

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

IN RE THE PERSONAL)	NO. 48012-3-II
RESTRAINT PETITION OF:)	
)	RESPONSE TO
ALEXIS J. SCHLOTTMAN)	PERSONAL RESTRAINT
)	PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Carol La Verne, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Alexis Schlottman is currently in the custody of the Washington Department of Corrections, serving a sentence of 96 months. CP 122.¹ Schlottman was found guilty by a jury of one count of first degree burglary, two counts of residential burglary, three counts of second degree theft, one count of theft of a firearm, two counts of second degree possession of stolen property, two counts of second

1 The court has granted the State's motion to transfer the record from the direct appeal, 44156-0-II, to this PRP.

degree malicious mischief, and one count of third degree malicious mischief. CP 117.

The State has no information that would make the waiver of the filing fee improper under RCW 4.24.430.

II. STATEMENT OF PROCEEDINGS

A. Substantive facts.

On November 18, 2011, around 12:20 to 12:30 p.m., Emily McMason noticed a dark green Mazda MVP minivan pull into the driveway of her neighbor, Marian Finely. RP 75, 77, 81.² Because there had been a recent series of burglaries in her neighborhood, McMason watched the minivan closely. RP 77. She observed the female driver exit the van, holding a piece of paper, and look around at the surrounding area. RP 77. The woman knocked on Finely's door, which is on the second story, and then peered into the windows on both the first and second stories. RP 78. The driver returned to the minivan, put the piece of paper she had been holding inside, and pulled out a crowbar. RP 79. McMason called 911. RP 79. She observed a second woman exit the passenger side of the minivan.

² The references to the verbatim report of proceedings are to the three-volume transcript of the trial, dated 10/15/12 to 10/19/12..

RP 79. Both of the women went inside Finely's house. RP 82. McMason, who was still on the phone with the emergency dispatcher, relayed a description of the women, the minivan, and the actions of the two suspects. RP 80-83.

McMason could see movement inside the Finely house. After approximately ten minutes, the two women exited the house through the front door. RP 83-84. The passenger in the minivan was carrying a stack of what looked like file folders and papers. The driver carried a large bag with an item protruding from it. RP 84. They both entered the minivan and it drove away northbound. RP 85-86.

A few moments later, several officers arrived at McMason's residence. While Deputy Brian Brennan spoke to her, an Olympia Police Officer stopped a dark green Mazda MVP minivan about three miles from the Finely home. RP 33-34, 91. Thurston County Deputy Sheriff Clay Westby, who was responding to the call, was diverted to the scene of the stop. RP 34. He identified the occupants as Darlene Lockard and Alexis Schlottman. RP 36. The registered owner of the minivan was Arron Davis, RP 37, Lockard's significant other. RP 274. Westby had identified Lockard as the driver and determined that her

driver's license was suspended, so he arrested her for third degree driving while license suspended. RP 35. McMason was brought to that location and she positively identified Lockard and Schlottman as the people she saw enter the Finely house. RP 90-92. Westby obtained a telephonic search warrant for the van. RP 39. Marian Finely was also brought to the location where the van was stopped, and she identified 45 items found in the van, including a firearm, that had been stolen from her house. RP 43,170-71,174-75.³ Also located, but not taken from Finely, were a crowbar, a boxed set of six knives, and a glass jar containing coins. RP 47-48. On the driver's side seat was a paper with the words "The Dynamic Duo" at the top. RP 50. Other items observed but not seized were left in the van, including a checkbook with checks in the name of "Japhet Bulkheading Incorporated, Floyd or Grace Japhet." RP 54. This struck Wesby as odd, so after he left the scene he investigated further. RP 56.

On November 17, 2011, the Donald and Lisa Japhet home, in the same general area as the Finely residence, was burglarized. RP

³ Finely testified at trial that it cost \$391.05 to repair the damage to her door, which had been pried open. RP 12, 163.

195-96. Donald Japhet testified that when he returned home late in the afternoon on November 17, he found the front door of the house open, the doorjamb split, and the deadbolt lock broken. RP 197. The lights were on throughout the house and the bedroom had been ransacked; drawers were upside down. RP 198. A laptop computer and helmet camera belonging to his son was missing, as well as jewelry and a bank statement and deposit book for Japhet Bulkheading, a business Donald Japhet owned with his brothers. RP 194, 200, 202, 206. The investigating deputy did not attempt to process the scene for fingerprints because prints can only be lifted from smooth surfaces, and unless he had reason to believe that a suspect had touched a particular smooth surface, he could expend a huge amount of time and get no results. RP 227. It cost the Japhets \$1726.40 to repair the door and their insurance company paid \$2736 for the stolen items. The deductible was \$500. RP 205.

While searching the minivan, deputies also found a credit card with the last name of "Winkelman" on it. RP 240. Detective Cameron Simper obtained a report of a burglary at the Winkelman residence the same day as the Finely burglary. RP 241. The Finely and

Winkelman houses are approximately four miles apart. RP 245. Simper obtained another search warrant for the van and retrieved the credit card, a flashlight, the knife set, and a jar of coins, all of which Winkelman had reported stolen. RP 246-47. Guy Winkelman identified the property as his. RP 250-51.

Winkelman testified at trial that when he returned home in the late afternoon of November 18, 2011, he discovered that the door into his garage had been pried open. RP 329. He had been home over the lunch hour and had not noticed any damage, but it is not clear from his testimony that he looked at that door at noon. RP 342. A connecting door between the garage and the house was not locked. RP 332-33. When Winkelman realized he had been burglarized, he first checked his credit cards and discovered one missing. His coin collection was missing along with other items totaling approximately \$7000. The damage to the door cost \$930 or \$950 to repair. RP 334. Only a small portion of the property stolen from the residence was recovered. RP 340. The house was not ransacked and Winkelman became aware of the burglary only because of the damaged door. RP 342.

Also testifying at trial was Donald Davidson, who lived approximately three blocks from the street where Finely lived. RP 178. At some time before the Finely burglary, Davidson had been at home when a van came down the long driveway to his secluded house. RP 180-82. It drove around the turnaround in front of his house and parked heading out toward the street. RP 180. A woman got out of the van, holding a piece of paper which she handed to Davidson when he came out of the house. RP 181. The paper was a flyer for a cleaning business called "The Dynamic Duo." RP 182. The woman said she and her passenger, who Davidson did not see clearly, were canvassing for customers for their business. RP 181, 185. When contacted in December of 2011, Davidson could not identify either person from a photo montage. RP 179, 185.

B. Procedural facts.

Schlottman was tried on the second amended information, which charged first degree burglary while armed with a firearm (Count 1); theft of a firearm (Count 2); three counts of second degree theft (Counts 4, 7, and 11); third degree malicious mischief (Count 5); first degree burglary (Count 6); two counts of second degree malicious

mischief (Counts 8 and 10); residential burglary (Count 9); and two counts of second degree possession of stolen property (Counts 12 and 13). CP 34-37. One count of unlawful possession of a firearm was dismissed before the case was submitted to the jury. RP 345-46.

Schlottman was found guilty as charged, except for Count 6, where the jury found her guilty of residential burglary, a lesser included crime of first degree burglary. CP 49-52, 107-116. She was sentenced to a total of 96 months, to be followed by 18 months of community custody. CP 122.

Schlottman appealed. Division II transferred the matter to Division I, which issued an unpublished opinion on June 16, 2014, affirming all of her convictions. A copy of the opinion is attached to this response as Appendix A. The mandate issued on August 13, 2014. See Appendix B. She now brings her first personal restraint petition (PRP).

III. RESPONSE TO ISSUES RAISED

A. This PRP is time-barred.

Schlottman asserts that her PRP is not successive or time-barred. It is not successive; she has not filed a previous PRP. It is,

however, time-barred.

RCW 10.73.090(1) provides that no collateral attack on a conviction may be brought more than one year after the judgment becomes final, providing that the judgment is valid on its face and rendered by a court of competent jurisdiction. RCW 10.73.090(3) defines "final":

(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

(a) The date it is filed with the clerk of the trial court;

(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.

The time bar is mandatory, unless one of the exceptions in RCW 10.73.100 applies. In re Pers. Restraint of Bonds, 165 Wn.2d 135, 140, 196 P.3d 672 (2008).

RCW 10.73.100 provides a list of six exceptions to the one-year time limit.

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion'

(2) The statute that the defendant was convicted

of violating was unconstitutional on its face or as applied to the defendant's conduct;

(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article 1, section 9 of the state Constitution;

(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;

(5) The sentence imposed was in excess of the court's jurisdiction; or

(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

This list is both exclusive and mandatory. State v. Wade, 133 Wn. App. 855, 870, 138 P.3d 168 (2006). As will be discussed below, none of these six exceptions applies.

