

NO. 36486-7-II
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

TRAVIS L. TUCKER,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Christine A. Pomeroy, Judge
Cause No. 06-1-02128-6

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE	2
D. ARGUMENT	5
(1) THE STATE IMPROPERLY COMMENTED ON TUCKER’S CONSTITUTIONAL RIGHT TO REMAIN SILENT POST-ARREST	5
(2) TUCKER WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO THE STATE’S IMPROPER COMMENT ON HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT POST-ARREST.....	9
(3) THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 8, THE INTENT TO COMMIT A CRIME INFERENCE INSTRUCTION, WHERE THERE WAS NO CORROBORATING EVIDENCE SUPPORTING THE GIVING OF THIS INSTRUCTION AND THIS INSTRUCTION ALSO CONSTITUTED AN UNCONSTITUTIONAL COMMENT ON THE EVIDENCE GIVEN THE PARTICULAR FACTS OF THIS CASE	11
(4) TUCKER WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO THE COURT GIVING INSTRUCTION NO. 8.....	15
(5) TUCKER WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO PROPOSE A VOLUNTARY INTOXICATION DEFENSE.....	16
(6) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO FIND BEYOND A REASONABLE DOUBT THAT TUCKER WAS GUILTY OF BURGLARY IN THE SECOND DEGREE.....	20
E. CONCLUSION	21

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>State v. Austin</u> , 59 Wn. App. 186, 796 P.2d 746 (1990)	16
<u>State v. Brunson</u> , 128 Wn.2d 98, 905 P.2d 346 (1995).....	11, 12
<u>State v. Cantu</u> , 156 Wn.2d 819, 132 P.3d 725 (2006).....	12
<u>State v. Clark</u> , 78 Wn. App. 471, 999 P.2d 964 (1995)	16
<u>State v. Craven</u> , 67 Wn. App. 921, 841 P.2d 774 (1992).....	20
<u>State v. Curtis</u> , 110 Wn. App. 6, 37 P.3d 1274 (2002)	6, 8
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996).....	12, 13
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	20
<u>State v. Earls</u> , 116 Wn.2d 364, 805 P.2d 211 (1991).....	5
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993), <i>review denied</i> , 123 Wn.2d 1004 (1994)	9
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	5, 6, 7, 9
<u>State v. Finley</u> , 97 Wn. App. 129, 982 P.2d 681, <i>review denied</i> , 139 Wn.2d 1027 (2000)	17
<u>State v. Foster</u> , 91 Wn.2d 466, 589 P.2d 789 (1979).....	13
<u>State v. Gabryschak</u> , 83 Wn. App. 249, 921 P.2d 549 (1996).....	17
<u>State v. Gallegos</u> , 65 Wn. App. 230, 828 P.2d 37, <i>review denied</i> , 119 Wn.2d 1024 (1992)	17
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	9

<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995)	9
<u>State v. Grimes</u> , 92 Wn. App. 973, 966 P.2d 394 (1998)	11
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 575 (1989), <i>cert. denied</i> , 475 U.S. 1020, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986).....	7
<u>State v. Hanna</u> , 123 Wn.2d 704, 871 P.2d 135 (1994).....	11
<u>State v. Hansen</u> , 46 Wn. App. 292, 730 P.2d 706, 737 P.2d 670 (1986).....	13
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	16
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	13
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987), <i>aff'd</i> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	10, 15, 19
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992).....	6
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996)	16
<u>State v. Moore</u> , 79 Wn.2d 51, 483 P.2d 630 (1971)	5
<u>State v. Nemitz</u> , 105 Wn. App. 205, 19 P.3d 480 (2001)	6
<u>State v. Priest</u> , 100 Wn. App. 451, 997 P.3d 452 (2000).....	17
<u>State v. Romero</u> , 113 Wn. App. 779, 54 P.3d 1255 (2002)	6
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	20
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990), <i>cert. denied</i> , 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).....	13
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	9
<u>State v. Trickle</u> , 16 Wn. App. 18, 553 P.2d 139 (1976), <i>review denied</i> , 88 Wn.2d 1004 (1977)	13

State v. Washington, 36 Wn. App. 792, 677 P.2d 786, *review denied*, 101 Wn.2d 1015 (1984) 17

