IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24979-4-III**
	)	**Consolidated with**
Respondent,	)	**No. 27549-3-III**
	)	
v.	)	**Division Three**
	)	
STEVEN PETE BURR,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Brown, J. ─ Steven Pete Burr appeals his attempted first degree murder conviction, contending the trial court erred in denying his evidence suppression motion. In a consolidated appeal, Mr. Burr contends he was prejudiced by the late filing of the transcripts in his case. We reject Mr. Burr's contentions, and affirm.

CRIME FACTS - No. 24979-4-III

Mr. Burr and Sandra Burr were married and lived together on South F Street in Spokane until June 24, 2004, when Mr. Burr was locked out by Ms. Burr during their divorce. Later, Ms. Burr became engaged to Terry Herzog and the pair lived together in the F Street house.

On October 7, 2005, around 7:30 p.m., Ms. Burr and Mr. Herzog were eating dinner in their living room when gunshots entered the home. One bullet struck Mr. Herzog in the chest, wounding him. A neighbor described a person wearing a yellow coat running from the scene. Ms. Burr thought Mr. Burr was responsible for the shooting. She gave law enforcement an unsigned card she reported she had received from Mr. Burr. The card contained some print, a date, and language appearing to threaten Ms. Burr and Mr. Herzog.

In early October 2005, Jean Harris allowed Mr. Burr to stay in a corner bedroom in her house, located on East Wabash in Spokane. After the shooting, Spokane Police Detective Mark Burbridge applied for a search warrant for the bedroom in Ms. Harris' home. The supporting affidavit partly stated:

> [Ms. Burr] told officers that [Mr. Burr] has been stalking her and threatening to hurt her and her fiancée [sic] [Mr. Herzog]. [Ms. Burr] Gave police a Thank You card that had been sent to her from [Mr. Burr]. This card has several hand written messages that say "Yours will come around" and "For What You Did and How You Did It", "Enjoy your secret, gutless, scumbag way of life, sandy Herzog Skank Pussy.
> I contacted [Ms.] Harris at 1218 E. Wabash. [Ms. Harris] said that the house is hers, but about 3 days ago [Mr.] Burr came by and asked if he could stay for awhile. [Ms. Harris] said that [Mr. Burr] moved his belongings into the south-east bedroom and all of his stuff is in there.
> [Ms. Harris] said she last saw [Mr. Burr] at about 1730 today when she left the house. [Ms. Harris] said when she got home from dinner, [Mr. Burr] was gone.

1 Clerk's Papers (CP) at 17-18.

The affidavit requested a search warrant be issued to search the bedroom of Ms. Harris' home, to seize "[y]ellow coat, guns, Ammunition, writings, notes, cards, receipts

– for guns or ammunition, [Mr.] Burr's finger prints." 1 CP at 19. A judge granted the request and a search warrant was issued, for the southeast bedroom of Ms. Harris' home, to search for and seize the following: "[y]ellow coat, guns, Ammunition, writings, notes, cards, receipts – for guns or ammunition, [Mr. Burr's] finger prints." 1 CP at 21-22. The search warrant listed the crime of attempted murder.

Detective Burbridge executed the search warrant on October 8, 2005. He found a two-page handwritten letter and a one-page handwritten letter. The two-page letter is referred to as a suicide letter containing information incriminating Mr. Burr. The one-page letter was addressed to a friend, Rusty, and incriminated Mr. Burr by showing a malevolent, threatening animus toward Mr. Herzog, it partly stated:

> I'm taking it to him where he feels safe. I want to look in his eyes face to face. . . . Let people write and think what they want. This is for my family and friends so that you will all know why. Love you all. Take care of yourselves. And more important, be happy.

