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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it gave Instruction No. 12 pursuant to RCW 9A.52.040 because no independent evidence supports the inference of criminal intent.

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it gave Instruction No. 14 which invited the jury to find that the defendant committed an assault by merely defending himself from an assault.

3. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, fourteenth amendment when it found him guilty of first degree burglary because the state failed to present substantial evidence on this charge.

4. The trial court erred when it imposed community custody conditions not authorized by the legislature.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it gives an instruction pursuant to RCW 9A.52.040 when no independent evidence supports the inference of criminal intent?

2. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it gives an instruction which invites the jury to find that the defendant committed an assault by merely defending himself or herself from an assault?

3. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it enters judgment of conviction in a case in which the state fails to present substantial evidence on the crime charged?

4. Does a trial court err if it imposes community custody conditions not authorized by the legislature?

STATEMENT OF THE CASE

Factual History

Dr. David Dixon is a 72-year-old family physician who has maintained his practice in the office building at 6108 N.E. Highway 99 Suite 108 in Vancouver for the past 12 years. RP 29-31. This office includes a reception area, a number of examining rooms, secretarial area, and an office. RP 17, 37-40. On a typical evening his nurses and secretaries will leave the building between 5 and 6 pm, and he will remain a short time in order to make notes in his patient charts. RP 32. Upon leaving each day he checks the locks and arms the security system, which includes door and window alarms along with motion sensors. RP 17, 33. The only access into the office is through the front door, the back door, or the windows. RP 32-33.

On September 7, 2005, Dr. Dixon followed his normal practice of making chart notes after his employees had left the building. RP 65. At about 6:15 pm he left the building secured and drove to Portland for a medical meeting. RP 35-36. During that meeting he got a call from the security company stating that the motion sensors had detected movement in the building. RP 34. Dr. Dixon was not unduly upset as there had previously been a number of false alarms. RP 33-34. After the meeting he drove home. RP 36. Once there his wife asked him if he had been by the office to check on the security company's call. RP 36. In response to her question he

decided to go back to the office. RP 36.

At about 9:55 pm, over three and one-half hours after he left, Dr. Dixon drove back to his office building and entered through the back door, which was locked. RP 36-37. When he walked into examining room three he saw someone, later identified as the defendant William Motter, standing behind the door. RP 39-40. He immediately pushed the door in an attempt to restrain the defendant while saying, "What the hell are you doing in my office." RP 74. The defendant shoved the door back in an attempt to escape. RP 54-55. Although Dr. Dixon kept shoving the door at the defendant in order to trap him behind it, the defendant was able to duck down, escape from behind the door, and run into another examining room. RP 54-55. Dr. Dixon pursued him, grabbed him, and proceeded to hit the defendant with closed fists. RP 55-56. The defendant again broke away from Dr. Dixon and this time tried to run down the hall to the front of the office. RP 56-57. However, when Dr. Dixon blocked his path, the defendant ran back down the hall and out the back door. RP 60. Dr. Dixon made no claim that the defendant ever tried to strike him with either an open or closed hand, tried to kick him, or tried to do anything other than run away. RP 29-67. He did say that the defendant apparently grabbed his shirt at one point while Dr. Dixon was striking him. RP 56. As all this was happening Dr. Dixon could hear the sirens of the police who had apparently been summoned by the security

company. RP 44.

A neighbor saw the defendant run out of the office and across a field just before the police arrived. RP 43. Upon talking to the neighbor and Dr. Dixon, the officers called for a K-9 unit, and within a few minutes the police dog tracked the defendant down a hill and into some blackberry bushes. RP 87-91. Once the police arrested the defendant and brought him back to the office, Dr. Dixon identified him as the intruder. RP 116-117.

Upon further examination, Dr. Dixon and the police discovered that there had been no forced entry to the office. RP 73-74. Both doors had been locked with deadbolts, and all of the windows were shut and locked. RP 51, 59, 65. Since there is no other access to the building, Dr. Dixon determined that when his staff had left that evening, one of them had left the back door unlocked and the defendant had come in and hidden while Dr. Dixon was doing his charting. RP 65. The defendant had then hidden and Dr. Dixon had locked him in when he left for his meeting in Portland. RP 65. In addition, after examining the office, Dr. Dixon determined that nothing was missing and nothing had been disturbed in spite of the fact that defendant had apparently been in the building for at least three and one-half hours before Dr. Dixon found him. RP 149-150. When arrested, the defendant had a backpack with him and the police believed him to be a transient. RP 117, 149. The defendant had no property on him from the office. RP 123-124.