Schlottman does not, in fact, argue that any exceptions apply. She claims that she filed within the one-year limit, but that does not appear to be the case. A party seeking review of a decision of a superior court in Thurston County must file it in the Court of Appeals, Division II. RAP 4.1(b)(2). The Supreme Court has concurrent

original jurisdiction in PRPs not involving the death penalty, but the Supreme Court will ordinarily transfer a PRP to the Court of Appeals. RAP 16.3(c).

The mandate issued in the direct appeal on August 13, 2014. Appendix B. Attached to this response as Appendix C is a copy of the cover page of Schlottman's PRP. It shows that on August 13, 2015, she filed it in Division I, which is not the proper court. There is a file stamp in Division II of August 17, 2015, four days after the year expired, and a Supreme Court file stamp showing it was filed there on August 19, 2015, six days after the year had expired. See Appendix D, letter from the Supreme Court. The time limit is strictly applied. In State v. McLean, 150 Wn.2d 583, 80 P.3d 587 (2003), a PRP mailed before the deadline but received by the court after it was held to be untimely.

Because this petition was not filed in either of the appropriate courts on or before August 13, 2015, it is not timely.

B. There was sufficient evidence presented to the jury to support a conviction for first degree burglary of the Finely residence. Actual possession of a firearm is sufficient to prove the element that the perpetrator be armed with a deadly weapon.

Scloftman argues that there was insufficient evidence to support her conviction for first degree burglary, primarily because the State did not prove a nexus between the crime and the weapon, thus not proving that she was armed for the purposes of that statute. Petition at 20-26.

First degree burglary is defined at RCW 9A.52.020:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

A firearm, loaded or unloaded, is a deadly weapon per se. RCW 9A.04.110(6). "A defendant is 'armed with a deadly weapon' for purposes of first degree burglary if a firearm is "'easily accessible and readily available for either offensive or defensive purposes.'" State v. Speece, 56 Wn. App. 412, 416, 783 P.2d 1108 (1989), *affirmed*, 115 Wn.2d 360, 798 P.2d 294 (1990) (quoting State v. Hall, 46 Wn. App. 689, 695, 732 P.2d 524, *review denied* 108 Wn.2d 1004 (1987)).

A firearm was stolen from the Finely residence during the burglary to which, during closing argument, Schlottman admitted. RP

43, 46-47, 51, 170-71, 176, 408. The gun was found in the van that Lockard was driving and in which Schlottman was a passenger moments after the burglary occurred. RP 33-34, 36, 170. Finely's neighbor watched Lockard and Schlottman enter the house and exit carrying property. RP 82, 84. The only way that firearm got from Finely's house to the van is that one or the other of the two suspects physically carried it.

Schlottman cites to several cases which hold that to prove that a defendant was armed, for purposes of the first degree burglary statute, the State must show a nexus between the crime and the weapons. *E.g.*, State v. Brown, 162 Wn.2d 422, 173 P.3d 245 (2007); State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002); State v. Eckenrode, 159 Wn.2d 488, 150 P.3d 1116 (2007). However, in each of these cases the defendants constructively possessed the weapons; they did not have them in their actual possession. Schlottman and/or Lockard did.

In Speece, the court held that where the deadly weapon is a firearm, "no analysis of a defendant's willingness or present ability to use a firearm, whether loaded or unloaded, is needed in determining

whether the firearm is easily accessible and readily available for use.” Speece, 56 Wn. App. at 416. Other cases hold that where the suspect actually possesses a weapon during the commission of a crime, as opposed to being in constructive possession, the nexus between the weapon and the crime is irrelevant. State v. Easterlin, 126 Wn. App. 170, 173, 107 P.3d 773 (2005), *affirmed on other grounds*, 159 Wn.2d 203, 149 P.3d 366 (2006). The Easterlin court distinguished between constructive and actual possession of the weapon, explaining that in a constructive possession case, it is necessary to prove a nexus so that a defendant does not face a harsher sentence “due to the incidental presence of a firearm.” Id. at 173. Where there is actual possession of the firearm, those protections become irrelevant. Id. In State v. Hernandez, 172 Wn. App. 537, 290 P.3d 1052 (2012), *review denied*, 177 Wn.2d 1022, 303 P.3d 1064 (2013), the defendants in three consolidated cases had stolen firearms in two different burglaries. They argued on appeal that there was insufficient evidence to support their convictions for first degree burglary while armed with firearms because the guns were “merely ‘loot’” taken during the burglaries. Id. at 542. The court

repeated the principle that when a burglary involves deadly weapons per se, and specifically when firearms are taken during a burglary, there is no need to consider the willingness or present ability to use the firearms as deadly weapons. Id. at 543. Further, where there is actual possession of a firearm, the evidence is sufficient to support a conviction for first degree burglary even where there is no evidence that the suspect intended to use it. Id. at 544. "Thus, a nexus requirement is inapplicable when the charge is first degree burglary and a firearm is stolen." Id. at 545.

Even when a defendant takes an unloaded firearm during a burglary, has no ammunition for it, and does not intend to load it, he is armed for purposes of the first degree burglary statute. In State v. Faille, 53 Wn. App. 111, 766 P.2d 478 (1988), the defendant took unloaded guns outside the burglarized house and placed them in some bushes. The court found that they were readily accessible and available for use, because even an unloaded gun can be used to frighten, intimidate, or control people. Id. at 114-15.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of

fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Id. at 201.

Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Schlottman's relies on cases which involved constructive possession of weapons and are not controlling in her case. Because either she or her fellow burglar physically carried the guns from the Finely residence, they were armed for purposes of first degree burglary.

C. The evidence presented at trial was sufficient to support Schlottman's convictions for residential burglaries of the Japhet and Winkelman residences. Schlottman argues that there must be proof beyond a shadow of a doubt, not proof beyond a reasonable doubt.

Schlottman maintains that the only evidence connecting her to the burglaries of the Japhet and Winkelman residences was the

presence of property stolen from those homes in the van in which she was riding, and that possession of stolen property alone cannot support a conviction for burglary. To reach this conclusion she disregards evidence which did connect her to those burglaries.

The two residential burglary charges at issue are Counts 9 (the Japhet burglary) and Count 6 (the Winkelman burglary), the latter of which was charged as a first degree burglary. CP 35-36. The jury apparently could not agree as to that charge, but found Schlottman guilty of the lesser included crime of residential burglary. CP 110-11. In both counts, Schlottman was charged as either a principal or an accomplice. CP 35-36.

Slottman asserts that when the charge is burglary, the State must prove that the person charged, rather than an accomplice, actually entered the burglarized residence. Petition at 27-28. She cites to State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982). This is a misreading of the Mace opinion. That decision held that proof of possession of property stolen in a burglary, without more, “is not prima facie evidence of burglary.” Id. at 843. See also State v. Hudlow, 182 Wn. App. 266, 288, 331 P.3d 90 (2014). The Mace

court went on to say:

It is, however, also well established that proof of such possession, if accompanied by "indicatory evidence on collateral matters," will support a burglary conviction. . . . In [*State v. Portee* [25 Wn.2d 246, 170 P.2d 326 (1946)]], we held at pages 253-54: ". . . . When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction. When the fact of possession . . . is supplemented by the giving of a false or improbable explanation of it, or a *failure to explain when a larceny is charged*, . . . or the giving of a fictitious name, a case is made for the jury." Other circumstances include flight or the presence of the accused near the scene of the crime.

Mace, 97 Wn.2d at 843, emphasis in original.

The Mace opinion did not address accomplice liability at all, much less hold that a defendant cannot be convicted of burglary unless she, rather than an accomplice, entered the victim residence.

In addition to the presence of property stolen from the Japhet and Winkelman residences in the defendants' van, there was the similarity between those burglaries and the burglary of the Finely residence, where Schlottman was observed entering the home. All of the homes were entered by forcing open a door with something like a crowbar. There was a crowbar in the van. All three residences were

within a short distance of each other and two of the burglaries occurred on the morning of the day that Schlottman and Lockard were arrested shortly after noon. The third occurred the previous day. The same kinds of property were taken in each burglary—cash, jewelry, cameras, and documents such as checks and a passport.