2 Report of Proceedings (RP) (Jan. 12, 2006) at 34. Detective Burbridge identified Rusty as Ron Turner.

The State charged Mr. Burr with one count of attempted first degree murder, and an alternative crime. Mr. Burr moved to suppress the two letters found during the warrant search. Mr. Burr argued the affidavit submitted in support of the search warrant was insufficient to support a finding of probable cause, and a *Franks*[1] hearing was required because material facts relating to his non-identification by Ms. Burr's

[1] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

neighbor, Ronald Adamson, were recklessly or intentionally omitted from the affidavit. The trial court denied the motion to suppress the two letters and entered written findings of fact and conclusions of law. The court concluded, "[b]ased on statements made by Ms. Burr and the documents she provided, there was probable cause to search the Wabash residence for document [sic] as listed in the warrant." 1 CP at 36. The trial court further concluded, "[t]he Court found the necessary nexus in the places to be searched for those documents." 1 CP at 36.

At trial, the two letters were admitted into evidence along with the card Ms. Burr gave to law enforcement. Ms. Burr testified she heard a loud "Hey" before the shooting, but she did not recognize the voice, and she did not see who fired the shots. RP (Jan. 11, 2006) at 39. Mr. Herzog testified that after the first shot, he heard someone say, "Payback's a bitch, ain't it?", and the voice sounded like Mr. Burr. RP (Jan. 11, 2006) at 60.

Ms. Burr's next door neighbor, Mr. Adamson, testified that after he heard gunshots, he went outside to investigate, and he saw an individual running. Mr. Adamson testified he did not identify that person as Mr. Burr, but he could not eliminate him, either. Mr. Adamson further testified he has flood lights on the front of his house, which are activated by motion. He testified that when he went outside to investigate the shooting, the lights had not been activated. When asked, "would it be fair to say that you had to have knowledge of where the trip line is in order not to set off the lights," Mr.

Adamson stated, "Yes." RP (Jan. 11, 2006) at 104-05.

Spokane Police Detective Brian Hammond testified officers found a "wooden walking stick or a cane" sitting against a shrub outside of Ms. Burr's home. RP (Jan. 11, 2006) at 141. A photograph of the walking stick was admitted into evidence. Carol Lewis, Ms. Burr's neighbor, testified she gave Mr. Burr a walking stick, and she identified the walking stick as the one in the photograph. Mr. Herzog testified he mowed the lawn a few days before the shooting, and he did not notice the walking stick. Mr. Adamson also did not see the walking stick earlier.

Ms. Harris testified that on the night of the shooting, she left her residence at 5:30 p.m., and Mr. Burr was in the house. James Woodall, a long-time acquaintance of Mr. Burr, testified that on the night of the shooting, he left his house at 7:40 p.m., and he did not see Mr. Burr there. Angelic Woodall testified that Mr. Burr came over to their house between 9:15 and 9:30 p.m., although she did not see him arrive. Janice Woodall testified that she saw Mr. Burr in their house at 10:00 p.m.

The jury found Mr. Burr guilty as charged. Mr. Burr was sentenced on the attempted first degree murder charge, to 225 months' confinement. On March 1, 2006, Mr. Burr appealed.

TRANSCRIPT-DELAY FACTS No. 27549-3-III

On June 28, 2006, this court extended the due date for trial transcripts to September 18, 2006. As of September 27, 2006, the court reporter, Loni Smith, had

not filed the trial transcripts with this court. This court remanded the case to the trial court "for any further proceedings necessary." 2 CP at 47. On October 6, 2006, the trial court ordered Ms. Smith to produce all materials necessary to produce the trial transcripts. On October 31, 2006, the trial court appointed an alternate court reporter to prepare the trial transcripts once the materials were received from Ms. Smith. After Ms. Smith did not produce the materials as ordered by the trial court, she was ordered to appear at a hearing to show cause as to why she should not be held in contempt of court. Ms. Smith then provided the trial court with a copy of her external hard drive. After the alternate court reporter was unable to complete the trial transcripts using this drive, on June 26, 2007, the trial court reappointed Ms. Smith as the court reporter, responsible for producing the trial transcripts. As of October 4, 2007, Ms. Smith had not completed the trial transcripts. After Ms. Smith failed to appear at a show cause hearing set for October 15, 2007, a bench warrant was issued for her arrest.

On July 29, 2008, Mr. Burr unsuccessfully moved to vacate his judgment and sentence, under CrR 7.8(b)(5), arguing his right to appeal a due process violation. Mr. Burr again appealed. Ms. Smith eventually completed the trial transcripts, filing them in the trial court on March 25, 2009. This court consolidated Mr. Burr's appeals.

