IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL ANTHONY LAR, Appellant.	No. 40801-5-II UNPUBLISHED OPINION

Hunt, J. — Michael Anthony Lar appeals his jury convictions for first degree burglary, first degree kidnapping, and first degree attempted robbery. He argues that (1) the trial court violated his state and federal constitutional rights when it refused to suppress evidence obtained after police arrested him without a warrant in a "high risk"[1] stop; (2) he received ineffective assistance when defense counsel failed to file a timely motion to suppress evidence flowing from Lar's allegedly unlawful arrest and from his allegedly coerced statements; (3) the trial court violated his right to a fair and impartial jury trial when it denied his motion to excuse a juror who had failed to disclose that he was acquainted with a State witness; and (4) the trial court erred in sentencing him to life in prison under the Persistent Offender Accountability Act (POAA)[2]

[1] Verbatim Report of Proceedings (VRP) (March 26, 2010) at 136.

[2] Chapter 9.94A RCW.

because the State did not produce substantial evidence that he had two prior bank robbery convictions. In his Statement of Additional Grounds (SAG), Lar asserts that the trial court erred during voir dire by conducting an "inadequate inquiry" into the possible prejudicial effect that adverse pretrial publicity might have had on the jury pool. SAG at 1. We affirm.

FACTS

I. Burglary, Kidnapping, and Attempted Robbery

A. Credit Union

Around 6:30 am on January 25, 2010, Holly Weitz arrived at the Twin Star Credit Union in Centralia to begin her opening shift as a bank teller. When Weitz approached the bank's parking lot, she saw fellow employee Esperanza Mejia-Tellez waiting in her vehicle. The credit union's opening procedures required Weitz to call Mejia-Tellez on her cell phone and then to enter the building, turn off the security system, turn on the bank's lights, and eventually tell Mejia-Tellez by cell phone that she could safely enter the building.

After Weitz parked her car, she established a cell phone connection with Mejia-Tellez, entered the credit union's side entrance, and disarmed the alarm. She heard a noise that sounded like "wind" coming from the assistant manager's office. Verbatim Reports of Proceedings (VRP) (March 25, 2010) at 23. She went to investigate, pushed open the door to the office, turned on the light, and saw a man wearing dark clothing with a ski mask over his face crouched in the corner. According to Weitz, the man was about 6'3" tall and approximately 60 years old. Although the mask covered most of his face, Weitz noticed his unusually blue eyes and white stubble on his upper lip. He appeared to be holding a handgun in his right hand and a knife in his

left hand. The man, later identified as Michael Anthony Lar, rushed toward Weitz and hit her on the back of the head with a metal object, which she believed was his handgun. Weitz screamed and dropped her cell phone. Lar held his gun to the back of her head, placed his knife on her throat, told her not to touch her cell phone, and threatened to take her hostage if she "screwed" anything up for him. VRP (March 25, 2010) at 26.

Weitz explained that she needed to talk to Mejia-Tellez, who otherwise would immediately call the police. Lar handed Weitz her cell phone. Weitz tried to call Mejia-Tellez four or five times, but she was so upset that she misdialed and was unable to get a call through. Lar took Weitz to the side entrance of the building and told her to stick her head outside and to wave for Mejia-Tellez to come inside, while pointing his gun at Weitz's head and telling her, "[Y]ou better not [f*ck] this up, [b*tch or] I'll take you with me." VRP (March 25, 2010) at 29. Weitz opened the side door and waived her cell phone at Mejia-Tellez, beckoning her inside.

Mejia-Tellez did not respond because she had already called the police. Weitz noticed Centralia Police Officer Neil Hoium with a gun, approaching on the right side of the credit union. Holding her thumb and index finger in the shape of a "gun," Weitz mouthed silently to Hoium that a male intruder inside had a gun. VRP (March 25, 2010) at 111. Hoium grabbed Weitz's arm and pulled her out of the doorway. According to Hoium, a male figure inside the credit union appeared out of the shadows holding what appeared to be a .45 caliber handgun. Hoium fired two shots at the man, who disappeared from view.

B. Arrest

About five minutes later, officers established a perimeter around the credit union; they

then spent several hours trying to establish communication with Lar, whom they believed was inside. Eventually two SWAT teams stormed the building, but Lar was not there. Police officers searched the bank and the surrounding area with a K-9 unit, which found no trace of the suspect and no additional evidence. Processing the scene inside the credit union, detectives found a broken window in the assistant manager's office, blood on the window frame and wall, and glass shards with what appeared to be blood on them below the window.

Later that same evening, Kimberly Ronnell observed a man walking down the street near her house a couple blocks from the credit union: He was "average" size with blonde or grayish hair, wearing a dark jacket and jeans, limping, holding his side, and looking "groggy." VRP (March 26, 2010) at 68. As Ronnell pulled into her front driveway, the man asked her to call him a taxi so he could go to Olympia; she did. A few minutes later, taxi driver Joey McKnight picked up Lar in front of Ronnell's house. Lar was wearing jeans and a coat and carrying a gray shoulder bag; he insisted on sitting in the back seat. According to McKnight, Lar wore black gloves, which he did not remove, even when paying for his fare. Lar told McKnight that he had hurt his arm in a car accident in Chehalis; but he did not ask to stop for treatment, even when McKnight picked up another passenger at the Centralia hospital on the way to Olympia. After delivering Lar to "Peppers,"[3] a bar in downtown Olympia, McKnight noticed that Lar was carrying a pair of bloody jeans and duct tape; McKnight called the Centralia Police Department, to which he had provided tips, and provided a description of Lar.

