

No. 43362-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Sherry Havens,

Appellant.

Mason County Superior Court Cause No. 11-1-00295-1

The Honorable Judge Toni Sheldon

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 3

ARGUMENT..... 6

I. Ms. Havens’s conviction violated her Fourteenth Amendment right to due process because the court’s instructions relieved the state of its burden to prove the essential elements of second-degree burglary..... 6

A. Standard of Review..... 6

B. A trial court must instruct the jury on the state’s burden to prove every element of the charged crime..... 8

C. The court’s instructions relieved the prosecution of its obligation to prove the essential elements of burglary. 9

II. The trial judge failed to properly determine Ms. Havens’s offender score and standard range. 11

III. Ms. Havens was deprived of her Sixth and Fourteenth Amendment right to the effective assistance of counsel. 14

A. Standard of Review..... 14

B. An accused person is constitutionally entitled to the effective assistance of counsel. 14

C. Defense counsel was ineffective for failing to adequately investigate Ms. Havens’s case. 16

D. Defense counsel unreasonably failed to seek instructions outlining Ms. Havens’s defense. 17

CONCLUSION 18

TABLE OF AUTHORITIES

FEDERAL CASES

Duncan v. Ornoski, 528 F.3d 1222 (9th Cir. 2008)	16
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	14
Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	15, 17
United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).....	17
United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973)	16
United States v. Salemo, 61 F.3d 214 (3 rd Cir., 1995)	14

WASHINGTON STATE CASES

City of Bellevue v. Lorang, 140 Wash.2d 19, 992 P.2d 496 (2000)	7
City of Bremerton v. Widell, 146 Wash. 2d 561, 51 P.3d 733 (2002)	9
In re Cadwallader, 155 Wash.2d 867, 123 P.3d 456 (2005).....	12, 13
In re Goodwin, 146 Wash.2d 861, 50 P.3d 618 (2002)	12
State v. A.N.J., 168 Wash. 2d 91, 225 P.3d 956 (2010).....	14, 16
State v. Aumick, 126 Wash.2d 422, 894 P.2d 1325 (1995).....	8
State v. Bashaw, 169 Wash.2d 133, 234 P.3d 195 (2010)	8
State v. Brown, 147 Wash.2d 330, 58 P.3d 889 (2002)	8
State v. Burke, 163 Wash.2d 204, 181 P.3d 1 (2008)	8
State v. Green, 157 Wash. App. 833, 239 P.3d 1130 (2010).....	10

State v. Hendrickson, 129 Wash.2d 61, 917 P.2d 563 (1996)	15
State v. Kirwin, 165 Wash.2d 818, 203 P.3d 1044 (2009).....	7
State v. Kutch, 90 Wash. App. 244, 951 P.2d 1139 (1998)	10
State v. Kyllo, 166 Wash.2d 856, 215 P.3d 177 (2009)	8, 17
State v. Miller, 90 Wash. App. 720, 954 P.2d 925 (1998).....	9, 11
State v. Nguyen, 165 Wash.2d 428, 197 P.3d 673 (2008)	7
State v. Nunez, 174 Wash. 2d 707, ____ P.3d ____ (2012).....	8
State v. R.H., 86 Wash. App. 807, 939 P.2d 217 (1997).....	10
State v. Reichenbach, 153 Wash.2d 126, 101 P.3d 80 (2004)	15, 17, 18
State v. Rodriguez, 121 Wash. App. 180, 87 P.3d 1201 (2004)	17
State v. Russell, 171 Wash.2d 118, 249 P.3d 604 (2011)	7
State v. Sandoval, 171 Wash. 2d 163, 249 P.3d 1015 (2011).....	15, 17
State v. Sibert, 168 Wash.2d 306, 230 P.3d 142 (2010)	8, 11
State v. Walsh, 143 Wash.2d 1, 17 P.3d 591 (2001).....	7
State v. Watt, 160 Wash.2d 626, 160 P.3d 640 (2007)	7
State v. Woods, 138 Wash. App. 191, 156 P.3d 309 (2007).....	17, 18

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI.....	1, 2, 14
U.S. Const. Amend. XIV	1, 2, 6, 8, 14
Wash. Const. Article I, Section 22.....	14

