

63538-7

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NO. 63538-7-1

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

STATE OF WASHINGTON,  
Respondents ,

v

JASON ROBERTS,  
Appellant,

2010 FEB 19 AM 10:41  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

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

The Honorable Michael Heavey

APPELLANTS STATEMENT OF  
ADDITIONAL GROUNDS FOR RELIEF

Jason Roberts, Sui Juris  
1313 North 13th Avenue  
WALLA, WALLA, WA. 99362

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## A. INTRODUCTION

The appellant, Jason Roberts, sui juris , have recieved from appointed counsel, Elizabeth Albertson, opening appellant brief, prepared and presented in this appellate review court. I have further reviewed its contents and based upon this review I have summarized below additional grounds that should be considered on this review. The appellant would like to further enact that he is not an attorney and doesn't ~~propert~~ to be such. Mr Roberts has limited access to legal materials during his incarceration and wishes this court to use liable reading to draw if any, conclusion and apply appropriate law to his arguments. The appellant is before this court sui juris, and expects his constitutional rights be upheld and that he not be further prejudiced nor shall his constitutional rights be violated, The appeal SHALL not be dismissed for lack of form or failure of process, an it be further enacted, that no summons, writ, declaration, return process, Judgment arrested, quashed or reversed, for any defect for want of form, but the said courts respectfully shall proceed to judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects or want of form in such writs, declarations or other pleadings, return process, judgment or

or course of proceeding whatsoever, except those only in case of demurrer, which the party demurring shall specifically set down and express together with his demurrer as the cause thereof and the said courts respectfully shall and may, by virtue of this act, from time to time, amend all and every such imperfections, defects and wants of form other than those only which the party demurring shall express as aforesaid and may at any time, permit either of the parties to amend any defect in the process of the pleadings upon such conditions as the said courts respectfully shall in their discretion, and by their rules prescribe (a) Judiciary Act of September 24, 1789, section 342 **FIRST CONGRESS**, sess, I, ch. 20, 1789. Due process provides the right of Sui Juris litigants are to be construed liberally and held to less stringent standards than formal pleading drafted by lawyers; if courts can reasonably read pleadings to valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirement. (Green v. Branson, 108 F.3d 1296 (10th Cir. 1997); Spencer v. Doe, 139 F.3d 107 (2nd Cir. 1998). Right to proceed Pro Se ( Sui Juris) is a fundamental statutory right that is afforded highest degree of protection. (Devine v. Indian River County School Bd, 121 F.3d 576 (11th Cir. 1997).

This appeal stems from judgment and sentence entered by King County Superior Court, The Honorable Michael Heavey, after the jury returned a verdict of guilty entered on February 12, 2009. The appellant was convicted of (1) unlawful possession of stolen property in the first degree and (2) Trafficking of stolen property in the first degree and sentenced to 69 months of confinement. As a result of the above said verdict the defendant moved the trial court to arrest jury verdict pursuant to CrR 7.4(a)(3) on the grounds that the state had not met its burden of proving a material element of the crime.

In response to this motion the trial court inappropriately transferred the appellants arrest of judgment motion to this court pursuant to CrR 7.8(c)(2). see appendix (A1) Subsequently the trial court failed to properly address the sufficiency of the evidence, and inappropriately breached its duty to provide appropriate procedural resolution by transferring the post judgment motion to arrest judgment as a post judgment motion for vacation of judgment under a faulty pretense a habeas corpus and personal restraint petition. In accordance with CrR 7.4(a)(3) the court has inherent authority to arrest judgments on motion of a defendant timely filed in the superior court identifying the causes but yet the trial court, under Toliver v Olsen, than this court, on July 7, 2009, stayed the motion pursuant to RAP

16.4(d). Mr. Roberts, is before this court, Sui Juris, and pursuant to RAP 10.10 he has written it in a manner that any reasonable person could understand. Mr. Roberts is not an attorney and does not attempt to set presumption and create confusion of legal theorization, but wishes this court not delude the law. In conclusion, if any of Mr. Roberts issue's in his RAP 10.10, strike the court as too conclusive, or insufficiently argued, or appear unsupported to merit review, the appellant respectfully request in accordance to RAP 10.10 (f) that Elizabeth Albertson act as a mediator and properly articulate the appellant issue's in question.

#### B. SUMMARY OF ARGUMENT

Mr. Roberts contends that the conviction for first degree trafficking in stolen property must be reversed, because (1) the defendant was entitled to instructions of attempted first and second degree trafficking in stolen property and the trial court committed prejudicial error by declining to give the proposed instructions, (2) In accordance with RCW 9A.28.020(1) the unlawful conviction of trafficking in stolen property in the 1st degree must be reversed when attempt is an element of the crime charged, it is constitutional error not to give an instruction defining attempt for the jury, (3) that the trial court erred in failing to grant

the defendants request for a bill of particulars, (4) the evidence is insufficient to show that the defendant knowingly had actual or constructive possession of stolen property exceeding \$1,500.00; and the defendant did not have actual possession or dominion and control over the premises of the residence of which stolen property was found.

### C. ASSIGNMENT OF ERROR

1. The trial court erred by denying the requested lesser included offense instructions of attempted first and second degree trafficking in stolen property based on an alternative theory of the case.

2. the trial court further manifested in error pursuant to RCW 9A.28.020(1) by not giving instruction defining attempt for the jury.

3. The trial court erred in failing to grant the defendants repeated request for a bill of particulars.

4. The evidence is insufficient to show that the defendant knowingly had actual or constructive possession of stolen property exceeding \$1,500.00; and the defendant did not have actual possession or dominion and control over the premises of the residence of which stolen property was found.

### D. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court abuse its discretion by refusing to give proposed lesser included instructions of attempted trafficking in stolen property in the first and second degree offenses based on the defendants theory, when the legal test of the lesser, and the factual test of substantial evidence are met; thereby, warranting the giving of such instructions?

2. In accordance to RCW 9A.28.020, did the trial court commit constitutional error by not giving the proposed instruction defining attempt and informing the jury that both intent and a substantial step are elements of an attempted to commit a crime?

3. Did the trial court error in allowing the trafficking charge to survive, by failing to grant Mr. Roberts repeated requests for a bill of particulars, when the states suppose to give proper notice to the accused of the nature of the conduct and event he's to defend against?

4. Was the evidence insufficient beyond a reasonable doubt to show that the defendant knowingly had possession of stolen property exceeding \$1,500.00 that was found at the Jacksons residence?

