No. 45326-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Timmy Sherman,**

Appellant.

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Grays Harbor County Superior Court Cause No. 12-1-00473-3

The Honorable Judge F. Mark McCauley

# Appellant's Opening Brief

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## ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Sherman was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

2. Defense counsel was ineffective for failing to properly raise the reasonable-belief-of-license defense.

3. Defense counsel was ineffective for failing to propose instructions necessary to the reasonable-belief-of-license defense.

4. Defense counsel provided ineffective assistance by failing to seek an instruction explaining the state's burden regarding the reasonable-belief-of-license defense.

   **ISSUE 1:** Defense counsel provides ineffective assistance by failing to identify and properly raise the sole available defense. Here, Mr. Sherman's attorney failed to properly raise the only defense available to Mr. Sherman, and did not seek instructions necessary to the defense. Was Mr. Sherman denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

5. The prosecutor committed misconduct that was flagrant and ill-intentioned.

6. The prosecutor committed misconduct that infringed Mr. Sherman's Fourteenth Amendment right to due process.

7. The prosecutor misstated the law by arguing that jurors could convict Mr. Sherman of burglary for entering onto premises that did not qualify as a building.

   **ISSUE 2:** A prosecutor commits misconduct by mischaracterizing the law in closing argument. Here, the prosecutor argued that a burglary conviction could rest on entry onto premises that did not qualify as a building. Did the prosecutor's misconduct violate Mr. Sherman's Sixth and Fourteenth Amendment right to a fair trial?

8. The sentencing court failed to properly determine Mr. Sherman's offender score.

9. The sentencing court's findings of fact do not support the offender score and standard range set forth in the judgment and sentence.

10. The sentencing court erred by including washed-out offenses in Mr. Sherman's offender score.

11. The trial court erred by sentencing Mr. Sherman with an offender score of 15.

12. The trial court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).

**ISSUE 3:** Prior class C felony convictions do not contribute to an offender score if the defendant subsequently spent five years in the community without reoffending. Here, the court included Mr. Sherman's 1989-1993 class C convictions in his offender score even though he subsequently spend more than five crime-free years in the community. Did the court err by including these convictions in Mr. Sherman's offender score?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Timmy Sherman needed to find a job. RP (7/16/13) 66. James Peterson had a logging road building business not far from where Mr. Sherman was staying. RP (7/16/13) 20-21, 45, 64, 67, 78. Mr. Sherman went to Peterson's property to ask if he had any work available. RP (7/16/13) 66, 87.

Peterson's property was on acreage and held several very large shops. RP (7/16/13) 21-22. It was surrounded in places by open area, as well as fences, walls and gates. It was not completely sealed by fencing or walls. RP (7/16/13) 46-48.

Mr. Sherman went into one of the shops, and found no one inside. He saw Girl Scout cookies and took them, as well as some change. RP (7/16/13) 28-31, 59. There were many other items of value in the shop, which he left undisturbed. RP (7/16/13) 54-57. Mr. Sherman left without making any contact with Peterson.

Peterson had a surveillance system. He contacted police, who identified Mr. Sherman as the person who had been inside the shop. RP (7/16/13) 24-31, 64. Mr. Sherman admitted it was him, and explained that he went in there to ask about employment. RP (7/16/13) 66, 76, 87.

The state charged Mr. Sherman with second-degree burglary.[1] CP 1.

At trial, the defense argued that his entry was lawful, though he did commit a theft once inside. RP (7/16/13) 111-119. The defense attorney did not propose any jury instructions to support this theory. CP 34-43.

During the prosecutor's rebuttal, he said:

> If you leave your chainsaw out on your lawn and somebody crosses your no trespassing sign and picks up your chainsaw, it's still a burglary because they took it off of your property. Okay. They're on your real property illegally.
> RP (7/16/13) 122.

Mr. Sherman objected. The court told the prosecutor to rephrase, but did not caution the jury, and the prosecutor went on to imply that entry onto any real property could support a burglary conviction. RP (7/16/13) 122-123.

The jury convicted Mr. Sherman. RP (7/17/13) 52.

At sentencing, the state alleged that Mr. Sherman had 15 points from prior convictions. A "Statement of Prosecuting Attorney" was filed, but the parties did not enter a stipulation on the points for purposes of the burglary sentence. RP (7/29/13) 15-27; CP 7-16, 53-56. The court entered a Judgment and Sentence which found 15 points for Mr. Sherman, and he

[1] Mr. Sherman was also charged with possession of methamphetamine. He pled guilty to that charge. CP 1-2, 57.

received a sentence of 68 months. CP 57-68. Mr. Sherman timely appealed. CP 69-70.