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Here, the evidence and the reasonable inferences from it are that Schlottman and Lockard were partners in burglarizing residences at a time when the occupants were not at home. They determined that no one was home by pretending to be going door-to-door to drum

up business for a cleaning or handyman service called The Dynamic Duo. They entered the homes by prying open the doors with a crowbar and took cash or property which could be sold. Schlottman argues that the Winkelman residence must have been burglarized before the Finely home, but not all of the property taken from the Winkelman house was found in the van, indicating that they must have stopped somewhere to divest themselves of some of the property. Petition at 31-32. It is not clear how that weakens the State's case. The alternative, if they did not burglarize the Winkelman home, is that they stopped somewhere before the Finely burglary and *acquired* the credit card taken from Winkelman, coincidentally having in the van property from the Japhet burglary, the property they had just finished taking from Finely's house, and a crowbar, shortly after they were observed entering Finely's house by means of prying open the door. That would be a coincidence of mind-boggling proportions. The fact that *any* of Winkelman's property was in the van, along with the other evidence discussed above, is sufficient for any reasonable trier of fact to conclude that Schlottman and Lockard burglarized that house.

Schlottman also maintains that there is no proof that the Winkelman residence was not burglarized earlier than November 18, 2011, because his house was not left as disheveled as the other two. Petition at 32. But the jury heard his testimony that he noticed the garage door pried open when he returned in the late afternoon and there was no damage when he left that morning. RP 329-30. The jury is the sole judge of credibility and the weight to be given the evidence. It could reasonably have found that the burglary occurred on November 18. Even if the evidence showed that the burglary did occur earlier, however, Schlottman does not explain how that causes the evidence to be insufficient. The Japhet burglary occurred on the previous day. RP 196. The checkbook taken from that residence was also in the defendants' van. Schlottman essentially argues that evidence is insufficient unless there was an eyewitness or a video of the crime. That is not the law.

Schlottman finds it "shockingly unreasonable" that she should be found guilty of committing burglaries where entry was gained with some kind of pry bar when that is a common method of breaking into buildings. Petition at 33. The State hazards a guess that stealing

cash, checkbooks, credit cards, and firearms is also common in burglaries. The State also hazards a guess that, had the police stopped and searched every vehicle in Olympia on the days of the burglaries, not another one of them would have contained a crowbar *and* property taken from residences which were entered by means of prying open a door. It would indeed be a monumental coincidence for a crowbar and Winkelman's credit card to be in the van driven by these defendants in the same area as the Winkelman house within hours of the time some *other* burglar broke into that house. The fact that the police did not extract GPS locations from Schlottman's phone, or have an eyewitness who saw her enter the Japhet and Winkelman homes, or find her fingerprints in the burglarized homes does not weaken the evidence discussed above. The standard for conviction is beyond a reasonable doubt, not that the State must have a video of the crime. An idiosyncratic *modus operandi* is not required.

Schlottman argues that there is insufficient evidence that she associated herself with the burglary of the Japhet residence because the only stolen property that was recovered was a checkbook which was found in the driver's side door of the van. Petition at 38.

Property stolen by this duo had to be somewhere, and Schlottman offers no basis for the theory that because the checkbook was closer to Lockard than it was to her, the evidence is insufficient to prove her participation in that burglary. It is circumstantial evidence that Lockard and Schlottman burglarized the Winkelman residence in the same manner as they did the Finely residence. Because the Winkelman residence was not ransacked to the degree that the other two victim houses were, that fact leads to an inference that the pair knew that they had more time than they could be sure of at the other burglaries. It does not make it less likely that they committed the Winkelman burglary.

D. The evidence was sufficient to support Schlottman's convictions for malicious mischief at the Japhet and Winkelman residences.

Scloottman argues that the evidence was insufficient to prove she participated in causing the damage to the doors of the Japhet and Winkelman residences as either a principal or an accomplice. She offers basically the same argument that she made in connection with the burglary convictions discussed in the previous section. She correctly identifies the elements of the two charges as set forth in the

jury instruction. Petition at 44-45; CP 99-100. Her only argument, however, is that there is insufficient proof that she is the person who, as a principal or accomplice, caused the damage to the doors. The State's response is the same.

Schlottman and Lockard were observed committing a burglary at the Finely residence. Two other residences within a short distance of that home were burglarized within a two-day period. Those residences were entered by prying open a door, exactly as the Finely house was entered. Property stolen from both of those residences was located in the van in which Schlottman was a passenger. It is a reasonable inference that Schlottman participated in the Japhet and Winkelman burglaries in the same manner in which she participated in the Finely burglary. It is possible that Schlottman did not actually pry open the door of the Finely residence. McMason testified that the driver, Lockard, carried the crowbar from the van to the house. RP 82. Both women entered the house and both women exited the house carrying property they did not carry into the house. RP 84-85.

The accomplice liability statute is codified as RCW 9A.08.020 and reads, in pertinent part, as follows:

(1) A person is guilty of a crime if it is committed by the

conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

.....

(c) He is an accomplice of another person in the commission of a crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) 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; or

(b) His conduct is expressly declared by law to establish his complicity.

Schlottman clearly participated in the Finely burglary, and that crime included entering the residence. State v. Dalton, 65 Wash. 663, 665, 118 P. 829 (1911) ("Knowledge that a crime has been committed, and the concealment of such knowledge, does not make a witness an accomplice, unless he aided or participated in the commission of the offense."). It is also a reasonable inference that

she stood ready to aid Lockard if Lockard was unable to pry the door open unassisted. She is therefore legally accountable for the conduct of Lockard during the commission of the crime of malicious mischief. The jury could reasonably conclude that the two women committed the Japhet and Winkelman burglaries in the same manner as they committed the Finely burglary.

There was sufficient evidence for a reasonable jury to find that Schlottman was guilty of malicious mischief in connection with both the Japhet and Winkelman homes.

E. Because Schlottman was charged and tried as either a principal or an accomplice to the crimes of second degree possession of stolen property, a jury instruction regarding constructive possession would be irrelevant.

Schlottman argues that because the credit card stolen from the Winkelman residence was found under one of the front seats of the van in which she and Lockard were arrested, the State failed to prove actual possession of the card. The jury was not instructed as to constructive possession, although she argues that the evidence was also insufficient to prove that. The State did not argue constructive possession. RP 387-88.

Schlottman was charged with second degree possession of a stolen access device as either a principal or an accomplice. CP 37. That means that if Lockard had actual possession of the card, Schlottman is also guilty of that crime. She does not argue that Lockard did not have actual possession.

Actual possession means that the person charged with possession had “personal custody” or “actual physical possession.” Actual possession may be proved by circumstantial evidence.

State v. Manion, 173 Wn. App. 610, 634, 295 P.3d 270 (2013), *review denied*, 180 Wn.2d 1027, 328 P.3d 902 (2014).

Schlottman relies on State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975), *review denied*, 86 Wn.2d 1010 (1976). In that case, the husband was driving a car, with his wife as a passenger, and with five one-pound bags of marijuana in the trunk. Other evidence indicating a drug sales operation were found in the Harris's house. Id. at 416. Harris did indeed hold that there was insufficient evidence to find that the passenger in a car possessed marijuana with the intent to deliver where there was no evidence that she knew the marijuana was there or that she had constructive possession, defined as dominion and control over either the drugs or the premises where the drugs

were found. Id. at 417-18. However, the passenger in Harris was not charged as an accomplice. Schlottman was.

The court in Harris had no difficulty finding that Mr. Harris had actual possession of the marijuana in the locked trunk of the car. “. . . Robert Harris, as owner and driver of the car, had possession of the marijuana . . . “ Id. at 417. Lockard was driving the van and it was registered to her significant other, giving rise to a reasonable inference that she had greater rights in the vehicle than someone who merely borrowed the van. As mentioned, Schlottman does not argue that Lockard was not in actual possession.

In addition, although the title of the crime is “possession of stolen property,” it also includes knowingly receiving, retaining, concealing, or disposing of stolen property. CP 37. The van belonged to Lockard’s significant other and she was driving. Lockard and Schlottman had been observed forcibly entering the Finely residence and taking property from it. The Winkelman residence was in the same area, was burgled the same day, and the credit card stolen from Winkelman was found in the van. The circumstantial evidence is more than sufficient to prove that Lockard received,

retained, possessed, or concealed the card, even if Schlottman herself did not, and Schlottman bears the same criminal liability as does Lockard. She maintains that this is “mere guilt by association,” Petition at 57; rather, it is accomplice liability.

A jury does not have to decide which participant in a crime acted as a principal and which as an accomplice. It need only decide that the principal and accomplice participated in the same crime. In re Pers. Restraint of Hegney, 138 Wn. App. 511, 524, 158 P.3d 1193 (2007). “Accomplice liability represents a legislative decision that one who participates in a crime is guilty as a principal, regardless of the degree of the participation.” State v. Hoffman, 116 Wn.2d 51, 104, 804 P.2d 577 (1991).

