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Washington State
Court of Appeals
Division Two

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CORY RANDON LEWIS, Appellant.	No. 49006-4-II (cons. with 50076-1-II UNPUBLISHED OPINION
In re the Matter of the Personal Restraint of: CORY RANDON LEWIS, Petitioner.	No. 50076-1-II

SUTTON, J. — Cory Randon Lewis appeals his conviction for second degree murder. Lewis's direct appeal was consolidated with his Personal Restraint Petition (PRP). In Lewis's direct appeal, he argues that the trial court failed to create a sufficient record to review its decision to deny Lewis's request for an exceptional downward sentence. He next argues that his trial counsel was ineffective for not properly arguing that Lewis should have received an exceptional downward sentence. Lewis also argues that the trial court improperly ordered a mental health evaluation as a condition of his community custody. Lastly, he argues that the trial court improperly imposed a $200 criminal filing fee as a mandatory legal financial obligation (LFO). We hold that the trial court record is sufficient to permit review of Lewis's sentence, his trial

counsel was not ineffective, the trial court properly ordered a mental health evaluation, and the trial court did not err by imposing the criminal filing fee.

In Lewis's PRP, he claims that the evidence is insufficient to support his conviction because his murder of Page was justified, and thus, the trial court erred in denying his request for an exceptional downward sentence. Because the record is sufficient for review and the trial court entered findings of fact to support its decision that an exceptional downward sentence was not factually or legally supported, the trial court did not err in denying Lewis's request for an exceptional downward sentence. Lewis also claims that the trial court improperly calculated his offender score by including offenses that had "washed out." However, because the prior offenses did not wash out, the trial court properly calculated Lewis's offender score. Thus, we affirm his conviction and we deny Lewis's PRP.

FACTS

The State charged Lewis with second degree murder for the death of Cory Page.[1] Lewis and Page were roommates and had a contentious relationship. In September 2014, they had a physical altercation. On December 7, Lewis and Page had another altercation that ended with the death of Page. Lewis elected to waive his right to a jury trial and the case proceeded to a bench trial.

At trial, Lewis testified that on December 8, he and Page got into an argument in Lewis's room. While the two were arguing, Page yelled at him, threatened to shoot him, and waived a gun around in the air. Lewis also claimed that Page pointed the gun directly at Lewis. Lewis stated

[1] The amended information also included a firearm enhancement.

that Page demanded some clothing back, and once Lewis gave Page the clothing, the argument ended. After the argument, Lewis grabbed his own gun and went to leave the residence.

As Lewis was leaving, Page was standing in his own doorway with his back to Lewis. Lewis then saw Page begin to turn and feared that Page would shoot him. Lewis then shot Page twice. As the first shot was fired, Page's hand was up in the upper portion of his torso and the bullet went through his wrist, fracturing it, and then entered his chest, ultimately causing his death. At the time that he was shot, Page was not facing Lewis. Either before or after the first shot, Page told Lewis to "chill." Verbatim Report of Proceedings (VRP) (Mar. 17, 2016) at 71; Clerk's Papers (CP) at 56. Lewis then fired a second shot that struck Page in the deltoid region of the right arm, fracturing his arm. Lewis attempted to shoot Page a third time but the gun jammed.

At trial, Lewis asserted that he acted in self-defense. He testified that he was worried that Page might shoot him, but that he could not recall if Page had a gun in his hand before he fired the shots at Page. Lewis stated that after he fired the shots, he left the residence, dumped the gun in a lake, and did not return to the home for several days. When he returned home, Lewis called 911 and reported Page's death. Initially, Lewis told the police that he did not know anything about Page's death. In an interview with the police, Lewis originally claimed innocence for Page's death but ultimately admitted to killing Page. During the interview, Lewis did not claim that he acted in self-defense, that Page had a gun in his hands when he took his clothes back, or that Page pointed a gun at him before he shot Page. Lewis eventually showed the police where he disposed of the gun.

At the trial, multiple officers testified to seeing Page's gun on the floor next to his body. The medical examiner testified that one bullet struck Page's hand, which was in front of his torso. This shot went through his wrist and entered his upper chest. The medical examiner opined that the wounds would have made it difficult for Page to pull a trigger or grip anything. Lastly, the medical examiner testified that it was these shots that caused Page's death.