#### E. STATEMENT OF THE CASE

Susan McCullough breeds Miniature Australian Shepherds part-time. 2-509 RP5-6. On Friday, August 22, 2008, two men came to her home in response to an advertisement that was placed in regards to puppies for sale. 2-5-09 RP 32-33. Both men left without purchasing a puppy. 2-5-09 RP32-33. The next day when Ms. McCullough went to the kennel, she realized that five puppies were gone. 2-509 RP 33. Sometime later on that day she notified the police of her losses. 2-5-09 RP 33. She then posted various "stolen puppies" ads and contacted King 5 News. 2-5-09 RP 35.

King 5 televised a story about the puppies. 2-5-09 RP 35. Soon after the McCullough's recieved a call from the Kent Police Department notifying her taht her puppies were found in the Jackson's residence and they need her to come identify them. 2-5-09 Rp 36-37. Kent Police Officers then met with Raymond and Susan McCullough were it was said the puppies were discovered inside the Jacksons residence, laying

on the couch. 2-5-09 RP 37; 2-9-09 RP 11;2-10-09 RP 61-62 <sup>1</sup>

Shortly,there after the Kent polices discovery of the stolen puppies on the Jacksons couch, Tammy Jackson instructs Tamia Jackson to go call Mr. Roberts, and tell him one of the puppies got ran over to get him over there right away. 2-9-09 Rp 110-111; 2-10-09 RP 20-22; 2-10-09 RP 40-41. Additionally, after Ms. Jackson directs her daughter to lure Mr. Roberts to the crime scene , there's a slow release of information from the Jacksons; pushed upon the kent Police, in order to saddle, tarnish and implicate Mr. Roberts soley as a suspect. 2-10-09 RP 61-64. Futhermore, the very next morning on August 26, 2008, Tammy Jackson speaks with Mr. Roberts shortly before he's pulled over approximately one block from the Jackson Residence. 2-10-09 RP 41, 99, 118-120. Mr. Roberts was subsequetly stopped arrested and a puppy was seized from his vehicle. 2-10-09 RP 102, 122, 130.

At trial the state called, Tamia Jackson, a thirteen year old female to testify to Mr. Roberts intent to sell the puppies found at the residence of the Jacksons. 2-9-09 Rp 99-101; however, Tamia alleged that Mr. Roberts purchaser was a nine year old girl named Kayla. 2-9-09 RP 154. Consequently, Tamia honesty admits that Mr. Roberts never even spoke to Kayla:see 2-9-09 RP 154-155.

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1. It could be noted that Mr. Roberts was not located at this residence at the time of the discovery of the stolen property.

Additionally, Tamia admits during cross examination to actually showing the puppies to various neighbors including Kayla herself, who's said to be 9 years old; See 2-9-09 RP 146. In fact, Tamia admits to no recollection of Kayla even coming over to look at the puppies. 2-9-09 RP 154-155.

At one point, Tamia's bother testified to hearing Mr. Roberts saying he was selling puppies for \$500.00 to \$900.00. 2-13-09 RP 44. Also, he later admits that he was not present during any conversations in regard to selling any of the puppies. 2-13-09 RP 41. It should be noted that during cross examination Mario testified to that Mr. Roberts conversation concerning selling the puppies for the amount mentioned above occurred on "tuesday, wednesday, or midweek" see: 2-13-09 RP 45, which makes his account of the events factually impossible given the date of arrest which was (August 26, 2008 at 8:00) see 2-10-09 RP18 Ms. Jackson testified to that Mr Roberts mainly absent from the residence. 2-10-09 RP 25 she also admitted that Mr. Roberts Mr. Roberts never even talked about selling puppies in her presence. 2-10-09 RP 7 or to selling puppies to anybody in the neighborhood and in the privacy of their own home. 2-10-09 RP 19. Testimony at trial further indicated that Mr. Roberts was not a residence of that location upon which the puppies were found. In fact testimony by all the Jackson substantiates Mr. Roberts slept in his car. 2-9-09 RP 168-169, 2-10-09 RP 92. Consequently, the the jury found Mr. Roberts guilty of both charges CP 167-168; 2-12-09 RP 61. Mr. Roberts timely appeals convictions. CP 499.

## F.GROUND 1; ARGUMENT

1. Mr. Roberts argues that his conviction for first degree trafficking of stolen property must be reversed because he was entitled to the instructions of attempted first and second degree trafficking in stolen property and the court declined to give them. 2/11/2009 RP 20. There was substantial evidence to give such instructions, and the failure to give the instructions requires reversal.

a. An instruction on the close relative of an inferior degree offense, a lesser included offense, is warranted when two conditions are met: FIRST, each of the elements of the lesser must be a necessary element of the offense charged, and SECOND, the evidence in the case must support an inference that the lesser crime was committed. See: State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150, 1153(2000) (quoting State v. Workman, 90 Wn. 2d 443, 447-48, 584 P.2d 382 (1978)). The two conditions, the legal prong and factual prong, are based upon the test set forth in State v. Peterson, 133 Wn.2d 885, 948 P.2d 381 (1997) and State v. Workman, 90 Wn. 2d 443, 548 P.2d 382 (1978); Fernandez-Medina, 141 Wn.2d at 455. In Fernandez-Medina, the Supreme Court states that the test for determining if a party is entitled to an instruction on an inferior offense differs from the test for entitlement to an instruction on a lesser include offense only with the respect to the lesser component of the test. Id. (emphasis added). As for the factual prong of the test, its purpose is to ensure that there is evidence to support giving the requested instruction. Id. This factual test requires a showing more particularized than that required of other jury instructions. Id. Specifically, the evidence must raise an inference that only the lesser included/ inferior degree offense was committed to the exclusion of the charged offense Id. (citing State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990) (lesser Included offense

instruction)) (additional emphasis added).

When substantial evidence in record supports a rational inference that the defendant committed only the lesser included or inferior offense to the exclusion of the greater offense, the factual component of the test.... is satisfied. The remedy for failing to give a lesser included instruction when one is warranted is reversal. Fernandez-Medina, 141 Wn.2d at 461-62.

The trial court's refusal to give an instruction, based on sufficiency of evidence is reviewable for abuse of discretion: State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Here, the legal prong of the Workman test, is clear that the elements of attempted first degree trafficking in stolen property under RCW 9A.82.050(2), contains necessary elements of the greater crime of first degree trafficking in stolen property.

Likewise, the elements of the circumstances surrounding the evidence warrant the proposed lesser included offense by the inherent character of the principal offense. Therefore, the existence of such hereditry quashes as a necessary element of the greater offense.

The same application of the Workman test is used for attempted second degree trafficking in stolen property under RCW 9A.28.020(1); and RCW 9A.82.055, when the conversion of the analogy is performed.

