

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

NO. 39599-1-II

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY \_\_\_\_\_

STATE OF WASHINGTON

Respondent,

vs.

**Steven Gray**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
FOR JEFFERSON COUNTY  
Cause Number: 09-1-00073-1  
The Honorable Craddock Verser

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**BRIEF OF RESPONDENT**

JUELANNE DALZELL  
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Date: January 7, 2010

**ORIGINAL**

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**BRIEF OF RESPONDENT**

*State of Washington v. Gray*

## STATEMENT OF THE CASE

### **I Restatement of Issues Presented**

Defendant's appeal presents four issues:

- A. Mr. Gray was not prejudiced by ineffective counsel when his counsel did not propose a jury instruction on a lesser included crime of Burglary in the Second Degree.
- B. Was Mr. Gray's counsel ineffective by not proposing a jury instruction on voluntary intoxication when there was no evidence showing Mr. Gray was intoxicated prior to the burglary?
- C. Was Mr. Gray's counsel ineffective when he stipulated to an offender score of nine?
- D. Was the information charging Mr. Gray deficient because it did not state that the residence was not a vehicle?

### **II Statement of Facts**

At about 1203 hours on April 18, 2009, Jefferson County Sheriff's Sergeant Benjamin Stamper arrived at mile .9, Linger Longer Road, Quilcene, WA, in response to a report of an unconscious male on the beach. He located the subject male on the beach approximately 30 yards from the road among drift logs, now conscious and extremely intoxicated. Sgt. Stamper recognized the male as Mr. Steven Gray, whom he had assisted in arresting in 2006 for a series of burglaries in the Brinnon area. RP 34-35.

Medics determined Mr. Gray was suffering from alcohol poisoning and transported him to Jefferson Healthcare Hospital. RP 37.

Sgt. Stamper collected the items from Mr. Gray's campsite, including the following: a blue and white checkered pillowcase, a white cotton glove, an empty "Covey Run" 750 ml wine bottle with the name "Larry Shinke" written on the label, an unopened 750 ml bottle of "red Table Wine," an empty ½ gallon bottle of "Pancho Villa" tequila, a chrome wine bottle opener, a black handled can opener, a can of "Nalley's" Turkey Chili, a gray down REI vest, a brown kitchen towel. RP 38-40.

Sgt. Stamper performed a records check of "Larry Shinke" and learned he had a residence in Renton, WA, and another at 801 Linger Longer Road, just a few hundred yards from his location. He drove to the gated driveway at 801 Linger Longer Road and walked to the residence. He found no one home, the front door unlocked, the back door had a "V" shaped slit cut into the screen door on the Northeast side of the home, glass had been broken from the door, with glass pieces scattered 12-15 feet into the home. RP 41-47.

Inside the home he found instructions for a "Radio Shack" security system lying on the dining room table, opened to a page titled, "Disarming the System." He also found a telephone answering machine on the table with both the incoming and outgoing lines cut. The liquor cabinet door was open. RP 48-50. Upstairs he observed a bunk bed with two pillows on each bed. A pillowcase was missing from the lower bed

and on the upper bed he observed a pillowcase similar to the one he had recovered from the beach. RP 51.

Sgt. Stamper left a message for Mr. Shinke on his answering machine at his Renton residence and drove to the hospital. RP 56. He arrived there at about 1337 hours and contacted Mr. Gray. After receiving medical clearance, he read Mr. Gray his rights, arrested him for Residential Burglary; and Theft 3; and transported him to the Jefferson County jail. At the jail, Sgt. Stamper became suspicious of the blue windbreaker jacket Mr. Gray was wearing, which bore a corporate logo and seized it. RP 57-58.

Mr. Shinke called Sgt. Stamper at about 1555 hours and, after Sgt. Stamper described the recovered items, said they closely resembled items from his house. Specifically, he identified the blue jacket which had been given to him by a relative who worked for the Vance Corporation. RP 74-78.

The Prosecutor filed an Information on April 20, 2009, charging Mr. Gray with Residential Burglary and Theft in the Third Degree. CP 1. The charging language for count I, Residential Burglary, read as follows:

On or about the 18<sup>th</sup> 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.

A jury trial was held on June 22, 2009, where Mr. Gray was found guilty on both charges. CP 3-11.

During the trial Mr. Shinke testified that he has two homes, one in Quilcene and one in Renton and that he spends approximately 40% of his time in Quilcene and the rest in Renton. RP 71. He also testified he has owned the Quilcene residence for 22 years; that he and his wife stay in the Quilcene residence three or four times a month for two or three days at a time; and that they do not rent it out. RP 71-72.

The defense called no witnesses.

A sentencing hearing was held on July 1, 2009. The judge asked the prosecutor to describe Mr. Gray's offender score. The prosecutor, Mr. Rosekrans responded,

“...just since 2006 his offender score is nine. Going back to his first offense in 1987, it would certainly be a lot higher than that, because he does have some prior felonies at that point that I don't believe washed. But, nonetheless, we just calculate his Offender Score as nine just going back to 2006.