In order to support his claim of self-defense, Lewis called his therapist, Regina Hicks. Hicks testified that Lewis was a former client of hers. Hicks established that Lewis had post-traumatic stress disorder (PTSD), a mental disorder. She said that the PTSD caused Lewis to have an exaggerated sense of threats and that Lewis was often defensive or reacted defensively to the threats. Lewis was aware of his mental health issues and knew that they would often result in verbal and physical fights. Hicks referred Lewis to anger management treatment to control his emotions. Lastly, Hicks testified that Lewis had told her about his contentious relationship with Page.

After the bench trial, the trial court made findings of fact and conclusions of law. The trial court found that "[a]fter Cory Page left [Lewis's] room, the threat, if any, subsided." CP at 53, Findings of Fact (FOF) 6. The court also found that "[w]hen Page left [Lewis's] room, he (Page) did not have a firearm in his hands." CP at 52, FOF 5. It also found that when Lewis shot Page, Page was not holding a firearm. Lastly, the trial court found that at the time of Page's death, Lewis "did not have a reasonable belief of imminent danger of harm, injury, or death." CP at 56, FOF

19. The trial court ultimately found Lewis guilty of second degree murder.[2] The trial court specifically concluded that "the State has proven beyond a reasonable doubt the absence of justifiable homicide in the murder of Cory Page." CP at 60, Conclusions of Law (COL) 6.

At the sentencing hearing, defense counsel orally moved for an exceptional downward sentence on the grounds that Page, to a significant degree, had provoked the incident. Defense counsel had not previously made the trial court or the State aware that counsel would be requesting a mitigated downward sentence. Defense counsel cited RCW 9.94A.535 as the authority granting the trial court discretion to mitigate the sentence on the grounds that, to a significant degree, Page had provoked the incident. Defense counsel also cited to an analogous case to support an exceptional downward sentence.[3] The trial court, after taking a recess to consider the matter, denied the motion on the grounds that it found no basis to impose a mitigated sentence. Specifically, the trial court stated,

> I do not find under the provisions of RCW 9.94A.535 that there is a basis to depart from the standard range. And I am familiar with the authority that was cited by [defense counsel]. And I don't believe -- although it is an intellectually sound argument by [defense counsel], I simply don't find there is a basis here. . . . I just don't see there is a basis for this.

VRP (April 28, 2016) at 28-29.

The trial court calculated Lewis's offender score to be a seven. The trial court's calculation included three prior class B felonies, three prior class C felonies, and Lewis's current conviction.

[2] Lewis was also convicted of unlawful possession of a firearm in the second degree, but does not appeal that conviction.

[3] VRP (Apr. 28, 2016) at 26; *State v. Mary Pascal*, 108 Wn.2d, 125, 736 P.2d 1065 (1987).

Lewis's three class C felonies were (1) a conviction in January of 2006 for second degree unlawful possession of a firearm, (2) a conviction in May of 2006 for unlawful possession of a controlled substance, and (3) a conviction in October of 2009 for attempting to elude. Defense counsel did not object to the inclusion of the class C felonies in the offender score calculation.

The trial court then sentenced Lewis to a standard range of 300 months with 60 months on the firearm enhancement, and 36 months of community custody. As a condition of community custody, the trial court ordered that the community corrections officer (CCO) could consider having the defendant undergo a mental health evaluation and treatment. The judgment and sentence states "[p]er CCO consider mental health treatment [and] anger management. Evid[ence] in trial, D[efendant] diagnosed w/ PTSD." CP at 35. The trial court also imposed LFOs, including a $200 criminal filing fee. Lewis filed a timely direct appeal and PRP. Lewis appeals his conviction for second degree murder and his judgment and sentence, including the court ordered mental health evaluation.

ANALYSIS

I. SUFFICIENCY OF THE RECORD FOR REVIEW

Lewis argues that the record is insufficient to permit appellate review of his sentence because the trial court made a legal error when it did not sufficiently enumerate its reasons for denying his request to impose an exceptional downward sentence. We disagree and hold that because the trial court properly exercised its discretion and stated its reasons why it denied an exceptional downward sentence, the trial court did not err.

Under RCW 9.94A.535(1)(a), a trial court has the discretion to downwardly depart from the standard sentencing range if it finds that "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." We review the trial court's decision not to impose an exceptional downward sentence if the court refused to exercise its discretion or it relied on an impermissible basis for its decision. *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). "[A] trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Here, the trial court found that

[w]hen Page left the defendant's room, he (Page) did not have a firearm in his hand.

[a]fter Cory Page left the defendant's room, the threat, if any, subsided . . . .