Constructive possession was never an issue in Schlottman’s trial, and therefore the lack of an instruction defining it is irrelevant.

F. The evidence was sufficient to prove that Schlottman was at least an accomplice, if not a principal, in the theft of the checkbook from the Japhet residence and the credit card from the Winkelman residence. The evidence was also sufficient to prove that the theft from the Japhet residence exceeded \$750 and that Schlottman intended to deprive Winkelman of the credit card.

1. Japhet burglary.

Schlottman first argues that it is unclear whether Schlottman was charged as a principal or an accomplice. Petition at 58. As explained in the preceding section, it does not matter. She then claims that because the charging language, CP 36 (Count 10), and the jury instruction, CP 95 (Instruction 39), accuse her of taking property exceeding \$750 in value, the evidence was insufficient to convict her because the only property recovered from the Japhet burglary was the checkbook, which cannot be valued that highly and which was not charged as theft of an access device. Petition at 59-60.

Schlottman is correct that the value of the checkbook would not be higher than \$750. The State never claimed that it was. However, the Japhets lost approximately \$3236 worth of property in the burglary, including a computer, a helmet camera, and jewelry, in addition to the checkbook. RP 200, 213. While the remainder of the property was not found in the van, and as far as this record reveals, has never been recovered, that doesn't mean it wasn't stolen, and stolen by Schlottman and Lockard. It would be an astonishing coincidence if the Japhets were the victims of two separate burglaries

by different people on the same day, with Schlottman and Lockard taking only the checkbook and someone else taking all of the other property. The Japhet burglary occurred the day before Schlottman and Lockard were arrested and there was ample time for them to have disposed of the other articles. It is a reasonable inference from all of the evidence outlined above, which will not be repeated here, that she and her fellow burglar took that property.

2. Winkelman credit card.

Schlottman argues that just because a credit card which was stolen during the burglary of the Winkelman residence was found under one of the front seats of the van in which she was riding, there is no proof that she had any knowledge of that burglary or that she even knew about the credit card. Petition at 61-63. Although Schlottman frames this issue as a failure to prove that she intended to deprive Winkelman of the credit card, this is the same argument that she has consistently made throughout this PRP—that there was no proof she was an accomplice to Lockard.

A person is an accomplice if he or she aids or agrees to aid another in planning or committing a crime with knowledge that his aid

will promote or facilitate the crime. Mere presence during a crime is not enough to show accomplice liability. State v. McDaniel, 155 Wn. App. 829, 863, 230 P.3d 245, *review denied*, 169 Wn.2d 1027 (2010).

Instead, the defendant must have associated herself with the criminal conduct, participated in the criminal conduct, and sought to make the crime successful by her actions. State v. Robinson, 73 Wn. App. 851, 855, 872 P.2d 43 (1994) (citing to In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979)). An accomplice does not have to participate in every element of the crime so long as the accomplice has general knowledge of the specific crime committed. State v. Roberts, 142 Wn.2d 471, 512-13, 14 P.3d 713 (2000).

Once again, Schlottman was seen and identified by a witness entering into the Finely home with Lockard. The home was entered by forcing open the door with a crowbar. Property was taken. The Winkelman home, not far from the Finely residence, was entered the same morning by prying open a door. Property was taken. The van in which Schlottman and Lockard were riding was stopped within moments of the Finely burglary. A stolen credit card from the Winkelman house was in the van. Not only is it a reasonable

inference that Schlottman participated in the Winkelman burglary, no person old enough to serve on a jury would conclude otherwise. Even if she did not specifically know about the credit card, the fact that she participated in the burglary makes her culpable for the theft the card. Roberts, 142 Wn.2d at 512-13.

G. Because Schlottman was charged as either a principal or an accomplice to the theft of a firearm, and because she clearly participated in the burglary of the residence from which it was stolen, it is irrelevant whether she handled the firearm or knew that Lockard stole it.

Once again, Schlottman makes the argument that there was no direct evidence that she did some act, such as taking the firearm from the Finely residence, or even handling it. Petition at 63-64. The State's response is the same. She was, if not a principal in the burglary, an accomplice of Lockard and bears the same culpability for anything Lockard did. She participated in the crime of burglary and bears the risk that another participant took something of which she was not aware. State v. Davis, 101 Wn.2d 654, 658, 682 P.2d 883 (1984) (" . . . an accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality."); State v. McChristian, 158 Wn. App. 392, 400,

241 P.3d 468 (2010) (“ . . . an accomplice need not have knowledge of each element of the principal’s crime to be convicted under RCW 9A.08.020; general knowledge of ‘the crime’ is sufficient.”). It is crystal clear that Schlottman was aware that she and Lockard were entering and remaining in the Finely house to steal property. Even if she did not know specifically that Lockard took the gun, she is an accomplice to that theft.

H. It was error to enter convictions for both the theft of the credit card from the Winkelman residence and possession of stolen property for possessing the same credit card. However, Schlottman is not entitled to relief because her PRP is untimely, but even if it were timely, she does not show a complete miscarriage of justice.

Schlottman was charged with second degree theft for stealing the credit card from the Winkelman residence (Count 7, CP 35) and with second degree possession of stolen property for possessing the same credit card. Count 13, CP 37. She was found guilty of both, CP 108, 114, and sentenced for both. CP 119.

Where a defendant is convicted of both stealing and possessing the same property, the possession of stolen property must be dismissed. State v. Hancock, 44 Wn. App. 297, 302, 721 P.2d 1006 (1986); State v. Richards, 27 Wn. App. 703, 707, 621 P.2d 165

(1980), *review denied*, 95 Wn.2d 1008 (1981).⁴ However, as argued in Section A of this response, this PRP is untimely. After one year, a PRP may be brought only for claims which meet the exceptions of RCW 10.73.100. That is not the case here.

While Schlottman refers to these two counts as merging, they do not. The merger doctrine applies only when one crime elevates a second crime to a higher degree. State v. Melick, 131 Wn. App. 835, 840, 129 P.3d 816 (2006). Possession of stolen property does not elevate theft to a higher degree, nor is the reverse true. While RCW 10.73.100(3) makes an exception for double jeopardy violations, the two convictions here do not constitute double jeopardy. Id. Nor did the court impose a sentence beyond its jurisdiction. RCW 10.73.100(5). For purposes of RCW 10.73.100(5), jurisdiction means only traditional notions of personal and subject matter jurisdiction.

A court has “subject matter jurisdiction where the court has the authority to adjudicate the *type of controversy* in the action, and . . . it does not lose subject matter jurisdiction merely by interpreting the law erroneously.”

⁴ Schlottman cites to State v. Adams, 146 Wn. App. 1030 (2008), petition at 65, but that is an unpublished case. GR 14.1 prohibits citing to unpublished Court of Appeals opinions as authority.

In re Pers. Restraint of Vehlewald, 92 Wn. App. 197, 201-02, 963 P.2d 903 (1998) (citing to State v. Moen, 129 Wn.2d 535, 545, 919 P.2d 69 (1996)).

Even if somehow this claim did meet one of the exceptions of RCW 10.73.100, Schlottman's other claims, which are largely sufficiency of the evidence challenges, do not, making this a mixed petition. If the court determines that even one claim in a PRP is time-barred, it must dismiss the petition. In re Pers. Restraint of Hankerson, 149 Wn.2d 695, 697, 72 P.3d 703 (2003).

In addition, a personal restraint petitioner must show not only error but resulting prejudice. A personal restraint petition is not an appeal. It is a collateral challenge to a judgment and sentence, and relief granted in a collateral attack is extraordinary. In re Pers. Restraint of Coats, 173 Wn.2d 123, 132, 267 P.3d (2011). A petitioner must demonstrate by a preponderance of the evidence that he or she has suffered a constitutional violation which caused actual and substantial prejudice, or that there occurred a nonconstitutional error that inherently resulted in a complete miscarriage of justice. Id.; In re Pers. Restraint of Brett, 142 Wn.2d 868, 874, 16 P.3d 601

(2001).

Schlottman's most serious offense was the first degree burglary. CP 119. Her offender score was eleven. Id. Even if Count 13 were dismissed, her offender score would decrease by one, making it ten. The sentencing grid set by the legislature tops out at an offender score of nine. RCW 9.94A.510. The standard sentencing range is the same for an offender score nine and above. Her standard range would not change, and there is nothing to indicate that the court would change her sentence of 96 months, which is already below the midpoint of the range of 87-116 months. CP 119. This is a nonconstitutional error, and it cannot be said that it resulted in a complete miscarriage of justice.

