

No. 41793-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Scheibel,

Appellant.

Lewis County Superior Court Cause No. 10-1-00126-8

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by overruling Mr. Scheibel's *corpus delicti* objection.
2. The trial court erred by admitting Mr. Scheibel's statements absent sufficient independent evidence proving the *corpus delicti* of attempted burglary.
3. The prosecution failed to present independent evidence establishing the *corpus delicti* of attempted burglary.
4. The trial court violated Mr. Scheibel's First, Sixth, and Fourteenth Amendment right to an open and public trial.
5. The trial court violated Mr. Scheibel's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.
6. The trial court violated Mr. Scheibel's right to an open and public trial by conducting a closed hearing in chambers to select the appropriate jury instructions.
7. Mr. Scheibel's conviction violated his Fourteenth Amendment right to due process.
8. The trial court erred by instructing the jury with an erroneous definition of the phrase "substantial step."
9. The trial court erred by giving Instruction No. 6.
10. 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.
11. Mr. Scheibel was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
12. Defense counsel was ineffective for failing to object Instruction No. 6.
13. Defense counsel was ineffective for failing to propose a proper instruction defining "substantial step."

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person's statements may not be admitted at trial until the prosecution establishes the *corpus delicti* of the crime by independent evidence. In this case, the state failed to establish the *corpus delicti* of attempted burglary by independent evidence. Should the trial judge have sustained Mr. Scheibel's *corpus delicti* objection and excluded his statements?
2. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge consulted with counsel in chambers to review pre-trial motions and to select the jury instructions that guided the jury's deliberations. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding a hearing in chambers without first conducting any portion of a *Bone-Club* analysis?
3. A conviction for attempt requires proof that the accused person took a "substantial step," defined as "conduct strongly corroborative of the actor's criminal purpose..." Here, the court's instructions defined the phrase as "conduct that strongly indicates a criminal purpose..." Did the instruction relieve the prosecution of its burden to prove the elements of the offense beyond a reasonable doubt?
4. An accused person is constitutionally entitled to counsel who is familiar with the applicable law. Here, defense counsel failed to object to the court's instruction defining "substantial step," and did not propose a proper instruction. Was Mr. Scheibel denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jason Scheibel was driving between Puyallup and Kelso in the late fall of 2009. He was running low on gas, encountered a detour, and took back roads. RP (11/2/10) 28-29, 39. He stopped at James Shannon's home near Toledo, and rang the doorbell. RP (11/2/10) 30-32, 40. Looking for gas, he pushed open the door to Mr. Shannon's detached garage. He saw no gas source, took nothing, and left. RP (11/2/10) 40, 47.

Mr. Scheibel's activities were captured, in part, on Mr. Shannon's security camera, which took several still photos. RP (10/29/10) 70-77. The man's face could not be seen, but he approached the door, appeared to ring the doorbell, look in through a window, and then the man left. RP (10/29/10) 71-77, 104; RP (11/2/10) 40. After some time, officers linked the vehicle in the photos to Mr. Scheibel and arrested him. He gave a statement, admitting that he had pushed the door open. RP (11/2/10) 27-33, 39-40, 47.

The state charged Jason Scheibel with Burglary in the Second Degree. CP 1-2. At the start of the trial, Judge Hunt stated:

We've had a pre-trial conference and resolved some of the issues here. The state has filed eight motions in limine. They're all stock, and I'm going to, since there is no objection by the defense in the pre-trial conference, I'm inclined to grant all of them....

RP (10/29/10) 5.

The state presented evidence that the only door to the detached garage had been opened at some point while Mr. Shannon was away. RP (10/29/10) 58, 60. There was a footprint on the door, and the frame had been splintered. RP (10/29/10) 63-64. The state showed the security camera photos to the jury, but the person in them was not identified (the person was seen only from the back). RP (10/29/10) 73-74.

Mr. Shannon confirmed to the jury that nothing had been taken. RP (10/29/10) 90. Deputy Anderson told the jury that based on his investigation of the scene, there was no indication that anyone had entered the building. RP (10/29/10) 108.

The defense objected to the admission of Mr. Scheibel's statement on *corpus delicti* grounds. RP (10/29/10) 116-130. The court agreed, ruling that the statement could not come in for the charge of Burglary in the Second Degree, but that the state had established the *corpus* for Attempted Burglary in the Second Degree. RP (10/29/10) 119, 123, 126-127; RP (11/2/10) 11-14. The state's motion to amend the charge was granted over defense objection.¹ RP (11/2/10) 16, 18.

