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Court of Appeals
Division III
State of Washington

NO. 31762-5-III & 31763-3-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

RICHARD EUGENE CORNWELL, JR.,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The failure to include the mental states for possession with intent to deliver a controlled substance in Instructions 15, 16, 17 and 18, as set out in the Second Amended Information, deprived Richard Eugene Cornwell, Jr. of due process under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3, as well as relieving the State of its burden to prove each element of the offense beyond a reasonable doubt. (CP 51; CP 73; CP 74; CP 75; CP 76; Appendices “A”; “B”; “C”; “D”)

2. Counts 2 - 5 of the Second Amended Information constitute the “same criminal conduct” for sentencing purposes.

3. Defense counsel’s failure

(a) to object to Instructions 15, 16, 17 and 18; and/or

(b) to argue “same criminal conduct” at sentencing; and/or

(c) to object to prosecutorial misconduct in closing argument;

constitutes ineffective assistance of counsel.

4. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of trafficking in stolen property first degree.

5. The State failed to prove, beyond a reasonable doubt, each and every element of possession of a stolen firearm as charged in Counts 8 and 9.

6. The prosecuting attorney committed misconduct in closing argument, insofar as Counts 8 and 9 are concerned, when he argued that the jury could consider all of the stolen property in connection with those counts contrary to Instruction 4. (CP 62; Appendix "E")

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did failure to inform the jury of the mental state required for possession with intent to deliver a controlled substance, as charged, deprive Mr. Cornwell of due process and a fair trial?

2. Was the State relieved of its burden of proof when Instructions 15, 16, 17 and 18 did not include the requisite mental states for the charged offenses?

3. If Mr. Cornwell's convictions for possession with intent to deliver a controlled substance under Counts 2 - 5 of the Second Amended Information are not reversed, do those counts constitute "same criminal conduct" for sentencing purposes?

4. Did Mr. Cornwell receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22?

5. Did the State prove, beyond a reasonable doubt, each and every element of the offense of trafficking in stolen property first degree?

6. Did the State prove, beyond a reasonable doubt, each and every element of the offense of possession of a stolen firearm as charged in Counts 8 and 9 of the Second Amended Information?

7. Did prosecutorial misconduct in closing argument deprive Mr. Cornwell of due process and a fair trial?

STATEMENT OF CASE

Detectives Bayne and Ruchert of the Walla Walla Police Department agreed to use Jesse Quintana as a confidential informant (CI) to effect buys of controlled substances from two (2) separate individuals. Mr. Cornwell was one of those individuals. (Steinmetz RP 27, ll. 2-5; RP 29, ll. 2-5; RP 68, ll. 12-14; RP 215, ll. 3-25)

A so-called controlled buy was conducted on December 7, 2012 at Mr. Cornwell's residence. (Steinmetz RP 40, ll. 14-23; RP 60, ll. 2-17;

RP 65, l. 22; RP 66, ll. 12-16; RP 78, ll. 8-10)

Mr. Quintana wore a recording device when he went into Mr. Cornwell's house. The recording device indicated that he obtained \$40.00 worth of methamphetamine while he was in the house. (Steinmetz RP 72, ll. 2-5; RP 225, ll. 5-21)

Based upon the purchase of methamphetamine officers obtained a search warrant for Mr. Cornwell's house. It was served on December 12, 2012. A second search warrant was obtained that day when items of stolen property were observed in the house. (Steinmetz RP 80, ll. 8-13; RP 82, ll. 20-22; RP 87, l. 17 to RP 88, l. 1; RP 88, ll. 3-8)

When the officers entered the house Mr. Cornwell saw them, turned around, ran to the basement and sat in a chair in a small office. There was a shotgun and rifles in the vicinity. Additional firearms were located in the attic in the garage. (Steinmetz RP 264, ll. 1-8; RP 265, ll. 3-12; RP 266, l. 20 to RP 267, l. 5; RP 335, ll. 9-10)

A muzzle loader rifle was located hanging over the door in the master bedroom. Mr. Quintana had seen that rifle when he purchased the methamphetamine. (Steinmetz RP 154, ll. 13-15; RP 227, ll. 11-17)

The officers located a safe containing multiple packages of miscellaneous controlled substances which were seized. They were later tested by the Washington State Patrol Crime Lab. The substances were heroin,

methamphetamine, methadone and dihydrocodeinone. (Steinmetz RP 85, ll. 8-11; RP 86, l. 13 to RP 87, l. 7; RP 102, ll. 2-4; RP 113, l. 2; l. 13; ll. 24-25; RP 114, ll. 22-24; RP 117, ll. 1-5; ll. 11-13; ll. 16-18; RP 120, ll. 9-17; RP 121, ll. 16-19)

The firearms which were seized included a short barreled shotgun, a .270 Savage rifle found in the office, an AR-10 rifle and case, an antique Japanese rifle and a Winchester shotgun. (Steinmetz RP 140, ll. 5-7; RP 141, ll. 3-4; RP 142, ll. 8-11; RP 143, ll. 14-15; RP 272, l. 18 to RP 273, l. 17; RP 317, ll. 2-3)

