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No. 33875-1-II
(Consolidated with No. 33919-6-II)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Simanovski,

Appellant.

Jefferson County Superior Court

Cause No. 05-1-00103-3

The Honorable Judge Craddock Verser

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by allowing extra courtroom security without holding a hearing to determine whether or not there was a compelling individualized threat of injury, disorderly conduct, or escape.
2. The trial court erred by allowing extra courtroom security without adequate cause.
3. The trial court erred by allowing extra courtroom security without considering less restrictive alternatives.
4. The trial court erred by allowing extra courtroom security without making findings justifying the measure.
5. The trial court erred by instructing the jury with an erroneous definition of knowledge.
6. The trial court erred by giving Instruction No. 20, which reads as follows:

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.
Supp. CP, Instruction 20.

7. The court's "knowledge" instruction contained an improper mandatory presumption.
8. The court's "knowledge" instruction impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.

9. Mr. Simanovski was denied the effective assistance of counsel when his attorney failed to object to the improper “knowledge” instruction.
10. The trial court erred by instructing the jury (in its opening remarks) that it would have to decide whether Mr. Simanovski was innocent or guilty.
11. The court erred by giving Instruction No. 4, which reads as follows:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Instruction No. 4, Supp. CP.

12. The trial court erred by equating a “reasonable doubt” with a “real possibility” that Mr. Simanovski was not guilty.
13. The trial court erred by explaining “reasonable doubt” in terms of “possible doubt” without clarifying that phrase.
14. The prosecuting attorney committed misconduct that was flagrant and ill-intentioned.
15. The trial court erred by failing to properly determine Mr. Simanovski’s criminal history.

16. The trial court erred by failing to properly determine Mr. Simanovski's offender score.

17. The trial court erred by adopting Finding No. 2.2, which purported to list Mr. Simanovski's criminal history as follows:

2.2 The defendant has the following prior criminal convictions (RCW 9.94A.100):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	<u>A or J</u> Adult, Juv	TYPE OF CRIME
1 VUCSA – Possess w/o Prescr	9/27/01	Cowlitz, WA	7/17/01	A	F
2 TMVWOP 2	9/27/01	Cowlitz, WA	7/17/01	A	F
3 Burglary 2	3/3/89	Jefferson, WA	11/7/88	A	F
4 Theft 1	3/3/89	Jefferson, WA	11/7/88	A	F
5 Burglary 2	7/5/91	Jefferson, WA	3/20/91	A	F
6 Malicious Mischief 1	7/5/91	Jefferson, WA	3/20/91	A	F
7 Escape 1	6/14/92	Jefferson, WA	11/6/92	A	F
8 TMVWOP 2	6/14/92	Jefferson, WA	11/6/92	A	F
9 TMVWOP 2	2/5/98	Jefferson, WA	12/6/97	A	F
10 VUCSA – POSSESS METH	2/5/98	Jefferson, WA	12/6/97	A	F
11 Possess Stolen Prop 2	2/5/98	Jefferson, WA	12/7/97	A	F

12	Attempt to Elude	9/27/01	Cowlitz, WA	8/20/00	A	F
13	TMVWOP 2	9/27/01	Cowlitz, WA	8/20/00	A	F
14	Kidnapping 1	2/25/85	Jefferson, WA	2/22/85	A	F-V

18. The trial court erred by failing to determine whether or not any of Mr. Simanovski's prior offenses comprised the same criminal conduct.
19. The trial court erred by sentencing Mr. Simanovski with an offender score of 13.
20. The trial court erred by using a standard range of 87-116 months.
21. The trial court erred by sentencing Mr. Simanovski to 101 months confinement.
22. Mr. Simanovski was denied the effective assistance of counsel when his attorney failed to review the list of prior convictions alleged by the prosecution.
23. The trial court violated Mr. Simanovski's constitutional right to a jury trial by finding that he had criminal history without submitting the issue to a jury or obtaining a waiver of the right to a jury trial.
24. The trial court erred by using a preponderance of the evidence standard in determining that Mr. Simanovski had criminal history.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mr. Simanovski was charged with Taking a Motor Vehicle Without the Owner's Permission in the Second Degree, two counts of Unlawful Possession of a Firearm in the First Degree, and Possession of Marijuana (less than 40 grams). Without holding a hearing and despite the absence of any evidence in the record, the trial court allowed three uniformed officers to stand guard near Mr. Simanovski and his codefendant. The trial judge did not consider less restrictive alternatives, and did not make any findings in support of this.

