FILED
COURT OF APPEALS
DIVISION II
2014 APR 29 AM 11:35
STATE OF WASHINGTON
BY ____
DEPUTY

No. 45326-6-II

# COURT OF APPEALS FOR THE STATE OF WASHINGTON
## DIVISION II

TIMMY SHERMAN,
Appellant,

v.

STATE OF WASHINGTON,
Appellee.

# STATEMENT OF ADDITIONAL GROUNDS, RAP 10.10

name: Timmy Sherman
DOC# 257112, Unit ____
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520-9504

AC 8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
FOR DIVISION II

| | | |
|---|---|---|
| Timmy Sherman, Petitioner, | ) | Case No.: 45326-6-II |
| vs. | ) | |
| State of Washington, Respondent | ) | STATEMENT OF ADDITIONAL GROUNDS, PURSUANT TO RAP 10.10 |

I, Timmy Sherman, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in the brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

## Additional Ground 1

Sherman did not get a full and fair hearing because his lawyer was ineffective in not submitting a misdemeanor (WPIC 19.06) jury instruction for trespassing (SEE CP 89-104 for July 16, 2013). Without this instruction to go along with the submitted misdemeanor theft instruction (CP 100) the jury could not have found him guilty of just trespassing and theft even though his attorney argued this during trial. Although the jury may have found him guilty of just theft, this was unlikely without the trespassing instruction, that is, the jury would be confused and limited in what they could determine without all relevant instructions of law. They likely selected the higher crime of burglary since it involves an unlawful

entry and they had no lesser trespass to select and may have felt obligated to choose the one that encompassed both entry and taking. The outcome of his trial would have been different if his lawyer wasn't ineffective by not submitting this instruction to the court. He didn't even object to the jury instructions individually, collectively, or one that was missing (e.g, trespassing) (See CP 79-80). Strictland v Washington, 466 US 668, 104 S. Ct 2052, 80 L. Ed.2d 674 (1984) duo prongs were satisfied in that there was prejudice and it was major because with the WPIC 19.06 he would have been found guilty of one or both misdemeaneanss (29 months for theft & 12 months for trespass) for a total of 29 months (ran concurrently) instead of the 68 months for 2nd degree burglary. He was prejudiced by the difference, that being an additional 39 months due to this Constitutional error which was not harmless. State v. Kyllo, 166 Wn.2d (over on back)

## Additional Ground 2

Sherman did not get a full and fair hearing/due proces of law (State v Powell, 150 Wn. App. 139, 156, 206 P.3d 203 (2009) because the trial judge made two errors pertaining to all the jury instructions:

(1), First, the judge did not read and explain the jury instructions at the start of the trial so the jury could ponder and factor them in before and as they were given evidence/testimony and attorney argument during trial (CP 1-13). The judge waited until both sides closed arguments (CP 80-104), then he gave instructions just a minute before closing argument. This is not proper or smart. For instance, jurors may have felt Sherman was guilty because he didn't testify and if the judge had gone over instruction #15 they may not have convicted him for not testifying like he had something to hide. The jurors had little time to ponder the law also just before closing remarks and had no real guidance during trial when it really counted. His lawyer didn't object to this either.

(2) Second, niether the judge, prosecution, or defense counsel ensured that jury instructions #15 and #16 (CP 1-13, 79-80 and 89-104) were provided to the jurors at the start of the trial so they had all the law to make their verdict, but isntead they waited until both sides clsoed their arguments to add these for the jury. These were added just aminute before closing arguments. Instruction #15 states: (over on back)

## Additional Ground 3

ADDITIONAL GROUND 1

862, 215 P.3d 177 (2009); USCA Const Amendments V, VI, & XIV and Wash. Const. Art 1, §22. RAP 2.5. All of this preserves and federalizes this issue. State v Powell, 150 Wn.Ap 139, 156, 206 P.3d 703 (2009) that he did not get a full and fair hearing/due process of law.

ADDITIONAL GROUND 2

"The defendant is not required to testify " and "and you may not use the fact that the defendant has not testified to infer guilt or prejudice in any way."

Instruction #16 (CP 100-101) states:

"You may give such weight and creditability to any alleged out of court statement as you see fit, taking into consideration the surrounding cir cumstances."

The jury wasn't given these until the trial practically was over so they could onder them and factor them in to all the testimony and evidence. This prejudiced Mr Sherman and denied him a full and fair hearing/due process of law.

Sherman did not get a full and fair hearing/due process of law because of his lawyer's ineffective assitance of counsel (Strictland v Washington, 644 US 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v Kyllo, 166 Wn.2d 862, 215 P.3d 177 (2009); USCA Const. Amend. V, VI, and XIV and Wash. Const. article 1, §22. RAP 2.5 preserves and federalizes this issue) because:

(1) He didn't object to the "change evidence" which was inadmissible because no money was ever recovered by the police and there was no exact figure either. Without this evidence the prosecution had insufficient evidence to convict Sherman (CP 89-119, CP 14-19, CP 24 and 62) of burglary. Mr Sherman never admitted to taking any money. The physical change is "best evidence" and wasn't even an exhibit at trial (state v Rogers, No 30205-5 II (reversed due to insufficient evidence) His lawyer should have filed a Knapstead motion before trial to release Sherman due to insufficient evidence (State v Kanpstead, 107 Wn.2d 346, 729 P.2d 48 (1986)).

