

No. 41793-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**JASON SCHEIBEL,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Did the trial court err by finding there was *corpus delicti* for attempted burglary in the second degree, thereby allowing Scheibel's statements to be admissible?
- B. Did the trial court violate Scheibel's public trial rights by holding an in chambers conference to discuss pretrial matters and proposed jury instructions?
- C. Did the substantial step jury instruction relieve the state of its burden of proving Scheibel undertook a substantial step towards the commission of burglary?
- D. Was Scheibel's trial counsel ineffective in his representation of Scheibel?

## II. STATEMENT OF THE CASE

James Shannon owns a house with a detached two-car garage and shed on ten acres in Toledo, Washington. 1RP 58.<sup>1</sup> Mr. Shannon spends the weekends at his residence and the weekdays at a relative's house in Spanaway while he attends school in Tacoma. 1RP 58. Mr. Shannon has owned the property in Toledo since 1978. 1RP 58. Mr. Shannon described his house as a single story home. 1RP 59. Mr. Shannon explained that the detached two-car garage "has kind of a cardboard on the back of it and I have a weight room in the garage part of it" and describes it

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<sup>1</sup> There are two volumes for the jury trial in this case. The State will refer to volume one, on October 29, 2010, as 1RP and volume two, on October 30, 2010 as 2RP.

as a shed. 1RP 59. The garage is only accessible from the outside. 1RP 59.

Mr. Shannon explained that when he leaves to go to school during the week he would secure his property, including the garage. 1RP 60. Mr. Shannon put up a wildlife camera as a surveillance camera at his home because he was away during the week. 1RP 61. Mr. Shannon testified that in the middle of October in 2009, his weight room and the entrance to the weight room/garage were intact. 1RP 62-63.

On December 12, 2009 Mr. Shannon went out to the shed weight room to perform some maintenance and found the frame to the door that enters the building had been splintered out where the latches attached even though the door had appeared to be locked. 1RP 63-4. When asked how the door was broken, Mr. Shannon stated, "there is a little metal piece on the frame that the knob goes into. And it was all torn loose and pushed way in. And the wood frame of the door was splintered about this far, kind of out maybe, but it was sticking out quite a ways." 1RP 64. Mr. Shannon also observed a footprint on the door. 1RP 64.

Mr. Shannon explained that after discovering the attempted burglary of the shed he checked his surveillance camera for activity

between the middle of October and December 12, 2009. 1RP 70. The camera takes still photographs every 15 seconds when something trips it and the camera determines the date and time the photographs are taken. 1RP 71-2. Eight photographs were admitted into evidence from Mr. Shannon's surveillance camera. 1RP 75. The photographs were taken on November 3, 2009 and show a vehicle pull up on Mr. Shannon's property and a person come to Mr. Shannon's front door. 1RP 75. The pictures indicate that the person and vehicle backed up and turned around and then returned to the property. 1RP 76. Mr. Shannon had never seen the person or vehicle before. 1RP 76. Mr. Shannon stated that in one of the pictures the man appears to be ringing the doorbell. 1RP 77.

Mr. Shannon testified that during the time frame from the middle of October to December 12, 2009 there were other people caught on his camera, but he knew all of those people such as his father and his brother. 1RP 78. Mr. Shannon stated that other than the people he knew, including a meter reader, there was no one else caught on his camera except the man who came to the door in the picture. 1RP 78, 83-84. Mr. Shannon stated he was on good terms with all the known people he had seen photographed on his

property between the middle of October and December 12, 2009. 1RP 78-9. Mr. Shannon could not think of any reason why any of those people would have been frustrated with him or wanted to cause the damage to the door. 1RP 79. Nothing was removed from the shed with the damaged door. 1RP 90. Mr. Shannon stated neither his brother nor his father had opened the door to the shed. 1RP 97.

