

No. 46428-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Bud Flowers,**

Appellant.

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Cowlitz County Superior Court Cause No. 13-1-01314-0

The Honorable Judge Marilyn K. Haan

**Appellant's Opening Brief**

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. The criminal attempt statute is unconstitutional because it was enacted in violation of Wash. Const. art. II, § 19.
2. The attempt statute was enacted as part of a bill that violated the single-subject rule.
3. The attempt statute was enacted as part of a bill that violated the subject-in-title rule.

**ISSUE 1:** Washington’s constitution requires that bills enacted into law embrace a single subject. The bill defining and classifying criminal attempts also created the “determinate plus” sentencing scheme for certain sex offenders, set forth a 60-month mandatory minimum for people convicted of sexually violent predator escape, changed the definition of that offense, elevated indecent liberties by forcible compulsion and second-degree assault with sexual motivation to class A felonies, created new alternate means of committing sexual misconduct with a minor in the first and second degrees, changed the qualifications for sex offender treatment providers treating sexually violent predators released to the community, and created qualified immunity and reporting duties for sex offender treatment providers treating certain sex offenders living in community settings. Is the criminal attempt statute unconstitutional because it was enacted in violation of art. II, § 19’s single subject rule?

**ISSUE 2:** Art. II, § 19 requires that the subject of a bill be expressed in its title. The statute defining and classifying criminal attempts was part of a bill captioned “AN ACT Relating to the management of sex offenders in the civil commitment and criminal justice systems... [and] prescribing penalties.” Was the criminal attempt statute enacted as part of a bill that violated the subject-in-title rule because the title contained no reference to many of the different subjects contained in the bill?

4. The court’s instruction defining “substantial step” impermissibly relieved the state of its burden of establishing every element of attempted murder in the first degree.

5. The court's instructions allowed conviction even absent proof that Mr. Flowers took a substantial step toward commission of first-degree murder.
6. The court's instructions on attempted murder failed to make the relevant legal standard manifestly clear to the average juror.

**ISSUE 3:** A conviction for attempt requires proof that the accused person took a "substantial step" toward commission of the crime charged; the phrase "substantial step" means "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 attempted murder in the first degree beyond a reasonable doubt, in violation of Mr. Flowers's Fourteenth Amendment right to due process?

7. The court abused its discretion by admitting exhibit 10B in violation of ER 402.
8. The court abused its discretion by admitting exhibit 10B in violation of ER 403.

**ISSUE 4:** Evidence is inadmissible if it is irrelevant or if its probative value is outweighed by the danger of confusion or unfair prejudice. Here, the court admitted a drawing of a homemade silencer over Mr. Flowers's objection even though there was no evidence regarding who had made the drawing, that Mr. Flowers had ever seen the drawing, or that a silencer was used in the crimes charged. Did the court abuse its discretion by admitting the exhibit?

9. Prosecutorial misconduct violated Mr. Flowers's Fourteenth Amendment right to a fair trial.
10. The prosecutor committed flagrant and ill-intentioned misconduct by arguing that the jury's role was to convict Mr. Flowers.

**ISSUE 5:** A jury's role is to determine whether the state has met its burden of proof; a prosecutor commits misconduct by arguing that the jury has some other duty. Here, the prosecutor argued in closing that the jury's role in the case was to find Mr. Flowers guilty. Did the prosecutorial misconduct violate Mr. Flowers's Fourteenth Amendment right to a fair trial?

11. The court erred by including four charges in the offender score that Mr. Flowers had stipulated were “pending.”
12. The sentencing court erred by sentencing Mr. Flowers with an offender score of 10 on count I.
13. The sentencing court erred by sentencing Mr. Flowers with an offender score of 9 on count II.

