

NO. 36802-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY STEVEN HELLER

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY [Signature]

ON APPEAL FROM THE SUPERIOR COURT OF
GRAYS HARBOR COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-00036-7

BRIEF OF APPELLANT

ROGER A. HUNKO, WSBA# 9295
Attorney for Appellant
The Law Office of Wecker-Hunko
569 Division Street, Suite E
Port Orchard, WA 98366
(360) 876-1001

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I. ASSIGNMENT OF ERROR

- A. The trial court erred when it granted the State's continuance and trial was held outside of Mr. Heller's speedy trial.
- B. The trial court erred when it gave Jury Instruction No. 11.
- C. The trial court erred when it entered Judgment against Mr. Heller when there was not sufficient evidence to convict him of Burglary in the Second Degree.
- D. Mr. Heller did not receive effective assistance of counsel.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Did the trial court err when it granted the State's continuance beyond speedy trial, when the state had stated it was prepared to go to trial on the very day it requested the continuance?
- B. Did the trial court err when it gave an inference of intent instruction over defense objection?
 - 1. Was it error to give any instruction on inference in light of the insufficiency of any evidence of intent to commit a crime?
 - 2. Was it error to give an instruction held to be unconstitutional by the Supreme Court of Washington in State v. Deal, 128 Wn.2d 693, 700-03, 911 P.2d 996 (1996)?
 - 3. Can the State demonstrate that this error was harmless beyond a reasonable doubt?
- C. Was the evidence insufficient to find an intent to commit a crime in the laundry room?
- D. Did Heller receive ineffective assistance of counsel when counsel failed to move for dismissal after the State's case in chief?

III. STATEMENT OF THE CASE

On January 19, 2007, Anthony Heller was charged by information filed in the Superior Court for Grays County with one count of Burglary in the Second Degree in violation of RCW 9A.52.030(1). CP 1. On March 27, 2007, Heller filed a Motion to Dismiss pursuant to State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). CP 25 The motion was heard on April 4, 2007. RP 1-16. Heller argued that the facts did not support the element of intent to commit a crime. RP 6. The court found if there was sufficient evidence that Heller entered the building, the jury could infer intent to commit a crime. RP 9. At that time the court denied the motion. RP 12. However, the court granted Heller leave to find case law to support his position with the possibility of reconsideration. RP 13. On April 5, 2007, Heller filed a Motion for Reconsideration and a Motion for Order Directing filing of a Bill of Particulars. CP 35-36. Those motions were heard on April 10, 2007. RP 17-32. After listening to argument, the court stated that it had not really had time to consider the arguments, and that the request for a bill of particulars was not timely. RP 29. However, if Heller would consider a motion for continuation and waive speedy trial, it would grant the motion for bill of particulars and consider the motion to dismiss. RP 30. Heller agreed and a new trial date was set for June 19, 2007, with a new speedy date of July 10, 2007. RP 31. On May 29, 2007, at 8:30 the case was called and both the state and Heller stated they were prepared to go to trial on June 19, 2007 and Heller was told to be on time. CP 52, RP 33. At 10:43 the state filed a motion to continue and was heard later that day. CP 53, RP 1-5 (separate report of proceedings). The state requested a continuance because the DPA would be going to training in South Carolina that entire

week. RP 2. The state's motion declared, "In May I received notification I was accepted for training at the National Advocacy Center in Columbia, South Carolina from June 18, 2007 through June 22, 2007. CP 53. In addition, the July training for five other DPAs was that week. RP 2. Heller objected to the continuance. RP 3. The court found good cause and granted the continuance. RP 3. A new trial date was set for July 17, 2007, one week past speedy trial. CP 54.

A trial by jury was held July 17, 2007. Over Heller's objection the court gave Jury Instruction No. 11 which states:

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 unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent. 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 72

The jury found Mr. Heller guilty as charged. CP 74. Timely notice of appeal was filed. CP 89.

IV. SUBSTANTIVE FACTS

On January 7, 2007, Jaramie Smith heard a loud rig that he hadn't heard before, so he looked out the window of his apartment. RP 36. Smith saw a vehicle pulling into the parking lot with its headlights on. RP 37. The lights went off and the vehicle pulled in slowly. RP 37. Smith did not see who was in the vehicle, other than there was one man. RP 38. Smith saw the man walk between two buildings and about a minute and a half later heard banging noises, which sounded like hitting something with change in it, like change

in your pocket, metal on metal. RP 39, 45. Smith decided to check things out and slowly walked around the corner, still hearing the banging noises. RP 42. Smith testified that he saw a man at the back window with something in his hand, which Smith claimed he dropped and took off running. RP 42. Smith had not mentioned to the police or any one else prior to trial that the man had something in his hand which he dropped. RP 56. Smith then changed his story stating that he saw the man half in the window, and when he saw Smith, he dropped what he had and took off running. Smith stated it sounded like he dropped change or keys, but didn't look to see what it was. RP 43. The man ran through the yard, down the middle of the road, down the alley and out of sight.