State v. White, 81 Wn.2d 223, 500 P.2d 1242 (1972) 9

Federal Cases

Doe v. United States, 487 U.S. 201, 108 S.Ct. 2341, 1010 L.Ed.2d 184 (1988)..... 5

Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978) 5, 6

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) 6

Constitution

Article 1, section 9 of the Washington Constitution..... 5

Article 1, section 22 (amend. 10) of the Washington Constitution 16

Article 4, section 16 of the Washington Constitution..... 13

Fifth Amendment to the United States Constitution..... 5

Fourteenth Amendment to the United States Constitution 5

Sixth Amendment to the United States Constitution 16

Statutes

RCW 9A.52.030..... 18

RCW 9A.52.040 11

Rules

CrR 3.5 2

CrR 3.6..... 2

ER 401 16

ER 402	16
RAP 2.5(a)(3).....	6

A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the State to ask Tucker a question that resulted in an unconstitutional comment on his right to remain silent post-arrest.
2. The trial court erred in allowing Tucker to be represented by counsel who provided ineffective assistance in failing to object to the State's improper question commenting on Tucker's constitutional right to remain silent post-arrest.
3. The trial court erred in giving the intent to commit a crime therein burglary inference instruction where the evidence did not corroborating the giving of this instruction.
4. The trial court erred in giving the intent to commit a crime therein burglary inference instruction where this instruction constituted an unconstitutional comment on the evidence given the particular facts of this case.
5. The trial court erred in allowing Tucker to be represented by counsel who provided ineffective assistance in failing to object to the court giving Instruction No. 8.
6. The trial court erred in allowing Tucker to be represented by counsel who provided ineffective assistance in failing to propose a voluntary intoxication defense.
7. The trial court erred in failing to take the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing the State to ask Tucker a question that resulted in an unconstitutional comment on his right to remain silent post-arrest? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Tucker to be represented by counsel who provided ineffective assistance in failing to object to the State's improper question

commenting on Tucker's constitutional right to remain silent post-arrest? [Assignment of Error No. 2].

3. Whether the trial court erred in giving Instruction No. 8, the intent to commit a crime inference instruction, where there was no corroborating evidence supporting the giving of this instruction and this instruction also constituted an unconstitutional comment on the evidence given the particular facts to this case? [Assignments of Error Nos. 3 and 4].
4. Whether the trial court erred in allowing Tucker to be represented by counsel who provided ineffective assistance in failing to object to the court giving Instruction No. 8? [Assignment of Error No. 5].
5. Whether the trial court erred in allowing Tucker to be represented by counsel who provided ineffective assistance in failing to propose a voluntary intoxication defense? [Assignment of Error No. 6].
6. Whether there was sufficient evidence to uphold Tucker's conviction for burglary in the second degree? [Assignment of Error No. 7].

C. STATEMENT OF THE CASE

1. Procedure

Travis L. Tucker (Tucker) was charged by first amended information filed in Thurston County Superior Court with one count of burglary in the second degree. [CP 5].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Tucker was tried by a jury, the Honorable Christine A. Pomeroy presiding. Tucker had no objections and took no exceptions to the Court's

Instructions to the Jury which included instructions on the lesser included offense of criminal trespass in the first degree (Instructions Nos. 11-13) and the burglary inference instruction (Instruction No. 8). [CP 24-41; RP 163-164]. The jury found Tucker guilty as charged of burglary in the second degree. [CP 23, 42; RP 210-215].

The court sentenced Tucker to a standard range sentence of 65-months. [CP 61-62; 6-29-07 RP 17-18].

Timely notice of appeal was filed on June 29, 2007. [CP 47-58]. This appeal follows.

2. Facts

On November 14, 2006 in the early morning hours (2 AM), Jennifer Cox (Cox), the general manager of a Taco Time in Olympia, received notification from the restaurant's alarm company that an alarm had gone off after business hours and the police had been called. [RP 22-23, 28-29]. Cox went to the restaurant, which was undergoing a remodel, to investigate the reported alarm. [RP 24, 29]. Upon arriving at the restaurant as she was entering, Cox heard a noise coming from the kitchen and left immediately to await the arrival of the police. [RP 30]. The police arrived and went into the restaurant to search. [RP 69-70, 72, 86-89]. The police discovered Tucker apparently hiding under some kitchen equipment. [RP 72-73, 89]. Tucker would not come out when ordered to

do so and the police forced him out using a taser and immediately noted that Tucker appeared to be intoxicated. [RP 75-76, 89-97, 102-103, 106]. Cox did not know Tucker, had not given him permission to be in the restaurant after hours, and noted that the alarm box for the restaurant appeared to be tampered with and the surveillance camera had been covered, but no items had been taken. [RP 35-36, 48-50, 55, 59].