**ISSUE 6:** The state must present some evidence that a prior conviction exists in order to use it to increase the offender score at sentencing. Here, the court increased Mr. Flowers’s offender score based on four charges that were listed as “pending” in the agreed criminal history, absent any evidence that the charges resulted in conviction. Did the court err by increasing the offender score based on convictions Mr. Flowers had stipulated were “pending”?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Bud Flowers and Travis Russell were friends. RP 35-39. They made a plan with another friend to start an airbrush and tattoo shop. RP 38. They also planned to build and sell bicycles powered with two-stroke engines. RP 38. Mr. Flowers and the other friend invested money and Russell did the work. RP 39.

The group built a prototype bike. RP 40. At one point, Russell agreed to store the bike at Mr. Flowers's home and dropped it off there. RP 44. Later, Russell felt uncomfortable because the third business partner had funded the prototype. RP 45-46. Russell called Mr. Flowers, who agreed to come to Russell's home to talk. RP 46.

Later that evening, Russell stumbled from his house injured. RP 66-68, 201-03. He was taken to the hospital with gunshot wounds. RP 68-70. He told the police that Mr. Flowers had shot him. RP 66, 198, 203, 327. Mr. Russell survived his injuries. He was interviewed twice more by police. RP 350-53. He said that he did not have any idea why Mr. Flowers shot him. RP 73.

The state charged Mr. Flowers with attempted first-degree murder and unlawful possession of a firearm.<sup>1</sup> CP 1-2.

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<sup>1</sup> Mr. Flowers had a prior felony conviction. CP 3.

At trial, the state introduced a drawing the police got from Mr. Flowers's girlfriend's bag. RP 349-50; Ex 10B. The girlfriend had found the drawing outside of Mr. Flowers's apartment building on the ground. RP 245. The drawing depicted a homemade gun silencer. RP 245, 444-45; Ex 10B. The police did not know who had made the drawing. RP 445. Nothing in the record suggested that a silencer was involved in the shooting. *See RP, CP generally.*

Mr. Flowers objected. He noted the absence of evidence that he'd created – or had ever even seen – the drawing. RP 445. Mr. Flowers also objected that the drawing was irrelevant, and that it was more prejudicial than probative. RP 461-64. He pointed out the lack of evidence that Russell had been shot with a silenced gun. RP 464. The court overruled the objection and admitted the exhibit. RP 446, 464.

During closing argument, the prosecutor made use of the drawing. According to the state, the drawing of the silencer was evidence of premeditation. RP 600. The prosecutor argued that the jury could use the drawing as proof that Mr. Flowers had plotted to kill Russell. RP 600.

The prosecutor ended his argument as follows:

So, at this point, everybody's got a role in this case. Travis had a role. That role was fighting for his life and fighting to stay alive. The neighbors had a role. Helping Travis, seeing what happened, identifying the Defendant and his car. Dr. Morrison had a role. Saving Travis' life. The police had a role, finding the evidence.

Arresting the Defendant. Everybody's had their role. But now it is your turn and it is your role as jurors in this case, when you review all of the evidence, to find him guilty and I'd ask you to do that. Thank you.  
RP 632-33.

The court's instructions outlined the requirements for a guilty verdict on attempted premeditated murder. The court informed the jury it had to find that Mr. Flowers had taken a "substantial step" toward commission of premeditated murder. CP 25. The court defined substantial step as follows: "A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation." CP 26.

The jury found Mr. Flowers guilty as charged.

At sentencing, Mr. Flowers's defense counsel agreed to the state's statement of criminal history. RP 647. The statement included four pending felony charges. Prosecutor's Statement of Defendant's Criminal History, Supp CP. The state never presented any evidence that those charges ended in conviction. RP 647-62. Even so, the court increased Mr. Flowers's offender score by four points. CP 49.

This timely appeal follows. CP 62.

## ARGUMENT

**I. MR. FLOWERS WAS CONVICTED AND SENTENCED THROUGH OPERATION OF A STATUTE ENACTED IN VIOLATION OF WASH. CONST. ART. II, § 19.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *State v. Lynch*, 178 Wn.2d 487, 309 P.3d 482 (2013). 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 Wn.2d 818, 823, 203 P.3d 1044 (2009).

