IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NELSON HERNANDEZ, Appellant.	No. 41707-3-II (Consolidated) PART PUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. ENRIQUE RIVERA, Appellant.	No. 41717-1-II
STATE OF WASHINGTON, Respondent, v. JASON DELACRUZ, Appellant.	No. 41908-4-II
In re Personal Restraint Petition of JASON DELACRUZ, Petitioner.	No. 43146-7 II

Bridgewater, J.P.T.[1] — Nelson Hernandez, Enrique Rivera, and Jason Delacruz appeal from their convictions and sentences. We have consolidated Delacruz's personal restraint

[1] Judge C. C. Bridgewater is serving as a judge pro tempore of the Court of Appeals, Division II, pursuant to CAR 21(c).

petition (PRP) with this appeal. We hold that (1) sufficient evidence supports the first degree burglary conviction; (2) convictions for both first degree burglary and residential burglary do not violate double jeopardy protections when they concern burglaries of different homes; (3) the defendants' convictions for firearm theft merge with their convictions for firearm possession, thus, we accept the State's concession, vacate those convictions, and remand for resentencing; and (4) trial counsel did not render ineffective assistance based on offender score calculation. Finally, we deny Delacruz's statement of additional grounds (SAG) and his PRP, holding that a witness's identification of Delacruz's photograph as being taken from the jail's booking area, did not rise to the level of a mistrial; and holding that neither the testimony using the term "victim" nor the prosecutor's closing comments were errors of constitutional magnitude that caused actual and substantial prejudice.

FACTS

I. Three burglaries

Over a two-day period, a group of five to six persons burglarized three different homes. The first burglary occurred at Sara Spencer's house, where a group of burglars kicked in her front door while she was at work and her son was at school. The burglars took various items of property, including a laptop computer, a digital camera, electronic game systems, and games.

The second burglary occurred at Iolani Menza's house, where a group of burglars kicked in his door while he and his son were at a restaurant eating breakfast. The burglars took various items of property, including a desktop computer, cameras, electronic game systems, and games, a ukulele, a Coach purse, a cell phone, and an iPod. Additionally, the burglars took a 20-gauge

shotgun, in a zippered, soft gun case from underneath Menza's bed. At the time of the burglary, the gun was loaded with blanks, birdshot, and slugs. Menza kept the fully functional shotgun for home protection.

The third burglary occurred at Joseph Kraut's house, where a group of burglars kicked in the garage door while Kraut and his wife were away on vacation. The burglars took an autographed Green Bay Packers jacket and baseball cards. Additionally, the burglars took a safe about the size of a dorm room refrigerator. Kraut kept the safe hidden, such that only someone looking for it would find it; and he secured the safe with both key and combination locks.

Kraut, who is a Washington State Patrol trooper, kept his wife's fine jewelry, his duty taser, and several firearms in the safe. The firearms included: (1) a .40 caliber duty revolver; (2) a .357 caliber "back-up weapon" revolver; (3) a 9mm Beretta, which was his first duty weapon; (4) a .357 Ruger, which he used for target practice; (4) a .22 Ruger pistol, which he also used for target practice; and (5) a .25 caliber pistol. Report of Proceedings (RP) at 263. The firearms were all operational but unloaded. Kraut stored the magazines for the .22 Ruger pistol and the .25 caliber pistol in the same safe but he stored the rest of the magazines in a separate location, which the burglars did not disturb.

II. Procedure

Police charged Hernandez, Rivera, and Delacruz each with two counts of first degree burglary; three counts of residential burglary; three counts of first degree theft; two counts of firearm theft; one count of possession of a stolen firearm; one count of possession of stolen property; and one count of first degree trafficking in stolen property. Additionally, the State

charged Hernandez and Delacruz with two counts of unlawful possession of a firearm. For all the defendants, the State alleged firearm enhancements on several of the charges.

The jury convicted Hernandez of one count first degree burglary, three counts of residential burglary, two counts of first degree theft, two counts of firearm theft, one count of possession of stolen firearm, one count of possession of stolen property, one count of first degree trafficking in stolen property, and one count of second degree unlawful possession of a firearm.

The jury convicted Rivera of one count of first degree burglary, three counts of residential burglary, two counts of first degree theft, two counts of firearm theft, one count of second degree theft, one count of possession of a stolen firearm, one count of first degree possession of stolen property, and one count of first degree trafficking in stolen property.