Tucker testified in his defense. [RP 121-160]. Tucker testified that he had been drinking on the night in question and that he had entered the restaurant because he wanted to get out of the elements. [RP 124-125, 127-136]. He had no intention of committing a crime therein; all Tucker wanted to do was get out of the elements and get warm. [RP 127-136, 153]. Tucker denied causing any damage to the alarm box and to covering the surveillance camera and also testified that he did not respond to the police because he had been asleep when the police confronted him. [RP 127-136, 153-160]. The State during its cross-examination of Tucker improperly questioned him on his post-arrest right to remain silent by asking, "When you were arrested, you immediately told the police this story that you are telling us here today, right?" [RP 159].

D. ARGUMENT

(1) THE STATE IMPROPERLY COMMENTED ON
TUCKER'S CONSTITUTIONAL RIGHT TO REMAIN
SILENT POST-ARREST.

The privilege against self-incrimination, or the right to remain silent, is based upon the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination. Miranda v. Arizona, 384 U.S. at 479.¹ "The purpose of the right is ... 'to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or having to share his thoughts and beliefs with the Government.'" State v. Easter, 130 Wn.2d 228, 241, 922 P.2d 1285 (1996) (*quoting Doe v. United States*, 487 U.S. 201, 213, 108 S.Ct. 2341, 1010 L.Ed.2d 184 (1988)). A defendant's constitutional right to silence applies in both pre- and post-arrest situations. State v. Easter, 130 Wn.2d at 243. Even without an explicit reference to Miranda, a prosecutor may be deemed to have purposely elicited the fact of silence in the face of arrest. In the Ninth Circuit case of Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978), the

¹ "[T]he protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment." State v. Earls, 116 Wn.2d 364, 374-375, 805 P.2d 211 (1991) (*citing State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971)). Article 1, section 9 provides:

No person shall be compelled in any criminal case to give evidence against himself....

The Fifth Amendment provides:

...nor shall [any person] be compelled in any criminal case to be a witness against himself....

court held the following exchange between the prosecutor and the arresting officer was the sort of inquiry forbidden by the Supreme Court in Miranda and Doyle v. Ohio, 426 U.S. 610, 618-619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

Q: Who arrested Mr. Douglas?
A: I did.
Q: Did he make any statements to you?
A: No.

State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002) (*quoting* Douglas v. Cupp, 578 F.2d at 267).

It is constitutional error for a police witness to testify that a defendant refused to speak to him or her. State v. Easter, 130 Wn.2d at 241. Likewise, it is constitutional error for the State to purposefully elicit testimony as to a defendant's silence. State v. Curtis, 110 Wn. App. at 13. Tucker can raise this issue, which is manifest error affecting a constitutional right, for the first time on appeal. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (*citing* State v. Curtis, 110 Wn. App. at 11; State v. Nemitz, 105 Wn. App. 205, 214, 19 P.3d 480 (2001); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); RAP 2.5(a)(3)). The State bears the burden of overcoming the presumption that a constitutional error is prejudicial. State v. Easter, 130 Wn.2d at 242.

In this case, it was the State who asked an improper question during its cross-examination of Tucker infringing on Tucker's constitutional right to remain silent post-arrest. The State impermissibly asked Tucker, "When you were arrested, you immediately told the police this story that you are telling us here today, right?" [RP 159].

As previously indicated, in Easter, our Supreme Court held it is a violation of a defendant's right to silence for a police officer to testify that the defendant refused to talk to him or her. State v. Easter, 130 Wn.2d at 241. (defendant's "right to silence was violated by testimony he did not answer and looked away without speaking" when questioned by officer). Thus, a direct comment on the right to remain silent, especially by the State implying that Tucker was lying during his testimony and would have told this "story" upon his arrest, is a constitutional error requiring a constitutional harmless error analysis, State v. Easter, 130 Wn.2d at 241. A constitutional harmless error means the error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), *cert. denied*, 475 U.S. 1020, 89 L.Ed.2d 321, 106 S.Ct. 1208 (1986).