Deputy Anderson saw the footprint on the shed which he believed belonged to an adult. 1RP 103. Deputy Anderson also stated that door, while intact, the stripping that went around the door was cracked and damaged. 1RP 103. Deputy Anderson was able to determine who owned the vehicle that Mr. Shannon's surveillance camera had photographed at Mr. Shannon's residence. 1RP 106. Deputy Anderson learned the vehicle belonged to Scheibel. 1RP 106.

Deputy Rick Van Wyck<sup>2</sup> did follow up investigation regarding the attempted burglary of Mr. Shannon's shed. 1RP 110. Deputy Van Wyck also ran the registration of the Ford Explorer and it came back registered to Scheibel. 2RP 21. Deputy Van Wyck stated that

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<sup>2</sup> The verbatim report of proceedings refers to Deputy Rick Van Wyck as VanWick (including the spelling of Deputy Van Wyck's name which the State highly doubts the deputy misspelled his own name). The State will be referring to Deputy Van Wyck by the proper spelling of name and not the misspelling from the transcript.

in the photographs it appears the man, later identified as Scheibel, is ringing the doorbell or trying the doorknob. 2RP 22. Deputy Van Wyck spoke to Scheibel. 2RP 27. Scheibel told Deputy Van Wyck that other than driving on the freeway he had never been to Lewis County. 2RP 27. Mr. Scheibel stated he did not know anyone in Lewis County. 2RP 27. Deputy Van Wyck then showed Scheibel an eight by ten photograph of the man standing at Mr. Shannon's back door and Scheibel admitted that was him in the photograph. 2RP 28. Scheibel claimed he went to Mr. Shannon's to ask for directions. 2RP 28. Scheibel told Deputy Van Wyck that he was heading to Kelso when he got low on gas and exited the freeway, hit a detour and ended up at Mr. Shannon's looking for directions. 2RP 29. Scheibel stated he left the residence but then realized how low he was on gas so he went back to the residence with the intent to get gas. 2RP 30. Scheibel told Deputy Van Wyck that when he returned to Mr. Shannon's property he walked all the way around the shop, got to the side door, which Scheibel said was open and he went inside looking for gas. 2RP 31. Scheibel admitted he did not know Mr. Shannon and did not have permission to be on the property or to take any gas. 2RP 31. Scheibel stated he did not get any gas. 2RP 32.

Scheibel was charged with burglary in the second degree. CP 1-2. During the course of the trial Scheibel's trial counsel objected to Scheibel's statements being admitted, arguing the State had not established *corpus delicti* for burglary in the second degree. 1RP 124-25. The trial court, after additional briefing, found the State had established *corpus delicti* for the lesser included offense of attempted burglary in the second degree. 2RP 11. Scheibel was found guilty of attempted burglary in the second degree. 2RP 99.

The State will further supplement the facts as needed throughout its argument.

### III. ARGUMENT

#### A. THERE WAS *COPRUS DELICTI* FOR ATTEMPTED BURGLARY IN THE SECOND DEGREE AND THEREFORE, SCHEIBEL'S STATEMENTS WERE PROPERLY ADMITTED BY THE TRIAL COURT.

The *corpus delicti* rule requires the state to present evidence sufficient to support the inference that a criminal act has occurred prior to the admission of the defendant's statements. *State v. Brockob*, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006). This rule ensures that a criminal defendant's statements, with nothing more, will not be sufficient evidence to convict him or her of a crime.

*State v. Brockob*, 159 Wn.2d at 328. Identity of the person who has committed the crime is not an element of *corpus delicti*, the State only needs to prove “that a crime was committed by someone.” *State v. Zillyette*, 163 Wn. App. 124, 129, 256 P.3d 1288 (2011) (citations and internal quotations omitted). “The State must present evidence independent of the incriminating statement that the crime a defendant *described in the statement* actually occurred.” *State v. Brockob*, 159 Wn.2d at 328 (emphasis original).