¹ The defense argued that the only offense for which there was proof was Malicious Mischief. RP (11/2/10) 16.

The jury received a summary of Mr. Scheibel's statement from Deputy Vanwich. He said Mr. Scheibel acknowledged he was the person in the photos, that he was looking for gas, and that he did not cause the damage to the door. RP (11/2/10) 28-32.

After both parties rested, the court held another closed hearing: "Record should reflect we've had an instruction conference off the record in chambers and established a set of instructions." RP (11/2/10) 52. In its instructions, the court defined the phrase "substantial step" as follows: "A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." Instruction No. 6, Court's Instructions to the Jury, Supp. CP. Defense counsel did not object to this instruction. RP (11/2/10) 52-55. Nor did the defense propose an alternative to this instruction.

The jury voted to convict Mr. Scheibel of the amended charge. CP 3. After sentencing, he timely appealed. CP 3-11, 12-21.

ARGUMENT

I. THE TRIAL JUDGE SHOULD HAVE EXCLUDED MR. SCHEIBEL'S STATEMENTS UNDER THE *CORPUS DELICTI* RULE.

A. Standard of Review.

The Court of Appeals reviews *de novo* a trial court decision finding sufficient evidence of the *corpus delicti*. *State v. McPhee*, 156 Wash.App. 44, 60, 230 P.3d 284 (2010).

B. The prosecution failed to present independent evidence establishing the *corpus delicti* of attempted burglary.

An accused person's statements may not be used to prove a criminal offense unless the prosecution establishes the *corpus delicti* of the charged crime by evidence independent of those statements. *State v. Dow*, 168 Wash.2d 243, 227 P.3d 1278 (2010); *State v. Brockob*, 159 Wash.2d 311, 328, 150 P.3d 59 (2006). The rule "requires independent evidence sufficient to establish every element of the crime charged." *Dow*, at 251.

The prosecution must

present evidence that is independent of the defendant's statement and that corroborates not just *a crime* but *the specific crime* with which the defendant has been charged... The State's evidence must support an inference that *the crime with which the defendant was charged* was committed... [This standard] requires that the evidence support not only the inference that *a crime* was committed but also the inference that *a particular crime* was committed.

Brockob, at 329 (emphasis in original).

The independent evidence must support each element of the charged crime. *Id; Dow, at 254* (noting that the prosecution must “prove every element of the crime charged by evidence independent of the defendant’s statement”) (citing *Brockob, at 328*). The independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence.² *Brockob, at 329*. If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Id., at 329-330*.

In this case, the independent evidence was insufficient to establish the *corpus delicti* of attempted burglary. When taken in a light most favorable to the state, the independent evidence only proved that Mr. Scheibel had damaged a door. RP (10/29/10) 63-64. Apart from his statement, nothing suggested that he acted with specific intent to commit burglary, or that he intended to commit a crime against a person or property within the residence. RP (10/29/10) 57-116; RP (11/2/10) 18-51.

The independent evidence regarding the damaged door fails the *corpus delicti* rule because it is not inconsistent with a hypothesis of innocence. *Dow, at 254; Brockob, at 329*. For example, Mr. Scheibel

² In this context, “innocence” refers to innocence of the charged crime, rather than blamelessness. *Brockob, supra*. Thus a person who is innocent of attempted burglary may nonetheless be guilty of a crime such as malicious mischief.

may have intended only to damage the door, committing the crime of malicious mischief. He may have intended to seek shelter, committing the crime of trespass. He may have planned to enter with the intent of manufacturing, using, or selling illegal drugs, rather than to commit a crime against persons or property within the residence. Under each of these scenarios, Mr. Scheibel would be guilty of a crime, but not the crime of attempted burglary. Considering only the independent evidence, the independent proof was insufficient to establish the *corpus delicti* of attempted burglary. *Id.*

The trial judge erroneously found the independent evidence sufficient. The court inferred that Mr. Scheibel must have intended to enter and steal property, because “there is no reason for there to be just a kick at the door and then just coming on the property, kicking the door and then leaving.” RP (11/2/10) 13. In essence, the trial judge found unreasonable the hypothesis that Mr. Scheibel committed only a malicious mischief. *See* RP (11/2/10) 13 [Mr. Scheibel “bore no ill will towards the alleged victim here.”] But this conclusion—that Mr. Scheibel did not intend to commit malicious mischief—does not eliminate the possibilities outlined above: that Mr. Scheibel intended only to seek shelter (and left after realizing the building was unsuitable for his purpose) or to commit a crime that was not against persons or property. The independent evidence

is consistent with guilt, but it is also consistent with other hypotheses. Accordingly, it was insufficient to independently establish the *corpus delicti*.