The jury convicted Delacruz on one count of first degree burglary, three counts of residential burglary, two counts of first degree theft, two counts of firearm theft, one count of second degree theft, one count of possession of stolen firearm, one count of first degree possession of stolen property, one count first degree trafficking in stolen property, and one count of first degree unlawful possession of a firearm.

At sentencing, the court merged one count of residential burglary with the sentence for first degree burglary (count II and count I). The court also merged the count of possession of stolen property with the sentence for first degree theft (count XV and XIV). Based on the State's argument that multiple firearms were involved, the court did not merge the count of possession of a stolen firearm with the sentence for theft of a firearm; the parties did not object. Hernandez, Rivera, and Delacruz appeal.

ANALYSIS

I. Sufficient Evidence

Hernandez, Rivera, and Delacruz argue that insufficient evidence supported their first degree burglary convictions because they did not commit the burglaries while armed and the firearms were merely "loot" acquired during the burglary. Br. of App. Delacruz at 10; Br. of App. Hernandez at 2; Br. of App. Rivera at 2. We hold that there is sufficient evidence to support first degree burglary because one of the defendants carried the stolen gun to the waiting vehicle; thus they committed the burglaries while armed.

When reviewing a challenge to the sufficiency of the evidence, we consider the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). We draw all reasonable inferences from the evidence in the State's favor and interpret the evidence "'most strongly against the defendant.'" *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We consider both circumstantial and direct evidence as equally reliable and defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

First degree burglary requires the State to prove, among other elements, that the defendants were armed with a deadly weapon or assaulted another person. RCW 9A.52.020. The statutory definition for "deadly weapon" provides:

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is

> used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6). This definitional statute creates two categories of deadly weapons: deadly weapons per se and deadly weapons in fact. A firearm, whether loaded or unloaded, is a deadly weapon per se. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 365, 256 P.3d 277 (2011).

When first degree burglary involves deadly weapons per se, specifically firearms taken in the course of a burglary, "'no analysis of willingness or present ability to use a firearm as a deadly weapon'" is necessary. *Martinez*, 171 Wn.2d at 367 (quoting *State v. Hall*, 46 Wn. App. 689, 695, 732 P.2d 524 (1987)). For purposes of first degree burglary, defendants are armed with a deadly weapon if a firearm is easily accessible and readily available for use by the defendants for either offensive or defensive purposes. *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). When the defendant had actual possession of a firearm, sufficient evidence supports a first degree burglary conviction despite the firearm being unloaded and no evidence showing that defendant intended to use it. *State v. Faille*, 53 Wn. App. 111, 114-15, 766 P.2d 478 (1988).

Here, Hernandez, Rivera, and Delacruz had actual possession of Menza's loaded, fully functional, 20-gauge shotgun, when one of them carried the shotgun out of Menza's house and placed it into the back of their vehicle. Where defendant was in actual possession of the firearm, sufficient evidence supports a first degree burglary conviction, despite no evidence showing that defendant intended to use it. *Hall*, 46 Wn. App. 695. This case involves a deadly weapon per se, a firearm, and a first degree burglary conviction, without firearm enhancements.

Hernandez, Rivera, and Delacruz rely on *Brown*, 162 Wn.2d 422, to argue that the State failed to show a nexus between the firearm and the crime. We have previously held that the

"nexus" requirement is not applicable to firearm enhancements when there is actual, not constructive, possession of a firearm. *State v. Easterlin*, 126 Wn. App. 170, 173, 107 P.3d 773 (2005), *review granted & aff'd on other grounds by* 159 Wn.2d 203 (2006) (our Supreme Court has affirmed this concept); *see Easterlin*, 159 Wn.2d at 209 (concluding that in actual possession cases, it will rarely be necessary to go beyond the commonly used "readily accessible and easily available" instruction). So even if we were considering a firearm enhancement, a "nexus" finding is not required because the possession was actual, not constructive.

Brown does not benefit the defendants here. Hernandez, Rivera, and Delacruz overlook that the *Brown* analysis encompasses both first degree burglary and firearm sentence enhancements and that *Brown*'s nexus requirements pertained to firearm sentence enhancements. *Brown*, 162 Wn.2d at 434 n.4 (arguing that the dissent relies on cases that do not involve both a deadly weapon sentence enhancement and first degree burglary).