WASHINGTON STATUTES

RCW 9.94A.030..... 12

RCW 9.94A.500..... 11

RCW 9.94A.525..... 12, 13

RCW 9A.52.010..... 9

RCW 9A.52.030..... 9

RCW 9A.52.090..... 9

OTHER AUTHORITIES

CrR 3.1 4

RAP 2.5 7

RPC 1.4 16

ASSIGNMENTS OF ERROR

1. Ms. Havens's conviction infringed her Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of second-degree burglary.
2. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
3. The court's instructions relieved the state of its burden to prove that Ms. Havens unlawfully entered or remained in a building.
4. The trial court failed to properly determine Ms. Havens's offender score.
5. The sentencing court erroneously included in the offender score an offense that had "washed out."
6. The trial court erred by sentencing Ms. Havens with an offender score of three.
7. The trial court erred by entering Finding of Fact No. 2.3 (Judgment and Sentence).
8. Ms. Havens was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.
9. Defense counsel unreasonably failed to investigate Ms. Havens's case and prepare for trial.
10. Defense counsel unreasonably failed to consult with an expert regarding a possible mental health defense.
11. Defense counsel erroneously failed to propose a proper instruction outlining Ms. Havens's defense.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court's instructions must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's instructions allowed conviction absent proof

that Ms. Havens knew she was not allowed to enter Walmart. Did the trial court's instructions relieve the prosecution of its burden to prove the essential elements of burglary, in violation of Ms. Havens's Fourteenth Amendment right to due process?

2. Class C felonies are excluded from the offender score if the defendant spent five years in the community without committing additional offenses. The trial court's criminal history finding included a five-year period with no criminal convictions. Should the sentencing court have excluded from the offender score Ms. Havens's prior Class C felony convictions because they washed out?
3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, Ms. Havens's defense attorney failed to conduct an adequate investigation. Was Ms. Havens denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel by her attorney's failure to adequately investigate her case?
4. The guarantee of effective assistance requires defense counsel to propose favorable instructions appropriate to the case. Here, counsel failed to propose instructions outlining Ms. Havens's defense to the burglary charge. Was Ms. Havens denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel by her attorney's failure to propose appropriate instructions?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In August of 2009, Sherry Havens was “served with a trespass notice...prohibiting her from lawfully entering the premises” of the Shelton Walmart store. Stipulation, Supp. CP. In April of 2011, she was in a car accident that forced her to use a walker to get around. RP 51. In addition, as a result of a head injury, she was unable to remember that she’d been trespassed from Walmart. RP 56.

In August of 2011, Ms. Havens drove into Shelton with her son and his friends. RP 51; CP 17. She dropped her son off at football practice and went to Walmart. RP 51. She had more than \$100 in cash in her purse to pay for any purchases. RP 54, 80.¹ After shopping for a while, she thought she saw her son outside in the parking lot, and went toward the door, pushing her cart (which contained items for which she had yet to pay). As she approached the door, she was seized by a security guard who accused her of attempting to shoplift. RP 53-54. She was arrested and taken to jail. RP 48. Her father picked up her son from football practice, and her mother retrieved the walker from where it had been left at Walmart. RP 82-86.

¹ Ms. Havens testified that she had \$200; however, a receipt from the jail indicated that she had \$114.93 following her arrest. RP 54, 80.

The state charged Ms. Havens with second-degree burglary. CP 17. Prior to trial, her attorney (James Foley) asserted that he did not plan to make an issue of his client's head injury, or her inability to remember the trespass notice. RP 13. Nothing in the record indicates that he ever consulted with an expert in connection with this issue. See RP generally; CP generally.² The parties stipulated that Ms. Havens had been served with a trespass notice "prohibiting her from lawfully entering the premises." Stipulation, Supp. CP.

At trial, the prosecution presented evidence that a Walmart security guard had followed Ms. Havens throughout the store. RP 25-32. The guard had observed her placing merchandise into a Tinkerbell tote bag (obtained from the totes department) and then into a Walmart plastic bag. RP 26-32. After she walked through the register area to McDonald's without paying, he confronted her. RP 32-36. She told him that she was going outside to see if her son was there. RP 35. She repeated this to a police officer who'd been summoned to arrest her. RP 47.

