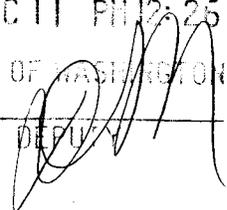


FILED
COURT OF APPEALS
DIVISION II

09 DEC 11 PM 12:25

STATE OF WASHINGTON

BY _____
DEPUTY



No. 39599-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Steven Gray,

Appellant.

Jefferson County Superior Court Cause No. 09-1-00073-1

The Honorable Craddock Verser

Appellant's Opening Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 339-4870
FAX: (866) 499-7475

P.M. | 2-10-2009

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3

ARGUMENT..... 5

I. Mr. Gray was denied the effective assistance of counsel under the Sixth and Fourteenth Amendments..... 5

A. Standard of Review..... 5

B. Mr. Gray was guaranteed the effective assistance of counsel at trial and at sentencing. 6

C. Defense counsel was ineffective for failing to seek instructions on the inferior degree offense of Burglary in the Second Degree. 7

D. Defense counsel was ineffective for failing to propose an instruction on voluntary intoxication. 11

E. Defense counsel was ineffective at sentencing by stipulating to an offender score of nine..... 13

II. Mr. Gray’s case must be dismissed without prejudice because the charging document was deficient..... 16

A. Standard of Review..... 16

B. The Information failed to allege that Mr. Gray
burglarized a dwelling other than a vehicle. 17

CONCLUSION 19

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	6
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	7
<i>United States v. Salemo</i> , 61 F.3d 214 (3 rd Cir. 1995)	6

WASHINGTON CASES

<i>In re Det. of Martin</i> , 163 Wn.2d 501, 182 P.3d 951 (2008)	18
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001)	6
<i>In re Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007)	7
<i>Queets Band of Indians v. State</i> , 102 Wn.2d 1, 682 P.2d 909 (1984)	15
<i>State Owned Forests v. Sutherland</i> , 124 Wn.App. 400, 101 P.3d 880 (2004)	17, 18
<i>State v. Anderson</i> , 72 Wn. App. 453, 864 P.2d 1001 (1994)	14
<i>State v. Christensen</i> , 153 Wn.2d 186, 102 P.3d 789, (2004)	17
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	8, 9
<i>State v. Franks</i> , 105 Wn.App. 950, 22 P.3d 269 (2001)	17
<i>State v. Grier</i> , 150 Wn.App. 619, 208 P.3d 1221 (2009)	8, 10
<i>State v. Haddock</i> , 141 Wn.2d 103, 3 P.3d 733 (2000)	14
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	7
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006)	6
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991)	16, 17, 18

<i>State v. Kruger</i> , 116 Wn. App. 685, 67 P.3d 1147 (2003).....	11, 13
<i>State v. Leyda</i> , 157 Wn.2d 335, 138 P.3d 610 (2006)	17
<i>State v. McDonald</i> , 123 Wn.App. 85, 96 P.3d 468 (2004)	9
<i>State v. McGill</i> , 112 Wn. App. 95, 47 P.3d 173 (2002).....	6, 16
<i>State v. Parker</i> , 102 Wn.2d 161, 683 P.2d 189 (1984).....	8
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	7, 8, 10
<i>State v. Porter</i> , 133 Wn.2d 177, 942 P.2d 974 (1997).....	14
<i>State v. Punsalan</i> , 156 Wn.2d 875, 133 P.3d 934 (2006).....	17, 18
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	7
<i>State v. Saunders</i> , 120 Wn. App. 800, 86 P.3d 232 (2004)	6, 16
<i>State v. Sommerville</i> , 111 Wn.2d 524 , 760 P.2d 932 (1988)	15
<i>State v. Stevens</i> , 127 Wn. App. 269, 110 P.3d 1179 (2005)	17
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	11, 12
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	11
<i>State v. Ward</i> , 125 Wn. App. 243, 104 P.3d 670 (2004)	8, 10
<i>State v. Williams</i> , 135 Wn.2d 365, 957 P.2d 216 (1998).....	14
<i>State v. Wright</i> , 76 Wn.App. 811, 888 P.2d 1214 (1995).....	14
<i>State v. Young</i> , 22 Wn. 273, 60 P. 650 (1900).....	8

