

NO. 44287-6-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

RYAN L. WESTBROOK,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR MASON COURT  
The Honorable Toni A. Sheldon, Judge  
Cause No. 11-1-00093-1

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 17.
02. The trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 18.
03. The trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 19.
04. The trial court erred in permitting Westbrook to be represented by counsel who provided ineffective assistance by proposing instructions similar to court's instructions 17-18.
05. The trial court erred in imposing an exceptional sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instructions 17-19?  
[Assignments of Error Nos. 1-3].
02. Whether the trial court erred in permitting Westbrook to be represented by counsel who provided ineffective assistance by proposing instructions similar to court's instructions 17-18?  
[Assignment of Error No. 4].
03. Whether the trial court erred in imposing an exceptional sentence for both theft and

trafficking offenses where there is no way of knowing which offense the jury found beyond a reasonable doubt that Westbrook used his position of trust or confidence to facilitate?  
[Assignment of Error No. 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Ryan L. Westbrook was charged by first amended information filed in Mason County Superior Court November 14, 2012, with theft in the second degree, count I, and three counts of trafficking in stolen property in the first degree, counts II-IV, contrary to RCWs 9A.56.040 and 9A.82.050. [CP 154]. Each count further alleged that Westbrook had used his position of trust or confidence to facilitate the respective offense, in violation of RCW 9.94A.535. [CP 154-55].

Trial to a jury commenced November 14, the Honorable Toni A. Sheldon presiding. [RP 31]. Westbrook was found guilty as charged, including a finding he had used his position of trust or confidence to facilitate the crime. [CP 71, 73, 75, 77, 79]. He was given an exceptional sentence of 60 months and timely notice of this appeal followed. [CP 36, 50-62].

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02. Substantive Facts: Trial

In early March 2011, husband and wife Joe and Lora Hade invited Westbrook and Desha Vaughn to stay at their residence because they were homeless with Vaughn's small child. [RP 62-63, 95, 165]. Near the end of March, the couple were told they would have to leave. [RP 65, 75-76, 108]. Following their departure, Mrs. Hade discovered jewelry missing, including her mother's high school class ring and a diamond set ring, which she called her "bling ring." [RP 68, 100-05, 112]. "Twenty-four boxes of jewelry, empty. Completely empty." [RP 102]. Other items, including copper, were also missing and the value of the stolen property exceeded \$750. [RP 69-71, 79-82, 112-14].

Later that day, Mr. Hade contacted Vaughn by telephone and the next day a bag with some of the missing items appeared on the Hades' front porch. [RP 78, 84, 128-130].

Records at Navy City Metals showed that Westbrook had been paid for the sale of copper the proceeding March 25<sup>th</sup> and 31<sup>st</sup>. [RP 71-72, 152-53]. Similarly, pawn slips at Cash American Pawn showed that Westbrook had pawned the high school class ring March 19<sup>th</sup> and other rings March 25<sup>th</sup>, the latter of which he retrieved March 31<sup>st</sup>. [RP 145-46].

When interviewed by the police, Westbrook admitted pawning the class ring (count II) and the diamond set ring (count III) at Cash American

Pawn, saying Vaughn had given him the property and asked him to pawn it for her. [RP 56-57]. At trial, he denied taking any of the Hades' property [RP 169, 172], admitted pawning jewelry Vaughn had given him that he didn't know was stolen [RP 171], some of which he later retrieved for her [RP 172], and said the copper he sold to Navy City Metal was from a job where he had cleaned out someone's property for them in Port Orchard. [RP 175-76].

D. ARGUMENT

01. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASHINGTON CONSTITUTION ART. 4, SEC. 16 BY GIVING INSTRUCTIONS 17, 18 AND 19.

The trial court impermissibly commented on the evidence concerning counts II-IV, trafficking in stolen property in the first degree, when it submitted instructions 17, 18 and 19 to the jury, which state, in relevant part:

INSTRUCTION 17: TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE

(1) That on or about and/or between February 1, 2001 and March 19, 2011 the defendant knowingly trafficked in stolen property (to-wit: a gold high school class ring) ... (emphasis added).

[CP 101].

INSTRUCTION 18: TRAFFICKING IN STOLEN  
PROPERTY IN THE FIRST DEGREE

(1) That on or about and/or between February 1, 2001 and April 2, 2011 the defendant knowingly trafficked in stolen property ( to-wit: a ladies diamond set wedding ring) ... (emphasis added).

[CP 102].

