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COURT OF APPEALS

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CLERK OF COURT

No. 34043-7-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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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 Opening Brief**

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## ASSIGNMENTS OF ERROR

1. Mr. Strickland was convicted under a statute that unconstitutionally violates the separation of powers.
2. The trial court erred by entering judgment based on an unconstitutional statute.
3. The legislature's failure to define an element of criminal attempt violates the separation of powers.
4. The judicial definition of the phrase "substantial step" encroaches on a core legislative function and violates the separation of powers.
5. The trial court erred by instructing the jury with an erroneous definition of the phrase "substantial step."
6. The trial court erred by giving Instruction No. 6, which reads as follows:

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.  
Supp. CP.
7. The court's instruction defining "substantial step" impermissibly relieved the state of its burden of establishing every element of the offense by proof beyond a reasonable doubt.
8. The trial court erred by instructing the jury with an erroneous definition of the crime of Attempted Theft in the First Degree.
9. The trial court erred by giving Instruction No. 2, which reads as follows:

The defendant, Jeffery A. Strickland, is charged with the crime of Attempt to Commit Theft in the First Degree.

A person commits the crime of Attempt to Commit Theft in the First Degree when he takes a substantial step toward the commission of the crime of Theft in the First Degree.

A person commits the crime of Theft in the First Degree when, with intent to deprive, he wrongfully obtains or exerts unauthorized control over the property of another of a value in excess of \$1500.  
Supp. CP.

10. The court's instruction defining Attempted Theft in the First Degree impermissibly relieved the state of its burden of establishing every element of the offense by proof beyond a reasonable doubt.
11. The trial court erred by failing to provide an instruction separately delineating the elements of the crime of Theft in the First Degree.
12. The combination of Instructions Nos. 2 and 4 was inadequate to apprise the jury of the elements of the crime of Theft in the First Degree.
13. Mr. Strickland was denied the effective assistance of counsel when his attorney failed to object to Instruction 2.
14. Mr. Strickland was denied the effective assistance of counsel when his attorney failed to object to Instruction 6.
15. Mr. Strickland was denied the effective assistance of counsel when his attorney failed to object to the lack of an instruction separately delineating the elements of Theft in the First Degree.
16. The trial court erred by failing to properly determine Mr. Strickland's criminal history.
17. The trial court erred by failing to properly determine Mr. Strickland's offender score.
18. The trial court erred by adopting Finding No. 2.2, which purported to list Mr. Strickland's criminal history as follows:

2.2 The defendant has the following prior criminal convictions (RCW 9.94A.100):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	Adult or Juv.	TYPE OF CRIME
1 Attempt to Elude		Cowlitz County, WA Cause# 95-8-1803-1	09/15/1995	J	F
2 PSP 2		Cowlitz County, WA Cause # 95-8-1803-1	09/15/1995	J	F
3 TMVWOP		Skagit County, WA Cause #96-8-667-4	10/14/1996	J	F
4 TMVWOP		Skagit County, WA Cause #96-8-772-7	02/04/1997	J	F
5 Unl. Pos. FA		King County, WA Cause #97-8-6500-5	11/25/1997	J	F
6 TMVOP		King County, WA Cause #98-1-8064-3	10/28/1998	A	F
7 Robbery 2		King County, WA Cause #99-1-3116-1	02/04/1999	A	F
8 TMVWOP		King County, WA Cause #00-1-6197-4	05/25/2000	A	F
9 Attempt to Elude		King County, WA Cause 00-1-6197-4	05/25/2000	A	F
10 Residential Buglary		King County, WA Cause #02-1-8267-6	09/20/2002	A	F

Supp. CP.

19. The trial court erred by failing to determine whether or not any of Mr. Strickland's prior offenses comprised the same criminal conduct.
20. The trial court erred by (apparently) sentencing Mr. Strickland with an offender score of 7.
21. The trial court erred by using a standard range of 16 ½ months to 21 ¾ months.
22. The trial court erred by sentencing Mr. Strickland to 19 months in prison.

23. The trial court violated Mr. Strickland's constitutional right to a jury trial by finding that he had criminal history without submitting the issue to a jury or obtaining a waiver of the right to a jury trial.
24. The trial court erred by using a preponderance of the evidence standard in determining that Mr. Strickland had criminal history.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mr. Strickland was charged with Attempted Theft in the First Degree. The statute criminalizing attempts requires proof of intent to commit the substantive crime and a substantial step toward the commission of that crime. The legislature has not defined the phrase “substantial step.” To fill the void, courts have defined the element by importing a definition from the Model Penal Code.