Review of a trial court’s determination that *corpus delicti* has been established is reviewed de novo. *State v. Pineda*, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000). The State is required to “prove every element of the crime charged by evidence independent of the defendant’s statement.” *State v. Dow*, 168 Wn.2d 243, 254, 227 P.3d 1278 (2010). The evidence is reviewed in the light most favorable to the State. *State v. Brockob*, 159 Wn.2d at 328. The independent evidence need not be sufficient to support a conviction against the defendant but must provide a prima facie showing that there is corroborative evidence of the crime that the defendant describes in his or her statement. *Id.* The evidence also must be consistent with guilt and inconsistent with a hypothesis of innocence. *Id.* at 329. If the independent evidence

supports reasonable and logical inferences of both guilt and innocence, than it is insufficient to corroborate a criminal defendant's admissions of guilt. *Id.*

The independent evidence need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime described in the defendant's incriminating statement. Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a logical and reasonable inference of the facts sought to be proved.

*Id.* (citations and emphasis omitted).

Scheibel argues to this Court that the independent evidence presented by the State, taken in the light most favorable to the State, was insufficient to establish the *corpus delicti* of attempted burglary in the second degree. Brief of Appellant 7. Scheibel rests his argument in large part that the evidence fails the *corpus delicti* test because the evidence is not inconsistent with a hypothesis of innocence because Scheibel could have entered the shed to seek shelter, manufacture or use drugs or simply committed malicious mischief by damaging the door. Brief of Appellant 7-8.

Scheibel's argument fails because the independent evidence, viewed in the light most favorable to the State does not support reasonable and logical inference of innocence. See *State v. Brockob*, 159 Wn.2d at 328. There is no reasonable and logical

inference that Scheibel kicked in the door to look for shelter. Scheibel arrived in a vehicle and was able to leave in his vehicle. See 1RP 75-77. The idea that Scheibel may have been looking for shelter and therefore attempting to commit criminal trespass is absurd. There was no reasonable or logical inference that could be made from the evidence presented to the trial court that kicking in the door was the crime of malicious mischief. Mr. Shannon testified that no one who had been on his property during this time had ill will towards him and he was on good terms with all of them. 1RP 78-79. There was no evidence provided that Scheibel harbored ill will towards Mr. Shannon and would intentionally and maliciously injure Mr. Shannon's property. Also, the kicking in of the door, without further damage, such as broken windows or damage inside the shed is inconsistent with what one generally sees in a malicious mischief type situation. Therefore, the argument of a hypothesis of innocence as evidenced by a malicious mischief claim is illogical. Further the argument that Scheibel was looking for someplace to manufacture, use or sell drugs is equally unreasonable and irrational.

These examples, as discussed above, given by Scheibel in his briefing, are not consistent with the hypothesis of innocence,

when viewing the reasonable and logical inferences supported by the evidence in the light most favorable to the State. The door to the shed was kicked in and then closed, presumably when it was discovered that there was nothing desirable to steal from the shed. The evidence of the door, with nothing else damaged, is evidence consistent with guilt and establishes the *corpus delicti* of attempted burglary in the second degree. Therefore, Scheibel's statements to Deputy Van Wyck were properly admitted and his conviction should be affirmed.

**B. SCHEIBEL'S PUBLIC TRIAL RIGHT WAS NOT VIOLATED WHEN THE TRIAL COURT CONDUCTED A PRETRIAL CONFERENCE AND THE CONFERENCE REGARDING JURY INSTRUCTIONS OUTSIDE OF THE COURTROOM.**

The United States Constitution and the Washington State Constitution guarantees that a criminal defendant has the right to a public trial. U.S. Const. amend. IV; Const. art. I, § 22. The Washington State Constitution also requires that "[j]ustice in all cases shall be administered openly and without undue delay." Const. art. I, § 10. A court must weigh the five *Bone-Club* factors prior to closing a courtroom in a criminal hearing or trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); *State v. Paumier*, 155 Wn. App. 673, 678, 230 P.2d 212 (2010), *review granted*, 169 Wn.2d 1017 (2010). The five *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a "serious imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