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V	17
U.S. Const. Amend. VI.....	1, 5, 6, 17
U.S. Const. Amend. XIV	1, 5, 6, 17

Wash. Const. Article I, Section 22.....	1, 6, 17
Wash. Const. Article I, Section 3.....	17

WASHINGTON STATUTES

Former RCW 9.94A.360.....	14
RCW 10.61.003	8
RCW 10.61.010	8
RCW 9.94A.525.....	13, 15
RCW 9.94A.589.....	13, 14
RCW 9A.04.110.....	9
RCW 9A.52.025.....	18
RCW 9A.52.030.....	9

OTHER AUTHORITIES

Sentencing Guidelines Commission, <i>Adult Sentencing Manual</i> , Section III	10, 16
-----------------------------------------------------------------------------------------	--------

ASSIGNMENTS OF ERROR

1. Mr. Gray was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel was ineffective for pursuing a strategy that required the jury to choose between conviction and outright acquittal.
3. Defense counsel was ineffective for failing to propose instructions on the inferior degree offense of Burglary in the Second Degree.
4. Defense counsel was ineffective for failing to propose an appropriate instruction on voluntary intoxication.
5. Defense counsel was ineffective for stipulating that Mr. Gray had an offender score of nine.
6. The trial court erred by sentencing Mr. Gray with an offender score of nine.
7. The trial court erred by counting Mr. Gray's 7/4/06 convictions separately without conducting a "same criminal conduct" analysis.
8. The trial court erred by counting Mr. Gray's 6/30/06 convictions separately without conducting a "same criminal conduct" analysis.
9. Mr. Gray's Residential Burglary conviction violated his Sixth and Fourteenth Amendment right to notice of the charges against him.
10. Mr. Gray's Residential Burglary conviction violated his Article I, Section 22 right to notice of the charges against him.
11. The Information was deficient because it failed to allege an essential element of Residential Burglary.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel provided deficient performance that prejudiced

Mr. Gray when he failed to propose instructions on the inferior degree offense of Burglary in the Second Degree. Was Mr. Gray denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

2. An accused person is entitled to an instruction on voluntary intoxication when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite mental state. Mr. Gray was charged with two crimes that required proof of intent, was highly intoxicated at the time of the offenses, and produced evidence that his drinking affected his ability to form intent. Should defense counsel have proposed an instruction on voluntary intoxication?

3. Multiple offenses are the same criminal conduct if they occur at the same time and place, involve the same criminal intent, and involve the same victim. Two pairs of Mr. Gray's prior offenses may have comprised the same criminal conduct. Was Mr. Gray deprived of the effective assistance of counsel when his attorney stipulated that he had an offender score of nine?

4. An accused person is constitutionally entitled to be informed of the charges against him. The Information in this case did not provide notice that Residential Burglary requires proof of entry into a dwelling other than a vehicle. Was Mr. Gray denied his constitutional right to adequate notice of the charge?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Steven Gray was passed out on the beach in Jefferson County near Quilcene when passersby called police to report it. RP (6/22/09) 34. By the time police arrived, Mr. Gray was sitting up but his communication was unclear. RP (6/22/09) 34. Around him were towels, a pillow, clothing, a can opener, a wine bottle opener, and several empty alcohol containers. RP (6/22/09) 35-39. He was taken to the hospital. RP (6/22/09) 37.

One of the empty bottles had the name "Larry Schinke" on it, the owner of a piece of property roughly 300 yards away. RP (6/22/09) 39-41. An officer went to the building on the property and found the back door had a cut screen and broken glass. RP (6/22/09) 41-44. He went inside and found that the phone line inside had been cut, security system information was out, and that closets as well as a liquor cabinet were open. RP (6/22/09) 48-51. The sergeant tried to lift prints without luck, left a message for the property owner, and went to the hospital where Mr. Gray was located. RP (6/22/09) 55-57, 66.