1. Is RCW 9A.28.020 (defining criminal attempt) unconstitutional? Assignments of Error Nos. 1-3.
  
2. Does the legislature’s failure to define an essential element of criminal attempt violate the constitutional separation of powers? Assignments of Error Nos. 1-3.
  
3. Does the judicial definition of “substantial step” encroach on a core legislative function and violate the constitutional separation of powers? Assignments of Error Nos. 1-7.
  
4. Was Mr. Strickland convicted under an unconstitutional statute? Assignments of Error Nos. 1-3.

At trial, Instruction No. 2 defined the charged crime as follows: “A person commits the crime of Attempt to Commit Theft in the First Degree when he takes a substantial step toward the commission of the crime of Theft in the First Degree.” Instruction No. 2 did not inform the jury that conviction also required proof of intent to commit Theft in the First Degree.

Instruction No. 2 also defined the crime of Theft in the First Degree, but did not separately delineate the elements of that crime. Instruction No. 2 was incorporated into the “to convict” instruction by reference.

Instruction No. 6 defined the phrase substantial step as “conduct which strongly indicates a criminal purpose...” This definition differs from the judicially-created definition based on the MPC.

Mr. Strickland’s attorney did not object to any of these instructions.

5. Did the court's instruction defining "substantial step" relieve the prosecution of its burden to prove every element beyond a reasonable doubt? Assignments of Error Nos. 4-7.
6. Did the court's instruction defining Attempted Theft in the First Degree relieve the prosecution of its burden to prove every element beyond a reasonable doubt? Assignments of Error Nos. 4-10.
7. Did the trial court commit reversible error by failing to include a modified definition instruction separately delineating the essential elements of Theft in the First Degree? Assignments of Error Nos. 11-12.
8. Was Mr. Strickland denied the effective assistance of counsel by his attorney's failure to object to the court's erroneous instructions? Assignments of Error Nos. 13-15.

Mr. Strickland acknowledged that he had 10 prior felonies and a history of stealing cars. Beyond these acknowledgments, no evidence was presented during the trial or at sentencing to establish Mr. Strickland's criminal history. The jury was not asked to determine Mr. Strickland's criminal history by proof beyond a reasonable doubt.

The court did not address Mr. Strickland's criminal history or offender score at sentencing. The judgment and sentence does not indicate Mr. Strickland's offender score, but does include a detailed finding on criminal history. The record does not indicate how the court arrived at this detailed finding.

Two pairs of prior convictions listed on the judgment and sentence occurred on the same dates. No evidence was submitted establishing that these prior convictions occurred at different times or places, involved different victims, or involved differing criminal intent. The sentencing court did not consider whether or not these offenses involved the same criminal conduct.

9. Did the trial court err by failing to properly determine Mr. Strickland's criminal history? Assignments of Error Nos. 16.
  
10. Did the trial court err by failing to properly determine Mr. Strickland's offender score? Assignments of Error Nos. 17.
  
11. Is Finding 2.2 based on insufficient evidence of criminal history? Assignments of Error Nos. 18.
  
12. Did the prosecutor fail to present sufficient evidence of Mr. Strickland's criminal history? Assignments of Error Nos. 16-22.
  
13. Did the trial court err by failing to determine whether or not any of Mr. Strickland's prior convictions comprised the same criminal conduct? Assignments of Error Nos. 19.
  
14. Did the trial court err by (apparently) sentencing Mr. Strickland with an offender score of 7? Assignments of Error Nos. 16-22.
  
15. Did the sentencing court's finding that Mr. Strickland had criminal history violate his constitutional right to a jury determination of all facts used to increase his sentence? (Included for preservation of error). Assignments of Error Nos. 23-24.
  
16. Did the sentencing court's decision finding criminal history by a preponderance of the evidence violate Mr. Strickland's constitutional right to proof beyond a reasonable doubt of all facts used to increase his sentence? (Included for preservation of error). Assignments of Error Nos. 23-24.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Jeffrey Strickland was accused of trying to steal a jeep worth more than \$1500, and was charged with Attempted Theft in the First Degree. RP(50-53). His case proceeded to a jury trial. CP 1-2,3. At trial, the court gave the following instructions (without objection):

Instruction 2: The defendant, Jeffery A. Strickland, is charged with the crime of Attempt to Commit Theft in the First Degree.

A person commits the crime of Attempt to Commit Theft in the First Degree when he takes a substantial step toward the commission of the crime of Theft in the First Degree.