1. Must the conviction be reversed because the trial court allowed extra security to be posted without holding a hearing to determine if such measures were necessary? Assignments of Error Nos. 1 – 4.
2. Must the conviction be reversed because the trial court allowed extra security to be posted without considering less restrictive alternatives? Assignments of Error Nos. 1 – 4.
3. Must the conviction be reversed because the trial court allowed extra security to be posted without any indication in the record of a compelling and individualized threat of injury to people, disorderly conduct, or escape? Assignments of Error Nos. 1 – 4.

The court's "knowledge" instruction inappropriately included a mandatory presumption, requiring the jury to find knowledge if Mr. Simanovski acted intentionally (without explaining what kind of intentional act could give rise to the presumption). The instruction also misstated the law, defining knowledge to mean awareness "of a fact, circumstance or result which is described by law as being a crime." Defense counsel did not object to the erroneous instruction.

4. Using a *de novo* standard of review, did the trial court's "knowledge" instruction create an impermissible mandatory presumption? Assignments of Error Nos. 5 - 8.

5. Using a *de novo* standard of review, did the trial court's "knowledge" instruction misstate the law and mislead the jury? Assignments of Error Nos. 5 – 8.
6. Using a *de novo* standard of review, was Mr. Simanovski denied the effective assistance of counsel by his lawyer's failure to object to the erroneous "knowledge" instruction? Assignments of Error Nos. 5 – 9.

At the beginning of trial, the judge told jurors they would be deciding whether Mr. Simanovski was "innocent" or guilty. At the end of trial, instead of giving the standard pattern instruction on reasonable doubt, the court gave an instruction which included the following language:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

7. Did the court's instruction on reasonable doubt violate Mr. Simanovski's constitutional right to due process? Assignments of Error Nos. 11 – 13.
8. Did the court's instruction erroneously equate a "reasonable doubt" with a "real possibility" that Mr. Simanovski was not guilty? Assignments of Error Nos. 11 – 13.
9. Did the court's instruction erroneously permit the jury to convict unless there was "substantial doubt" about Mr. Simanovski's guilt? Assignments of Error Nos. 11 – 13.

10. Did the court's erroneous remark that the jury would be charged with finding Mr. Simanovski "innocent" or guilty compound the problem with the erroneous reasonable doubt instruction? Assignment of Error No. 10.

In closing arguments, the prosecuting attorney repeatedly argued that Mr. Simanovski could be found guilty of Unlawful Possession of a Firearm if the firearm was accessible to him, regardless of whether or not he had dominion and control over the weapon.

11. Did the prosecuting attorney's misconduct in closing violate Mr. Simanovski's right to a fair trial? Assignment of Error No. 14.
12. Was the prosecuting attorney's misconduct so flagrant and ill-intentioned as to require reversal? Assignment of Error No. 14.

At trial, Mr. Simanovski acknowledged that he had a prior conviction for Burglary in the Second Degree. No evidence was presented during the trial or at sentencing to establish that Mr. Simanovski had any additional criminal history.

Using a preponderance standard, the trial court found that Mr. Simanovski had 13 prior felony convictions. The record does not indicate how the court arrived at this result.

Six pairs of prior convictions listed in the defendant's criminal history on the judgment and sentence occurred on the same date. No evidence was presented to establish that these offenses took place at different times or in different places, or that they involved different victims or different criminal intent. The trial court did not determine whether or not these prior convictions comprised the same criminal conduct. Mr. Simanovski was sentenced with an offender score of 13.

After sentence was pronounced and the warrant of commitment signed, defense counsel remarked that he had not reviewed the list of prior convictions alleged by the prosecution, but that he was "sure it was accurate." RP (10-7-05) 35.

13. Is Finding 2.2 based on insufficient evidence of criminal history? Assignments of Error Nos. 15 – 21.
14. Did the prosecutor fail to present sufficient evidence that Mr. Simanovski had criminal history beyond the burglary conviction he acknowledged? Assignments of Error Nos. 15 – 21.
15. Did the trial court err by failing to determine whether or not any of Mr. Simanovski's prior convictions comprised the same criminal conduct? Assignments of Error Nos. 15 – 21.
16. Did the trial court err by sentencing Mr. Simanovski with an offender score of 13? Assignments of Error Nos. 15 – 21.
17. Was Mr. Simanovski denied the effective assistance of counsel by his attorney's failure to review the list of prior convictions alleged by the prosecution? Assignments of Error Nos. 22.

18. Did the sentencing court's finding that Mr. Simanovski had criminal history violate his constitutional right to a jury determination of all facts used to increase his sentence? Assignments of Error Nos. 23 – 24.

