IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BARRY DONALD STRONG, Appellant.	No. 39262-3-II UNPUBLISHED OPINION

Serko, J.P.T.[1] — A jury found Barry Donald Strong guilty of second degree theft. He appeals, arguing that (1) the trial court violated his public trial right by closing the court on four occasions without weighing the five *Bone-Club*[2] factors, (2) the prosecutor commented on his right to silence by eliciting testimony that he refused to name a potential suspect, (3) he received ineffective assistance of counsel when his trial counsel failed to object to testimony that Strong was in jail, (4) the trial court commented on the evidence by handing a calculator to a witness struggling with math, and (5) insufficient evidence supports a finding that he acted as an

[1] Judge Susan Serko is serving as a judge pro tempore of the Washington State Court of Appeals pursuant to CAR 21(c).

[2] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

accomplice. We disagree and affirm.

FACTS

On July 15, 2008, at around 2:00 pm, Strong and a companion entered a T-Mobile store in Clark County, Washington. Strong and his companion asked about device availability and rate plans and then tested phones. The pair left after Strong's companion stated that he wanted to bring his girlfriend in later to check out some phones. Strong had driven his companion to the store in a white Cadillac.

Strong and his companion returned a few hours later with a woman;[3] again Strong drove the white Cadillac. Strong and his companions asked more questions about the phones, and the man checked out Bluetooth headset devices. Strong and the woman abruptly left the store, and he yelled to the store in general that they would stick with "Cricket." II Verbatim Report of Proceedings (VRP) at 56. A sales representative observed Strong drive out of the parking lot.

Strong's male companion stayed in the store and picked up four Bluetooth headsets. The man approached the register and began asking questions about which one was the best device. As the man approached the register, Strong drove the Cadillac slowly past the store's front door and the man watched the vehicle. The man then stated that he would ask his friends, and he walked toward the front door. The man hesitated at the door, but ran out as soon as a store employee walked toward him. A store employee chased the man. The Cadillac pulled up behind the man, who jumped into the backseat while the vehicle was still moving.

The State charged Strong with second degree theft[4] pursuant to former RCW

[3] Investigators never identified the man and woman with Strong.

9A.56.040(1)(a) (2007).[5] At trial, a T-Mobile sales representative testified that two of the Bluetooth headsets were worth $99.99 each and the other two were worth $119.99 each, for a total value of $439.96. A jury found Strong guilty of second degree theft.

ANALYSIS

I. Right to a Public Trial

First, Strong argues that the trial court violated his right to a public trial four times by holding conferences with the prosecutor and defense counsel either in the hallway or in chambers. He contends that he is entitled to a new trial. We disagree.

Before being sworn in, a juror informed the trial court that she knew one of the testifying officers:

> A JUROR: Yes, I recognize the name of —
> THE COURT: One second, please.
> You need to hear this, Mr. Petersen [the prosecutor].
> Go ahead.
> A JUROR: I recognize the name of an officer. The name is Barbara Kipp. I must not have heard her name when you were saying it.
> THE COURT: Gentlemen, may I see you in chambers for just a second, please.
> Ma'am, why don't you go ahead and have a seat in that first row.
> *(Chambers conference; not recorded.)*
> THE COURT: Stay seated.
> Okay. Ma'am, how do you know Ms. Kipp?
> THE JUROR: She worked at one point with my husband.
> THE COURT: Okay. And what does your husband do?
> THE JUROR: He works for the State of Washington investigating child abuse.
> THE COURT: Okay, he's with CPS?

[4] The State also charged Strong with bail jumping, and the jury found him guilty of that offense. Strong does not appeal that conviction.

[5] In 2009, the legislature amended RCW 9A.56.040, raising the value amounts for second degree theft from $250—$1,500 to $750—$5,000. Laws of 2009, ch. 431, § 8.

> THE JUROR: Yes.
> THE COURT: Okay. Will your knowledge of this particular witness affect your ability to be fair and impartial during the trial?
> THE JUROR: No.
> THE COURT: Okay. Gentlemen, may I see you at sidebar for just a second.
> *(Bench conference; not recorded)*
> THE COURT: Ma'am, do you still feel comfortable sitting as a juror on this case?
> THE JUROR: I do.
> THE COURT: Okay. All right, thank you for letting us know that. Okay. You may proceed, counselor.
> And I'll just note for the record that neither side is objecting to this juror sitting.