In addition, according to RCW 10.61.003 DEGREE OFFENSES-INFERIOR DEGREE-ATTEMPT. Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information and guilty of any degree thereto, or of an attempt to commit the offense.

Also, see RCW 10.61.010 conviction of a lesser crime. Upon the trial court of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, of an attempt to commit the crime so charged, or of an attempted to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall

in their verdict specify the degree or attempt of which the accused is guilty.

An attempt is a lesser included offense of the crime charged and the jury may convict a defendant of attempt to commit the crime charged, even though the attempted was not specifically charged. See State v. Wiggins, 114 Wn.App. 478, 57 P.3d 1199(2002) (Wiggins at 485).

Consequently, the legal prong of the Workman test is satisfied. Thus, the question is whether the evidence raises the inference that only the lesser included....offense was committed to the exclusion of the charged offense(trafficking in stolen property in the first degree).? Fernandez-Medina, 141 Wn.2d at 455.

RCW 9A.28.020(1) defines criminal attempt as follows:

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.82.050(1) defines trafficking in stolen property in the first degree as follows:

A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property in the first degree.

See Appendix B1 for proposed instructions of attempted trafficking in the 1st & 2nd degree and reference to record: 2-10-09 RP 132-139;2-11 RP 13-20...

In Jackson, it was explained that for fact finder to draw inferences from proven circumstances, the inferences must be rationally related to the proven fact. "The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference," id. at 875 (quoting Tot v. United States, 319 U.S. 463, 467; 53 s. Ct. 1241, 1244, 87 L.Ed. 2d 1519 (1943)), adding:

-- A presumption is only ~~permissible~~ when no more than one conclusion can

be drawn from any set of circumstances. An inference should not arise where there exist other reasonable conclusions that would follow from the circumstances. *Id.* at 876 (emphasis added). In other words, if the finder of fact concludes an alternative reasonable explanation exists for the defendant's actions, then the state has failed to meet its burden of establishing guilt beyond a reasonable doubt. This is language which appears to drive the court of appeals opinion, see Bencivenga, slip op. at 3; however, the court of appeals misconstrues it, the issue to be decided is whether it was error "to instruct the jury that it may infer the defendant acted within the building from the fact that the defendant may have attempted entrance into the building," concluding it was.

Intent to attempt a crime also may be inferred from all the facts and circumstances. State v. Nicholson, 77 Wn.2d 415, 420, 463 P.2d 633 (1969).

Where a crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result. W. LaFarve & A. Scott, *Criminal Law* § 6.2(c), at 500 (2d ed. 1986). Therefore, in order to serve as a basis for the crime of attempt, a crime defined by a particular result must include the intent to accomplish that criminal result as an element. Common-Wealth v. Griffin, 310 Pa. Super 39, 50-51, 456 A.2d 171 (1983); People v. Foster, 19 N.Y. 2d 150, 153, 225 N.E.2d 200, 278 N.Y.S.2d 603 (1967).

At the conclusion of trial Mr. Roberts proposed defensive theory related instructions of attempted trafficking in stolen property in the first and second degree based upon the manner the property was left at the Jaskson residence and not trafficked. 2-11-09 RP 14. Further, the specific conduct supporting foundation of his arguments, upon the evidence in the light most favorable to the state were relevant. 2-11-09 RP18. In spite of the trial courts analysis

of reasoning pertaining to its ruling, the court favored a majority of the states' assertions. (Citing a ruling pertaining to this issue, "attempted trafficking, first or second degree, does not apply under the facts of this case.") 2-11-09 RP 20.

Thus, the question is, did the court error in rendering this ruling when there was substantial evidence in record?

According to West, 18 Wn. App. at 691 (citing People v. Gibson, 94 Cal. App. 2d 468, 210 P.2d 747 (1949)). See also id. (person wearing mask, carrying a rifle, and forcing a hostage to accompany him to the bank door that was locked, is taking a substantial step towards burglary and criminal trespass) (citing Rumfelt v. United States, 445 F.2d 134 (7th Cir.) cert. denied, 404 U.S. 853 (1971)).

b. Likewise, Mr. Roberts' trial lawyer, Mr. Stimmel, asserted that given the manner the dogs were allegedly left at the residence; in comparison, to the whole series of acts within the material elements of the state's accusation, which it said, could constitute trafficking; could it fact be tried and not succeeded at. 2-11-09 RP 14, 17, 18. Intent to attempt a crime may be inferred from fact and circumstances. State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999).

In contrast, the State pleaded to the trial court that there is no evidence that Mr. Roberts was attempting to possess the property, but wasn't able to, no evidence that the property was not stolen, and that the defendant thought it was. 2-11-09 RP 17. The state insisted to the trial court that these were the only instances the defendant presumptively could be found to have committed attempted trafficking in the first and second degree. 2-11-09 RP 17.

The court then asked Mr. Stimmel, "How would He attempt to traffic?"

Mr. Roberts then explains his theory and the trial court then agree's with the analysis, yet digresses only to come to a dire, conflicting conclusion by ultimately denying Mr Roberts requested instructions of attempted first and second degree trafficking. (It's reasoning behind this conflicting ruling is that since the state conceded to its own proposed instruction of second degree trafficking in stolen property it would not give the defendants attempted trafficking in stolen property instructions). 2-11-09 RP 17-20.

Nevertheless, as the United States Supreme Court has stated: [I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the charged offense remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. Keeble v. United States, 412 U.S. 205, 212-13, 93 S.ct 1993, 36 L.Ed.2d 844 (1973).

To add to the states catch -22, it has failed to provide the defendant with a unanimity instruction and failed to establish every **material** element of count II (trafficking) ,beyond a reasonable doubt; particularly the state's assertion of Mr. Roberts selling canines. The test for sufficiency of instructions is whether the

instructions, read as a whole, **allow counsel** to argue their theory of the case, are not misleading, and properly inform the trier of fact of applicable law. State v. Mark, 94 Wn.2d 520, 618 P.2d 73 (1980); Braxton v. Rotec Indus. INC., 30 Wn.App. 221, 633, P.2d 897 (1981).

Here, the trial court examined none of the testimony on record to rationalize its refusal to give Mr. Roberts attempted trafficking in the first and second degree instruction. 2-11-09 RP 13 -20 (The Honorable Michael Heavey simply just stated, there was no substantial evidence, with out reflecting or weighing the evidence out on record). A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when deciding whether or not an instruction should be given. See State v. Bright, 129 Wn.2d 257, 269-70, 916 P.2d 922 (1996) (using State's evidence to justify an instruction on an inferior degree offense).