Around 8:45 pm, Lar walked into the Phoenix Inn, four blocks from Peppers, and asked

[3] VRP (March 26, 2010) at 77.

the front desk attendant, Emma Alexander, to call him a taxi to go to Seattle or as "far north as possible." VRP (March 26, 2010) at 82. According to Alexander, Lar was wearing black workout pants, leather shoes, a dark navy-blue jacket, and a black glove on his right hand. He had blood splotches on his clothing, a pair of denim jeans wrapped around his right arm, and a roll of duct tape. Lar told Alexander that he had injured his arm in a car accident in Chehalis. Although Lar appeared to be in extreme pain, he repeatedly told Alexander not to call paramedics to assist him because he did not have health insurance. Alexander arranged for a taxi to take Lar to Sea-Tac Airport. Around 9:05 pm, a white taxi with a red top picked Lar up at the inn. Lar conversed with the taxi driver for about five minutes before entering the cab.

Another Phoenix Inn employee, Crystal Schultz, called the Olympia Police Department and provided a description of Lar and the taxi. At approximately 9:15 pm, six or seven blocks from the inn, Olympia Police Officer Jacob Brown spotted a taxi matching this description, drove behind the taxi, and noticed a white male with "lightish or gray hair" crouched in the back seat. VRP (March 26, 2010) at 135. Earlier in the day, the Olympia Police Department had briefed Brown about the attempted Centralia credit union robbery; and dispatch had informed him that they suspected the man Schultz had reported to have been involved. Brown called for backup.

The Olympia police shut down the street, conducted a "high risk" stop, pulled Lar out of the taxi at gunpoint, and put him face down on the sidewalk. VRP (March 26, 2010) at 136. According to Brown, Olympia police "detained" Lar and put him in handcuffs. VRP (March 26, 2010) at 143. Centralia police officers, also present, (1) observed that Lar had "blue"[4] eyes; that

[4] VRP (March 26, 2010) at 44.

he was wearing "layers,"[5] including black sweats and a jacket; that he appeared to have wounded his arm; and that he was holding duct tape and a pair of jeans; (2) "arrested" Lar; and (3) took him to the Olympia police station, where police confiscated several layers of his clothing and photographed his injuries. Because Lar had gunshot wounds to his arm and to his hip, they had him transported to the hospital.

C. Investigation

Lar spent several days hospitalized under heavy sedation, restrained to his bed. As he drifted in and out of consciousness that first evening, Centralia police officers discussed with him aspects of the attempted robbery without first reading him *Miranda*[6] rights. At one point, Lar told Detective Carl Buster that he did not want to talk; and Buster stopped discussing the case with Lar. Later, however, according to Officer Gary Byrnes, before the officers engaged in any overt questioning, Lar volunteered the following information: (1) he was "going to prison for the rest of his life"[7]; (2) he was not mad at the officer who had shot him; and (3) if the girl at the credit union had done what he had told her, none of this would have happened.

Early the next morning, at approximately 1:00 am, Byrnes read Lar his *Miranda* rights for the first time at the hospital. According to Byrnes, Lar indicated that he understood his rights, said that he did not want any attorneys to visit him, reiterated that he was not angry at the officer who had shot him, described how he had carried out the attempted robbery and how he had

[5] VRP (March 26, 2010) at 46.

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

[7] VRP (March 10, 2010) at 12.

eluded the police, and explained that he had hidden in the bushes near at the north end of the credit union until around 6:00 pm, when the police left. Lar also explained that he then had buried his gun across the street from the credit union, had looked for but could not find his lost car keys, and had caught a taxi to Olympia. Lar drifted in and out of sleep while he had this conversation with Byrnes, repeatedly pushing an intravenous pain medication button.

Later that day, Centralia police officers returned to the credit union to look for more evidence. Using canine dogs to track Lar's scent, they discovered a black ski mask and an electronic key fob for a Cadillac in the bushes. On the credit union's exterior wall, they found a red spot that appeared to be blood; they also found a straw of grass saturated in blood and two glass shards. Later tests revealed that the blood on one of the glass shards matched Lar's DNA profile.

Buried in the bushes on the property across the street from the credit union, officers found a knife with a three-inch blade and a black BB gun that looked like a pistol. Three or four blocks away, officers found a white Cadillac with Montana plates registered to Lar's wife; its doors and lights activated when they pressed a button on the key fob that they had found in the bushes outside the credit union. After obtaining a search warrant, the police found Lar's wallet inside the Cadillac.

II. Procedure

The State charged Lar with first degree burglary, first degree kidnapping, and attempted first degree robbery, with deadly weapon sentence enhancements. The State also notified Lar that it would request life in prison without parole under the Persistent Offender Accountability Act

("POAA").[8]

[8] RCW 9.94A.555.

