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COURT OF APPEALS

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STATE OF WASHINGTON

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No. 33961-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Dwight Feeser,

Appellant.

Grays Harbor County Superior Court

Cause No. 05-1-00278-9

The Honorable Judge David Foscue

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instruction No. 4, which reads as follows:

To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about May 5, 2005, the defendant shot Brian Sheets;
2. That the defendant acted with intent to cause the death of Brian Sheets;
3. That Brian Sheets died as a result of the defendant's acts; and
4. 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.

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.

This instruction and Instruction No. 5 are alternative means of committing the crime of Murder in the Second Degree. Only one alternative must be proven. The jury need not be unanimous as to which alternative has been proven beyond a reasonable doubt. Instruction No. 4, Supp. CP.

2. The trial court erred by omitting an essential element from Instruction No. 4, the "to convict" instruction for Intentional Murder.
3. Mr. Feeser was denied his constitutional right to a jury trial because the jury did not determine whether or not he acted without premeditation, an essential element of Intentional Second Degree Murder.
4. The Information was deficient because it omitted an essential element of Second Degree Intentional Murder.
5. The trial court erred by giving Instruction No. 5, which reads as follows:

To convict the defendant of the crime of Felony Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about May 5, 2005, Brian Sheets was killed;
2. The defendant was committing the crime of Assault in the Second Degree;
3. The defendant caused the death of Brian Sheets in the course of and in furtherance of such crime;
4. That Brian Sheets was not a participant in the crime of Assault in the Second Degree; and
5. 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.

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.

This instruction and Instruction No. 4 are alternative means of committing the crime of Murder in the Second Degree. Only one alternative must be proven. The jury need not be unanimous as to which alternative has been proven beyond a reasonable doubt. Instruction No. 5, Supp. CP.

6. Mr. Feeser was convicted under an unconstitutional statute.
7. Mr. Feeser was convicted of a crime defined by the judiciary in violation of the constitutional separation of powers.
8. The trial court erred by entering Finding of Fact No. 2.3 of the Judgment and Sentence, which reads as follows:

1	1	***	134 to 234 months	60 months	194 to 294 months	Life/\$50,000
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CP 5.

9. The trial court erred by sentencing Mr. Feeser with an offender score of one.

10. Mr. Feeser's Judgment and Sentence is void on its face because of the discrepancy between his criminal history and the offender score.
11. Mr. Feeser should have been sentenced with an offender score of zero.
12. The trial court erred by miscalculating Mr. Feeser's standard sentence range.
13. Mr. Feeser was denied the effective assistance of counsel when his attorney agreed to the prosecution's determination of the standard range.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Dwight Feeser was accused of committing Second Degree Murder by two alternative means: Intentional Murder, or Felony Murder during commission of Second Degree Assault. The language charging Intentional Murder did not allege that he acted without premeditation. Nor did the court's Intentional Murder "to convict" instruction require the jury to find that he acted without premeditation. The jury was instructed that it need not be unanimous as to the means, and the jury's verdict was a general verdict.

1. Did the Information omit an essential element of Second Degree Intentional Murder?
2. Did the "to convict" instruction omit an essential element of Second Degree Intentional Murder? Assignments of Error Nos. 1, 2, 3.

The prosecution accused Mr. Feeser of committing Second Degree Felony Murder by causing the death of another person during the commission of Assault in the Second Degree. The Washington legislature has not defined the elements of Assault. In the absence of a legislative definition, the judiciary has, defined the elements of the crime, and has expanded and refined that definition without input from the legislature.

3. Does the absence of a legislative definition of assault violate the separation of powers doctrine? Assignments of Error Nos. 6, 7.

4. Does the judicially created definition of Assault violate the separation of powers doctrine? Assignments of Error Nos. 6, 7.

5. Was Mr. Feeser's conviction for Second Degree Felony Murder based on assault based on an unconstitutional statute? Assignments of Error Nos. 5, 6, 7.

