

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

STATE OF WASHINGTON,)	No.: 64709-1-I
)	King County No.: 08-1-13391-1SEA
Respondent/Plaintiff,)	
)	PETITIONER'S PRO SE STATEMENT
vs.)	OF ADDITIONAL GROUNDS FOR
)	REVIEW PURSUANT TO RAP 10.10
GABRIEL J. BURNS,)	
)	
Petitioner/Defendant.)	

Petitioner GABRIEL J. BURNS, pro se, having received the opening brief prepared by his attorney of record, MAUREEN M. CYR, submits the following Statement of Additional Grounds For Review (SAG).

It is Petitioner's understanding that the Court will review the SAG when the direct appeal is being considered by the Court.

ADDITIONAL GROUND #1

- (1) Petitioner Was Denied Due Process During Trial Because The "To Convict" Instruction On The Burglary First Degree Was Improper

During trial, the State Prosecutor misinformed the jury concerning the elements to be proven as to burglary in the first degree. Jury Instruction #16 stated:

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"To convict the defendant of the crime of burglary in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19th day of December, 2008, the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged or assaulted a person; and

(4) That any of these acts occurred in the State of Washington.

[SEE Appendix A, Juror Instruction #16, emphasis added].

"An accused has a constitutional right to be informed of the nature and cause of the accusation against him or her so as to enable the accused to prepare a defense." State v. Hawthorne, 48 Wn.App. 23, 25, 737 P.2d 717 (1987).

"Charging" a person, is not an element of burglary in the first degree. However, "where the trial court, at the request of the State's attorney, proceeds to incorporate the unnecessary element in the instructional language..., then the State assumes the burden of proving that element." State v. Hobbs, 71 Wn.App. 419, 423, 859 P.2d 73 (1993).

This surplus language in the "to convict" instruction probably confused the jury.

In Sullivan v. Louisiana, 508 U.S. 275, 281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the U.S. Supreme Court held that a defective reasonable doubt instruction was a structural error. The Court reasoned that because a defective reasonable doubt instruction "vitiates all the jury's findings," harmless error analysis cannot apply. Id. at 508 U.S. 279-280.

The State did not except to the instruction, so it became the law of the case. SEE State v. Hunt, 75 Wn.App. 795, 806, 880 P.2d 96, review denied, 125 Wn.2d 1009 (1994).

Herein, the jury could have convicted Petitioner based upon his "charging" into the residence, and doing any of several acts that were testified to by the witnesses. This testimony, compiled with the improper instruction by the court, could have led the jury to improperly convict Petitioner.

For all of the foregoing reasons, this court should grant relief herein.

ADDITIONAL GROUND #2

- (2) The Petitioner Was Denied Due Process Herein Where The Charging Information Alleged That Petitioner Assaulted Timothy Kilgren In Relation To Burglary In The First Degree As Alleged In Count III

In Count III of the Third Amended Information the State charged Petitioner with Burglary in the First Degree. The Information alleged in pertinent part that:

"That the defendant GABRIEL JORDON BURNS in King County, Washington, on or about December 19, 2008, did enter and remain unlawfully in a building located at 6014 NE 61st Street, Seattle, in said county and state, with intent to commit a crime against a person or property therein, and in entering, and while in such building and in immediate flight therefrom, the defendant and another participant in the crime did assault a person, to-wit: Timothy Kilgren; Contrary to RCW 9A.52.020, and the peace and dignity of the State of Washington."

[Appendix B, Third Amended Information, Pg. 2].

Although the Information charged the Burglary in the first Degree based upon the assault of Timothy Kilgren, the jury was instructed that the defendant need only have **"charged or assaulted"** **"a person"**. [SEE Appendix A, Jury Instruction #16].

Due process requires that the State prove beyond a reasonable doubt all the necessary facts

of the crime charged. State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); citing, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Herein, Petitioner was charged with burglary in the first degree: by assaulting Timothy Kilgren. Assaulting a specific person is not an element of burglary in the first degree. If however, the State charges assaulting a specific person, and the court and the State informs the jury of this element, then it becomes the law of the case. SEE State v. Ong, 88 Wn.App. 572, 577, 945 P.2d 749 (1997).

Here, the State assumed the additional burden of proving that Petitioner or an accomplice assaulted Timothy Kilgren, to support the Burglary first degree. The jury must have been confused, because they found the defendant "NOT GUILTY" of assault in the second degree against Timothy Kilgren, as charged in Count VII. [SEE Appendix C, Jury Instruction #29; Appendix B, Third Amended Information at Pgs. 3-4]. But, they found the Defendant guilty of Burglary in the first degree, which was probably, based upon the "charged or assaulted" language in the instruction, given as Jury Instruction #16.

Whereas the jury may not have found that the Defendant "assaulted" Timothy Kilgren, they may have found that he "charged" someone during the incident, and where no definition of charged was given to the jury.

For these reasons, this court should grant the appropriate relief herein.