A. Pretrial Motions

Following a CrR 3.5 hearing to determine the admissibility of Lar's statements to the police officers at the hospital, the trial court ruled that Lar had been "in custody"[9] at the hospital and suppressed all of the statements that Lar had made to the officers because (1) Lar's heavy medication rendered his pre-*Miranda* statements involuntary; (2) after the police read him his *Miranda* rights, Lar did not knowingly and voluntarily waive them; and (3) the officers violated Lar's Fifth Amendment[10] rights when they continued questioning him after he invoked his right to remain silent during questioning about a different offense.[11]

Lar did not move to suppress the BB gun and knife. But he did move to suppress his medical records, which police officers had seized from the hospital without a warrant. The court granted the motion. Lar later moved to suppress all evidence that the police had obtained following his warrantless detention, arrest, and subsequent search. Lar argued that the police lacked probable cause or reasonable suspicion to stop his taxi and, therefore, the State needed to show an exception to the warrant requirement before any evidence flowing from his detention and arrest was admissible. The trial court refused to hear this untimely motion because Lar had not

[9] Clerk's Papers (CP) at 62.

[10] U.S. Const. amend. V.

[11] At the hospital around "mid-day" on January 26, a detective from Ellensburg had read Lar his *Miranda* rights and then had spoken to Lar about an unrelated crime; apparently, Lar had invoked his right to remain silent. CP at 61. Centralia police officers then questioned Lar about the Centralia bank robbery, believing that Lar had not, however, invoked his right to remain silent about the attempted credit union robbery that they were investigating.

filed it by the time of the omnibus hearing.[12] When the State rested its case, Lar renewed his motion to suppress this evidence, and the trial court again denied it.

On the eve of trial, Lar moved for a continuance and waived his speedy trial rights after learning that the Centralia Police Department had allegedly issued a press release to newspapers, radio stations, and television stations in Lewis County and surrounding areas. The media reported that DNA evidence linked Lar to the Centralia credit union robbery and to an earlier bank robbery at the same credit union, and that he might have committed seven other bank robberies in western states. Lar expressed concern that this information could affect the jurors in his trial. The trial court denied Lar's motion, noting that (1) it was "totally speculative" about what information would be available to prospective jurors and whether it would affect any juror's ability to be fair and impartial in his trial; and (2) the parties could deal with the publicity during voir dire. VRP (March 23, 2010) at 7. The trial court asked the parties to remind it to inquire about the publicity during voir dire if it forgot to ask.[13]

B. Trial

During voir dire, the trial court apparently read the State's witness list and asked the jurors if they were acquainted with any of the State's witnesses. Juror 32 initially indicated that

[12] The trial court also commented that the motion was "generic" and that Lar could have submitted it at an earlier date. VRP (March 24, 2010) at 20.

[13] The parties did not designate a verbatim report of the jury selection proceedings as part of the record on appeal. *See* VRP (March 24, 2010) at 8. Nevertheless, nothing in the record suggests that the trial court failed to question the jury pool about the pretrial publicity as planned. The record also shows that the trial court instructed the empanelled jury not to read or to listen to any publicity about the case. *See* VRP (March 24, 2010) at 12.

he did not know any of the State's witnesses, and the parties accepted him as the eighth member of Lar's jury panel. According to the clerk's notes, Lar exercised four of his six peremptory challenges during voir dire. The parties accepted twelve jurors and two alternates for the jury panel.

During noon recess on the second day of trial, Lar's counsel observed juror 32 greet a person whom counsel realized was State witness Joey McKnight, the taxi driver who had transported Lar from Centralia to Olympia. Counsel immediately notified the trial court, and the parties questioned the juror out of the presence of the other jurors. Juror 32 testified that (1) McKnight was "the boyfriend of a former girlfriend of [juror 32's] stepson," (2) he did not know McKnight very well, (3) he (juror 32) had originally indicated that he did not know any of the State's witnesses because he did not know McKnight's last name, (4) he had not spoken to McKnight in over six months, and (5) he would not give McKnight's testimony more weight than other witnesses' testimonies. VRP (March 25, 2010) at 57. Lar moved to excuse juror 32, arguing that he would have used one of his two remaining peremptory challenges to strike juror 32 during voir dire had he known about the juror's acquaintance with McKnight. Ruling that juror 32 had sufficiently shown that he could be fair and impartial, the trial court denied Lar's motion.

C. Verdict and Sentencing

The jury found Lar guilty of all three charges, committed while armed with a deadly weapon. At sentencing, the State presented two certified copies of Lar's 1985 and 1997 federal judgment and sentences and asked the trial court to sentence Lar to life in prison without the

possibility of parole under the POAA. Jennifer Tien authenticated the documents, testifying that she was a federal probation officer familiar with Lar's criminal record and had supervised him following his earlier federal convictions, beginning in October 2008. The 1985 judgment and sentence showed that the federal court had sentenced a "Michael Anthony Lar" on two counts of armed bank robbery; the 1997 judgment and sentences on two separate cases similarly showed that the federal court had sentenced a "Michael Anthony Lar" on one count of armed bank robbery and one amended count of armed bank robbery.[14]

Lar objected to admission of these prior federal judgment and sentences, arguing that the State had not provided a sufficient foundation to show that he had committed these crimes. Overruling Lar's objection, the trial court admitted the documents as court records and sentenced Lar to life in prison without the possibility of parole under the POAA. Lar appeals his convictions and sentence.

ANALYSIS

I. Pretrial Publicity

In his SAG, Lar contends that (1) during voir dire, the trial court erred by conducting an "inadequate inquiry" into the prospective jury pool's familiarity with adverse pretrial publicity from the local news and radio stations the day before jury selection; and (2) the "probability of prejudice" was so great that it requires reversal of his conviction. SAG at 3 (quoting *United States v. Smith*, 790 F.2d 789, 795 (9th Cir. 1986)). We disagree.