Statutes are presumed constitutional; the party challenging a statute’s constitutionality must demonstrate its unconstitutionality beyond a reasonable doubt. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000) *opinion corrected*, 27 P.3d 608 (2001). This standard is met when “argument and research show that there is no reasonable doubt that the statute violates the constitution.” *Id.*

B. The Washington constitution requires that all bills embrace a single subject, which must be expressed in the bill’s title.

Under Wash. Const. art. II, § 19, “No bill shall embrace more than one subject, and that shall be expressed in the title.” The provision is intended (a) to prevent “logrolling” (where a law is pushed through by attaching it to other legislation), and (b) “to notify members of the

Legislature and the public of the subject matter of the measure.”

*Amalgamated Transit Union*, 142 Wn.2d at 207.

For purposes of the subject-in-title rule, courts consider only the substantive language describing the bill. A title’s “mere reference to a section... does not state a subject.” *Patrice v. Murphy*, 136 Wn.2d 845, 853, 966 P.2d 1271 (1998) (internal quotation marks and citations omitted). This is so even if the numerical reference follows words such as “amending,” “adding new sections to,” or “repealing.” *Id.*; see also *Fray v. Spokane Cnty.*, 134 Wn.2d 637, 651-555, 952 P.2d 601 (1998). This is so because bare numeric references do not give adequate notice: “To say that mere reference to a numbered section embodies the idea of a theme, proposition, or discourse, it seems to us, is not sustained by the ordinary understanding of those terms.” *State v. Superior Court of King Cnty.*, 28 Wash. 317, 325, 68 P. 957 (1902).

The title of a bill may be general or restrictive. *Amalgamated Transit Union*, 142 Wn.2d at 207-208. Restrictive titles are “narrow, as opposed to broad;” the label applies whenever ““a particular part or branch of a subject is carved out and selected as the subject of the legislation.”” *State v. Broadaway*, 133 Wn.2d 118, 127, 942 P.2d 363 (1997) (quoting *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 23, 211 P.2d 651 (1949)),

*overruled on other grounds by State ex rel. Washington State Finance Commission v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963)).

Restrictive titles will not be regarded as liberally as general titles; any provision not fairly within a restrictive title will not be given force. *Amalgamated Transit Union*, 142 Wn.2d at 210. Violations of art. II, § 19 “are more readily found where a restrictive title is used.” *Id.*, at 211. Examples of restrictive titles include “An act relating to the acquisition of property by public agencies,” “An act relating to local improvements in cities and towns,” “An act relating to increasing penalties for armed crime.” *Id.*

General titles, on the other hand, are “broad rather than narrow.” *Amalgamated Transit Union*, 142 Wn.2d at 207-208. They “may be comprehensive and generic rather than specific.” *Id.* A statute enacted under a general title is invalid unless there is “rational unity between the general subject and the incidental subjects.” *Id.*, at 209. Examples of general titles include “An Act relating to violence prevention,” “An Act relating to tort actions.” *Id.*, at 208 (providing examples).

The single-subject rule provides legislators “the opportunity to consider legislative subjects in separate bills, so that each subject may stand or fall upon its own merits or demerits.” *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 525, 304 P.2d 676 (1956). The relevant

inquiry is whether “the body of the act contain[s] more than one general subject...” *Id.*, at 523. Part of the analysis turns on whether either subject is “necessary to implement the other.” *Amalgamated Transit Union*, 142 Wn.2d at 217. A statute passed in violation of the single subject rule is unconstitutional and therefore void. *Id.*, at 216; *Toll Bridge*, 49 Wn2d at 525.

For example, in *Toll Bridge*, the Supreme Court invalidated an act because it embraced two subjects: “(1) To provide legislation, permanent in character, empowering a state agency to establish and operate all toll roads, and (2) to provide for the construction of a specific toll road linking Tacoma, Seattle, and Everett.” *Toll Bridge*, 49 Wn.2d at 523. Similarly, in *Amalgamated Transit Union*, the Court found that in I-695 embraced two different purposes: “to specifically set license tab fees at \$30 and to provide a continuing method of approving all future tax increases.” *Amalgamated Transit Union*, 142 Wn.2d at 217.