The sentencing court's finding on criminal history included four prior felonies, the latest of which occurred in 1997. The prosecution has not cross-appealed that finding. Based on the criminal history as found by the court, the correct offender score should have been zero, and the correct standard range should have been 123-220 months (plus a 60 month enhancement). Without explanation, the sentencing court calculated Mr. Feeser's offender score as 1, and determined that his standard range was 134 to 234 months.

Despite the discrepancies between the criminal history and the offender score, defense counsel agreed to the prosecuting attorney's calculation of the standard range.

6. Is the Judgment and Sentence void on its face because of a discrepancy between Mr. Feeser's criminal history and the offender score? Assignments of Error Nos. 8, 9, 10, 11, 12.

7. Was Mr. Feeser's sentence imposed in excess of the sentencing court's statutory authority? Assignments of Error Nos. 8, 9, 10, 11, 12.

8. Must Mr. Feeser's sentence be vacated and the case remanded for sentencing with an offender score of zero? Assignments of Error Nos. 8, 9, 10, 11, 12.

9. Was Mr. Feeser denied the effective assistance of counsel at sentencing? Assignments of Error No. 13.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On May 5, 2005 Dwight Feeser shot his lifelong friend, Brian Sheets, during an argument. RP 4-339.¹ Mr. Feeser was charged with committing Second Degree Murder by two alternative means: Intentional Murder and Felony Murder based on assault. The Information alleged as follows:

That the said defendant, Dwight C. Feeser, in Grays Harbor County, Washington, on or about May 5, 2005, with intent to cause the death of Brian Sheets, did cause the death of Brian Sheets, and/or did commit or attempt to commit the crime of Assault in the Second Degree, a felony, and in the course of and in the furtherance of said crime caused the death of Brian Sheets, a person other than one of the participants...

CP 1.

At trial, Mr. Feeser testified that he shot Sheets in self-defense. RP 306.

The court gave the jury two "to convict" instructions, one for each alternative means of committing Second Degree Murder. Instruction No. 4 provided:

To convict the defendant of the crime of Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about May 5, 2005, the defendant shot Brian Sheets;

¹ This brief only refers to the Verbatim Report of Proceedings prepared by Court Reporter Brenda Johnston, which are continuously numbered.

2. That the defendant acted with intent to cause the death of Brian Sheets;
3. That Brian Sheets died as a result of the defendant's acts; and
4. 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.

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.

This instruction and Instruction No. 5 are alternative means of committing the crime of Murder in the Second Degree. Only one alternative must be proven. The jury need not be unanimous as to which alternative has been proven beyond a reasonable doubt. Instruction No. 4, Supp. CP.

The court did not separately instruct the jury that Second Degree Intentional Murder requires proof of the absence of premeditation. Supp. CP. Instruction No. 5, relating to Second Degree Felony murder (based on an underlying assault) provided:

To convict the defendant of the crime of Felony Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about May 5, 2005, Brian Sheets was killed;
2. The defendant was committing the crime of Assault in the Second Degree;
3. The defendant caused the death of Brian Sheets in the course of and in furtherance of such crime;
4. That Brian Sheets was not a participant in the crime of Assault in the Second Degree; and
5. 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.

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.

This instruction and Instruction No. 4 are alternative means of committing the crime of Murder in the Second Degree. Only one alternative must be proven. The jury need not be unanimous as to which alternative has been proven beyond a reasonable doubt. Instruction No. 5, Supp. CP.

By a general verdict, the jury convicted Mr. Feeser of murder in the second degree, and (by special verdict) found that he'd been armed with a firearm at the time of the crime. CP 4, Supp. CP

Following a sentencing hearing, the court entered the following finding regarding Mr. Feeser's criminal history:

2.2 CRIMINAL HISTORY: (RCW 9.94A.525)

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	Adult of Juvenile	TYPE OF CRIME
Unl Taking of Motor Vehicle			1969	Adult	Felony
Unl Taking of Motor Vehicle 2	1970	Washed out	1974	Adult	Felony
Grand Larceny	1977	Washed out	1977	Adult	Felony
Unl. Poss. FA 2	08-05-97	Grays Harbor	1997	Adult	Felony

CP 4-5.