The Japanese rifle and the Winchester shotgun were later identified by Jack McCaw. They were taken in a burglary at his farmhouse in September 2012. (Steinmetz RP 271, ll. 3-13)

A damaged green Snap-on tool chest was located in the garage. Barton Harvey later identified it as having been stolen from him. The cost of the toolbox new was \$7,900.00. He was able to sell it for \$3,000.00. (Steinmetz RP 148, ll. 21-23; RP 149, ll. 10-11; RP 172, ll. 3-9; RP 175, ll. 8-11)

The officers also located a scale in the garage with a syringe next to it. Smoking devices were located in a dresser in the master bedroom. Documents for the Carrillo family were also found in the master bedroom. The documents were later identified by Elizabeth Carrillo. (Steinmetz RP

146, ll. 7-8; ll. 18-21; RP 147, ll. 1-2; ll. 5-15; RP 161, ll. 6-16; RP 277, ll. 5-16; RP 278, ll. 16-22)

Pearl Funk, whose antique store had been burglarized, was able to recognize doll boxes in a photograph taken by the officers. She recalled that she was able to recover cigarette lighters, dolls and trays from the police department property room. (Steinmetz RP 124, l. 23 to RP 125, l. 18; RP 129, ll. 21-25; RP 131, ll. 15-20)

A grandfather clock and a mantel clock were also seized. Duane Depping identified those items as coming from a burglary at his farmhouse. (Steinmetz RP 152, ll. 8-10; ll. 20-22; RP 179, l. 17 to RP 180, l. 3; RP 184, l. 19 to RP 185, l. 3)

Detective Harris conducted measurements from Lincoln School to Mr. Cornwell's residence. The distance was three hundred and eighty-five (385) feet. (Steinmetz RP 281, ll. 5-6; RP 299, ll. 7-13 RP 300, ll. 15-22)

Detective Harris also measured the sawed off shotgun. It had a fourteen (14) inch barrel and an overall length of twenty-four (24) inches. (Steinmetz RP 315, l. 15 to RP 316, l. 13)

Detective Harris conducted an interview of Mr. Cornwell following *Miranda*¹ warnings. The interview occurred at the Walla Walla City Jail. Mr. Cornwell said that he traded drugs for the property which the of-

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

fficers found in the house. He claimed he didn't know it was stolen. He observed that "you can assume anything." (Steinmetz RP 319, l. 6 to RP 320, l. 13; RP 323, ll. 15-17; RP 324, ll. 3-5)

Mr. Cornwell also engaged in a recorded interview with Captain Buttice following *Miranda* warnings. He provided the captain with the names of individuals who had brought certain items to his house to trade for drugs. Mr. Cornwell was hoping to work as a CI. Captain Buttice later decided that he could not provide enough information for CI work. (Steinmetz RP 321, ll. 2-14; RP 345, ll. 9-10; RP 350, ll. 16-23; RP 352, l. 21 to RP 354, l. 10; RP 363, ll. 8-22)

An Information was filed on December 13, 2012 charging Mr. Cornwell with one (1) count of delivery of methamphetamine within one thousand (1000) feet of school grounds; four (4) counts of possession with intent to deliver controlled substances within one thousand (1000) feet of school grounds; use of drug paraphernalia; possession of stolen property first degree; three (3) counts of possession of a stolen firearm and trafficking in stolen property first degree (CP 12)

An Amended Information was filed on May 17, 2013 adding firearm enhancements to Counts 1 through 5. Count 10 was changed to possession of an unlawful firearm. A notice to seek an exceptional sentence was filed the same date. (CP 41; CP 46)

A Second Amended Information was filed on May 20, 2013. It merely changed the date in Count 11. (CP 51)

Mr. Cornwell posted a bail bond on December 28, 2012. He waived time-for-trial on February 27, 2013. (CP 19; CP 26)

Defense counsel did not object to any of the Court's instructions. (Steinmetz RP 402, ll. 2-3)

The prosecuting attorney made the following statements during closing argument:

... If all we had here was perhaps a couple of items, maybe the two firearms that belonged to Mr. McCaw and those were found, identified and returned to Mr. McCaw there might be some difficulty as to whether or not that those firearms were stolen, okay? Maybe somebody gave them to him as a gift or traded for controlled substances or other property that he legitimately had, you know, maybe one could wonder whether or not he knew they were stolen.

(Steinmetz RP 441, l. 20 to RP 442, l. 4)

But when you have the quantity, the mass quantity that we had here in this house, that belonged to more than a handful of victims and it was a multitude of items; a garage full, in the house, a grandfather clock and other things that would have sentimental value. The documents belonging to the Carrillo family. You know, why would Mr. Cornwell have in his residence citizen -- citizenship paperwork, passport paperwork belonging to a complete stranger?