CP at 52, 53, FOF 5, 6. The trial court rejected the notion that Lewis was under imminent danger of harm, injury, or death from Page. Specifically, it stated,

> I do not find a basis under the provisions of RCW 9.94A.535 that there is a basis to depart from the standard range. And I am familiar with the authority that was cited by [defense counsel]. And I don't believe—although it is an intellectually sound argument by [defense counsel], I simply don't find there is a basis here. . . . I just don't see there is a basis for this.

VRP (Apr. 28, 16) at 28-29.

The trial court specifically found that any conduct or threat by Page, if it existed, had subsided and did not justify the murder by Lewis. The trial court rejected the arguments by defense counsel that Lewis was in fear for his life or in fear from suffering great bodily harm at the time he shot Page. Because the trial court stated its reasons why an exceptional downward sentence

should not be imposed, the record is sufficient for appellate review. Because the record is sufficient for our review, the trial court properly exercised its discretion under RCW 9.94A.535 when it ruled that an exceptional downward sentence was not factually or legally supported. Thus, we hold that the trial court did not err in sentencing the defendant within the standard range.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Lewis argues that his trial counsel was ineffective because he did not sufficiently brief or explain that Page's conduct, as the provoker under 9.94A.535(1)(a), was a mitigating factor that justified the trial court imposing an exceptional downward sentence from the standard sentencing range. Specifically, defense counsel requested that a sentence of 120 months be imposed when the standard range was between 216 to 316 months. We disagree and hold that Lewis's trial counsel was not deficient.

A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, Lewis must show that (1) his trial counsel's representation was deficient and (2) his trial counsel's deficient representation prejudiced him. *Strickland*, 466 U.S. at 687-88; *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

The first prong is met by the defendant showing that the performance falls "'below an objective standard of reasonableness.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 668). A defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *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.'" *Grier*, 171 Wn.2d at 33 (quoting *Kyllo*, 166 Wn.2d at 863). The second prong is met if the defendant shows that there is a substantial likelihood that the misconduct affected the verdict. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010). A defendant's failure to meet their burden on either prong will be fatal to a claim of ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 862.

Lewis argues that "it was deficient performance for defense counsel not to cite [*State v.*] *Whitfield* and make it an essential part of a more zealous advocacy for the mitigated sentence Lewis was requesting." Br. of Appellant at 13; *State v. Whitfield*, 99 Wn. App. 331, 994 P.2d 222 (1999). In *Whitfield*, the trial court imposed an exceptional downward sentence based on the mitigating factor that the victim was the provoker of the incident. *Whitfield*, 99 Wn. App. at 333. The trial court agreed with the defendant that, to a significant degree, the victim was the provoker of the incident, and thus, imposed an exceptional downward sentence from the standard range. *Whitfield*, 99 Wn. App. at 333. On appeal, the State argued that, as a matter of law, the victim's nonthreatening words were insufficient to provoke the assault and that the defendant's response was not proportionate. *Whitfield*, 99 Wn. App. at 335. Division One affirmed the trial court's determination that verbal provocation is a sufficient mitigating factor to invoke an exceptional downward sentence from the standard range and that the defendant's response to the initial provocation need not be proportional. *Whitfield*, 99 Wn. App. at 337-38.

Whitfield is distinguishable because here the issue is whether there was any provocation at all when Lewis shot Page, not whether Page's provocation was sufficient. Thus, whether or not

defense counsel cited to *Whitfield*, it would not have changed the trial court's determination regarding whether a mitigated exceptional downward sentence was factually or legally supported under RCW 9.94A.535(1)(a). Therefore, because the outcome of the sentencing would not have been affected by his counsel citing to *Whitfield*, Lewis fails to show the prejudice prong of the *Strickland* test. *Strickland*, 466 U.S. at 687. Therefore, we hold that Lewis's claim of ineffective assistance of counsel fails.

III. MENTAL HEALTH EVALUATION AS A CONDITION OF COMMUNITY CUSTODY

Lewis next argues that the trial court erred when it ordered a mental health status evaluation under RCW 9.94B.080 as a condition of community custody without first determining whether he was a mentally ill person as defined under RCW 71.24.025. We disagree.

We review the imposition of community custody conditions for an abuse of discretion. *State v. Johnson*, 184 Wn. App. 777, 779, 340 P.3d 230 (2014). A trial court abuses its discretion if its decision is manifestly unreasonable, is exercised on untenable grounds, or for untenable reasons. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

RCW 9.94B.080 states,

> The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense.

Under RCW 9.94B.080, a trial court may "order a mental health evaluation *only if* the court finds [the defendant] 'is a mentally ill person as defined in RCW 71.24.025' and mental illness likely

'influenced the offense.'" *State v. Shelton*, 194 Wn. App. 660, 675-76, 378 P.3d 230 (2016) (emphasis added), *review denied*, 187 Wn.2d 1002 (2017).