Raymond Fuller was taking out his garbage when he saw a man sitting in a vehicle with the engine running, lights off, start to back out and then pulled back in and just sat there. RP 58. About five minutes or so later Fuller heard yelling that sounded like someone chasing him off or something. RP 59.

Officer Wheeler arrived on the scene in response to a suspicious vehicle call. After speaking with Smith, Wheeler searched for the suspect in the immediate area and took pictures of the laundry room. RP 68. However, before he could take pictures a female retrieving her laundry was attempting to fix the window. RP 69. The photos depicted the way the window looked after the female had messed with them. RP 70. There was no evidence inside the building of any tampering. Inside the laundry room, there were two coin operated machines, a washer and dryer. RP 71. Officer Wheeler did not find anything on the ground outside the window other than the screen leaning against the building. RP 81-82.

After completing the investigation at the scene, Officer Wheeler checked the area for a person matching the description given. RP 72. Wheeler located a man matching the description, black male wearing blue baseball style hat, black jacket and blue jeans, traveling southbound across alley on First Street. RP 74. When confronted by Wheeler, Heller stated he was walking from 1015 Oakhurst Dr. another apartment complex. RP 76. Wheeler transported Heller back to the apartment where the incident had occurred, and Smith identified him as the person he had seen at the window. RP 77-78. No tools or evidence of any kind was found at the scene or on Heller's person. RP 84. There were some tools that an ordinary person would have in the vehicle. RP 86-7. No pry bars or screwdrivers were identified by Wheeler. RP 87.

After the State rested, Heller did not move for dismissal. Counsel called Heller's wife to testify. RP 104. She testified about what vehicles she owned and what tools were inside the vehicle. She also testified that Heller had contacted her to come and pick up the vehicle after he was arrested. RP 106. Heller also testified. He testified that he had a few beers earlier in the evening and was heading home from a friends house. However, he needed to get gas, and he needed to go to the bathroom. RP 109. He did not stop at the gas station because he saw a police car, and he did not have a driver's license, so he kept going and pulled into this apartment complex to relieve himself. RP 109-10. He turned off his lights because there were people outside and he did not want to shine his lights in their eyes. RP 110. He testified that he saw a man taking out his trash, and waited for him to leave before exiting because he did not want him to see him relieving himself. RP 116. He then went between the buildings, next to the laundry room window, where he relieved

himself. He stated that he leaned up against the window, and it popped out open. RP 110. Then a man came back and asked him in a threatening way what he was doing. RP 112. Heller ran because he was a black man in a dark alley and he felt threatened by the man. RP 112. When the Officer caught up to him, Heller lied about where he had been because he had been drinking and his license was suspended. RP 113.

V. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION TO CONTINUE AFTER THE STATE HAD ONLY HOURS BEFORE STATED THAT IT WAS READY TO GO TO TRIAL ON THE SCHEDULED DATE, EXTENDING HELLER'S TRIAL BEYOND SPEEDY TRIAL DATE.

In both civil and criminal cases, the decision to grant or deny a motion for continuance rests within the sound discretion of the trial court and is reviewed for abuse of discretion. The trial court's decision will not be disturbed unless the exercise of discretion is manifestly unreasonable or rests on untenable grounds or reasons. State v. Downing, 151 Wn.2d 265, 272-273, 87 P.3d 1169 (2004). When a prosecutor is unavailable, a trial court generally has discretion to grant the State a continuance unless there is substantial prejudice to the defendant in the presentation of his defense. State v. Raper, 47 Wn. App. 530, 535, 736 P.2d 680 (1987) (prosecutor in the middle of another trial when trial was to begin); State v. Jones, 117 Wn. App. 721, 728-29, 72 P.3d 1110 (2003) (illness of counsel, prescheduled training of witness, and prescheduled vacation of prosecutor).

In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. Downing, 151 Wn.2d at 273.