In *Brown*, Brown and another man burglarized a house but did not remove anything. When the occupant of the house returned home, he observed his unloaded AK-47 rifle, normally kept in the closet, on his bed, along with an ammunition clip from a different rifle. Based on the rifle's location, the trial court convicted Brown of first degree burglary and applied a firearm sentence enhancement. *Brown*, 162 Wn.2d at 427. Our Supreme Court vacated the first degree burglary conviction and firearm enhancement, holding that application of a firearm sentence enhancement required a nexus among the defendant, the weapon, and the crime, and that did not exist. *Brown*, 162 Wn.2d at 432, 435. The *Brown* court distinguished the long line of case law holding that a defendant is armed if he or she enters a building unarmed and then acquires a

firearm as "loot." *Brown*, 162 Wn.2d at 434 n.4 (citing *Faille*, 53 Wn. App. at 114-15; *Hall*, 46 Wn. App. at 695). The *Brown* court stated that those cases were not determinative because in those cases, weapons were removed from the homes and those cases did not involve firearm enhancements but dealt solely with first degree burglary. *Brown*, 162 Wn.2d at 434 n.4. Thus, a nexus requirement is inapplicable when the charge is first degree burglary and a firearm is stolen.

Taken in the light most favorable to the State, we hold that sufficient evidence supports Hernandez's, Rivera's, and Delacruz's first degree burglary convictions.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

II. Double Jeopardy

Hernandez argues that his convictions for both first degree burglary and residential burglary violate constitutional protections against double jeopardy.

We review double jeopardy claims de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). Article I, section 9 of the Washington Constitution and the Fifth Amendment to the federal constitution protect persons from a second prosecution for the same offense and from multiple punishments for the same offense imposed in the same proceeding. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010).

Hernandez correctly argues that the jury convicted him of both residential burglary and first degree burglary for the Menza burglary. But the trial court merged those convictions at sentencing. Hernandez's judgment and sentence shows that the trial court entered one conviction

for first degree burglary and two convictions for residential burglary. Regarding Menza's house, the trial court entered one conviction for first degree burglary; regarding Spencer's house, the trial court entered one conviction for residential burglary; and regarding Kraut's house, the trial court entered one conviction for residential burglary. Because Hernandez's multiple convictions punished distinct acts, the trial court did not impose multiple punishments for the same offense. Therefore, we reject Hernandez's double jeopardy argument.

III. Assistance of Counsel

Hernandez, Rivera, and Delacruz[2] argue that their counsel were ineffective at sentencing because counsel failed to ask the court (1) to vacate convictions for possession of stolen firearms after they were convicted for taking the same property and (2) to treat several convictions as one crime for the offender score. We accept the State's concession and we vacate the convictions for possession of a stolen firearm because they merge with the convictions for firearm theft based on the Kraut burglary. *State v. Melnick*, 131 Wn. App. 835, 841, 129 P.3d 316 (2006). We remand for resentencing regarding those counts; therefore, we do not consider them in our discussion of calculating the offender score.

Washington follows the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to show that Hernandez, Rivera, and Delacruz received ineffective assistance of counsel, they must show (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Because defendants must meet both prongs, a failure to show either prong will end the inquiry. *See State v. Fredrick*,

[2] Delacruz adopts Hernandez's arguments and assignments of error by reference. RAP 10.1)(g).

45 Wn. App. 916, 923, 729 P.2d 56 (1986). Deficient performance is that which falls below an objective standard of reasonableness. *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015

(2009). Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

1. Calculating Offender Score

For the first time on appeal, Hernandez, Rivera, and Delacruz[3] argue that some of their convictions occurred at the same time and place and involved the same victim; therefore, they constituted the "same criminal conduct" under RCW 9.94A.589(1)(a). Hernandez, Rivera, and Delacruz argue that trial counsel rendered ineffective assistance by failing to raise this argument at sentencing. Specifically, they contend that a set of convictions connected to the Menza burglary constituted the same criminal conduct: (1) firearm theft (count V) and (2) first degree theft (count IV). Additionally, Hernandez, Rivera, and Delacruz contend that the same set of convictions, connected to the Kraut burglary, constituted the same criminal conduct: (1) firearm theft (count XII) and (2) first degree theft (count XIV).

As an initial matter, Hernandez, Rivera, and Delacruz stipulated to their offender scores; thus, this court might conclude that they have failed to preserve this issue for appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (defendant waives challenge to same criminal conduct where alleged error involves an agreement to facts). Nonetheless, because Hernandez, Rivera, and Delacruz raise the issue in the context of a claim of ineffective assistance from counsel, we will consider these claims on their merits to determine if trial counsel gave deficient assistance.

[3] In his PRP, Delacruz also makes an offender score argument. We consider that argument herein.