19. Did the sentencing court's decision finding criminal history by a preponderance of the evidence violate Mr. Simanovski's constitutional right to proof beyond a reasonable doubt of all facts used to increase his sentence? Assignments of Error Nos. 23 – 24.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On June 22, 2005 David Simanovski was in the back seat of a (possibly stolen) car stopped by the police in Jefferson County. RP(8-22-05) 115, 118. Officers found a .270 caliber rifle in the front seat between the driver and the passenger, a loaded handgun and a bag of marijuana in the back, and methamphetamine near the front driver's side of the car. RP(8-22-05) 121 – 125. David Simanovski was charged with Taking a Motor Vehicle Without Permission in the Second Degree, two counts of Unlawful Possession of a Firearm in the First Degree, and Possession of Marijuana (less than 40 grams). CP 1 – 3.

On the first day of Mr. Simanovski's jury trial, the defense objected to the extra security in the courtroom, noting there were three uniformed guards standing close to the defendant. RP(8-22-05) 10 – 11. Without holding a hearing, the trial judge indicated that he was not removing anyone, and allowed the guards to remain where they were. RP(8-22-05) 11 – 12.

In opening instructions to the jury the court told the jurors that their job was to "listen to the evidence in this case to determine whether the State's met the burden of proof, whether these gentlemen are innocent

or guilty.” RP(8-22-05) 27. At the close of trial, the court used the following “reasonable doubt” instruction:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Instruction No. 4, Supp CP.

The court also used an instruction defining knowledge which was based on WPIC 10.02:

A person knows or acts knowingly or with knowledge when he is aware of a fact, circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.
Supp. CP, Instruction 20.

During closing arguments, the prosecutor repeatedly urged the jurors to convict Mr. Simanovski if he had access to the rifle, whether or not he had dominion and control over it:

When I have the ability to take constructive possession and reduce it to actual possession, I have the ability because I know that the firearm is in the vehicle. That is constructive possession... They get out of the van; anybody can take the rifle at that time... RP (8-22-05) 102.

[He] sets this rifle down in between the seat where Mr. Simanovski or Mr. Inman had the ability of immediate control.... Dominion and control need not be exclusive. It means not that one person doesn't have to be able to hold that weapon at that time for it to be constructively possessed. [Sic]. It means that anybody that has the ability to reach out, knowing that that firearm is there, because knowledge is key-- you have to be able to see it... RP (8-22-05) 103.

[He] left the rifle sitting in the van, accessible to both defendants... [then] they all get out and the rifle is set down somewhere in the van, accessible to anybody. RP (8-22-05) 104.

Mere presence is not enough. But, if I'm on my way to go shooting and I have the ability to reach the gun at any time... [T]hat's what the State is required to prove. RP (8-22-05) 132.

[T]hey're going shooting down at the gravel pit. They never made it, but that's where they were going. Nine bullets loaded in the gun, three of them in Mr. Inman's pocket, and a rifle sitting between every single one of them that anybody could pick up at any time. RP (8-22-05) 135.

[T]hese guns were basically sitting in a vehicle with the defendants and they had access to them and they were going shooting. And

that is enough to convict the defendants of the crime of Unlawful Possession of A Firearm...

[The State] has shown that the defendants were possessing these weapons constructively, if not actually, were constructively possessing those weapons based on everything that happened, the totality of the circumstances, proximity to the weapons, the fact that they're going shooting, the location of the bullets, the location of where the weapons are, and the fact that any one of them could have grabbed it at any time.

RP (8-22-05) 136.

Although the defendant anticipated this issue during the instructions conference, no objection was made to the prosecution's argument during closing. RP(8-23-05) 67 – 81, 95 – 105.

Mr. Simanovski was found guilty of one count of Unlawful Possession of a Firearm in the First Degree and acquitted of the four remaining charges. CP 4 – 16.

