

FILED

APR 21 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29378-5-III

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

STATE OF WASHINGTON,

Appellant,

v.

SAMUEL OSBORNE,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR GRANT COUNTY

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED

APR 21 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 29378-5-III

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

STATE OF WASHINGTON,

Appellant,

v.

SAMUEL OSBORNE,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR GRANT COUNTY

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PRESENTED..... 1

C. STATEMENT OF CASE.....2

D. ARGUMENT.....4

 1. INSTRUCTION 9 RELIEVED THE STATE OF ITS
 BURDEN OF PROVING EACH ELEMENT OF
 THE CRIME OF ATTEMPTED SECOND
 DEGREE BURGLARY BEYOND A
 REASONABLE DOUBT 4

 a. The right to due process and the right to a jury
 trial require the court instruct to properly instruct
 the jury on every element of the offense..... 4

 b. Instruction 9 relieved the State of its burden of
 proving the elements of the crime of attempted
 burglary..... 4

 c. The error in Instruction 9 requires reversal of Mr.
 Osborne’s conviction 6

 2. THE COURT MISCALCULATED MR.
 OSBORNE’S OFFENDER SCORE 7

 a. A sentencing court must base its offender score
 calculation on the criminal history it determines
 exists at the time of sentencing 7

 b. The trial court’s findings do not support the
 offender score..... 8

E. CONCLUSION..... 12

TABLE OF AUTHORITIES

United States Constitution	
U.S. Const. amend. XIV	1, 4
Washington Constitution	
Const. Art.I, § 22	4
Washington Supreme Court	
<u>In re the Personal Restraint Petition of Goodwin</u> , 146 Wn.2d 861, 50 P.3d 618 (2002)	8
<u>State v. Ammons</u> , 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986)	8
<u>State v. Armenta</u> , 134 Wn.2d 1, 14, 948 P.2d 1280 (1997)	11
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002)	6
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999)	8, 11
<u>State v. Krall</u> , 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)	9
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005)	4
Washington Court of Appeals	
<u>State v. Reed</u> , 150 Wn.App. 761, 208 P.3d 1274 (2009)	6
United States Supreme Court	
<u>Appendi v. New Jersey</u> , 530 U.S. 466, 20 S.Ct. 2348, 147 L.Ed.2d 435 (2000);	4
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970);	4
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)	6, 7
<u>Sandstrom v. Montana</u> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)	4
Statutes	
RCW 9.94A.500	7, 10
RCW 9.94A.525	1, 8, 10, 11
RCW 9.94A.589	11

A. ASSIGNMENT OF ERROR

1. Instruction 9 relieved the State of its burden of proving each element of the offense and thereby denied Samuel Osborne due process.

2. The trial court erred in calculating Mr. Osborne's offender score.

B. ISSUE PRESENTED

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State prove each element of an offense beyond a reasonable doubt. Instruction 9 allowed the jury to convict Mr. Osborne of attempted burglary without finding that he engaged in conduct strongly indicating a criminal intent. Did Instruction 9 relieve the State of its burden of proving the crime and thereby deny Mr. Osborne due process?

2. A sentencing court must specify those offenses which it determines make up a defendant's criminal history. The trial court's calculation of the person's offender score is in turn based upon that criminal history. RCW 9.94A.525(2) provides that prior Class B and C felonies "shall not be included" in an individual's offender score unless the court finds the person did not spend ten and five or more years respectively in the community without a criminal offense.

Where the court's finding of Mr. Osborne's criminal history does not include any offense in the more than nineteen years preceding the current offense, did the court err in including four Class B and one Class C felonies in Mr. Osborne's offender score?

C. STATEMENT OF CASE

While driving on a rural road past the site of former Air Force missile silos, Grant County Sheriff's Deputy Richard LaGrave observed a chain across the access road to the site was cut and saw a van driving along the fence line. Deputy LaGrave was aware that the site now housed two separate commercial structures owned by two private owners who had experienced recent burglaries. Based on that information and because of the remote location, the officer called additional officers to assist him in making contact with the individual[s] in the van.