The sergeant met with Mr. Schinke a week later, and Mr. Schinke provided him with Mr. Gray's identification, which he'd found inside his property. RP (6/22/08) 60, 64. Mr. Schinke lived in Renton 60% of the

time, and was at the Quilcene property two to three days at a time three or four times a month. RP (6/22/09) 71-72. He said he'd barricaded the back door when he left the property last. RP (6/22/09) 83. He identified the jacket Mr. Gray was wearing when he was arrested as his, as well as the wine bottle, pillowcase, and other items. RP (6/22/09) 74-79.

The state charged Mr. Gray with Residential Burglary and Theft in the Third Degree. CP 1-2. The charging language for the burglary charge was:

On or about the 18th day of April, 2009, in the County of Jefferson, State of Washington, the above-named Defendant with intent to commit a crime against a person or property therein, entered or remained unlawfully in the dwelling of Larry Shinke, located at 801 Linger Longer Road, Quilcene; contrary to Revised Code of Washington 9A.52.025(1), a class B felony.

CP 2.

At the jury trial, the defense did not request a lesser included instruction regarding Burglary in the Second Degree. RP (6/22/09) 92-94. The defense did not propose an instruction on voluntary intoxication. RP (6/22/09) 92-94, 123-125. The court did not give either instruction. Court's Instructions to the Jury, Supp. CP. In his closing argument, the defense attorney argued that Mr. Gray was intoxicated and could not have formed the requisite intent to commit the crimes. RP (6/22/09) 122-125. The jury convicted Mr. Gray on both charges. CP 3.

A sentencing hearing was held. The state alleged that Mr. Gray's score was 9 points, and the defense attorney agreed. RP (7/1/09) 135-136. Mr. Gray had been convicted of Residential Burglary and Malicious Mischief, which had the same crime and sentencing dates. Without comment, the court counted them separately. CP 4; RP (7/1/09) 135-146. Mr. Gray had also been convicted of two counts of Residential Burglary which had the same offense and sentencing dates, and again, without comment, the court counted them separately. CP 4; RP (7/1/09) 135-146. Mr. Gray urged the court to order a prison-based DOSA sentence, since his evaluation indicated an alcohol problem. RP (7/1/09) 137-140, 144. The court denied the defense request, found Mr. Gray had 9 points, and sentenced him to the top of his standard range. RP (7/1/09) 144-146; CP 3-11. This timely appeal followed. CP 12.

ARGUMENT

I. MR. GRAY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Standard of Review

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); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. Mr. Gray was guaranteed the effective assistance of counsel at trial and at sentencing.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22.

The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995). The right to the assistance of an attorney includes the right to the effective assistance of counsel at sentencing. *See, e.g., State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); *State v. McGill*, 112 Wn. App. 95, 101, 47 P.3d 173 (2002).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an

objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

C. Defense counsel was ineffective for failing to seek instructions on the inferior degree offense of Burglary in the Second Degree.

Defense counsel’s failure to seek instructions on an inferior degree offense or a lesser-included offense can deprive an accused of the

effective assistance of counsel. *State v. Grier*, 150 Wn.App. 619, 635, 208 P.3d 1221 (2009) (citing *Pittman, supra*, and *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004)). Counsel's failure to request appropriate instructions on a lesser offense constitutes ineffective assistance if (1) the accused person is entitled to the instructions and (2) under the facts of the case, it was objectively unreasonable for defense counsel pursue an "all or nothing" strategy. *Grier*, at 635.