In spite of the enactment of the former in 1971 preceded the enactment of RCW 9A.28.020 in 1975, the court resorted to the common law for the elements of attempted: (1) criminal intent and (2) "an overt act, rather than the statutory phrase substantial step." An overt act was understood to mean "a direct, ineffectual act done toward commission of a crime and, where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt." 67 Wn.App at 746-47.

In State v. Grundy, 76 Wn.App. 335, 337, 886 P.2d 208 (1994), the same court citing State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978), held that "[t]he overt act must be a substantial step, that is, one which is strongly corroborative of the crime." (Emphasis added.) As the Supreme Court later noted, Workman had adopted the Model

Penal Code of the American Law Institute's definition of "substantial step." Under that approach a substantial step need not be an overt act, as long as its behavior strongly corroborative of the actor's criminal purpose. Thus, lving in wait may be a substantial step.

Similarly, to Mr. Roberts theory stating, "that in the manner the dogs were left at the Jacksons property and not trafficked," a verdict of attempted trafficking in the first or second degree would be rendered. 2-11-09 RP 14. An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue the jury may have relied upon the presumption rather than the evidence. If the jury may have failed to consider evidence of intent, a reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. See State v. Belmarez, 101 Wn.2d 212, 216 P.2d 492 (1984). Additionally, according to Mr. Roberts acclamated the proposed instructions, and asserted that elements of count 2 trafficking, "could be attempted with the stolen merchandise; that is, it could be tried and not succeeded at." 2-11-09 RP 14,17,18. In contrast, it was testified to by Ms. Tammy Jackson was mainly absent from the residence where the stolen property was kept. 2-10-09 RP 25. This actually correlates Mr. Roberts reasoing for the lesser included requested instruction. See 2-11-09 RP 14.

Accordingly, it's the jury's ability to "separate the tares from the wheat" they deserve more deference than was afforded by the trial court, and this court must loathe to allow expansion of the trial judge's authority into the fact-finding province of the jury. The evidence must be viewed in the light most favorable to the party requesting the instruction. State v. Fernandez- Medina, 141 Wn. 2d at 455-56. The decision not to give an instruction is reviewed

for an abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998).

Any slight act done in furtherance of a crime constitutes an attempt if it clearly shows the design of the individual to commit the crime Aumick, 126 Wn.2d at 427. In State v. Curran, 116 Wn.2d 174, 183 P.2d 558 (1991), it was said, "a defendant is entitled to a lesser included offense instruction if the charged crime could not be committed without also committing the lesser offense, Curran at 183.

It does not matter who presents the evidence....Fernandez-Medina, 141 Wn.2d at 456. Finally, a criminal defendant is entitled to a lesser included offense instruction when each of the elements of the lesser offense is also an element of the offense charged and the evidence supports an inference that the lesser offense was committed. A failure to give a lesser included offense instruction when such supporting evidence is present constitutes prejudicial error. State v. Knight, 54 Wn.App 143, 772 P.2d 1042 (1989). c. Here, the error was not harmless beyond a reasonable doubt, and the conviction must be reversed.

#### GROUND 2 ; ARGUMENT

**2.** In accordance to RCW 9A.28.020(1) the unlawful conviction of trafficking in stolen property in the first degree must be reversed when attempted is an element of the charged crime, it is constitutional error not to give an instruction defining attempt for the jury.

**a.** MR. Roberts further disputes that in light of the trial courts error of failure to give proposed instructions of attempted first and second degree trafficking, the trial court persisted to bask in constitutional error by not giving defendants requested instruction.

No. 17. See: Appendix C1.

In accordance to RCW 9A.28.020, "Did the trial court manifest in further error by not giving the proposed instruction defining attempt and informing the jury that both intent and a substantial step are elements of an attempt to commit a crime?" See Appendix C2 & also: State v. Jackson, 62 Wn. App. 53, 813 P.2d 156 (1991) (citing the note on use to WPIC 100.01 with approval); State v. Stewart, 35 Wn. App. 552, 55, 667 P.2d 1139 (1983).

In order for an error involving the denial of a federal constitutional right to be held harmless in a state criminal case the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Chapman v. California, 386 U.S. 18 23-24, 17 L.Ed 705, 87 S.ct 824, 24 A.L.R. 3d 1065 (1967). An instructional error is only harmless if it is "trivial, formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it." Although substantial evidence of a defendant's guilt is not challenged or explained by the defendant, it does not constitute harmless error for a defendant in a criminal trial to be further deprived of his federal constitutional rights through the prosecuting attorney's continuous and repeated adverse comments and the trial judge to the jury as various inferences which can be drawn against the defendant from his failure to testify. Chapman v. California, 386 U.S. at 707.

b. The rule is that failure to instruct the jury as to the intent element of a crime can be harmless error only if the defense theory of the case does not involve the element of intent. State v. Smith,

56 Wn.App.909, 914, 786 P.2d 320 (1990); State v. Tyler, 47 Wn.app. 648, 653, 736 P.2d 1090 (1987), overruled on other grounds in state v. Delcambre, 116 Wn.2d 444, 805 P.2d 233 (1991). Mr. Roberts proposed an attempted trafficking 1st & 2nd degree instruction accompanied by requested instruction No. 17 (See Appendix C1) , and the trial court erroneously failed to give such meritorious defense instructions. 2-11-09 RP 14.

An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider intent, a reviewing court cannot hold that error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent is overwhelming is then simply irrelevant. See State v. Belmarez, 101 Wn.2d 212, 216 P.2d 492 (1984).

c. The trial court refusal to instruct and inform the jury that "attempt" contains two separate elements (1) the intent, and (2) a substantial step are elements of an attempt to commit a crime which are elements to the requested lesser included defense theory instruction. A new trial is prayed for and therefore required.

### GROUND 3 ; ARGUMENT

3. **The Trial Court Erred in Failing to Grant Mr. Roberts request for a Bill of Particulars.** Mr. Roberts contends that as applied in this case, the trafficking statute is unconstitutionally vague; that is, it did not give proper notice to the accused of the events he was supposed to defend against. In regards to the charging documents regarding the overlapping language of the trafficking and possession of stolen property charges, Mr Roberts requested a bill of particulars in form of a proposed order on 2/4/2009 RP 8-17 motion in limine #1 to withdraw (dismiss) Count 2, Trafficking in stolen property in the first degree to be dismissed; with an alternative proposed order that the state shall specify, by further amendment or bill of particulars, the specific conduct which the prosecution intends to prove in support of the crime of trafficking in stolen property.