II VRP at 49-50.

The next hallway conference occurred when a T-Mobile sales representative testified about the value of the stolen Bluetooth headsets. At the end of direct examination, the trial court asked defense counsel if he wished to cross-examine the witness, and defense counsel requested a sidebar. The trial court then asked the lawyers to step into the hallway. When the trial court, prosecutor, and defense counsel returned, the State resumed direct examination and asked the witness more about how he determined the stolen items' prices. The trial court gave no indication of what was discussed in the sidebar.

Later that day, the prosecutor requested a sidebar during cross-examination of Officer Brinski, and a chambers conference was held and not recorded or explained.

Finally, when showing a videotape to the jury, a hearing-impaired juror stated that she did not understand everything said in the videotape:

> THE COURT: Okay. Gentlemen, hallway.
>
> *(Hallway conference; not recorded).*
>
> THE COURT: Remain seated. All right. [Juror], what we're going to do for your personal benefit is to have it replayed. And we're gonna have you come sit closer to the sound so that you can maybe hear better.

II VRP at 112. At no point did Strong object or consent to the in-chambers or hallway conferences. The trial court also did not make any findings before holding the hearings outside the courtroom.

The Sixth Amendment to the federal constitution and Washington's article I, § 22 guarantee a defendant the right to a public trial. Before closing a criminal hearing or trial, the trial court must weigh the five *Bone-Club*[6] factors and enter findings. *Presley v. Georgia*, __ U.S. __, 130 S. Ct. 721, 724, ___ L. Ed. 2d ___ (2010); *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005); *State v. Bone-Club*, 128 Wn.2d 254, 258-60, 906 P.2d 325 (1995); *State v. Paumier*, 155 Wn. App. 673, 678, 230 P.3d 212, review granted, 169 Wn.2d 1017 (2010). If the

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[6] The *Bone-Club* analysis provides:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)) (alterations in original).

proceeding is subject to the right to a public trial, the trial court's failure to conduct a *Bone-Club* inquiry before excluding the public violates the defendant's public trial rights. *Brightman*, 155 Wn.2d at 515-16. Whether a defendant's right to a public trial has been violated is a question of law that we review de novo. *Brightman*, 155 Wn.2d at 514.

The public trial right applies to the evidentiary phases of the trial and other adversary proceedings. *State v. Rivera*, 108 Wn. App. 645, 652, 32 P.3d 292 (2001), *review denied*, 146 Wn.2d 1006 (2002). The defendant's right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, during voir dire, and during the jury selection process. *Rivera*, 108 Wn. App. at 653. A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues. *Rivera*, 108 Wn. App. at 653 (neither public nor defendant had a right to be present when trial court addressed juror's complaint about another juror's hygiene).

Here, it is not clear what issue the trial court and attorneys discussed during the sidebars in the hallway and in chambers. We cannot determine from the record whether the matters discussed in conference were ministerial, legal, or factual. As the appellant, Strong bears the burden of establishing a complete record that would permit us to review his assignments of error. RAP 9.2. He failed to include any materials that might have demonstrated to us that the trial court discussed factual matters, rather than ministerial or legal matters outside the courtroom. He is likely not able to take advantage of RAP 9.3 or 9.4 because there is no record that the court reporter's notes or the videotape of the proceedings was lost or damaged. Accordingly, Strong

presents us with a matter outside the record, which we do not review on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

II. Comment on Right to Silence

Second, Strong argues that the prosecutor violated his right to silence by eliciting testimony that Strong refused to answer a question an officer asked him during custodial interrogation. Again, we disagree.

A defendant has a right to remain silent under the Fifth Amendment to the federal constitution and article I, § 9 of the Washington Constitution. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). The Fifth Amendment of the United States Constitution states, in part, that no person "shall be compelled in any criminal case to be a witness against himself." Similarly, article I, § 9 of the Washington Constitution reads, "[n]o person shall be compelled in any criminal case to give evidence against himself." We give the same interpretation to both clauses and liberally construe the right against self-incrimination. *Easter*, 130 Wn.2d at 235-36.