In the instant case, the State's question constitutes error of constitutional proportions and is not harmless. The direct implication of

the State's question is that Tucker was guilty by refusing to tell this "story" before testifying, which appears more egregious than the silence followed by looking away in Easter.

There was no probative value in the State's question. The only value was the inference that only a person who had something to hide or was guilty would remain silent. The question served no purpose other than to imply that Tucker remaining silent at the time of his arrest "was more consistent with guilt than with innocence." *See State v. Curtis*, 110 Wn. App. at 14.

The State's evidence against Tucker regarding the crime at issue was not overwhelming. The evidence the State presented against Tucker consisted of the police finding him inside a restaurant after hours, which constituted criminal trespass not the burglary for which Tucker was convicted. The State's impermissible question commenting on Tucker's constitutional right to remain silent post-arrest was the State's attempt to bolster a weak case by implying Tucker was lying and had committed burglary or else he would have said something sooner (before testifying). Any improper inference based on Tucker's exercise of his right to remain silent post-arrest that could be construed as bolstering the State's case is prejudicial, and it cannot be said this error was harmless beyond a

reasonable doubt. *See State v. Easter*, 130 Wn.2d at 242-243. This court should reverse Tucker's conviction for burglary in the second degree.

(2) TUCKER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE STATE'S IMPROPER COMMENT ON HIS CONSTITUTIONAL RIGHT TO REMAIN SILENT POST-ARREST.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the error claimed and argued above by failing to object to the State's improper comment on

Tucker's right to remain silent post-arrest,² then both elements of ineffective assistance of counsel have been established. For the reasons set forth above, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to such an unconstitutional question, and had counsel done so, the trial court would have prevented the State from asking such a question with its resulting improper implications.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent—but for counsel's failure to object the trial court would have been compelled to prevent the State from this unconstitutional questioning and its resulting implication with the result that Tucker would not have been convicted of burglary in the second degree and, possibly, only convicted of criminal trespass in the first degree as set forth in the lesser included offense instructions.

² While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

- (3) THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 8, THE INTENT TO COMMIT A CRIME INFERENCE INSTRUCTION, WHERE THERE WAS NO CORROBORATING EVIDENCE SUPPORTING THE GIVING OF THIS INSTRUCTION AND THIS INSTRUCTION ALSO CONSTITUTED AN UNCONSTITUTIONAL COMMENT ON THE EVIDENCE GIVEN THE PARTICULAR FACTS OF THIS CASE.

The court instructed the jury in Instruction No. 8 as follows:

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 34].

The State may use evidentiary devices, such as presumptions and inferences, to assist it in meeting its burden of proof, though they are not favored in criminal law. State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). The State Supreme Court has approved the permissive inference of intent to commit a crime “whenever the evidence shows a person enters or remains unlawfully in a building.” State v. Grimes, 92 Wn. App. 973, 980 n.2, 966 P.2d 394 (1998), *citing* State v. Brunson, 128 Wn.2d 98, 107, 905 P.2d 346 (1995). The permissible inference of criminal intent is found in RCW 9A.52.040, which provides:

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.

When permissive inferences are only part of the State's burden of proof supporting an element and not the "sole and sufficient" proof of such element, due process is not offended if the prosecution shows that the inference more likely than not flows from the proven fact. State v. Brunson, 128 Wn.2d at 107; *see also* State v. Cantu, 156 Wn.2d 819, 826, 132 P.3d 725 (2006). In every case where the jury has been instructed on the burglary permissive inference of criminal intent there has been some evidence corroborating the criminal intent, i.e. something was taken or in the process of being taken. *See e.g.* State v. Brunson, *supra*; State v. Cantu, *supra*; State v. Deal, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). It is because of this corroboration the giving of the inference instruction was not found to be error since the instruction was not the "sole" evidence of criminal intent.

Unlike the cases cited above, the evidence presented by the State does not provide the requisite corroboration that would have supported the giving of the inference instruction. The State's evidence consisted of the fact that Tucker was found inside the restaurant after hours. What this evidence amounts to is evidence of a possible criminal trespass not a burglary. The "sole" evidence establishing the additional element the State bore the burden of proving beyond a reasonable doubt of the intent to commit a crime was

the inference instruction—Instruction No. 8. The trial court erred in giving Instruction No. 8 where it was not supported by the record.

