91150-9

Supreme Court No. (to be set)
Court of Appeals No. 45326-6-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
TimmySherman
Appellant/Petitioner

Grays Harbor County Superior Court Cause No. 12-1-00473-3
The Honorable Judge F. Mark McCauley

PETITION FOR REVIEW

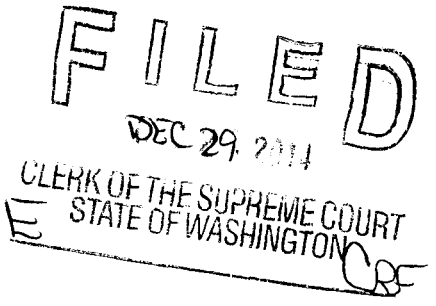

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

Petitioner Timmy Sherman, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Timmy Sherman seeks review of the Court of Appeals Commissioner's Ruling Affirming Judgment and Sentence and Order Denying Motion to Modify of the Commissioner's Ruling. The ruling and order are attached.

III. ISSUES PRESENTED FOR REVIEW

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?

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?

IV. STATEMENT OF THE CASE

Timmy Sherman was looking for 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 Mr. Sherman did commit petty theft once inside. RP (7/16/13) 111-119. Mr. Sherman's 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.

Mr. Sherman timely appealed. CP 69-70. A Court of Appeals commissioner upheld his conviction. Appendix, pp 1-7. A Court of Appeals panel denied Mr. Sherman's motion to modify the commissioner's decision without written opinion. Appendix. p. 8.

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

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that Mr. Sherman's attorney provided ineffective assistance of counsel by failing to raise the defense that he reasonably believed he had license to enter the property. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

The right to counsel includes the right to the effective assistance of counsel.[2] 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.

[2] 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)).

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).[3]

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

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[3] 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).

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.[4] 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 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.

The commissioner found that Mr. Sherman's attorney actually did raise the reasonable belief defense because he argued that it was reasonable to believe that he could find a job at the shop. Ruling, p. 4.

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[4] 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.

That commissioner's reasoning is incorrect for two reasons. First, a reasonable belief that there may be work available on the property is not the same as a reasonable belief that Mr. Sherman was actually permitted to enter the property. The argument regarding the availability of a job was insufficient to negate the element of unlawful entry.

Second, even if defense counsel had argued the reasonable belief defense, he still failed to request an instruction informing the jury of the legal import of the argument. CP 34-41. Absent a relevant instruction, the jury would have been left believing that it was required to convict whether Mr. Sherman had a reasonable belief that he would have been allowed on the property or not. *Powell*, 150 Wn. App. at 156-57.

Even so, the commissioner found that the court's instructions were sufficient to permit Mr. Sherman to argue the reasonable belief defense. Ruling, p. 5 (*citing State v. Cordero*, 170 Wn. App. 351, 370, 284 P.3d 773 (2012); *State v. Ponce*, 166 Wn. App. 409, 269 P.3d 408 (2012)).But the commissioner's reliance on *Cordero* and *Ponce* is misplaced.

Neither *Cordero* nor *Ponce* dealt with a situation analogous to that in Mr. Sherman's case. In both of those cases, the accused claimed to have been invited into the premises he was alleged to have burglarized. *Cordero*, 170 Wn. App. at 357-58; *Ponce*, 166 Wn. App. at 414. The court in those cases ruled that a reasonable belief instruction was not

warranted because the other instructions were sufficient for the accused to argue his theory of the case. *Cordero*, 170 Wn. App. at 370; *Ponce*, 166 Wn. App. at 419-20. Indeed, neither *Cordero* nor *Ponce* actually raised a true "reasonable belief" defense. Rather, each case dealt with a simple claim of lawful, invited entry. *Id.* As noted by the *Cordero* and *Ponce* courts, defense counsel needed only to point to the definition of unlawful entry to argue that issue to the jury. *Id.*

Here, on the other hand, Mr. Sherman believed he would be granted license to enter the building in order to look for a job. RP (7/16/13) 66, 87. He had not been explicitly invited and none of the court's instructions informed the jury of the legal significance of his reasonable belief. Unlike in *Cordero* and *Ponce*, the court's instructions in this case were not sufficient to permit Mr. Sherman to argue his reasonable belief defense.