Did the State Give Proper Notice to the accused of the Events He Was to Defend Against?

a. **BACKGROUND:** At the omnibus hearing held on 1/16/2009; the state moved to amend the information to add Count 2, Trafficking. Mr. Roberts objected orally because the trafficking count is merely a broad restatement of the statute and does not furnish a reasonable notice to Mr. Roberts as to the conduct he must defend against. In oral colloquy, Mr. Roberts also objected that, as amended, the first count appears to be a lesser included offense within the second count. The defense did not object to timeliness, having acknowledged that new facts are not presented in the amendment. At the omnibus hearing, Judge Gain orally stated that Mr. Roberts could renew his objection at trial.

b. The State did not say whether it intended the trafficking count to be an alternative to possession of stolen property("PSP"), or a greater crime within which PSP as a lesser crime, or two violations of the same crime. The status of PSP as a lesser included crime within trafficking is a bit murky, but appears established in State v. Knight, 54, Wn. App. 143, 772 P.2d 1042 (1989). In Knight, the crime of PSP 1st degree and 2nd degree were said to be lesser included crimes within attempted trafficking 1st degree, and the court reversed the attempted trafficking conviction because the trial court did not instruct on the lesser included offenses of PSP 1st and 2nd degree. Other decisions seemingly in accordance with Knight are unpublished.

If PSP is a lesser included offense within trafficking, as appears from Knight, then the state charged Mr. Roberts with two instances of the same crime based on the same facts. This charging violates Mr. Roberts' protection against double jeopardy. State v. Bobic, 140 Wash.2d 250, 996 P.2d 610 (2000). The remedy is dismissal of the trafficking charge.

Thus, the question is did the trial court error in allowing the trafficking charge to survive?

The Sentencing Reform Act of 1981 requires prosecuting attorneys to develop charging standards that are precise:

**Selection of Charges/ Degree of Charge**

(1) The prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges:

- (a) Will significantly enhance the strength of the state's case's at trial; or
- (b) Will result in restitution to all victims.

(2) The prosecutor should not overcharge to obtain a guilty plea.

Overcharging includes:

- (a) Charging a higher degree;
- (b) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication.

Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

**RCW 9.94A.440.** Prosecuting authorities should be required to make charging decisions as narrowly tailored to particular facts of the case as is possible.

As you can see the trial court erred in allowing the trafficking charge to survive, by failing to grant Mr. Roberts request for a bill of particulars.

- c. Accordingly, the conviction for first degree trafficking in stolen property in count II must be vacated.

#### GROUND 4; ARGUMENT

4. The evidence is insufficient to show that the defendant knowingly had actual or constructive possession of stolen property exceeding \$1,500.00; and the defendant did not have actual possession or dominion and control over premises of the residence of which stolen property was found.

- a. Mr. Roberts persist that there is insufficient evidence to show he had actual or constructive possession of stolen property exceeding \$1,500.00 in total value. If the state insists Mr. Roberts had actual possession of stolen property; he relies on a series precedented, controlling case laws. First, we must define actual possession. Actual possession means goods are in the personal custody of the person charged, State v. Callahan, 77 Wash. 2d 27, 29, 459 P.2d 400 (1969). If the state claims actual possession on 8-23-08 at 3-4 am, in relation to a green Blazer, an unidentified individual who the State has wrongfully labled Mr. Roberts Nephew. 2-10-09 RP 32,80-81; 2-9-09 RP 95-96. Conflicting statements or inconsistent statements do not always

provide evidence sufficient to show knowledge or construction possession. United States v. Valadez-Gallegos, 162 F.3d 1256 (10th Cir. 1998). Further, state v. Plank, 46 Wn.App. at 731-33 (treats the definition from controlled substances cases as applying to stolen property cases.) Also, Mariesha and Tamia putting puppies in the Jacksons residence backyard with an unidentified individual. 2-9-09 RP 94; 2-10-09 RP 84. To possess stolen property, a person must have actual control over it; passing, fleeting or momentary control will not suffice. State v. Staley, 123 Wn.2d 794, 801-02, 872 P.2d 502 (1994). Also, to "possess" means to have actual control, care and management of, and not passing control, fleeting and shadowy in its nature. See State v. Cooper, Mo. App., 32 S.W. 2d 1098, 1099 (citing United States v. Landry, 257 F.2d 425).

Sufficient evidence supports a jury's determination of guilty if, viewing the evidence in the light most favorable to the prosecution, any rational tier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn. 2d 216, 221, 616 P.2d 628 (1980).

All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

Constructive possession is established by viewing the totality of the circumstances, including the proximity of the property and ownership of the premises "where contraband was found." See State v. Turner, 103 Wn.App. 515, 522-23, 13 P.3d 234 (2000). Likewise, the contraband was found by Kent Police inside the Jackson home laying on the couch. 2-5-09RP 37; 2-9-09RP 11; 2-10-09 RP61-12<sup>1</sup>. Again," actual possession means that the goods are in the personal custody of the person charged with possession ;

---

1. It should be duly noted that Mr. Roberts was not located at this residence at the time recovery of the stolen property.

whereas constructive possession means that the goods are not in actual, physical possession has dominion and control over the goods." Staley, 123 Wn. 2d at 798 (quoting Callahan, 77 Wn. 2d at 29). But state must show more than a 'passing' or 'momentary' handling.' Staley, 123 Wn. 2d at 801-02; Callahan, 77 Wn. 2d at 29. For example, in Callahan, the only evidence of possession (the drugs) was the fact that the defendant told an officer at the time of his arrest that he had at one point handled the drugs. Callahan, 77 Wn. 2d at 29. the court held this insufficient to prove possession 'since possession entails actual control, not passing control which is only momentary handling.' Id.

**b.** Mr. Roberts was not a resident of the Jacksons house hold where stolen property was found there within. 2-9-09 RP 168-169; 2-10-09 RP 92. In State v Callahan, Supra, the drugs were found on a houseboat. When the search warrant was executed, the defendant was sitting at a desk with another individual and box filled with various drugs was on the floor between the two men. The defendant admitted that two books on drugs, two guns and a set of broken scales found on the houseboat belonged to him. He also stated that, "while on the houseboat for the preceding 2 or 3 days, he was not in the status of a tenant, cotenant, or subtenant." Defendant had admitted that he had handle the drugs earlier in the day. The Supreme Court held that this was not sufficient evidence to support a finding of dominion and control.<sup>n</sup>

In accordance to RCW 9A.56. 150 and WPIC 77.02 PSP in the First Degree; the state needed to prove (1) that the defendant knowingly recieved, retained, possessed, concealed, stolen property, (2) acted with knowledge that the property had been stolen, (3) withheld or appropriated the property to the use of someone other than the true owner or person entitled there to, (4) the value of the stolen property exceeded \$1,500.00, (5) the act occurred in Washington. RCW 9A.56.150

**Possessing Stolen Property in the First Degree- Other than Firearm or Motor Vehicle**, states,"(1) A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds one thousand five hundred dollars in value.