## ARGUMENT

### I. MR. SHERMAN'S DEFENSE ATTORNEY PROVIDED 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. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 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 failing to raise the defense that Mr. Sherman reasonably believed that he had license to enter the property.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *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.*

To be minimally competent, an attorney must research the relevant law. *Kyllo*, 166 Wn.2d at 862. The accused is denied a fair trial when defense counsel fails to identify the sole defense available and present it to the jury. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). Counsel's failure to propose instructions on the defense theory prejudices the accused if the jury is left with no recognition of the legal significance of the evidence. *Powell*, 150 Wn. App. at 156-57.

Mr. Sherman's defense attorney provided ineffective assistance by failing to properly raise the only available defense.

In order to convict Mr. Sherman of burglary, the state was required to prove beyond a reasonable doubt that he unlawfully entered or remained in a building. RCW 9A.52.030. There is a statutory defense for situations in which:

> The actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain.

RCW 9A.52.090(3).[2]

The reasonable belief defense is not an affirmative defense. *J.P.*, 130 Wn. App. 895. Instead, it negates the element of unlawful entry or

[2] Although, by its terms, the statute applies to criminal trespass, courts have extended the defense to burglary charges as well. *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005).

unlawful remaining. *Id.* (*citing City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002). Once the defense has been raised, the prosecution must prove beyond a reasonable doubt that the accused did not reasonably believe that the owner would have licensed him to be in the building. *Id.*

It was undisputed that Mr. Sherman entered the building in order to inquire about a job. RP (7/16/13) 66, 87. It was reasonable for Mr. Sherman to believe that a person known to employ people in the community would license job-seekers to enter the building to inquire.

Mr. Sherman's attorney argued in closing that the entry into the building was not unlawful. RP (7/16/13) 112-13. Nonetheless, defense counsel did not propose WPIC 19.06 regarding the reasonable belief defense.[3] Nor did he outline the defense and argue it for the jury. CP 34-41; RP (7/16/13) 111-19.

Defense counsel's failure to raise the defense fell below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862. Counsel had no reasonable strategic reason not to raise the available defense. An instruction on the reasonable belief defense would not have placed any

[3] Like the statute, WPIC 19.06 specifies that it applies to criminal trespass. The comment to the pattern instruction, however, specifies that it can apply to burglary charges as well. Comment to WPIC 19.06.

additional burden on the defense. *J.P.*, 130 Wn. App. at 895. Such an instruction would have made clear to the jury the state's burden of disproving the reasonable belief defense. Mr. Sherman's attorney provided deficient performance by failing to present the reasonable belief defense to the jury. *Powell*, 150 Wn. App. at 156.

Mr. Sherman was prejudiced by his attorney's deficient performance. *Kyllo*, 166 Wn.2d at 862. The evidence demonstrated that Mr. Sherman entered the property to ask about a job. RP (7/16/13) 66, 87. Without an instruction on the reasonable belief defense, the jury was left with no awareness of the legal significance of that evidence. *Powell*, 150 Wn. App. at 156-57. Instead, the jury likely believed that they were required to convict Mr. Sherman regardless of his belief that he would have been granted license to enter the building. Failure to properly raise the reasonable belief defense relieved the state of its burden to prove unlawful entry beyond a reasonable doubt. *J.P.*, 130 Wn. App. at 895. There is a reasonable probability that defense counsel's deficient performance affected the outcome of this case. *Kyllo*, 166 Wn.2d at 862.

Mr. Sherman's defense attorney provided ineffective assistance of counsel by failing to raise the reasonable belief defense. *Powell*, 150 Wn. App. at 156. Mr. Sherman's conviction must be reversed. *Kyllo*, 166 Wn.2d at 862.

## II. PROSECUTORIAL MISCONDUCT DENIED MR. SHERMAN A FAIR TRIAL.

### A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

### B. The prosecutor committed misconduct by misstating the law in closing argument.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not

only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the American Bar Association Standards for Criminal Justice std. 3–5.8 (cited by Glasmann, 175 Wn.2d at 706).

A prosecutor commits misconduct by mischaracterizing the law to the jury. *State v. Evans,* 163 Wn. App. 635, 643, 260 P.3d 934 (2011).

Here, the prosecutor misstated the elements of burglary. To convict for second degree burglary, the state must prove that the accused unlawfully entered or remained in a building with intent to commit a crime inside. RCW 9A.52.030.