Ms. Havens testified about the incident, and told the jury that she had not intended to steal anything, that she had enough cash to pay for her items, and that she'd gone near the doorway to look for her son. RP 52-

² Because Ms. Havens was indigent, any consultation with an expert would have appeared in the docket as a motion for public funds to hire an expert, pursuant to CrR 3.1(f).

54. On cross examination, she explained that she did not remember being trespassed in 2009, as a result of her head injury. RP 56.

Defense counsel did not propose any jury instructions, and did not object to those proposed by the prosecution. RP 87-89. The court's instructions did not include any reference to the trespass notice or its legal effect, and did not explain how Ms. Havens's head injury or lack of recollection might affect the lawfulness of her entry. Court's Instructions, Supp. CP.

Ms. Havens was convicted as charged. Verdict, Supp. CP. At sentencing, the prosecutor alleged that she had three prior felony convictions on which she was sentenced in 2005: a burglary and two possession charges. RP 125-126. No evidence was presented as to her term of confinement or her release dates. RP 125-131. The prosecutor alleged an offender score of three,³ and also referenced

a fairly extensive history of misdemeanor convictions going back to 2003. They involve shoplifting out of Shelton Municipal Court, theft in the third degree out of Shelton Municipal Court, theft in the third degree out of Shelton Municipal Court, driving while license suspended in the third degree out of Mason County District Court and, well, several driving—I won't go through all of those, but several driving in license third degrees out of Mason County District Court and Shelton Municipal Court, plus there is another

³ The burglary scored double and the possession charges comprised the same criminal conduct. RP 125-126.

theft conviction that she recently had in June of 2011 out of Thurston County District Court. RP 126-127.

The prosecution did not provide any additional detail regarding these misdemeanor convictions.⁴ RP 125-131.

Defense counsel indicated that he didn't "contest the accuracy of the State's recitation of the history," but did not agree or disagree with the prosecutor's calculation of the offender score. RP 128.

The court found three prior felony convictions and sentenced her with an offender score of three. CP 5-15. Ms. Havens timely appealed. CP 16.

ARGUMENT

I. MS. HAVENS'S CONVICTION VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT'S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF SECOND-DEGREE BURGLARY.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). A manifest error affecting a constitutional right may be raised for the first

⁴During her testimony, Ms. Havens had acknowledged a prior burglary from 2004 and misdemeanor theft convictions from 2003, 2004, and 2011. RP 55, 57.

time on review.⁵ 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). 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).

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it

⁵ The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

Jury instructions are reviewed de novo. *State v. Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010), overruled on other grounds by *State v. Nunez*, 174 Wash. 2d 707, ___ P.3d ___ (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

B. A trial court must instruct the jury on the state's burden to prove every element of the charged crime.

A trial court's failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). An instruction that relieves the prosecution of its burden to prove every element of a crime requires automatic reversal. *State v. Sibert*, 168 Wash.2d 306, 312, 230 P.3d 142 (2010) (plurality) (citing *State v. Brown*, 147 Wash.2d 330, 339, 58 P.3d 889 (2002)). Not every omission relieves the prosecution of its burden; however, the "total omission" of essential elements can do so. *Sibert*, at 312.

C. The court's instructions relieved the prosecution of its obligation to prove the essential elements of burglary.

Conviction of second-degree burglary requires proof that the accused, acting "with intent to commit a crime against a person or property therein... enter[ed] or remain[ed] unlawfully in a building..."

RCW 9A.52.030. A person enters or remains unlawfully "when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(5).

By statute, a person may not be convicted of burglary if "[t]he premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises..." RCW 9A.52.090. Entering or remaining in a business open to the public is not rendered unlawful by the accused person's intent to commit a crime. *State v. Miller*, 90 Wash. App. 720, 725, 954 P.2d 925 (1998). Where the burglary is alleged to have occurred in a business open to the public, the prosecution is obligated to disprove the applicability of RCW 9A.52.090. *City of Bremerton v. Widell*, 146 Wash. 2d 561, 570, 51 P.3d 733 (2002).

A trespass notice may be sufficient to exclude an individual from a place generally open to the public.⁶ However, the prosecution bears the burden of proving the lawfulness and scope of any exclusion before criminal liability can attach. See *State v. Green*, 157 Wash. App. 833, 845-46, 239 P.3d 1130 (2010); *State v. R.H.*, 86 Wash. App. 807, 812-13, 939 P.2d 217 (1997).⁷

Because the prosecution bears the burden of proof generally, the state must prove the accused person's knowledge and understanding of the terms of a trespass notice at the time of the offense, if the illegality of entry is based on such a notice.⁸ The prosecutor acknowledged this prior to jury selection. RP 13.