At sentencing, the state did not offer any proof regarding Mr. Simanovski's criminal history, and a Judgment and Sentence was entered that indicated Mr. Simanovski had the following criminal history:

2.2 The defendant has the following prior criminal convictions (RCW 9.94A.100):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv	TYPE OF CRIME
1 VUCSA – Possess w/o Prescr	9/27/01	Cowlitz, WA	7/17/01	A	F
2 TMVWOP 2	9/27/01	Cowlitz, WA	7/17/01	A	F

3	Burglary 2	3/3/89	Jefferson, WA	11/7/88	A	F
4	Theft 1	3/3/89	Jefferson, WA	11/7/88	A	F
5	Burglary 2	7/5/91	Jefferson, WA	3/20/91	A	F
6	Malicious Mischief 1	7/5/91	Jefferson, WA	3/20/91	A	F
7	Escape 1	6/14/92	Jefferson, WA	11/6/92	A	F
8	TMVWOP 2	6/14/92	Jefferson, WA	11/6/92	A	F
9	TMVWOP 2	2/5/98	Jefferson, WA	12/6/97	A	F
10	VUCSA – POSSESS METH	2/5/98	Jefferson, WA	12/6/97	A	F
11	Possess Stolen Prop 2	2/5/98	Jefferson, WA	12/7/97	A	F
12	Attempt to Elude	9/27/01	Cowlitz, WA	8/20/00	A	F
13	TMVWOP 2	9/27/01	Cowlitz, WA	8/20/00	A	F
14	Kidnapping 1	2/25/85	Jefferson, WA	2/22/85	A	F-V

CP 4 – 16.

Six pairs of prior offenses listed in the criminal history occurred on the same date. No evidence was introduced establishing that these offenses occurred at different times or places, involved different victims, or involved differing criminal intent. The trial judge did not make a

determination as to whether or not any of the prior offenses comprised the same criminal history. RP (10-7-05).

At the end of the sentencing hearing, after the warrant of commitment had been signed, defense counsel noted " Judge, I didn't review the criminal history indicated by the counsel, but I'm sure that it's accurate." RP (10-7-05) 35.

Mr. Simanovski appealed. CP 17.

ARGUMENT

I. THE COURT IMPOSED EXCESSIVE COURTROOM SECURITY WITHOUT HOLDING A HEARING AND WITHOUT FINDING A COMPELLING INDIVIDUALIZED THREAT OF INJURY, DISORDERLY CONDUCT, OR ESCAPE.

The presumption of innocence is a fundamental attribute of due process under the Fourteenth Amendment to the U.S. Constitution. U.S. Const. Amend. XIV, *Estelle v. Williams*, 425 U.S. 501 at 503, 96 S.Ct. 1691 (1976). An accused in a criminal case has the right to be brought before the court “with the appearance, dignity, and self-respect of a free and innocent man.” *State v. Finch*, 137 Wn.2d 792 at 844, 975 P.2d 967 (1999). When a trial court imposes security measures that cannot be concealed from the jury, the judge must make a record of “a compelling individualized threat of injury to people in the courtroom, disorderly conduct, or escape” to justify use of those measures. *State v. Gonzalez*, 129 Wn.App. 895 at 902, 120 P.3d 645 (2005), *citing State v. Hartzog*, 96 Wash.2d 383, 635 P.2d 694 (1981). Furthermore, the court “must make every effort to minimize the impact on the jury of any unavoidable exposure.” *Gonzalez*, at 902. Erroneous imposition of courtroom security measures may be “structural error of the sort that defies analysis by harmless error standards,” because it abridges a

fundamental trial right, the presumption of innocence. *Gonzalez*, at 904-905; U.S. Const. Amend. XIV.

In this case, over defense objection, the trial judge allowed the jail to place three uniformed guards near Mr. Simanovski and his codefendant. RP(8-21-05)10 – 12. The decision was made without a hearing, without any individualized showing that this uniformed presence was necessary to protect courtroom security, without any effort to investigate less restrictive alternatives, without any instructions to mitigate the effect on the jury, and without entry of any findings to justify the decision. RP(8-21-05)10 – 12.

The trial court's decision to allow extra security under these circumstances violated Mr. Simanovski's constitutional right (under the due process clause) to the presumption of innocence. It gave the jury the impression that he was a dangerous man from whom the community must be protected. For these reasons, the conviction must be reversed and the case remanded to the superior court for a new trial. *Gonzalez, supra*.

II. THE COURT'S "KNOWLEDGE" INSTRUCTION VIOLATED DUE PROCESS BECAUSE IT CREATED A MANDATORY PRESUMPTION, MISSTATED THE LAW, AND MISLED THE JURY REGARDING AN ESSENTIAL ELEMENT.

'Knowledge' is an element of Unlawful Possession of a Firearm; to obtain a conviction, the prosecution must prove that the defendant knowingly possessed a firearm. *State v. Anderson*, 141 Wn.2d 357, 5 P.3d

1247 (2000). Under RCW 9A.08.010(1)(b), “A person knows or acts knowingly or with knowledge when (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.”

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction which misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury.