Procedural History

By information filed September 12, 2005, the Clark County Prosecutor charged the defendant William Henry Motter with one count of first degree burglary. CP 1-2. The case later came on for trial before a jury with the state calling four witnesses, who testified to the facts contained in the preceding Factual History. *See Factual History*. Following the reception of evidence the court instructed the jury and including an instruction based upon RCW 9A.52.040. This instruction stated:

INSTRUCTION NO. 12

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

CP 54.

Although the defense did not objection to the giving of Instruction No. 12, it did object to the giving of instruction No. 14. CP 24, 56; RP 129.

This instruction stated as follows:

INSTRUCTION NO. 14

No person may, by any intentional act reasonable likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 56.

In its closing the prosecution specifically argued from Instruction No. 12 that the jury could infer that the defendant had the intent to steal. RP 162-163. The prosecution also argued from Instruction No. 14 that the defendant had no legal right to defend himself in any way from Dr. Dixon's attempts to restrain and hit him. *Id.* Following argument and deliberation the jury returned a verdict of "guilty" to First Degree Burglary. CP 69. The court later sentenced the defendant to 106 months on a standard range of from 87 to 116 months. RP 145-147.

As part of the judgment and sentence in this case the trial court imposed 18 to 36 months community custody with a number of conditions of community custody, which included the following conditions:

- ☒ . . . The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.
- ☒ Defendant shall undergo an evaluation for treatment for ☒ substance abuse ☐ mental health ☒ anger management treatment and fully comply with all recommended treatment.
- ☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a ☒ substances abuse ☐ mental health ☒ anger management

treatment program as established by the community corrections officer and/or the treatment facility.

- ☒ Treatment shall be at the defendant's expense and he/she shall keep his/her account current if it is determined that the defendant is financially able to afford it.

CP 149-150.

Following imposition of sentence the defendant filed timely notice of appeal. CP 159-163.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT GAVE INSTRUCTION NO. 12 PURSUANT TO RCW 9A.52.040 BECAUSE NO INDEPENDENT EVIDENCE SUPPORTS THE INFERENCE OF CRIMINAL INTENT.

Under RCW 9A.52.040 the state is entitled to a permissive instruction on intent to commit a crime given certain circumstances in a burglary case.

This statute states:

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

RCW 9A.52.040.

In the case at bar the trial court gave the following instruction based upon this statute and WPIC 60.05:

INSTRUCTION NO. 12

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

CP 54.

In *State v. Jackson*, 112 Wn.2d 867, 774 P.2d 1211 (1989), the Washington State Supreme Court held that this instruction based upon RCW

9A.52.040 did not necessarily violate a defendant right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment because it was permissive in nature and did not require the jury to find the presumed fact from the proven fact. The court held:

WPIC 60.05 provides for a permissive inference or presumption, which allows the trier of fact to either infer the elemental fact from proof by the prosecutor, or reject the inference. WPIC 60.05 does not apply to those attempting to enter or remain unlawfully “unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” *Leary v. United States*, 395 U.S. 6, 36, 23 L.Ed.2d 57, 89 S.Ct. 1532 [1548] (1969). *See also Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979).

State v. Jackson, 112 Wn.2d at 875 (brackets in original).

However, before this presumption can be presented to the jury, the evidence presented at trial must prove inference either by the “more likely than not” standard or by the “proof beyond a reasonable doubt” standard depending upon existence of evidence the state presents to corroborate the inference. *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). If the state has evidence to independently prove the ultimate fact then the state need only prove that inferred fact flows from the proven fact by a “more likely than not” standard. *Id.* However, if the state has no independent proof of the ultimate fact then in order to meet with the requirements of due process the state must prove that inferred fact flows from

the proven fact by a “beyond a reasonable doubt” standard. *Id.* See also *State v. Hanna*, 123 Wn.2d 704, 871 P.2d 135 (1994).