RCW 71.24.025 defines a "mentally ill person" as a person who has a condition that is caused by a mental disorder or presents a likelihood of serious harm. Former RCW 71.24.025(27) (2016). A mental disorder is "any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions." Former RCW 71.05.020(29) (2016).

Here, the trial court heard testimony from Lewis's therapist that Lewis had PTSD, a mental disorder, his PTSD made him more aggressive, and his PTSD had a substantial adverse effect on his cognitive and volitional functions. In the judgment and sentence, the trial court found that Lewis's mental impairment had an adverse impact on his functioning, and the trial court's finding stated, "Per CCO consider mental health treatment [and] anger management. Evid[ence] in trial, D[efendant] damaged w/ PTSD." CP at 35. Thus, the trial court found that Lewis was a mentally ill person as defined in RCW 71.24.025, based on his mental health history and its impact on his functioning. Because the trial court made this finding, it had the discretion under RCW 9.94B.080 to order a mental health evaluation and did not abuse its discretion. Thus, we affirm the trial court's decision to order a mental health evaluation as a condition of Lewis's community custody.

IV. IMPOSITION OF THE CRIMINAL FILING FEE

Lewis next argues that the trial court erred when it imposed a criminal filing fee of $200. Specifically, Lewis states that "by directing only that the defendant is 'liable' for the criminal filing fee, the [l]egislature did not create a mandatory fee." Br. of Appellant at 19; RCW 36.18.020(2)(h).

Lewis argues that the word "liable" does not necessarily mean "obligated." Br. of Appellant at 19. We disagree.

Washington courts have consistently affirmed that such LFO fees are mandatory.[4] *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); *State v. Blazina*, 174 Wn. App. 906, 911 n.3, 301 P.3d 492 (2013). Thus, we do not engage in statutory interpretation and we affirm the trial court's imposition of the criminal filing fee.

PERSONAL RESTRAINT PETITION

I. LEGAL PRINCIPLES

To be entitled to relief in a PRP, the petitioner must establish by a preponderance of the evidence either constitutional error that resulted in actual and substantial prejudice to the petitioner, or a nonconstitutional error that resulted in a complete miscarriage of justice. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 676, 327 P.3d 660 (2014). Here, Lewis alleges a constitutional error in his sufficiency of the evidence claim and alleges a nonconstitutional error in the alleged miscalculation of his offender score.

To make a prima facie showing, the petitioner must present the evidence that is available to support the factual allegations underlying the claim of unlawful constraint. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013). A petition must state with particularity facts that,

[4] Lewis argues that this court has a "split of authority" regarding whether the fee is mandatory. Br. of Appellant at 20-21. However, he cites to a footnote in an unpublished case for this proposition. Br. of Appellant at 21; *State v. Schechert*, 2016 WL 2654604 *3, n.5. Because we do not make holdings in footnotes or unpublished cases, we do not address this argument. *See* GR 14.1(a).

if proven, would entitle the petitioner to relief—bald assertions and conclusory allegations are not enough. *Yates*, 177 Wn.2d at 18.

If the petitioner's allegations are based on matters outside the existing record, he must also demonstrate that he has competent, admissible evidence supporting the allegations. *Yates*, 177 Wn.2d at 18. If the evidence is based on knowledge in the possession of others, the petitioner must present their affidavits, with admissible statements, or other corroborative evidence. *Yates*, 177 Wn.2d at 18. Factual allegations must be based on more than speculation, conjecture, or inadmissible hearsay. *Yates*, 177 Wn.2d at 18.

II. TRIAL COURT'S FINDING OF FACT THAT THE MURDER OF PAGE WAS NOT JUSTIFIED

Lewis claims that the evidence presented at his bench trial was insufficient to support a conviction for second degree murder because his murder of Page was justified by provocation. Lewis claims that the trial court's finding of fact 19 is not sufficient to support the trial court's conclusion that he was guilty of second degree murder. Finding of fact 19 states that "[a]t the time of murdering [Page] [Lewis] did not have a reasonable belief of imminent danger of harm, injury, or death." CP at 57, FOF 19. The relevant conclusions of law state,

> 3. That the State has proven that [Lewis] is guilty beyond a reasonable doubt of the crimes of MURDER IN THE SECOND DEGREE [] . . . in that, on or about the 7th day of December, 2014, [Lewis] did unlawfully and feloniously act with intent to cause the death of another person, [Page], thereby cause the death of [Page], a human being, and in the commission thereof was armed with a firearm . . . .
>
> . . . .
>
> 6. The State has proven beyond a reasonable doubt the absence of justifiable homicide in the murder of [Page].
>
> 7. The State has proven beyond a reasonable doubt [that Lewis] did not have a reasonable fear of injury, harm or death at the time of murdering Mr. Page.