ADDITIONAL GROUND #3

- (3) The Petitioner Was Denied Due Process Herein Where The Charging Information Alleged That Petitioner Committed Acts That Were Amended Without Notice When The Jury Was Instructed

Petitioner incorporates herein by reference the arguments and authority cited herein in Ground #2, as well as Issue #1, of the Opening Brief.

Again, the Third Amended Information charged that Petitioner did take "U.S. currency, and laptop computers," from the person and in the presence of Lamar Kumangai-McGee. [SEE Appendix B, Third Amended Information, Count I at Pg. 1].

However, the State told the jury that the Defendant took only a wallet from Lamar Kumangai-McGee. [SEE Report of Proceeding (RP) at 231-232].

Further, the jury was instructed that the Defendant need only have taken personal property from the person or in the presence of another (Lamar Kumangai-McGee). [SEE Appendix D, Jury Instruction #9].

Here again, the jury was informed in accordance with the law, but improperly informed as to the burden the State imposed upon itself when it charged Defendant with specific acts, that became the law of the case. The jury was never told that the Defendant wasn't charged with theft of a wallet, but only currency. There was also testimony in the trial that there was a laptop or computer that belonged to someone other than the person who it allegedly belonged to in the information. The evidence herein was insufficient to find the elements and the specific facts charged in the information.

When an information alleges certain acts, its language becomes the law of the case, and should be included in the jury instructions on that basis. SEE State v. Hull, 83 Wn.App. 786, 797-98, 924 P.2d 375 (1996).

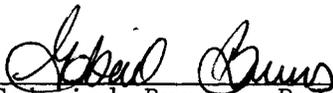
ADDITIONAL GROUND #4

- (4) Petitioner Was Denied Due Process
Where His Sentence On The Class C
Felonies In Relation To The Community
Custody Time Periods Exceed The
Statutory Maximums

"A trial court may not impose a sentence providing for a term of confinement or community supervision or community placement that exceeds the statutory maximum for the crime." State v. Hibdon, 140 Wn.App. 534, 538, 166 P.3d 826 (2007); State v. Toney, 149 Wn.App. 787, 793-96, 205 P.3d 944 (2009).

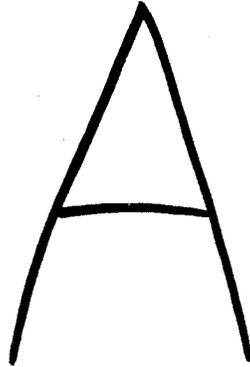
Herein, the trial court imposed 55 months on Counts 4-6, Felony Harassment. The statutory maximum time period on Class C Felonies are up to five-(5) years. The 10 year no contact orders, and the 24 to 36 months of community custody should not have applied to these crimes, as reflected in the judgment and sentence.

DATED this 15 day of NOVEMBER, 2010.



Gabriel Burns, Petitioner

APPENDIX



APPENDIX

No. 16

To convict the defendant of the crime of burglary in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19th of December, 2008, the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein;

(3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged or assaulted a person; and

(4) That any of these acts 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 as to Count III.

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 as to Count III.

APPENDIX #A

APPENDIX

B

APPENDIX

1 place and occasion that it would be difficult to separate proof of one charge from proof of the
2 other, committed as follows:

3 That the defendant GABRIEL JORDON BURNS in King County, Washington, on or
4 about December 19, 2008, did unlawfully and with intent to commit theft attempt to take
5 personal property of another, to-wit: U.S. currency, from the person and in the presence of
6 Braden McRae, against his will, by the use or threatened use of immediate force, violence and
7 fear of injury to such person or his property and to the person or property of another, and in the
8 commission of and in immediate flight therefrom, the defendant displayed what appeared to be a
9 firearm, to-wit: a gun;

10 Contrary to RCW 9A.56.200(1)(a)(ii) and 9A.56.190, and against the peace and dignity
11 of the State of Washington.

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COUNT III

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse GABRIEL
JORDON BURNS of the crime of **Burglary in the First Degree**, a crime of the same or similar
character and based on the same conduct as another crime charged herein, which crimes were
part of a common scheme or plan and which crimes were so closely connected in respect to time,
place and occasion that it would be difficult to separate proof of one charge from proof of the
other, committed as follows:

That the defendant GABRIEL JORDON BURNS in King County, Washington, on or
about December 19, 2008, did enter and remain unlawfully in a building located at 6014 NE 61st
Street, Seattle, in said county and state, with intent to commit a crime against a person or
property therein, and in entering, and while in such building and in immediate flight therefrom,
the defendant and another participant in the crime did assault a person, to-wit: Timothy Kilgren;

Contrary to RCW 9A.52.020, and against the peace and dignity of the State of
Washington.