For example, in *State v. Brunson*, 128 Wn.2d 98, 905 P.2d 346 (1995), three defendant’s appealed from their independent convictions for burglary with each defendant arguing that the use of WPIC 60.05 in their cases violated their right to due process because the state had failed to prove “beyond a reasonable doubt” that the fact to be inferred (criminal intent) flowed from the proven fact (unlawful entry or remaining). In the first of the three cases the defendant had cut a hole into the roof of a car rental business in order to gain access and then had “ransacked” the place and jimmied a locked file cabinet. In the second case the defendant was halfway through a kitchen when the homeowner had confronted him. The defendant ran off while stating that he only wanted to use the telephone. In the third case the defendant waited for a tenant to drive out of a locked apartment garage and drove in before the automatic gate shut. Upon being confronted the manager of the building found a number of tools stolen from a nearby storage shed in the back of the truck.

In each of the three consolidated cases the trial courts had given an instruction identical to Instruction No. 12 in the case at bar. On appeal, each defendant argued, *inter alia*, that (1) the state had the duty to prove “beyond a reasonable doubt” that the inferred fact (criminal intent) flowed from the

proven fact (the unlawful entry), and (2) that the state had failed to prove meet this standard of proof. In addressing these two arguments the court first clarified what the applicable standard was. The court held:

Therefore, “[w]hen an inference is only part of the prosecution’s proof supporting an element of the crime, due process requires the presumed fact to flow ‘more likely than not’ from proof of the basic fact.” *Hanna*, 123 Wn.2d at 710, 871 P.2d 135 (quoting *Ulster*, 442 U.S. at 165, 99 S.Ct. at 2229).

When an inference is the “sole and sufficient” proof of an element, however, the Supreme Court in *Ulster* suggested the reasonable doubt standard would apply. *Ulster*, 442 U.S. at 167, 99 S.Ct. at 2229-30. The rationale for the Court’s suggestion is straightforward: because the prosecution must prove every element beyond a reasonable doubt, the rational connection contained in a sole and sufficient inference must be true beyond a reasonable doubt. The state may not circumvent its burden of persuasion through exclusive use of a permissive inference.

State v. Brunson, 128 Wn.2d at 128.

In each of the three consolidated cases the court found evidence of criminal intent independent of the presumption, although the court found much less evidence corroborative of criminal intent in the case where the defendant was found climbing through the kitchen window. In this case the court noted:

Although West’s case is less clear-cut, the evidence of West’s attempted entry through a kitchen window, his implausible excuse (to use the phone), and the kitchenware found outside all are sufficient to prove West intended to steal once he was inside Bowman’s house. In each of the three cases, the jury had sufficient evidence, regardless of the inference instruction, to find intent to commit a crime. The lower standard in *Ulster* therefore applies. *Ulster*, 442 U.S. at 167,

99 S.Ct. at 2230 (“prosecution may rely on all of the evidence in the record to meet the reasonable-doubt standard”).

State v. Brunson, 128 Wn.2d at 109.

The court then addressed the defendants’ arguments that the state had failed to prove the inference even under the less stringent standard of “more likely than not.” The court rejected this argument, stating as follows:

Under the facts of these cases, criminal intent flows more likely than not from Defendants’ unlawful entries. Defendants suggest hypothetical examples of unlawful entry made without intent to commit a crime inside, such as a homeless person seeking shelter or neighbors cutting through private areas. However, the court judges the sufficiency of the inference in light of the facts of each case. “This Court has never required that a presumption be accurate in every imaginable case.” *Ulster*, 442 U.S. at 156 n. 14, 99 S.Ct. at 2224 n. 14. Sufficient evidence exists that Defendants entered buildings unlawfully to commit crimes inside.

State v. Brunson, 128 Wn.2d at 111.

In the case at bar the state charged the defendant with first degree burglary under RCW 9A.52.020(1)(b). This statute holds:

(1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime . . . (b) assaults any person.

RCW 9A.52.020(1)(b).