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.

This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. This court should grant review. RAP 13.4 (b)(3) and (4).

B. The Supreme Court should accept review and hold that the prosecutor committed misconduct by misstating the law during closing argument. The Court of Appeals' published decision conflicts with the Supreme Court's decisions in *Cronin* and *Roberts*. RAP 13.4(b)(1).

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); 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.[5]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

[5] Still, the commissioner found that the court's instruction to "rephrase" and the "fleeting" nature of the prosecutor's improper argument preclude a finding of prejudice. Ruling, p. 5. But the court did not sustain Mr. Sherman's objection, tell the jury to disregard the prosecutor's mischaracterization of the law. RP (7/16/13) 122.The court's failure to rule on Mr. Sherman's valid objection did not cure the error.

a substantial likelihood that the prosecutor's improper argument affected the verdict. *Glasmann*, 175 Wn.2d at 704.

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.*

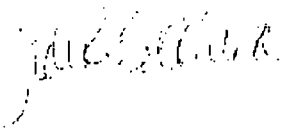
This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. This court should grant review. RAP 13.4 (b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the Constitution. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted December 23, 2014.

BACKLUND AND MISTRY



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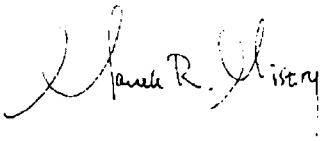

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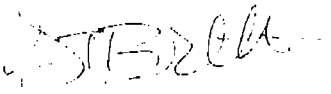

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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

TimmySherman, DOC #257112
Stafford Corrections Center
191 Constantine Way
Aberdeen, WA 98520

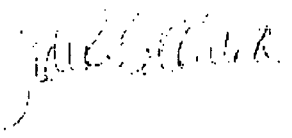
and to:

Grays Harbor County Prosecuting Attorney
102 West Broadway Ave, #102
Montesano, WA 98563

In addition, I electronically filed the original with the Court of Appeals.

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 December 23, 2014.



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Attorney for the Appellant

APPENDIX:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON, Respondent, v. TIMMY L. SHERMAN, Appellant.	No. 45326-6-II RULING AFFIRMING JUDGMENT AND SENTENCE

Timmy Sherman appeals from his conviction for second degree burglary, arguing that he received ineffective assistance of counsel, that the prosecutor engaged in misconduct during closing argument and that the trial court erred in calculating his offender score. He also raises a number of claims in his Statement of Additional Grounds. This court considered his appeal as a motion on the merits under RAP 18.14. Concluding that his appeal is clearly without merit, this court affirms Sherman's judgment and sentence.

James Peterson builds logging roads. Among twelve buildings on his property is a shop where he keeps his tools and equipment. His business is not open to the public.

He does not have any employees but occasionally hires family and friends. There are no trespassing signs at both entrances to his property. There are no signs advertising his business at the property.

When Peterson went to his shop on November 26, 2012, he could tell that someone had entered his shop because a string on the door was broken. He noticed that a dresser drawer was ajar and that change had been taken from a computer table. He then reviewed video from his security system. The video showed a man, who he did not recognize, driving onto the property, walking into Peterson's shop, reaching for the place where his change had been, taking a box of Thin Mints and opening the drawer that Peterson found ajar.

Grays Harbor County Deputy Sheriff Richard Cork responded to Peterson's call. When he reviewed Peterson's video, he thought the deputy who works primarily in that area might recognize the man on the video. That deputy, Robert Wilson, identified Sherman as the man on the video. Deputies Cork, Wilson and others went to a property where Deputy Wilson knew Sherman was staying. Deputy Wilson took Sherman into custody.