I. Defense counsel was not ineffective for failing to argue that some of Schlottman's offenses constituted the same criminal conduct. Even if that argument were available, she does not demonstrate a likelihood that the court would have granted such a request.

Schlottman maintains that her attorney was ineffective because he failed to argue to the sentencing court that the crimes committed during the various burglaries, theft and malicious mischief, constituted the same criminal conduct and only the burglaries should have

counted in her offender score. There are several reasons that a competent defense attorney would not make that argument, but even if it were deficient performance for him to have failed to do so, she does not show prejudice.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis

begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

When calculating an offender score, RCW 9.94A.589(1)(a) provides that all "current and prior convictions [should be treated] as if they were prior convictions for the purpose of the offender score," but recognizes the exception that "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a).

The "same criminal conduct" "means two or more crimes that require the same criminal intent, involve the same victim, and are committed at the same time and place." All of these elements must exist in order for a court to make a finding of same criminal conduct.

State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Courts narrowly construe this analysis and a trial court's finding on the issue is reviewed under an abuse of discretion standard. Porter, 133 Wn.2d at 181 (1997); State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999). Courts construe the concept of "same criminal conduct" narrowly to disallow most assertions. Porter, 133 Wn.2d at 181. Abuse occurs if the trial court "arbitrarily counted the convictions separately." Haddock, 141 Wn.2d at 110.

Generally, a defendant does not waive a miscalculated offender score. In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). However, where "the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion[.]" a waiver may occur. Id.; State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000, *review denied*, 141 Wn.2d 1030, 11 P.3d 827 (2000). Unlike questions regarding the "inclusion of out-of-state convictions in the offender score," "[a]pplication of the same

criminal conduct statute involves both factual determinations and the exercise of discretion.” Nitsch, 100 Wn. App. at 523. Distinguishable from instances arising from out-of-state convictions, a question of same criminal conduct is “not merely a calculation problem” nor is the statute “mandatory.” Id. “[S]ound reasons exist for the implicit grant of discretion contained in the legislative language[,]” i.e. the Legislature’s use of the permissive “if.” Id.; RCW 9.94A.400(1)(a).

1. Burglary antimerger statute.

RCW 9A.52.050 provides:

Every person who, in the commission of a burglary shall commit any other crime, may be punished therefore as well as for the burglary, and may be prosecuted for each crime separately.

The Washington Supreme Court has held that this statute supersedes the same criminal conduct analysis contained in RCW 9.94A.589(1)(a). State v. Williams, 181 Wn.2d 795, 799, 336 P.3d 1152 (2014). The legislature gave the courts independent authority to punish burglary separately from any other crimes committed during or incidental to the burglary, even if they would constitute the same criminal conduct under RCW 9.94A.589(1)(a). State v. Knight, 176 Wn. App. 936, 962, 309 P.3d 776 (2013), *review denied*, 179 Wn.2d

1021, 318 P.3d 279 (2014). “The plain language of RCW 9A.52.050 expresses the intent of the Legislature that ‘any other crime’ committed in the commission of a burglary would not merge with the offense of a first-degree burglary when a defendant is convicted of both.” State v. Sweet, 138 Wn.2d 466, 478, 908 P.2d 1223 (1999).

Schlottman's attorney was successful in convincing the sentencing court to count the second degree theft (Count 11) and second degree possession of stolen property (Count 12) as one crime for scoring purposes because both involved the Japhet family. RP 454-59. Counsel could well have, in light of the burglary antimerger statute, considered that it was unlikely that the court would count all of the crimes against the Japhets as one offense, or all of the crimes involved in either the Finely or Winkelman burglaries as the same criminal conduct. Choosing the strongest arguments, rather than bringing a conglomeration of weaker arguments, is good representation. Schlottman cannot show that any request to count the crimes as the same criminal conduct would likely be granted, and therefore she cannot show prejudice, and her claim of ineffective assistance of counsel should be denied.

2. The Japhet burglary involved more than one victim.

If the crimes under consideration involved more than one victim, RCW 9.94A.589(1)(a) does not apply. State v. Lessley, 118 Wn.2d 773, 779, 827 P.2d 996 (1992) (“[M]ultiple crimes affecting multiple victims are not to be considered the same criminal conduct.”); State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987) (finding that it is more serious conduct to victimize more than one person); State v. Davison, 56 Wn. App. 554, 558, 784 P.2d 1268 (1990). The Japhet residence was occupied by Donald and Lisa Japhet, and their son. RP 194, 200, 210. Property was taken from all three. RP 200, 202, 213. Therefore, the theft and malicious mischief convictions (Counts 10 and 11) cannot be counted as the same criminal conduct or combined with the burglary conviction (Count 9).

3. It is unlikely that the court would have combined enough counts as same criminal conduct to bring Schlottman’s offender score below nine.

There is no evidence that there were multiple victims in the Finely or Winkelman burglaries. However, Schlottman’s offender score for each burglary was eleven. Even if the court could be convinced, in the face of so many guilty verdicts, to find that theft

and/or malicious mischief was the same criminal conduct as the burglaries, it is unlikely her offender score would drop below nine, which is the highest standard range set by the legislature. RCW 9.94A.510. In the context of calculating an offender score, an error is harmless if the sentence range remains the same when the score is correctly calculated. State v. Fleming, 140 Wn. App. 132, 138, 170 P.3d 50 (2007). The same criminal conduct analysis is part of calculating the offender score.

Schlottman has not shown that a same criminal conduct argument would have been successful. Even if it were successful, she has not shown that it would make a difference in her offender score. The result is that she has not shown prejudice, and without prejudice she has not shown ineffective assistance of counsel.

J. A PRP is not an appeal. Schlottman carries a much higher burden than she did on direct appeal. She has failed to carry that burden.

A personal restraint petition is not an appeal. It is a collateral challenge to a judgment and sentence, and relief granted in a collateral attack is extraordinary. In re Pers. Restraint of Coats, 173 Wn.2d 123, 132, 267 P.3d (2011). The petitioner bears a higher

burden than on a direct appeal. Id. A petitioner must demonstrate by a preponderance of the evidence that he or she has suffered a constitutional violation which caused actual and substantial prejudice, or that there occurred a nonconstitutional error that inherently resulted in a complete miscarriage of justice. Id.; In re Pers. Restraint of Brett, 142 Wn.2d 868, 874, 16 P.3d 601 (2001). A petitioner can only obtain relief from restraint that is unlawful for the limited reasons set forth in the rules defining the procedure. RAP 16.4(c);⁵ In re Pers. Restraint of Cook, 114 Wn.2d 802, 809, 792 P.2d 506 (1990).

Even if this petition were timely, Schlottman has not carried her burden of establishing that she is entitled to extraordinary relief.

IV. CONCLUSION

For all of the reasons argued above, the State respectfully asks this court to deny and dismiss Schlottman's personal restraint petition.

RESPECTFULLY SUBMITTED this 16th day of December, 2015.

JON TUNHEIM
Prosecuting Attorney


CAROL LA VERNE, WSBA #19229
Deputy Prosecuting Attorney

⁵ RAP 16.4 sets forth the criteria for granting a PRP, not for reviewing it. In re Pers. Restraint of Adolph, 170 Wn.2d 556, 562, 243 P.3d 540 (2010).

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
 v.)
 ALEXIS J. SCHLOTTMANN,)
)
 Appellant.)

No. 71661-1-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: June 16, 2014

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JUN 16 AM 10:18

TRICKEY, J. — Alexis Schlottmann appeals the judgment and sentence entered following her convictions arising from her participation in several residential burglaries. Schlottmann claims errors based on a partial jury, ineffective assistance of counsel, and prosecutorial misconduct. Finding no error, we affirm.

FACTS

Emily McMason lived across from Marian Finely on a dead-end street.¹ On the afternoon of November 18, 2011, McMason noticed an unfamiliar dark green Mazda minivan pull into Finely's driveway.² The vehicle parked on the driveway, and its driver emerged holding a piece of paper.³ McMason observed the driver as she walked around the house, examined the surroundings, and peered into windows.⁴ When McMason saw the driver remove a crowbar from the vehicle, she called 911 to report this suspicious activity.⁵

¹ 1 Report of Proceedings (RP) (October 15, 2012, afternoon) at 75.

² 1 RP at 75-76, 81.

³ 1 RP at 77.

⁴ 1 RP at 77-78.

⁵ 1 RP at 79.