Under this statute the state had the burden of proving three elements:

(1) that the defendant “enter[ed] or remain[ed] unlawfully in a building, (2) that he did so “with intent to commit a crime against a person or property

therein,” and (3) that “in entering or while in the building or in immediate flight therefrom” the defendant “assault[ed] any person.”

Unlike the evidence from the three consolidated cases in *Brunson*, the evidence in the case at bar does not prove any intent to commit a crime in Dr. Dixon’s office. Rather, if any inference flows from the evidence presented at trial it is that the defendant was a homeless person looking for a place to sleep. This evidence is as follows: (1) that the defendant probably entered the building between 5:30 and 6:15 pm, which was the interim between Dr. Dixon’s staff leaving and apparently leaving the back door unlocked and Dr. Dixon leaving and locking the back door (thus the defendant had been in the building for three and one-half hours before being discovered), (2) that at a minimum the defendant had been in the building and set off the motion sensors (thus putting the defendant in the building for two hours before being discovered), (3) that the defendant had not taken or attempted to take any items in the building, in spite of having hours in which to do so, and (3) that nothing had even been disturbed or moved in the building. These facts, particularly when coupled with the defendant’s presence in the building for hours does not logically support an inference that the defendant acted with the intent to commit a crime.

Since the evidence in this case fails to provide any independent support for the presumptive instruction, the state has the burden of proving

“beyond a reasonable doubt” that under the facts of the case the presumed fact (criminal intent) flows from the proven fact (unlawful entry or remaining). Unlike the three consolidated cases in *Brunson*, the evidence in the case at bar does not prove “beyond a reasonable doubt” that the defendant acted with the intent to commit a crime. Thus, in giving the instruction the trial court relieved the state of proving the second of the three elements of first degree burglary thereby violating the defendant right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

Since the error in giving the instruction in this case is constitutional in nature, it is presumed prejudicial and this court should reverse and remand for a new trial unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Under the facts of this case the error is far from harmless beyond a reasonable doubt. As was already mentioned there is not evidence in the record to support an inference that the defendant acted with criminal intent; actually the evidence supports a contrary conclusion. Thus, but for the error it is more likely than not that the jury would have acquitted on the burglary charge. Under these facts the error was prejudicial by any standard and certainly prejudicial under the presumptive standard for constitutional errors.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT GAVE INSTRUCTION NO. 14 WHICH INVITED THE JURY TO FIND THAT THE DEFENDANT COMMITTED AN ASSAULT BY MERELY DEFENDING HIMSELF FROM AN ASSAULT.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, due process also guarantees that a defendant charged with a crime will be allowed to argue his or her theory of the case without hinderance from instructions that misstate the applicable law. *State v. Irons*, 101 Wn.App. 544, 549, 4 P.3d 174 (2000).

For example in *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000), the defendants from separate trials appealed their convictions (one for first degree assault and one for first degree murder) arguing that the trial court had erred when it gave a jury instruction on accomplice instruction that allowed the jury to find that the defendants were guilty as accomplices if they knew that their actions or words would promote the commission of “a” crime as opposed to knowledge that their actions or words would promote the commission of the “the” crime that the principle committed. Relying upon its decision in *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000), the court

held this instruction to be error because the accomplice liability statute required that the accomplice have knowledge that his or her actions will promote the commission of the crime with which the defendant is charged as an accomplice. In both of these cases the court reversed because the defendants had offered theories of the case that admitted the defendants' commission of a number of crimes but disavowed any knowledge that the principle was going to commit the crime charged.

In the case at bar the trial court gave the following instruction over defense objection.

No person may, by any intentional act reasonable likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 56.

The error in giving this instruction was that the defendant did not claim that he acted in self-defense. Rather, the defendant's theory of the case was (1) that he was not in the building with the intent to commit a crime, and (2) that his sole intent when discovered by Dr. Dixon was to flee the building. At no point did the defendant claim that he acted in self-defense. Rather, he claimed that any physical contact between him and Dr. Dixon was initiated by Dr. Dixon with the defendant never intentionally touching the doctor.

Rather, he acted solely to get away without ever hitting, striking, kicking or in any way having intentional contact with the doctor. Thus, under the defendant's theory of the case he did not commit an assault because he did not intentionally touch the doctor.

