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STATE OF WASHINGTON  
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NO. 34495-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

WESLEY PHIPPS,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THURSTON COUNTY

Before The Honorable Gary R. Tabor, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. Appellant Wesley Phipps was denied his right to a unanimous jury verdict due to the failure of the trial court to instruct the jury that it had to reach a unanimous verdict as to which of the two possible methods of entry into an apartment alleged by the State constituted attempted residential burglary.

2. The trial court erred in permitting Phipps to be represented by counsel who provided ineffective assistance by failing to propound a unanimous verdict jury instruction.

3. Jury Instruction No. 6—which defines attempted residential burglary—omitted from the jury’s consideration the required elements for attempted residential burglary, thereby violating the Appellant’s due process rights.

4. To the extent defense counsel may have contributed to the error in Instruction No. 6, the Appellant received ineffective assistance of counsel.

5. Defense counsel was ineffective when he failed to propose a lesser included offense instruction for the crime of attempted criminal trespass.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An accused person has the constitutional right to a unanimous jury verdict. Where the State alleges alternate means was Appellant denied his right to a unanimous act to which act or acts constituted attempted residential burglary, where the testimony indicated that there were two methods that the alleged offense could have occurred and where the State made no election as to the manner in which the alleged offense occurred? Assignment of Error No. 1.

2. Whether the trial court erred in permitting Phipps to be represented by counsel who provided ineffective assistance by failing to propound a jury unanimity instruction, where the testimony involved two possible methods in which attempted residential burglary could have been committed, where the State made no election as to which act or acts constituted assault? Assignment of Error No. 2.

3. Appellant was convicted of attempted residential burglary. A person commits attempted *residential burglary*, when he does any act that is a substantial step toward the commission of *residential burglary*. Instruction No. 6, which defined attempted residential burglary for appellant's jury, defined a different crime. It told the jury that a person commits attempted residential burglary when, with intent to commit *attempted residential burglary*, he does any act that is a substantial step toward *attempted*

*residential burglary*. In other words, it defined the crime as an attempt to commit an attempt. Does this violation of appellant's due process rights require a new trial? Assignment of Error No. 3.

4. Where appellant's attorney failed to object to Jury Instruction No. 6, did appellant receive ineffective assistance of counsel? Assignment of Error No. 4.

5. Where the State presented testimony at trial that the Appellant and another man went to the apartment to obtain a car title, not to intimidate an occupant of this apartment, was the appellant's attorney ineffective when he failed to request a lesser included offense instruction for attempted criminal trespass? Assignment of Error No. 5.

### C. STATEMENT OF THE CASE<sup>1</sup>

#### 1. Trial testimony:

##### a: Randle Kuhn:

Randle Kuhn acted as a police informant for an undercover operation that resulted in Wesley Phipps being arrested on December 8, 2005. Report of Proceedings [RP] at 7-8. Kuhn testified that on December 13, 2005, he was staying at a friend's apartment in Lacey, Thurston County, Washington. RP at 14. There were a total of five people in the apartment. RP at 22. At

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<sup>1</sup> This Statement of the Case addresses the facts related to the issues presented in accord with RAP 10.3(a)(4).

approximately 3:00 a.m., while the occupants of the apartment were sleeping, he heard a knock on the apartment door. RP at 15. The woman who rents that apartment told him that “she didn’t want anybody else there.” RP at 14-15. Kuhn unlocked the door bolt and opened the door, but left it chained. RP at 15. He recognized the person at the door as “Galaxy.” RP at 15. Kuhn told him that nobody else was allowed into the apartment, and that “he’d have to come back later.” RP at 15. Kuhn told him that he was going to have to leave, and that he was going to shut the door. RP at 15. He testified that at that time Wesley Phipps “came around the corner of the door and tried to push the door open very aggressively.” RP at 15. He testified that the chain was still on the door, and that Phipps “pushed it pretty hard, very aggressively.” RP at 16, 17. Exhibits 1 through 5. Phipps said that he wanted to come in and that he “wanted to talk right now, that he had just got out that he was very upset and he wanted to—he had his hands in a fist and he was wearing black gloves and he looked like he was wanting to fight me.” RP at 18. Kuhn testified that Phipps said that he was going to “handle me.” RP at 18. Kuhn stated that he interpreted this as a threat, that Phipps was angry with him and that “he wanted to fight.” RP at 18. Kuhn told Phipps that he was going to shut the door in order to unlock the chain so that he could open the door to let him in. He closed the door, bolted it, and told

Phipps that he needed to leave. RP at 18. He testified, without objection, that Kim said that Phipps needed to leave or that she was going to call the police. RP at 18.