The prosecution did not appeal this finding of criminal history.

The court determined Mr. Feeser had an offender score of 1 and a standard range of 134-234 months. Defense counsel did not object to these calculations, and Mr. Feeser was sentenced to 234 months, plus a 60-month firearm enhancement. RP 423-436; CP 4-9. This timely appeal followed. CP 10.

ARGUMENT

I. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF SECOND DEGREE INTENTIONAL MURDER.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution, as well as Article I, Section 3 and Article I, Section 22 (amend. 10) of the Washington State Constitution. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93 at 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, at 105-106. If the Information is deficient, no prejudice need be shown, and the case

must be dismissed without prejudice. *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

Second Degree Murder is defined by RCW 9A.32.050. Under that statute, “A person is guilty of murder in the second degree when: [w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.” RCW 9A.32.050(1)(a).

When a statute is clear and unambiguous, its meaning is to be derived from the language of the statute alone and it is not subject to judicial construction. *State v. Azpitarte*, 140 Wn.2d 138 at 141, 995 P.2d 31 (2000). In *Azpitarte*, the Supreme Court examined *former* RCW 10.99.040(4)(b), which punished as a class C felony any assault in violation of a no contact order “that [did] not amount to assault in the first or second degree.” *Former* RCW 10.99.040(4)(b). The Court of Appeals concluded that *any* assault could be punished under this section; the Supreme Court disagreed:

[W]ithout a showing of ambiguity, we derive the statute's meaning from its language alone.... By finding that any assault can elevate a violation of a no-contact order to a felony, the Court of Appeals reads out of the statute the requirement that the assault “not amount to assault in the first or second degree.” We will not delete language from a clear statute even if the Legislature intended something else but failed to express it adequately. *Azpitarte*, at 142.

Here, as in *Azpitarre*, the statute is clear and unambiguous: it exempts from the second-degree murder statute any intentional killings done with premeditation. RCW 9A.32.050(1)(a). Accordingly, the absence of premeditation is an essential element of the crime that must be alleged in the Information.

In this case, the operative language of the Information alleges that Mr. Feeser, “with intent to cause the death of Brian Sheets, did cause the death of Brian Sheets...” CP 1. It does not allege that he acted without premeditation. Because of this, the Information is deficient, and reversal is required even in the absence of prejudice. *Kjorsvik, supra*. The conviction must therefore be reversed and the case dismissed. *Kjorsvik*.

II. THE TRIAL COURT’S INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF SECOND DEGREE MURDER.

The Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of every element of the charged offense. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). *State v. Smith*, 155 Wn.2d 496 at 502, 120 P.3d 559 (2005). A “to convict” instruction must contain all 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. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). The jury has the right to regard the “to

convict” instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997). The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003). Furthermore, the failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005).

Here, the “to convict” instruction for Second Degree Intentional Murder was set forth in Instruction No. 4, Supp. CP. The court did not require the jury to find the absence of premeditation; instead, the jury was only required to find “[t]hat the defendant acted with intent to cause the death of Brian Sheets...” Supp. CP. Instructional error of this type is harmless only if the state can establish beyond a reasonable doubt that the error did not contribute to the verdict. *Mills*, at 15 n.7. Under the facts of this case, this showing cannot be made; accordingly, the conviction must be reversed and the case remanded for a new trial. *Mills, supra*.

III. THE CONVICTION FOR SECOND DEGREE FELONY MURDER MUST BE REVERSED AND THE CASE DISMISSED BECAUSE THE LEGISLATURE'S FAILURE TO DEFINE THE UNDERLYING CRIME OF ASSAULT IN THE SECOND DEGREE VIOLATES THE SEPARATION OF POWERS AND IS UNCONSTITUTIONAL.