(Steinmetz RP 442, ll. 5-13)

... He had what we know is a lot of stolen property and he admitted to having -- knowing that some of it was stolen. He admits to buying some of that property.

You decide whether or not we have to have admission from him, a statement from him that says he knew all of that property was stolen. If you have to have that from an individual who was engaging in this activity

as much as Mr. Cornwell was, if that's reasonable.

(Steinmetz RP 469, ll. 12-21)

During closing argument defense counsel conceded that Mr. Cornwell was guilty of possession of stolen property second degree and possession of an unlawful firearm. (Steinmetz RP 464, ll. 1-3)

The jury found Mr. Cornwell guilty on all counts. Special verdicts were entered with regard to the school and firearm enhancements. No firearm enhancement was found as to Count 1. (CP 105; CP 106; CP 107; CP 108; CP 109; CP 111)

After the verdicts were read the trial court revoked Mr. Cornwell's conditions of release. He was remanded into custody. He attempted to escape. (Steinmetz RP 496, ll. 4-7)

The trial court entered CrR 3.5 Findings of Fact and Conclusions of Law on June 10, 2013. (CP 121)

An Information was filed under Cause Number 13 1 00206 7 on May 28, 2013 charging Mr. Cornwell with attempted first degree escape. An Amended Information was filed on May 29, 2013 correcting the date. (*206 CP 3; 206 CP 6)

* designates consolidated cases

Mr. Cornwell entered a guilty plea to attempted first degree escape on June 24, 2013 following a colloquy with the Court. (206 CP 10; Latham RP 4, l. 1 to RP 8, l. 17)

Judgment and Sentence on both cases was entered on June 24, 2013. (206 CP 24; 430 CP 139)

Mr. Cornwell was sentenced to one hundred and twenty-four (124) months under Cause Number 12 1 00430 4 and forty-seven point two five (47.25) months under Cause Number 13 1 00206 7. The sentences in the respective cases were ordered to run consecutive to one another.

Notices of Appeal were filed on June 24, 2013 and June 25, 2013. An Amended Notice of Appeal was also filed on June 25, 2013 following an amendment of the Judgment and Sentence in Cause Number 12 1 00430 4. (206 CP 38; 430 CP 156; CP 175; CP 192)

SUMMARY OF ARGUMENT

Instructional error impacting Mr. Cornwell's right to due process and a fair trial, relieving the State of its burden of proof and violating the "essential elements" rule, requires reversal and dismissal of Counts 2 - 5.

The State's failure to prove, beyond a reasonable doubt, each and every element of the offenses in Counts 8, 9 and 11 requires reversal and dismissal of those counts.

In the event that Counts 2 - 5 are not reversed and dismissed, Mr. Cornwell is entitled to be resentenced since they constitute the “same criminal conduct.”

Alternatively, ineffective assistance of counsel and prosecutorial misconduct, either independently or in combination, deprived Mr. Cornwell of a fair trial. He is entitled to a new trial on all counts except Counts 6, 7 and 10 in Cause No. 12 1 00430 4 and except Cause No. 13 1 00206 7.

ARGUMENT

I. INSTRUCTIONAL ERROR

Count 2 of the Second Amended Information states, in part:

That the said **Richard Eugene Cornwell Jr.** in the County of Walla Walla, State of Washington, on or about December 12, 2012, **did knowingly and unlawfully possess** with intent to deliver, a controlled substance, to wit: Heroin

(Emphasis supplied.)

Count 3 states, in part:

That the said **Richard Eugene Cornwell, Jr.** in the County of Walla Walla, State of Washington, on or about December 12, 2012, **did knowingly and unlawfully pos-**

sess with intent to deliver, a controlled substance, to wit: methamphetamine

(Emphasis supplied.)

Count 4 states, in part:

That the said **Richard Eugene Cornwell, Jr.** in the County of Walla Walla, State of Washington, on or about December 12, 2012, **did knowingly and unlawfully possess** with intent to deliver, a controlled substance, to wit: Dihydrocodeinone

(Emphasis supplied.)

Count 5 states, in part:

That the said **Richard Eugene Cornwell, Jr.** in the County of Walla Walla, State of Washington, on or about December 12, 2012, **did knowingly and unlawfully possess** with intent to deliver, a controlled substance, to wit: Methadone

(Emphasis supplied.)

The trial court's to-convict instructions as to each of the foregoing counts failed to include the language "did knowingly and unlawfully possess." The absence of the mental state language in the jury instructions relieved the State of its burden of proof.

RCW 9A.04.100(1) states:

Every person charged with the commission of a crime is presumed innocent unless proven guilty. No person may be convicted of a crime unless each element of such crime

is proved by competent evidence beyond a reasonable doubt.

Mr. Cornwell asserts that omission of the mental elements converted the offense of possession with intent to deliver a controlled substance to a strict liability offense. The instructions allowed the jury to convict him without finding that he “knowingly and unlawfully” intended to deliver the controlled substances.