The error in giving the first aggressor instruction was that it invited the jury to believe that the defendant acted illegally when he attempted to get away from the defendant or when he attempted to block the doctor's repeated blows to the defendant's person. This error was exacerbated by the fact that the court used a legal term of art (self-defense) as part of Instruction No. 14 but then did not define that term for the jury. Under Washington law the concept of "self-defense" allows the use of reasonable force by a person who reasonably believes he or she is about to be injured. Thus, it may include the use of force equal to or exceeding the force of the primary aggressor if that is reasonable under the circumstances. *State v. Acosta*, 101 Wn.2d 612, 616-17, 683 P.2d 1069 (1984). Under the primary aggressor instruction used in this case the defendant as one who was acting illegally did not have the right to claim self-defense under the legal definition for that term.

The problem is that the court did not instruct the jury on what self-defense was. Thus, the court left the jury to the common meaning of the term which includes conduct the law does not classify as self-defense. For example, if a person holds up an arm or a hand in an attempt to parry a blow

by another person, or if a person has incidental contact with a person attempting to restrain or hit, then under a common meaning the person has acted in “self-defense.” By contrast, under the legal definition for the term the holding up of an arm or the attempting to flee is not “self-defense” because it does not involve any actions constituting the intentional touching of another person (or the attempt to create apprehension). Thus, by using the first aggressor instruction in this case and not simultaneously defining “self-defense” the court left the jury with the impression that if the defendant did nothing but run away or attempt to block the blows Dr. Dixon was giving him the defendant was himself committing an assault sufficient to make him guilty of first degree burglary. Thus, by using the first aggressor instruction without defining “self-defense” the court prevented the defendant from effectively arguing his theory of the case.

Under the facts presented to the jury in this case there was substantial support for the defense claim that the defendant did not ever intentionally strike Dr. Dixon. In fact, Dr. Dixon’s description of the event leads to the conclusion that the defendant did nothing but attempt to flee without ever attempting to harm, strike, touch, or scare the doctor. Thus, but for the improper use of the first aggressor instruction, it is more likely than not that the jury would have returned a verdict of acquittal to the first degree burglary charge. As a result, the defendant is entitled to a new trial.

III. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FOUND HIM GUILTY OF FIRST DEGREE BURGLARY BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

As was already mentioned in Argument I in the case at bar, the state charged the defendant with first degree burglary under RCW 9A.52.020(1)(b). Under this statute the state had the burden of proving the following three elements beyond a reasonable doubt: (1) that the defendant “enter[ed] or remain[ed] unlawfully in a building, (2) that he did so “with intent to commit a crime against a person or property therein,” and (3) that “in entering or while in the building or in immediate flight therefrom” the defendant “assault[ed] any person.” As was already discussed in Argument I, the state presented no independent evidence, even seen in the light most

favorable to the state, that the defendant acted with criminal intent. If the defendant is correct in Argument I and the trial court erred when it gave the instruction on presumed intent, then the state's case also fails for a lack of substantial evidence on the element of criminal intent. Thus, in the case at bar, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when entered judgement of conviction for first degree assault because the state failed to present substantial evidence on the necessary element of criminal intent. As a result, this court should reverse the conviction and remand with instructions to enter judgement of the lesser included offense of criminal trespass.

IV. THE TRIAL COURT ERRED WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar the defendant argues that the trial court exceeded its statutory authority when it imposed

community custody conditions not authorized in the sentencing reform act.

The following sets out this argument.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the

defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar the defendant was found guilty of first degree burglary under RCW 9A.52.020(1)(b). Under RCW 9.94A.030(48)(a)(viii) this crime, as a class A felony, is defined as a "violent" offense. At sentencing the court imposed 106 months in prison and 18 to 36 months community custody. For offenders sentenced to over 12 months confinement on a violent offense RCW 9.94A.715 controls the imposition of community custody conditions. This statute states as follows in relevant part:

(1) When a court sentences a person to the custody of the department for . . . a violent offense . . . the court shall in addition to the other terms of the sentence, sentence the offender to community custody . . .

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to

community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

RCW 9.94A.715(1)-(2).