Here, the court's instructions did not even mention the trespass notice, or the prosecution's burden of proof regarding Ms. Havens's

⁶ The Supreme Court has never specified the circumstances under which premises generally open to the public may be closed to a particular individual, or what defenses might be available in the face of such a limited closure.

⁷ In *R.H.*, the court noted that the law "does not condone" a trespass conviction for returning to property "after being unjustly ordered to vacate it." *R.H.*, at 812-813.

⁸ No published opinion has directly addressed the mental state required to prove the unlawfulness of an entry based on a trespass notice. The Court of Appeals has assumed that the prosecution must prove "sufficient notice" before criminal liability may attach, and has held that verbal notice is sufficient. *State v. Kutch*, 90 Wash. App. 244, 247-250, 951 P.2d 1139 (1998). In *Kutch*, Division III affirmed the appellant's burglary conviction; the holding was apparently based (in part) on the court's conclusion that Mr. Kutch's claim that he "suffered from substance abuse and did not know what he was signing at the time" was unsupported by the evidence and contradicted by the trial court's unchallenged findings. *Id.*, at 248.

mental state (other than intent to commit a crime within the building).⁹ Court's Instructions, Supp. CP. Because of this, jurors were left to guess at the effect of Ms. Haven's stipulation that she'd been "served with a trespass notice on August 7, 2009 from the Shelton Walmart, prohibiting her from lawfully entering the premises." Stipulation, Supp. CP. Nor were jurors instructed on how they should view Ms. Havens's testimony that she "had head trauma" and that "at August [sic] I didn't recall - remember that I was kicked out of Wal-Mart." RP 56.

The "total omission" from the instructions of any guidance regarding these issues requires automatic reversal. Sibert, at 312. Accordingly, Ms. Havens's convictions must be reversed and the charges remanded to the trial court for a new trial. Sibert, at 312.

II. THE TRIAL JUDGE FAILED TO PROPERLY DETERMINE MS. HAVENS'S OFFENDER SCORE AND STANDARD RANGE.

At sentencing, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and "shall include, where known, for each conviction (i)

⁹ As noted above, intent to commit a crime does not transform an otherwise lawful entry into an unlawful entry. Miller, at 725.

whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030(11).

Under RCW 9.94A.525, the sentencing court is required to determine an offender score based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). Prior offenses that are class C felonies “wash out” of the offender score after the offender has spent five years in the community “without committing any crime that subsequently results in a conviction.” RCW 9.94A.525(2)(c).

An offender “cannot agree to a sentence in excess of that which is statutorily authorized.” *In re Cadwallader*, 155 Wash.2d 867, 874, 123 P.3d 456 (2005). In particular, an offender “cannot waive a challenge to a miscalculated offender score.” *In re Goodwin*, 146 Wash.2d 861, 873-874, 50 P.3d 618 (2002). Where the prosecution fails to properly allege a prior conviction that might prevent washout, it is held to the existing record on remand, and is not permitted to prove the prior conviction or its effect on the offender score. *Cadwallader*, at 878-880.

In this case, the prosecution alleged and the sentencing court found that Ms. Havens’s criminal history included three felonies, two of which were class C felonies. RP 125-127; CP 6. The prosecutor did not indicate

when Ms. Havens was released from custody on each offense, did not specifically allege each misdemeanor conviction, and failed to allege or prove any crimes committed within five years of her 2005 convictions. RP 125-127.¹⁰ The court made no findings regarding confinement/release dates on the felony charges, and did not find that she had been convicted of any misdemeanors. CP 6.

According to the court's findings, Ms. Havens spent more than five years in the community "without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c); CP 6. Under these circumstances, Ms. Havens's class C felonies washed out, and should not have been included in her offender score. RCW 9.94A.525(2)(c).

The trial court's criminal history finding supports an offender score of two. CP 6; RCW 9.94A.525. Because the prosecutor failed to specifically allege any crimes occurring within the five years following her 2005 convictions, the state is held to the existing record on remand. Cadwallader, at 878-880. Ms. Havens's sentence must be vacated, and the case remanded for resentencing with an offender score of two.