*State v. Bone-Club*, 128 Wn.2d at 258-59. A criminal defendant's public trial rights are violated if there is a proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.2d 150 (2005). Whether a trial court has violated the public trial right is a question of law and reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

The public trial requirement is primarily for the benefit of the accused. *State v. Momah*, 167 Wn.2d at 148. The public trial right ensures "that the public may see he [the accused] is fairly dealt with and not unjustly condemned and that the presence of interested

spectators may keep his triers keenly alive to the sense of the responsibility of their functions.” *Id.* The right to a public trial is closely linked to the defendant’s right to be present during critical phases of the trial. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations omitted).

The right to a public trial extends to evidentiary hearings, voir dire and other adversary proceedings. *State v. Sadler*, 147 Wn. App. at 114. A criminal defendant does not however have a public trial right to trial on purely legal or ministerial matters. *State v. Sublett*, 156 Wn. App. 160, 181, 231 P.3d 231 (2010), *citing State v. Sadler*, 147 Wn. App. at 114.<sup>3</sup> The Supreme Court has previously held that in-chamber conference between the judge and counsel for legal matters does not trigger a criminal defendant’s right to be present. *In re Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). The wording of jury instructions is a legal matter. *Id.*

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<sup>3</sup> The Court in *Sadler* gives a variety of examples of purely legal and/or ministerial matters from the Supreme Court cases *In re Pirtle* and *In re Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). “(1) a deferred ruling on a ER 609 motion, (2) a defense motion for funds to get Lord’s hair cut and to provide him with clothing for trial, (3) questions regarding the wording of the jury questionnaires and pretrial instructions, (4) a time limit for testing certain evidence, (5) the trial court’s announcement of its ruling on previously argued matters, (6) a decision allowing the jurors to take notes during trial, and (7) an order directing the State to provide the defense with summaries of the witness testimony...(1)the wording of jury instructions; (2) ministerial matters; and (3) whether the jury should be sequestered.” *State v. Sadler*, 147 Wn. App. at 116-17.

In the present case, Scheibel argues that the in-chambers conference conducted between counsel and the judge in regards to the jury instructions is a violation of Scheibel's right to an open and public trial. Brief of Appellant 11. Scheibel also argues that the in chambers review of pre-trial motions also violated Scheibel's right to a public trial. Brief of Appellant 11. Scheibel urges this Court to reject the exceptions for ministerial or legal matters. Brief of Appellant 12.

In regards to the pre-trial motions, the State's motions in limine,<sup>4</sup> were filed by the State on October 28, 2010, the day before the trial. CP Limine. On the first day of trial, prior to empaneling a jury, the trial court 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 eight of them. Is that correct, Mr. Clark?

MR. CLARK: That's correct.

THE COURT: All right, all eight will be granted

1RP 5. "The purpose of a motion in limine is to dispose of **legal matters** so counsel will not be forced to make comments in the

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<sup>4</sup> The State is filing a supplemental designation of Clerk's papers to include the State's motions in limine. The State will cite to the motions in limine as CP Limine.

presence of the jury which might prejudice his presentation.” *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984) (citations and internal quotations omitted) (emphasis added). Scheibel’s trial counsel had the opportunity, in open court and with Scheibel present, to object to the motions and chose not to do so. 1RP 5. Motions in limine are purely a legal matter and reviewing the written motions and even discussing them briefly outside of the courtroom is not a violation of Scheibel’s public trial rights.

Towards the conclusion of trial the judge met with the attorney’s for an in-chambers conference in regards to the jury instructions. 2RP 52. Both parties were given the opportunity to review the proposed instructions and place any objections or exceptions on the record. 2RP 52-55.

