IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TRAVIS WADE NEWSOME, Appellant.	No. 40771-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Travis Wade Newsome appeals his convictions of first degree burglary (domestic violence), theft of a motor vehicle, second degree driving while license suspended or revoked, fourth degree assault (domestic violence), and unlawful imprisonment (domestic violence). Newsome challenges two jury instructions pertaining to the burglary charge, the sufficiency of the evidence supporting his burglary conviction, his attorney's decisions regarding the admission of evidence, the trial court's exclusion of evidence, and the trial court's consideration of testimony during his sentencing hearing. Because the evidence was insufficient to prove that the knife Newsome possessed in the course of the burglary was a deadly weapon, we reverse his first degree burglary conviction and remand for further proceedings.

Facts

On the evening of September 24, 2009, Renee Johnson met Newsome at a tavern to discuss their troubled relationship. The two left the tavern together after midnight, and Johnson drove Newsome home. When they arrived, a physical struggle ensued, during which Newsome allegedly attempted to force himself on Johnson and strangle her. Johnson opened the car door and fell to the ground. After further struggle, Newsome ordered Johnson back into the car and made her drive to a nearby store. When the car came to a rolling stop, Newsome got out, and Johnson drove away. She pulled into a driveway and called 911 as well as her best friend, Paula Rose.

The next day, the store's owner discovered that his 4x4 vehicle, which had been in the parking lot with a key in the ignition, was missing. Officers later found the vehicle on the side of the highway.

Newsome was still at large when Johnson and her daughter returned to Johnson's home on September 26. When they checked the periphery of the house, they saw and heard signs that someone had been there and might be inside. Johnson and her daughter screamed, ran to their car, and called 911. While waiting for law enforcement, Johnson saw Newsome walking through her back yard toward an adjoining field. A few minutes later, Lewis County Sheriff's Deputy Duke Adkisson tracked Newsome and found him hiding in some tall grass. The deputy ordered Newsome to the ground, handcuffed him, and searched him after asking if anything in Newsome's pockets might cause injury. Newsome said he had a knife in his pocket, and the deputy found a paring knife with the blade pointed down in his jeans.

The State charged Newsome with first degree burglary (domestic violence), the alternative

offense of residential burglary (domestic violence), theft of a motor vehicle, second degree driving while license suspended or revoked, fourth degree assault (domestic violence), second degree assault with sexual motivation (domestic violence), and unlawful imprisonment (domestic violence).

At trial, Johnson described the attack as set forth above. Both she and her daughter testified that when they entered her home after Newsome's arrest, several items were out of place. Johnson added that she and Newsome had never lived together and that he was not welcome at her house after June 2008. Newsome was at her residence three or four times in 2009, however, as an uninvited guest. He never had a key and never kept his things at her house. She testified that she told Newsome at the tavern that the relationship was over, but he wanted to make it work.

Rose testified that Johnson left her two phone messages in the early morning hours of September 25 after Johnson called 911 but before the deputies arrived. Rose said that Johnson was "scared and panicked and just sounded horrible." Report of Proceedings (RP) (May 5, 2010) at 74. Rose transferred those messages to a compact disk that the State played for the jury.

The deputies who responded to Johnson's 911 call on September 25, testified that she was very upset when they arrived. When the deputies asked what had happened, Johnson described the altercation with Newsome. After his arrest, Newsome admitted to a deputy that he and Johnson had argued as she drove him home, but he denied that any physical struggle had occurred.

At the end of the State's case in chief, the trial court informed the parties that inadvertent contact between Newsome and a juror during a recess might have revealed something the juror

should not have seen, i.e., his handcuffs. The defense proposed explaining why Newsome was in custody by having him acknowledge that he was currently serving a driving under the influence (DUI) sentence. The State agreed that this would be appropriate because a certified copy of Newsome's driving record, which explained that his license suspension was related to a DUI offense, had already been admitted.

The defense then argued that the evidence was insufficient to support the first degree burglary charge because Newsome had not used the knife in his pocket as a deadly weapon. The State responded that the knife's possession was equivalent to its use as a deadly weapon, and the trial court denied the motion to dismiss.

Miranda Rasmussen testified for the defense that Newsome and Johnson were getting along well during the summer of 2009. Defense counsel then asked whether the State would object if Rasmussen testified about Newsome's thoughts concerning a possible break-up with Johnson. In an offer of proof, Rasmussen said she and Newsome discussed his relationship with Johnson a few nights before September 24, and that Newsome said he was thinking of ending it. The defense argued that this testimony was admissible to show Newsome's state of mind. When the State replied that such testimony from Rasmussen would be self-serving hearsay insulated from cross-examination, the trial court agreed and refused to allow it.