The law is well settled that jury instructions are sufficient if, when read as a whole, they allow counsel to argue his or her theory of the case, are not misleading and **properly inform the trier of fact of the applicable law.**

See: State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). (Emphasis supplied.)

The State told Mr. Cornwell that it intended to prove that he “knowingly and unlawfully” intended to deliver the respective controlled substances. The State thus placed upon itself the burden to do so.

The State bears the burden of proving every element of the crime charged beyond a reasonable doubt. It follows that the “to-convict” instruction must contain every element of the crime charged. Failure to include every element of the crime charged amounts to constitutional error that may be raised for the first time on appeal. We review “to-convict” instructions *de novo*.

State v. Jain, 151 Wn. App. 117, 124-25, 210 P.3d 1061 (2009).

There is no doubt that instructional error occurred.

There is no doubt that the instructional error amounts to constitutional error.

Due process requires the trial court to accurately instruct the jury on every element required to convict a defendant **of the crimes alleged** and on the State's burden of proving every element **of the crimes alleged** beyond a reasonable doubt. *State v. Chambers*, 157 Wn. App. 465, 474-75, 237 P.3d 352 (2010), review denied, 170 Wn.2d 1031 (2011). Moreover, because the purpose of jury instructions is to instruct the jury on the applicable law, they "must necessarily contain more complete and precise statements of the law than are required in an information" or charging document. *State v. Borrero*, 97 Wn. App. 101, 107, 982 P.2d 1187 (1999).

State v. Rivas, 168 Wn. App. 882, 891-92, 278 P.3d 686 (2012). (Emphasis supplied.)

Mr. Cornwell's right to due process and a fair trial were violated by the jury instructions which misstate the law. "An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." *State v. Sibert*, 168 Wn.2d 306, 312, 230 P.3d 142 (2010) quoting *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

The State may well argue that the jury instructions as a whole properly informed the jury of the requisite mental states. However, any such argument would be without merit.

... “a ‘to-convict’ [jury] instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (quoting *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). We are not to look to other jury instructions to supply a missing element from a “to-convict” jury instruction. *Id.* At 262-63.

State v. Sibert, supra, 311.

Moreover, the State’s inclusion of the language “knowingly and unlawfully” in the Second Amended Information informed Mr. Cornwell of its intent to prove that phrase as an element of the charged offenses. Its omission from the Instructions violates the “essential elements” rule under Const. art. I, § 22. *See: State v. Huyen Bich Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008).

Mr. Cornwell is entitled to have his convictions on Counts 2 - 5 reversed. He is also entitled to have the counts dismissed under principles of double-jeopardy. *See: Fifth Amendment to the United States Constitution; Const. art. I, § 9; and State v. Daniels*, 160 Wn.2d 256, 265, 156 P.3d 905 (2007), *cert. denied* 558 U.S. 819, 130 S. Ct. 85, 175 L. Ed.2d 28.

II. SAME CRIMINAL CONDUCT

In the event the Court disagrees with Mr. Cornwell’s argument in the preceding section of this brief, then he submits that Counts 2 - 5 con-

stitute the “same criminal conduct.”

RCW 9.94A.589(1)(a) provides, in part:

... “[S]ame criminal conduct” as used in this subsection means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

In *State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993)

the defendant was charged with two (2) counts of intent to deliver a controlled substance. The controlled substances were cocaine and heroin.

The *Garza-Villarreal* Court ruled at 49:

The fact that the two charges involve different drugs does not by itself evidence any difference in intent. The possession of each drug furthered the overall criminal objective of delivering controlled substances in the future. ...

...

We therefore hold concurrent counts of possession with intent to deliver which occur in the same transaction constitute the same criminal conduct because the objective criminal intent in each case is identical - an intent to deliver any controlled substance in the future.

Mr. Cornwell’s possession of heroin, methamphetamine, dihydrocodeinone and methadone fall well within the parameters of the *Garza-Villarreal* analysis.

As announced in *State v. Williams*, 135 Wn.2d 365, 367, 957 P.2d 216 (1998):

The two crimes occurred at the same time and place, and the “victim” of both drug sales was the public at large, not the purchasers.

The drugs were in a safe/lockbox in Mr. Cornwell’s office in the basement of his house. Thus, the charged offenses occurred at the same time and place. Moreover, as indicated by the *Williams* decision, the public is the victim.

The criminal intent does not change from one controlled substance to another.

If Counts 2 - 5 are not reversed and dismissed, then Mr. Cornwell is entitled to be resentenced on the basis that those counts constitute the “same criminal conduct.” If so, this reduces his offender score.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both that counsel’s performance was deficient and that his defense was thereby prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). Counsel’s performance is deficient when it falls below an objective standard of reasonableness. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To demonstrate prejudice, the defendant must show that ““there is a reasona-

ble probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*" *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694). Defense counsel's failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel. *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004) (concluding that counsel's performance was deficient where counsel did not argue same criminal conduct as to rape and kidnapping charges); cf. *Brown* [*State v. Brown*, 159 Wn. App. 1, 248 P.3d 518 (2010), review denied, 171 Wn.2d 1015 (2011)] at 16-17 (concluding that defendant received effective assistance of counsel.