Trial courts have broad discretion to determine how best to conduct jury voir dire. *State*

[14] The State appears to have amended this conviction in 2001 to "armed bank robbery." Sentencing Ex. 2; *see also* VRP (May 26-27, 2010) at 12.

v. Davis, 141 Wn.2d 798, 826, 10 P.3d 977 (2000). The trial court's exercise of discretion is limited "*only when the record reveals* that the [trial] court abused its discretion and thus prejudiced the defendant's right to a fair trial by an impartial jury." *Davis*, 141 Wn.2d at 826 (emphasis added). Absent an abuse of discretion and a showing that the rights of an accused have been substantially prejudiced, we will not disturb on appeal a trial court's ruling on the scope and content of voir dire. *Davis*, 141 Wn.2d at 826. Where trial-related publicity creates a probability of prejudice, the defendant is denied due process of law if the trial court does not take sufficient steps to ensure a fair trial. *State v. Wixon*, 30 Wn. App. 63, 67, 631 P.2d 1033, *review denied*, 96 Wn.2d 1012 (1981).[15] Such is not the case here.

Lar did not designate a transcript of voir dire as part of the record on appeal.[16] Thus, we cannot review specific questions that the trial court and counsel asked prospective jurors about their exposure to Lar's pretrial publicity. The record that we do have before us, however, shows that (1) the trial court expressly planned to question the jury pool about their familiarity with the publicity; (2) to assure that this inquiry happened, the trial court specifically asked both counsel to remind it to ask such questions if it forgot; (3) Lar was represented by counsel at the pretrial hearing where the publicity was discussed and during jury selection and, therefore, presumably

[15] We found no probability of prejudice where (1) Wixon's counsel had the opportunity to make "general inquiries" of the prospective jurors about their familiarity with the pretrial publicity, (2) counsel chose not to do so, and (3) he did not exercise all of his peremptory challenges. *Wixon*, 30 Wn. App. at 70-71.

[16] RAP 9.2 (b) provides: "A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review."

followed through with this voir dire component[17]; and (4) at the end of voir dire, Lar had two unused peremptory challenges, which he could have used to excuse any remaining jurors that he believed might have been tainted by pretrial publicity.[18] That Lar chose not to exercise these remaining peremptory challenges suggests that he was satisfied of the jury's freedom from such pretrial publicity taint.

Lar is not required to include in his SAG citations to the record. Nevertheless, "the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review." RAP 10.10(c). The record before us contains no support for Lar's assertions that the trial court failed to inquire about potential jurors' exposure to adverse pretrial publicity and that such failure prejudiced him. On the contrary, as we set forth above, the record supports an opposite conclusion.

II. Motion To Excuse Juror

Lar next argues that, in denying his motion to excuse juror 32 on the second day of trial, the trial court violated his right to a fair and impartial jury, guaranteed by the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. He contends that (1) juror 32 failed to disclose during voir dire his acquaintance with a State witness; (2) had he (Lar) known this fact during voir dire, he would have used one of his remaining

[17] Lar does not assert that his trial counsel rendered ineffective assistance by failing to make sure that the trial court asked the jury venire about pretrial publicity. Moreover, "[t]here is a strong presumption that [trial] counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *see also State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

[18] We note that Lar does not assert nor does the record suggest that the trial court refused to excuse for cause any juror exposed to and affected by the pretrial publicity.

peremptory challenges to remove juror 32; and (3) because there were two alternates available in the jury box when the trial court denied his motion, excusing juror 32 would not have delayed the trial. The State responds that the juror sufficiently demonstrated that he could be fair and impartial in trying Lar's case and, therefore, the trial court did not abuse its discretion in denying Lar's motion. We agree with the State.

A. Standard of Review

We review for abuse of discretion a trial court's decision about whether to excuse a juror. *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Depaz*, 165 Wn.2d at 852. The question for the trial court is whether the challenged juror can set aside preconceived ideas and try the case fairly and impartially. *Ottis v. Stevenson-Carson Sch. Dist*. No. 303, 61 Wn. App. 747, 752-53, 812 P.2d 133 (1991). The trial court has authority to find facts before deciding to dismiss a juror as unfit under RCW 2.36.110; the trial court also weighs the credibility of the challenged juror based on its observations. *State v. Jorden*, 103 Wn. App. 221, 229, 11 P.3d 866 (2000), *review denied*, 143 Wn.2d 1015 (2001). We defer to the trial court's factual determinations in such matters. *Jorden*, 103 Wn. App. at 229.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to a trial by an impartial jury. *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). A defendant is entitled to a fair trial, not a perfect one. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984).

> To invalidate the result of a . . . trial because of a juror's mistaken, though honest response to a [voir dire] question, is to insist on something closer to perfection than our judicial system can be expected to give.

McDonough, 464 U.S. at 555. "The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough*, 464 U.S. at 556. A juror's failure to speak during voir dire about a material fact *can* also amount to juror misconduct. *Allyn v. Boe*, 87 Wn. App. 722, 729, 943 P.2d 364 (1997). But there is no such misconduct alleged or shown here.