Deputy David Libby saw a vehicle matching the one shown on the video entering Peterson's property. Both Deputy Libby and Deputy Wilson saw a box of Thin Mints on the passenger seat of the vehicle. Deputy Libby obtained Sherman's consent and retrieved the Thin Mints from the vehicle. Sherman told Deputy Cork that he had gone to Peterson's property to look for a job. He also told Deputy Cork that he had left fifty cents for the Thin Mints. Sherman also told Deputy Libby that he had taken the Thin Mints and had left some change behind.

The State charged Sherman with second degree burglary.[1] Peterson and the deputies testified as described above. During closing argument, Sherman's counsel admitted that Sherman stole the Thin Mints but denied that Sherman entered Peterson's shop with the intent to steal, noting that many thousands of dollars of equipment and other items had been left untouched. In rebuttal, the deputy prosecutor argued:

> 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 your property. Okay. They're on your real property illegally.

Report of Proceedings (RP) Jul.16, 2013 at 122. Sherman objected to that argument as a misstatement of the law. The court directed the deputy prosecutor to "[r]ephrase." RP Jul. 16, 2013 at 122.

At Sherman's request, the trial court instructed the jury that first degree criminal trespass was a lesser included offense to second degree burglary. The jury found Sherman guilty of second degree burglary. At sentencing, the State submitted a Statement of Prosecuting Attorney listing Sherman's prior criminal history. Based on that criminal history, the trial court calculated Sherman's offender score as 15 and imposed a sentence at the high end of the standard range for such an offender score.

First, Sherman argues that he received ineffective assistance of counsel when his trial counsel failed to raise a statutory defense and to seek a jury instruction as to that defense. To establish ineffective assistance of counsel, Sherman must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that

[1] The State also charged Sherman with unlawful possession of methamphetamine. He pleaded guilty to that charge and was sentenced for that conviction along with his conviction for second degree burglary.

as a result of that deficient performance, the result of his case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This court presumes strongly that trial counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

Sherman contends that his trial counsel performed deficiently by not raising the following statutory defense, which is contained in the criminal trespass statute but was extended to burglary charges in *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005):

> 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).

However, while his trial counsel did not refer to this statutory defense, which negates criminal intent, he did argue that Sherman had a reasonable belief that he would have been licensed to enter the property to look for a job:

> So what we have here is a shop that can be seen from Highway 101, that my client lives approximately two miles away from.··And Mr. Peterson testified that the end of the gate where his shop is, he brings a low rider -- low tow -- I can't remember the name of it, some type of semi-truck that hauls heavy equipment out and that his neighbors know that he has a business there.··That he's moving heavy equipment.··That, you know, neighbors talk to neighbors.··My client lives two miles away.··It's reasonable to assume that my client in driving by and seeing this ginormous [sic] shop and other structures said to himself, hey, maybe I could find work there.

RP July 16, 2013 at 112-13. Thus, Sherman's trial counsel did not perform deficiently because he did argue that Sherman had a reasonable belief that his entry to Peterson's property was licensed.

Sherman also argues that his trial counsel performed deficiently in not requesting a jury instruction as this reasonable belief defense. But in *State v. Cordero,* 170 Wn. App. 351, 370, 284 P.3d 773 (2012), this court held:

> We explained in [*State v.*]*Ponce*[, 166 Wn. App. 409.269 P.3d 408 (2012),] that *J.P.* did no more than recognize that—because the unlawful entry element of criminal trespass is identical to the unlawful entry element of burglary—a statutory defense to criminal trespass that negates its unlawful entry element must also negate the unlawful entry element of burglary. 166 Wn. App. at 411, 269 P.3d 408. *J.P.* did not hold or suggest that a defendant charged with burglary was entitled to have an additional jury instruction, addressing a statutory defense that the legislature has provided only for criminal trespass, where the court's jury instructions are already sufficient to apprise the jury of the law and enable the defendant to argue his theory of lawful entry.