State v. Rattano Keo Phuong, 174 Wn. App. 494, 547 (2013).

Mr. Cornwell's case is akin to *Rattano Keo Phuong* and *Saunders*². The *Brown* case involved multiple violations of a no-contact order occurring over a short period of time. It is clearly distinguishable.

When Mr. Cornwell's case is viewed in light of the decisions in *Williams* and *Garza-Villarreal*, there is little doubt that the trial court would have found that Counts 2 - 5 constituted the "same criminal conduct."

Defense counsel was ineffective in not raising an argument concerning "same criminal conduct."

² *State v. Saunders*, 120 Wn. App. 800, 824-25, 86 P.3d 232 (2004).

Defense counsel was also ineffective in not objecting to the missing elements in the jury instructions.

Mr. Cornwell recognizes that WPIC 50.14 does not include the language “knowingly and unlawfully.” However, the State elected to include that language in the charging document. Thus, the State was required to prove those elements as part of its case. Defense counsel should have required the language to be included in the jury instruction as an essential element of the offense. *See*: Const. art. I, § 22.

Finally, defense counsel was ineffective in not objecting to the prosecuting attorney’s closing argument which misstated the law concerning multiple counts. Each count is required to be considered separately. The prosecuting attorney informed the jury that they could consider all of the evidence presented, whether applicable or not, to Counts 8 and 9 (possession of a stolen firearm).

In essence, what the prosecuting attorney did was to tell the jury that the firearms were stolen; but, however, to meet the element of knowledge on the part of Mr. Cornwell, it could consider the fact that other stolen property was also found. This prejudiced Mr. Cornwell to a degree of essentially relieving the State of its burden of proof. There was no proof that Mr. Cornwell knew that either firearm was stolen.

IV. SUFFICIENCY OF THE EVIDENCE

A. Possession of a Stolen Firearm

We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.

State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284 (2010).

The *McPhee* case involved possession of stolen firearms. Mr. McPhee's convictions were affirmed based upon the additional circumstantial evidence that he had hidden the firearms in the brush when he saw an advertisement for them in a local newspaper. Moreover, he lived next door to the residence from which the guns were stolen. He had been in that residence looking for a source of power for his own buildings.

The *McPhee* Court noted, *supra*:

Bare possession of stolen property is insufficient to justify a conviction. *See State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). "However, possession of recently stolen property in connection with other evidence tending to show guilt is sufficient." *Couet*, 71 Wn.2d at 775.

The evidence at trial indicates that the 1897 Winchester and the Japanese rifle were stolen. Evidence also supports the fact that Mr. Cornwall acquired the guns in exchange for drugs. He contends that that par-

ticular fact, in and of itself, is not indicative of knowledge on his part that the guns were stolen.

The guns had been stolen in September of 2012. There was no testimony to indicate when Mr. Cornwell had acquired possession of the guns.

It is Mr. Cornwell's position that the prosecuting attorney's closing argument, which misstated the law concerning separate consideration of each count adversely impacted the jury's deliberations insofar as Counts 8 and 9 are concerned. The prosecuting attorney's assertion that the jury could consider all of the rest of the stolen property that was located in conjunction with the two (2) counts of possession of a stolen firearm was improper.

WPIC 3.01 requires a jury to consider multiple counts separately.

WPIC 1.02 provides, in part:

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted **that relates to that proposition**

(Emphasis supplied.)

The State failed to meet its burden of proof as to Mr. Cornwell's knowledge that the guns were stolen. The convictions should be reversed and dismissed.

B. Trafficking in Stolen Property First Degree

RCW 9A.82.010(19) states:

“Traffic” means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, **or** to buy, receive, possess, or obtain control of stolen property, **with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.**

(Emphasis supplied.)

The State did not present any evidence that Mr. Cornwell sold, transferred, distributed, dispensed, or otherwise disposed of stolen property to any other person.

The State did present evidence that Mr. Cornwell received, possessed, and obtained control over certain items of stolen property. However, the State did not present any evidence that Mr. Cornwell intended to sell, transfer, distribute, dispense, or otherwise dispose of the property to any other person.

Count 11 of the Second Amended Information states:

That the said **Richard Eugene Cornwell, Jr.** in the County of Walla Walla, State of Washington, on or between December 7, 2012 and December 12, 2012, **did knowingly traffic in stolen property**, to wit: various items stolen from individuals in and around the Walla Walla valley.

(Emphasis supplied.)

Instruction 37 included all of the alternative means of committing trafficking in stolen property. (CP 95; Appendix “F”)

The evidence presented may have established that Mr. Cornwell possessed stolen property. In fact, defense counsel conceded that he had possessed stolen property. However, mere acknowledgement that a person possesses stolen property does not necessarily equate to trafficking in stolen property.