State v. Savage, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), *citing* *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

Here, ‘knowledge’ was defined by Instruction No. 20 (based on WPIC 10.02), which included the following optional language (bracketed in WPIC 10.02): “Acting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 20, Supp. CP.¹

Inappropriate use of the last sentence relieves the prosecution of its burden of establishing the knowledge element, and is reversible error. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.² The trial court’s “knowledge” instruction was the same as that given in this case. The Court of Appeals reversed the conviction because the last sentence of the instruction could be read to

¹ The final sentence is bracketed in the WPIC because it is to be used only where applicable.

² Although not an element of the charged offense, knowledge was included in the “to convict” instruction and thus became an element under the law of the case in *Goble*. *Goble* at 201.

mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer. *Goble*, at 203.

Here, as in *Goble*, the inclusion of the final sentence was erroneous; it allowed the jury to presume that Mr. Simanovski had knowledge of the firearm if he acted intentionally, but did not give any guidance as to what intentional act could trigger this mandatory presumption. Under the instruction as given, the jury could attribute knowledge of the firearm to Mr. Simanovski if he intentionally rode in the vehicle or intentionally accompanied his codefendants on their outing.

The instruction was also confusing and misleading; the court told the jury that a person "acts knowingly" when he "is aware of a fact, circumstance or result described by law as being a crime..." This language differed from the statutory language of RCW 9A.08.010(1)(b); under Instruction No. 20, the information at issue—the "fact, circumstances or result"—must itself be described by law as a crime. This is nonsensical. *See* RCW 9A.08.010 (which requires that the fact be described by a criminal statute, not that the fact itself be described as a crime). The *Goble* court criticized WPIC 10.02 on this basis as well. *See Goble* at 203 ("We agree that the instruction is confusing.")

The end result was that the jury was unable to determine what was meant by the knowledge element of Instructions 14 and 17. The instruction defining knowledge created a conclusive presumption and violated due process. *Goble, supra; Savage, supra;* Because of this, the conviction must be reversed and the case remanded for a new trial. *Goble, supra.*

III. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S "KNOWLEDGE" INSTRUCTION.

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..." Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ "such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Lopez*, 107

Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel's performance is evaluated against the entire record. *Lopez, at 275.*

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel's performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland, supra*. The defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Holm, supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d

610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, ‘knowledge’ was an essential element of the crime charged. Despite this, Mr. Simanovski’s attorney failed to object to the court’s “knowledge” instruction, which was a distortion of the statutory definition found in RCW 9A.08.010(1)(b). This failure to object was deficient performance; a reasonably competent attorney would have been familiar with the statute, and would have known that the language of the instruction differed from the language of the statute. *See, e.g., State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) (“[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”)

Mr. Simanovski was prejudiced by the error. The “knowledge” instruction was confusing and misleading, and it misstated the law. As a result, the jury would not have been able to properly interpret the “to convict” instructions. Defense counsel’s failure to object to the improper “knowledge” instruction denied Mr. Simanovski the effective assistance of counsel. *Strickland*. The conviction must be reversed, and the case remanded for a new trial.

IV. THE TRIAL COURT'S "REASONABLE DOUBT" INSTRUCTION VIOLATED DUE PROCESS AND WAS UNCONSTITUTIONAL (ARGUMENT INCLUDED TO PRESERVE ANY ERROR).

In a criminal case, the jury must be instructed that the State has the burden to prove each essential element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Proper instruction on the reasonable doubt standard is crucial because that standard "provides concrete substance for the presumption of innocence" which is the cornerstone of our criminal justice system. *In re Winship*, 397 U.S. at 363. Failure to give clear instruction on reasonable doubt is not only error, it is a "grievous constitutional failure" mandating reversal. *State v. McHenry*, 88 Wn.2d 211, 214, 588 P.2d 188 (1977). An instruction is improper if it serves to relieve the State of its burden. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996).

In Washington, the traditional pattern instruction has defined reasonable doubt as "a doubt for which a reason can be given." WPIC 4.01. The precursor of this instruction was specifically approved by the Washington Supreme Court in *State v. Tanzymore*, 54 Wn. 2d 290, 340 P.2d 178 (1959).

Instead of using the traditional WPIC instruction, the court here used an instruction derived from one accepted by Division I in *State v.*

Castle. 86 Wn. App. 48, 935 P.2d 656, review denied 133 Wn.2d 1014 (1997). The instruction differed from the traditional instructions in its final paragraph:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Instruction No. 4, Supp. CP.