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McMason then noticed the passenger of the vehicle—later identified as Schlottmann—exit the minivan and, together with the driver, break into Finely's residence through the front door.⁶ After approximately 10 minutes, Schlottmann and the driver exited the residence.⁷ McMason noticed Schlottmann carrying a stack of what appeared to be manila file folders.⁸ The driver was hauling a large bag with items protruding from the inside.⁹ Schlottmann and the driver returned to the vehicle and departed from the scene.¹⁰

McMason relayed these observations to the 911 dispatcher as they occurred.¹¹ Over the telephone, McMason provided a detailed description of the minivan, its license plate, and the driver and passenger.¹²

Law enforcement officers subsequently arrived at McMason's residence.¹³ While they interviewed McMason, the Olympia Police Department stopped a dark green Mazda with a license plate number identical to that which McMason had previously provided.¹⁴ The police stopped the minivan approximately three miles from the Finely residence.¹⁵ The driver of the vehicle was identified as Darlene Lockard and the passenger was Schlottmann.¹⁶

McMason thereafter identified both woman as the individuals she

⁶ 1 RP at 79, 81-82.

⁷ 1 RP at 83-84.

⁸ 1 RP at 84.

⁹ 1 RP at 84.

¹⁰ 1 RP at 85.

¹¹ 1 RP at 80.

¹² 1 RP at 80-81.

¹³ 1 RP at 87.

¹⁴ 1 RP at 33-34, 91.

¹⁵ 1 RP at 35-36.

¹⁶ 1 RP at 35-36.

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witnessed burglarize Finely's residence.¹⁷ After a search warrant was obtained, Thurston County deputies searched the minivan and took an inventory of all of the items discovered inside.¹⁸ The deputies recovered 48 stolen items.¹⁹ Among them was a Savage .32 caliber pistol, a crowbar, a set of knives, a glass 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."²⁰ Finely identified 45 items stolen from her residence, including the pistol.²¹ The knives, glass jar, and checkbook did not belong to Finely.²²

The Thurston County Sherriff's office soon determined that Schlottmann and Lockard were the perpetrators responsible for two other burglaries that took place near Finely's residence. On the same day as the Finely burglary, Schlottmann and Lockard also burglarized Guy Winkleman's residence, located approximately four miles away from Finely.²³ Approximately \$7,000 worth of property had been stolen.²⁴ On November 17, 2011, Lockard and Schlottmann burglarized the residence of Donald and Lisa Japhet.²⁵ Lockard and Schlottmann stole several items, including the checkbook for Japhet

¹⁷ 1 RP at 38, 92.

¹⁸ 1 RP at 41.

¹⁹ 1 RP at 42.

²⁰ 1 RP at 41, 46, 48, 54.

²¹ 1 RP at 43-46; 2 RP (October 16, 2012) at 170-71.

²² 1 RP at 48, 54.

²³ 2 RP at 241, 245.

²⁴ 3 RP (October 17, 18, 19, 30, 2012) at 334.

²⁵ 2 RP at 197.

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Bulkheading, a computer, a helmet camera, and some jewelry.²⁶ The police determined that a crowbar was used to break into the residence.²⁷

The State charged Schlottmann, by second amended information, with first degree burglary while armed with a firearm (Count I); theft of a firearm (Count II); second degree unlawful possession of a firearm (Count III); second degree theft (Counts IV, VII, and XI); third degree malicious mischief (Count V); first degree burglary (Count VI); second degree malicious mischief (Counts VIII and X); residential burglary (Count IX); and second degree possession of stolen property (Counts XII and XIII).²⁸ Counts I, II, IV, and V were for crimes committed against the Finely residence. Schlottmann pleaded not guilty to these charges.²⁹

A jury trial was held on October 15 to October 19, 2012. The State presented the testimony of numerous witnesses, including McMason, Finely, Winkelman, Donald and Lisa Japhet, and several law enforcement officers involved in the investigations.³⁰

Following trial, the jury convicted Schlottmann of first degree burglary (Count I); theft of a firearm (Count II); theft in the second degree (Counts IV, VII, and XI); third degree malicious mischief (Count V); residential burglary as a lesser included charge (Count VI); malicious mischief in the second degree (Counts VIII and X); residential burglary (Count IX); and possession of stolen

²⁶ 2 RP at 200-202

²⁷ 2 RP at 236-37.

²⁸ Clerk's Papers (CP) at 34-37; 4 RP at 4-7; 3 RP at 316.

²⁹ 3 RP at 316-17.

³⁰ 1 RP at 5, 32, 68, 72; 2 RP at 116, 151, 193, 209, 233; 3 RP at 295, 307, 328.

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property in the second degree (Counts XII and XIII).³¹ The trial court imposed a sentence of 96 months followed by 18 months of community custody.³²

Schlottmann appeals.

ANALYSIS

Impartial Jury Claim

Schlottmann first contends that the trial court violated her right to a fair and impartial jury when, after voir dire, it denied her motion to dismiss a juror. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to trial by an impartial jury. State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). RCW 2.36.110 and CrR 6.5 also protect the right to an impartial jury. While RCW 2.36.110 "provides the grounds for which the court may dismiss a juror," CrR 6.5 sets forth the procedures under which an excused juror is replaced. State v. Depaz, 165 Wn.2d 842, 852, 204 P.3d 217 (2009); see also State v. Rafay, 168 Wn. App. 734, 821, 285 P.3d 83 (2012) ("RCW 2.36.110 governs the removal of jurors."). Pursuant to RCW 2.36.110, a judge has a duty "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, prejudice, . . . or by reason of conduct or practices incompatible with proper and efficient jury service." CrR 6.5 states, "If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged." These provisions place the

³¹ CP at 117.

³² CP at 122.

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trial court under a continuous obligation to excuse a juror who is unfit and unable to perform the duties of a juror. State v. Jordan, 103 Wn. App. 221, 226-27, 11 P.3d 866 (2000).

The trial court's ability to observe a juror puts the trial court in the best position to determine whether the juror can be fair and impartial. State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987). Accordingly, we review for abuse of discretion the trial court's decision to remove a juror. Rafay, 168 Wn. App. at 821. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Depaz, 165 Wn.2d at 858.

At the inception of voir dire, the trial court read each of the charges to the venire.³³ The trial court noted the date on which each charged crime took place—November 17 or 18, 2011.³⁴ The court then 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."³⁵

During voir dire, the trial court asked the prospective jurors: "Have 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."³⁶ At this time, the venire had only been made aware of the State's charges against Schlottmann and the dates the crimes allegedly took place. After a number of potential jurors raised their hands, the trial court added, "[W]e're just trying to determine if it's too

³³ 4 RP (October 15, 2012, morning) at 4-7.

³⁴ 4 RP at 4-7.

³⁵ 4 RP at 9.

³⁶ 4 RP at 19.

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close to something that maybe that you have some personal experience or someone in your family close to you."³⁷ The court proceeded to inquire further of those jurors who raised their hands.³⁸ Juror No. 1 did not raise his hand.³⁹

Defense counsel later addressed the venire:

What [the trial court] 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 be -- interfere with your ability to listen to the evidence, interfere with your ability to give each side; both the prosecutor and the state, a fair trial.^[40]

After the jury was impaneled, trial counsel made opening arguments. During the State's opening argument, the prosecutor provided more details to the jury about the case.⁴¹ He reiterated that the case began in November, and specified the neighborhoods and streets in which the crimes were alleged to have occurred.⁴²

At the beginning of trial the next day, before the witnesses were called, Juror No. 1 brought to the trial court's attention that his residence had been the subject of an attempted burglary.⁴³ He informed the court that he lived near Finely's residence and that on November 10, 2011, his door had been damaged by what he believed to be a crowbar.⁴⁴ The prosecutor and defense counsel were given the opportunity to question the juror about this incident.⁴⁵ The

³⁷ 4 RP at 19.

³⁸ 4 RP at 19-22.

³⁹ 4 RP at 19.

⁴⁰ 4 RP at 49-50.

⁴¹ 4 RP at 90-97.

⁴² 4 RP at 90-91, 93-94.

⁴³ 2 RP at 109.

⁴⁴ 2 RP at 109-12.

⁴⁵ 2 RP at 109-11.

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impaneled, the prosecutor offered more information about the crimes, including the location in which one of the burglaries took place. It is reasonable to infer that Juror No. 1 recognized the similarities between the charged crimes and the attempted burglary of his residence once the prosecutor provided these details during opening arguments.

Furthermore, upon inquiry, Juror No. 1 expressed his belief that he could set his experience aside and decide the case based upon the evidence produced at trial. The trial court is in the best position to evaluate the juror's candor and impartiality. State v. Elmore, 155 Wn.2d 758, 769 n.3, 123 P.3d 72 (2005). We accept the trial court's discretion in determining that Juror No. 1 was not unfit to serve. Schlottmann was not convicted by an unfair or partial jury.