C. The criminal attempt statute was enacted as part of a bill that violated both the subject-in-title and single-subject rules.

RCW 9A.28.020 criminalizes attempt. The current version of the statute was enacted in 2001. Laws of 2001, 2nd sp. s. ch. 12, § 354. The title of the enacting bill was “AN ACT Relating to the management of sex

offenders in the civil commitment and criminal justice systems... [and] prescribing penalties.” Laws of 2001, 2nd sp. s. ch. 12.

1. The subjects addressed by the bill are not encompassed by the bill’s title.

The bill enacting the current incarnation of the criminal attempt statute was titled “AN ACT Relating to the management of sex offenders in the civil commitment and criminal justice systems... [and] prescribing penalties.”<sup>2</sup> The subjects addressed by the bill did not fall within this title.

The title here is restrictive. *Amalgamated Transit Union*, 142 Wn.2d at 207-208. The title has “carved out and selected” “a particular part or branch of a subject.” *Broadaway*, 133 Wn.2d at 127 (citations and internal quotation marks omitted).

The phrase “the management of sex offenders in the civil commitment and criminal justice systems” is even more restrictive than the examples of restrictive titles given in *Amalgamated Transit Union*: “the acquisition of property by public agencies,” “local improvements in cities and towns,” “increasing penalties for armed crime.” *Amalgamated*

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<sup>2</sup> This court recently held that the amendments to the attempt statute did not violate the subject-in-title rule because the statutory provision was included in the list of amended sections following the bill’s title. *State v. Alexander*, No. 44351-1-II, 2014 WL 6945311, at \*3, --- Wn. App. ---, --- P.3d --- (Dec. 9, 2014). But the Supreme Court has explicitly held that a ministerial recitation of statutory provisions does not comprise part of the bill’s title for constitutional purposes. *Patrice*, 136 Wn.2d at 853; *Fray*, 134 Wn.2d at 651-555. The reasoning of *Alexander* is directly foreclosed by Supreme Court precedent. That case was wrongly decided, and should be revisited.

*Transit Union*, 142 Wn.2d at 211. It is not akin to the examples of general titles listed in that case: “violence prevention,” “tort actions.”

*Amalgamated Transit Union*, 142 Wn.2d at 208.<sup>3</sup>

Because the title is restrictive, provisions that are not fairly within it have no force. *Amalgamated Transit Union*, 142 Wn.2d at 210. The criminal attempt statute is not fairly within the title.<sup>4</sup> Criminal attempt has nothing to do with the management of sex offenders.<sup>5</sup> Accordingly, it is not “fairly within [the title, and thus] will not be given force.”

*Amalgamated Transit*, 142 Wn.2d at 210. Because the definition of attempt is not “fairly within” the bill’s purpose of management of sex offenders, RCW 9A.28.020 was amended in violation of the subject-in-title rule. *Id.*<sup>6</sup>

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<sup>3</sup> Had the bill been titled “An Act relating to sex offenders,” it might have qualified as a general title.

<sup>4</sup> Many of the bill’s other provisions do not relate to the management of sex offenders in either the criminal or the civil commitment systems.

<sup>5</sup> The amendments to the criminal attempt statute would arguably fall within an act limited to “prescribing penalties” (the second part of the bill’s title). But there is no authority that permits a court to ignore the main part of a bill’s title. Of course, the problem does not arise in bills that actually follow the constitution’s single-subject rule.

<sup>6</sup> The *Alexander* court held that the bill’s title was general, rather than restrictive. *Alexander*, No. 44351-1-II, 2014 WL 6945311, at \*5, --- Wn. App. ---. As outlined above, that holding contradicts the Supreme Court’s clear guidance regarding general and restrictive titles as set forth in *Amalgamated Transit*. *Amalgamated Transit Union*, 142 Wn.2d at 208. *Alexander* was wrongly decided. Additionally, even if the more liberal general title rule controlled, the criminal attempt statute is not even rationally related to the management of sex offenders. *Amalgamated Transit Union*, 142 Wn.2d at 209. The provision fails under both analyses.