This instruction required the jury to find "a real possibility" that Mr. Simanovski was not guilty in order to acquit. In analyzing the instruction, the *Castle* court was asked to determine whether or not the phrase "real possibility" raised the standard for an acquittal, thus relieving the prosecution of its burden. Division I held that it did not, and has since been joined by Divisions II and III.³

In construing an instruction defining reasonable doubt, a reviewing court should consider how reasonable jurors could have understood the

³ See also *State v. Dykstra*, 127 Wn.App. 1, 110 P.3d 758 (Div. 3,2005); *State v. Bennett*, 131 Wn.App. 319, 126 P.3d 836 (2006).

instruction as a whole. *Cage v. Louisiana*, 498 U.S. 39 at 41, 112 L. Ed. 2d 339, 111 S. Ct. 328 (1990), citing *Francis v. Franklin*, 471 U.S. 307, 316 (1985). In *Cage*, the U.S. Supreme Court unequivocally stated that reasonable doubt is not “substantial doubt.” 498 U.S. at 40-41. The Court held that the word ‘substantial’ “suggests a higher degree of doubt than is required for acquittal under the reasonable doubt standard.” 498 U.S. at 41.

When viewed from the standpoint of a reasonable juror, the “real possibility” language in this case is equivalent to the “substantial doubt” language rejected by the U.S. Supreme Court in *Cage*. Under the instruction given, the jury was obliged to find the defendant guilty unless the doubt was sufficiently substantial to be considered “real.” The term “real” was not defined for the jury. As a result, there is a grave possibility that the jury erroneously used a “substantial doubt” standard, and convicted Mr. Simanovski based on a lower standard than is constitutionally permissible under *In re Winship*.

The problem was compounded by inclusion of the following language: “There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt.” The *Castle* court was not asked to address the difficulties raised by this sentence. This sentence is

problematic for two reasons. First, the instruction creates a likelihood of confusion by injecting the words “possible doubt” into the jury’s deliberations. Defining the phrase “reasonable doubt” is a challenging undertaking. Adding a similar phrase without making any effort to define it or distinguish it does not help to clarify the subject. Second, instead of defining the state’s burden in an affirmative manner, this portion of the instruction focuses on what the prosecutor need *not* do. The effect of this is to detract from the serious and heavy burden that the state does bear.

These problems render the instruction improper. An error in a reasonable doubt instruction can never be harmless error.⁴ *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Because of this, the conviction must be reversed.

V. THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING THAT WAS SO FLAGRANT AND ILL-INTENTIONED THAT REVERSAL IS REQUIRED.

A prosecutor has a duty to act impartially and in the interest of justice. *State v. Rivers*, 96 Wn.App. 672 at 675, 981 P.2d 16 (1999).

Comments made during closing arguments are reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the

⁴ The error here posed additional problems because of the trial court’s opening remarks to the jury, which suggested that they would be determining whether Mr. Simanovski was innocent or guilty.

argument, and the jury instructions.” *State v. Boehning* 127 Wn.App. 511 at 519, 111 P.3d 899 (2005). In the absence of an objection, prosecutorial misconduct requires reversal when it is so flagrant and ill-intentioned that a curative instruction would not have corrected the error. *State v. Henderson*, 100 Wn.App. 794, 998 P.2d 907 (2000). Instances of misconduct may be viewed cumulatively to determine if reversal is required. *Henderson*, at 804.

A prosecuting attorney may not misstate the law or make arguments at odds with the court’s instructions. *State v. Huckins*, 66 Wn.App. 213 at 218, 836 P.2d 230 (1992); *see also State v. Allen*, 127 Wn.App. 125 at 137, 110 P.3d 849 (2005).

To establish Mr. Simanovski’s possession of the firearm in this case, the prosecution was required to prove actual possession or constructive possession. Under the court’s instructions, “constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.” Instruction No. 15, Supp. CP.

The prosecutor committed egregious misconduct by repeatedly misstating the law during closing arguments. According to the prosecuting attorney, Mr. Simanovski could be convicted of possessing

the rifle if it was accessible to him, regardless of whether or not he had
dominion and control over it:

When I have the ability to take constructive possession and reduce
it to actual possession, I have the ability because I know that the
firearm is in the vehicle. That is constructive possession...
They get out of the van; anybody can take the rifle at that time...
RP (8-22-05) 102.

[He] sets this rifle down in between the seat where Mr. Simanovski
or Mr. Inman had the ability of immediate control.... Dominion and
control need not be exclusive. It means not that one person doesn't
have to be able to hold that weapon at that time for it to be
constructively possessed. [Sic]. It means that anybody that has the
ability to reach out, knowing that that firearm is there, because
knowledge is key-- you have to be able to see it...
RP (8-22-05) 103.

