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DIVISION II

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STATE OF WASHINGTON

BY:   
DEPUTY

No. 46068-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Tim Duggins,**

Appellant.

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Thurston County Superior Court Cause No. 13-1-00961-1

The Honorable Judge Carol Murphy

**Appellant's Opening Brief**

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### ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Duggins's convictions were entered in violation of his Wash Const. art. I, §§ 21 and 22 right to a jury trial.
2. Mr. Duggins did not knowingly, intelligently, and voluntarily waive his right to a jury trial through a personal expression of waiver.

**ISSUE 1:** An accused person must be tried by a jury absent a personal expression of waiver of the right to a jury trial. Here, the court accepted Mr. Duggins's waiver of his right to a jury trial without mentioning it in court or asking him whether he understood what he was waiving. Is the state unable to prove that Mr. Duggins's knowingly, intelligently, and voluntarily waived his article I, §§ 21 and 22 right to a jury trial?

3. Mr. Duggins's conviction violated his Sixth and Fourteenth Amendment right to an adequate charging document.
4. Mr. Duggins's conviction violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.
5. The charging document failed to allege critical facts identifying the charge and allowing Mr. Duggins to plead a former acquittal or conviction in any subsequent prosecution for a similar offense.

**ISSUE 2:** In addition to specifying the essential elements of an offense, a charging document must set forth any critical facts necessary to identify the particular crime charged. Here, the Information charging Mr. Duggins with theft and burglary did not mention what he was alleged to have stolen, whom he was alleged to have stolen from, where the alleged offenses took place, or any other information to identify the facts behind the charges. Did the omission of critical facts infringe Mr. Duggins's right to an adequate charging document under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 3 and 22?

6. Defense counsel's ineffective assistance deprive Mr. Duggins of his Sixth and Fourteenth Amendment right to counsel.

7. Defense counsel provided deficient performance by failing to raise that Mr. Duggins's theft and burglary offenses comprised the same criminal conduct for sentencing purposes.
8. Mr. Duggins was prejudiced by his attorney's deficient performance.

**ISSUE 3:** Defense counsel provides ineffective assistance by failing to validly argue at sentencing that two offenses should be scored together as the same criminal conduct. Here, Mr. Duggins's theft and burglary convictions were committed at the same time and place, against the same victim, and with the same criminal intent but defense counsel still agreed to their being scored separately at sentencing. Was Mr. Duggins denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel at sentencing?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Duggins was arrested for stealing a bag of sunglasses out of the unlocked shed behind a consignment store. CP 19-20. The state charged him with theft and burglary using the following language:

[Mr. Duggins], in the State of Washington, on or about June 19, 2013, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a building.

...

[Mr. Duggins], in the State of Washington, on or about June 19, 2013, did wrongfully obtain or exert unauthorized control over property or services of another or the value thereof, with intent to deprive said person of such property or services, the value of which exceeds seven hundred and fifty dollars (\$750.00).  
CP 3.

Mr. Duggins decided to enter drug court. RP 3-5. He signed a drug court contract, which included a lengthy recitation of his responsibilities under the program, the fee he would have to pay, requirements for leaving the program and graduation, as well as a waiver of several statutory and constitutional rights. CP 4-7.

The court accepted Mr. Duggins's entry into the drug court program. RP 5. At a hearing, Mr. Duggins's attorney told the court that he had read over the contract with his client, specifically the portions relating to the fee and the standard sentencing range. RP 4. Neither defense counsel, Mr. Duggins, nor the court mentioned his waiver of his right to a jury trial. CP 3-5.

Mr. Duggins was eventually terminated from the drug court program. RP 8-9. The court found him guilty of theft and burglary based on a review of the police reports. CP 11-39.

At sentencing, Mr. Duggins's attorney agreed to the state's calculation of his offender score. RP 20. Without objection, the court scored the theft and burglary convictions against each other for sentencing purposes. CP 43-44, 54.

This timely appeal follows. CP 63.

### **ARGUMENT**

**I. MR. DUGGINS'S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL.**

**A. Standard of Review.**

Constitutional issues are reviewed *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014) *review denied*, 180 Wn.2d 1023, 328 P.3d 902 (2014). Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

- B. The record does not demonstrate a knowing, intelligent, and voluntary waiver of Mr. Duggins's right to a jury trial because he did not make a personal expression of his desire to waive that right.

The Washington constitution provides that the right to a jury trial "shall remain inviolate." Art. I, § 21; *see also* art. I, § 22 (guaranteeing accused persons the right to a trial by an impartial jury). The right to a jury trial under the Washington state constitution is broader than the federal right.<sup>1</sup> *See, e.g., City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

A waiver of the state constitutional right to a jury trial must be knowing, intelligent, and voluntary. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). An accused person must be tried by a jury absent a personal expression of waiver of the right to a jury trial. *Id.* at 724. A written waiver, alone, is not sufficient. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 240 n. 10, 165 P.3d 391 (2007).

The state bears the burden of demonstrating that an accused person validly waived the right to a jury trial. *Stegall*, 124 Wn.2d at 730. Appellate courts indulge "every reasonable presumption against the waiver... absent an adequate record to the contrary." *Id.* "Silent

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<sup>1</sup> The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. U.S. Const. Amends. VI; XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

acquiescence” is insufficient to demonstrate a constitutionally valid waiver. *Id.*

Here, Mr. Duggins never personally expressed the intent to waive his right to a jury trial. RP 3-5. Indeed, the right was not even mentioned at the hearing at which the court accepted Mr. Duggins’s entry into the drug court program. RP 3-5. Defense counsel indicated that he had gone over the lengthy drug court contract with his client, but only specifically mentioned that they had discussed the weekly fee and standard sentencing range. RP 4. Mr. Duggins’s attorney never expressed a knowing, intelligent, and voluntary waiver of the right to a jury trial on his client’s behalf. RP 3-5.