¹⁰ See also Ms. Havens's testimony, RP 55-56.

III. MS. HAVENS WAS DEPRIVED OF HER 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. *State v. A.N.J.*, 168 Wash. 2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to 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 satisfy “the familiar two-part Strickland... test for ineffective assistance claims—first,

objectively unreasonable performance, and second, prejudice to the defendant.” *State v. Sandoval*, 171 Wash. 2d 163, 169, 249 P.3d 1015 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Prejudice is defined as “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).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy.¹¹

These are guidelines only, not “mechanical rules.” *Strickland*, at 696. Instead, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* In every case, the court must consider whether the result is unreliable because of a breakdown in the adversarial process. *Id.*

¹¹ 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 was ineffective for failing to adequately investigate Ms. Havens's case.

To be effective, counsel must conduct an adequate investigation. A.N.J., at 110-112. Any decision not to investigate must be directly assessed for reasonableness. *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008). A failure to investigate is especially egregious when counsel fails to consider potentially exculpatory evidence. *Id.*, at 1234-35.

The duty to investigate requires counsel to consult with experts, where appropriate. A.N.J., at 112. In addition, counsel should confer with the accused person without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973); see also RPC 1.4.

In this case, counsel was aware that Ms. Havens had sustained a head injury, and that (at the time of the offense) she was unable to recall receiving a trespass notice from Walmart. RP 13. Despite this, counsel did not consult with an expert to determine whether or not Ms. Havens had a viable defense or an applicable mitigating factor that could have been presented during plea negotiations or at sentencing.

Defense counsel should have consulted with experts and investigated the possibility of a defense at trial or a mitigating factor

during plea negotiations or at sentencing. By failing to do these basic things, fundamental to representation of an accused person, counsel engaged in conduct that fell below an objective standard of reasonableness. Sandoval, at 169; Reichenbach, at 130.

Counsel's error undermines "the fundamental fairness of the proceeding," resulting in a breakdown of the adversarial process. Strickland, at 696. Counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Accordingly, "the adversary process itself [is] presumptively unreliable" here. *Id.* Ms. Havens's convictions must be reversed and the case must be remanded for a new trial. *Id.*

D. Defense counsel unreasonably failed to seek instructions outlining Ms. Havens's defense.

To be minimally competent, an attorney must research the relevant law. *Kyllo*, at 862. Familiarity with the law allows counsel to seek appropriate instructions at trial. 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).

Here, defense counsel failed to propose instructions outlining Ms. Havens's defense to the burglary charge. As the prosecutor acknowledged, Ms. Havens's testimony regarding her head injury and its effect on her memory presented a complete defense to the burglary charge (although it would not have resulted in acquittal of theft). RP 13.

Although defense counsel's intent, initially, was not to offer testimony about Ms. Havens's head injury, such testimony was introduced without objection on cross-examination. RP 56. Following introduction of the evidence, it was incumbent upon defense counsel to seek instructions outlining how the jury was to consider such evidence. See, e.g., Woods, supra. If jurors believed Ms. Havens's testimony, she would have been entitled to a not guilty verdict on the burglary charge.

The prosecution did not offer any testimony disputing Ms. Havens's assertion regarding her head injury. See RP, generally. In light of this, there is a reasonable likelihood that jurors would have voted to acquit, given a proper instruction. Accordingly, Ms. Havens was denied the effective assistance of counsel. Reichenbach, at 130.

CONCLUSION

For the foregoing reasons, Ms. Havens's conviction must be reversed and the case remanded for a new trial. In the alternative, her

sentence must be vacated, and the case remanded for resentencing with an offender score of two.

Respectfully submitted on September 27, 2012,

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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

A handwritten signature in cursive script that reads "Manek R. Mistry".

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Sherry Havens
c/o Mason County Jail
P.O. Box 519
Shelton, WA 98584

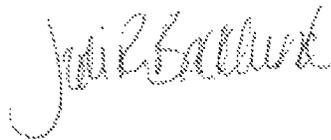
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Mason County Prosecuting Attorney
timw@co.mason.wa.us

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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 27, 2012.



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

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timw@co.mason.wa.us