At trial Tammy Jackson testified to Mr. Roberts being mainly absent from there residence where stolen property was found<sup>2</sup>. 2-10-09 RP 25.

Exclusive control by the defendant is not required to establish possession of the same prohibited item. State v. Turner, 103 Wn. App. 515, 522, 13 P.3d 234 (2000). However, a defendant's mere proximity to drugs is insufficient to prove constructive possession. That is so even if there is evidence that the defendant handled drugs, because " possession entails actual control, not a passing control which is a momentary handling." Callahan, 77 Wn.2d at 29. Presence and proximity to narcotics are inadequate to support a conviction. See U.S.v. Valadez-Gallegos, 162 F3d 1256(10 Cir.1998) Again, see Plank, 46 Wn. App. at 731-33; treating the definition from controlled substance cases as applying to stolen property cases. As established by Callahan, the rule is 'where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession.'" State v Spruell, 57 Wn.App. 383, 388, 788 P.2d 21 (1990); State v. Cote, 123 Wn. App. 546, 548-50, 96 P.3d 410(2004).

On the other hand Tamia and her brother stayed 1 or 2 nights in Federal Way; coincidentally, Tammy Jackson testified to needing  
2. Again, it's noted that Mr. Roberts was no were in the vicinity of the Jacksons residence at the time of the discovery of the stolen property.

Tamia Jackson their, at the Jacksons home to help her feed the stolen property. 2-10-09 RP 8-9; 2-10-09 RP 25. Similarly,"[t]o"posses" means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature.'" Landry at 431 (citing United States v. Wainer, 170 F.2d 603, 606 (7th Cir. 1948)).

In United States v. Landry, 257 F2d 425: it was said," The government plausibly contends the fact of possession may be shown by circumstantial proof. With this we agree; in fact, this court has so held. United States v Pinna, 7 Cir., 229 F.2d 216, 218. But no court, so far as we are aware, has held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places that possession in some other person.'" Landry at 431.

c. So as we can see it is greatly prayed upon for this court to reverse and dismiss on double jeopardy grounds.

#### G. CONCLUSION

Reversal fo Mr. Roberts convictions is required where (1) the trial court erred by denying the requested lesser included offense of attempted first and second degree trafficking in stolen property on an alternative theory of the case, (2) the trial court further manifested in error pursuant to RCW 9A.28.020 (1) by not giving instruction defining attempt for jury, (3) the trial court erred in failing to grant the defendant's requests for a bill of particulars, and (4) the evidence is insufficient to show that the defendant knowingly had actual or constructive possession of stolen property exceeding \$1,500.00; and the defendant did not have actual possession or dominion and control over the

premises of the residence of which stolen property was found.

Dated this 11th day of January, 2010.

Respectfully submitted,

*Jason Williams Roberts*

Jason Williams Roberts

Pro Se (Sui Juris)

H. APPENDIXES

**APPENDIX A1**

**FILED**  
KING COUNTY, WASHINGTON

MAY 28 2009

KNT  
SUPERIOR COURT CLERK

COPY TO COURT OF APPEALS JUN 03 2009

**SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Jason William Roberts, )  
 )  
 Defendant. )

NO. 08-1-09682-0 KNT

ORDER OF TRANSFER

**[CLERK'S ACTION REQUIRED]**

The above entitled court, having considered a:

- Motion to withdraw a guilty plea
- Motion for relief from judgment
- Petition for writ of habeas corpus
- Motion for arrest of Judgment

and having determined that a transfer to the Court of Appeals would serve the ends of justice, Toliver v. Olsen, 109 Wn.2d 607, 612-613; CrR 7.8(c)(2),

IT IS HEREBY ORDERED that the clerk is directed to transfer the motion to the Court of Appeals, Division I.

DATED: May 21, 2009.

*Michael Heavey*  
JUDGE MICHAEL HEAVEY



**ORIGINAL**

**APPENDIX B1**

~~APPENDIX~~  
~~B1~~

No. \_\_\_\_

To convict the defendant of the crime of attempted trafficking in stolen property in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 23, 2008 through August 26, 2008, the defendant did an act that was a substantial step toward the commission of trafficking in stolen property in the first degree;

(2) That the act was done with the intent to commit trafficking in stolen property in the first degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Request No. 19  
Proposed by defendant

WPIC 100.02 Attempt--Elements

To convict the defendant of the crime of attempted \_\_\_\_\_, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about \_\_\_\_\_, the defendant did an act that was a substantial step toward the commission of \_\_\_\_\_;

(2) That the act was done with the intent to commit \_\_\_\_\_;  
and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

#### NOTE ON USE

Fill in the name of the crime in elements (1) and (2). If attempt to commit the crime is being submitted to the jury along with the crime charged, the jury will be receiving instructions defining and setting out the elements of the crime charged. If the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime. WPIC 100.01, Attempt-Definition, may be used with this instruction. See the Comment below.

Use WPIC 10.01, Intent-Definition, and WPIC 100.05, Attempt-Substantial Step-Definition, with this instruction. If attempt to commit the crime is being submitted to the jury along with the crime charged, use WPIC 155.00, Concluding Instruction-Lesser Degree/Lesser Included/Attempt, and WPIC 180.05, Verdict Form B-Lesser Degree/Lesser Included/Attempt, with this instruction. It may be necessary to substitute "overt act" for "substantial step" in element (1) when the defendant is charged with the attempt to commit a drug-related offense under RCW Chapter 69.50. See the Comment below.

#### COMMENT

RCW 9A.28.020.

Elements of attempt. An attempted crime involves two elements: the intent to commit a specific crime and the taking of a substantial step toward its commission. *State v. DeRyke*, 149 Wn.2d 906, 73 P.3d 1000 (2003).