RCW 10.61.003 and RCW 10.61.010 guarantee the "unqualified right" to have the jury pass on the inferior degree offense if there is "even the slightest evidence" that the accused person may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984), quoting *State v. Young*, 22 Wn. 273, 276-277, 60 P. 650 (1900). The appellate court views the evidence in a light most favorable to the accused person. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The instruction should be given even if there is contradictory evidence, or if the accused person presents other defenses. *Id., supra*. The right to an appropriate inferior degree instruction is "absolute," and failure to give such an instruction requires reversal. *Parker*, at 164.

Burglary in the Second Degree is an inferior degree offense to Residential Burglary.¹ *State v. McDonald*, 123 Wn.App. 85, 90, 96 P.3d 468 (2004). A person is guilty of second-degree burglary if the unlawful entry is to a building other than a dwelling. RCW 9A.52.030. A dwelling is a building or structure that “is used or ordinarily used by a person for lodging.” Instruction No. 7, Court’s Instructions to the Jury, Supp. CP; *see also* RCW 9A.04.110(7).

The question of whether a building qualifies as a dwelling “turns on all relevant factors and is generally a matter for the jury to decide.” *McDonald*, at 91. For example, in *McDonald*, the Court of Appeals reversed a residential burglary conviction after the lower court refused to instruct on second-degree burglary. According to the Court, “a jury could have found that no one was living in [the house] from about October 2002, to at least March 2003, and thus that the house was not being ‘used or ordinarily used by a person for lodging’ on December 9, 2002.” *Id.*, at 90.

In this case, defense counsel’s failure to propose instructions on second-degree burglary was objectively unreasonable, and deprived Mr.

¹An offense qualifies as an inferior degree offense if “(1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense...” *Fernandez-Medina*, at 454 (internal quotation marks and citations omitted).

Gray of the effective assistance of counsel. First, Mr. Gray was entitled to the instructions. The testimony showed that the building was unoccupied on the day of the alleged intrusion. RP (6/22/09) 43-48, 74-85.

Furthermore, Schinke testified that his primary residence was in Renton, and that he only used the Port Townsend house two or three days at a time, three or four times per month. RP (6/22/09) 70-72. This is at least “slight” evidence that the building was not “used or ordinarily used” as lodging on or about April 18, 2009. Accordingly, a request for instructions on the lesser offense should have been granted, and the jury should have been allowed to determine whether or not Schinke’s intermittent use qualified the building as a “dwelling” under the law.

Second, an “all or nothing” strategy was objectively unreasonable. The state’s evidence was strong, and Mr. Gray could have asserted the same intoxication/lack-of-intent defense to the lesser charge. Had he been convicted of second-degree burglary, his standard range would have been 51-68 months, instead of the 63-84 month standard range that applied to the Residential Burglary charge. *See Sentencing Guidelines Commission, Adult Sentencing Manual*, Section III, pp. 66-67.

As in *Grier*, *Ward*, and *Pittman*, defense counsel’s failure to pursue the inferior degree offense was objectively unreasonable and prejudiced Mr. Gray. Because he was denied the effective assistance of

counsel, his convictions must be reversed and the case remanded to the trial court for a new trial. *Grier, supra*.

D. Defense counsel was ineffective for failing to propose an instruction on voluntary intoxication.

Evidence that an accused person was intoxicated at the time of the offense may negate the mental element of a crime. A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite mental state. *State v. Kruger*, 116 Wn. App. 685, 691, 67 P.3d 1147 (2003). This standard can be met by showing the effects of alcohol on the defendant's mind and body, for example by providing evidence that the accused person blacked out, vomited, slurred speech, and was impervious to pepper spray. *Kruger, at 692*.

Where the facts support an intoxication defense, failure to properly present the defense constitutes ineffective assistance. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). Reversal is required if counsel's failure to properly present the defense prejudiced the accused. *Id., at 229*.

The defense strategy in this case was to cast doubt on Mr. Gray's ability to form the intent to commit a crime. The evidence showed that

Mr. Gray was intoxicated, that he had passed out on the beach, and that he was so intoxicated he required medical attention when contacted by the police. RP (6/22/09) 34-37. In closing, defense counsel argued that Mr. Gray was so intoxicated that the jury could not find he formed the intent necessary for conviction. RP (6/22/09) 123-125.