(2) He did not object to the questioning of Deputy Libby (CP 68-77) by the proseuustion which allowedspeculation of other uncharged crimes to taint the trial. The deputy stated:

"...and then a little bit later on the gentleman who lives in the main residence asked use (the police) to come in and look through some of Sherman belongings that were in the trailor that he had put in the trailor and he wanted us to see it because he was afraid it might be stolen and wanted us to be aware of that."

Q Was thre anhthing that ever came of that?
(over on back)

Additional Ground 4

Herman did not get a full and fair hearing/due process of law. If all the individual errors (0 in the RAP SAG 10.10 breif and those cited by his appeal attorney in the OPening Appellate brief) weren't enough individually to reverse his conviction, collectively they denied him a fair trial necessitating reversal. State v Perrett, 86 Wn App 312-323, 936 P.2d 426 (1997) (Several non-reversible errors taken together denied defendant a fair trial, thus court reverse his conviction).

## ADDITIONAL GROUND 3

This not only confused the jury but prejudiced Sherman because now jurors suspect he's involved in another unrelated (uncharged) crime he got away with. His lawyer should have objected and the judge should have given clarifying instruction to disregard it as not relevant (ER 401-402).

(3) He did not mention to the jury or let Sherman testyfy to the fact Sherman has done Evacuation work for Don L. Entis who owns Log Road Construction at Cosmopolis, Washington. Since Mr Sherman onlylived 2 miles from the business he is accused of burglarizing andhas lived in the area for 35 years, these facts would have been relevant forthe jury hear to refute the burglary element of "unlawful entry" because it supports his contention he was looking fora job doing evacuation work and that he entered building #1 to inquire about work. The state really did not prove the "unlawful entry" element of Burglary. Washington v Daran-Davila, 71 Wn. App. 701-706 (1995) (every element of a crime must be proved to prove a conviction).

(4) He didn't ask the court, after the guilty veridict on Burglary in the second degree, for an ARRESTED JDUGMENT to either reverse the conviction or to change it to the misdemeanors of trespass and/or theft. He should have argued the jury went against the weight of the evidnce (CP 114-119) because the change evidence was not admissible resulting in insufficient evidence (CP53-54 of July 17, 2013 transcripts).

(5) He (the appeal lawyer) didn't make a finding (CP 81-86) that the witness (Deputy Sheriff Robert Wilson) gave improper testimony to the jury in the form of an opinion that the defendant Sherman was guilty of burglary, which invades the province of the jury and was unfairly prejudical to him ( per State v Demery, 144 Wn.2d 753, 759 (2001) and State v Brown, 132 W.2d 529, 561, 940 P.2d 546 (1997) (comments that encourage a jury to render a verdict on irrelevant prejudicial matter not in evidence are improper). A curative instruction wouldnot have corrected this error which denied Sherman a fair trial. State v Ziegler, 114 Wn.2d 533, 540, 789 P.2d 791 (1990) and State v Alexander, 64 Wn.App. 147-158, 822 P.2d 1250 (1997)(reversed due to improper opinion concerning guilt).

(6) He didn't object to the prosecutor's inflamatory remarks during closing argument (CP 110) where the prosecution speaks to the jury's emotion by stating:

"This case is aboutproperty rights. The right to have your stuff on your land. To be safe in your home without some guy coming in and going through your stuff when you are not there....etc.) State v Belgarde, 110 Wn.2d 504 512, 775 P.2d 174 (1988)(Reversed becaue inflamatoryremarks made by prosecution at closing arguments denied defendant a fair trial). State v Christopher, 114 Wn.App 858, 863, 60 P.3d 677 (2003) (prosecutorial misconduct during closing arguments denied defendant a fair trial).

If there are additional grounds, a brief summary is attached to this statement.

DATED this 26th day of April, 2014.

Timmy Sherman
(Appellant's Signature)

(Appellant's Printed Name)
Timmy Sherman

Stafford Creek Correction Center
191 Constantine Way, Unit# ____
Aberdeen, Washington 98520

# DECLARATION OF SERVICE BY MAIL
## GR 3.1

I, Timmy Sherman, declare and say:

That on the 26th day of April, 2014, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 45326-6-II:

A four page Statement of Additional Grounds (SAG) Brief to go with my attorney's previously submitted Opening Appellate Brief dated March 27, 2014.

FILED
COURT OF APPEALS
DIVISION II
APR 29 AM 11:35
OF WASHINGTON
DEPUTY

addressed to the following:

Court Of Appeals Div II In Tacoma
950 Broadway, Suite 300
Tacoma, WA 98402

Attorney Jodi Backlund
P.O. Box 6490
Olympia, WA 98507

Grays Harboe Prosecuting Attorney
102 W. Broadway ave., #102
Montesano, WA 98520

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 26th day of April, 2014, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Signature
Timmy Sherman

Print Name

DOC 257112 UNIT ____

STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520