B. Juror 32's Ability To Try Case Fairly and Impartially

Because Lar did not arrange for transcription of voir dire, we do not have that part of the record before us. Nevertheless, it appears that, as Lar asserts, (1) during voir dire, the trial court asked the prospective jurors if they were acquainted with any State witnesses, juror 32 did not respond, and he was accepted for the jury; (2) on the second day of trial, Lar moved to excuse juror 32 after his counsel saw this juror greet State witness McKnight in the hallway; and (3) counsel questioned juror 32, who explained that he did not know McKnight well ("the boyfriend of a former girlfriend of [juror 32's] stepson"[19]), had not spoken to him in over six months, would not be influenced by this acquaintance, had not known McKnight's last name to respond during voir dire, and would not give McKnight's testimony more weight than the other witnesses. Satisfied that this juror was unbiased, the trial court denied Lar's motion to excuse him.

But Lar does not contend that juror 32 committed misconduct in failing to disclose during voir dire that he had a passing acquaintance with McKnight or in sharing during jury deliberations

[19] VRP (March 25, 2010) at 57.

any personal views about the witness's credibility. Nor does Lar claim that juror 32 was biased against him or that juror 32 intentionally disobeyed the trial court's instructions not to speak to witnesses. On the contrary, the record shows that juror 32 did not realize that his stepson's former girlfriend's boyfriend, whose surname (McKnight) he did not know, was a State witness during voir dire or when juror 32 greeted him in the hallway on the second day of trial because McKnight did not testify as a State witness until the *third* day of trial.

Lar appears to argue that, because he had two unused peremptory challenges when the jury was empanelled, (1) he could have used one challenge to excuse juror 32 during voir dire if he had known about the juror's acquaintance with McKnight; (2) the trial court deprived him of his right to exercise a peremptory challenge when it denied his motion to remove juror 32 on the second day of trial; and (3) therefore, automatic reversal is required. Lar's reliance on *State v. Bird*, 136 Wn. App. 127, 148 P.3d 1058 (2006), is misplaced: *During jury selection*, the trial court miscalculated the number of Bird's remaining peremptory challenges, thereby denying him an available challenge to which he was entitled. *Bird*, 136 Wn. App. at 131-32. Under those circumstances, our court held that the trial court's erroneous denial of a peremptory challenge left an objectionable juror on the jury, which required reversal without a showing of prejudice. *Bird*, 136 Wn. App. at 134. The facts here differ significantly: The trial court neither miscalculated Lar's peremptory challenges nor denied Lar's use of them during voir dire; rather, Lar simply did not use them all. And it was not until the second day of trial that Lar moved to excuse Juror 32, allegedly to exercise an "available peremptory challenge," after the trial court found no reason to excuse him for cause and to replace him with an alternate juror. Br. of Appellant at 33. Contrary

to RAP 10.3(a)(6), Lar cites no authority for his proposition that he is entitled to exercise peremptory challenges after the jury has been selected, sworn, and empanelled and the trial has begun. Thus, we do not further address this argument.

We turn instead to the question of whether the trial court abused its discretion when it found juror 32 did not exhibit any "prejudice" and could continue to try the case fairly and impartially, and it denied Lar's motion to excuse this juror. VRP (March 25, 2010) at 60. Under RCW 2.36.110, the trial court 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.

(Emphasis added). The trial court fulfilled this duty here. Away from the other jurors, counsel questioned juror 32 about his relationship with McKnight. Juror 32 testified that he had not known and, therefore, not recognized McKnight's name when the court read the witness list during voir dire; that McKnight was a "boyfriend of a former girlfriend of [his] stepson,"[20] with whom he had not spoken in over six months; and that McKnight's testimony would not have any effect on his ability to serve as a juror and cause him to give McKnight's testimony more weight than that of other witnesses. The trial court found that juror 32 had not exhibited any "prejudice," that he had "answered the questions appropriately," and that there was not a "legal basis" for excluding him. VRP (March 25, 2010) at 60. Deferring to the trial court's broad discretion in such findings and rulings, we find no abuse in denying Lar's motion to excuse Juror 32 during the second day of trial.

[20] VRP (March 26, 2010) at 57.

III. Evidence

Lar next argues that the trial court erred in denying his motion to suppress evidence that police unlawfully seized after they detained, arrested, and searched him without a warrant. The State responds that (1) the trial court did not abuse its discretion in denying Lar's CrR 3.6 motion as untimely under the Lewis County Local Rules; and (2) even if the trial court had ruled on the merits of Lar's motion, he would not have prevailed. We agree with the State.

We review for abuse of discretion a trial court's admission of evidence. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable reasons or grounds. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court's evidentiary error that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "[E]rror is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Where an error violates a constitutional mandate, we apply the more stringent "harmless error beyond a reasonable doubt" standard. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). In addition, we can affirm the trial court on any ground the record supports. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Assuming then, without deciding, that the trial court should not have ruled Lar's motion untimely, any error was harmless because the record shows that the challenged seizure of evidence was legal. Generally, warrantless searches and seizures are per se unreasonable and

violate the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, unless the State shows that an exception to the warrant requirement applies.[21] Such exceptions include exigent circumstances, searches incident to a valid arrest, inventory searches, seizure of objects in plain view, and *Terry*[22] investigative stops. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Under both *Terry* and Washington case law, a police officer may stop a person for investigative purposes without a warrant if the officer has reasonable suspicion that the person has been involved in criminal activity. *Terry*, 392 U.S. at 27.[23] To justify a *Terry* stop and an investigatory detention, an officer must have "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *see also State v. Kennedy*, 107 Wn.2d 1, 5, 726 P.2d 445 (1986). Articulable suspicion means "a substantial possibility that criminal conduct has occurred or is about to occur." *Kennedy*, 107 Wn.2d at 6. When evaluating the reasonableness of an investigative stop, we consider the totality of the circumstances, including the officer's training and experience, the location of the stop, and the conduct of the person detained. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