Ineffective Assistance of Counsel Claim

Schlottmann next contends that she was denied effective assistance of counsel because defense counsel conceded guilt to several criminal counts. We disagree.

An accused's right to effective assistance of counsel derives from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987)).

To prevail on a claim of ineffective assistance of counsel, Schlottmann must prove deficient performance and resulting prejudice. State v. McFarland,

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127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Schlottmann bears the burden of overcoming “a strong presumption that counsel’s performance was reasonable.” Grier, 171 Wn.2d at 33 (quoting State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Deficient performance exists where defense counsel’s representation “fell below an objective standard of reasonableness based on consideration of all the circumstances.” McFarland, 127 Wn.2d at 334-35.

If defense counsel’s performance can be characterized as legitimate trial strategy or tactics, performance is not deficient. Grier, 171 Wn.2d at 33. But “a criminal defendant can ‘rebut the presumption of reasonable performance by demonstrating that ‘there is no conceivable legitimate tactic explaining counsel’s performance.’” Grier, 171 Wn.2d at 33 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)).

Schlottmann alleges that during opening arguments, defense counsel admitted her guilt to all of the charges involving the Finely residence, including first degree burglary. Schlottmann is mistaken. The record reflects that defense counsel admitted to a lesser included crime of residential burglary.⁵² See RCW

⁵² To convict Schlottmann of Count I, first degree robbery, the jury was instructed to find the following relevant elements beyond a reasonable doubt:

- (1) That on or about November 18, 2011, the defendant or an accomplice, entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building, to wit: residence at Marian Finley [sic] or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon.

9A.56.040; 9A.52.025. Defense counsel also admitted to second degree theft and third degree malicious mischief.

The following excerpt from opening arguments is illustrative:

But 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.

Yes, Ms. McMason was being a good neighbor. Ms. McMason, I think the evidence will even show, she brought out the binoculars so she could get the good information such as license plate number to the van and clothing descriptions, yes. And regrettably, Ms. Schlottmann used some very poor judgment, that's in fact criminal judgment, **and that she went into a home where she should not have been, 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 we'll be up front about that.**^[53]

At closing argument, defense counsel again acknowledged, "Ms. Lockard and Ms. Schlottmann did in fact go into Ms. Finely's house illegally without permission and take items from the house."⁵⁴ Defense counsel further stated, "Certainly she [was an accomplice] in the burglary of Ms. Finely's home. Certainly she did that with the stealing of many expensive items."⁵⁵

Defense counsel also conceded Schlottmann's guilt to malicious mischief

CP at 76.

To convict Schlottmann of residential burglary as a lesser degree of first degree burglary, the jury was instructed to find the following relevant elements beyond a reasonable doubt:

- (1) That on or about November 18, 2011, the defendant, or an accomplice, entered or remained unlawfully in a dwelling, to wit: residence of Marian Finley [sic];
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein.

CP at 78.

⁵³ 4 RP at 97-99 (emphasis added).

⁵⁴ 3 RP at 408.

⁵⁵ 3 RP at 409-10.

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in the third degree, for damaging Finely's door.⁵⁶

Accordingly, in total, trial counsel conceded guilt to three offenses: third degree malicious mischief, second degree theft, and residential burglary, a lesser included offense to first degree burglary.

Notwithstanding these concessions, defense counsel vigorously defended Schlottmann on the remaining counts, including the crime of first degree robbery while armed with a firearm. Defense counsel denied that Schlottmann either took a weapon or knew that a weapon had been stolen and argued that, therefore, Schlottmann could not be found guilty as an accomplice to the charges of theft of a firearm or first degree burglary.⁵⁷ Counsel expressly indicated that "given the absence of proof, it would be inappropriate to find her guilty of theft of a firearm and inappropriate to find her guilty of the more serious offense of burglary in the first degree."⁵⁸ Defense counsel further noted, "[The] burglary was a residential burglary because the [S]tate has not proven beyond a reasonable doubt that the weapon used there was being used as defined by the definition as a deadly weapon."⁵⁹ Defense counsel additionally denied all the remaining counts related to the Japhet and Winkelman residences.⁶⁰

Furthermore, contrary to Schlottmann's contention, it is evident that defense counsel's concessions were a trial tactic aimed at enhancing Schlottmann's credibility in order to avoid convictions on the remaining charges,

⁵⁶ 3 RP at 410-11, 413-14.

⁵⁷ 3 RP at 408-13.

⁵⁸ 3 RP at 410.

⁵⁹ 3 RP at 413.

⁶⁰ 3 RP at 414-25.

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particularly first degree burglary while armed with a firearm. In light of the overwhelming evidence, this strategy was reasonable.

Conceding guilt on a particular count can be a sound trial tactic when the evidence on that count is overwhelming. State v. Silva, 106 Wn. App. 586, 596, 24 P.3d 477, review denied, 145 Wn.2d 1012 (2001). This approach may win the jury's confidence and preserve the defendant's credibility when a more serious charge is at stake. State v. Hermann, 138 Wn. App. 596, 605, 158 P.3d 96 (2007); Silva, 106 Wn. App. at 597-98. Defense counsel is not required to consult with the client before making this strategic move. Silva, 106 Wn. App. at 596 (citing Underwood v. Clark, 939 F.2d 473, 474 (7th Cir.1991)).

Here, Schlottmann makes no effort to contend that the evidence of her guilt as to the conceded charges was not overwhelming. Nor could she do so convincingly. At trial, the State presented the following evidence: an eyewitness who observed the burglary, provided the police a detailed description of the suspects and the vehicle, and later identified the suspects shortly after the crime; evidence that the vehicle and physical characteristics of suspects matched the eyewitness's description; evidence that the items recovered in the minivan were identified as belonging to Finely; evidence that the minivan identified by the eyewitness was stopped in close proximity to Finely's residence. The State's evidence pertaining to the crimes against the Finely residence was immense. Defense counsel's decision to admit to these crimes was a strategic one intended to earn the jury's favor and preserve Schlottmann's credibility as to the remaining charges. Accordingly, Schlottmann's claim fails.

Prosecutorial Misconduct Claim

Schlottmann contends, finally, that three of the prosecutor's remarks made during closing argument deprived her of a fair trial. Again, we disagree.

A prosecutor owes a defendant a duty to ensure the right to a fair trial is not violated. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the challenged conduct was both improper and resulted in prejudice. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). We review alleged misconduct "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Once a defendant establishes that the prosecutor's conduct was improper, a reviewing court determines whether the defendant was prejudiced. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant objected at trial, on appeal he or she "must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." Emery, 174 Wn.2d at 760.

Following closing arguments, defense counsel moved for a mistrial based upon the prosecutor's comments that she now challenges on appeal.⁶¹ The trial court denied the motion.⁶² "The decision to deny a request for mistrial based upon alleged prosecutorial misconduct lies within the sound discretion of the trial

⁶¹ 3 RP at 439.

⁶² 3 RP at 442.

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court, and it will not be disturbed absent an abuse of discretion." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

At closing argument, while reviewing the evidence surrounding the Finely burglary, the prosecutor made the following comment:

They took similar items. They want jewelry, electronics, and they wanted that checkbook. 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. And they want things that they can sell quickly--.**^[63]

Defense counsel objected to this comment, arguing that it was inflammatory.⁶⁴ The trial court held a sidebar, after which the court instructed the prosecutor to "[g]o ahead."⁶⁵

Schlottmann contends that by making this remark, the prosecutor improperly referenced evidence outside of the record and prejudicially implied that Schlottmann burglarized homes in order to purchase drugs.

A prosecutor is allowed wide latitude in closing arguments to draw reasonable inferences from the facts in evidence and to express such inferences to the jury. State v. Gregory, 158 Wn.2d 759, 860, 147 P.2d 1201 (2006); Dhaliwal, 150 Wn.2d at 577. But a prosecutor is not permitted to make prejudicial statements that are not supported by the record. State v. Ramos, 164 Wn. App. 327, 341, 263 P.3d 1268 (2011). Similarly, "[m]ere appeals to the jury's passion or prejudice are improper." Gregory, 158 Wn.2d at 808.

Here, the prosecutor improperly appealed to the jury's passion and

⁶³ 3 RP at 396 (emphasis added).

⁶⁴ 3 RP at 396.

⁶⁵ 3 RP at 396.

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prejudice. The prosecutor's remark was designed to portray Schlottmann as a drug user or addict whose motive in the burglaries was to procure drugs. There was no evidence presented to the jury that established such a motive. This comment exceeded the wide latitude granted to prosecutors in closing argument.

