. He then compounded his error by telling the jury that it was their job to find her guilty because Schlottmann did not take responsibility for the crimes.

A jury's duty, however, is to determine whether the State has proved its allegations beyond a reasonable doubt. State v. Anderson, 153 Wn. App. 417, 429, 220 P.3d 1273, 1280 (2009). In Anderson, this Court

found the jury's job was not to "solve" a case or to "declare what happened on the day in question." Id. "Rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Id. Accordingly, the Court found the prosecutor's arguments improper. Id.

This Court also found the prosecutor's mischaracterization of the jury's duty was prosecutorial misconduct in State v. Walker, 164 Wn. App. 724, 733, 265 P.3d 191, 196 (2011). There, the prosecutor argued the jury's job was to declare the truth. "So I talked to you at the very beginning about this—about declaring the truth as part of your role in returning a verdict." Id. This Court relied on its holding in Anderson and found the prosecutor's mischaracterization of the jury's duty was improper. Id.

Although the prosecutor's statements here did not ask the jury to "declare the truth," it certainly misstated the jury's "duty" or "job." Rather than suggesting that it was the jury's duty to find the truth, the prosecutor argued the jury's job was to find Schlottmann guilty and that the trial court had instructed it to do so. This minimized the State's burden of proof.

In addition, the prosecutor's comments overlooked Schlottmann's presumption of innocence and suggested that she had some duty to take

responsibility for the crimes. As the Anderson Court explained, Schlottmann had no affirmative, initial duty to carry out in order to avoid conviction; the burden was on the State. Thus, the State's suggestion to the contrary was improper.

Third and finally, the prosecutor's improper comments were so prejudicial that a jury instruction could not have cured the prejudice. In fact, no curative instruction was given in this case. As Schlottmann's attorney explained: "[T]he court did not either sustain or overrule an objection, and...it...did deprive Ms. Schlottmann of asking for any type of curative instruction at the time if there was any prejudice." 3RP 441

In response, the trial court noted that, prior to closing arguments, it instructed the jury "to disregard the lawyer's remarks, et cetera, that are not consistent with the evidence." The court continued, "[...] And I don't need to comment further." 3RP 442. Although the trial court instructed the jury to disregard the lawyer's comments that are not in evidence, that instruction was given before the prosecutor's improper statements. Furthermore, that instruction related only to comments about evidence. The prosecutor's comments here misled the jury as to the law - that the jury had a duty to convict Schlottmann because she failed to take responsibility for the crime. This has nothing to do with the evidence

presented, and the court's earlier instruction, therefore, did not cure the prejudicial effect.

Finally, the prosecutor's comments affected Schlottmann's constitutional right against self-incrimination and her right to present a defense. "When a prosecutor's comments also affect a separate constitutional right, they are subject to the stricter standard of constitutional harmless error." State v. Johnson, 80 Wn. App. 337, 341, 908 P.2d 900, 903 (1996) (overruled on other grounds by State v. Miller, 110 Wn App. 283, 40 P.3d 692 (2002)). As such, the burden is now on the State to demonstrate the prosecutor's improper comments were harmless.

iv. Prosecutorial Misconduct Prejudiced The Defense Such That Schlottmann Is Entitled To A New Trial

A prosecutor's statements during closing argument are presumably made to influence the jury. See State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699, 702 (1984). In fact, a prosecutor "usually exercises a great influence upon jurors." State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500, 503 (1956). Thus, while afforded wide latitude, the prosecutor "has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." Id. (emphasis added) (citation omitted).

The prosecutor's comment that Schlottmann wanted to victimize people, had no conscience, and participated in the burglaries to buy drugs

were prejudicial and designed to inflame the passion of the jury. Moreover, Schlottmann's counsel objected to each of these statements and later moved for a mistrial. But no curative instruction was given. Rather, the trial court relied on a statement it made to the jury prior to closing arguments - that nothing the lawyers say is evidence. This statement is insufficient to cure the prejudice resulting from these comments.

As a threshold matter, this instruction was given prior to the jury hearing these comments. Also, each time the defense objected to an improper comment, the prosecutor would immediately reiterate the point. 3RP 400-401, 433. This strategy would naturally lead the jury to believe that the prosecutor's actions were appropriate, and that his comments merited their consideration, regardless of any objection. See State v. Davenport, 100 Wn.2d 757, 764, 675 P.2d 1213, 1217 (1984) ("Petitioner's timely and specific objection to the State's comment was overruled by the trial court. This ruling lent an aura of legitimacy to what was otherwise improper argument.").

For instance, after the defense objected to the prosecutor's statement that Schlottmann is a burglar and a thief, who never took responsibility for the crime, the defense requested a side bar. 3RP 400. Without any ruling on the objection, the prosecutor stated, "[a]gain, Ms.

Lockard and Ms. Schlottmann are burglars and thieves with no conscience.” 3RP 401.

The persistence of these improper comments throughout the prosecutor’s closing arguments and the trial court’s failure to provide any curative instruction prejudiced Schlottmann’s case. Washington courts have held as much in Ramos, Jones, Stith, Anderson and Walker.

4. CUMULATIVE ERROR DEPRIVED SCHLOTTMANN OF A FAIR TRIAL.

Even if this Court does not find that the foregoing errors, standing alone, deprived Schlottmann of her due process right to a fair trial, she is entitled to a new trial under the cumulative error doctrine. See State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668, 678 (1984). The errors outlined in the previous sections reveal a trial at which: (1) a juror withheld material information, relating to his being a potential victim of the series of burglaries in this case, during *voir dire*; (2) the defense attorney conceded the defendant’s guilt to the highest level charge, at the outset of trial, without Schlottmann’s consent, and before the presentation of any evidence; and (3) the prosecutor argued Schlottman had no conscience, alleged she committed the burglaries in order to buy drugs, and argued she should be penalized for not taking responsibility for these crimes.

Surely a trial that included such errors is not the fair trial contemplated by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 of the Washington Constitution. This Court should remedy these errors by reversing and remanding this case.

D. CONCLUSION

For the foregoing reasons, this Court should reverse Schlottmann's conviction and sentence and remand this case for a new trial.

DATED this 8th day of October, 2013.

Respectfully submitted,

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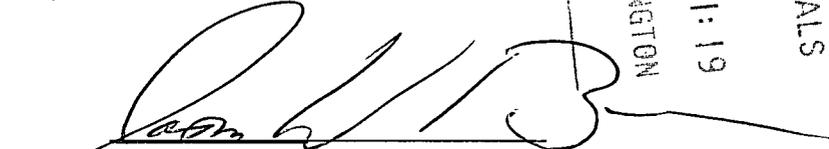
Attorneys for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by United States Mail, in properly stamped and addressed envelopes, a copy of the opening brief, to which this declaration is attached, to Carol La Verne, Esquire, Deputy Prosecuting Attorney, Thurston County Prosecutor's Office, 2000 Lakeridge Drive S.W., Bldg 2, Olympia, WA 98502-6045, and to the Defendant/Appellant, Alexis Schlottmann at Washington Corrections Center for Women, 9601 Bujacich Road North West, Gig Harbor, WA 98332-8300.

I SWEAR AND AFFIRM, UNDER PENALTY OF PERJURY,
UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE
FOREGOING IS TRUE AND CORRECT.

DATED this 8th day of October, 2013.


Jason W. Bruce WSBA 10634
Attorney for Defendant/Appellant

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