The jury instructions were sufficient for Sherman to argue his theory that he lawfully entered Peterson's property to look for a job. Thus, Sherman does not show that his trial counsel's failure to request a specific jury instruction on his reasonable belief defense was deficient performance. Sherman fails to demonstrate that he received ineffective assistance of counsel.

Second, Sherman argues that the deputy prosecutor committed misconduct in his rebuttal argument quoted above. Even assuming that the argument was improper, Sherman must demonstrate that the statement created a substantial likelihood that the argument affected the verdict. *In re Personal Restraint of Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Given the fleeting argument, and the trial counsel's instruction to rephrase it in response to Sherman's objection, Sherman fails to demonstrate a substantial likelihood that the argument affected the verdict.

Third, Sherman argues that the trial court erred in calculating his offender score as fifteen because it contained three Class C felonies between 1989 and 1993, which he

contends washed out under former RCW 9.94A.525(2)(c) (2011) because he had a five-year crime-free period between 1993 and 1999. He contends that because he did not stipulate to the inclusion of those convictions in his offender score, the State did not meet its burden of showing that they were properly included in his offender score. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). But an attachment to his plea of guilty to unlawful possession of methamphetamine, for which he was sentenced along with being sentenced for his second degree burglary, those Class C felonies were each listed as counting one point toward his offender score, without any contention that they had washed out. Thus, he stipulated that those felonies were properly included in his offender score. *State v. Hickman*, 116 Wn. App. 902, 907, 68 P.3d 1156 (2003).

Sherman raises a number of claims his Statement of Additional Grounds. First, he argues that he did not receive a fair hearing because the jury was not instructed that trespass was a lesser included crime to burglary. But the jury was properly instructed that first degree criminal trespass is a lesser included crime to second degree burglary. Second, he argues that the trial court erred in not giving its jury instructions at the beginning of the trial. But there is no such requirement and the court gave the prescribed preliminary instructions at the beginning of trial. Third, he argues he received ineffective assistance of counsel when his counsel: (1) failed to object to the evidence that he took change from Peterson's computer table; (2) did not object to testimony from Deputy Libby about a co-resident of Sherman who asked the deputy to look into Sherman's trailer to see if there was any stolen property; (3) did not present evidence that he had done excavation work for another contractor; (4) did not moved to arrest the judgment for insufficient evidence; (5) did not object to Deputy Wilson opining that Sherman was guilty

of burglary; and (6) did not object to the deputy prosecutor's argument that "[t]his case is about property rights." RP July 16, 2013 at 110. As to arguments (1), (3), (4) and (6), Sherman does not show that his counsel's performance was deficient, so he cannot establish ineffective assistance of counsel. As to argument (5), there was no such opinion of guilt rendered by Deputy Wilson. And as to argument (2), even if his counsel performed deficiently in not objecting to that testimony, Sherman does not show a reasonable probability that the result of his trial probably would have been different, so he cannot establish ineffective assistance of counsel. Finally, he argues cumulative error deprived him of a fair trial. But he shows no such cumulative error.

Because Sherman's appeal is clearly controlled by settled law, it is clearly without merit under RAP 18.14(e)(1). Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Sherman's judgment and sentence are affirmed. He is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 2nd day of September, 2014.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Jason F. Walker
Hon. F. Mark McCauley
Timmy L. Sherman

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TIMMY L. SHERMAN, Appellant.	No. 45326-6-II ORDER DENYING MOTION TO MODIFY COMMISSIONER'S RULING

APPELLANT filed a motion to modify the commissioner's ruling dated September 2, 2014. After consideration, this court denies appellant's motion.

IT IS SO ORDERED.

PANEL: Jj. Worswick, Lee, Sutton.

DATED this 25th day of November, 2014.

Worswick J
PRESIDING JUDGE

BACKLUND & MISTRY

December 23, 2014 - 10:56 AM

Transmittal Letter

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