Newsome testified that he could not drive because he was serving a DUI sentence. He said that when Johnson proposed going out on September 24, he did not see a future with her. He then testified that although neither of them wanted to give up the relationship, they both wanted it to end when they met on September 24. He said he borrowed the 4x4 vehicle after Johnson left him at the store but abandoned it when it stopped working properly. Newsome said

he went to Johnson's house at her suggestion and entered with a key to collect some personal belongings. He found the knife on the floor by the back door. Johnson repeated on rebuttal that she had never given Newsome a key to her house.

After the State's rebuttal witnesses testified, defense counsel objected to the trial court's refusal to give his proposed jury instruction defining a deadly weapon. The trial court responded that its instruction was the same in substance but simply deleted irrelevant factual references. The proposed instruction read,

> Deadly weapon means any weapon, device, instrument, substance, or article, 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.
>
> The "circumstances" of the use, attempted use or threatened use described above include the intent and present ability of the user, the degree of force, the part of the body to which it is applied and the physical injuries inflicted. Ready capacity is determined in relation to surrounding circumstances with reference to potential substantial bodily harm.

Clerk's Papers (CP) at 40. The court instructed the jury as follows:

> Deadly weapon means any weapon, device, or instrument, 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.
>
> The "circumstances" of the use, attempted use, or threatened use include, but are not limited to, the intent and present ability of the user. Ready capacity is determined in relation to surrounding circumstances with reference to substantial bodily harm.

CP at 49. Defense counsel also objected to the permissive inference instruction, arguing that it was inappropriate given Newsome's relationship with Johnson.

During closing argument, the State contended that the knife found in Newsome's possession was a deadly weapon because he was carrying it when he left Johnson's house. When defense counsel responded that the jury had to consider the circumstances of how he used the

knife before finding that it was a deadly weapon, the State replied that carrying the knife was using it.

The jury found Newsome guilty of first degree burglary, theft of a motor vehicle, second degree driving while license suspended or revoked, fourth degree assault, and unlawful imprisonment, but it acquitted him of second degree assault based on the alleged strangulation attempt.

During sentencing, the trial court allowed the State to present testimony from Newsome's district court probation officer in an attempt to show why the maximum penalty was appropriate. Defense counsel did not object and cross-examined the officer. The State requested a maximum sentence on the felony convictions with the misdemeanor sentences running consecutively. The trial court imposed a high-end standard range sentence on the burglary conviction but ran the rest of the sentences concurrently.

Newsome appeals his convictions and sentences.

Discussion

Deadly Weapon Instruction

Newsome argues that the trial court erred in refusing his proposed instruction explaining that the knife found in his possession was not a deadly weapon per se but only in the manner used. Newsome makes this argument without setting forth the language of the proposed and final instructions and thus violates RAP 10.4(c), which provides that a party who presents an issue requiring the study of a jury instruction should include that instruction in his brief on appeal. In this context, the word "should" is a word of command, not merely suggestion. *Thomas v. French*, 99 Wn.2d 95, 99, 659 P.2d 1097 (1983).

In addition to failing to include the text of the relevant instructions in his brief, Newsome fails to cite the pages of the clerk's papers containing those instructions, thereby violating RAP 10.3(a)(6). He also fails to cite the court's discussion of the proposed deadly weapon instruction and its decision to provide an instruction that was both substantively similar as well as a correct statement of the law. *See* RCW 9A.04.110(6). Had Newsome properly cited the record and included the instructions in his brief, the lack of merit in his argument would have been obvious. We decline to consider this issue further.

Sufficiency of the Evidence—First Degree Burglary

Newsome argues here that the evidence was insufficient to prove that the knife he possessed was a deadly weapon, which was an essential element of the first degree burglary charge. RCW 9A.52.020(1)(a).

Evidence is sufficient if, viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

To convict Newsome of first degree burglary, the jury had to find that he entered or remained unlawfully in a building, that the entering or remaining was with intent to commit a crime against a person or property therein, that in so entering or while in the building or in immediate flight therefrom he was armed with a deadly weapon, and that these acts occurred in Washington. Newsome challenges only the sufficiency of the evidence supporting the deadly weapon element, which the court defined as any weapon, device, or instrument "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." CP at 49. This instruction correctly reflected the statutory definition in RCW 9A.04.110(6), which provides that weapons can be deadly per se (i.e., explosives and firearms), or deadly because they are capable of causing death or substantial bodily harm under the circumstances in which they are used, attempted to be used, or threatened to be used. *State v. Taylor*, 97 Wn. App. 123, 126, 982 P.2d 687 (1999).