Failure to instruct the jury as to both of these elements is constitutional error. See *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995); *State v. Jackson*, 62 Wn.App. 53, 813 P.2d 156

(1991) (citing the Note on Use to WPIC 100.01 with approval); State v. Stewart, 35 Wn.App. 552, 555, 667 P.2d 1139 (1983). Impossibility. RCW 9A.28.020(2) specifically provides that it is no defense that the crime charged to have been attempted was factually or legally impossible of commission. Neither legal nor factual impossibility is a defense to attempt. State v. Walsh, 123 Wn.2d 741, 870 P.2d 974 (1994) (holding crime of "spotlighting" was completed, not merely attempted, by effort to kill or injure big game, in place where such animals may reasonably be expected); State v. Luther, 125 Wn.App. 176, 105 P.3d 56 (2005); see also State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002) (addressing factual impossibility). No pattern instruction on impossibility is proposed. An instruction can usually be drafted in the language of the statute.

**Intent.** When a crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result. Thus, a crime defined by a particular result must include the intent to accomplish that criminal result as an element in order for that crime to serve as a basis for the crime of attempt. State v. Dunbar, 117 Wn.2d 587, 817 P.2d 1360 (1991) (trial court properly dismissed charge of attempted first degree murder by creation of a grave risk of death because first degree murder by creation of a grave risk of death does not require a specific intent to kill).

In an attempted burglary case, the jury must be instructed on the statutory definition of intent. State v. Allen, 101 Wn.2d 355, 678 P.2d 798 (1984) (finding reversible error).

The lack of a mens rea element in the crime of rape of a child is not inconsistent with the attempt statute's element of "intent to commit a specific crime" and it therefore may serve as a base crime for criminal attempt. State v. Chhom, 128 Wn.2d 739, 911 P.2d 1014 (1996) (clarifying Dunbar, supra). The intent required for attempted rape of a child is the intent to "accomplish the criminal result: to have sexual intercourse." 128 Wn.2d at 743 (other elements of rape of a child remain strict liability). Intent to attempt a crime may be inferred from the facts and circumstances. State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999).

**Substantial step.** A substantial step for purposes of the attempt statute is not the same as a substantial step for purposes of the conspiracy statute. State v. Dent, 123 Wn.2d 467, 474-77, 869 P.2d 392 (1994). See the Comments to WPIC 110.03, Criminal Conspiracy-Substantial Step-Definition, and WPIC 100.05, Attempt-Substantial Step-Definition.

**Drug-related crimes.** In 1992, Division III of the Court of Appeals held that a defendant charged with attempt to commit a drug-related crime must be charged under RCW 69.50.407, rather

than RCW 9A.28.020, the general attempt statute. *State v. Roby*, 67 Wn.App. 741, 840 P.2d 218 (1992). Because the enactment of the former in 1971 preceded the enactment of RCW 9A.28.020 in 1975, the court resorted to the common law for the elements of attempt: (1) criminal intent and (2) an overt act, rather than the statutory phrase substantial step. "An overt act was understood to mean a 'direct, ineffectual act done toward commission of a crime and, where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt.'" 67 Wn.App. at 746-47. In *State v. Grundy*, 76 Wn.App. 335, 337, 886 P.2d 208 (1994), the same court, citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), held that "[t]he overt act must be a substantial step, that is, one which is strongly corroborative of the crime." (Emphasis added.) As the Supreme Court later noted, *Workman* had adopted

the Model Penal Code of the American Law Institute's definition of "substantial step." Under that approach a substantial step need not be an overt act, as long as it is behavior strongly corroborative of the actor's criminal purpose. Thus, lying in wait may be a substantial step.

*State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993). On the other hand, despite its reliance on 1971 common law precedents for the requirement of an "overt act," the *Roby* court was willing to rely on RCW 9A.28.020(2) for the proposition that factual impossibility was not a defense to attempt under RCW 69.50.407. See also *State v. Wojtyna*, 70 Wn.App. 689, 855 P.2d 315 (1993) (1994). The applicability of this instruction to attempts to commit drug-related offenses therefore is in some doubt, and the committee recommends caution in using this instruction, and particularly the term "substantial step," in such cases.

Cross-reference. See generally *Fine & Ends*, 13A Washington Practice, Criminal Law, § 604 (2007-08).

[Current as of July 2008.]

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11A WAPRAC WPIC 100.02

END OF DOCUMENT

~~APPENDIX~~  
~~B 1~~

No. \_\_\_\_

To convict the defendant of the crime of attempted trafficking in stolen property in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 23, 2008 through August 26, 2008, the defendant did an act that was a substantial step toward the commission of trafficking in stolen property in the second degree;

(2) That the act was done with the intent to commit trafficking in stolen property in the second degree; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Request No. 20  
Proposed by defendant

WPIC 100.02 Attempt-Elements

To convict the defendant of the crime of attempted \_\_\_\_\_, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about \_\_\_\_\_, the defendant did an act that was a substantial step toward the commission of \_\_\_\_\_;

(2) That the act was done with the intent to commit \_\_\_\_\_; and

(3) That the act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

#### NOTE ON USE

Fill in the name of the crime in elements (1) and (2). If attempt to commit the crime is being submitted to the jury along with the crime charged, the jury will be receiving instructions defining and setting out the elements of the crime charged. If the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime. WPIC 100.01, Attempt-Definition, may be used with this instruction. See the Comment below.

Use WPIC 10.01, Intent-Definition, and WPIC 100.05, Attempt-Substantial Step-Definition, with this instruction. If attempt to commit the crime is being submitted to the jury along with the crime charged, use WPIC 155.00, Concluding Instruction-Lesser Degree/Lesser Included/Attempt, and WPIC 180.05, Verdict Form B-Lesser Degree/Lesser Included/Attempt, with this instruction. It may be necessary to substitute "overt act" for "substantial step" in element (1) when the defendant is charged with the attempt to commit a drug-related offense under RCW Chapter 69.50. See the Comment below.

#### COMMENT

RCW 9A.28.020.

Elements of attempt. An attempted crime involves two elements: the intent to commit a specific crime and the taking of a substantial step toward its commission. *State v. DeRyke*, 149 Wn.2d 906, 73 P.3d 1000 (2003).

Failure to instruct the jury as to both of these elements is constitutional error. See *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995); *State v. Jackson*, 62 Wn.App. 53, 813 P.2d 156

(1991) (citing the Note on Use to WPIC 100.01 with approval); State v. Stewart, 35 Wn.App. 552, 555, 667 P.2d 1139 (1983). Impossibility. RCW 9A.28.020(2) specifically provides that it is no defense that the crime charged to have been attempted was factually or legally impossible of commission. Neither legal nor factual impossibility is a defense to attempt. State v. Walsh, 123 Wn.2d 741, 870 P.2d 974 (1994) (holding crime of "spotlighting" was completed, not merely attempted, by effort to kill or injure big game, in place where such animals may reasonably be expected); State v. Luther, 125 Wn.App. 176, 105 P.3d 56 (2005); see also State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002) (addressing factual impossibility). No pattern instruction on impossibility is proposed. An instruction can usually be drafted in the language of the statute.