Absent a personal expression of waiver, the state cannot meet its burden to demonstrate that Mr. Duggins knowingly, voluntarily, and intelligently waived his right to trial by jury. *Stegall*, 124 Wn.2d at 725. This violation of Mr. Duggins’s right to a jury trial is manifest on the record and may be raised for the first time on appeal. RAP 2.5(a)(3). Mr. Duggins’s convictions must be reversed and his case remanded for a new trial. *Id.*

**II. THE INFORMATION CHARGING MR. DUGGINS WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO INCLUDE CRITICAL FACTS.**

**A. Standard of Review.**

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

**B. The document charging Mr. Duggins fails to allege the critical facts necessary for him to prepare a defense or plead to an acquittal or conviction as a bar against a second prosecution for the same crime.**

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI,

XIV.<sup>2</sup> A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005). The charge must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).

Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.*

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). Thus, for example, a charging document for violation of a domestic violence protection order must specifically identify the order allegedly violated. *Id.*

In theft cases, Information must not name the owner but must “clearly” charge the accused person with a crime relating to “specifically

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<sup>2</sup> Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

described property.” *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes “not a single word to indicate the nature, character, or value of the property,” the charge is “too vague and indefinite upon which to deprive one of his [or her] liberty.” *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

In this case, the Information passes only the first of the three requirements set forth above: it charges in the language of the statute, and thus “contains the elements of the offense intended to be charged.” *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it includes no critical facts. In the absence of any critical facts, the Information does not provide adequate notice of the charges, nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

The language charging Mr. Duggins parrots the statute and nothing more. CP 3. The Information does not specify what building he allegedly entered, which items he allegedly stole, from whom he allegedly stole, or any other fact relevant to the charges. CP 3. Because of this, the allegations are “too vague and indefinite upon which to deprive [Mr. Duggins] of his liberty.” *Id.* It provides neither notice nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d

at 631. The critical facts in Mr. Duggins's case cannot be found by any fair construction of the charging document. *Rivas*, 168 Wn. App. at 887.

The Information is constitutionally deficient. Mr. Duggins's convictions must be reversed and the charges dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

### **III. MR. DUGGINS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

#### **A. Standard of Review.**

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *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). Reversal is required if counsel's deficient performance prejudices the accused. *Kyлло*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

- B. Defense counsel provided ineffective assistance by agreeing to an incorrectly calculated offender score.

The right to counsel includes the right to the effective assistance of counsel.<sup>3</sup> U.S. Const. Amends. VI, XIV; *Strickland*, 466 U.S. at 685.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Defense counsel provides ineffective assistance by failing to validly raise that two offenses comprise the same criminal conduct for sentencing purposes. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013).

When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a). Two current offenses are not scored against one another if they constitute the same criminal conduct:

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<sup>3</sup> Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *Fleming*, 142 Wn.2d at 865; *Horton*, 136 Wn. App. 29. Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland* 466 U.S. at 687).

... If the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, 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).

Here, Mr. Duggins's theft and burglary convictions occurred at the same time and place and involved the same victim. CP 19-20. The two offenses also involved the same criminal intent to steal from the consignment shop. CP 19-20. Accordingly, the theft and burglary convictions should not have scored against one another for sentencing purposes. RCW 9.94A.589(1)(a).

Even so, Mr. Duggins's defense attorney agreed to the state's calculation of his offender score, which counted his theft and burglary convictions separately. RP 20. Defense counsel had no valid strategic reason for agreeing to an offender score that was one point higher than it ought to have been. Counsel's provided deficient performance by failing to argue that the two offenses comprised the same criminal conduct.

*Phuong*, 174 Wn. App. at 548.

Mr. Duggins was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. The facts of Mr. Duggins's case

fit squarely into the standard for same criminal conduct. RCW 9.94A.589(1)(a). If defense counsel had raised the issue at sentencing, Mr. Duggins's offender score would have been reduced by one point. RCW 9.94A.589(1)(a). There is a reasonable probability that counsel's deficient performance affected the outcome of the sentencing proceeding. *Phuong*, 174 Wn. App. at 548.

Mr. Duggins's attorney provided ineffective assistance of counsel by failing to properly raise that his two offenses comprised the same criminal conduct. *Id.* Mr. Duggins's case must be remanded for resentencing. *Id.*

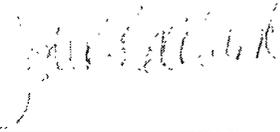
### **CONCLUSION**

Mr. Duggins did not knowingly, voluntarily, and intelligently waive his right to a jury trial. His charging document was constitutionally deficient because it failed to allege any facts relevant to his case. Mr. Duggins's convictions must be reversed.

In the alternative, Mr. Duggins's defense attorney provided ineffective assistance of counsel by failing to argue the theft and burglary convictions comprised the same criminal conduct for sentencing purposes. Mr. Duggins's case must be remanded for resentencing.

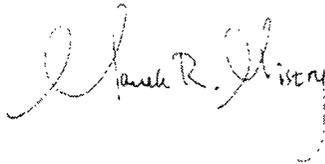
Respectfully submitted on September 22, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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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 September 22, 2014.



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