In the absence of any indication that Mr. Cornwell actually sold, transferred, distributed, dispensed, or otherwise disposed of stolen property, or intended to do so, the State failed to carry its burden of proof. Mr. Cornwell is entitled to have this conviction reversed and dismissed.

V. PROSECUTORIAL MISCONDUCT

The prosecuting attorney’s closing argument, as it pertains to possession of a stolen firearm, misstated the law. The prosecuting attorney told the jury that they could consider the fact of all other stolen property in assessing if Mr. Cornwell knew that the guns were also stolen.

... [A] case will not be reversed for improper argument of law by counsel unless such error is prejudicial to the accused, [citation omitted], and only those errors which may have affected the outcome of the trial are prejudicial. *State v. Gilcrist*, 91 Wn.2d

603, 612, 509 P.2d 809 (1979). Errors that deny a defendant a fair trial are *per se* prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. [Citation omitted.] Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984).

Mr. Cornwell asserts that the prosecuting attorney's closing argument obviously influenced the jury. The argument told the jury that they did not have to abide by Instruction No. 4 and consider each count separately. Rather, the argument told the jury that if it determined that Mr. Cornwell possessed stolen property, then it could use that fact to infer that he knew guns were stolen.

Moreover, the fact that defense counsel conceded that Mr. Cornwell possessed stolen property, further exacerbated the prosecuting attorney's argument.

Additionally, if defense counsel had objected to the argument, the Court could have directed the jury to disregard the remark and rely upon

the instructions. Thus, ineffective assistance of counsel on this issue further compounded the fact that Mr. Cornwell did not receive a fair trial.

CONCLUSION

Mr. Cornwell's rights under the Sixth Amendment and Const. art. I, § 22 were violated by the fact that all elements of the offense(s) of possession with intent to deliver a controlled substance as charged in Counts 2 - 5 were not included in the jury instructions.

Mr. Cornwell did not receive effective assistance of counsel as guaranteed by the Sixth Amendment and Const. art. I, § 22. Defense counsel's performance resulting in instructional error and/or an erroneous sentence was deficient and prejudicial.

The State's failure to prove, beyond a reasonable doubt, each and every element of the offenses of possession of a stolen firearm and trafficking in stolen property requires reversal and dismissal of those three (3) counts.

Prosecutorial misconduct in closing argument, as to Counts 8 and 9, also requires their reversal and dismissal.

Depending upon the Court's calculation of the issues raised, Mr. Cornwell is entitled to be resentenced. The calculation of a new offender

score may vary from a three (3) to a seven (7). The sentencing ranges are set out in attached appendices (“G”; “H”; “I”; “J” and “K”)

Mr. Cornwell requests that appropriate directions be given to the trial court as to any resentencing.

Counts 2 - 5 must either be reversed and dismissed or treated as the “same criminal conduct.”

Counts 8 and 9 should be reversed and dismissed due to lack of sufficient evidence. Count 11 should be reversed and dismissed for the same reason.

DATED this 17th day of March, 2014.

Respectfully submitted,

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APPENDIX “A”

INSTRUCTION NO. 15

To convict the defendant of the crime of Count 2: Violation of the Uniform Controlled Substances Act - Possession With Intent to Deliver Heroin, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 12th day of December, 2012, the defendant possessed a controlled substance, to-wit: heroin;

(2) That the defendant possessed the substance with the intent to deliver the heroin; and

(3) That the acts occurred in Walla Walla County, State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “B”

INSTRUCTION NO. 16

To convict the defendant of the crime of Count 3: Violation of the Uniform Controlled Substances Act - Possession With Intent to Deliver Methamphetamine, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 12th day of December, 2012, the defendant possessed a controlled substance, to-wit: methamphetamine;

(2) That the defendant possessed the substance with the intent to deliver the heroin; and

(3) That the acts occurred in Walla Walla County, State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “C”

INSTRUCTION 17

To convict the defendant of the crime of Count 4: Violation of the Uniform Controlled Substances Act - Possession With Intent to Deliver Dihydrocodeinone, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 12th day of December, 2012, the defendant possessed a controlled substance, to-wit: dihydrocodeinone;

(2) That the defendant possessed the substance with the intent to deliver the heroin; and

(3) That the acts occurred in Walla Walla County, State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “D”

INSTRUCTION NO. 18

To convict the defendant of the crime of Count 5: Violation of the Uniform Controlled Substances Act - Possession With Intent to Deliver Methadone, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 12th day of December, 2012, the defendant possessed a controlled substance, to-wit: methadone;

(2) That the defendant possessed the substance with the intent to deliver the heroin; and

(3) That the acts occurred in Walla Walla County, State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “E”

INSTRUCTION NO. 4

A separate crime is charged in each count. You must separately decide each count charged against the defendant. Your verdict on one count should not control your verdict on any other count.