COUNT IV

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse GABRIEL
JORDON BURNS of the crime of **Felony Harassment**, a crime of the same or similar character
and based on the same conduct as another crime charged herein, which crimes were part of a
common scheme or plan and which crimes were so closely connected in respect to time, place
and occasion that it would be difficult to separate proof of one charge from proof of the other,
committed as follows:

That the defendant GABRIEL JORDON BURNS in King County, Washington, on or
about December 19, 2008, knowingly and without lawful authority, did threaten to cause bodily
injury immediately or in the future to Janet Yeilding, by threatening to kill Janet Yeilding, and
the words or conduct did place said person in reasonable fear that the threat would be carried out;

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2 Contrary to RCW 9A.46.020(1), (2), and against the peace and dignity of the State of
Washington.

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COUNT V

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse GABRIEL JORDON BURNS of the crime of **Felony Harassment**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant GABRIEL JORDON BURNS in King County, Washington, on or about December 19, 2008, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Mia Valasco, by threatening to kill Mia Valasco, and the words or conduct did place said person in reasonable fear that the threat would be carried out;

Contrary to RCW 9A.46.020(1), (2), and against the peace and dignity of the State of Washington.

COUNT VI

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse GABRIEL JORDON BURNS of the crime of **Felony Harassment**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the other, committed as follows:

That the defendant GABRIEL JORDON BURNS in King County, Washington, on or about December 19, 2008, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Timothy Kilgren, by threatening to kill Timothy Kilgren, and the words or conduct did place said person in reasonable fear that the threat would be carried out;

Contrary to RCW 9A.46.020(1), (2), and against the peace and dignity of the State of Washington.

COUNT VII

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse GABRIEL JORDON BURNS of the crime of **Assault in the Second Degree**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time,

1 place and occasion that it would be difficult to separate proof of one charge from proof of the
2 other, committed as follows:

3 That the defendant GABRIEL JORDON BURNS in King County, Washington, on or
4 about December 19, 2008, did intentionally assault Timothy Kilgren with a deadly weapon, to-
5 wit: a gun;

6 Contrary to RCW 9A.36.021(1)(c), and against the peace and dignity of the State of
7 Washington.

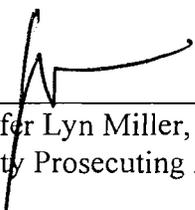
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COUNT VIII

And I, Daniel T. Satterberg, Prosecuting Attorney aforesaid further do accuse GABRIEL
JORDON BURNS of the crime of **Malicious Mischief in the Second Degree**, a crime of the
same or similar character and based on the same conduct as another crime charged herein, which
crimes were part of a common scheme or plan and which crimes were so closely connected in
respect to time, place and occasion that it would be difficult to separate proof of one charge from
proof of the other, committed as follows:

That the defendant GABRIEL JORDON BURNS in King County, Washington, on or
about December 19, 2008, did knowingly and maliciously cause physical damage, in excess of
\$250, to household items, the property of renters at 6014 NE 61st Street in Seattle;

Contrary to RCW 9A.48.080(1)(a), and against the peace and dignity of the State of
Washington.

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
Jennifer Lyn Miller, WSBA #31600
Deputy Prosecuting Attorney

APPENDIX

C

APPENDIX

No. 29

To convict the defendant of the crime of assault in the second degree, as charged in count VII, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19th of December, 2008, the defendant assaulted Timothy Kilgren with a deadly weapon; and

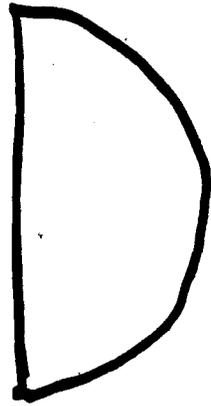
(2) That the acts occurred in the State of Washington.

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

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

APPENDIX #C

APPENDIX



APPENDIX

No. 9

To convict the defendant of the crime of robbery in the first degree, as charged in count I each of the following six elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 19th of December, 2008 the defendant unlawfully took personal property from the person or in the presence of another (Lamar Kumangai-McGee);

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property;

(4) That force or fear was used by the defendant to obtain or retain possession of the property;

(5) That in the commission of these acts or in immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon; and

(6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), (5), and (6) has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty as to count I.

APPENDIX #D

GABRIEL BURNS

P.O. Box 777, Monroe, Washington 98272

November 09, 2010

Richard Johnson, Clerk
Division I, Court of Appeals
One Union Square
600 - University Street
Seattle, Washington 98101

RE: State v. Burns, C.O.A. #64709-1-I

Dear Clerk:

Please find enclosed for filing in this matter, Petitioner's pro se Statement of Additional Grounds For Review (SAG), with Appendixes attached thereto.

Thank you,


Gabriel Burns #823563
Monroe Correctional Complex/WSR
P.O. Box 777, Unit B-116
Monroe, Washington 98272

2010 NOV 25 AM 10:23

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Appellant)	COURT OF APPEALS No. 64709-1
)	
v.)	
)	
GABRIEL BURNS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 29TH DAY OF NOVEMBER, 2010, A COPY OF THE **APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

[X] Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle WA 98104

SIGNED IN SEATTLE, WASHINGTON THIS 29th DAY OF NOVEMBER, 2010

x *Ann Joyce*

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 NOV 30 PM 4:39