CP at 59, 60, COL 3, 6, 7. To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). Following a bench trial, we review "whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *Homan*, 181 Wn.2d at 105-06.

"Substantial evidence" is "evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Homan*, 181 Wn.2d at 106. Unchallenged findings of fact are verities on appeal. *Homan*, 181 Wn.2d at 106. If the record contains conflicting testimony, this court will not disturb the trier of fact's credibility and weight determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

We review challenges to conclusions of law de novo. *Homan*, 181 Wn.2d at 106. "Where a conclusion of law is erroneously labeled as a finding of fact, we review it de novo as a conclusion of law." *State v. Z.U.E.*, 178 Wn. App. 769, 779 n.2, 315 P.3d 1158 (2014). "'Circumstantial evidence and direct evidence are equally reliable' in determining the sufficiency of the evidence." *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)).

A person is guilty of second degree murder when that person, with intent to cause the death of another person, but without premeditation, causes the death of such person unless the killing is justified. RCW 9A.32.050(1). A killing is justified if the murderer reasonably believed that the victim had the intent to inflict death or great personal injury, reasonably believed that there was

imminent danger of such harm being accomplished, and used such force as a reasonable prudent person would in similar conditions. RCW 9A.16.050, 020.

Here, Lewis admitted that he shot Page after they argued, but claimed self-defense because he was in fear of imminent harm at the time that he shot Page with his firearm. However, the trial court heard testimony from various officers and the medical examiner which indicated that the murder was not done in self-defense. The trial court found the officers' and the medical examiner's testimony credible, that Lewis did not initially claim self-defense, and that Page did not have a gun in his hands when Lewis shot him.

The trial court found that Page did not have a firearm when he left Lewis's room, and that when Page left Lewis's room any threat to Lewis, if one had ever existed, had subsided. CP at 53, FOF 6. The trial court concluded that Lewis's testimony that he was in fear from Page at the time Lewis shot Page was not credible. CP at 53, COL 7.

Because we defer to the trier of fact for credibility determinations, and we view the evidence and the reasonable inferences in a light most favorable to the State, there was evidence sufficient to prove beyond a reasonable doubt that Lewis intended to cause the death of Page. As discussed above, substantial evidence was presented to support the trial court's findings of fact, including finding of fact 19, that Lewis's murder of Page was not done while Lewis was under a belief of imminent danger of harm, injury, or death. CP at 53, FOF 6. These findings of fact support the trial court's conclusion that the murder of Page was not justified. Thus, Lewis's claim fails.

III. PRIOR CONVICTIONS IN OFFENDER SCORE CALCULATION

Lastly, Lewis claims that the trial court improperly calculated his offender score when it included six prior convictions. He claims that he remained crime free for the five years preceding his current conviction for second degree murder. Lewis claims that the following class C felony convictions wash out: the 1999 felony harassment conviction, the 2006 second degree unlawful possession of a firearm conviction, and the 2009 attempting to elude a pursuing police vehicle conviction. Lewis claims that, because these convictions wash out, his offender score was improperly calculated. Preliminarily, the 1999 felony harassment conviction was not included in the offender score calculation.

Under the "wash out" provision of RCW 9.94A.525(2)(c), prior class C felony convictions are excluded in a defendant's offender score when, since the last date of release from confinement of a felony conviction or entry of the judgment and sentence, the offender has spent five consecutive years in the community without committing any crime that subsequently results in a conviction. Here, Lewis committed three prior class C felonies between 2005 and 2009. Lewis's last release date from custody was February 10, 2010. He was charged in this case on January 27, 2015 and subsequently convicted of second degree murder on December 7, 2014.

Lewis committed a crime that resulted in a conviction prior to the five year wash out period. Because Lewis has not spent five consecutive years in the community without committing any crime that subsequently resulted in a conviction, his three prior class C felony convictions did not wash out. Thus, because the three class C felony convictions did not wash out, the trial court

properly included them in the calculation of his offender score. Therefore, Lewis's claim fails. We affirm Lewis's conviction and we deny his PRP.

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.

SUTTON, J.

We concur:

JOHANSON, P.J.

BJORGEN, J.