Taking the evidence in a light most favorable to Mr. Gray, the jury could have inferred that Mr. Gray's alcohol consumption prevented him from forming the required mental state for each crime. Despite this, defense counsel failed to propose a voluntary intoxication instruction. Given that the defense strategy focused on Mr. Gray's voluntary intoxication and his inability to form intent, defense counsel should have proposed an appropriate instruction. Counsel's failure to propose these instructions constituted deficient performance. *Id., supra.*

The error prejudiced Mr. Gray. In the absence of an instruction, the jury was unaware that Mr. Gray's intoxication could be taken into account when considering whether or not he intended to commit a crime against a person or property within the building, and whether or not he intended to permanently deprive the owner of the property taken. As the Supreme Court said in *Thomas, supra*, "a proper instruction... was crucial.... A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an

instruction based on pertinent cases.” *Id.*, at 229. Because of defense counsel’s deficient performance, Mr. Gray was unable to present his theory to the jury. “[W]ithout the instruction[s], the defense was impotent.” *Kruger*, at 695. Accordingly, Mr. Gray was denied the effective assistance of counsel. His convictions must be reversed and his case remanded to the trial court for a new trial.

E. Defense counsel was ineffective at sentencing by stipulating to an offender score of nine.

Under RCW 9.94A.525, the sentencing court is required to analyze multiple prior convictions to determine whether or not they are based on the same criminal conduct:

(5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used.

RCW 9.94A.525(5)(a)(i).

Under RCW 9.94A.589(1)(a), “same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a) requires analysis of whether the offender’s criminal intent, objectively viewed, changed from one crime to the next. *State v. Haddock*, 141 Wn.2d 103, 113, 3 P.3d 733 (2000); *see also State v. Anderson*, 72 Wn. App. 453, 464, 864 P.2d 1001 (1994). Sometimes, this will require determination of whether one crime furthered another. *Haddock*, at 114. A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

The sentencing court is not bound by prior determinations, but must exercise its discretion and decide whether multiple prior offenses should count separately or together. *State v. Wright*, 76 Wn.App. 811, 829, 888 P.2d 1214 (1995) (interpreting *former* RCW 9.94A.360(6)(a)). Furthermore, the sentencing court may not presume prior cases should be counted separately unless they (1) stem from different charging

documents, (2) were filed in different jurisdictions, or (3) were sentenced on different dates. RCW 9.94A.525.²

In this case, defense counsel stipulated to an offender score of nine, based on Mr. Gray's four prior Residential Burglary charges and a prior Malicious Mischief in the Second Degree. RP (7/1/09) 136; CP 4. Even a cursory review of the Judgment and Sentence reveals that four of these charges may have scored against the burglary charge as only four points rather than the six points to which counsel stipulated. CP 4.

Specifically, Mr. Gray's Residential Burglary and Malicious Mischief from July 4, 2006 and his two Residential Burglary charges from June 30, 2006 may well have comprised the same criminal conduct. CP 4.

Counsel should have argued that each pair of crimes comprised the same criminal conduct. Had the trial court found each pair to comprise the same criminal conduct, Mr. Gray's score on the current Residential

² RCW 9.94A.525 permits the court to presume prior cases were separate if the sentences were "imposed on separate dates, or in separate counties or jurisdictions," or if charges were filed "in separate complaints, indictments, or informations..." RCW 9.94A.525. The statute does not mention other prior cases not meeting these conditions. Where the legislature specifically designates the things to which a statute applies, there is an inference that omissions were intentional. *Queets Band of Indians v. State*, 102 Wn.2d 1, 5, 682 P.2d 909 (1984). In such cases, "the silence of the Legislature is telling." *Queets Band of Indians*, at 5. In other words, *expressio unius est exclusio alterius* – specific inclusions exclude implication. *State v. Sommerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988). Thus the statute does not allow the court to presume prior cases count separately unless they stem from different charging documents, were filed in different counties, or were sentenced on different dates. RCW 9.94A.525; *Sommerville*, *supra*.