Officer Mark Brinski interviewed Strong while Strong was in jail. Officer Brinski read Strong his *Miranda*[7] rights and asked Strong if he understood these rights. Strong indicated that he understood his rights and agreed to talk about the incident. At trial, Officer Brinski related his interview with Strong, stating that Strong became upset when questioned about the incident and insisted that he did not steal the property.[8] Strong told the officer that he had been in the store

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

[8] At a CrR 3.5 hearing, the trial court found that Strong waived his *Miranda* rights and found the statements admissible. Strong does not challenge this ruling.

looking for a phone and/or phone charger with a woman. Officer Brinski asked Strong for the woman's name and Strong "refused to give [Officer Brinski] the name of the female that was with him." II VRP at 99. Strong then went on to make "some derogatory comments" and claimed that the officer was playing a game with him. II VRP at 99. Strong did not make any further statements at this point. Strong did not object nor move for a mistrial.[9]

Strong argues that refusing to answer the officer's question constituted an invocation of his right to silence. The State argues that Strong waived his right to remain silent, so it could elicit testimony about what he said and would not say after waiving that right. We agree with the State.

The State may not use pre-arrest or post-arrest silence as substantive evidence of guilt. *Easter*, 130 Wn.2d at 238. Testimony that the defendant refused to answer questions can be a comment on the defendant's right to silence. *State v. Perrett*, 86 Wn. App. 312, 322, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997) (statement that defendant "had nothing to say" an improper comment on silence). But when a defendant does not remain silent and instead speaks with the police, the State may comment on what he does not say. *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (citing *State v. Young*, 89 Wn.2d 613, 621, 574 P.2d 1171 (1978)), *cert. denied*, 534 U.S. 1000 (2001). Such refusals do not amount to constitutionally protected silence, and the State may use them as substantive evidence of guilt. *State v. McFarland*, 73 Wn. App. 57, 64-65, 867 P.2d 660 (1994) (defendant's failure to mention he had contact with shotgun until

[9] Strong did not raise this issue below, but an appellant may challenge for the first time on appeal an improper comment on his right to silence because the issue amounts to a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002).

after he was confronted with incriminating evidence held admissible when he had spoken freely with the police about the alleged crime), *aff'd*, 127 Wn.2d 332, 899 P.2d 1251 (1995); *State v. Bradfield*, 29 Wn. App. 679, 685, 630 P.2d 494 (non-statements of defendant admissible when defendant voluntarily speaks to the police), *review denied*, 96 Wn.2d 1018 (1981).

Officer Brinski's testimony is similar to the testimony given in *State v. Evans*, 129 Wn. App. 211, 118 P.2d 419 (2005), *rev'd*, 159 Wn.2d 402, 150 P.3d 105 (2007). In *Evans*, an officer stated that he explained the *Miranda* warnings to Evans and that Evans did not specifically answer questions other than to say that the police were going to do what they were going to do. *Evans*, 129 Wn. App. at 226. On appeal, we held that this was not a comment on Evans's right to remain silent because the officer did not testify that Evans refused to answer questions. *Evans*, 129 Wn. App. at 226. While the officer's testimony may have portrayed Evans as "recalcitrant," the State did not use the statement as substantive evidence of guilt. *Evans*, 129 Wn. App. at 226.

Similarly, Officer Brinski did not state that Strong refused to answer questions. Instead, Officer Brinski testified that Strong declined to name the woman with him. The testimony was not a comment on Strong's silence. In addition, because Strong had agreed to talk with officers rather than invoke his right to silence, the State could comment on what Strong did and did not say. *Clark*, 143 Wn.2d at 765. Officer Brinski did not comment on Strong's right to remain silent.

Strong's attempt to analogize this situation to *Easter* also fails. In that case, the testifying officer stated that Easter refused to answer questions and ignored the officer, called Easter a "smart drunk," and stated that Easter was evasive and uncooperative during the interrogation.

Easter, 130 Wn.2d at 232-33. During closing argument, the prosecutor referred to Easter as a "smart drunk" several times. *Easter*, 130 Wn.2d at 234. These comments are not analogous to Officer Brinski's testimony. Officer Brinski did not state that Strong refused to answer questions and was uncooperative. He also did not make pejorative comments, as the *Easter* officer did. Officer Brinski stated instead that Strong refused to name the woman with him. This is different than refusing to answer any questions and invoking the right to silence.

We hold that because Strong answered Officer Brinski's questions, the State could elicit testimony about what Strong did and did not say. Officer Brinski's statement was not a comment on Strong's right to silence. Because the prosecutor did not elicit a comment on Strong's right to remain silent, we do not reach Strong's harmless error argument.