> An informant's tip may justify an investigative stop if the tip
>
> possesses sufficient indicia of reliability, *i.e.*, the circumstances suggest the informant's reliability or there is some corroborative observation which suggests the presence of criminal activity or that the information was obtained in a reasonable fashion.

[21] *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002).

[22] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[23] *See also State v. Glover*, 116 Wn.2d 509, 513, 806 P.2d 760 (1991).

Kennedy, 107 Wn.2d at 7. Although an anonymous informant's accurate description of a vehicle alone is "not [sufficient] corroboration or indicia of reliability" for an investigative stop,[24] our Supreme Court has upheld an investigative stop based on two informant tips where the officer had experience with the crime investigated and corroborated some of the informants' factual information before he conducted the stop. *Kennedy*, 107 Wn.2d at 8-9. Here, as in *Kennedy*, the Centralia and Olympia police departments received telephone tips from two citizens (McKnight and Schultz), describing the same suspicious man with visible injuries who had traveled from Ronnell's house (near the Centralia credit union) to Olympia; based on these tips, the police suspected that this was the same man who had burglarized and attempted to rob the Centralia credit union with a knife and a gun earlier that day.

After receiving a call from dispatch that the suspect was last seen leaving Olympia's Phoenix Inn in a white taxi with a red top, Officer Brown independently corroborated the tips: Six or seven blocks from the Phoenix Inn, he saw a taxi with the same logos dispatch had described, pulled up behind the taxi, and observed, crouched in the back seat, a white male with "lightish or gray hair"[25] who matched the descriptions of the Centralia robbery suspect and the suspicious person from the Phoenix Inn. At this point, Officer Brown and other Olympia and Centralia police officers had sufficient evidence to form a reasonable suspicion that the man in the taxi, Lar, had been involved in the attempted robbery to justify conducting an investigative

[24] *State v. Lesnick*, 84 Wn.2d 940, 943, 530 P.2d 243 (1975).
[25] VRP (March 26, 2010) at 135.

stop.[26] They also had reason to believe that he was armed and dangerous and to treat the stop as "high risk."[27] Olympia police conducted a "high risk" stop of Lar's taxi, with their weapons drawn.[28]

Centralia police officers independently corroborated the citizen tips as they took note of Lar's physical characteristics, his bloody jeans and duct tape, and his probable gunshot wounds, which, taken together with the totality of circumstances, gave the officers probable cause to arrest Lar. *See State v. Lee*, 147 Wn. App. 912, 922, 199 P.3d 445 (2008), *review denied*, 166 Wn.2d 1016 (2009) (applying totality of circumstances test to *Terry* stops). After arresting Lar for the burglary and the attempted credit union robbery, they searched his person incident to arrest and

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[26] Lar relies on *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006), from Division Three of our court, to argue ineffective assistance of counsel. Br. of Appellant at 22-26. This reliance is similarly misplaced based on its distinguishing facts. Unlike the officer in *Meckelson*, here, Officer Brown did not pull Lar's taxi over for a "pretextual" traffic stop or because he believed Lar might have committed some generalized crime that the police had yet to discover. *Meckelson*, 133 Wn. App. at 436. On the contrary, the officers were pursuing this *particular* suspect for a *particular* crime; and, when they stopped Lar's taxi, they reasonably suspected that that he had committed the attempted credit union robbery in Centralia and that he was armed with a knife and a gun. Consistent with *Kennedy*, the officers did not pull Lar's taxi over until Officer Brown had independently corroborated the citizens' tips.

[27] The officers knew the following facts: (1) A white male, approximately 6' 3" and 60 years old with gray or light-colored hair, had displayed a knife and a gun while attempting to rob a credit union in Centralia earlier in the day; (2) he had threatened to take the robbery victim hostage; (3) he had been seen wearing bloody clothing and may have been shot; (4) he had recently traveled by taxi to Olympia, where he had last been seen leaving the Phoenix Inn in a white taxi with a red top; (5) shortly after receiving the dispatch description of the taxi, Officer Brown saw a taxi matching the description six or seven blocks from the Phoenix Inn; and (6) the man Officer Brown observed in the back seat of the taxi matched the description of the robbery suspect.

[28] That officers point weapons at a suspect they believe to be dangerous does not automatically convert an investigative stop to an arrest. *State v. Belieu*, 112 Wn.2d 587, 604, 773 P.2d 46 (1989).

seized evidence from Lar, including the blood-stained clothing and duct tape that both citizens had reported he had been carrying. *State v. O'Neill*, 148 Wn.2d 564, 585, 62 P.3d 489 (2003) (valid search incident to arrest if there is probable cause to arrest and an "actual custodial arrest" takes place). The police later used a court order to obtain Lar's DNA and compared it to one of the blood-stained glass shards found at the credit union.