After he closed the door, he heard them talk “amongst themselves for a few minutes” and then heard them go downstairs. RP at 20. Less than a minute later he heard someone coming up the back stairs to a deck at the back of the apartment with a door that led into the apartment. RP at 20, 25. He saw two figures through the shade but could not identify them. RP at 20. He heard the “door start to shake very violently like someone as trying to come in it.” RP at 20. They then walked back down the stairs and Kuhn heard a car engine start. RP at 20.

Galaxy had been at the apartment earlier in the evening, between 12 and 1:00 a.m. RP at 25. He was upset and angry with Kuhn because Kuhn asked him to leave because he was being loud and the other people in the apartment wanted to go to sleep. RP at 25-26.

**b. Det. Dave Miller:**

Det. Miller contacted Phipps on December 13, 2005, regarding the alleged incident. After he was placed under arrest, Phipps stated that he was not in Lacey at the time of the incident and that he several witnesses who could testify that he was at home the entire night. RP at 30. Phipps was

taken to the Thurston County jail. RP at 30. While being transported to the jail, he stated that he was at Lacey after being picked up by Mike Robinson in order to take him to an apartment to buy a car. He stated that he was surprised that Kuhn was at the apartment that he did not know that he would be there. RP at 31. He denied threatening Kuhn, but did ask if Kuhn would talk to him. RP at 31.

**c. Michael Robinson:**

Michael Robinson stated Phipps was going to buy his car and that he and Phipps went to an apartment in Lacey between 10 and 11 p.m. on December 19 in order to find Robinson's mother, who had the title to the car. RP at 47, 50. His mother is friends with one of the persons who lives in the apartment. RP at 47. When he got the apartment building, he went upstairs by himself and Phipps remained downstairs. RP at 47. Kim answered the door and told him that his mother was not there and that she might be back later. RP at 48. He stated that he did not know Kuhn and did not see him on December 13. RP at 48.

**2. Procedural history:**

The State charged Phipps by Information filed on December 16, 2005 in Thurston County Superior Court with one count of attempted residential

burglary, contrary to RCW 9A.28.020<sup>2</sup> and RCW 9A.52.025.<sup>3</sup> Clerk's Papers [CP] at 5. The State alleged that on December 13, 2005, Phipps took a substantial step toward entering or remaining unlawfully in a dwelling with

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<sup>2</sup> RCW 9A.28.020, regarding criminal attempt, provides:

(1) 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.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;

(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;

(c) Class C felony when the crime attempted is a class B felony;

(d) Gross misdemeanor when the crime attempted is a class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

<sup>3</sup> RCW 9A.52.025 provides:

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

(2) Residential burglary is a class B felony. In establishing sentencing guidelines and disposition standards, the sentencing guidelines commission and the juvenile disposition standards commission shall consider residential burglary as a more serious offense than second degree burglary.

an intent to commit a crime against a person or property. CP at 10. The State filed an Amended Information on February 14, 2006. CP at 10.

Phipps was tried by a jury, the Honorable Gary Tabor presiding, on February 27, 2006. Phipps did not testify in his own defense.<sup>4</sup> RP at 52. The prosecution requested an instruction on assault, which the court declined to give. RP at 53-54.

The jury found Phipps guilty of attempted residential burglary as charged in the Amended Information on February 27, 2006. CP at 21; RP at 94.

### **3. Sentencing:**

The matter came on for sentencing on February 28, 2006. Phipps' counsel stipulated that his offender score was 6, and that he had a range of 24.74 to 32.25 months. RP (2.28.06) at 3. CP at 24.

Phipps pleaded guilty in Thurston County cause number 05-1-2364-7 to delivery of methamphetamine and was sentenced on February 21, 2006, to 64 months. CP at 24; RP (2.28.06) at 4, 5. Counsel asked that the sentence be imposed concurrently to cause number 05-1-2364-7. RP (2.28.06) at 5. Phipps was allowed an opportunity for allocution. RP (2.28.06) at 7-8.

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<sup>4</sup> A pattern jury instruction that a defendant is not compelled to testify was granted. Instruction No. 4. CP at 17.

Judge Tabor sentenced Phipps to 32.25 months, to be served concurrently with cause number 05-1-2364-7. CP at 26; RP (2.28.06) at 9.