Intent. When a crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result. Thus, a crime defined by a particular result must include the intent to accomplish that criminal result as an element in order for that crime to serve as a basis for the crime of attempt. State v. Dunbar, 117 Wn.2d 587, 817 P.2d 1360 (1991) (trial court properly dismissed charge of attempted first degree murder by creation of a grave risk of death because first degree murder by creation of a grave risk of death does not require a specific intent to kill).

In an attempted burglary case, the jury must be instructed on the statutory definition of intent. State v. Allen, 101 Wn.2d 355, 678 P.2d 798 (1984) (finding reversible error).

The lack of a mens rea element in the crime of rape of a child is not inconsistent with the attempt statute's element of "intent to commit a specific crime" and it therefore may serve as a base crime for criminal attempt. State v. Chhom, 128 Wn.2d 739, 911 P.2d 1014 (1996) (clarifying Dunbar, supra). The intent required for attempted rape of a child is the intent to "accomplish the criminal result: to have sexual intercourse." 128 Wn.2d at 743 (other elements of rape of a child remain strict liability). Intent to attempt a crime may be inferred from the facts and circumstances. State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999).

Substantial step. A substantial step for purposes of the attempt statute is not the same as a substantial step for purposes of the conspiracy statute. State v. Dent, 123 Wn.2d 467, 474-77, 869 P.2d 392 (1994). See the Comments to WPIC 110.03, Criminal Conspiracy—Substantial Step—Definition, and WPIC 100.05, Attempt—Substantial Step—Definition.

Drug-related crimes. In 1992, Division III of the Court of Appeals held that a defendant charged with attempt to commit a drug-related crime must be charged under RCW 69.50.407, rather

than RCW 9A.28.020, the general attempt statute. *State v. Roby*, 67 Wn.App. 741, 840 P.2d 218 (1992). Because the enactment of the former in 1971 preceded the enactment of RCW 9A.28.020 in 1975, the court resorted to the common law for the elements of attempt: (1) criminal intent and (2) an overt act, rather than the statutory phrase substantial step. "An overt act was understood to mean a 'direct, ineffectual act done toward commission of a crime and, where the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt.'" 67 Wn.App. at 746-47. In *State v. Grundy*, 76 Wn.App. 335, 337, 886 P.2d 208 (1994), the same court, citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978), held that "[t]he overt act must be a substantial step, that is, one which is strongly corroborative of the crime." (Emphasis added.) As the Supreme Court later noted, *Workman* had adopted

the Model Penal Code of the American Law Institute's definition of "substantial step." Under that approach a substantial step need not be an overt act, as long as it is behavior strongly corroborative of the actor's criminal purpose. Thus, lying in wait may be a substantial step.

*State v. Harris*, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993). On the other hand, despite its reliance on 1971 common law precedents for the requirement of an "overt act," the *Roby* court was willing to rely on RCW 9A.28.020(2) for the proposition that factual impossibility was not a defense to attempt under RCW 69.50.407. See also *State v. Wojtyna*, 70 Wn.App. 689, 855 P.2d 315 (1993) (1994). The applicability of this instruction to attempts to commit drug-related offenses therefore is in some doubt, and the committee recommends caution in using this instruction, and particularly the term "substantial step," in such cases.

Cross-reference. See generally *Fine & Ende*, 13A Washington Practice, Criminal Law, § 604 (2007-08).

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**APPENDIX C1**

No. \_\_\_\_\_

A person commits the crime of attempted trafficking in stolen property when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

Request No. 17  
Proposed by defendant

WPIC 100.01 Attempt-Definition

A person commits the crime of attempted \_\_\_\_\_ when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

NOTE ON USE

This instruction may be used whenever an attempt to commit a crime is in issue, whether it is an attempt charge filed under RCW 9A.28.020 or the attempt is submitted as an included offense. See the Comment below. For a discussion of when to use this instruction instead of WPIC 100.02, Attempt-Elements, see the Comment below.

Give instructions defining the crime charged to have been attempted. Use WPIC 10.01, Intent-Definition, and WPIC 100.05, Attempt-Substantial Step-Definition, with this instruction. If attempt to commit the crime is being submitted to the jury along with the crime charged, use WPIC 155.00, Concluding Instruction-Lesser Degree/Lesser Included/Attempt, and WPIC 180.05, Verdict Form B-Lesser Degree/Lesser Included/Attempt, with this instruction.

Use this instruction with caution when the defendant is charged with attempt to commit a drug-related offense. See the Comment to WPIC 100.02, Attempt-Elements.

COMMENT

RCW 9A.28.020.

It is constitutional error not to give an instruction defining attempt and informing the jury that both intent and a substantial step are elements of an attempt to commit a crime. See State v. Jackson, 62 Wn.App. 53, 813 P.2d 156 (1991) (citing the Note on Use to WPIC 100.01 with approval); State v. Stewart, 35 Wn.App. 552, 555, 667 P.2d 1139 (1983).

The requirements of an attempt are addressed in both the instruction above and WPIC 100.02. Usually, only one of these instructions should be used. The instruction above should be used if the to-convict instruction in a particular case is drafted using the word "attempt" along with the elements of the underlying offense. For example, if the to-convict instruction requires the prosecution to prove that the defendant attempted to rob a person on a given date, then the instruction above could be used to define the to-convict instruction's use of the word "attempt." If, however, the to-convict instruction is based on WPIC 100.02, then the instruction above generally will not be needed.

See the Comment to WPIC 100.02, Attempt-Elements.

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STATE OF WASHINGTON )  
Respondent )  
)  
ROBERTS, JASON W. )  
Appellant )

NO. 63538-7-1

**AFFIDAVIT OF SERVICE  
BY MAILING**

I, Jason W. Roberts, being first sworn upon oath, do hereby certify that I have served the following documents:

Statement of Additional Grounds for Review,

**Upon:** Mr. Richard D. Johnson  
Court Administrator/Clerk  
The Court of Appeals Div. I  
One Union Square  
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Seattle, Wa. 98101-4170

Stephen P. Hobbs, WSBA# 18935  
King County Prosecuting Attorney  
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**By placing same in the United States mail at:**

Elizabeth Albertson  
Washington Appellate Project  
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Seattle, Wa 98101

**WASHINGTON STATE PENITENTIARY  
1313 NORTH 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA. 99362**

On this 11<sup>TH</sup> day of February, 2010.

Jason W. Roberts  
Jason W. Roberts  
Name & Number

**Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.**