The criminal attempt statute was enacted as part of a bill that violates the subject-in-title rule. Accordingly it is unconstitutional. *Amalgamated Transit Union*, 142 Wn.2d at 210. Because he was found guilty of violating an unconstitutional statute, Mr. Flowers's conviction must be vacated and the charge dismissed with prejudice.

2. The bill addressed many different subjects.

The bill at issue here violates the single subject rule because each provisions is not related to the others.<sup>7</sup> *Amalgamated Transit Union*, 142 Wn.2d at 212; *Washington Toll Bridge*, 49 Wn.2d at 525. In addition to reenacting and amending the criminal attempt statute, the bill addressed a variety of subjects.

A large portion of the bill addressed transitional facilities for sexually violent predators released to less restrictive alternatives. Laws of 2001, 2nd sp. s. ch. 12, §§ 201-226. Among other things, these provisions authorized DSHS to set up a transitional facility on McNeil Island,

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<sup>7</sup> The *Alexander* court conflates the requirement that the bill's provisions be rationally related to one another with the requirement that they be rationally related to the bill's title. *Alexander*, No. 44351-1-IL, 2014 WL 6945311, at \*4-6, --- Wn. App. ---. The Supreme Court has made plain, however, that the constitutional analysis is founded not upon the bill's title, but upon "whether a measure is drafted in such a way that those voting on it may be required to vote for something of which the voter disapproves in order to obtain approval of an unrelated law." *Amalgamated Transit Union*, 142 Wn.2d at 212. Insofar as it fails to address this inquiry, *Alexander* was wrongly decided.

provided incentives for localities to construct other such facilities, and placed restrictions on the location of potential transitional facilities.

The majority of the bill fell under the heading “sentencing structure.” This portion of the bill addressed provisions of the SRA and RCW 9.95. It included §354, which set forth amendments to the criminal attempt statute. These amendments added certain sex crimes to the list of attempts that qualify as class A felonies. Laws of 2001, 2nd sp. s. ch. 12, § 354.

The section captioned “sentencing structure” embraced other subjects as well. It set up the determinate-plus sentencing scheme.<sup>8</sup> Laws of 2001, 2nd sp. s. ch. 12, §§ 303-304. It set a mandatory minimum of 60 months for sexually violent predator escape, and changed the definition of that offense. Laws of 2001, 2nd sp. s. ch. 12, §§ 315, 360. It created a new means of committing sexual misconduct, criminalizing sexual contact between school employees and students. Laws of 2001, 2nd sp. s. ch. 12, §§ 357-358. It elevated assault with sexual motivation and indecent liberties by forcible compulsion to class A felony status. Laws of 2001, 2nd sp. s. ch. 12, §§ 355, 359.

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<sup>8</sup> The determinate plus system applies to certain sex offenders who are not persistent offenders. It requires imposition of the statutory maximum and a parole date. Laws of 2001, 2nd sp. s. ch. 12, §§ 303-304.

Another part of the bill was captioned “sex offender treatment providers.” Among other things, it established qualifications for providers who treat sexually violent predators in transitional facilities. 2001 Wash. Legis. Serv. 2nd Sp. Sess. Ch. 12, § 402. It also created limited immunity for such providers, and for providers who treat level III sex offenders on community custody. 2001 Wash. Legis. Serv. 2nd Sp. Sess. Ch. 12, § 403.

As this summary shows, the bill embraced numerous subjects. The statute criminalizing attempt bears no relationship to transitional facilities for civil detainees committed under RCW 71.09. Nor does it relate to the definition of sexually violent predator escape, or the mandatory minimum for that offense. It does not relate to sex between school employees and students, the classification of assault with sexual motivation or indecent liberties by forcible compulsion, the qualifications of sex offender treatment providers, or limitations on civil liability for such providers.