As he waited, Deputy LaGrave drove into the site and found the van parked near one of the buildings; however, he did not see any people. 8/18/10 RP 40-41. Assuming the occupant[s] of the van were hiding, Deputy LaGrave waited and kept watch over the area until other officers could arrive. Id at 42. After other officers arrived, they searched the building owned by Robert Echols and found Mr. Osborne hiding under a tarp. 8/18/10 RP 57. Charles

Mitchell, the owner of the van, was found hiding in sage brush several hundred yards from the buildings 8/19/10 RP 38

Michael Smith testified he had been to the second building, owned by David Jones, on several occasions in the preceding days as he was considering taking a lease on the facility. 8/19/10 RP 61 Mr. Smith testified he was initially interested in the building due to its industrial electrical capacity. On each of his prior visits he had noticed increasing damage to and removal of large-gauge copper wiring. Id. Officers found similar wiring in the back seat of Mr. Mitchell's van. 8/19/10 RP 91.

The State charged Mr. Osborne with two counts of second degree burglary with alternative counts of attempted second degree burglary. CP 11-14. A jury acquitted Mr. Osborne of burglary but found him guilty of the two attempt charges. CP 40-45. The State also charged Mr. Osborne with counts of first degree malicious mischief for the alleged damage to the wiring of Mr. Jones's building, third degree theft (presumably for taking the wire from Mr. Jones's building), and possession of stolen property (presumably for possessing the wire found in Mr. Mitchell's van. CP 11-14. The jury acquitted Mr. Osborne of each of these charges. 46-48.

D. ARGUMENT

1. INSTRUCTION 9 RELIEVED THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT OF THE CRIME OF ATTEMPTED SECOND DEGREE BURGLARY BEYOND A REASONABLE DOUBT

a. The right to due process and the right to a jury trial require the court instruct to properly instruct the jury on every element of the offense. The jury-trial guarantee of the Sixth Amendment and Article I, § 22 of the Washington Constitution, and the Fourteenth Amendment's Due Process Clause and the similar provisions of Article I, § 3 of the Washington Constitution, require the State prove each element to a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Mills, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005). This requirement is violated where a jury instruction relieves the State of its burden of proving each element of the crime. Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

b. Instruction 9 relieved the State of its burden of proving the elements of the crime of attempted burglary. With respect to Count 2, the court instructed the jury in relevant part:

A person is guilty of attempt to commit a crime when, with intent to commit that crime, he does any act which is a substantial step toward commission of that crime. A "substantial step" is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

To convict the defendant of the crime of attempted burglary in the second degree, as charged in Count 2, the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about May 29, 2010, the defendant did an act which was a substantial step toward commission of burglary in the second degree.
2. That the act was done with the intent to commit burglary in the second degree.

.....

CP 27 (Instruction 7). With respect to Count 4, however, the court provided a different instruction:

To convict the defendant of the crime of attempted burglary in the second degree, as charged in Count 2, the State must prove each of the following elements beyond reasonable doubt:

1. That on or about May 29, 2010, the defendant did an act which was a substantial step toward commission of burglary in the second degree.
2. That the act was done with the intent to commit burglary in the second degree other than any incident of burglary in the second degree found by you to establish an element of Count 1 or Count 2.

.....

CP 29 (Instruction 9).

While the court instructed the jury how to determine if Mr. Osborne took a substantial step with respect to Count 2, it provided no such instruction for Count 4. Because it included a definition of

“substantial step” in Instruction 7, but not in Instruction 9, the jury could quite reasonably assume that definition only applied to Count 2. Thus, the jury was free to convict Mr. Osborne of Count 4 without determining if he engaged in “conduct which strongly indicate[d] a criminal purpose.”

c. The error in Instruction 9 requires reversal of Mr. Osborne’s conviction. The Supreme Court has applied a harmless-error test to erroneous jury instructions. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). However, the Court held “an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal.” Brown, 147 Wn.2d at 339 (citing Smith, 131 Wn.2d at 265); see also State v. Reed, 150 Wn.App. 761,770, 208 P.3d 1274 (2009) (if “a jury instruction is erroneous but does not relieve the State of its burden to prove every essential element, then the error is harmless”) Because Instruction 9 relieved the State of its burden of proving Mr. Osborne took a substantial step towards the commission of the crime, the error cannot be harmless.

But even if the Court were to apply a harmless-error test, the State cannot meet its burden. To prevail, the State must prove

beyond a reasonable doubt that the jury would have found Mr. Osborne attempted a separate count of burglary if properly instructed; thus, the error requires reversal. Neder, 527 U.S. at 15-18. The State's evidence establishing an intent to burglarize Mr. Jones's shop was substantial. The State established there were several burglaries of that building in the preceding days, involving the theft of wire like that found in the van in which Mr. Osborne arrived. There was no similar testimony regarding Mr. Echols' shop. Because of that, the State cannot prove beyond reasonable doubt that the error was harmless. This Court must reverse Mr. Osborne's conviction.