Nevertheless, Schlottmann does not demonstrate that the prosecutor's comment substantially affected the jury verdict. The remark was made in the context of a prolonged trial as well as a lengthy closing argument. A sidebar was immediately held following this comment, after which the prosecutor did not mention the alleged drug related motive again. Additionally, the jury was instructed to "decide the facts in this case based upon the evidence presented."⁶⁶ The jury was also directed "that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits."⁶⁷ We presume that jurors follow instructions to disregard improper evidence. State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994).

Schlottmann has not shown prejudice as a result of the prosecutor's improper comment. Accordingly, the trial court did not err in denying Schlottmann's motion for mistrial with respect to this comment.

Schlottmann next contends that the prosecutor committed misconduct by making the following remarks during closing argument: "Again, Ms. Lockard and Schlottmann are two burglars and thieves with no conscience."⁶⁸ In rebuttal, the

⁶⁶ CP at 55.

⁶⁷ CP at 56.

⁶⁸ 3 RP at 401.

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prosecutor stated that "[Schlottmann] wanted to victimize other people."⁶⁹ Schlottmann did not object to these remarks.⁷⁰

Schlottmann contends that the prosecutor injected his own opinion as to Schlottmann's motives for committing the crimes, which were outside of the record. She is incorrect. These statements were proper inferences based on the evidence produced at trial.

Even assuming that the comments were improper, Schlottmann fails to establish prejudice. She makes no effort to show that there was a substantial likelihood that the prosecutor's comments affected the jury's verdict. Therefore, we find no error as to these comments.

Schlottmann next challenges the following comments made by the prosecutor:

Now let's talk about circumstantial evidence. The best evidence that we have is that we already know what they are. They're burglars and thieves. How do we know that? Ms. McMason. Eyewitness. Saw them do it. [Defense counsel] says well -- he told you at the beginning of the case, well, she doesn't contest that. Really? 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 --⁷¹

After a sidebar was held, defense counsel noted his objection for the record.⁷² In his rebuttal argument, the prosecutor stated: "Again, Ms. Schlottmann surrounds herself with these things, but she wants to deny all of

⁶⁹ 3 RP at 432.

⁷⁰ See 3 RP at 401, 432.

⁷¹ 3 RP at 400.

⁷² 3 RP at 400-01.

them. As I said, she's never taken responsibility for any of it."⁷³ Defense counsel objected, and the court ordered the prosecutor to proceed.⁷⁴ The prosecutor resumed, "She's never taken responsibility for any of these crimes, but for [defense counsel] doing that for her now. But again, she wants to limit what her responsibility is, for obvious reasons."⁷⁵

Schlottmann argues that the prosecutor improperly commented on her constitutional right to plead not guilty, as well as her right against self-incrimination and right to present a defense.

"[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." Gregory, 158 Wn.2d at 806 (quoting State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984)). Specifically, the State may not invite the jury to draw a negative inference from the defendant's exercise of a constitutional right. Gregory, 158 Wn.2d at 806 (citing State v. Jones, 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993)). But "not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights." Gregory, 158 Wn.2d at 806. The question is whether the prosecutor "manifestly intended the remarks to be a comment on that right." State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

Here, viewing these statements in the context of the entire record, the

⁷³ 3 RP at 433.

⁷⁴ 3 RP at 433.

⁷⁵ 3 RP at 433.

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prosecutor's remarks were not intended to comment on Schlottmann's constitutional rights. Indeed, the comments were invited by defense counsel's opening argument. As previously discussed, defense counsel conceded guilt to the lesser offense of residential burglary, and admitted that the State would be able to prove many of the charges. The prosecutor's comments did not expand beyond the scope of defense counsel's statements. See State v. Dennison, 72 Wn.2d 842, 849, 435 P.2d 526 (1967) (A prosecutor's remarks do not constitute misconduct if they are invited by defense counsel unless they "go beyond a pertinent reply.") (quoting State v. LaPorte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)).

Schlottmann's prosecutorial misconduct claims are not persuasive. The trial court did not abuse its discretion in denying her motion for mistrial.

Affirmed.

Tricker, J.

WE CONCUR:

Cappelwick, J.

Becker, J.

APPENDIX B

20

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

FILED
SUPERIOR COURT, WA
THURSTON COUNTY, WA
2014 AUG 18 AM 11:14
BETTY J. GOULD, CLERK

STATE OF WASHINGTON,)	No. 71661-1-1
)	
Respondent,)	
)	MANDATE
v.)	
)	Thurston County
ALEXIS J. SCHLOTTMANN,)	
)	Superior Court No. 11-1-01815-0
Appellant.)	

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Thurston County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on June 16, 2014, became the decision terminating review of this court in the above entitled case on August 13, 2014. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

Pursuant to RAP 14.4, costs in the amount of \$3,080.70 are awarded against judgment debtor ALEXIS J. SCHLOTTMANN to be awarded as follows: \$66.00 in favor of judgment creditor THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE and \$3,014.70 in favor of judgment creditor the APPELLATE INDIGENT DEFENSE FUND.

- c: Jason Wayne Bruce
- Paetra T. Brownlee
- Carol L. La Verne
- Hon. Lisa L. Sutton



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 13th day of August, 2014.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

12-9-11477-6

APPENDIX C

48012-3-II

Filed
Washington State Supreme Court
Thurston County Superior Court No. 11-101815-0
CoA Div. II No. [REDACTED]

Σ AUG 19 2015
RT
Ronald R. Carpenter
Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE COURT OF APPEALS, DIVISION TWO, OF THE STATE OF WASHINGTON

92189-0

In re the Personal Restraint of

Alexis J. Schlottmann,

Petitioner

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 AUG 13 PM 4:59

PERSONAL RESTRAINT PETITION

Mitch Harrison

Attorney for Appellant

Harrison Law Firm

101 Warren Avenue N

Seattle, Washington 98109

Tel (253) 335 - 2965 ♦ Fax (888) 598 - 1715

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Supreme Court Deputy Clerk

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DIVISION II
2015 AUG 17 PM 1:01
STATE OF WASHINGTON
BY DEPUTY

APPENDIX D

THE SUPREME COURT
STATE OF WASHINGTON

RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
DEPUTY CLERK / CHIEF STAFF ATTORNEY



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September 8, 2015

Mitch Harrison (sent by e-mail only)
Harrison Law
101 Warren Avenue N.
Seattle, WA 98109-4928

Hon. David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway
Suite 300, MS TB-06
Tacoma, WA 98402-4454

FILED
SUPERIOR COURT
THURSTON COUNTY, WA
2015 OCT -8 AM 8:14
Linda Myline Eddy
Thurston County Clerk

11-1-1815-0

Re: Supreme Court No. 92189-0 - Personal Restraint Petition of Alexis J. Schlottmann

Clerk and Counsel:

On August 19, 2015, the Petitioner's "PERSONAL RESTRAINT PETITION" was received. By notation ruling I have authorized the filing of the petition without prepayment of the filing fee. The personal restraint petition has been assigned the above referenced Supreme Court cause number.

On August 19, 2015, the Petitioner's "MOTION TO FILE OVER LENGTH PETITIONER'S BRIEF" was also received. The motion is referred to Division II of the Court of Appeals.

Pursuant to RAP 16.5, effective September 1, 2014, the personal restraint petition is transferred to Division II of the Court of Appeals. A copy of RAP 16.5 is enclosed for the Petitioner. A scanned copy of the personal restraint petition and motion to file over length Petitioner's brief are enclosed for the Clerk of the Court of Appeals.

Sincerely,

Susan L. Carlson
Supreme Court Deputy Clerk

SLC:mt

Separate enclosures as stated



CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Response to Personal Restraint
Petition on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND TO--

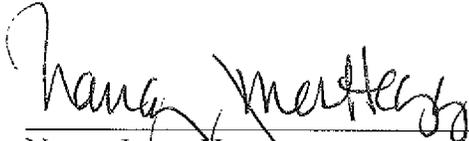
MITCH HARRISON
101 WARREN AVENUE NORTH
SEATTLE, WA 98109
EMAIL: MITCH@MITCHHARRISONLAW.COM

--AND TO--

JAMES T. SHACKLETON
926 24TH WAY SW
OLYMPIA, WA 98502-6002
EMAIL: SHACKLJ@CO.THURSTON.WA.US

I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 16th day of December, 2015, at Olympia, Washington.



Nancy Jones-Begg

THURSTON COUNTY PROSECUTOR

December 16, 2015 - 3:19 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 48012-3

Is this a Personal Restraint Petition? Yes No

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Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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