The prosecution failed to prove the *corpus delicti* by independent evidence. *Brockob, supra; Dow, supra*. Mr. Scheibel's conviction must be reversed, his statements suppressed, and the case dismissed with prejudice. *Id.*

II. THE TRIAL COURT VIOLATED BOTH MR. SCHEIBEL'S AND THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, 161 Wash.App. 568, ___, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Njonge*, at ___.

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const.

Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675, (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at 261-262, 257.³ In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State*

³ See also *State v. Strobe*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

v. *Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007).

The public trial right “applies to all judicial proceedings.” *Momah*, at 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.” *See, e.g., Strode*, at 230.⁴

C. The trial court violated the public trial requirement by holding a hearing in chambers.

In this case, the trial judge conducted an *in camera* hearings to review pre-trial motion and to select the appropriate jury instructions. RP (10/29/10) 5; RP (11/2/10) 52. These *in camera* proceedings, conducted outside the public’s eye without the required analysis and findings, violated Mr. Scheibel’s constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club*, *supra*. It also violated public’s right to an open trial. *Id.* Accordingly, Mr. Scheibel’s conviction should be reversed and the case remanded for a new trial. *Id.*

⁴ (“This court, however, ‘has never found a public trial right violation to be [trivial or] *de minimis*’”) (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The Court of Appeals has held that the right to a public trial only extends to hearings that require the resolution of disputed facts, and does not encompass hearings to resolve issues that are purely legal or ministerial. *See, e.g., State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered.

The evils addressed by the requirement of open and public trials do not arise solely in the context of adversary proceedings to resolve disputed facts. Instead, a judge, an attorney, or another player in the judicial system can be guilty of impropriety at any stage, regardless of the substance of the hearing. Without public scrutiny, such impropriety remains hidden.

The problem is primarily one of appearance. For example, a murder victim's family, already upset that the murder weapon was suppressed prior to trial, might feel that the judge is colluding with the defense upon learning—after an acquittal is entered—that a jury question about the missing gun was met only with an instruction to continue deliberating. While such a response may well be appropriate, the fact that it was arrived at in secret could lead the victim's family to speculation

about judicial impropriety.

The difficulty with closed hearings extends beyond mere appearance issues. In another era, racist judges, prosecutors, and defense attorneys may have met secretly in chambers to ensure that a black defendant was convicted, or a white defendant acquitted. Milder forms of misconduct may have taken the form of grumblings about female or minority jurors.⁵ Such blatant sexism and racial prejudice may be less common now than they were in years past; however, closed hearings allow such prejudices to be voiced with impunity, regardless of whether or not the hearing involves adversarial positions or disputed facts.

Even without actual malfeasance of the sort described, secret hearings degrade the public's perception of the judicial system. When hearings are conducted behind closed doors, members of the public are free to imagine the worst: the conspiracy-minded will see vast plots, the cynical will see corruption or incompetence. Only by opening all hearings—no matter how trivial—to the light of public scrutiny, can the judiciary be assured that it will be accorded the respect it deserves.

In *Sublett*, the Court of Appeals also implied that the need for an

⁵ Similarly, in chambers, a judge may improperly silence a contract public defender's objections in a particular case by threatening to withhold assignment to future indigent cases. Such pressure could be applied during argument over purely legal issues, and would place counsel's ethical duties in conflict with her or his livelihood.

open and public hearing was obviated by the production of a written answer to the jury's question. *Sublett*, at 182. Under this reasoning, no proceeding need ever be open to the public, since courts excel at producing written records of their proceedings. The production of written jury instructions in this case does not eliminate the constitutional requirement that proceedings be open and public.

In this case, the *in camera* hearings violated Mr. Scheibel's public trial right under the state and federal constitutions. They also violated the public's right to monitor proceedings. For these reasons, Mr. Scheibel's conviction must be reversed, and the case remanded for a new trial. *Bone-Club*, *supra*.

III. MR. SCHEIBEL'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE HE UNDERTOOK A SUBSTANTIAL STEP TOWARD THE COMMISSION OF BURGLARY.