At least three of those being burglaries that occurred here in Jefferson County. He was at least, he was last sentenced September 1, 2006, here in Jefferson County on two, maybe three burglaries and received a fifty month sentence. So, with an Offender Score of nine his standard range would be sixty-three to eighty-four months for the mid-range of seventy-three and a half months.” RP 135-136.

The Judgment and Sentence form shows the following conviction history for Mr. Gray (CP 4):

#	Crime	Date of Crime	Date of Sentence	Sentencing Court
1.	Residential Burglary	7/04/06	9/01/06	Jefferson Superior
2.	Malicious Mischief 2 <sup>nd</sup>	7/04/06	9/01/06	Jefferson Superior
3.	Residential Burglary	6/30/06	9/01/06	Jefferson Superior
4.	Residential Burglary	6/30/06	9/01/06	Jefferson Superior
5.	Residential Burglary	3/29/06	5/19/06	Jefferson Superior

The prosecutor stated and defense attorney agreed that the standard range was sixty-three to eighty-four months. RP 136.

### III Argument

#### 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).

- a. **Mr. Gray was not prejudiced by ineffective counsel when his counsel did not propose a jury instruction on a lesser included crime of Burglary in the Second Degree.**

Mr. Gray argues that his counsel was ineffective because he did not propose a jury instruction on the lesser included offense of Burglary in the Second Degree. He contends that the structure burglarized might not

qualify as a dwelling as defined in RCW 9A.04.110(7), i.e., a building or structure that “is used or ordinarily used by a person for lodging.” He bases this on the fact that the owners of the residence at 801 Linger Longer Road also owned another home in Renton and shifted between them frequently. RP 71-72.

An appellant claiming ineffective assistance of counsel, must show (1) that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is 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 *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Legitimate trial strategy or tactics are no basis for an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d at 77-78, 917 P.2d 563 (1996).

There is a strong presumption that defense counsel's conduct is not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

A defendant is entitled to a lesser included offense instruction if (1) each element of the lesser offense is a necessary element of the charged offense (“the legal prong”), and (2) taking the evidence in the light most favorable to him or her, a jury could find that he or she committed the lesser offense instead of the charged offense (“the factual prong”). *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Bergeson*, 64 Wn.App. 366, 369, 824 P.2d 515 (1992).

To satisfy the factual prong of *Workman*, there must be some affirmative proof that the defendant committed only the lesser crime. *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990).

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. RCW 9A.52.025.

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. RCW 9A.52.030.

An instruction on any issue or theory which is unsupported by the evidence is improper. *State v. Aleshire*, 89 Wn.2d 67, 568 P.2d 799 (1977); *State v. Upton*, 16 Wn.App. 195, 556 P.2d 239 (1976).

Mr. Gray argues that under *State v. McDonald*, 123 Wn.App. 85,90,96 P.3d 468 (2004), for a Residential Burglary charge, it is ineffective assistance to not propose a lesser included offense instruction when there is evidence from which a jury could infer that structure was not “used or ordinarily used by a person for lodging.” However Mr. Gray’s case differs significantly from *McDonald*. In *McDonald* there was evidence that the structure had been unoccupied from October 2003 through March 2003; and was undergoing remodeling.

Here, Mr. Shinke testified his home had been continually in use as a dwelling for 22 years and he resided there three or four times a month. The Shinke residence was fully furnished including food, clothing, and linen. There was no evidence presented that would allow a jury to infer the home was not a dwelling.

Mr. Gray’s argument is without merit and should be denied.

- b. Was Mr. Gray’s counsel ineffective by not proposing a jury instruction on voluntary intoxication when there was no evidence showing Mr. Gray was intoxicated prior to the burglary?**

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his

intoxication may be taken into consideration in determining such mental state. RCW 9A.16.090

Mr. Gray argues that under *State v. Kruger*, 116 Wn.App. 685, 694, 67 P.3d 1147 (2003), it is ineffective assistance to fail to request a voluntary intoxication instruction when there is "evidence from which the jury could have inferred that the defendant's intoxication prevented him from forming the requisite intent." Appellant's Br. at 11. His argument extends well beyond the court's decision in *Kruger*, where a highly intoxicated defendant resisted pepper spray, swung a beer bottle at a police officer, head butted him, and then vomited in the local jail. *Kruger* at 688-89. The *Kruger* court observed intent was the focus of the defense, and all witnesses had testified to the level of Kruger's intoxication. *Kruger* at 693. The *Kruger* court concluded that because the defendant's intoxication constituted the theory of his defense, he was not allowed an opportunity to present a defense. *Kruger* at 693 (citing *State v. Finley*, 97 Wn.App. 129, 134, 982 P.2d 681 (1999)).

Mr. Gray's case differs from the facts in *Kruger* because there is no evidence in the record that he was intoxicated during the residential burglary. On the contrary, his actions in entering the home and disconnecting the alarm system showed he was not incapacitated. It is not clear that an instruction would have been appropriate even if counsel had

requested one at trial since there was no evidence of intoxication at the time of the burglary.

