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Division III
State of Washington

No. 29832-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Darrell Smith,

Appellant.

Grant County Superior Court Cause No. 10-1-00119-3

The Honorable Judge Evan Sperline

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 iv

ASSIGNMENTS OF ERROR 9

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 11

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 13

ARGUMENT 18

I. The jury’s consideration of extrinsic evidence not admitted at trial violated Mr. Smith’s right to due process under the Fourteenth Amendment and Article I, Section 3..... 18

A. Standard of Review 18

B. Mr. Smith’s convictions must be reversed because the jury’s consideration of extrinsic evidence “could have” influenced the verdicts. 18

II. The prosecutor violated the Privacy Act by playing for the jury an illegally recorded conversation. 21

A. Standard of Review 21

B. The police unlawfully recorded Mr. Smith’s statements without his knowledge or consent..... 21

III.	Mr. Smith was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.	23
A.	Standard of Review.....	23
B.	The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.	24
C.	Defense counsel provided ineffective assistance by failing to object to the extrinsic evidence on Privacy Act grounds.....	25
IV.	Errors in the court’s instructions infringed Mr. Smith’s right to due process under the Fourteenth Amendment and Article I, Section 3.	26
A.	Standard of Review.....	26
B.	The court’s nonstandard “to convict” instructions allowed the jury to convict even in the absence of proof beyond a reasonable doubt.....	27
C.	The court’s nonstandard introductory instructions failed to provide adequate guidelines for the jury’s deliberations.....	29
V.	Mr. Smith’s conviction in Count V violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.	32
A.	Standard of Review.....	32
B.	The evidence was insufficient to prove that Mr. Smith possessed a measurable amount of methamphetamine.	32
VI.	The sentencing court’s finding regarding Mr. Smith’s present or future ability to pay his legal financial obligations is not supported by the record.	40

CONCLUSION 40

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)	27
<i>Connecticut v. Johnson</i> , 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983).....	27
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	22
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .	25, 27
<i>Smalis v. Pennsylvania</i> , 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).....	38
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	23, 24
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).....	25, 27
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).....	27
<i>United States v. Salemo</i> , 61 F.3d 214 (3rd Cir. 1995)	22

WASHINGTON STATE CASES

<i>Bellevue School Dist. v. E.S.</i> , 171 Wash.2d 695, 257 P.3d 570 (2011) ...	17, 25, 31
<i>In re Detention of Anderson</i> , 166 Wash.2d 543, 211 P.3d 994 (2009).....	31
<i>In re Fleming</i> , 142 Wash.2d 853, 16 P.3d 610 (2001).....	22
<i>In re Hubert</i> , 138 Wash.App. 924, 158 P.3d 1282 (2007).....	24