A recent decision in Division One addressed a very similar situation. See State v. Chichester, 141 Wn.App. 446, 170 P.3d 583 (Div. I, 2007). In that case, the week before trial, a readiness hearing was held. Both counsel indicated the days for trial were good and they were both ready for trial. Chichester, 141 Wn. App. At 449. Later that same day, the prosecutor informed the court that the State had only one prosecutor available to proceed with the trials set on that day. Id. The trial court suggested another deputy could try the case and the State responded that none was available. Id. at 450. On the day of trial, the State maintained that it could not continue due to unavailability of the prosecutor because of another trial. The court denied the continuance and granted the defense motion for dismissal, even though speedy was more than a month away. Id. Division One held that the trial court did not abuse its discretion in finding that the state did not use due diligence in solving the self-created scheduling conflict. Id. at 454. Furthermore, the court held that the trial court properly considered the expense and inconvenience that granting the motion would create for Chichester, who had missed work and traveled a considerable distance to be present for trial on the confirmed date. Id.

Similarly, here, at the readiness hearing both parties confirmed that they were ready to go to trial. Then, two hours later, the deputy claimed she was not ready because she had received notice in May that she had been approved for training. Unless she received the notice after the readiness hearing, this is a fact that she should have known before stating that the state was ready. If, however, she had received the notice of approval after the readiness hearing, the deputy either should have declined the training because she was committed to trial, or found another deputy to handle the trial for her. Unlike in

Chichester, there would have been ample time for another deputy to prepare. However, the State claimed that five other deputies would be out at the same time for the annual meeting. Like in Chichester, the state created the scheduling conflict, and the motion to continue should have been denied.

The court also recognized that Heller was prejudiced by the delay, and therefore allowed for a continuance that allowed for plenty of time for him to work it out with his schedule. However, Heller had rearranged his schedule, and had to reschedule his own training in anticipation of the scheduled trial date. RP [3-4]. Furthermore, unlike Chichester, the continuance was granted beyond Heller's speedy trial date of July 10, 2007. Therefore, because it was an abuse of discretion to grant the continuance, Heller was prejudiced by the continuance, and Heller's speedy trial right was violated, this court should remand to the trial court for dismissal with prejudice.

B. THE TRIAL COURT ERRED WHEN IT GAVE JURY INSTRUCTION NO. 11, CREATING A MANDATORY INFERENCE AND SHIFTING THE BURDEN OF PROOF TO HELLER.

1. The Trial Court erred when it gave an instruction on inference when the evidence did not support such an inference.

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 of 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, 157 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 was 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 has not been 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 testimony that Heller had pulled into the laundry area slowly with his lights out. Heller walked in between the buildings, and Smith heard banging noises. Smith claimed he went to check it out

and saw Heller with the window on his chest, and when Heller saw Smith, he dropped something and ran. No evidence of any tampering inside the laundry was found. No tools or evidence outside the laundry was found. No tools or evidence on Heller's person was found. Heller ran, and lied to the police about what he was doing. Heller also had a reasonable explanation for why he ran and lied to the police. He had been drinking and did not have a valid driver's license. Therefore, because there was absolutely no corroborating evidence of any intent to commit a crime, the inference instruction provided the sole evidence of the element of intent. The trial court erred in giving Instruction No. 11 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. 11, 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 (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 996 (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. 11, 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, Instruction Nos. 12-14 CP 72, on criminal trespass in the first degree. As stated above, the state did not present any evidence that a crime had been committed or was about to be committed. The only evidence the State presented is that Heller was partially in the laundry window. 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 intent to commit a crime therein. Any comments or instructions by the court usurping or 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. 11), while at the same time instructing the jury on the lesser included offense of criminal trespass (Instructions Nos. 12-14), the court communicated an attitude to the jury regarding

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

2. The Inference of Intent Instruction violated due process by creating an improper mandatory presumption on an essential element.

The trial court's inference of intent instruction stated:

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 unless such entering or remaining shall be explained by evidence satisfactory to the jury to have been made without such criminal intent. 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 72 (emphasis added)

The Washington Supreme Court has found that the language underscored above violates due process by creating a mandatory presumption which shifts the burden of persuasion on the element of intent from the state to the defendant. State v. Deal, 128 Wn.2d 693, 700-03, 911 P.2d 996 (1996). While Heller did not object to the instruction on this basis at trial, errors of constitutional magnitude may be raised for the first time on appeal. State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968).