As the Washington Supreme Court recently explained, this statutory definition means that mere possession is insufficient to render "deadly" a dangerous weapon other than a firearm or explosive. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 366, 256 P.3d 277 (2011).

> To interpret the statute otherwise would eliminate the distinction between deadly weapons per se (firearms and explosives) and deadly weapons in fact (other weapons). Likewise, it would render meaningless the provision as to the circumstances of use, attempted use, or threatened use.

Martinez, 171 Wn.2d at 366.

At issue in *Martinez* was whether the evidence was sufficient to support a first degree burglary conviction where an officer chased Martinez from a building, tackled him, and noticed an empty knife sheath on his belt during a pat down. When the officer asked about the sheath, Martinez said that the knife must have fallen out while he was running. Officers later found a knife about 15 feet from the building; Martinez identified the knife as his own. *Martinez*, 171 Wn.2d at 358.

Because neither actual nor threatened use of the knife was at issue, the relevant inquiry was whether the State presented sufficient evidence to prove attempted use. *Martinez*, 171 Wn.2d at 368. Even when viewed in the light most favorable to the State, the evidence could not

support such a finding. *Martinez*, 171 Wn.2d at 368. No one saw Martinez with the knife, he manifested no intent to use it either before or after he was apprehended, and he did not have access to it during the scuffle with the officer. "[T]he only evidence that Mr. Martinez attempted to use the knife was the unfastened sheath. This evidence is insufficient to lead a rational fact finder to find intent to use the weapon beyond a reasonable doubt." *Martinez*, 171 Wn.2d at 369.

We must reach the same conclusion here. As in *Martinez*, the only inquiry is whether Newsome attempted to use the knife; there is no evidence that he actually used it or threatened to do so. The record does not provide evidence of an attempted use during his pursuit or apprehension. Once Deputy Adkisson found him hiding, Newsome complied with the deputy's commands and made no attempt to resist the arrest or search. The deputy had no idea that Newsome had a knife until Newsome so informed him. The State argues that the knife was positioned in such a way that it could have been used as a weapon, but a potential use is not an attempted use. Newsome's possession of the knife did not render it a deadly weapon, and we must reverse his first degree burglary conviction.

Permissive Inference Instruction

Newsome also contends that the trial court erred in giving the jury an "inference of intent" instruction pertaining to the burglary charges that the evidence did not support. Despite our reversal of Newsome's first degree burglary conviction, this issue is not moot because of the possibility of his retrial on the residential burglary alternative.[1]

The instruction at issue informed the jury that

> [a] person who enters or remains unlawfully in a building may be inferred

[1] To prove residential burglary, the State again had to prove that Newsome entered or remained in Johnson's home with intent to commit a crime against a person or property therein.

> to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

CP at 57. This instruction was based on RCW 9A.52.040, which provides,

> In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

A permissive inference is constitutionally impermissible only when, under the facts presented, there is no rational way the trier of fact could make the connection the inference permits. *State v. Jackson*, 112 Wn.2d 867, 880, 774 P.2d 1211 (1989); *State v. Grayson*, 48 Wn. App. 667, 670, 739 P.2d 1206, *review denied*, 109 Wn.2d 1008 (1987); *see also State v. Deal*, 128 Wn.2d 693, 700, 911 P.2d 996 (1996) (when permissive inferences are only part of State's proof supporting an element, due process is not offended if prosecution shows that inference more likely than not flows from proven fact). Newsome contends that the permissive inference instruction was impermissible because "[i]t was undisputed that [he] had been coming and going freely in and out of Johnson's house for years," thereby eliminating any basis to claim that his presence in the house created grounds to infer that his motives were criminal. Br. of Appellant at 17.

This argument ignores testimony from several witnesses. Rose testified that two weeks before the incident, Johnson had told Newsome he was not welcome at her home. Johnson's daughter testified that when Newsome had been at her mother's home three weeks earlier, Johnson had become very upset when he refused to leave. By September 2009, Newsome had not been welcome at Johnson's house for "a long time." RP (May 6, 2010) at 67. Johnson

testified that after summer 2008, Newsome was not welcome at her home. She denied that Newsome had a key to her home or any personal items to collect. She added that after Newsome's entry on September 26, several windows were open and liquor and food were scattered throughout the house. In addition, the knife found in Newsome's pocket matched a set of Johnson's kitchen knives. Furthermore, Newsome's actions in fleeing and hiding in the grass do not appear to be those of a person who entered the residence for a lawful purpose. We see no error in the trial court's conclusion that given the evidence, the permissive inference instruction was appropriate.