Timely notice of appeal was filed on February 28, 2006. CP at 36-45.

This appeal follows.

#### **D. ARGUMENT**

1. **THE JURY INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND ALTERNATIVE MEANS OF COMMITTING ATTEMPTED RESIDENTIAL BURGLARY WITHOUT REQUIRING JURY UNANIMITY.**

A criminal defendant has a constitutional right to a unanimous jury verdict. *State v. Stephenson*, 89 Wn. App. 217, 221, 948 P.2d 1321 (1997); Wash. Const. art. I, § 21. Due process requires the State to prove beyond a reasonable doubt every element of the crime charged. *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984); *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). A jury may convict a defendant only if it unanimously concludes that the defendant committed the act charged in the charging document. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Thus, “[w]here the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident.” *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); see *State v.*

*Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The right to jury unanimity includes the right to a unanimous verdict on the means by which the defendant committed the alleged offense or offenses. *Kitchen*, 92 Wn. App. at 451. If it cannot be determined from the record the means upon which the jury relied on to reach its verdict, the conviction must be reversed. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). To ensure jury unanimity, either the State must elect which act constituted the crime or the trial court must instruct the jury to agree on a specific criminal act. *Kitchen*, 110 Wn.2d at 409.

The right to a unanimous jury verdict is protected under both the federal and state constitutions. U.S. Const. amend. VI;<sup>5</sup> Const. art. I, § 21;<sup>6</sup> Const. art. I, § 22.<sup>7</sup> In Washington, an accused may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. *State v. Petrich*, 101 Wn.2d at 569.

In some situations, the right to jury unanimity includes the right to express unanimity as to the means by which the defendant committed the crime. *State v. Klimes*, 117 Wn. App. 758, 770, 73 P.3d 416 (2003). If the

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<sup>5</sup>The Sixth Amendment guarantees the right to a “speedy and public trial, by impartial jury . . .”

<sup>6</sup>In relevant part, Const. Art. I, § 21 provides, “[t]he right of trial by jury shall remain inviolate. . .”

<sup>7</sup>Const. Art. I, § 22 provides, “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury. . .”

evidence is sufficient to support both alternative means, a particularized expression of jury unanimity is unnecessary. *Id.* But where the evidence is insufficient as to one or the other means, the jury's verdict must be reversed. Because there was no unanimity instruction, the prosecutor did not elect and the evidence was insufficient on each means, the residential burglary conviction must be reversed.

The State charged Phipps with the felony offense of attempted residential burglary. CP at 10. Pursuant to RCW 9A.52.025, a person is guilty of residential burglary "if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." A unanimity instruction was required because the record contains testimony tending to show two separate attempts to enter the apartment. The State made no election as to whether the attempted entry was the allegation that Phipps attempted to enter the apartment after Galaxy knocked on the door and Kuhn opened it, or Kuhn's testimony that he heard the screen door at the back of the apartment "shake very violently like someone was trying to come in." RP at 20. The trial court did not provide the jury with a unanimity instruction.

If, as here, the prosecution submits evidence of multiple acts, any one of which could support the offense, the State must either elect one act to rely on for the conviction or the jury must be instructed that it must unanimously

agree on a specific criminal act. *State v. Jones*, 71 Wn. App. 798, 821, 863 P.2d 85 (1993); *Kitchen*, 110 Wn.2d at 409; *Petrich*, 101 Wn2d at 572. Where neither alternative is followed, a constitutional error arises stemming from the possibility that some jurors may have relied on one act while other jurors relied on another, resulting in a lack of unanimity on all elements necessary for a conviction. *Kitchen*, 110 Wn.2d at 411.

An error for failing to give a unanimity instruction is of constitutional magnitude and can be raised for the first time on appeal. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). The issue is one of constitutional magnitude because it impinges upon the defendant's right to trial by jury. *Jones*, 71 Wn. App. at 821. The failure to give a unanimity instruction is presumed prejudicial and is not harmless unless a rational trier of fact could not have a reasonable doubt as to whether the evidence of each incident establishes the commission of the crime. *Jones*, 71 Wn. App. at 822. The error stems from the possibility that some of the jurors may have relied on one act or incident and some on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *Kitchen*, 110 Wn.2d at 411.

The jury instructions failed to require jury unanimity as to the burglary count, the prosecutor did not elect a means in closing argument, and therefore the conviction must be reversed and dismissed.