In closing argument, however, the prosecutor argued that a person need only commit a crime on another person's property in order to be convicted of burglary:

> If you leave your chainsaw out on your lawn and somebody crosses your no trespassing sign and picks up your chainsaw, it's still a burglary because they took it off of your property. Okay. They're on your real property illegally.

RP (7/16/13) 122. Mr. Sherman objected to the prosecutor's mischaracterization of the law. The court did not rule on the objection and instead ordered the prosecutor to "rephrase." RP (7/16/13) 122. In

response, the prosecutor quoted the definition of "premises," which is unrelated to the elements of burglary.[4] RP (7/16/13) 122.

The prosecutor's argument was incorrect for two reasons. First, it omitted the element that the accused must enter or remain on the property with intent to commit a crime inside. RCW 9A.52.030. Second, it excluded the requirement that the accused must enter or remain in a building. RCW 9A.52.030.

Mr. Sherman was prejudiced by the state's mischaracterization of the law of burglary. *Glasmann*, 175 Wn.2d at 704. There was no direct evidence that Mr. Sherman had intent to commit a crime when he entered and remained in the building. The building contained tools and equipment worth a significant amount of money, which Mr. Sherman left completely undisturbed. RP (7/16/13) 51-58. Rather than argue that the facts supported the inference that Mr. Sherman acted with intent to commit a crime, the prosecutor chose to obfuscate that element altogether. There is a substantial likelihood that the prosecutor's improper argument affected the verdict. *Glasmann*, 175 Wn.2d at 704.

[4] Nor did the definition of "premises" relate to the court's instructions on the lesser offense of trespass. CP 48.

The prosecutor committed misconduct by mischaracterizing the elements of burglary in closing. *Evans*, 163 Wn. App. at 643. Mr. Sherman's conviction must be reversed. *Id.*

## III. THE COURT MISCALCULATED MR. SHERMAN'S OFFENDER SCORE.

### A. Standard of Review.

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013).

### B. Mr. Sherman's sentence must be vacated because three of his prior offenses should have "washed out."

The state bears the burden of showing by a preponderance of the evidence that a prior conviction adds a point to the accused's offender score. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Prior convictions for class C felonies are not included in an offender score if the accused has spent five consecutive years in the community without conviction following his/her conviction or release from confinement. RCW 9.94A.525(2)(c).

In connection with his guilty plea to the drug offense, Mr. Sherman agreed that he committed the offenses listed on the state's criminal history

sheet. CP 8. The sheet shows three class C felony convictions between 1989 and 1993.[5] CP 54-55. Mr. Sherman then had six crime-free years, from 1993-1999. CP 54.

The criminal history sheet does not mention when Mr. Sherman was released from custody on any of his prior offenses. CP 54-55. Although Mr. Sherman agreed that he had been convicted of the offenses listed, he did not stipulate that he was held in custody beyond his sentencing date. CP 8. The state did not prove the facts necessary to include the three class C offenses from 1989 to 1993 added points to Mr. Sherman's offender score. *Ford*, 137 Wn.2d at 480.

The court erred by using convictions for class C felonies that had washed out to increase Mr. Sherman's offender score. RCW 9.94A.525(2)(c). The case must be remanded for resentencing. *Id.*

## CONCLUSION

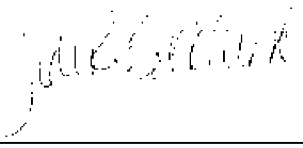
Mr. Sherman's defense attorney provided ineffective assistance by failing to properly raise the only defense available to his client. The prosecutor committed misconduct by mischaracterizing the law in closing argument. Mr. Sherman's conviction must be reversed.

[5] Second degree trafficking in stolen property, second degree possession of stolen property, and communicating with a minor for immoral purposes are all class C felonies. RCW 9.68A.090, RCW 9A.56.160, RCW 9A.82.055.

In the alternative, the court erred by sentencing Mr. Sherman with an offender score of fifteen when three of his prior convictions had "washed out." Mr. Sherman's sentence must be vacated and his case remanded for resentencing.

Respectfully submitted on March 27, 2014,

**BACKLUND AND MISTRY**



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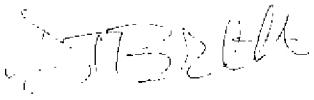

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# CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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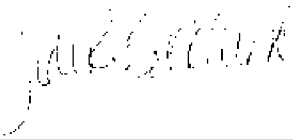
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 March 27, 2014.



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