<i>State v. Bashaw</i> , 169 Wash.2d 133, 234 P.3d 195 (2010)	25
<i>State v. Bennett</i> , 161 Wash.2d 303, 165 P.3d 1241 (2007)	26
<i>State v. Bertrand</i> , ___ Wash.App. ___, 267 P.3d 511 (2011)	39
<i>State v. Boling</i> , 131 Wash.App. 329, 127 P.3d 740 (2006)	18, 19
<i>State v. Bradshaw</i> , 152 Wash.2d 528, 98 P.3d 1190 (2004).....	35, 37
<i>State v. Chavez</i> , 163 Wash.2d 262, 180 P.3d 1250 (2008).....	37
<i>State v. Christensen</i> , 153 Wash.2d 186, 102 P.3d 789 (2004).....	20, 21
<i>State v. Cleppe</i> , 96 Wash.2d 373, 635 P.2d 435 (1981)	37
<i>State v. Depaz</i> , 165 Wash.2d 842, 204 P.3d 217 (2009).....	17
<i>State v. Engel</i> , 166 Wash.2d 572, 210 P.3d 1007 (2009)	20, 31
<i>State v. Goodman</i> , 150 Wash.2d 774, 83 P.3d 410 (2004).....	37
<i>State v. Hendrickson</i> , 129 Wash.2d 61, 917 P.2d 563 (1996)	24
<i>State v. Horton</i> , 136 Wash.App. 29, 146 P.3d 1227 (2006)	22
<i>State v. Hudson</i> , 150 Wash.App. 646, 208 P.3d 1236 (2009)	17
<i>State v. Johnson</i> , 137 Wash.App. 862, 155 P.3d 183 (2007).....	18
<i>State v. Kylo</i> , 166 Wash.2d 856, 215 P.3d 177 (2009)	24, 25, 27, 30
<i>State v. Larkins</i> , 79 Wash.2d 392, 486 P.2d 95 (1971).....	35, 36, 38
<i>State v. Malone</i> ; 72 Wash.App. 429, 864 P.2d 990 (1994).....	36, 37
<i>State v. Pete</i> , 152 Wash.2d 546, 98 P.3d 803 (2004).....	17, 18
<i>State v. Porter</i> , 98 Wash.App. 631, 990 P.2d 460 (1999)	21, 22
<i>State v. Reichenbach</i> , 153 Wash.2d 126, 101 P.3d 80 (2004)	23, 24
<i>State v. Rowell</i> , 138 Wash.App. 780, 158 P.3d 1248 (2007).....	36, 37

<i>State v. Russell</i> , 171 Wash.2d 118, 249 P.3d 604 (2011)	20
<i>State v. Saunders</i> , 91 Wash.App. 575, 958 P.2d 364 (1998)	25
<i>State v. Staley</i> , 123 Wash.2d 794, 872 P.2d 502 (1994)	37
<i>State v. Williams</i> , 62 Wash.App. 748, 815 P.2d 825 (1991), <i>review denied</i> , 118 Wash.2d 1019, 827 P.2d 1012 (1992) (“ <i>Williams II</i> ”)	36
<i>State v. Williams</i> , 94 Wash.2d 531, 617 P.2d 1012 (1980) (“ <i>Williams I</i> ”)	20, 21

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI	21, 22
U.S. Const. Amend. XIV	7, 9, 10, 16, 18, 21, 22, 24, 30
Wash. Const. Article I, Section 22	22
Wash. Const. Article I, Section 3	7, 9, 16, 18, 24

WASHINGTON STATUTES

RCW 69.50.4013	30, 37
RCW 9.73.030	20, 21
RCW 9.73.050	19, 20, 21
RCW 9.73.090	20, 21, 23
RCW 9A.04.060	36

OTHER AUTHORITIES

<i>Arizona v. Cheramie</i> , 189 P.3d 374 (2008)	33
<i>Arizona v. Moreno</i> , 374 P.2d 872 (1962)	33
<i>California v. Rubacalba</i> , 859 P.2d 708 (1993)	31

<i>Costes v. Arkansas</i> , 287 S.W.3d 639 (2008).....	31
CrR 7.5.....	16, 17
<i>Dawkins v. Maryland</i> , 547 A.2d 1041 (1988)	34
<i>Doe v. Bridgeport Police Dept.</i> , 198 F.R.D. 325 (2001)	31
<i>Finn v. Kentucky</i> , 313 S.W.3d 89 (2010).....	32
<i>Garner v. Texas</i> , 848 S.W.2d 799 (1993).....	32
<i>Gilchrist v. Florida</i> , 784 So.2d 624 (2001)	32
<i>Hawaii v. Hironaka</i> , 53 P.3d 806 (2002).....	32
<i>Head v. Oklahoma</i> , 146 P.3d 1141 (2006).....	32
<i>Hudson v. Mississippi</i> , 30 So.3d 1199 (2010)	32
<i>Idaho v. Rhode</i> , 988 P.2d 685 (1999)	32
Kentucky Revised Statutes §218A.1415.....	37
<i>Lord v. Florida</i> , 616 So.2d 1065 (1993).....	31, 32
<i>Louisiana v. Joseph</i> , 32 So.3d 244 (2010).....	31
<i>Massachussetts v. Caramanica</i> , 729 N.E.2d 656 (2000).....	26
<i>Missouri v. Taylor</i> , 216 S.W.3d 187 (2007)	32
<i>New Jersey v. Wells</i> , 763 A.2d 1279 (2000).....	32
<i>New York v. Mizell</i> , 532 N.E.2d 1249 (1988).....	32
<i>North Carolina v. Davis</i> , 650 S.E.2d 612 (2007)	32
<i>Ohio v. Eppinger</i> , 835 N.E.2d 746 (2005).....	32
RAP 2.5.....	19
<i>South Carolina v. Robinson</i> , 426 S.E.2d 317 (1992).....	32