Moreover, given the particular facts of this case—the State’s lack of corroborating evidence supporting the giving of the instruction, Instruction No. 8 also constituted an unconstitutional comment on the evidence by the court. Art. 4, sec. 16 of the Washington Constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The constitution prohibits judges from conveying to the jury their personal attitudes towards the merits of the case. State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979). The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge’s opinion from influencing the jury. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). A judge comments on the evidence if the court’s attitude towards the merits of the case or the court’s evaluation relative to the disputed issue is inferable. *See* State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court has been communicated to the jury. State v. Trickle, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977); *see also*, State v. Deal, 128 Wn.2d 693, 703, 911 P.2d (1996), *quoting* State v. Swan, 114 Wn.2d

613, 657, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

Here, the trial court's giving of Instruction No. 8, the intent to commit a crime therein inference instruction, was an unconstitutional comment on the evidence because the court also gave lesser included offense instructions, Instructions Nos. 11-13 [CP 37-39], on criminal trespass in the first degree. The evidence elicited at trial consisted of the fact that Tucker was found in the restaurant after hours coupled with Tucker's testimony that he had gone into the restaurant while intoxicated merely to get out of the elements as he was cold. The sole difference between the two crimes is that in criminal trespass a person knowingly enters or remains unlawfully in a building while in burglary a person enters or remains unlawfully in a building with the intent to commit a crime therein. Any comment/instruction by the court usurping/influencing the jury's decision-making process in this regard is improper and that is exactly what happened here given the court's instructions to the jury. By instructing the jury on the intent to commit a crime therein inference (Instruction No. 8) at the same time instructing the jury on the lesser included offense of criminal trespass (Instructions Nos. 11-13), the judge communicated an attitude to the jury regarding the merits of the case. In

effect, the trial court telegraphed its belief in Tucker's guilt of burglary to the jury and thereby unconstitutionally commented on the evidence.

(4) TUCKER WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO THE COURT GIVING INSTRUCTION NO. 8.³

Should this court find that trial counsel waived the error claimed and argued above by failing to object to Instruction No. 8,⁴ then both elements of ineffective assistance of counsel have been established. For the reasons set forth above, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object to Instruction No. 8 where the instruction was not supported by the record and constituted an unconstitutional comment on the evidence, and had counsel done so, the trial court would not have given the instruction.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in

³ In an effort to avoid needless duplication, the law regarding ineffective assistance of counsel previously set forth in this brief is hereby adopted and incorporated for this portion of the brief.

⁴ While it is submitted that the error at issue may be raised for the first time on appeal— at least with regard to the trial court's unconstitutional comment on the evidence, this portion of the brief is presented only out of an abundance of caution should this court disagree.

the outcome.” Leavitt, 49 Wn. App. at 359. The prejudice here is apparent—but for counsel’s failure to object the trial court would have been compelled not give the instruction with the result that Tucker would not have been convicted of burglary in the second degree and, possibly, only convicted of criminal trespass in the first degree as set forth in the lesser included offense instructions.

(5) TUCKER WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO PROPOSE A VOLUNTARY INTOXICATION DEFENSE.⁵

Under the Sixth Amendment to the United States Constitution and Art. 1 sec. 22 (amend. 10) of the Washington Constitution, a criminal defendant has the right to present all admissible evidence in his or her defense. State v. Clark, 78 Wn. App. 471, 999 P.2d 964 (1995); State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996). Evidence is admissible when relevant, provided other rules do not preclude its admission. State v. Clark, 78 Wn. App. at 477; ER 401, 402; *see also* State v. Austin, 59 Wn. App. 186, 194-195, 796 P.2d 746 (1990).

A party is entitled to have the court instruct the jury on its theory of the case if evidence exists in the record to support the theory. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). A defendant is

⁵ In an effort to avoid needless duplication, the law regarding ineffective assistance of counsel previously set forth in this brief is hereby adopted and incorporated for this portion of the brief.

entitled to have his or her theory of the case submitted to the jury under the appropriate instructions when the theory is supported by substantial evidence. State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681, *review denied*, 139 Wn.2d 1027 (2000) (*citing* State v. Washington, 36 Wn. App. 792, 793, 677 P.2d 786, *review denied*, 101 Wn.2d 1015 (1984)).