An instruction on any issue or theory which is unsupported by the evidence is improper. *State v. Aleshire*, 89 Wn.2d 67, 568 P.2d 799 (1977); *State v. Upton*, 16 Wn.App. 195, 556 P.2d 239 (1976). Mr. Gray presented no evidence he was intoxicated at the time of the burglary. Under such circumstances, the failure to request an instruction on voluntary intoxication does not mean that Mr. Gray was denied his right to effective assistance of counsel. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982).

Mr. Gray's appeal is without merit and should be denied.

**c. Was Mr. Gray's counsel ineffective when he stipulated to an offender score of nine?**

Mr. Gray argues that defense counsel was ineffective because he stipulated to an Offender Score of nine rather than raising the issue of "same criminal conduct" for the prior convictions. Mr. Gray asserts that

"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. 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. 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." Appellant's Brief at 15.

Here, the defense counsel stipulated to the Offender Score stated by the prosecutor. Mr. Gray's argument that this constituted ineffective assistance fails because Mr. Critchlow had knowledge that the previous Jefferson County convictions should be tallied separately and an offender score of nine was correct. Mr. Critchlow had this knowledge because his firm, Jefferson Associated Counsel, had represented Mr. Gray in all of his prior Jefferson County cases.

Mr. Gray's appeal is without merit and should be denied.

**d. Was the information charging Mr. Gray deficient because it did not state that the residence was not a vehicle?**

Mr. Gray argues that the charging document was deficient because it did not state that the residence of Mr. Shinke was not a vehicle.

A charging document must contain "[a]ll essential elements of a crime" so as to give the defendant notice of the charges and allow the defendant to prepare a defense. *State v. Tresenriter*, 101 Wn.App. 486, 491, 4 P.3d 145 (2000) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)). When, as here, the defendant challenges the charging document for the first time on appeal, we liberally construe the document in favor of validity. *Tresenriter*, 101 Wn.App. at 491, 4 P.3d 145. Under the liberal construction rule, if an apparently missing element may be

fairly implied from language within the charging document, we will uphold the charging document on appeal. *Tresenriter*, 101 Wn.App. at 491, 4 P.3d 145. The test is: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Tresenriter*, 101 Wn.App. at 491, 4 P.3d 145 (quoting *Kjorsvik*, 117 Wn.2d at 105-06, 812 P.2d 86).

The court distinguishes between charging documents that are constitutionally deficient-i.e., documents that fail to allege sufficient facts supporting each element of the crime charged-and those that are merely vague. *State v. Leach*, 113 Wn.2d 679, 686, 782 P.2d 552 (1989). A charging document that states each statutory element of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. *Leach*, 113 Wn.2d at 687, 782 P.2d 552. A defendant may not challenge a charging document for “vagueness” on appeal if he or she failed to request a bill of particulars at trial. *Leach*, 113 Wn.2d at 687, 782 P.2d 552.

The information here stated:

On or about the 18<sup>th</sup> 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.

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. RCW 9A.52.025(1).

WPIC 60.02.01 Residential Burglary—Definition:

A person commits the crime of residential burglary when he or she enters or remains unlawfully in a dwelling with intent to commit a crime against a person or property therein.

The information charging Mr. Gray with residential burglary did “allege sufficient facts supporting each element of the crime charged”: intent to commit a crime; unlawful entry; into the dwelling of Mr. Shinke and its street address. The fact that the dwelling had a street address supported the fact it was other than a vehicle because vehicles do not have street addresses.

The information in this case closely follows WPIC 60.02.01, which does not state that the dwelling was other than a vehicle.

In addition, Mr. Gray raises this issue for the first time on appeal and did not request a bill of particulars at trial.

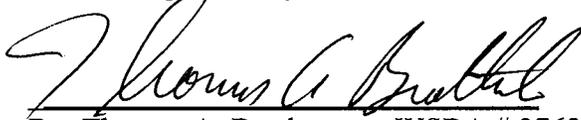
Because the charging document did “allege sufficient facts supporting each element of the crime charged” Mr. Gray’s appeal is without merit and should be denied.

**IV. CONCLUSION**

The State respectfully requests that this Court affirm Appellant's conviction and sentence as determined by the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3,18.1 and RCW 10.73.

Respectfully submitted this 7th day of January, 2010.

JUELANNE DALZELL, Jefferson County  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Thomas A. Brotherton", written over a horizontal line.

By: Thomas A. Brotherton , WSBA # 37624  
Deputy Prosecuting Attorney

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

STATE OF WASHINGTON,  
Respondent,  
vs.  
STEVEN GRAY,  
Respondents.

Case No.: 39599-1-II  
Superior Court No.: 09-1-00073-

**DECLARATION OF MAILING**

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
10 JAN 19 2010  
BY  
DELIVERED

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 15<sup>th</sup> day of January, 2010, I mailed, postage prepaid, a copy of the BRIEF OF RESPONDENT to the following:

David C. Ponzoha, Clerk  
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Steven W. Gray, DOC #935386  
c/o Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 15<sup>th</sup> day of January, 2010, at Port Townsend, Washington.

  
Janice N. Chadbourne  
Legal Assistant