A person commits the crime of Theft in the First Degree when, with intent to deprive, he wrongfully obtains or exerts unauthorized control over the property of another of a value in excess of \$1500.

Instruction 4: To convict the defendant, Jeffery A. Strickland of the crime of Attempt to Commit Theft in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 16, 2005, the defendant did an act which was a substantial step toward the commission of the crime of Theft in the First degree, as defined in instruction No. 2;

(2) That the act was done with the intent to commit Theft in the First Degree; and

(3) That the 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.

On the other hand, if after weighing all of 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.

Instruction 6: A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

Supp. CP.

Mr. Strickland was convicted. CP3. He acknowledged that he had ten prior felonies, and his attorney acknowledged "a history of attempting to take motor vehicles." RP 127; Memorandum of Authorities p. 2, Supp. CP. At sentencing the prosecution alleged that he had an offender score of 7, and claimed his range was 16.5 to 21.75 months. RP 120.

Other than Mr. Strickland's acknowledgments, no evidence was produced to establish his prior convictions. The sentencing court did not determine his criminal history or calculate his offender score on the record. The judgment and sentence included the following finding regarding Mr. Strickland's criminal history:

2.2 The defendant has the following prior criminal convictions (RCW 9.94A.100):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	Adult or Juv.	TYPE OF CRIME
1 Attempt to Elude		Cowlitz County, WA Cause# 95-8-1803-1	09/15/1995	J	F
2 PSP 2		Cowlitz County, WA Cause # 95-8-1803-1	09/15/1995	J	F
3 TMVWOP		Skagit County, WA Cause #96-8-667-4	10/14/1996	J	F
4 TMVWOP		Skagit County, WA Cause #96-8-772-7	02/04/1997	J	F

5	Unl. Pos. FA		King County, WA Cause #97-8-6500-5	11/25/1997	J	F
6	TMVOP		King County, WA Cause #98-1-8064-3	10/28/1998	A	F
7	Robbery 2		King County, WA Cause #99-1-3116-1	02/04/1999	A	F
8	TMVWOP		King County, WA Cause #00-1-6197-4	05/25/2000	A	F
9	Attempt to Elude		King County, WA Cause 00-1-6197-4	05/25/2000	A	F
10	Residential Burglary		King County, WA Cause #02-1-8267-6	09/20/2002	A	F

Supp. CP.

Mr. Strickland was sentenced to 19 months, and this timely appeal followed. CP 6, 13-14.

### ARGUMENT

**I. RCW 9A.28.020 VIOLATES THE SEPARATION OF POWERS DOCTRINE BECAUSE IT FAILS TO DEFINE THE ESSENTIAL ELEMENTS OF THE OFFENSE AND REQUIRES JUDICIAL ENCROACHMENT ON A CORE LEGISLATIVE FUNCTION.**

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. *State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002). The State Constitution divides political power into legislative authority (article II, section 1), executive power (article III, section 2), and judicial power (article IV, section 1). *Moreno*, at 505. Each branch of government

wields only the power it is given. *Moreno*, at 505; *State v. DiLuzio*, 121 Wn.App. 822 at 825, 90 P.3d 1141 (2004).

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the “fundamental functions” of another. *Moreno*, at 505. A violation of separation of powers occurs whenever “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 506, *citations omitted*. Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that are more properly accomplished by other branches. *Moreno* at 506, *citing Morrison v. Olson*, 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

It is the function of the legislature to define the elements of a crime. *Staples v. United States*, 511 U.S. 600 at 604 (1994); *State v. Wadsworth*, 139 Wn.2d 724 at 734, 991 P.2d 80 (2000). “Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.’” *U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515 (1971), *citations omitted*.

The legislature has criminalized attempts to commit crimes. RCW 9A.28.020 reads (in relevant part) 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.” The legislature has not defined the phrase “substantial step.” Instead, the courts have been forced to provide a definition.

Following enactment of RCW 9A.28.020, the Washington Supreme Court noted that the new statute changed the definition of attempt:

Under the earlier statute, RCW 9.01.070, now repealed, the elements of the crime were intent and an act tending but failing to accomplish the crime. We held under that statute that the act, however slight, must be overt and clearly show the design of the person to commit a crime. We must assume, of course, that the legislature's adoption of different language in the newer statute was intentional. The standard of a substantial step will not be identical to the standard of an overt act.  
*State v. Workman*, 90 Wn.2d 443, 450-451, 584 P.2d 382 (1978).