3. The conviction must be reversed because the state cannot prove that the error was harmless beyond a reasonable doubt.

This Court will find a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Constitutional error is presumed

prejudicial and the State bears the burden to prove that it was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

This is a burden the State cannot meet. In Deal, the court found the instructional error harmless where Deal himself admitted that he had unlawfully entered and then remained in his estranged wife's house while intentionally assaulting her male companion. Based on these admissions, the court was convinced that "the jury would have found [Deal] guilty...even if the improper instruction had not been given." Deal, 128 Wn.2d at 703.

By contrast here, there were no such admissions. In fact, the only evidence presented is that Heller drove in slowly with his lights off, sat in his car a few moments, and then was seen by Smith partially in or out of the window. He had no tools and nothing had been damaged. Heller did not admit to going to commit any crime. In fact, he testified that he went back there to relieve himself. Heller was startled by Smith, and ran. Heller lied to the police about where he was coming from, but he had been drinking and did not have a valid license. Based on that testimony, a reasonable jury could have concluded, in the absence of the "inference of intent" instruction, that Heller did not enter the laundry with the intent to commit a crime.

This was a viable defense as demonstrated by the trial court's instruction on the lesser included offense of criminal trespass in the first degree. A defendant is entitled to have the jury instructed on the lesser included offense only where the evidence in the case supports an inference that the lesser crime was committed. State v. Knight, 54 Wn. App. 143, 154, 772 P.2d 1042, rev. denied, 113 Wn. 2d 1014 (1989).

By instructing the jury on trespass, the trial court necessarily concluded that based on the evidence, the jury might not find that Heller entered the laundry room with the intent to commit a crime. Any possibility in this regard is dissipated, however, when the trial court instructed the jury that it could infer intent merely from Heller's presence in the window. The unconstitutional instruction likely had significant impact at trial.

Therefore, the trial court erred when it gave the unconstitutional "inference of intent" instruction. The instruction violated Heller's due process rights because it relieved the State of its burden to prove an element of burglary. This Court should reverse.

C. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THE MR. HELLER ENTERED THE LAUNDRY ROOM WITH THE INTENT TO COMMIT ANY CRIME.

This Court reviews challenges to sufficiency of evidence by determining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt.

State v. Zakel, 61 Wn. App. 805, 811, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992), *citing* State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

RCW 9A.52.030 provides, in pertinent part,

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.

Basic principles of due process require the State to prove every essential element of a crime beyond a reasonable doubt. State v. Cantu, 156 Wn.2d 819,

825, 132 P.3d 725 (2006). Criminal intent is an essential element of burglary. Id. The intent required for burglary is intent to commit any crime inside the burglarized premises. State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985).

While it is true that, for purposes of a burglary prosecution, intent to commit a crime may be inferred when a person enters or remains unlawfully in a building (RCW 9A.52.040), this permissive inference cannot relieve the State of its burden to prove each element of a crime without violating due process. State v. Randhawa, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Permissive inferences do not necessarily relieve the State of its burden of persuasion because the State is still required to persuade the fact-finder that the proposed inference should follow from the proven facts. State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996).

The evidence at trial has been stated many times above. There was absolutely no evidence presented to suggest that Heller entered the laundry room intending to commit a crime. Inside the laundry there were two coin operated machines which would require tools to break into. Heller did not have any tools with him. There were no tools found inside or outside the laundry room. While there may have been 'normal tools that any one would have' in the vehicle, there were no tools identified in the vehicle that would have been useful for breaking into the machines. There was absolutely no evidence presented to support intent to commit a crime.

The State presented insufficient evidence to support either that Heller entered the laundry room, or to support an inference beyond a reasonable doubt that

Mr. Heller entered the laundry room with intent to commit a crime. Therefore, this court should vacate Heller's conviction and remand for dismissal, or vacate the conviction for burglary in the second degree and enter a conviction on the lesser included charge of criminal trespass in the first degree.

D. MR. HELLER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO MOVE FOR DISMISSAL AFTER THE STATE'S CASE IN CHIEF, WHEN THERE WAS INSUFFICIENT EVIDENCE TO CONVICT HELLER.

The Sixth Amendment to the United States Constitution guarantees to indigent defendants the assistance of counsel in criminal cases. The Washington State Constitution also confers a right to counsel. Wash. Const. Art. 1, §22. "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendant's the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Effective assistance of counsel is a constitutionally protected right. U.S. Const. amend. VI; Wash. Const. Art. I. §22.

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). The standard of review for effectiveness of counsel is set forth in Strickland v. Washington, U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) that this deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v.

Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). The first prong of the Strickland test is met if counsel's performance falls below an objective standard of reasonableness in light of all circumstances. Thomas, 109 Wn.2d at 226. The prejudice to the defendant required by the second prong of the test is present "if there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also*, State v. Klinger, 96 Wn.App. 926, 980 P.2d 282 (1999). A reviewing court indulges in a strong presumption that counsel's representation falls within the wide range of proper assistance. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). In order to overcome this presumption, the Appellant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. McFarland, 127 Wn.2d at 336.

Here, defense counsel should have sought dismissal of the burglary charge because the prosecutor failed to produce evidence of an intent to commit any crime during it's case in chief. This case is controlled by State v. Lopez, 107 Wn. App. 270, 27 P.3d 237 (2001). In Lopez, the defendant was charged with Unlawful Possession of a Firearm in the First Degree. At trial, the prosecutor did not present any evidence of a constitutionally valid prior conviction. Despite this, defense counsel neglected to move for dismissal after the state had rested. Instead, the defendant testified, admitting a prior conviction for Burglary in the First Degree. The Court of Appeals reversed for ineffective assistance:

[D]efense counsel should have moved for dismissal of the unlawful possession charge at the close of the State's case in chief. Because the State had neglected to prove an essential element of unlawful firearm possession, the trial court would have necessarily granted the motion.

Ordinarily, counsel's strategic or tactical decisions will not provide a basis for an ineffectiveness challenge...But here, no sound strategic or tactical reason is evident for counsel's failure to move for dismissal at the end of the State's case is chief...Moreover, no possible advantage could flow to Mr. Lopez from counsel's failure to move for dismissal...Defense counsel's failure in this regard simply cannot be attributed to improvident trial strategy or misguided tactics...[C]ounsel's representation was deficient...

...By failing to move for dismissal, and then eliciting the necessary evidence from Mr. Lopez, defense counsel essentially gifted the State with a certain conviction. Accordingly, Mr. Lopez was prejudiced by counsel's deficient performance. We must reverse the unlawful possession conviction.

Lopez at 275-277, *quotations marks and citations omitted*.

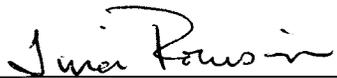
Similarly, in this case the prosecutor failed to present any evidence of intent to commit any crime, an essential element of burglary in the second degree. Defense counsel had previously filed and argued a motion to dismiss under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). In order to preserve the issue for appeal, Heller needed to move for dismissal. Furthermore, the State presented no evidence that the vehicle driven in was Heller's. Heller presented that evidence. Heller's testimony conflicted with the State's evidence as to whether Heller was in the window or not. Had Heller not testified, Heller could have made any argument suggesting possibilities for the entry into the laundry, such as, maybe he was going in there to use the bathroom. However, when Heller testified, providing inconsistent information, the jury was left to decide who to believe as to the events. Once the jury decided to believe Smith rather than Heller, the doubt was given to the jury as to what was intended. Because the State did not present sufficient evidence, the inconsistent testimony provided by Heller, most likely convicted him. Therefore, Heller received ineffective assistance of counsel when counsel failed to move for dismissal at the

end of the State's case in chief. This is a constitutional error that requires remand for dismissal.

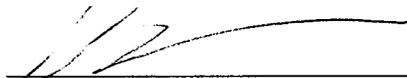
VI. CONCLUSION

For the forgoing reasons, this case should be remanded for dismissal.

Respectfully Submitted this 1 day of April, 2008



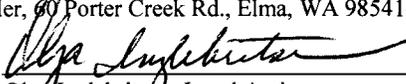
Tina R. Robinson, WSBA# 37965
Associate Attorney

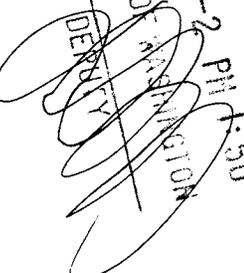


Roger A. Hunko, WSBA# 9295
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 1 day of April, 2008, I caused a true and correct original of this Brief of Appellant to be served on the following in the manner indicated: via U.S. Mail David Ponzoha, Clerk Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, Washington 98402; a copy sent via U.S. Mail to: Megan M Valentine, Gray's Harbor Prosecutor's Office, 102 W Broadway Ave., Rm 102, Montesano, WA, 98563-3621; and to Anthony Heller, 60 Porter Creek Rd., Elma, WA 98541-9204

By: 
Olga Inglebritson, Legal Assistant

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