Scheibel argues to this Court a web of conspiracy theories including that a judge or an attorney can be guilty of impropriety at any stage and this necessitates the need for hearings to be public, regardless of the substance of said hearing. Brief of Appellant 12. Under Scheibel’s extreme view of the public trial doctrine, nothing could ever be done outside the presence of an open courtroom with a recorder present. There could be no scheduling conference, no discussion about what time breaks needed to be taken, strategic

issues regarding transportation of the defendant or witnesses, or even the order of the witnesses could not be discussed outside of an official proceeding. The State respectfully requests this court to be consistent with its prior holdings in *Sadler* and *Sublett*, and find that an in-chambers conference regarding which jury instructions will be given and a brief discussion regarding the State's motions in limine are legal proceedings and the right to an open and public trial is not violated by such activity. Scheibel's right to an open and public trial was not violated and his convictions should be affirmed.

**C. THE JURY INSTRUCTION FOR SUBSTANTIAL STEP THAT WAS GIVEN BY THE TRIAL COURT DID NOT RELIEVE THE STATE OF ITS BURDEN OF PROVING SCHEIBEL UNDERTOOK A SUBSTANTIAL STEP TOWARDS COMMITTING BURGLARY.**

Scheibel failed to object to jury instruction number six and is therefore barred from raising issue with the jury instruction under RAP 2.5(a). 2RP 55; CP 34. An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *State v. O'Hara*, 167 Wn.2d at 98. The exception to this rule is

“when the claimed error is a manifest error affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *State v. McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *State v. O’Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *State v. McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Scheibel is claiming the jury instruction for substantial step given by the trial court was erroneous and violated his Due Process rights under the 14<sup>th</sup> Amendment of the United States Constitution. Brief of Appellant 15-16. Scheibel argues he can raise this matter for the first time on review because the alleged error affects his constitutional right to have the State prove every element of the offense beyond a reasonable doubt. Brief of Appellant 15-16. While the alleged error does affect a constitutional right, no error occurred and therefore Scheibel has not suffered any prejudice from the trial court's jury instruction on substantial step.

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Jurors are presumed to follow the court's instructions. *State v. Kirkham*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *State v. Bennett*, 161 Wn.2d at 307. Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). An erroneous jury instruction may be harmless if it appears, after reviewing the record as a whole, beyond a reasonable doubt that the error did not contribute to the

finding of guilt. *Neder v. United States*, 527 U.S. 1, 15-16, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999). The reviewing court must look at the facts of a particular case to determine if a flawed jury instruction is harmless error. *State v. Carter*, 154 Wn.2d 71, 81, 109 P.3d 823 (2005) (citations omitted).

**1. The Use Of The Word Indicate Instead Of Corroborate In Jury Instruction For Substantial Step Does Not Relieve The State Of Its Burden.**

“A person is guilty of 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(1). “In order for conduct to comprise a substantial step, it must be strongly corroborative of a defendant’s criminal purpose.” *State v. Price*, 103 Wn. App. 845, 852, 14 P.3d 841 (2000), *citing State v. Workman*, 90 Wn.2d 443, 452, 584 P.2d 382 (1978). Corroborate is defined as. “1: To make strong or strengthen in body or construction 2: to establish or make firm: establish legality or by law 3: to provide evidence of the truth of: make more certain: confirm” Webster’s Third New International Dictionary Of The English Language, 512 (2002 ed.). Therefore, the conduct of the defendant must provide evidence or make more certain the defendant's criminal purpose.

The jury instruction given in Scheibel's case defining substantial step states, "[a] substantial step is conduct that strongly indicates a criminal purpose that is more than mere preparation." CP 34. This jury instruction is the standard pattern instruction for substantial step. See WPIC 100.05. Scheibel argues that by employing the word indicate rather than corroborative the trial court removed the requirement that "intent be established by independent proof and corroborated by the accused's conduct." Brief of Appellant 17. The State strongly disagrees with Scheibel's characterization of instruction number six and argues to this Court that the instruction correctly states the law and does not relieve the State of its burden to prove Scheibel took a substantial step towards burglary in the second degree.