We hold that, because the initial stop, subsequent arrest, search incident to arrest, and seizure of evidence were legal, the trial court would have been justified in denying Lar's motion to suppress had it ruled on the merits. Accordingly, we affirm the trial court's denial of Lar's motion to suppress on this alternative ground.

IV. Effective Assistance of Counsel

Lar also argues that he received ineffective assistance when his trial counsel failed to file a timely motion to suppress evidence seized after his warrantless detention and arrest and a motion to suppress the BB gun and the knife that the police found after they "coerced" his statements at the hospital. Br. of Appellant at 26.

A. Standard of Review

We review de novo ineffective assistance of counsel claims.[29] To establish ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that this deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A defendant must meet both prongs; failure to show either prong will end our inquiry.

[29] *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

The threshold for deficient performance is high; a defendant must overcome "'a strong presumption that counsel's performance was reasonable.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

> "'When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.' Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's performance.' Not all strategies or tactics on the part of defense counsel are immune from attack. 'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'"

Grier, 171 Wn.2d at 33-34 (citations omitted) (quoting *Kyllo*, 166 Wn.2d at 863; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Roe v. Flores-Ortega*, 527 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

B. Failure To File Timely Motion To Suppress Evidence Seized Following Arrest

The State concedes that Lar's counsel was deficient in failing to file timely his motion to suppress the evidence flowing from Lar's warrantless detention and arrest: his identity, his clothing, his statements, his DNA, the police officers' observations that Lar had probable gunshot wounds, and the BB gun and knife. We accept the State's concession that counsel was deficient in failing to file the motion to suppress within the timeframe specified by the court rules. Therefore, we address the second prong of the ineffective assistance test—prejudice: Lar must demonstrate that, but for his counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Because we have already held that the record supports the

seizure of evidence incident to Lar's arrest, we cannot say there is a reasonable probability that the trial court would have granted counsel's motion to suppress had he timely filed it or that the result of the trial would have been different. Because Lar has not shown prejudice, his ineffective assistance of counsel claim fails.

C. Failure To Move To Suppress BB Gun and Knife

Lar also argues that he received ineffective assistance when his counsel failed to move to suppress the BB gun and the knife, which the police discovered by allegedly exploiting his "coerced statements" at the hospital.[30] Br. of Appellant at 26. Because Lar has not shown that this failure shows his counsel's performance was deficient, we disagree.

The trial court suppressed all of Lar's statements to the officers at the hospital, including his statements about where he had hidden the BB gun and the knife. Clerk's Papers (CP) at 62. Lar's counsel did not, however, move to suppress the BB gun and knife, which police later found and seized after learning their locations from Lar. As a matter of legitimate strategy, Lar's trial counsel may have wanted the BB gun in evidence to argue in closing that it was not a real gun and, thus, not a "deadly weapon," thereby partially negating one element of Lar's first degree burglary[31] and attempted first degree robbery[32] charges, as well as the deadly weapon sentencing

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[30] The State does not address Lar's second ineffective assistance claim based on counsel's failure to move to suppress the BB gun and knife as fruits of Lar's illegal hospital interrogation.

[31] RCW 9A.52.020(1) provides:

> 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.

(Emphasis added).

enhancements[33] on all counts.

Because the officers found and seized the BB gun and the knife at the same time, it appears unlikely that Lar could have moved to suppress only the knife while keeping the BB gun before the jury. Moreover, Weitz had already described the knife in her testimony about Lar's robbery attempt at the credit union, and she had pointed it out for the jury when they viewed the credit union's surveillance video. Consistent with his argument that the BB gun was not a "deadly weapon," defense counsel also argued in closing that the knife's blade was "less than three inches" long and, thus, it, too, was not a "deadly weapon." VRP (March 31, 2010) at 48. Because Lar has not shown the absence of a legitimate strategic reason for counsel's decision not to move to suppress the BB gun and knife, he fails to meet the deficient performance prong of his ineffective assistance of counsel claim. *Grier*, 171 Wn.2d at 33; *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Accordingly, we need not address the second, prejudice prong in holding that Lar has not shown ineffective assistance of counsel on this ground.

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[32] RCW 9A.56.200(1) provides:

> A person is guilty of robbery in the first degree if:
> (a) In the commission of a robbery or of immediate flight therefrom, he or she:
> (i) Is *armed with a deadly weapon*; or
> (ii) Displays what appears to be a firearm or other deadly weapon; or
> (iii) Inflicts bodily injury; . . .

(Emphasis added).

[33] Former RCW 9.94A.533(4) (2009). The Legislature amended this statute in 2011, but the changes do not affect the issues in this case.

V. Persistent Offender Sentence

Lastly, Lar argues that the trial court erred in sentencing him to life in prison without the possibility of parole under the POAA because the State did not submit "substantial evidence" that he had two prior convictions for bank robbery.[34] Br. of Appellant at 35. Lar contends that Tien's testimony that he (Lar) was the defendant named on the two federal felony judgment and sentence documents was insufficient proof of his prior convictions because (1) although familiar with Lar's criminal record, Tien had not been physically present when the federal court sentenced Lar for his earlier crimes; and (2) her testimony was insufficient to prove that he was the same Michael Anthony Lar named in the documents because the State presented no fingerprint comparisons or testimony from a person who had been physically present at the sentencings for these prior convictions. These arguments fail.