Nor is the provision on criminal attempt “necessary to implement the other” provisions. *Amalgamated Transit Union*, 142 Wn.2d at 217. It is not necessary to implement sections regarding the civil management of sex offenders, the licensing of treatment providers, and the other subjects covered by the bill. *Id.*

The statute criminalizing attempt was enacted in a bill that embraced multiple subjects. Accordingly it is void under Wash. Const.

art. II, § 19. *Amalgamated Transit Union*, 142 Wn.2d at 216; *Toll Bridge*, 49 Wn.2d at 525. It has not been resuscitated by reenactment or amendment since 2001. *See Morin v. Harrell*, 161 Wn.2d 226, 228, 164 P.3d 495 (2007) (a proper “amendment or reenactment cures the art. II, § 19 defect.”) Accordingly, the law is unconstitutional.

Because he was found guilty of violating an unconstitutional statute, Mr. Flowers’s conviction must be vacated and the charge dismissed with prejudice. *Amalgamated Transit Union*, 142 Wn.2d at 207.

**II. MR. FLOWERS’S CONVICTION FOR FIRST-DEGREE ATTEMPTED MURDER VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME.**

**A. Standard of Review**

Constitutional violations are reviewed *de novo*. *Lynch*, 178 Wn.2d 487. Jury instructions are also reviewed *de novo*. *State v. McCreven*, 170 Wn. App. 444, 461, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyлло*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).<sup>9</sup> Even if not manifest, an error may nonetheless be reviewed as a matter of discretion under RAP 2.5. *See State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

Due process requires the prosecution to prove every element of a charged crime. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A trial court's failure to instruct the jury as to every element violates due process. U.S. Const. Amend. XIV; *Haberman*, 105 Wn. App. at 935. 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 Wn.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

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<sup>9</sup> This error, which implicates Mr. Flowers's due process right to have the jury instructed on each element of the offense is one of constitutional magnitude. *State v. Haberman*, 105 Wn. App. 926, 935, 22 P.3d 264 (2001).

Additionally, an error is manifest if it "actually affected [the defendant's] rights at trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). To secure review, an appellant need only make "a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." *Id.* (emphasis added). The appellant must show that the trial judge could have foreseen and corrected the error and that the record contains sufficient facts to review the claim. *Id.* Here, all of the facts necessary for review are contained in the jury instructions. Likewise, the trial judge could have foreseen the error through careful reading of the instructions and the Supreme Court's precedent in *Workman*. *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978). The error is reviewable under RAP 2.5(a)(3).

did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

C. The court's instructions relieved the state of its burden to prove that Mr. Flowers engaged in conduct corroborating the intent to commit the specific crime of murder in the first degree.

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." *Workman*, 90 Wn.2d at 451; *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995).

In this case, the trial court gave an instruction that differed from the definition of "substantial step" adopted by the *Workman* court. The court's instruction defined "substantial step" (in relevant part) as "conduct that strongly *indicates a* criminal purpose..." CP 26 (emphasis added). This instruction is 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. 8 removed this requirement by employing the word "indicate" instead of "corroborate;" under Instruction No. 8 there is no requirement that intent be established by independent proof and corroborated by the accused's conduct. CP 26.

Second, Instruction No. 8 requires only that the conduct indicate *a criminal purpose*, rather than *the* criminal purpose. This is analogous to the problem addressed by the Supreme Court in cases involving accomplice liability. *See State v. Roberts*, 142 Wn.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 Wn.2d 568, 14 P.3d 752 (2000).

As in *Roberts* and *Cronin*, the language used in Instruction No. 8 permits conviction if the accused person's conduct strongly indicates intent to commit *any* crime. The end result was that the prosecution was relieved of its duty to establish by proof beyond a reasonable doubt every element of attempted murder. Under the instructions as given, the prosecution was not required to provide independent corroboration of Mr. Flowers's alleged criminal intent; nor was it required to show that his

conduct strongly corroborated his intent to commit the particular crime of first degree murder.