The State Constitution divides political power into legislative authority (Article II, Section 1), executive power (Article III, Section 2), and judicial power (Article IV, Section 1). *State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002) . Each branch of government wields only the power it is given. *Moreno*, at 505; *State v. DiLuzio*, 121 Wn.App. 822 at 825, 90 P.3d 1141 (2004). The doctrine of separation of powers is derived from this constitutional distribution of the government's authority. *Moreno*, at 505.

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the “fundamental functions” of another. *Moreno*, at 505. A violation of separation of powers occurs whenever “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 506, *citations omitted*. Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that are more properly accomplished by other branches. *Moreno at 506, citing Morrison v. Olson*, 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

It is the function of the Legislature to define the elements of a crime. *State v. Wadsworth*, 139 Wn.2d 724 at 734, 991 P.2d 80 (2000). Division II has recently clarified that this means that “the Legislature must set out in the statute the essential elements of a crime.” *State v. David*, 2006 Wn. App. LEXIS 1705 (2006). This is so “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community... This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.’” *U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515 (1971), *citations omitted*.

RCW 9A.32.050 defines Second Degree Murder to include deaths caused by a defendant during the commission of Felony Assault. In this case, Mr. Feeser was charged with committing Felony Murder by causing a death during the commission of Assault in the Second Degree. Accordingly, the constitutionality of the statute defining Assault in the Second Degree is at issue here.

Under RCW 9A.36.021, “A person is guilty of assault in the second degree if he or she... Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or... Assaults another with a deadly weapon.” The statute does not define the core meaning of the crime; instead, the legislature has left the definition to the judiciary under

RCW 9A.04.060.² The lack of a legislative definition has forced the judiciary to define the core meaning of the crime of assault, except in very limited circumstances not applicable here.³ This violates the separation of powers. *Moreno, supra*.

Through the actions of the judiciary, the definition of assault has expanded over a period of many years. At the turn of the last century, Washington's criminal code included a definition of assault. In 1906 the Supreme Court noted that "An assault is defined by the Code to be an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution." *State v. McFadden*, 42 Wash. 1 at 3, 84 P. 401 (1906). In 1909, the legislature adopted a new criminal code. The Supreme Court noted that the section defining assault (Rem. & Bal. Code SS 2746) "was repealed by the new criminal code, and so far as we are able to discover, the term assault is not defined in the latter act." *Howell*

² RCW 9A.04.060 fills legislative gaps in the criminal code with reference to the common law.

³ There are some sections of the statute in which the legislature *has* specifically defined the elements of specific kinds of assault. For example, *see* RCW 9A.36.011(1)(b): "A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ...Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance."

v. *Winters*, 58 Wash. 436 at 438, 108 Pac. 1077 (1910). In the absence of a statutory definition, the Supreme Court imported a definition from the common law, quoting from a treatise on torts:

“An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; “A right to live in society without being put in fear of personal harm.”” Cooley, *Torts* (3d ed.), p. 278
Howell v. Winters, at 438.

This common law definition was broader in scope than the pre-1909 code section, because it required only an apparent (as opposed to an actual) ability to inflict bodily injury.

Howell v. Winters was a civil case. It was not until 1922 that the common law definition adopted by *Howell v. Winters* was approved by the Supreme Court for use in a criminal case. In *State v. Shaffer*, 120 Wash. 345 at 348-350, 207 P. 229 (1922), the Supreme Court, consistent with its holding in *Howell v. Winters*, expanded the criminal definition of assault to cover situations where the defendant lacked the actual ability to inflict

bodily injury. The same definition was endorsed again in two cases from 1942. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 125 P.2d 681 (1942) was a civil action for malicious prosecution which turned in part on the criminal law's definition of assault; *State v. Rush*, 14 Wn.2d 138, 127 P.2d 411 (1942) was a criminal case described by the court as being "indistinguishable" from *Shaffer, supra. State v. Rush*, at 140.