INSTRUCTION 19: TRAFFICKING IN STOLEN  
PROPERTY IN THE FIRST DEGREE

(1) That on or about and/or between March 25<sup>th</sup>, 2011 and March 31<sup>st</sup>, 2011 the defendant knowingly trafficked in stolen property ( to-wit: copper, and/or metal, and/or an anvil) ... (emphasis added).

[CP 103].

As these instructions effectively stated that the identified property in each instruction was stolen, they relieved the State of its burden of proving this essential element for each of the three crimes beyond a reasonable doubt in violation of Art. 4, sec. 16 of the Washington Constitution, thus requiring reversal of the resultant convictions. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). inappropriate

Art. 4, sec. 16 of the Washington Constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses. State v. Crotts, 22

Wash. 245, 250-51, 60 P. 403 (1900). It is error for a judge to instruct the jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). And while a defendant on appeal is ordinarily limited to specific objections raised before the trial court, he or she may, for the first time on appeal, argue that an instruction was an improper comment on the evidence. State v. Tili, 139 Wn.2d 107, 126 n.9, 985 P.2d 365 (1999) (citation omitted); RAP 2.5(a)(3); State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006) (citing State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006)).

It was wrong to identify the property at issue in each of the above instructions. No clarification was needed. Not only were the items distinctively different for each count, the relevant charging periods also varied. [CP 154-55]. The identification of the property undercut Westbrook’s ability to effectually assert his defense: whether the respective items were stolen and whether he was aware of this. Indisputably, instructions 17-19 conveyed the idea that the court had accepted as true the fact that the identified property was stolen. This is key. State v. Levy, 156 Wn.2d at 726.

As noted in State v. Jones, 106 Wn. App. 40, 45, 21 P.3d 1172 (2001), Washington courts have repeatedly condemned the use of “to-wit” language in jury instructions. “Counsel would be well advised to avoid the

use of ‘to wit’ language in future ‘to convict’ instructions.” Id. The use of “to-wit” language runs the risk of constituting an improper comment on the evidence. The court’s instructions here at issue are analogous to the “to-wit” language criticized as constituting a comment on the evidence in Becker, where our Supreme Court ruled that when the trial court referred to a youth program as a school, it took a fundamental factual determination away from the jury. State v. Becker, 132 Wn.2d at 64-65.

Once it has been demonstrated that a trial judge’s conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). To uphold the corresponding convictions, the record must affirmatively show that no prejudice could have resulted. State v. Levy, 156 Wn.2d at 725.

In this case, the fact of whether the property in counts II-IV was stolen and whether Westbrook was aware of this constituted the threshold issues without which there were no crimes. It is conceivable the jury could have determined that he was without this knowledge or that the proof fell short of establishing it sans jury instructions 17-19. Because this decision was removed from the jury’s consideration, the record does not affirmatively show that no prejudice could have resulted, with the result that Westbrook’s

three convictions for trafficking in stolen property in the first degree must be reversed.

02. WESTBROOK WAS PREJUDICED AS A RESULT OF HIS TRIAL COUNSEL PROPOSING INSTRUCTIONS SIMILAR TO COURT'S INSTRUCTIONS 17 (count II) AND 18 (count III).<sup>1</sup>

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

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<sup>1</sup> Westbrook proposed no instruction for count IV, court's instruction 19. [RP 205].

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Westbrook proposed instructions similar to court's instructions 17-18 by identifying the property in counts II and III:

UNNUMBERED INSTRUCTION RE COUNT II

(1) That on or about a period between February 1, 2011 and March 19, 2011, the defendant knowingly trafficked in stolen property in the form of a gold high school class ring ... (emphasis added).

[CP 131].

UNNUMBERED INSTRUCTION RE COUNT III

(1) That on or about a period between February 1, 2011 and April 2, 2011, the defendant knowingly trafficked in stolen property in the form of a ladies diamond set wedding ring ... (emphasis added).

[CP 134].

Should this court find that trial counsel waived the issues relating to the trial court's instructions 17-18 by determining the above instructions are indistinguishable, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have proposed these instructions, which identify the property at issue in each instruction, for, under the reasoning previously set forth, no clarification was needed and the proposed instructions amounted to unconstitutional comments on the evidence in violation of Art. 4, sec. 16 of the Washington Constitution, as previously set forth, supra at 6-7.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here, as previously set forth, supra at 7-8, is self-evident.

03. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE FOR BOTH THEFT AND TRAFFICKING OFFENSES WHERE THERE IS NO WAY OF KNOWING WHICH OFFENSE THE JURY FOUND BEYOND A REASONABLE DOUBT THAT WESTBROOK USED HIS POSITION OF TRUST OR CONFIDENCE TO FACILITATE.

In Blakely v. Washington, 542 U.S. 296, 313-14,

124 S. Ct. 2531, 147 L. Ed. 2d 403 (2004), the United States Supreme Court held that a defendant has a Sixth Amendment right to have a jury determine, beyond a reasonable doubt, aggravating facts used to impose an exceptional sentence above the standard range. State v. Nuñez, 174 Wn.2d 707, 712, 285 P.3d 21 (2012). Here, the jury was instructed that the “State has the burden of proving the existence of the aggravating circumstance beyond a reasonable doubt.” [CP 113; Court’s Instruction 27].

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). And when a trial court acts beyond its statutory authority, the matter may be heard for the first time on appeal. State v. Moen, 129 Wn.2d 535, 545-46, 919 P.2d 69 (1996), A sentence in excess of statutory authority is subject to collateral attack. In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

The first amended information alleged in each of the four counts that Westbrook “used his position of trust or confidence to facilitate the crime contrary to RCW 9.94A.535.” [CP 154-56]. The Special Verdict Form, to which the jury answered “yes,” stated:

We, the jury, having found the defendant guilty of either Theft in the Second Degree, and/or Trafficking in Stolen Property in the First degree and/or Trafficking in Stolen Property in the Second Degree, return a special verdict by answering the following question submitted by the court as follows (emphasis in the original):

QUESTION: Did the Defendant use his position of trust or confidence to facilitate the commission of the crime?<sup>2</sup>

[CP 71].

With an offender score of 5, Westbrook's standard range for count I (theft in the second degree) was 4-12 months and for counts II-IV (trafficking in stolen property in the first degree) 22-29 months. [CP 52]. Based on the aggravating factor (abuse of trust or confidence) found by the jury [CP 71], the court imposed a sentence above the standard range for all counts [CP 53], thereby adding 12 months to the high end for count I (4-12 months + 12 months = 24 months) and 31 months to the high end for counts II-IV (22-29 months + 31 months = 60 months). [CP 54]. As the counts were to be served concurrently, Westbrook's exceptional sentence totaled 60 months.

The jury never made a finding as to which offense gave rise to the aggravating factor. Because of the imprecise language of the Special Verdict Form, there is no way of knowing whether any of the jurors found

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<sup>2</sup> Similar language appeared in Court's Instruction 27: "If you find the defendant guilty of theft in the second degree or trafficking in stolen property in the first or second degree, you will answer.... [CP 113].

that Westbrook used his position of trust or confidence to facilitate the commission of any of the trafficking offenses.<sup>3</sup> The form indicates that the jury, having found Westbrook guilty of either theft and/or trafficking, then found that he used “his position of trust or confidence to facilitate the commission of the crime (emphasis added)(.)” [CP 71]. Which crime? It remains possible the jury found that Westbrook used his position of trust or confidence to facilitate the theft but not the trafficking. There is no answer.

And this is not a distinction without a difference. As noted above, based on the Special Verdict Form, the court sentenced Westbrook to 24 months on the theft charge by adding 12 months to the high end of his standard range of 4-12 months, and to 60 months on the trafficking charges by adding 31 months to the high end of his standard range of 22-29 months. Since, as a result of the unartfull language of the Special Verdict Form, there is no way to determine whether the jury found beyond a reasonable doubt that Westbrook used his position of trust or confidence to facilitate the trafficking offenses or, for that matter, the theft offense, the court was without authority to impose the exceptional sentence for either offense, with the result that the case should be remanded for resentencing within Westbrook’s standard range.

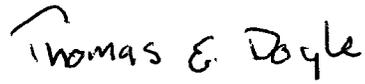
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<sup>3</sup> Of course the same can be said for the theft offense.

E. CONCLUSION

Based on the above, Westbrook respectfully requests this court to reverse his convictions in counts II-IV and/or to remand for resentencing consistent with the arguments presented herein.

DATED this 30<sup>th</sup> day of June 2013.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE  
Attorney for Appellant  
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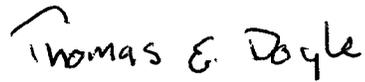
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Tim Higgs  
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DATED this 30<sup>th</sup> day of June 2013.



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**July 01, 2013 - 9:30 AM**

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