2. PHIPPS WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO PROPOSE A UNANIMITY INSTRUCTION.<sup>8</sup>

As argued in Section D. 1. of this brief, *supra*, Phipps assigns error to the failure of defense counsel to propose a unanimity instruction.

The Sixth Amendment to the United States Constitution guarantees to indigent defendants the assistance of counsel in criminal cases. The Washington State Constitution also confers a right to counsel. Wash. Const. art. I, § 22. “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Effective assistance of counsel is a constitutionally protected right. U.S. Const. amend. VI; Washington Const. art. I. § 22.

The standard for reviewing the effectiveness of counsel is set forth in *Strickland*. See also, *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987); *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A criminal

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<sup>8</sup> While it has been argued in preceding section of this brief that the errors at issue constitute constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this Court disagree with this assessment.

defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990). A reviewing court indulges in a strong presumption that counsel's representation falls within the wide range of proper assistance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). In making this determination, a reviewing court presumes that he received effective representation. *Tilton*, 149 Wn.2d at 784; *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). In order to overcome this presumption, the Appellant must show that counsel had no legitimate strategic or tactical

rational for his or her conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Representation is not deficient if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Assuming, *arguendo*, this court finds that trial counsel waived the issues presented in the preceding section of this brief by failing to propound a unanimity instruction, then elements of ineffective assistance of counsel have been established.

The record does not reveal any tactical or strategic reason why trial counsel would have failed to prepare a unanimity instruction. To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn. App. at 359. The prejudice here is self-evident: there is no tactical advantage to failing to propose a unanimity instruction.

Not only did counsel's omission constitute deficient performance, but he was prejudiced thereby, and that it is reasonable to surmise that the

outcome of the trial would have been different if not for the error. Phipps has satisfied both prongs of *Strickland* and established that reversal is merited.

3. **PHIPPS' CONVICTION FOR ATTEMPTED RESIDENTIAL BURGLARY VIOLATES DUE PROCESS BECAUSE THE JURY INSTRUCTIONS RELIEVED THE STATE OF ITS DUTY TO PROVE ALL ELEMENTS BEYOND A REASONABLE DOUBT.**

There were two serious errors in the instructions pertaining to this charge. First, the instructions misstated the elements of attempted residential burglary, significantly easing the State's burden of proof. Second, the instructions replaced the need for a completed burglary with proof that a defendant merely "was committing" a burglary—a standard for which jurors were not provided a definition or other guidance.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S Ct. 1068, 25 L. Ed. 2d 368 (1970); *Seattle v. Norby*, 88 Wn. App. 545, 554, 945 P.2d 269 (1997), *overruled on other grounds*, *State v. Robbins*, 138 Wn.2d 486, 980 P.2d 725 (1999). The jury must be instructed on each element of a criminal offense. Instructions that relieve the State of its burden to prove an element may be challenged for the first time on appeal. *State v. Eastmond*, 129 Wn.2d 497,

502, 919 P.2d 577 (1996); *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

a. **Instruction 6 Misstated the Elements of Attempted Residential Burglary.**

A person commits attempted residential burglary in the first degree when, with the intent to commit burglary, he does any act that is a substantial step toward the commission of a burglary in the first degree. RCW 9A.28.020(1). “A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.” Instruction No. 11; CP at 19; Washington Pattern Jury Instructions, WPIC 100.05, at 222 (West (1994); *see also State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978) (preparation not enough). In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *City of Seattle v. Norby*, 88 Wn. App. 545, 554, 945 P.2d 269 (1997), *overruled on other grounds*, *State v. Robbins*, 138 Wn.2d 486, 980 P.2d 725 (1999). The jury must be instructed on each element of a criminal offense.

Jury instructions that relieve the State of its burden to prove an element may be challenged for the first time on appeal. *State v. Eastmond*,

129 Wn.2d 497, 502, 919 P.2d 577 (1996); *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

As charged in this case, a person is guilty of attempted residential burglary when with the intent to commit a residential burglary, the person takes a substantial step toward commission of the crime of residential burglary (i.e., entering or remaining unlawfully in the dwelling of another with the intent to commit a crime in the dwelling). RCW 9A.28.020, 9A.52.050. In the case at bar, the instructions misstated the elements of attempted residential burglary, significantly easing the State's burden of proof.