Indicate as defined in the dictionary means, "to point out or point to or toward with more or less exactness: show or make known with a fair degree of certainty: as a(1): to show the probable presence or existence or nature or course of: give fair evidence of: be fairly certain sign or symptom of: reveal in fairly clear way (2): to demonstrate or suggest the probable extent or degree of." Webster's Third New International Dictionary Of The English Language, 1150 (2002 ed.). In order for the conduct to

compromise a substantial step the State must necessarily present evidence to the finder of fact which demonstrates in a fairly clear way or gives fair evidence of a criminal purpose. *State v. Workman*, 90 Wn.2d at 452, WPIC 100.05. The pattern jury instruction given in Scheibel's case, WPIC 100.05, has been found to be consistent with the language regarding substantial step set forth in *Workman*. *State v. Gatalksi*, 40 Wn. App. 601, 613, 699 P.2d 804 (1985), *review denied*, 104 Wn.2d 1019 (1985), *overruled on other grounds State v. Harris*, 121 Wn.2d 317, 849 P.2d 1216 (1993). Indicate and corroborate are substantially similar. The use of the word indicate does not negate or diminish the State's burden to prove a substantial step beyond a reasonable doubt

**2. The Use Of "A" Rather Than "The" In The Definition Of Substantial Step Does Not Relieve The State Of Its Burden.**

Scheibel further argues that the use of "a criminal purpose" instead of "the criminal purpose" similarly relieves the State of its burden. Brief of Appellant 17. The trial court gave the standard jury instruction for substantial step. WPIC 100.05; CP 34. The use of "a criminal purpose" does not diminish the State's burden to prove Scheibel attempted to commit burglary in the second degree.

Scheibel is reading jury instruction six in a vacuum without regards to the fact it is just a definition of substantial step and it is necessarily tied with jury instructions numbers three and four. CP 31-32, 34. Instruction three states, “A person commits the crime of attempted burglary in the second degree when, with the intent to commit **that** crime, he or she does any act that is a **substantial step towards the commission of that** crime.” CP 31 (emphasis added). Jurors are presumed to follow the court’s instructions. *State v. Kirkham*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). Therefore, the argument that the jury could find Scheibel guilty if they find there is evidence that strongly indicates he committed any crime, is without merit. Scheibel’s conviction should be affirmed.

**D. SCHEIBEL RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL THROUGHOUT THE PROCEEDINGS.**

To prevail on an ineffective assistance of counsel claim Scheibel must show that (1) the attorney’s performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney’s conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, *citing*

*State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. Trial counsel's competency must be determined by evaluating the entire trial court record. *State v. McFarland*, 127 Wn.2d at 335. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Scheibel argues his trial counsel's failure to object to WPIC 100.05, which ultimately became jury instruction six, was ineffective assistance of counsel because the jury instruction improperly relieves the State of its burden to prove the crime charged beyond a reasonable doubt. Brief of Appellant 20-22; CP 34. This argument fails. The proposed instruction was a correct and

accurate definition of the law as argued in the section above.

Therefore, Scheibel cannot overcome his burden to show his trial counsel's performance was deficient.

While not conceding that Scheibel's trial counsel was deficient, *arguendo*, if Scheibel's trial counsel had proposed an alternative instruction, that was not the standard WPIC, it is highly unlikely that the trial court would give such an instruction.

Therefore, Scheibel cannot show, with reasonable probability that but for his trial counsel's deficient performance, failing to the result of the proceedings would have been different. *Horton, supra*.

Scheibel's claim of ineffective assistance of counsel fails and his conviction should be affirmed.

#### IV. CONCLUSION

For the foregoing reasons, this court should affirm Scheibel's conviction.

RESPECTFULLY submitted this 21<sup>st</sup> day of November, 2011.

JONATHAN L. MEYER  
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by: \_\_\_\_\_  
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# LEWIS COUNTY PROSECUTOR

**November 21, 2011 - 4:04 PM**

## Transmittal Letter

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