CRIME ANALYSIS - No. 24979-4-III

The issue is whether the trial court erred in denying Mr. Burr's motion to suppress the two letters found during the execution of the search warrant. Mr. Burr first

contends the affidavit in support of the search warrant did not establish probable cause. Specifically, Mr. Burr contends no probable cause existed to search the bedroom at Ms. Harris' residence for notes, writings or cards.

We review a magistrate's decision to issue a warrant for an abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). In general, this decision should be given great deference. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). However, a trial court's legal conclusion as to whether an affidavit establishes probable cause is reviewed de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). Further, our review is limited to the four corners of the affidavit. *Id*. "[T]he information we may consider is the information that was available to the issuing magistrate." *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110 (1994).

A judge properly issues a search warrant only upon a determination of probable cause. *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). "Probable cause exists where the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location." *Id*. Thus, "'probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched."' *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). Courts evaluate the existence of probable

cause on a case-by-case basis. *Id*. at 149. However, "[a]bsent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *Id*. at 147. Further, "[t]he magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit." *Maddox*, 152 Wn.2d at 505.

Mr. Burr argues the affidavit in support of the search warrant offered no facts to support a reasonable inference that police would find incriminating writings in Ms. Harris' residence. He contends a finding of probable cause is inconsistent with *Thein* and *Olson*. *See Thein*, 138 Wn.2d at 133; *Olson*, 73 Wn. App. 348.

In *Thein*, police officers obtained a search warrant for the defendant's residence based on their generalized conclusion that drug dealers commonly keep evidence of illegal drug dealing in their homes. *Thein*, 138 Wn.2d at 138-40. Our Supreme Court ruled that the generalized statements were insufficient to establish probable cause to search the defendant's residence. *Id*. at 148. The court reasoned, "Although common sense and experience inform the inferences reasonably to be drawn from the facts, broad generalizations do not alone establish probable cause." *Id*. at 148-49.

In *Olson*, police officers obtained a search warrant for the defendant's residence based on an officer's general conclusions about the habits of drug dealers. *Olson*, 73 Wn. App. at 357. On appeal, the court rejected these general conclusions as a basis for the search warrant, stating, "An officer's belief that persons who cultivate marijuana

often keep records and materials in safe houses is not, in our judgment, a sufficient basis for the issuance of a warrant to search a residence of a person connected to the grow operation." *Id*.

Here, unlike *Thein* and *Olson*, the affidavit in support of the search warrant contains more than generalized or conclusory statements. The affidavit contains specific facts regarding Mr. Burr's behavior toward Ms. Burr, and the fact that he had given her a card stating, "'Yours will come around' and 'For What You Did and How You Did It', 'Enjoy your secret, gutless, scumbag way of life, sandy Herzog Skank Pussy." 1 CP at 17. Further, the affidavit stated that according to Ms. Harris, Mr. Burr moved his belongings into the southeast bedroom of her residence "and all of his stuff is in there." 1 CP at 18. The affidavit also stated that Ms. Harris saw Mr. Burr at her residence approximately two hours before the shooting. Based on these facts, it was reasonable to infer that evidence related to the crime, specifically, incriminating writings, would be found in the southeast bedroom at Ms. Harris' residence. According to the affidavit, Mr. Burr had previously documented his feelings to Ms. Burr, he had moved all his belongings into the southeast bedroom of Ms. Harris' residence, and he was at the residence before the shooting. Accordingly, the affidavit in support of the search warrant established probable cause to search the bedroom for notes, writings or cards.

Next, Mr. Burr contends, for the first time on appeal, the search warrant did not

describe the documents with sufficient particularity. Specifically, Mr. Burr contends the search warrant's description "writings, notes, cards" left the police officers executing the warrant with unconstitutionally broad discretion. 1 CP at 22.