Division II has recently rejected this argument. *State v. Davis*, 174 Wn. App. 623, 635-38, 300 P.3d 465 (2013) *review denied*, 88878-7, 2013 WL 5493682 (Wash. Oct. 2, 2013). The *Davis* court found that the definition of “substantial step” adopted in *Workman* was not mandatory. This is both right and wrong. *Workman* did not hold that a trial court *must* define the phrase “substantial step” for the jury. However, under *Workman*, if the court’s instructions did include a definition, the definition should be as set forth in *Workman*:

We find it appropriate to adopt the Model Penal Code approach to the definition of a substantial step... This approach does not conflict with the doctrine already developed in this state regarding the crime of attempt....It does, however, give full recognition to the changes in the statute adopted by the legislature. We therefore hold it would be proper for a trial court to include in its instruction to a jury on the crime of attempt the qualifying statement that in order for conduct to be a substantial step it must be strongly corroborative of the actor's criminal purpose.

*Workman*, 90 Wn.2d at 452.

A trial court has broad discretion when asked to define words of common understanding. *State v. Cross*, 156 Wn.2d 580, 617, 132 P.3d 80 (2006). However, once the decision is made to give a definition, that definition must be correct. Here, *Workman* provides the proper definition. *Davis* was decided incorrectly, and should be reconsidered.

Mr. Flowers's conviction must be reversed and the case remanded for a new trial. *Brown*, 147 Wn.2d 330.

**III. THE COURT ERRED BY ADMITTING IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE.**

A. Standard of Review.

Evidentiary rulings are reviewed for abuse of discretion. *In re Det. of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.*

B. The court abused its discretion by admitting a drawing of a homemade gun silencer when there was no evidence linking it to Mr. Flowers or to the charged offenses.

Irrelevant evidence is not admissible. ER 401, 402. Even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury. ER 403.

The court must balance the probative value and risk of unfair prejudice on the record. *State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d 503 (2004). An evidentiary error requires reversal if, within a reasonable probability, it materially affected the outcome of the trial. *Id.* at 438.

Here, the court erred by admitting a drawing of a homemade gun silencer found in Mr. Flowers's girlfriend's bag. RP 245, 444-45; Ex 10B. Over Mr. Flowers's objection, the court admitted the drawing even though

no witness could identify the artist or testify that Mr. Flowers had ever even seen the drawing. RP 461-64.

The evidence was not relevant to Mr. Flowers's case. There was no allegation that the person who shot Russell had used a silencer. *See RP generally*. There was also no evidence linking Mr. Flowers to the drawing of the silencer. RP 445. The drawing was not relevant to any element of the offenses with which Mr. Flowers was charged.

The evidence also carried a high risk of unfair prejudice to Mr. Flowers. First, the prosecution used the drawing to support its theory regarding the primary issue at trial – whether the state had proved premeditation. The prosecutor argued in closing that the drawing was evidence that Mr. Flowers had plotted to kill Russell. RP 600.

Second, the drawing allowed jurors to associate Mr. Flowers with weapons, in general. This pertained to an additional weakness in the state's case. The gun used to shoot Russell was never recovered. *See RP generally*. Nor were any other guns found in Mr. Flowers's home or on his person. RP 439-48, 247.

The court erred by admitting irrelevant evidence whose risk of unfair prejudice and confusion outweighed any probative value. *Id*; ER 402, 403. Mr. Flowers's conviction must be reversed. *Acosta*, 123 Wn. App. at 443.

**IV. PROSECUTORIAL MISCONDUCT DEPRIVED MR. FLOWERS OF A FAIR TRIAL.**

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.* A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

B. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by arguing that the jury's "role" was to convict Mr. Flowers.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

In a criminal trial, the jury’s role is to determine whether the state has met its burden of proof beyond a reasonable doubt. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). A prosecutor commits misconduct by arguing that the jury has some other responsibility. *Id.*

Here, the prosecutor committed misconduct by arguing in closing that the jury’s role was to find Mr. Flowers guilty. RP 633. That argument was improper because it misstated the jury’s responsibility. *Emery*, 174 Wn.2d at 760.