Thirty years later, the core definition of "assault" expanded further, again without any input from the legislature. This expansion appeared in *dicta* in the Supreme Court's opinion in *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972). In that case, the Court (in *dicta*) quoted from a federal case on assault:

There can in actuality be two concepts in criminal law of assault as noted in *United States v. Rizzo*, 409 F.2d 400, 403 (7th Cir. 1969), *cert. denied*, 396 U.S. 911, 90 S.Ct. 226, 24 L.Ed.2d 187 (1969).

One concept is that an assault is an attempt to commit a battery. There may be an attempt to commit a battery, and hence an assault, under circumstances where the intended victim is unaware of danger. Apprehension on the part of the victim is not an essential element of that type of assault. . . .

The second concept is that an assault is 'committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.' The concept is thought to have been assimilated into the criminal law from the law of torts. It is usually required that the apprehension of harm be a reasonable one.

State v. Frazier, at 630-631.

Following *Frazier*, Washington's judicially-created definition of assault was enlarged to include (1) actual battery (consisting of an unlawful touching with criminal intent, not necessarily injurious), (2) an attempt to commit a battery (whether or not injury was intended), and (3) placing another in apprehension of harm (whether or not injury was intended). See, e.g., *State v. Garcia*, 20 Wn.App. 401 at 403, 579 P.2d 1034 (1978); *State v. Strand*, 20 Wn.App. 768 at 780, 582 P.2d 874 (1978). These three definitions make up the core definition of the crime of assault today. See WPIC 35.50; see also *State v. Nicholson*, 119 Wn.App. 855 at 860, 84 P.3d 877 (2003).

Since the legislature removed the statutory definition of assault from the criminal code in 1909, the judiciary has stepped in to fill the vacuum and has undertaken to define the crime; the judicial definition has evolved and expanded over the last century.

In the tort context, the evolution of a particular term does not create constitutional problems. But in the criminal context, the lack of a legislative definition and the judicial creation of a definition violate the separation of powers doctrine. By not defining the crime, the legislature has abdicated its responsibility and invited the judiciary to encroach on a core legislative function. *Moreno, supra*; *Wadsworth, supra*.

The statutory and judicial scheme under which Mr. Feeser was convicted violates the separation of powers doctrine and is therefore unconstitutional. *Moreno, supra*. Because of this, his conviction must be reversed and the case dismissed with prejudice.

IV. THE JUDGMENT AND SENTENCE IS VOID ON ITS FACE BECAUSE THE TRIAL COURT ENTERED A FINDING THAT MR. FEESER'S LAST CONVICTION WAS A 1997 CLASS C FELONY, YET SENTENCED MR. FEESER WITH AN OFFENDER SCORE OF ONE.

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). Under RCW 9.94A.525, the offender score is calculated by adding one point for each prior adult felony and one-half point for each prior juvenile felony (with exceptions not relevant here). The result is then rounded down to the nearest whole number. *See* RCW 9.94A.525. Prior offenses that “washed out” are not to be included in the offender score. RCW 9.94A.525(2). Under this provision, Class C felonies “shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.”

Illegal or erroneous sentences, including those based on a miscalculated offender score, may be challenged at any time. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867 at 874, 123 P.3d 456 (2005); *State v. Ford*, 137 Wn.2d 472 at 477, 973 P.2d 452 (1999). Furthermore, a defendant cannot agree to a sentence in excess of that which is statutorily authorized; therefore, vacation and remand is required even

when the defendant agrees to a miscalculated offender score.

Cadwallader, supra, at 874.

In this case, the trial court found that Mr. Feeser had four prior felonies, the last of which was a Class C felony entered in 1997. The court did not find any subsequent criminal history, and the prosecution did not appeal this finding. Based on this criminal history and the rule in RCW 9.94A.525, Mr. Feeser's offender score is zero, and his standard range is 123-220 months. RCW 9.94A.525; RCW 9.94A.510; RCW 9.94A.515.