Ineffective Assistance of Counsel

Newsome claims here that his attorney represented him ineffectively by failing to object to the admission of hearsay evidence and by having him testify about his prior DUI conviction.

To prevail, Newsome must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). To rebut this presumption, a defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). When a defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence likely would have been sustained, and (3) that the trial's result would have differed had the evidence not been admitted. *Saunders*, 91 Wn. App. at 578.

A. Failure to Object to Hearsay

Newsome contends that his attorney was deficient in failing to object to testimony from two deputies about Johnson's statements when they responded to her initial 911 call. Newsome does not describe these statements but, based on the citation in his statement of facts, we assume that he is referring to Johnson's initial statements concerning her altercation with Newsome.[2]

Newsome contends that these statements were inadmissible under several evidentiary rules, but he does not discuss the rule concerning excited utterances. Under ER 803(a)(2), a hearsay statement is admissible as an excited utterance if a startling event occurred, if the statement was made while the declarant was under the stress of the excitement caused by the event, and if the statement related to the startling event. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

An excited utterance may be prompted by a question that follows a startling event, such as when an investigator asks a crime victim what happened. *State v. Owens*, 128 Wn.2d 908, 913, 913 P.2d 366 (1996); *see also State v. Robinson*, 44 Wn. App. 611, 616, 722 P.2d 1379 (responses to questions admissible as excited utterances), *review denied*, 107 Wn.2d 1009 (1986); *State v. Fleming*, 27 Wn. App. 952, 958, 621 P.2d 779 (1980) (victim's statements to police during three-hour interview admissible as excited utterances), *review denied*, 95 Wn.2d 1013 (1981). Here, a startling event occurred, and the deputies who responded to Johnson's resulting

[2] The State refused to address the merits of this argument due to Newsome's failure to cite or describe the statements he finds objectionable. In his reply brief, Newsome asserted that he could not have set forth the statements in his opening brief because of the 50-page limit. RAP 10.4(b). Newsome's opening brief was 31 pages long, and we assume that he could have provided a citation to the record in the 19 pages remaining before he reached the page limit. We also note that a party may request an extension of the page limit when additional briefing is necessary. RAP 10.4(b).

911 call testified that she was still very upset when they arrived. They asked her what had happened, and her responses related to the startling event. Consequently, her statements were admissible under ER 803(a)(2), and there is little likelihood that the trial court would have sustained an objection to their admission. *See State v. Simmons*, 63 Wn.2d 17, 20-21, 385 P.2d 389 (1963) (principal rationale for excluding hearsay not present when both hearsay declarant and recipient testified at trial and were available for cross-examination).

Moreover, there is no reasonable likelihood that the trial's result would have differed had this testimony been excluded. The jury heard recordings of the phone messages Johnson made to her friend before the deputies arrived, and Johnson testified fully and consistently with the deputies' testimony about her statements. We find no basis for this claim of ineffective assistance of counsel.

B. Admission of DUI Conviction

Newsome next contends that his attorney was ineffective in deciding to explain his presence in shackles with testimony that he was serving a sentence for a DUI conviction. He argues that a mistrial motion is the only effective course when a juror sees the defendant shackled.

The record shows that the trial court informed the parties that inadvertent contact between Newsome and a juror during a recess might have revealed Newsome's handcuffs and the fact that he was already in custody. But even if a juror did see Newsome in handcuffs, a new trial was not warranted absent a showing of prejudice. *State v. Ollison*, 68 Wn.2d 65, 69, 411 P.2d 419, *cert. denied*, 385 U.S. 874 (1966); *see also State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (mistrial appropriate only when trial irregularity so prejudices defendant that nothing short of new trial can ensure he will be tried fairly). As the State pointed out, Newsome could not show

prejudice because the fact of his prior conviction was already in evidence. Defense counsel made a tactical decision to have Newsome explain that he was serving a DUI sentence. We see no probability that this explanation altered the trial's outcome given the considerable evidence that Newsome and Johnson quarreled, that he took another's car, and that he entered Johnson's house. This claim of ineffective assistance also fails.

Exclusion of State-of-Mind Evidence

Newsome argues here that the trial court violated his right to present a complete defense when it prohibited a witness from testifying about Newsome's state of mind concerning his relationship with Johnson.