The State proposed a jury instruction defining the crime of attempted residential burglary. This instruction, which became the court's Instruction No. 6, told the jury:

A person commits the crime of attempted residential burglary when, with intent to commit *that crime*, he or she does any act which is a substantial step toward the commission of *that crime*.

CP at 18 (emphasis added); Washington Pattern Jury Instructions, WPIC 100.01, at 218 (West 1994).

The error is found in the italicized language. Rather than refer to "that crime," the instruction should have referred to the specific crime

attempted: residential burglary. By using the phrase “that crime” instead, the elements are changed. Specifically, “that crime” can only refer to attempted residential burglary, rather than residential burglary, because it is the only crime mentioned within the instruction preceding the words “that crime.”

Therefore, Instruction No. 6 told Phipps' jury:

A person commits the crime of attempted residential burglary when, with intent to commit *attempted* residential burglary, he or she does any act which is a substantial step toward the commission of *attempted* residential burglary.

Rather than requiring the jury to find Phipps intended to commit residential burglary, the jury was told it need only find that Phipps intended *an attempt* to commit residential burglary. And rather than requiring that Phipps take a substantial step toward commission of a residential burglary, the instruction merely required the jury to find that Phipps took a substantial step toward *an attempt* to commit residential burglary. Stated another way, it required a substantial step toward a substantial step. Instruction No. 6 defined a far more inchoate offense than that charged in the information.<sup>9</sup>

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<sup>9</sup> The pattern instruction, WPIC 100.01, encourages this mistake. It reads:

A person commits the crime of attempted \_\_\_\_\_  
(fill in crime)

when, with intent to commit that crime, he or she does any act which a substantial step toward the commission of that crime.

Washington Pattern Jury Instructions, WPIC 100.01 at 218 (West 1994). To the reader of this blank WPIC, it would be apparent that “that crime” is the same crime used to fill in the blank – for example, “first degree burglary.” But to jurors, “that crime” appears to refer to

This error is similar to the error in *State v. Smith*, 131 Wn.2d 248, 930 P.2d 917 (1997). Like Phipps, Smith’s conviction involved proof of an inchoate crime—conspiracy to commit first-degree murder. Instead of telling the jurors that the State had to prove Smith conspired with others to commit first-degree murder, the “to convict” instruction required jurors to find that Smith conspired to commit *conspiracy* to commit murder—much like the attempt to attempt here. *Smith*, 131 Wn.2d at 261-62.

The rest of the jury instructions at Smith’s trial correctly set out the law, including the instructions defining first-degree murder and the term “conspiracy.” *Smith*, 131 Wn.2d at 261. And defense counsel and the prosecutor argued the proper elements of the offense to the jury. *Smith*, 131 Wn.2d at 261, 264. However, the Supreme Court reversed and reasoned that where a jury “purports to be a complete statement of law yet states the wrong crime,” the jury “is not required to search other instructions to see if another element should be included in the instruction defining the crime.” *Smith*, 131 Wn.2d at 263-64 (quoting *State v. Aumick* 126 Wn.2d 422, 431, 894 P.2d 1325 (1995)).

Phipps’ case requires the same result, because the State cannot demonstrate that the instructional error was harmless. A constitutional error

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“attempted first degree burglary” because they were not privy to the original form.

is harmless only if the State can demonstrate “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. E. 2d 35 (1999) (quoting *Chapman v. California*, 386 U.W. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

Instruction No. 6 purported to be a complete statement of the law defining attempted residential burglary, yet mistakenly required only that Phipps intend to attempt “that crime” and that he merely commit a substantial step toward an attempt of “that crime.”

Under the standard, the jury could find that Phipps possessed the requisite *mens rea* for residential burglary if at some point he merely intended any act that would be a substantial step toward the burglary, yet never actually intended to commit residential burglary. For instance, jurors could have found that the State had proved the intent element merely if they found Phipps intended to do the physical act of pushing on or pushing open the apartment door, albeit with no specific purpose. Under the instruction provided to the jury, such acts would constitute the intent to attempt residential burglary. Indeed, by its own terms, “intent to attempt” means that the defendant specifically did not intend to complete the crime.

Moreover, under Instruction No. 6, the jury would have concluded

that Phipps satisfied the *actus reus* for the offense in the absence of a substantial step toward committing residential burglary. Instruction No. 6 merely required a substantial step toward an attempt (meaning a substantial step toward a substantial step). Almost any act would satisfy that standard. Indeed, it is difficult to imagine what not have qualified as a substantial step toward a substantial step. Any degree of preparation would suffice; perhaps even mere presence.