In the absence of a legislative definition, the Court held that it was “appropriate to adopt the Model Penal Code approach to the definition of a substantial step [because it] does not conflict with the doctrine already developed [and] give[s] full recognition to the changes in the statute adopted by the legislature.” *Workman*, at 452. Under the MPC, “conduct is not a substantial step unless it is strongly corroborative of the actor’s criminal purpose.” *Workman*, at 451, *quotation marks and citation*

*omitted.* The Supreme Court later decided that a substantial step need not include an overt act. *See, e.g., State v. Aumick*, 126 Wn.2d 422, 428, 894 P.2d 1325 (1995), *citing State v. Harris*, 121 Wn.2d 317, 849 P.2d 1216 (1993). The basis for this decision was that the MPC does not require an overt act. *Harris, supra*, at 321. Thus an accused may be convicted of attempting a crime even in the absence of an overt act, not because of legislative action, but because the judiciary was forced to define an element of criminal attempt. This violates the separation of powers. *Wadsworth, supra; U.S. v. Bass, supra.*

Because the legislature failed to define an essential element of criminal attempt, the judiciary has stepped in to fill the vacuum and has undertaken to define the crime. This violates the separation of powers; the silence of the legislature has forced the judiciary to encroach on a core legislative function. *Moreno, supra; Wadsworth, supra.* The statutory and judicial scheme under which Mr. Strickland was convicted is unconstitutional; his conviction must be reversed and the case dismissed with prejudice. *Moreno.*

**II. INSTRUCTION NO. 6, DEFINING THE PHRASE “SUBSTANTIAL STEP,” RELIEVED THE PROSECUTION OF ITS DUTY TO ESTABLISH EACH ELEMENT OF THE CRIME BY PROOF BEYOND A REASONABLE DOUBT.**

Jury instructions, when taken as a whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *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). Because such errors are of constitutional dimension, they may be raised for the first time on appeal. RAP 2.5; *Aumick, supra*, at 429.

Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction which misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

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.28.020. As noted above, a “substantial step” is “conduct strongly corroborative of the actor’s

criminal purpose.” *Workman*, at 451; *Aumick, supra*, at 427. The question of what constitutes a substantial step depends on the facts of the case. *State v. Smith*, 115 Wn.2d 775, 791, 801 P2d 975 (1990)

In this case, the trial court gave an instruction that differed from the accepted definition of “substantial step” adopted by the *Workman* Court. Instruction No. 6 defined “substantial step” (in relevant part) as “conduct which strongly indicates a criminal purpose...” Supp. CP. This instruction was erroneous for two reasons.

First, the instruction requires only that the conduct *indicate* (rather than corroborate) a criminal purpose. The word ‘corroborate’ means “to strengthen or support with *other* evidence; [to] make *more* certain.” *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company), *emphasis added*. The *Workman* Court’s choice of the word “corroborative” requires the prosecution to provide some independent evidence of intent, which must then be corroborated by the accused’s conduct. Instruction 6 removed this requirement by employing the word “indicate” instead of “corroborate;” under Instruction No. 6, there is no requirement that intent be established by independent proof and corroborated by the accused’s conduct. Supp. CP.

Second, Instruction 6 requires only that the conduct indicate *a* criminal purpose, rather than *the* criminal purpose. This is similar to the

problem addressed by the Supreme Court in cases involving accomplice liability. *See State v. Roberts*, 142 Wn.2d 471 at 513, 14 P.3d 713 (2000) (accomplice instructions erroneously permitted conviction if the defendant participated in “a crime,” even if he was unaware that the principal intended “the crime” charged); *see also State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000). As in *Roberts and Cronin*, the language used in Instruction No. 6 permits conviction if the accused’s conduct strongly indicates intent to commit *any* crime. This is incorrect under the definition adopted by the Supreme Court in *Workman*.

The end result was that the prosecution was relieved of its duty to establish by proof beyond a reasonable doubt every element of the charged crime. Under the instructions as given, the prosecution was not required to provide independent corroboration of Mr. Strickland’s alleged criminal intent; nor was it required to show that his conduct strongly corroborated his alleged intent to commit the particular crime of Theft in the First Degree. Because of this, the conviction must be reversed and the case remanded for a new trial. *Brown, supra*.

**III. INSTRUCTION NO. 2, DEFINING ATTEMPTED THEFT IN THE FIRST DEGREE, OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.**

As noted above, erroneous jury instructions violate due process when they relieve the state of its burden to prove every element of the

crime charged. *Thomas*, 150 Wn.2d 821 at 844; *Randhawa, supra*, at 76. Because such errors are of constitutional dimension, they may be raised for the first time on appeal. RAP 2.5; *Aumick, supra*.