A. Standard of Review

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wash.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Kyllö*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009); *State v.*

Berg, 147 Wash.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wash.App. 547, 554, 90 P.3d 1133 (2004).

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁶ An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

B. The court’s instructions relieved the state of its burden to prove that Mr. Scheibel engaged in conduct corroborating an intent to commit the specific crime Attempted Burglary in the Second Degree.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Instructions that relieve the state of its

⁶ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

burden to prove an element violate due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995).

An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004). Such an error 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 Wash.2d 330, 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. A “substantial step” is “conduct strongly corroborative of the actor’s criminal purpose.” *State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978); *Aumick*, at 427.

In this case, the trial court gave an instruction that differed from the definition of “substantial step” adopted by the *Workman* Court. The court defined “substantial step” (in relevant part) as “conduct that strongly *indicates a* criminal purpose...” Instruction No. 6, Supp. CP (emphasis added). 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 No. 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. Instruction No. 6, Supp. CP.

Second, Instruction No. 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 Wash.2d 471, 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 Wash.2d 568, 14 P.3d 752 (2000). As in *Roberts and Cronin*, the language used in Instruction No. 6 permits conviction if the accused person’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.⁷ Under the instructions as given, the prosecution was not required to provide independent corroboration of Mr. Scheibel's alleged criminal intent; nor was it required to show that his conduct strongly corroborated an intent to commit the particular crime of Attempted Burglary in the Second Degree. Because of this, the conviction must be reversed and the case remanded for a new trial. *Brown, supra*.

IV. MR. SCHEIBEL WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

⁷ This creates a manifest error affecting Mr. Scheibel's right to due process, and thus may be raised for the first time on review, pursuant to RAP 2.5(a)(3). Even if not manifest, the error may nonetheless be reviewed as a matter of discretion under RAP 2.5. *See State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). In addition, Mr. Scheibel argues that his attorney deprived him of the effective assistance of counsel by failing to object or propose a proper instruction.

- B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “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 “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption of adequate performance, which is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

C. Defense counsel provided ineffective assistance by failing to object to Instruction No. 6 and by failing to propose a proper instruction defining “substantial step.”

The reasonable competence standard requires defense counsel to be familiar with the instructions applicable to the representation. *See, e.g., State v. Tilton*, 149 Wash.2d 775, 784, 72 P.3d 735 (2003); *State v. Jury*, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978). A failure to propose proper instructions constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wash. App. 191, 156 P.3d 309 (2007); *see also State v. Rodriguez*, 121 Wash. App. 180, 87 P.3d 1201 (2004).

In this case, the prosecution was required to prove that Mr. Scheibel took a substantial step toward the commission of second-degree

burglary. RCW 9A.28.020; *see* Instruction No. 4, Supp. CP. A reasonably competent attorney would have been familiar with the correct legal standard, and would have proposed instructions making clear that the prosecution bore the burden of proving that Mr. Scheibel engaged in conduct that was “conduct strongly corroborative of [his] criminal purpose”—that is, his intent to commit a burglary. *Workman*, at 451.

Defense counsel not only failed to propose a proper instruction, but also failed to object to the instruction that the court included in its instructions packet. RP (11/2/10) 52-55. There is “no conceivable legitimate tactic” explaining counsel’s failure to object and failure to propose proper instructions. *Reichenbach*, at 130. Nor is there any indication in the record suggesting that counsel was actually pursuing a strategy that required him to refrain from objecting or proposing proper instructions. *See Hendrickson*, *supra*.

Furthermore, counsel’s failure to propose a proper instruction prejudiced Mr. Scheibel. A reasonable juror could have entertained doubts about whether or not breaking the door strongly corroborated the intent to commit burglary. However, because of counsel’s mistake, the jury was not able to properly evaluate this evidence. Instruction No. 6, Supp. CP.

The defense attorney's failure to propose proper instructions deprived Mr. Scheibel of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Tilton*. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

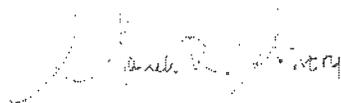
For the foregoing reasons, Mr. Scheibel's conviction must be reversed and the case dismissed with prejudice. In the alternative, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on September 2, 2011.

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CERTIFICATE OF MAILING

I certify that on September 2, 2011:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jason Christopher Scheibel
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I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 September 2, 2011.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

September 02, 2011 - 2:10 PM

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Statement of Arrangements

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Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

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