APPENDIX “F”

INSTRUCTION NO. 37

To convict the defendant of Count 11: Trafficking in Stolen Property in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between the 7th day of December, 2012 and the 12th day of December, 2012,

(a.) The defendant

(i.) Knowingly bought or received or possessed or retained control over property knowing that the property was stolen; and

(ii.) Intended to sell or transfer or dispense that property to another person; or

- (b.) The defendant knowingly sold or transferred or distributed or dispensed or disposed of property to another person knowing that the property was stolen;
- (2) That the property was stolen property; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty.

If you find from the evidence that elements (2) and (3) and either (1)(a.) or (1)(b) has been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty. Elements (1)(a) and (1)(b) are alternatives and only one need be proved. You need not unanimously agree as to which of elements (1)(a) and (1)(b) has been proved.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX “G”

RCW 9.94A.517. Table 3 --Drug offense sentencing grid

TABLE 3

DRUG OFFENSE SENTENCING GRID

Seriousness Level	Offender Score 0 to 2	Offender Score 3 to 5	Offender Score 6 to 9 or more
III	51 to 68 months	68+ to 100 months	100+ to 120 months
II	12+ to 20 months	20+ to 60 months	60+ to 120 months
I	0 to 6 months	6+ to 12 months	12+ to 24 months

APPENDIX “H”

RCW 9.94A.518

Table 4 — Drug offenses seriousness level.

TABLE 4
DRUG OFFENSES
INCLUDED WITHIN EACH SERIOUSNESS LEVEL

- III Any felony offense under chapter [69.50](#) RCW with a deadly weapon special verdict under *RCW [9.94A.602](#) (now .825)
- Controlled Substance Homicide (RCW [69.50.415](#))
 - Delivery of imitation controlled substance by person eighteen or over to person under eighteen (RCW [69.52.030\(2\)](#))
 - Involving a minor in drug dealing (RCW [69.50.4015](#))
 - Manufacture of methamphetamine (RCW [69.50.401\(2\)\(b\)](#))
 - Over 18 and deliver heroin, methamphetamine, a narcotic from Schedule I or II, or flunitrazepam from Schedule IV to someone under 18 (RCW [69.50.406](#))
 - Over 18 and deliver narcotic from Schedule III, IV, or V or a nonnarcotic, except flunitrazepam or methamphetamine, from Schedule I-V to someone under 18 and 3 years jun-

- ior (RCW [69.50.406](#))
- Possession of Ephedrine, Pseudoephedrine, or Anhydrous Ammonia with intent to manufacture methamphetamine (**RCW [69.50.440](#))
- Selling for profit (controlled or counterfeit) any controlled substance (RCW [69.50.410](#))
- II Create, deliver, or possess a counterfeit controlled substance (RCW [69.50.4011](#))
- Deliver or possess with intent to deliver methamphetamine (RCW [69.50.401\(2\)\(b\)](#))
- Delivery of a material in lieu of a controlled substance (RCW [69.50.4012](#))
- Maintaining a Dwelling or Place for Controlled Substances (RCW [69.50.402\(1\)\(f\)](#))
- Manufacture, deliver, or possess with intent to deliver amphetamine (RCW [69.50.401\(2\)\(b\)](#))
- Manufacture, deliver, or possess with intent to deliver narcotics from Schedule I or II or flunitrazepam from Schedule IV (RCW [69.50.401\(2\)\(a\)](#))
- Manufacture, deliver, or possess with intent to deliver narcotics from Schedule III, IV, or V or nonnarcotics from Schedule I-V (except marijuana, amphetamine, methamphetamines, or flunitrazepam) (RCW [69.50.401\(2\)](#) (c) through (e))
- Manufacture, distribute, or possess with intent to distribute an imitation controlled substance (RCW [69.52.030\(1\)](#))
- I Forged Prescription (RCW [69.41.020](#))
- Forged Prescription for a Controlled Substance (RCW [69.50.403](#))
- Manufacture, deliver, or possess with intent to deliver marijuana (RCW [69.50.401\(2\)\(c\)](#))
- Possess Controlled Substance that is a Narcotic from Schedule III, IV, or V or Nonnarcotic from Schedule I-V (RCW [69.50.4013](#))
- Possession of Controlled Substance that is either heroin or narcotics from Schedule I or II (RCW [69.50.4013](#))
- Unlawful Use of Building for Drug Purposes (RCW [69.53.010](#))

APPENDIX “I”

POSSESSION OF A STOLEN FIREARM

RCW 9A.56.310
CLASS B – NONVIOLENT

OFFENDER SCORING RCW 9.94A.525(7)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(8)) on or after 7/01/2006, use the General Nonviolent Offense with a Sexual Motivation Finding scoring form on page 176.

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 174.