A criminal defendant has a constitutional right to present relevant, admissible evidence in his defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993). Nonetheless, the refusal to admit evidence lies largely within the trial court's discretion, and we will not reverse the trial court's decision absent an abuse of that discretion. *Rehak*, 67 Wn. App. at 162.

Newsome wanted his friend Rasmussen to testify that he was thinking of breaking up with Johnson before they met on September 24. He argued that Rasmussen's testimony was admissible to show his state of mind. *See* ER 803(a)(3) (statements of declarant's then-existing state of mind not excluded by hearsay rule). This testimony would have rebutted Johnson's testimony that the break-up was her idea. The trial court agreed with the State that the proposed testimony was self-serving hearsay and thus inadmissible.

Division Three of this court recently explained that there is no "self-serving hearsay" rule that bars admission of statements that would otherwise satisfy a hearsay rule exception. *State v.*

Pavlik, No. 29172-3-III, 2011 WL 6607312, at *3 (Wash. Ct. App. Dec. 22, 2011). The court noted initially that Washington adopted the Rules of Evidence in 1979, and one of those rules provides that a statement is not hearsay if it is offered against a party and is the party's own statement. *Pavlik*, 2011 WL 6607312, at *3-4 (citing ER 801(d)(2)). Prerule cases admitted such admissions by party-opponents as hearsay exceptions instead of excluding them from the hearsay definition altogether. Under this approach, admissions of a party were hearsay but admissible against the party if relevant. *Pavlik*, 2011 WL 6607312, at *4. It is against this backdrop that the reference to self-serving hearsay was made. *Pavlik*, 2011 WL 6607312, at *4 (citing *State v. Huff*, 3 Wn. App. 632, 636, 477 P.2d 22 (1970), *review denied*, 79 Wn.2d 1004 (1971)). As the court stated in *Huff*,

> Out-of-court admissions by a party, although hearsay, may be admissible against the party if they are relevant. However, if an out-of-court admission by a party is self-serving . . . in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule.

3 Wn. App. at 636 (citations omitted).

Subsequent cases citing this alleged bar to self-serving statements failed to recognize it as prerule authority. *Pavlik*, 2011 WL 6607312, at *4. The rules of evidence contain no self-serving hearsay bar that excludes an otherwise admissible statement. *Pavlik*, 2011 WL 6607312, at *5; *see also State v. King*, 71 Wn.2d 573, 577, 429 P.2d 914 (1967) ("self-serving" is shorthand way of saying statement is hearsay and does not fit recognized exception to hearsay rule). Rather, admissibility must be addressed under the recognized exceptions to the hearsay rule. *Pavlik*, 2011 WL 6607312, at *5.

Here, Newsome's statement about wanting to end his relationship with Johnson, as

offered by Rasmussen, was arguably admissible under the state-of-mind exception to the hearsay rule. ER 803(a)(3). And had it been offered after Newsome testified and was cross-examined, it would have been admissible to rebut a claim of recent fabrication. ER 801(d)(1)(ii).

Any error in excluding the statement was harmless, however, because there is no reasonable probability that the exclusion affected the verdict. *See Pavlik*, 2011 WL 6607312, at *6. Newsome testified about his thoughts concerning the relationship on the night of the altercation with Johnson. Additional testimony about his desire to end their relationship would have done little to assist the defense in light of the evidence of the struggle, vehicle theft, and burglary.

Sentencing Testimony

Finally, Newsome contends that the trial court abused its discretion in allowing his probation officer to testify about his motivation to change. More specifically, Newsome objects to the officer's opinion that he was "[e]xternally motivated. He seemed to, in my opinion, just want to get through it for the court's benefit and I didn't really see a real desire to change." RP (May 21, 2010) at 6. Although Newsome acknowledges that the rules of evidence do not apply to sentencing hearings, he argues that the officer exceeded the proper scope of lay witness testimony by speculating about Newsome's subjective motivations. *See* ER 1101(c)(3) (rules of evidence do not apply to sentencing); ER 701 (limiting opinion testimony from lay witnesses).

But Newsome did not object to this testimony or to the trial court's decision to allow the probation officer to testify, and he was given the opportunity to fully cross-examine the officer. Consequently, this claim of error is waived. *See State v. Coria*, 146 Wn.2d 631, 641, 48 P.3d 980 (2002) (untimely objection to evidence waived); *see also* RCW 9.94A.585 (standard range

sentence cannot be appealed).

We reverse Newsome's first degree burglary conviction and remand for further proceedings in accordance with this opinion.

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.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

WORSWICK, A.C.J.