Despite this, the trial court determined Mr. Feeser had an offender score of 1, calculated his standard range as 134-234 months, and imposed 234 months incarceration plus a 60 month firearm enhancement. CP 4-6. The trial judge gave no explanation for the discrepancy between its finding on criminal history and its calculation of the offender score.⁴ RP 434-436.

Because the trial court judge miscalculated the offender score, the judgment and sentence is void on its face. *Cadwallader, supra.* Since the prosecuting attorney did not cross-appeal the trial court's finding on Mr.

⁴Defense counsel agreed with the prosecution's assertion that the standard range was 134-234 months. RP 428-432. However, as noted above, a defendant cannot agree to a miscalculated offender score; a sentence based on such a score is in excess of the court's statutory authority. *Cadwallader, supra.*

Feeser's criminal history, it is barred from arguing for any additional criminal history. The sentence must be vacated and the case remanded to the trial court for resentencing with an offender score of zero.

Cadwallader, supra.

V. IF THE OFFENDER SCORE ISSUE HAS BEEN WAIVED, MR. FEESER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.⁵

The right to counsel is guaranteed by the Sixth Amendment and Fourteenth Amendment to the U.S. Constitution and by Article I, Section 22 of the Washington Constitution. Furthermore, 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)). This includes the right to the effective assistance of counsel at sentencing. *See, e.g., State v. Saunders*, 120 Wn. App. 800 at 824, 86 P.3d 232 (2004); *State v. McGill*, 112 Wn. App. 95 at 101, 47 P.3d 173 (2002).

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel's performance was deficient, and (2)

⁵ As noted above, a defendant cannot agree to a miscalculated offender score. *Cadwallader, supra.* Nonetheless, this section is included, to ensure that Mr. Feeser's issues are addressed on the merits.

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.

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, defense counsel expressed agreement with the standard range and offender score, despite the inconsistency between the criminal history and the offender score. RP 428-432. Under these circumstances,

Mr. Feeser was denied the effective assistance of counsel.⁶ *Strickland, supra.*

First, defense counsel's performance was deficient. A reasonably competent attorney would have investigated the accused's criminal history and argued for the correct offender score of zero. Second, defense counsel's deficient prejudiced Mr. Feeser. If defense counsel had pointed out the problem with the offender score and the standard range, Mr. Feeser would have been sentenced within his actual standard range. The failure to familiarize himself with Mr. Feeser's criminal history and to assert the correct offender score and standard range was ineffective. Accordingly, Mr. Feeser's sentence must be vacated and the case remanded for a new sentencing hearing. *Saunders, supra; McGill, supra.*

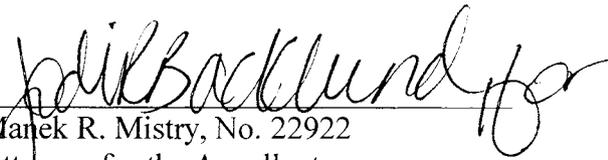
⁶ As noted above, a defendant cannot agree to a sentence based on a miscalculated offender score, because such a sentence is in excess of the trial court's statutory authority. *Cadwallader, supra.* Nonetheless, an argument on ineffective assistance of counsel is included here to ensure that the issue is properly before this court.

CONCLUSION

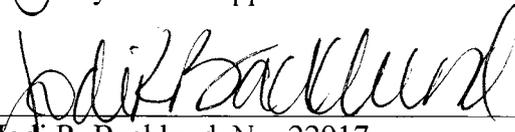
For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, the case must be remanded for a new trial. If the conviction is not reversed, the sentence must be vacated and the case remanded to the trial court for sentencing with an offender score of zero.

Respectfully submitted on August 23, 2006.

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CERTIFICATE OF MAILING

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

Dwight Feeser, DOC# 625703
Eloy Detention Center
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Eloy, AZ 85231

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway Ave, Room 102
Montesano, WA 98563-3621

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

All postage prepaid, on August 23, 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 August 23, 2006.



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

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