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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 34043-7-II

BY YJ
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Jeffrey Strickland,
Appellant.

Grays Harbor Superior Court

Cause No. 05-1-00512-5

The Honorable Judge David Foscue

Appellant's Reply Brief

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PM 8/30/04

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ARGUMENT

I. RCW 9A.28.020 VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Mr. Strickland rests on the opening brief.

II. INSTRUCTION NO. 6 IMPROPERLY RELIEVED THE PROSECUTION OF ITS BURDEN TO ESTABLISH A SUBSTANTIAL STEP TOWARDS THE COMPLETED CRIME.

Respondent erroneously asserts that “[t]he defendant does not argue that the definition is improper...” Brief of Respondent, p. 5. This is incorrect; Mr. Strickland’s argument was that the trial court’s deviation from the *Workman* instruction was improper, and relieved the prosecution of establishing a substantial step beyond a reasonable doubt. *See* Appellant’s Opening Brief, p. 7-9; *State v. Workman*, 90 Wn.2d 443, 450-451, 584 P.2d 382 (1978).

Instruction No. 6 substituted the word “indicate” for “corroborate,” and the phrase “a criminal purpose” for the phrase “the criminal purpose.” CP 18. These problems with the instruction relieved the prosecution of its burden, and require reversal. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997); *see also State v. Roberts*, 142 Wn.2d 471 at 513, 14 P.3d 713 (2000); *see also State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000).

Respondent has made no attempt to establish that the error was harmless beyond a reasonable doubt; accordingly the conviction must be reversed and the case remanded for a new trial. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

III. INSTRUCTION NO. 2 OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

Respondent mischaracterizes Mr. Strickland's argument. Brief of Respondent, p. 5. Mr. Strickland argued that Instruction No. 2 omitted the intent element from the definition of Attempted Theft in the First Degree contained in that instruction. Instruction No. 2, CP 17. Respondent has not addressed this argument, and has failed to demonstrate that the error was harmless beyond a reasonable doubt. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Brown, supra*.

IV. THE COURT FAILED TO GIVE A SEPARATE "TO CONVICT" INSTRUCTION OUTLINING THE ELEMENTS OF THEFT IN THE FIRST DEGREE.

Respondent mischaracterizes Mr. Strickland's argument. Brief of Respondent, p. 5. Mr. Strickland argues that the failure to include a "to convict" instruction outlining the elements of Theft in the First Degree requires reversal. See "Note on Use" to WPIC 100.02; see also *State v. DeRyke*, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003).

The lack of a separate instruction requires reversal.

V. MR. STRICKLAND WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent has not addressed this issue. Accordingly, Mr. Strickland stands on his opening brief.

VI. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. STRICKLAND'S CRIMINAL HISTORY AND OFFENDER SCORE.

Contrary to Respondent's assertion, the SRA and the Constitution require the prosecution to produce *evidence* of a defendant's criminal history. RCW 9.94A.500(1); U.S. Const. Amend. XIV. This evidence must be more than mere allegation:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant. *State v. Ford*, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999).

This applies to the same criminal conduct determination as well. A defendant may, by affirmative conduct, waive the issue (*State v. O'Neal*, 126 Wn.App. 395, 109 P.3d 429 (2005); *State v. Beasley*, 126 Wn.App. 670, 109 P.3d 849 (2005)). However, the mere failure to raise the issue in the trial court does not amount to a waiver, and will not preclude appellate review. *See, e.g., State v. Anderson*, 92 Wn.App. 54, 960 P.2d 975, *review denied* 137 Wn.2d 1016, 978 P.2d 1099 (1999); *State v. Rowland*, 97 Wn.App. 301, 983 P.2d 696 (1999); *see also State v.*

Nitsch, 100 Wn.App. 512 at 521, 997 P.2d 1000, *review denied* 141 Wn.2d 1030, 11 P.3d 827 (2000).

Because the trial court failed to comply with these basic requirements, the sentence must be vacated and the case remanded for a new sentencing hearing.

VII. THE TRIAL COURT VIOLATED MR. STRICKLAND'S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER *BLAKELY* BY IMPOSING AN AGGRAVATED SENTENCE WITHOUT A JURY DETERMINATION OF HIS PRIOR CONVICTIONS (ARGUMENT INCLUDED TO PRESERVE ANY ERROR).

Mr. Strickland rests on his opening brief.

CONCLUSION

For the foregoing reasons, Mr. Strickland's conviction must be reversed and the case dismissed. If dismissal is not granted, the case must be remanded to the trial court for a new trial.

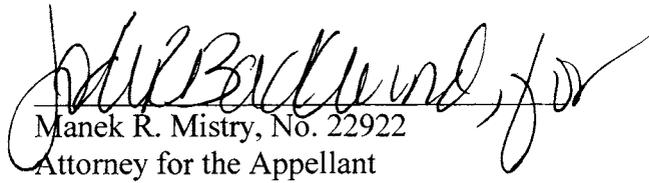
Even if the conviction is upheld, the sentence must be vacated and the case remanded to the trial court for proper determination of Mr. Strickland's criminal history and offender score.

Respectfully submitted on August 30, 2006.

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STATE OF WASHINGTON

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Jeffery Strickland, DOC #788803
Washington State Penitentiary
1313 North 13th Avenue
Walla, Walla, WA 99362

and to the Grays Harbor Prosecuting Attorney at their address
of record, and that I sent the original and one copy to the Court of
Appeals, Division II, for filing;

All postage prepaid, on August 30, 2006.

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 August 30, 2006.



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