To obtain a conviction for an attempted crime, the prosecution must prove the accused acted with intent to commit that crime. RCW 9A.28.020. Instruction No. 2 purported to define the crime of Attempted Theft in the First Degree, but omitted the intent element. According to the instruction, “A person commits the crime of Attempt to Commit Theft in the First Degree when he takes a substantial step toward the commission of the crime of Theft in the First Degree.” Instruction No. 2, Supp. CP. By failing to include intent in the instruction defining the offense, the trial court committed reversible error.<sup>1</sup> *Aumick, supra*.

**IV. INSTRUCTIONS NOS. 2 AND 4 WERE INADEQUATE TO APPRISE THE JURY OF THE ELEMENTS OF THE CHARGED CRIME.**

When a person is charged with an attempt to commit a crime,

a separate elements instruction must be given delineating the elements of that crime. This may require a modification of the instruction in WPIC that defines that particular crime so that the elements of that crime are delineated as separate elements necessary to constitute that crime.

“Note on Use” to WPIC 100.02.

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<sup>1</sup> Although the “to convict” instruction (Instruction No. 4) included intent as an element, this only served to confuse the issue by leaving the jury with two conflicting instructions. *Compare* Instructions Nos. 2 and 4, Supp. CP.

The Washington Supreme Court has cited this approach with approval. *State v. DeRyke*, 149 Wn.2d 906, 911, 73 P.3d 1000 (2003). The purpose of this requirement is to emphasize to the jury that the substantive crime attempted consists of separate elements that must be evaluated.

In this case, the trial court defined Theft in the First Degree in Instruction 2; however, the instruction was not modified to delineate the separate elements of the crime. Because of this, the combination of instructions was inadequate to fully inform the jury of the requirements for conviction. The conviction must be reversed and the case remanded for a new trial.

**V. MR. STRICKLAND WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE ERRONEOUS INSTRUCTIONS.**

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of

counsel. *Strickland v. Washington*, 466 U.S. 668 at 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland v. Washington*, *supra*. The defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Holm*, *supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong.

To establish deficient performance, a defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must

show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, intent and a substantial step were essential elements of the crime charged. Despite this, Mr. Strickland's attorney failed to object to Instruction No. 2 (which omitted the intent element) and Instruction No. 6 (which incorrectly defined the phrase “substantial step.”) Supp. CP, RP 69. This failure to object was deficient performance; a reasonably competent attorney would have been familiar with the definition, and would have known that the language of the instruction differed from the definition. *See, e.g., State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) (“[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”)

Mr. Strickland was prejudiced by the error. By omitting an essential element (intent) from the definition of the offense, Instruction No. 2 relieved the state of its burden. *See above*. Likewise, the

“substantial step” instruction misstated the law, relieved the state of its duty to provide independent evidence of intent, and permitted the jury to convict if Mr. Strickland’s conduct strongly indicated intent to commit *any* crime (rather than the crime charged). *See above*. Finally, the failure to include a modified instruction defining Theft in the First Degree “so that the elements of that crime are delineated as separate elements necessary to constitute that crime” allowed the jury to convict without a complete understanding of the separate elements of the substantive crime. *See above*. Defense counsel’s failure to object to the improper instructions denied Mr. Strickland the effective assistance of counsel. *Strickland v. Washington*. The conviction must be reversed, and the case remanded for a new trial.

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

A. The prosecution produced insufficient evidence to establish Mr. Strickland’s criminal history.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing “before imposing a sentence upon a defendant.” Furthermore, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record...

Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.”

RCW 9.94A.500(1).

“Criminal history” means more than just a list of prior felonies (although it is often treated as such). Instead, “criminal history” is defined to include all prior convictions and juvenile adjudications, and “shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030(13). To establish criminal history, “the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2).

Mr. Strickland acknowledged that he had ten prior felonies, and his attorney acknowledged “a history of attempting to take motor vehicles.” RP 127; Memorandum of Authorities p. 2, Supp. CP. Other than these two acknowledgments, no more information was before the court establishing criminal history. The sentencing court did not determine his criminal history or calculate his offender score on the record.

Despite the absence of any additional information regarding criminal history, the judgment and sentence reflects a detailed finding on

Mr. Strickland's criminal history, including charges and offense dates.