"The Fourth Amendment mandates that warrants describe with particularity the things to be seized." *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). In general, this court will not review an issue raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). "An error is manifest when it has practical and identifiable consequences in the trial of the case." *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001). Whether a constitutional issue can be raised for the first time on appeal involves a four part analysis:

> First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest . . . . Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Because Mr. Burr did not raise the particularity contention in his suppression motion, we will not consider it for the first time on appeal. *See State v. Garbaccio*, 151 Wn. App. 716, 731, 214 P.3d 168 (2009) (declining to consider contention not raised in the defendant's suppression motion). In the absence of a motion to suppress on this

particular ground and a ruling by the trial court, we have nothing to review. *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990), *overruled on other grounds by McFarland*, 127 Wn.2d at 337.

Even assuming constitutional error, any error in admitting the two letters found during the execution of the search warrant was harmless. "Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *Id*. Further, to determine whether constitutional error is harmless, "the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id*. at 426.

Mr. Herzog testified after the first shot, he heard someone say "[p]ayback's a bitch, ain't it?", and the voice sounded like Mr. Burr. RP (Jan. 11, 2006) at 60. In addition, the card Ms. Burr provided to law enforcement was admitted into evidence. Further, Detective Hammond testified officers found a "wooden walking stick or a cane" sitting against a shrub outside of Ms. Burr's home. RP (Jan. 11, 2006) at 141. A photograph of the walking stick was admitted into evidence. Ms. Lewis testified she gave Mr. Burr a walking stick, and she identified the walking stick as the one in the photograph. Mr. Herzog testified he mowed the lawn a few days before the shooting,

and he did not notice the walking stick. Mr. Adamson testified he did not see a walking stick against a bush outside of Ms. Burr's home.

Mr. Adamson further testified he has flood lights on the front of his house, which are activated by motion. He testified when he went outside to investigate the shooting, the lights had not been activated. When asked, "would it be fair to say that you had to have knowledge of where the trip line is in order not to set off the lights," Mr. Adamson stated, "Yes." RP (Jan. 11, 2006) at 104-05.

Ms. Harris testified that on the night of the shooting, she left her residence at 5:30 p.m., and Mr. Burr was in the house. Mr. Woodall testified that on the night of the shooting, he left his house at 7:40 p.m., and he did not see Mr. Burr there. Angelic Woodall testified that Mr. Burr came over to their house between 9:15 and 9:30 p.m., although she did not see him arrive. Janice Woodall testified that she saw Mr. Burr in their house at 10:00 p.m.

Looking at this untainted evidence, it "is so overwhelming that it necessarily leads to a finding of guilt." *Guloy*, 104 Wn.2d at 426.

Finally, Mr. Burr assigns error to a finding of fact entered by the trial court with respect to its ruling on his suppression motion. However, this finding is not necessary to resolve the legal issues raised by Mr. Burr. Further, because Mr. Burr presents no argument related to this issue, we decline to address it. *See Newell v. Newell*, 117 Wn. App. 711, 717 n.17, 72 P.3d 1130 (2003).

In sum, the trial court did not err in denying Mr. Burr's motion to suppress the two letters found during the execution of the search warrant.

TRANSCRIPT-DELAY ANALYSIS - No. 27549-3-III

The issue is whether the delay in preparation of the trial transcripts constituted a violation of Mr. Burr's due process rights.

"Washington guarantees the right to appeal criminal prosecutions, and substantial delay in the appellate process may constitute a due process violation." *State v. Lennon*, 94 Wn. App. 573, 577, 976 P.2d 121 (1999) (citing Wash. Const. art. I, § 22; *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1990)). In determining whether a delayed appeal amounts to a due process violation, this court considers (1) "the length of the delay," (2) "the reason for the delay," (3) "the defendant's diligence in pursuing the right to appeal," and (4) "the prejudice to the defendant." *Id*. at 578 (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *Coe*, 922 F.2d at 531-32; *Rheuark v. Shaw*, 628 F.2d 297, 303 (5th Cir. 1980)). "The length of the delay acts as a triggering mechanism, meaning that unless the delay is unreasonable under the circumstance, there is no necessity to inquire further." *Id*. (citing *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992); *Barker*, 407 U.S. at 430). "In extreme circumstances, an inordinate delay may give rise to a presumption of prejudice." *Id*. (citing *Doggett*, 505 U.S. at 655-57).