We review de novo a sentencing court's offender score calculation and its interpretation of the POAA. *State v. Knippling*, 166 Wn.2d 93, 98, 206 P.3d 332 (2009); *State v. Birch*, 151 Wn. App. 504, 515, 213 P.3d 63 (2009). To establish a defendant's criminal history for POAA and Sentencing Reform Act of 1981[35] sentencing purposes, the State must prove the existence of his prior convictions by a mere preponderance of evidence.[36] Although this burden of proof requires

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[34] Lar does not argue that he had a Sixth Amendment right to a jury trial before the trial court sentenced him under the POAA. Therefore, we do not address this issue in our opinion.

[35] Ch. 9.94A RCW.

[36] *Knippling*, 166 Wn.2d at 100; *State v. Wheeler*, 145 Wn.2d 116, 121, 34 P.3d 799 (2001) (citing *State v. Thorne*, 129 Wn.2d 736, 782, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)), *cert. denied*, 535 U.S. 996 (2002); RCW 9.94A.500(1).

"some showing that the defendant before the court for sentencing and the person named in the prior conviction[s] are the same person," when the prior convictions at issue are under the same name as the defendant before the sentencing court, identity of names is sufficient proof of this requirement.[37] *State v. Ammons*, 105 Wn.2d 175, 190, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930 (1986).

A defendant may rebut such showing by declaring under oath that he is not the person named in the prior convictions. *Ammons*, 105 Wn.2d at 190. Only then does the burden shift back to the State to prove by independent evidence—such as fingerprints, testimony from court personnel present at the prior adjudication, or institutional packets—that the defendant before the court for sentencing and the defendant named in the prior conviction are the same person. *Ammons*, 105 Wn.2d at 190. If, however, a defendant files no such declaration, the identity of the names alone is sufficient to include the prior conviction in the defendant's offender score. *Ammons*, 105 Wn.2d at 190; *see also State v. Priest*, 147 Wn. App. 662, 670, 196 P.3d 763 (2008), *review denied*, 166 Wn.2d 1007 (2009).

Under the POAA, the trial court must sentence a persistent offender to life in prison without the possibility of parole. *Knippling*, 166 Wn.2d at 98; RCW 9.94A.570. A "persistent offender" is someone who, at sentencing for a most serious offense conviction, has previously been convicted on two separate occasions of most serious offenses under RCW 9.94A.525.[38] A

[37] We acknowledge that "'[t]he best evidence of a prior conviction is a certified copy of the judgment.'" *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002) (quoting *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)).

[38] Former RCW 9.94A.030(34)(a) (Laws of 2009 ch. 28 § 4).

"[m]ost serious offense" includes "[a]ny felony defined under any law as a class A felony or criminal solicitation of or criminal conspiracy to commit a class A felony." Former RCW 9.94A.030(29)(a) (2009). As we have just noted, the State submitted certified copies of a "Michael Anthony Lar['s]" two earlier federal judgment and sentences for two prior "most serious offense[s]"—a 1985 conviction for two counts of armed bank robbery and two 1997 convictions for armed bank robbery and bank robbery. Sentencing Ex. 1, 2. Lar submitted no declaration under oath that he was not the person named in these judgment and sentences. Therefore, under *Ammons* and the POAA's sentencing rules, governed by the SRA,[39] the State's reliance on Lar's name to prove that he was the same Michael Anthony Lar named on the two federal judgment and sentences was sufficient proof by a preponderance of the evidence that he was the same defendant.[40] We hold, therefore, that the State presented sufficient evidence of Lar's two prior

[39] The Washington Supreme Court has held that, under the POAA, the State must prove the existence of a defendant's prior convictions by only a preponderance of the evidence. *Thorne*, 129 Wn.2d at 784. Thus, the State can use certified copies of his judgment and sentences to prove to the trial court a defendant's prior convictions; if the defendant contests his identity, the State can submit his fingerprints to prove his identity. *Thorne*, 129 Wn.2d at 783.

[40] Lar's reliance on *State v. Hunter*, 29 Wn. App. 218, 627 P.2d 1339 (1981), to support his insufficiency argument fails. Br. of Appellant at 35-37. *Hunter* did not involve proof of prior convictions for POAA sentencing purposes; rather, it involved proof of a prior conviction as an *element of the charged crime* of attempted first degree escape, namely that Hunter had been in jail on a felony conviction at the time of his attempted escape. *Hunter*, 29 Wn. App. at 221-22. We held that (1) where a former judgment is an *element of the substantive crime charged*, identity of the name alone in a judgment and sentence is not sufficient proof of the identity of the person charged to warrant submitting the prior conviction to the jury; and (2) the State must submit independent evidence that the defendant is the same person named on the prior conviction. *Hunter*, 29 Wn. App. at 221-22. In contrast, for purposes of sentencing under the POAA, a defendant's prior convictions are not "elements" of any criminal offense; therefore, the State need not prove their existence beyond a reasonable doubt. *Wheeler*, 145 Wn.2d at 120; *Thorne*, 129 Wn.2d at 779, 784.

most serious offenses and that the trial court did not err in sentencing Lar to life in prison without the possibility of parole under the POAA.

We affirm Lar's convictions and sentence.

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

Hunt, J.

I concur:

Armstrong, P.J.

I concur in result only:

Quinn-Brintnall, J.