Numerous published cases have enumerated the jury’s role and admonished prosecutors against arguing that it is anything less than determining whether the state has met its burden. *Id.*; *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009); *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011), *as amended (Nov. 18, 2011)*, *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012). The prosecutor was on notice that such arguments are highly improper.

Despite this, the prosecutor argued that the jury's role was to convict Mr. Flowers. Accordingly, the prosecutor's misconduct was flagrant and ill-intentioned.

Mr. Flowers was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704. The evidence of premeditation in Mr. Flowers's case was slim. The improper comment on the jury's "role" encouraged the jury to convict even if they had reasonable doubt regarding the elements of the charges. There is a substantial likelihood that the prosecutorial misconduct affected the verdict in Mr. Flowers's trial. *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by arguing in closing that the jury's role was to find Mr. Flower's guilty. *Id.*; *Emery*, 174 Wn.2d at 760; *Walker*, 164 Wn. App. at 732. Mr. Flowers's convictions must be reversed.

**V. THE SENTENCING COURT MISCALCULATED MR. FLOWERS'S OFFENDER SCORE.**

**A. Standard of Review.**

An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013).

B. The court erred by increasing Mr. Flowers's offender score based on pending charges, absent any evidence that the charges resulted in conviction.

In order for a prior conviction to be included in an offender score calculation, the state must prove that the conviction occurred by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). Bare assertions on the part of the state fail to meet this burden. *Id.* The state must introduce "evidence of some kind to support the alleged criminal history." *Id.*

Here, the state filed a statement of Mr. Flowers's criminal history several months before the trial. Prosecutor's Statement of Defendant's Criminal History, Supp CP. Defense counsel agreed to the accuracy of that statement at sentencing. RP 647.

The state's recitation of Mr. Flowers's criminal history included four pending charges. Prosecutor's Statement of Defendant's Criminal History, Supp CP. The state never presented any evidence that those charges resulted in conviction. RP 647-62. Mr. Flowers did not make an agreement to that effect. RP 647-62. Still, the court used the charges to increase Mr. Flowers's offender score by four points. CP 49.

The court erred by increasing Mr. Flowers's offender score based on these four pending charges, absent any evidence that they ended in

conviction. *Hunley*, 175 Wn.2d at 909. Mr. Flowers's case must be remanded for resentencing. *Id.*

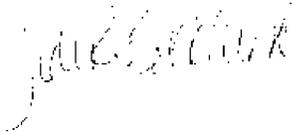
### **CONCLUSION**

Mr. Flowers's attempted murder conviction rests on a statute enacted in violation of the single-subject and subject-in-title rules. The court's instructions defining the requirements for conviction of attempted murder violated due process by relieving the state of its burden to prove each element beyond a reasonable doubt. The court abused its discretion by admitting irrelevant and highly prejudicial evidence. The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct in closing argument by claiming that the jury's role was to find Mr. Flowers guilty. For all these reasons, Mr. Flowers's convictions must be reversed.

In the alternative, the sentencing court erred by increasing Mr. Flowers's offender score based on charges that Mr. Flowers agreed were "pending," despite the absence of proof that the charges resulted in convictions. Mr. Flowers's case must be remanded for resentencing.

Respectfully submitted on December 22, 2014,

**BACKLUND AND MISTRY**



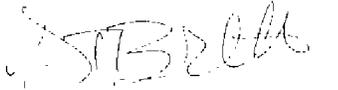
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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Bud Flowers, DOC #817430  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

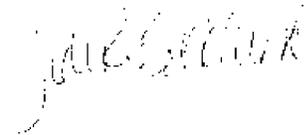
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz 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 December 22, 2014.



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## BACKLUND & MISTRY

December 22, 2014 - 2:10 PM

### Transmittal Letter

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