Here, the delay in preparing the trial transcripts was just over three years, within

the range where consideration of the other three factors becomes necessary. *See United States v. Smith*, 94 F.3d 204, 209 (6th Cir. 1996) (discussing cases where appeal delays of 2 to 13 years were deemed to be egregious enough to require further inquiry). The State concedes the delay here is long enough to trigger consideration of the other three factors. Respondent's Br. at 3; *see also Smith*, 94 F.3d at 209 (accepting the government's concession that a three year delay justified further inquiry).

Turning to the second factor, the reason for the delay was the court reporter's unexplained failure to complete the transcripts in a timely manner, despite multiple attempts by the trial court to obtain the transcripts, and the eventual issuance of a bench warrant for Ms. Smith. The delay was not the fault of the State or the courts. *See Lennon*, 94 Wn. App. at 578 (stating "the court reporter's unexplained procrastination – was not the fault of the State or this court").

Turning to the third factor, the State concedes "there was no lack of diligence on any party's part." Respondent's Br. at 3. In addition, Mr. Burr was diligent in pursuing his appeal, as evidenced by his filing of a motion to vacate his judgment and sentence when the trial transcripts were not forthcoming. Thus, the third factor weighs in Mr. Burr's favor. *See Lennon*, 94 Wn. App. at 578 (acknowledging that the defendant's efforts to pursue his appeal weigh in his favor under the third factor).

Turning to the fourth and final factor, "the primary consideration will always be

the degree to which a defendant is prejudiced by the delay." *Lennon*, 94 Wn. App. at 578. The question of prejudice requires consideration of the following three interests of a convicted defendant seeking a prompt appeal: "(1) to prevent oppressive incarceration pending review; (2) to minimize the defendant's anxiety and concern; and (3) to limit the possibility that the grounds for the appeal or the defenses in the case of a retrial might be impaired." *Id*. at 578-79 (citing *Barker*, 407 U.S. at 532; *Smith*, 94 F.3d at 207; *United States v. Johnson*, 732 F.2d 379, 382 (4th Cir. 1984); *Rheuark*, 628 F.2d at 303 n.8).

Mr. Burr first argues that remaining incarcerated while he was waiting for the trial transcripts caused him great anxiety and concern. However, in the delayed appeal context, more than mere incarceration is required to show prejudice. *See Lennon*, 94 Wn. App. at 579 (defendant arguing prejudice from oppressive incarceration during the delay in his appeal "[w]ithout more . . . cannot show the degree of prejudice necessary to trigger due process protection"). "It is not unusual for appellants to serve their entire sentences before their appeals are heard." *Lennon*, 94 Wn. App. at 579.

Second, Mr. Burr argues the delay reduces the opportunity for the reliable development of facts at a new trial, if his appeal is successful. However, Mr. Burr does not explain how the delay has this effect. Without such an explanation, Mr. Burr cannot establish prejudice. Further, because his appeal was not successful, there is no risk of impairment of the defense in the case of a retrial.

In sum, Mr. Burr has not established a due process violation, because he has not established he was prejudiced by the transcript delay.

Statements of Additional Grounds for Review (SAG)

Pro se, Mr. Burr raises two issues in his SAGs. First, he contends the trial court violated his constitutional rights by taking over three years to produce the trial transcripts. Because this issue is addressed above, we do not consider it. Next, Mr. Burr contends the trial transcripts are incomplete. He alleges the transcripts are missing statements of witnesses, and contain incorrect statements and names. However, he does not state what information is missing or what is incorrect. If other facts exist supporting Mr. Burr's contention, they may be presented in a personal restraint petition. *See McFarland*, 127 Wn.2d at 335 (stating, "[i]f a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition").

Mr. Burr poses several questions such as why the bench warrant for Ms. Smith was not served, and whether Ms. Smith was an employee of the court. These questions do not pose legal issues on which this court can render a decision.

In sum, Mr. Burr's statements of additional grounds for review are without merit.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW

2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.