Finding No. 2.2. CP 4. Although not noted in the Judgment and Sentence (or orally on the record) Mr. Strickland was apparently sentenced with an offender score of 7. There is no indication as to how these findings were made.

A trial court's findings are reviewed for substantial evidence. *In re Custody of Shields*, 120 Wn.App. 108 at 120, 84 P.3d 905 (2004).

Because of the absence of any information regarding Mr. Strickland's criminal history, the findings in this case are completely unsupported and must be vacated. *Shields, supra*. The sentence must also be vacated, and the case remanded for resentencing.<sup>2</sup>

B. The trial court failed to determine whether or not any of Mr. Strickland's prior convictions were the same criminal conduct.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. Under that statute, the court is required to analyze multiple prior convictions to determine whether or not they should count as one offense:

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<sup>2</sup> As the Supreme Court said in *State v. Ford*: "Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions." *State v. Ford*, 137 Wn.2d 472 at 484, 973 P.2d 452 (1999)

Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense... The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently... whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a)...  
RCW 9.94A.525(5)(a)(i)

Under RCW 9.94A.589(1)(a), “same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. The sentencing court is not bound by prior determinations, but must exercise its discretion and decide whether multiple prior offenses should count separately or together. *State v. Wright*, 76 Wn.App. 811 at 829, 888 P.2d 1214 (1995), interpreting *former* RCW 9.94A.360(6)(a).

In this case, the Judgment and Sentence lists two pairs of convictions with the same offense date that occurred in the same county. CP 4. No evidence was introduced suggesting that either pair of offenses involved different times, places, victims, or criminal intent. The trial court did not determine on the record whether or not the prior offenses were the same criminal conduct. RP 120-130. Because the trial court failed to make this determination, the sentence must be vacated, and the case remanded for resentencing with a corrected offender score. *Wright, supra*.

**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).**

The Sixth Amendment requires any fact used to enhance a sentence to be proved beyond a reasonable doubt to a jury. *State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005), citing *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). The *Blakely* court left intact an exception for prior convictions; however, the continuing validity of that exception is in doubt. See, e.g., *State v. Mounts*, 130 Wn. App. 219 at n. 10, 122 P.3d 745 (2005), quoting Justice Thomas' observation in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254 at p. 1264, 161 L.Ed.2d 205 (2005) that *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which underlies the exception for prior convictions, "has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."

It now appears that five members of the U.S. Supreme Court (Justices Scalia, Stevens, Souter, and Ginsberg, all of whom dissented from *Almendarez-Torres*, and Justice Thomas, who authored a concurring opinion urging a broader rule in *Apprendi v. New Jersey*, 530 U.S. 466,

120 S.Ct. 2348 (2000)) believe that prior convictions which enhance the penalties for a crime must be proved to a jury beyond a reasonable doubt.<sup>3</sup>

Here, Mr. Strickland's prior felony conviction was not submitted to the jury.<sup>4</sup> Instead, the trial court, (apparently) using a preponderance standard, found that Mr. Strickland had ten prior felonies.<sup>5</sup> CP 4. This violated Mr. Strickland's constitutional right to a jury trial under the Sixth Amendment, and the resulting sentence was improper. The aggravated sentence must be vacated, and the case remanded for sentencing with no criminal history.

### **CONCLUSION**

Mr. Strickland's conviction must be reversed and the case dismissed, because the statute criminalizing attempt fails to define the elements of that offense and violates the constitutional separation of powers. In the alternative, the conviction must be reversed and the case

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<sup>3</sup> Division I has continued to rely on *Almendarez-Torres*, despite its apparent lack of support in the high court. *See, e.g.* *State v. Rivers*, 130 Wash .App. 689, 128 P.3d 608 (2005).

<sup>4</sup> Nor is there any indication in the record that he knowingly, intelligently and voluntarily waived his right to a jury determination of his prior convictions. RP(10-7-05 29 – 36.

<sup>5</sup> This finding is contested in the previous section of this brief.

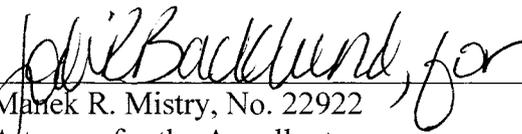
remanded to the trial court because of errors in the court's instructions and because Mr. Strickland was denied the effective assistance of counsel.

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 April 24, 2006.

**BACKLUND AND MISTRY**

  
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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 13<sup>th</sup> 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 April 24, 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 April 24, 2006.



Jodi R. Backlund, No. 22917  
Attorney for the Appellant

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