Burglary charge would have been reduced from nine to six, resulting in a standard range of only 33-43 months (rather than the 63-84 month range to which he was sentenced). Sentencing Guidelines Commission, *Adult Sentencing Manual*, Section III p. 66.

Defense counsel should not have stipulated to an offender score of nine. Ultimately, the decision to treat the two pairs of offenses as the “same criminal conduct” would have rested with the trial court’s discretion. The trial court did not have the opportunity to exercise its discretion, because defense counsel failed to bring the issue to the court’s attention.

Because defense counsel failed to request a “same criminal conduct” determination, Mr. Gray was denied the effective assistance of counsel. His sentence must be vacated and the case remanded to the trial court for a new sentencing hearing. *Saunders, supra; McGill, supra.*

II. MR. GRAY’S CASE MUST BE DISMISSED WITHOUT PREJUDICE BECAUSE THE CHARGING DOCUMENT WAS DEFICIENT.

A. Standard of Review

An Information challenged after verdict is liberally construed. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). Dismissal is required when the necessary facts cannot be found by fair construction of the Information. *Id.*, at 105-106.

B. The Information failed to allege that Mr. Gray burglarized a dwelling other than a vehicle.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution, as well as Article I, Section 3 and Article I, Section 22 (amend. 10) of the Washington State Constitution. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *Kjorsvik*, at 102. If the Information is deficient, no prejudice need be shown, and the case must be dismissed. *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

The elements of an offense are determined with reference to the language of the statute. *See State v. Leyda*, 157 Wn.2d 335, 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269, 274, 110 P.3d 1179 (2005). The meaning of a statute is a question of law reviewed *de novo*. *State Owned Forests v. Sutherland*, 124 Wn.App. 400, 409, 101 P.3d 880 (2004). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789, (2004). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland*, at 409; *see also State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934 (2006) ("Plain language does not require construction;" *Id.*, at 879, citations

omitted). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland, at* 410.

RCW 9A.52.025 provides (in relevant part): “A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” Under the plain language of the statute, conviction requires proof that the dwelling unlawfully entered was not a vehicle. RCW 9A.52.025. The statute is not ambiguous, and thus is not subject to statutory construction. *Punsalan, supra*. Furthermore, this language must be given effect, and may not be rendered superfluous. *Sutherland, at* 410. Finally, giving force to this provision does not render the entire statute absurd or meaningless; thus this court may not “correct” the statute on that basis. *In re Det. of Martin*, 163 Wn.2d 501, 511-512, 182 P.3d 951 (2008).

In this case, the operative language of the Information does not allege that the dwelling was not a vehicle, as required by RCW 9A.52.025. CP 2. Nor can this requirement be found under a liberal reading of the document. *Kjorsvik, supra*. Because of this, the Information is deficient and dismissal is required, even in the absence of prejudice. *Id., supra*.

CONCLUSION

For the foregoing reasons, Mr. Gray's convictions must be reversed. The burglary charge must be dismissed without prejudice, and the theft charge must be remanded to the superior court for a new trial. If the convictions are not reversed, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on December 10, 2009.

BACKLUND AND MISTRY



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



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

CERTIFICATE OF MAILING

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

Steven Gray, DOC #935386
Airway Heights Corrections Center
P. O. Box 2049
Airway Heights, WA 99001

and to:

Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368

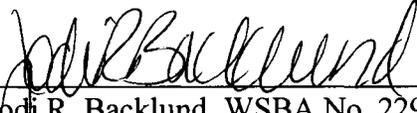
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DIVISION II
BY _____
DEPT. _____

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

All postage prepaid, on December 10, 2009.

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

Signed at Olympia, Washington on December 10, 2009.



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