As RCW 9.94A.715(2)(a) states, “the conditions of community custody shall include those provided for in RCW 9.94A.700(4).” In addition, “[t]he conditions may also include those provided for in RCW 9.94A.700(5).” Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be

subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

Section (5) of this same statute states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.700(5).

Under these provisions no causal link need be established between the condition imposed and the crime committed so long as the condition “relates to the circumstances of the crime.” *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8th ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Julian*, 102 Wn.

App. 296, 304, 9 P.3d 851 (2000) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In the case at bar the trial court imposed the following conditions among others:

- ☒ . . . The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.
- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.
- ☒ Defendant shall undergo an evaluation for treatment for ☒ substance abuse ☐ mental health ☒ anger management treatment and fully comply with all recommended treatment.
- ☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a ☒ substances abuse ☐ mental health ☒ anger management treatment program as established by the community corrections officer and/or the treatment facility.
- ☒ Treatment shall be at the defendant’s expense and he/she shall keep his/her account current if it is determined that the defendant is financially able to afford it.

CP 149-150.

The last three conditions listed above are not related to the offense the defendant committed in any way. Indeed the court itself failed to enter any finding that the defendant had a substance abuse problem. This is found on page two of the judgment and sentence where the court failed to mark the paragraph that states:

- The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

CP 144.

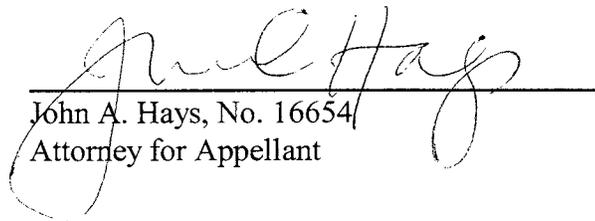
Under RCW 9.94A.700(4)(c) the court does have authority to prohibit a defendant from possessing or consuming controlled substances “except pursuant to lawfully issued prescriptions.” However, there is nothing in this section that allows the court to require that the defendant notify the department upon receiving a valid prescription for a controlled substance. Neither is there anything in this section that allows the trial court to prohibit a defendant from possessing or using “any paraphernalia that can be used for the ingestion or possession of controlled substance” such as “pagers, cell phone, and police scanners.” Indeed, this prohibition is hopelessly vague as almost any item can be used for the ingestion of controlled substances, such as knives, soda cans, or other kitchen utensils. Thus, the trial court exceeded its authority when it imposed the first and second conditions listed above.

CONCLUSION

The trial court denied the defendant his right to due process when it entered judgment unsupported by substantial evidence. As a result this court should reverse the conviction and remand with instructions to enter judgement on the lesser included offense of trespass. In the alternative, the trial court denied the defendant a fair trial when it gave Instructions 12 and 14, thereby entitling the defendant to a new trial.

DATED this 11th day of August, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9A.52.040

In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

INSTRUCTION NO. 12

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

INSTRUCTION NO. 14

No person may, by any intentional act reasonable likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

1
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6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 WILLIAM HENRY MOTTER,)
10 Appellant,)

CLARK CO. NO.05-1-02000-8
APPEAL NO: 34251-1-II

AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON)
12 COUNTY OF CLARK) vs.
13)

14 CATHY RUSSELL, being duly sworn on oath, states that on the 11TH day of AUGUST, 2006, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTORNEY
17 1200 FRANKLIN ST.
VANCOUVER, WA 98668

WILLIAM H. MOTTER #889252
WA STATE PENITENTIARY,
P.O. BOX 520
WALLA WALLA, WA 99362

18 and that said envelope contained the following:

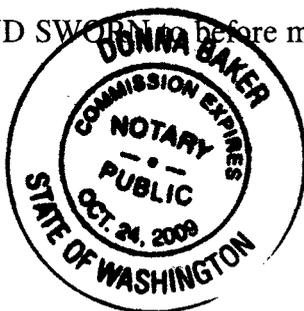
- 19 1. BRIEF OF APPELLANT
- 20 2. AFFIDAVIT OF MAILING

21 DATED this 11TH day of AUGUST, 2006.

Cathy Russell

CATHY RUSSELL

22 SUBSCRIBED AND SWORN before me this 11th day of AUGUST, 2006.



Donna Baker

NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09