ADULT HISTORY:

Enter number of felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of serious violent and violent felony dispositions x 1 = _____

Enter number of nonviolent felony dispositions x ½ = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? (if yes) + 1 = _____

Total the last column to get the **Offender Score** (Round down to the nearest whole number)

SENTENCE RANGE

		Offender Score									
		0	1	2	3	4	5	6	7	8	9+
LEVEL V	9m	13m	15m	17.5m	25.5m	38m	47.5m	59.5m	72m	84m	
	6 - 12	12+ - 14	13 - 17	15 - 20	22 - 29	33 - 43	41 - 54	51 - 68	62 - 82	72 - 96	

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 26 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 170 for standard range adjustments.
- ✓ For sentencing alternatives, see page 163.
- ✓ For community custody eligibility, see page 171.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 168.
- ✓ Each firearm possessed under this section is a separate offense.
- ✓ The offender shall be sentenced according to RCW 9.94A.589(1)(c) if the offender is convicted of Unlawful Possession of a Firearm 1 or 2 (RCW 9.41.040) and for felonies Theft of a Firearm or Possession of a Stolen Firearm, or both, as current offenses.
- ✓ If the present conviction is for Unlawful Possession of a Firearm 1 or 2 and felonies Theft of a Firearm or Possession of a Stolen Firearm, or both, charged under RCW 9.41.040, other current convictions for Unlawful Possession of a Firearm 1 or 2, Possession of a Stolen Firearm or Theft of a Firearm may not be included in the computation of the offender score per RCW 9.94A.589(1)(c). The offender will serve consecutive sentences for these particular offenses.

APPENDIX “J”

ESCAPE FIRST DEGREE

RCW 9A.76.110
CLASS B -- NONVIOLENT

OFFENDER SCORING RCW 9.94A.525(15)

If it was found that this offense was committed with sexual motivation (RCW 9.94A.533(9)) on or after 7/01/2006, use the General Nonviolent Offense with a Sexual Motivation Finding scoring form on page 176.

If the present conviction is for a felony domestic violence offense where domestic violence was plead and proven, use the General Nonviolent Offense Where Domestic Violence Has Been Plead and Proven scoring form on page 174.

ADULT HISTORY:

Enter number of felony convictions x 1 = _____

JUVENILE HISTORY:

Enter number of felony dispositions x ½ = _____

OTHER CURRENT OFFENSES:

(Other current offenses that do not encompass the same conduct count in offender score)

Enter number of other felony convictions x 1 = _____

STATUS:

Was the offender on community custody on the date the current offense was committed? (If yes) + 1 = _____

Total the last column to get the **Offender Score** (Round down to the nearest whole number)

SENTENCE RANGE

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
	6m	9m	13m	15m	17.5m	25.5m	38m	50m	61.5m	73.5m
LEVEL IV	3-9	6-12	12+-14	13-17	15-20	22-29	33-43	43-57	53-70	63-84

- ✓ For attempt, solicitation, conspiracy (RCW 9.94A.595) see page 26 or for gang-related felonies where the court found the offender involved a minor (RCW 9.94A.833) see page 170 for standard range adjustments.
- ✓ For deadly weapon enhancement, see page 173.
- ✓ For sentencing alternatives, see page 163.
- ✓ For community custody eligibility, see page 171.
- ✓ For any applicable enhancements other than deadly weapon enhancement, see page 168.

APPENDIX “K”

RESENTENCING

If Counts 2 - 5 are reversed/dismissed without Counts 8, 9 and 11

being reversed/dismissed:

Count 1:	60+ to 120 + 24 Mos. School Enhancement
Count 6:	90 days
Count 7:	12+ - 14 Mos.
Count 8:	41 - 54 Mos.
Count 9:	41 - 54 Mos.
Count 10:	22 - 29 Mos.
Count 11:	33 - 43 Mos.
Attempted 1° Escape:	33 - 43 Mos. X 75%

If either Count 8 and 9 or Count 11 is dismissed, then a further reduction in the offender score occurs. A final sentencing range can only be determined once a decision is rendered.

If Counts 2 - 5 are treated as “same criminal conduct” then:

Count 1:	60+ to 120 + 24 Mos. School Enhancement
Counts 2 - 5:	60+ to 120 Mos.
Count 6:	90 days
Count 7:	14 - 18 Mos.
Count 8:	51 - 68 Mos.
Count 9:	51 - 68 Mos.
Count 10:	33 - 43 Mos.
Count 11:	43 - 57 Mos.
Attempted 1° Escape:	43 - 57 Mos. X 75%

NO. 31762-5-III & 31763-3-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)
) WALLA WALLA COUNTY
Plaintiff,) NO. 12 1 00430 4 & 13 1 00206 7
Respondent,)
) CERTIFICATE OF SERVICE
v.)
)
RICHARD EUGENE CORNWELL, JR.,)
)
Defendant,)
Appellant.)
)

I certify under penalty of perjury under the laws of the State of Washington that on this 17th day of March, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

COURT OF APPEALS, DIVISION III
Attn: Renee Townsley, Clerk
500 N Cedar St
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(per agreement)

CERTIFICATE OF SERVICE

RICHARD EUGENE CORNWELL, JR. #367292
Washington State Penitentiary
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U.S. MAIL

s/ Dennis W. Morgan

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