III. Ineffective Assistance of Counsel

Third, Strong argues that he received ineffective assistance of counsel when his counsel failed to object to testimony elicited by the State that a police officer arrested Strong and booked him into jail. We disagree.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 335. We begin with a strong presumption that counsel provided adequate and effective representation. *McFarland*, 127 Wn.2d at 335. To prevail in an ineffective assistance of counsel claim, Strong must show (1) that his trial counsel's performance was deficient and (2) that this deficiency prejudiced him. *Strickland*, 466 U.S. at 687.

Here, Strong failed to show deficient performance. Strong assigns error to his counsel's

failure to object to Officer Brinksi's testimony. However, Strong brought a motion in limine requesting that the trial court not permit Officer Brinski to testify that Strong was in custody at the time Officer Brinski questioned him. The State opposed the motion, arguing that such testimony would not be very prejudicial because *Miranda* warnings are generally given to a person in custody. The trial court denied Strong's motion.

At that point, Strong's counsel had no duty to object to any testimony about Strong's presence in the jail. A motion in limine's purpose is to avoid the requirement that counsel object to contested evidence when it is offered during trial. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The party who loses a motion in limine is deemed to have a standing objection where a judge has made a final ruling on the motion unless the trial court indicates that further objections at trial are required when making its ruling. *Powell*, 126 Wn.2d at 256. Strong's counsel brought a motion in limine to exclude any testimony by Officer Brinski that Strong was in jail, but the trial court denied the motion. The trial court did not indicate that any further objections were required. Counsel therefore had a standing objection and had no reason to object during Officer Brinski's testimony. *Powell*, 126 Wn.2d at 256. Strong has failed to demonstrate deficient performance. Accordingly, we need not determine if there was prejudice. *In re Pers. Restraint of Davis,* 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Strong has failed to show that he received ineffective assistance of counsel.

IV. Judicial Comment on the Evidence

Fourth, Strong argues that the trial court violated article IV, § 16 of the Washington Constitution by commenting on the evidence. We disagree.

At trial, a T-Mobile sales representative testified about the value of the items stolen:

> Q. Okay. Okay. And you—you described four Bluetooth headsets.
> A. Yes.
> Q. Okay. Can you identify what kind of headsets those are[?]
> A. Two Motorola H-7-10 headsets and two Motorola H-12 headsets.
> Q. Okay. Have you had an opportunity to determine the value, the sale price of those items on July 15th?
> A. At the time the H-7-10 headsets were 99.99 each; and the H-12 headsets were 119.99 each. Two of each were stolen. All four would equal around $139 (sic).
> . . . .
> Q. Okay. Did you then price those four headsets at the time of [. . .] July 15th of the value?
> A. Yes.
> Q. Okay. What was the total value for all four of them together?
> A. Around $139.
> Q. All four together?
> A. Correct.
> Q. Yeah. Let me follow up again.
> A. I'm sorry, I'm not doing my math correct[ly] at all. Excuse me, no. Two headsets. One model was 99.99. The other model was 119.99.
> THE COURT: (Handing calculator to witness.)
> THE WITNESS: Thank you. Thank you. Oh, my goodness, let me make sure my math is accurate here. This is embarrassing. (Making computation on calculator.) That would total 439.96.

II VRP at 74-76 (some alterations in original).

Strong contends that when the trial court handed a calculator to a witness, it implied that the witness should revise his testimony to reflect what the court thought was correct. The State argues that the action was not a comment on the evidence because the trial court was merely assisting a witness who was struggling with addition. It is constitutional error for a trial court to comment on the evidence. Wash. Const. art. IV, § 16; *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). A statement by the trial court constitutes a comment on the evidence if the trial court's attitude toward the merits of

the case or the trial court's evaluation relative to the disputed issue is inferable from the statement. *Lane*, 125 Wn.2d at 838. The jury must be able to infer from the trial court's comments that he or she personally believes or disbelieves evidence relative to a disputed issue. *Jankelson v. Cisel*, 3 Wn. App. 139, 145, 473 P.2d 202 (1970), *review denied*, 78 Wn.2d 996 (1971). The trial court may not comment on the evidence in order to prevent the trial court's opinion from influencing the jury. *Lane*, 125 Wn.2d at 838. We presume prejudice from judicial comments on the evidence, and the State must show the absence of prejudice, unless the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006).