2. Firearm Theft and First Degree Theft

To establish that their trial counsel ineffectively represented them by stipulating to their offender scores, Hernandez, Rivera, and Delacruz must show that trial counsel's representation (1) "was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances"; and (2) "prejudiced [Hernandez's, Rivera's, and Delacruz's case], i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 334-35.

We will not reverse a trial court's determination of what constitutes the same criminal conduct absent an abuse of discretion or misapplication of the law. *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999). Where two or more offenses encompass the same criminal conduct, the sentencing court counts them as a single crime when calculating the defendant's offender score. RCW 9.94A.589(1)(a). "Same criminal conduct" means "two or more crimes that require the same criminal intent, [were] committed at the same time and place, and involve[d] the same victim." RCW 9.94A.589(1)(a). If any one of these elements is missing, the sentencing court must count the offenses separately in calculating the offender score. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). The parties do not dispute that the crimes occurred at the same time and place. Instead, the State correctly argues that the two crimes are not the same criminal conduct because they have different intents.

To determine if two crimes share criminal intent, this court focuses on whether the offender's intent, objectively viewed, changed from one crime to the next. *State v. Adame*, 56

Wn. App. 803, 810, 785 P.2d 1144, *review denied*, 114 Wn.2d 1030 (1990). We consider multiple factors to determine objective intent, including: (1) how intimately related the crimes are, (2) whether the criminal objective intent substantially changed between the crimes, (3) whether one crime furthered another, and (4) whether both crimes were part of a recognizable scheme or plan. *State v. Lewis*, 115 Wn.2d 294, 301, 797 P.2d 1141 (1990); *State v. Burns*, 114 Wn.2d 314, 319, 788 P.2d 531 (1990).

Hernandez's, Rivera's, and Delacruz's convictions for firearm theft and first degree theft do not have the same intent. This court has held that firearm theft[4] convictions involve the criminal intent "to steal and possess [victim's] firearms." *State v. Tresenriter*, 101 Wn. App. 486, 497, 4 P.3d 145 (2000). In contrast, first degree theft[5] involves the criminal intent to deprive the owner of property and services, other than firearms, valued above $1,500. We conclude that because firearm theft and first degree theft have different criminal intents, trial counsel did not render ineffective representation by stipulating to their offender scores.

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[4] RCW 9A.56.300 provides:

> (1) A person is guilty of theft of a firearm if he or she commits a theft of any firearm.
> (2) This section applies regardless of the value of the firearm taken in the theft.
> (3) Each firearm taken in the theft under this section is a separate offense.
> (4) The definition of "theft" and the defense allowed against the prosecution for theft under RCW 9A.56.020 shall apply to the crime of theft of a firearm.
> (5) As used in this section, "firearm" means any firearm as defined in RCW 9.41.010.
> (6) Theft of a firearm is a class B felony.

[5] RCW 9A.56.030 provides, in relevant part:

> (1) A person is guilty of theft in the first degree if he or she commits theft of:
> (a) Property or services which exceed(s) five thousand dollars in value other than a firearm as defined in RCW 9.41.010;
> (b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another.

IV. Statement of Additional Grounds

In his SAG, Delacruz also argues that the trial court erred by denying his mistrial motion after a witness's statement suggested that Delacruz was in custody. When asked by the State to identify a photograph for the jury, Detective Kolp replied, "'This is a digital photograph I took yesterday morning in the booking area of the Pierce County jail.'" SAG at 2. Delacruz objected and asked for a mistrial. The trial court stated that Delacruz had a point, but it added that there were no perfect trials, and this incident did not rise to the level of a mistrial. The trial court denied the mistrial motion; the parties did not ask the trial court for a curative jury instruction.

We review the trial court's denial of a mistrial motion for abuse of discretion and find such an abuse only when a "defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant will be tried fairly." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Every criminal defendant is entitled to a fair trial by an impartial jury. *State v. Gonzalez*, 129 Wn. App. 895, 900,120 P.3d 645 (2005). This right includes the right to the presumption of innocence. *Gonzalez*, 129 Wn. App. at 900. The trial court has the duty to be alert to any factor that could undermine the presumption of innocence, thereby undermining the fairness of the proceeding. *Gonzalez*, 129 Wn. App. at 900.

In *Gonzalez*, the trial court undermined the presumption of innocence by informing the jury: (1) the defendant was in jail because he could not post bail, (2) the Department of Corrections was transporting him back and forth, and (3) the defendant would appear in the courtroom in restraints and under guard. *Gonzalez*, 129 Wn. App. at 898. The facts here are simply not that egregious.