2. THE COURT MISCALCULATED MR. OSBORNE'S OFFENDER SCORE

a. A sentencing court must base its offender score

calculation on the criminal history it determines exists at the time of sentencing. RCW 9.94A.500(1) requires in relevant part

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

RCW 9.94A.530(11) provides:

"Criminal history" means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere . . . The history

shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration

Sentencing authority derives strictly from statute. State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). A sentencing court's failure to follow the dictates of the SRA may be raised on appeal even if no objection was raised below. State v. Ford, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999); In re the Personal Restraint Petition of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

b. The trial court's findings do not support the offender score. RCW 9.94A.525(2)(b) provides in relevant part:

. . . class B prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c) creates a similar five-year "wash out" period for Class C felonies.

RCW 9.94A.525(2) does not require inclusion of a prior offenses in the offender score "unless" they are shown to have

washed out. Instead, the statute provides they “shall not be included” unless they have been shown to have not washed out. The term “shall” indicates a mandatory duty on the trial court. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). Thus before a court can include a Class B or C felony in an offender score the court must determine the person has not spent ten or five crime-free years, respectively, from the date of release from confinement to the date of the next offense. RCW 9.94A.525(2)(c). To permit such a determination, the trial court must find the dates of the offense, sentencing, and release, for any intervening misdemeanor convictions which may have prevented the listed offenses from washing out.

The judgment and sentence in this case contains a section entitled “II. Findings.” CP 49. Among the court’s findings is paragraph 2.3, which provides:

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv	Type of Crime
1	ESCAPE 2	2/15/84	2/18/84	MASON CO 83-1-00127-7	A	NV
2	BURGLARY 2	8/19/85	12/16/85	GRAYS HARBOR CO 85-1-00213-2	A	NV
3	BURGLARY 2	10/31/91	11/01/91	KITTITAS CO 91-1-00155-2	A	NV
4	ARSON 2	7/28/98	5/28/91	KITTITAS CO 91-1-00005-0	A	NV
5	BURGLARY 2	7/28/98	5/28/91	KITTITAS CO 91-1-00005-0	A	NV

Additional criminal history is attached in Appendix 2.2.

The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

The prior convictions listed as number(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

CP 51.

As is clear from the court's findings, the last offenses in Mr. Osborne's criminal history, the Class B felonies of second degree arson and second degree burglary, were sentenced in May 1991, nineteen years before the current offense were committed. The court did not make a finding that any term of confinement was imposed. Further, the court did not find Mr. Osborne's criminal history included any misdemeanor convictions. Thus, the criminal history the court determined to exist pursuant to RCW 9.94A.500(1) includes a gap of nineteen years before the current offense. Pursuant to that finding the court could not include any Class B or C felony in Mr. Osborne's offender score. RCW 9.94A.525(2).

The Supreme Court has said “[i]n the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.” State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (citing Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); and State v. Cass, 62 Wn.App. 793, 795, 816 P.2d 57 (1991), review denied, 118 Wn.2d 1012 (1992)). Due process requires the State bear the “ultimate burden of ensuring the record” supports the individual’s criminal history and offender score. Ford, 137 Wn.2d at 480-81.

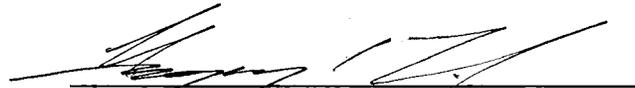
The Court’s findings do not include any misdemeanor or felony offense within the nineteen-year gap in Mr. Osborne’s criminal history. Pursuant to Armenta the absence of such a finding requires this Court to presume the court found insufficient proof of such offenses. And in the absence of such a finding, Mr. Osborne’s offender score can be no higher than two.¹ Thus, the court should strike the offender score calculation and remand for resentencing.

¹ Pursuant to RCW 9.94A.589(1)(a) each of Mr. Osborne’s current offenses are scored as prior offenses. Pursuant to RCW 9.94A.525(16) a prior conviction of second degree burglary is scored as two points if the current offense is a second degree burglary.

E. CONCLUSION

For the reasons above this Court must reverse Mr.
Osborne's conviction on Count 4 and reverse his sentence.

Respectfully submitted this 7th day of April, 2011.

A handwritten signature in black ink, appearing to read 'Gregory C. Link', is written over a horizontal line.

GREGORY C. LINK – 25228
Washington Appellate Project
Attorney for Appellant