[He] left the rifle sitting in the van, accessible to both defendants...
[then] they all get out and the rifle is set down somewhere in the
van, accessible to anybody.
RP (8-22-05) 104.

Mere presence is not enough. But, if I'm on my way to go
shooting and I have the ability to reach the gun at any time...
[T]hat's what the State is required to prove.
RP (8-22-05) 132.

[T]hey're going shooting down at the gravel pit. They never made
it, but that's where they were going. Nine bullets loaded in the
gun, three of them in Mr. Inman's pocket, and a rifle sitting
between every single one of them that anybody could pick up at
any time.
RP (8-22-05) 135.

[T]hese guns were basically sitting in a vehicle with the defendants
and they had access to them and they were going shooting. And
that is enough to convict the defendants of the crime of Unlawful
Possession of A Firearm...

[The State] has shown that the defendants were possessing these weapons constructively, if not actually, were constructively possessing those weapons based on everything that happened, the totality of the circumstances, proximity to the weapons, the fact that they're going shooting, the location of the bullets, the location of where the weapons are, and the fact that any one of them could have grabbed it at any time.
RP (8-22-05) 136.

This misconduct prejudiced Mr. Simanovski. As the trial court noted, the evidence of possession by Mr. Simanovski was very thin. RP(8-22-05) 56 – 57. His position at trial was that he did not have dominion and control over the rifle, despite its proximity. RP(8-22-05) 121 – 130. The prosecuting attorney's repeated argument that accessibility was sufficient for conviction misstated the law and directly undermined Mr. Simanovski's theory of the case. Because of this, the conviction must be reversed and the case remanded to the superior court for a new trial. *Henderson, supra*.

VI. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. SIMANOVSKI'S CRIMINAL HISTORY AND OFFENDER SCORE.

A. There was insufficient evidence to establish Mr. Simanovski's criminal history.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing "before imposing a sentence upon a defendant." Furthermore, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it

has found to exist. All of this information shall be part of the record...
Court clerks shall provide, without charge, certified copies of documents
relating to criminal convictions requested by prosecuting attorneys.”
RCW 9.94A.500(1).

“Criminal history” means more than just a list of prior felonies
(although it is often treated as such). Instead, “criminal history” is defined
to include all prior convictions and juvenile adjudications, and “shall
include, where known, for each conviction (i) whether the defendant has
been placed on probation and the length and terms thereof; and (ii)
whether the defendant has been incarcerated and the length of
incarceration.” RCW 9.94A.030(13). To establish criminal history, “the
trial court may rely on no more information than is admitted by the plea
agreement, or admitted, acknowledged, or proved in a trial or at the time
of sentencing.” RCW 9.94A.530(2).

In this case, Mr. Simanovski acknowledged one prior conviction
for Burglary in the Second Degree. RP(8-21-05) 88. No evidence was
presented that he had any additional criminal history; nor did he admit or
acknowledge any other prior convictions. RP(10-7-05) 29 – 36. The
sentencing court did not determine his criminal history or calculate his
offender score on the record. Despite the absence of any evidence of
additional criminal history, the judgment and sentence reflected a finding

that Mr. Simanovski had 14 prior felony convictions and an offender score of 13. There is no indication in the record as to how this finding was made. RP(10-7-05) 29 – 36.

A trial court's findings are reviewed for substantial evidence. *In re Custody of Shields*, 120 Wn.App. 108 at 120, 84 P.3d 905 (2004).

Because of the absence of any evidence of additional criminal history, the findings in this case are completely unsupported and must be vacated.

Shields, supra. The sentence must also be vacated, and the case remanded for resentencing.⁵

B. The trial court failed to determine whether or not any of Mr. Simanovski's prior convictions were the same criminal conduct.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. Under that statute, the court is required to analyze multiple prior convictions to determine whether or not they should count as one offense:

Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense... The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served

⁵ As the Supreme Court said in *State v. Ford*: "Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions." *State v. Ford*, 137 Wn.2d 472 at 484, 973 P.2d 452 (1999)

concurrently... whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a)...
RCW 9.94A.525(5)(a)(i)

Under RCW 9.94A.589(1)(a), “same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. The sentencing court is not bound by prior determinations, but must exercise its discretion and decide whether multiple prior offenses should count separately or together. *State v. Wright*, 76 Wn.App. 811 at 829, 888 P.2d 1214 (1995), interpreting *former* RCW 9.94A.360(6)(a).