The instruction for the defense of voluntary intoxication states:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

Thus to support a voluntary intoxication instruction, the defendant must show (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the drinking affected the defendant's ability to acquire the required mental state. State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996) (*citing* State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37, *review denied*, 119 Wn.2d 1024 (1992)). What is relevant is the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state. State v. Priest, 100 Wn. App. 451, 455, 997 P.3d 452 (2000). In order to satisfy the first part of this test, the "particular mental state" may include knowingly. *See* State v. Finley, 97 Wn. App. at 135.

Here, the crime of burglary in the second degree requires the particular mental element of knowingly entering a building “with the intent to commit a crime against a person or property therein.” RCW 9A.52.030. In addition, there was substantial evidence in the record that Tucker had been drinking (Tucker admitted as much and the police officers having contact with Tucker noted he was intoxicated). Because of his intoxication, Tucker could not form the requisite intent to commit a crime against a person or property therein, or as he testified he, given his state, he only entered the restaurant to get out of the elements. Tucker was entitled to a voluntary intoxication defense instruction. However, early in the case his counsel notified the court, “at this time I just want to state for the record that the defense would not be presenting a voluntary intoxication defense.” [5-31-07 RP 4]. In so doing, given the particular facts of this case, counsel provided ineffective assistance.

Both elements of ineffective assistance of counsel have been established based on this record as to counsel’s failure to propose a voluntary intoxication defense instruction. The record does not reveal any tactical or strategic reason why trial counsel would have failed to propose a voluntary intoxication defense where the evidence elicited at trial merely established that Tucker was found in the restaurant after hours particularly where the defense proposed and obtained instructions on the lesser

included offense of criminal trespass, [CP 12, 16-18, 37-39], a crime without the element of the “intent to commit a crime against a person or property therein,” and Tucker’s intoxication coupled with an instruction on voluntary intoxication would have negated an essential element of burglary—the crime for which Tucker was convicted. Had counsel proposed an instruction on voluntary intoxication, the trial court would have been compelled to give such an instruction based on this record.

To establish prejudice a defendant must show a reasonable probability that but for counsel’s deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff’d*, 111 Wn.2d 66, 758 P.2d 982 (1988). A “reasonable probability” means a probability “sufficient to undermine confidence in the outcome.” Leavitt, 49 Wn. App. at 359. The prejudice here is apparent—but for counsel’s failure to propose an instruction on the defense of voluntary intoxication, the trial court would have given the instruction with the result that Tucker would not have been convicted of burglary in the second degree and, possibly, only convicted of criminal trespass in the first degree as set forth in the lesser included offense instructions.

(6) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO FIND BEYOND A REASONABLE DOUBT THAT TUCKER WAS GUILTY OF BURGLARY IN THE SECOND DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, Tucker was charged and convicted of burglary in the second degree. In order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that Tucker entered or remained unlawfully in the Taco Time restaurant “with the intent to

commit a crime against a person or property therein.” [CP 36]. This is a burden the State cannot sustain.

The sum of the evidence in support of the State’s burden on this essential element was the fact that Tucker was found in the restaurant after hours coupled with an improper inference instruction challenged herein. However, Tucker testified that he was intoxicated and had entered the restaurant to get out of the elements. He had no intention of committing a crime against a person or property therein.

Thus, the evidence does not establish beyond a reasonable doubt the essential element that Tucker was unlawfully in the restaurant with the intent to commit a crime therein. What the evidence establishes beyond a reasonable is that Tucker was guilty of criminal trespass and nothing more. This court should reverse and dismiss Tucker’s conviction for burglary in the second degree.

E. CONCLUSION

Based on the above, Tucker respectfully requests this court to reverse and dismiss his conviction.

DATED this 17th day of December 2007.

Patricia A. Pethick
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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under
the laws of the State of Washington that on the 17th day of December
2007, I delivered a true and correct copy of the Petition for Review to
which this certificate is attached by United States Mail, to the following:

Travis L. Tucker
DOC# 803884
Washington State Penitentiary
1313 N. 13th Ave.
Walla Walla, WA 99362

Carol La Verne
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

Signed at Tacoma, Washington this 17th day of December 2007.

Patricia A. Pethick
Patricia A. Pethick