In light of Instruction No. 6, there was no need for the jury to assess the proper elements of the case against Phipps. The instruction required a conviction for conduct well below the requisite standard of proof for attempted residential burglary.

As in *Smith*, the State may point out that other jury instructions correctly stated the law. For instance, Instruction No. 7, the “to convict” instruction indicated in element 1 that the State had to prove that “the defendant did an act which was a substantial step toward the commission of residential burglary[.]” CP at 18. However, as in *Smith*, the mere possibility that jurors could have somehow divined the proper legal standard does not change the outcome. Where the possibility exists that the defendant was convicted based on an erroneous jury instruction, appellate courts will not infer that the jury reached its verdict under a correct standard. Reversal is

required. See *State v. Stein* 144 Wn.2d 236, 246, 27 P.3d 184 (2001); see also *State v. Brown*, 147 Wn.2d 330, 343, 58 P.3d 889 (2002) (in light of erroneous instruction, possibility jurors applied proper standard insufficient to save attempted murder convictions). This has long been the law. See *McClaine v. Territory*, 1 Wash. 345, 353, 25 P. 453 (1890). (instruction misstating elements cannot be cured by other instructions); *State v. Rader*, 118 Wash. 198, 204, 202 Pac 64 (1922); *State v. Hilsinger*, 167 Wash. 427, 9 P.2d 357 (1932).

In response, the State may point out that defense counsel failed to object to the court's instruction and that any error was therefore invited. To the extent defense counsel contributed to the error, however Phipps received ineffective assistance of counsel, as discussed *infra*.

4. **IN ADDITION TO THE INADEQUATE REPRESENTATION DISCUSSED IN SECTION D. 2., SUPRA, PHIPPS' COUNSEL WAS INEFFECTIVE IN TWO ADDITIONAL WAYS.**

As noted in Section D. 2., *supra*, Phipps had the right to effective assistance of counsel at trial. U.S. Const. amend. VI; Const. art. I, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); *State v. Gentry*, 125 Wn.2d 570, 646-47, 888 P.2d 1105 (1995); *State v. Doogan*,

82 Wn. App. 185, 188, 917 P.2d 155 (1996).

Defense counsel was ineffective in two ways. First counsel failed to object to the improper Instruction No. 6. Second, counsel failed to propose a lesser included offense instruction on attempted criminal trespass where it was supported in both law and fact.

**a. Instruction No. 6 Improperly Stated The Law.**

Phipps had the right to effective assistance of counsel at trial. U.S. Const. amend. VI; Const. art. 1, § 22. The invited error doctrine does not bar review of a claim of ineffective assistance of counsel. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); *State v. Gentry*, 125 Wn.2d 507, 646-47, 888 P.2d 1105 (1995); *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in one report, and that deficiency must have prejudice. *Doogan*, 82 Wn. App. at 188 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, L. Ed.2d 674 (1984)). As set forth above, Instruction no. 6 was erroneous because it allowed a conviction in the absence of proof of all necessary elements of the charged offense. Because the instruction allowed jurors to convict based on a far more inchoate crime

that the law permits, Phipps was prejudiced. Reversal is required.

**b. Phipps Was Entitled to a Lesser Included Offense Instruction On Attempted Criminal Trespass.**

A defendant is entitled to a lesser included offense instruction if the proposed instruction meets the legal and factual “prongs” of the *Workman* test. *State v. Workman*, 90 Wn.2d 443, 446-48, 584 P.2d 382 (1978). The legal prong is met where each of the elements of the lesser offense are included within the elements of the greater offense, while the factual prong is met where the evidence supports an inference that only the lesser offense was committed. *Id.* On review of the factual prong, a court examines the evidence in the light most favorable to the party seeking the instruction. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

A person is guilty of residential burglary if, “with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025(1). A person is guilty of criminal trespass in the first degree if the person “knowingly enters or remains unlawfully in a building.” RCW 9A.52.070(1). Any person acting with intent also acts knowingly. RCW 9A.08.010(2). And the definition of “building” includes any dwelling. RCW 9A.52.030(1). Accordingly, the only difference between first degree criminal trespass and

residential burglary is that latter requires the additional element of intent to commit a crime insider the dwelling. All of the elements of first degree criminal trespass are therefore included within the crime of residential burglary, and former is a lesser included offense of the latter. *State v. Brunson*, 128 Wn.2d 98, 102, 905 P.2d 346 (1995); *see also State v. Soto*, 45 Wn. App. 839, 840-41, 727 P.2d 999 (1986) (first degree trespass is a lesser offense included within second degree burglary); *State v. Mounsey*, 31 Wn. App. 511, 517-18, 643 P.2d 892, *review denied*, 97 Wn.2d 1028 (19892) (first degree criminal trespass is a lesser offense included within first degree burglary).