In this case, the Judgment and Sentence lists six pairs of convictions with the same offense date that occurred in the same county. CP 5. No evidence was introduced suggesting that any related pair of offenses involved different times, places, victims, or criminal intent. The trial court did not determine on the record whether or not the prior offenses were the same criminal conduct. RP(10-7-05) 29 – 36. Because the trial court failed to make this determination, the sentence must be vacated, and the case remanded for resentencing with a corrected offender score. *Wright, supra*.

- C. Mr. Simanovski was denied the effective assistance of counsel when his attorney failed to review the list of prior convictions alleged by the prosecuting attorney.

By failing to even review the prosecuting attorney's list of Mr. Simanovski's prior convictions, defense counsel's representation fell below an objective standard of reasonableness. Counsel's abdication of the most basic responsibility at sentencing means that the criminal history listed on the judgment and sentence has not been subjected to the adversarial process which is at the heart of our criminal justice system. *Strickland, supra*. Because of this, the sentence must be reversed and the case remanded for a new sentencing hearing.

VII. THE TRIAL COURT VIOLATED MR. SIMANOVSKI'S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER *BLAKELY* BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY DETERMINATION OF HIS PRIOR CONVICTIONS (ARGUMENT INCLUDED TO PRESERVE ANY ERROR).

The Sixth Amendment requires any fact used to enhance a sentence to be proved beyond a reasonable doubt to a jury. *State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005), citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). The *Blakely* court left intact an exception for prior convictions; however, the continuing validity of that exception is in doubt. See, e.g., *State v. Mounts*, 130 Wn. App. 219 at n. 10, 122 P.3d 745 (2005), quoting Justice Thomas' observation in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254 at p. 1264, 161 L.Ed.2d 205

(2005) that *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which underlies the exception for prior convictions, “has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.”

It now appears that five members of the U.S. Supreme Court (Justices Scalia, Stevens, Souter, and Ginsberg, all of whom dissented from *Almendarez-Torres*, and Justice Thomas, who authored a concurring opinion urging a broader rule in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)) believe that prior convictions which enhance the penalties for a crime must be proved to a jury beyond a reasonable doubt.⁶

Here, Mr. Simanovski's prior felony conviction was not submitted to the jury.⁷ Instead, the trial court, using a preponderance standard, found that Mr. Simanovski had one prior felony.⁸ CP 6. This violated Mr. Simanovski's constitutional right to a jury trial under the Sixth

⁶ Division I has continued to rely on *Almendarez-Torres*, despite its apparent lack of support in the high court. *See, e.g.* *State v. Rivers*, 130 Wash .App. 689, 128 P.3d 608 (2005).

⁷ Nor is there any indication in the record that he knowingly, intelligently and voluntarily waived his right to a jury determination of his prior convictions. RP(10-7-05 29 – 36.

⁸ This finding is contested in the previous section of this brief.

Amendment, and the resulting sentence was improper. The aggravated sentence must be vacated, and the case remanded for sentencing with no criminal history.

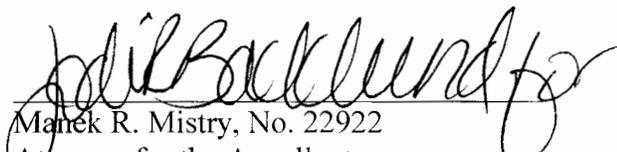
CONCLUSION

Mr. Simanovski's conviction must be reversed and the case remanded for a new trial because the trial court allowed excessive courtroom security without holding a hearing, used an improper instruction defining knowledge, and used an improper "reasonable doubt" instruction. In addition, the prosecutor committed misconduct during closing that was flagrant and ill-intentioned; this, too requires reversal and remand for a new trial.

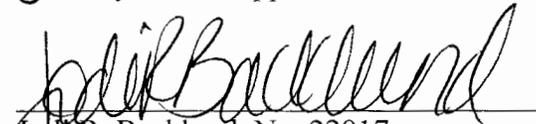
In the alternative, Mr. Simanovski's sentence must be vacated and the case must be remanded for a new sentencing hearing because the trial court failed to properly determine Mr. Simanovski's criminal history and offender score, and failed to determine whether any of his prior offenses comprised the same criminal conduct.

Respectfully submitted on April 12, 2006.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

David Simanovski, DOC # 947700
Cedar Creek Corrections Center
P.O. Box 37
Littlerock, WA 98388

and to the Jefferson County Prosecuting Attorney.

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 12, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 12, 2006.



Jodi R. Backlund, No. 22917
Attorney for the Appellant

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