Here, there was a one-time reference to a photograph taken from jail. Although the jury learned of Delacruz's custodial status, which may present some risk of prejudice, any prejudice was unlikely to have affected the trial outcome. We conclude that, in and of itself, this fact does not rise to the level sufficient to violate Delacruz's right to a fair and impartial trial. *State v. Mullin-Coston*, 115 Wn. App. 679, 693, 64 P.3d 40 (2003). Therefore, we hold that the trial court did not abuse its discretion by denying Delacruz's mistrial motion.

V. PRP

In his PRP, Delacruz argues that the trial court erred by: (1) permitting the use of the word "victim" and (2) permitting prosecutorial misconduct, based on vouching. PRP at 5.

A. Standard of Review

Personal restraint petitioners challenging a trial court judgment and sentence must do more than show legal error; they must show either constitutional error that caused actual and substantial prejudice or nonconstitutional error that inherently caused a complete miscarriage of justice. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (citing *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990)).

B. The Term "Victim"

Delacruz argues that the trial court erred by permitting the use of the word "victim." During trial, the trial court asked the parties to instruct witnesses to use the name of individual homeowners instead of calling them "victims," and the parties agreed. But during their testimony about their investigation, two police officers used the term "victim" and none of the defendants objected.

Here, two witnesses used the term "victim" in passing and without objection. Had any of the defendants objected, the trial court would have had the opportunity to instruct the jury that the crimes had not yet been proven. Nonetheless, the references were brief and, further, there was no dispute that someone burglarized the residences, leaving the homeowners victims of a crime. We conclude that the passing use of the term "victim" here does not rise to the level of evidentiary error that entitles Delacruz to relief. *Lord*, 152 Wn.2d at 188.

C. Prosecutorial Misconduct: Vouching

Delacruz next argues that the prosecutor impermissibly vouched for the credibility of the State's witnesses. Police charged Gerado Marin-Andres and Gregorio Smith Escalante with crimes relating to some or all the three burglaries; both men pleaded guilty to their respective charges and testified at trial. In his closing argument, Delacruz argued that Escalante and Marin-Andres lacked credibility because they testified as part of their agreement with the State. In rebuttal, the State responded that surveillance photography corroborated Escalante's and Marin-Andres's testimony; therefore, the jury should consider it credible. The State then argued that in contrast, no evidence corroborated Delacruz's testimony; therefore, the jury should consider it less credible. Delacruz objected, arguing that this argument was "burden shifting." RP at 830. The trial court overruled the objection.

It is improper to imply that the defense has a duty to present evidence. *State v. Gregory*, 158 Wn.2d 759, 859, 147 P.3d 1201 (2006). But the State is entitled to comment on the quality and quantity of presented evidence and such a comment does not necessarily suggest that the defense bears the burden of proof. *Gregory*, 158 Wn.2d at 860. A prosecutor may not assert a

personal opinion about the defendant's guilt or a witness's credibility. *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). But a prosecutor enjoys wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *Gregory*, 158 Wn.2d at 860. To determine whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, we view the challenged comments in context and look for "clear and unmistakable" expressions of personal opinion. *McKenzie*, 157 Wn.2d at 53-54 (quoting *State v. Papadopolous*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

Here, in response to Delacruz's attack on the credibility of the State's witnesses, the prosecutor compared the witnesses' testimony with the other evidence. She then told the jury that the evidence supported the State's witnesses, rather than Delacruz's testimony. Because the prosecutor merely commented on the amount or quality of evidence supporting, or not supporting, Escalante's, Marin-Andres's, and Delacruz's testimony, this comment does not suggest that Delacruz had the burden of proof. *Gregory*, 158 Wn.2d at 860. Additionally, the prosecutor's remarks highlighted independent facts. This is a permissible comment on the evidence and the inferences available from it. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). We conclude that the prosecutor's comments were proper; and did not reach the credibility of the State's witnesses.

Delacruz does not meet his burden to show either constitutional error that caused actual and substantial prejudice or nonconstitutional error that inherently caused a complete miscarriage of justice. *Lord*, 152 Wn.2d at 188. Thus, we deny the PRP.

We affirm, but remand for vacation of the defendants' convictions for possession of stolen firearms. Finally, we dismiss Delacruz's SAG and deny his PRP, holding that the identification of the photograph, as being taken from the jail's booking area, did not rise to the level of a mistrial; and holding that neither the testimony using the term "victim" nor the prosecutor's closing comments were errors that entitle him to relief.

Bridgewater, J.P.T.

We concur:

Hunt, J.

Van Deren, J.