The same is true of *attempted* first degree criminal trespass and *attempted* residential burglary. A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, the person does any act that is a substantial step toward the commission of that specific crime. RCW 9A.28.020. In the case of attempted residential burglary, a person is guilty if, with intent to commit residential burglary, the person takes a *substantial step* toward committing residential burglary, *i.e. entering or remaining unlawfully in a dwelling* with intent to commit a crime. In the case of attempted first degree criminal trespass, a person is guilty if, with intent to commit first

degree criminal trespass, the person takes a *substantial step* toward committing criminal trespass, *i.e. entering or remaining unlawfully in a building which includes a dwelling*. Again, the elements are exactly the same except that residential burglary requires the additional element of intent to commit a crime inside the dwelling. It is not possible to take a substantial step toward committing residential burglary (entering or remaining unlawfully with intent to commit a crime) without also taking a substantial step toward committing first degree criminal trespass (entering or remaining unlawfully). *Attempted* first degree criminal trespass is therefore a lesser included offense of *attempted* residential burglary.

Defense counsel was ineffective in failing to propose an instruction on the lesser included offense because there was evidence supporting an inference that only the lesser offense was committed.<sup>10</sup> The prosecution—as well as Det. Miller—largely engaged in speculation that Phipps’ purpose for being at the apartment was to intimidate Kuhn and that the alleged attempt to enter the apartment was connected to Phipps’ arrest on December 8. This theory was propounded—without defense objection—by Det. Miller, who testified that Kuhn was a police informant and that “this threat toward Kuhn

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<sup>10</sup> Defense counsel, in fact, filed no written instructions stating that he was having a problem with this printer and that it was “actually in my car to take to the shop.” RP at 52.

was because he worked with the police.” RP at 29. Despite Det. Miller’s assertion that Phipps threatened Kuhn and that it stemmed from Phipps’ December 8 arrest, there was little evidence that the incident was related to the prior arrest. Kuhn stated that Phipps “wanted to talk right now,” that he “was very upset,” that he had his hands in a fist, and the he “was going to handle me.” RP at 18. The record does not state that Phipps referred to the previous arrest, that he was upset about Kuhn’s role in the arrest as an informant, that he was aware that Kuhn was an informant, or that he wanted to intimate Kuhn.

These facts, taken in the light most favorable to Phipps, establish that he committed only an attempted trespass rather than attempted residential burglary. Defense counsel’s failure to propose the instruction was ineffective and materially prejudiced his client.

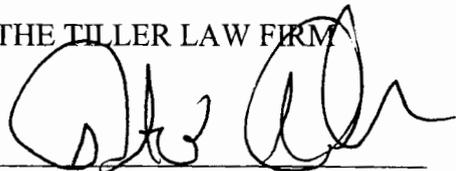
#### **E. CONCLUSION.**

Instructional error deprived Phipps of his right to require the State to a unanimous jury verdict and to prove all elements of the offense beyond a reasonable doubt. Moreover, counsel was ineffective by failing to object to Instruction No. 6, and by failing to propose a lesser included offense instruction. This Court should reverse Phipps’ conviction.

DATED: July 31, 2006.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', written over a horizontal line.

PETER B. TILLER-WSBA 20835  
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STATE OF WASHINGTON  
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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WESLEY PHIPPS,

Appellant.

COURT OF APPEALS NO.  
34495-5-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to Wesley Phipps, Appellant, and James C. Powers, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on July 31, 2006, at the Centralia, Washington post office addressed as follows:

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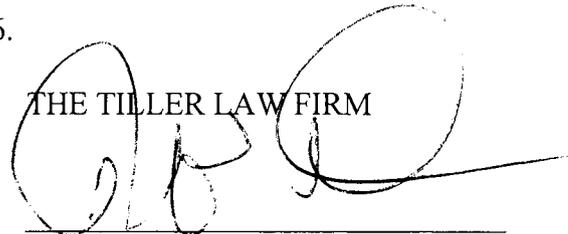
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