There is no indication that the trial court believed or disbelieved testimony about the value of the headsets stolen. The witness testified that two headsets worth $99.99 each and two headsets worth $119.99 each were stolen, and then had difficulty adding those amounts while testifying. The trial court merely provided the witness a calculator to help, but did not express an opinion about whether the headsets were really worth the values stated. The only inferable statement from the trial court's action was that it, like the rest of the courtroom, recognized that the witness was struggling with addition.

Further, even if the actions constituted an impermissible comment, there is no prejudice. The witness clearly testified that two headsets worth $99.99 each and two headsets worth $119.99 each were stolen. Even if the witness could not correctly add those amounts while testifying, the jury still had evidence that $439.96 worth of merchandise was stolen.

The State argues that if the trial court's action was an impermissible comment on the

evidence, jury instruction 1 cured any error. We agree. A jury instruction admonishing the jury that the trial court judge may not comment on the evidence and that the jury should disregard any such comment may cure error. *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837 (2000). This is so because we presume that the jury follows the instructions given to it. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998).

In jury instruction 1, the trial court here instructed the jury to disregard any comment it believed the trial court made:

> You are the sole judges of the credibility of each witness and of the value or weight to be given to the testimony of each witness. . . .
>
> . . . .
>
> A trial judge may not comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

Clerk's Papers (CP) at 76-77. If any improper comment occurred, this admonishment cured it.

We hold that the trial court did not comment on the evidence by handing a calculator to a witness struggling with addition. If any improper comment occurred, the comment did not prejudice Strong and jury instruction 1 cured any error.

V. Sufficient Evidence

Finally, Strong argues that insufficient evidence supports his conviction. Specifically, Strong contends that the State failed to prove that he commanded, encouraged, requested, or aided the unidentified man in stealing the headsets. Strong asserts that although the "[S]tate's evidence does lead to a suspicion that [he] at least knew that the passenger from the vehicle was going to commit the theft, the evidence does not rise to a level beyond mere suspicion." Br. of

Appellant at 29. We disagree.

In determining whether the evidence is sufficient to support a conviction, we view the evidence in the light most favorable to the State, asking whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006). We draw all reasonable inferences from the evidence in favor of the State and interpret it most strongly against Strong. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the evidence's persuasiveness. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Direct and circumstantial evidence are equally reliable. *Thomas*, 150 Wn.2d at 874.

The trial court instructed the jury that a person acts as an accomplice

> if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP at 89; *see also* RCW 9A.08.020(3)(a). A person is guilty of a crime if he or she is an accomplice of another person in the commission of a crime. RCW 9A.08.020(1), (2)(c).

A person can act as an accomplice where he or she positions a vehicle for a quick getaway and allows time for the principal to complete the crime. *State v. McDaniel*, 155 Wn. App. 829, 864, 230 P.3d 245 (2010). Here, looking at the evidence in the light most favorable to the State,

the jury could infer that Strong both positioned the Cadillac for a quick getaway and helped his companion complete the crime. Strong came into T-Mobile with his companion twice, each time both men asked questions about the store's devices and each talked to different employees. Strong's presence helped distract the other employee, providing time for his companion to scope out the store's security and goods. In addition, Strong left the store the second time shortly before his companion, and drove the Cadillac slowly by the store. When his companion saw this, he headed toward the door. Strong's vehicle was in position and pulled in behind the man just as he exited the store with the four stolen Bluetooth headsets. Strong saw the man running and being chased by a T-Mobile employee because he pulled up from behind. In addition, the man jumped into the backseat of the Cadillac without Strong slowing to a stop. A reasonable jury could infer that Strong positioned the vehicle to facilitate a quick getaway.

In addition, it is reasonable for a jury to infer that Strong solicited, commanded, encouraged, or requested the man to steal the Bluetooth headsets. Strong announced generally and loudly to the store that he was going to stick with "Cricket," and exited. II VRP at 56. At this point his companion grabbed the Bluetooth headsets and approached the register. The man began to exit the store after Strong drove by slowly, and seemed to hesitate as if he did not want to steal the items. It is reasonable to infer that Strong directed the man to steal the items and gave him the cue when he yelled and exited the store. Sufficient evidence supports Strong's conviction for second degree theft as an accomplice.

Affirmed.

A majority of the panel has determined this opinion will not be published in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Serko, J.P.T.

We concur:

Penoyar, C.J.

Worswick, J.