<i>Torrence v. Florida</i> , 574 So.2d 1188 (1991).....	26
WPIC 1.02.....	27, 29
WPIC 35.19.....	26
WPIC 5.01.....	27
WPIC 6.51.....	27

ASSIGNMENTS OF ERROR

1. Mr. Smith's convictions were entered in violation of his due process rights under the Fourteenth Amendment and Wash. Const. Article I, Section 3.
2. The trial judge erred by agreeing to replay a recorded interview of Mr. Smith during jury deliberations.
3. The jury's consideration of extrinsic evidence prejudiced Mr. Smith.
4. The trial judge erred by refusing to instruct the jury to disregard extrinsic evidence to which they had been improperly exposed.
5. The trial judge abused his discretion by refusing to grant Mr. Smith's motion for a new trial.
6. The trial court erred by entering Finding of Fact No. 1 in its Order Denying Defendant's Motion for New Trial (CP 138).
7. The trial court erred by admitting an illegally recorded conversation that did not fit within an exception to the Privacy Act.
8. The Grant County Jail unlawfully recorded Mr. Smith's telephone calls without obtaining prior consent from all parties to each conversation.

9. Defense counsel was ineffective for failing to object to inadmissible and prejudicial evidence.
10. Defense counsel unreasonably failed to argue that the jury's use of extrinsic evidence that had been illegally recorded violated the Privacy Act.
11. The court's nonstandard "to convict" instructions erroneously permitted conviction in the absence of proof beyond a reasonable doubt.
12. The court's nonstandard "to convict" instructions erroneously instructed jurors that they "should" acquit Mr. Smith if the evidence was insufficient.
13. The evidence was insufficient to prove that Mr. Smith unlawfully possessed methamphetamine.
14. The prosecution failed to prove that Mr. Smith possessed a sufficient quantity of methamphetamine to warrant conviction.
15. The sentencing court erred by finding that Mr. Smith has the ability or likely future ability to pay his legal financial obligations.

16. The sentencing court erred by adopting Finding No. 2.5 (Judgment and Sentence).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal conviction must be overturned where juror deliberations are tainted by extrinsic evidence. In this case, the court allowed jurors to hear an incriminating recording that had not been admitted into evidence, and refused to instruct the jury to disregard the extrinsic material. Did Mr. Smith's convictions violate Mr. Smith's right to due process under the Fourteenth Amendment and Wash. Const. Article I, Section 3?

2. A recorded conversation is inadmissible at trial unless it was made in strict compliance with the Privacy Act. Here, the prosecution played for the jury a recorded conversation made in violation of the Privacy Act. Did the erroneous exposure of the jury to an illegally recorded conversation violate Mr. Smith's rights under the Privacy Act?

3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to object under the Privacy Act when the prosecutor erroneously played an illegally recorded conversation for the Jury. Was Mr. Smith

denied his right to the effective assistance of counsel by his attorney's unreasonable failure to argue a Privacy Act violation?

4. In a criminal case, the jury must be instructed on its obligation to acquit if the evidence is insufficient to prove the elements of the offense beyond a reasonable doubt. In this case, the court's nonstandard "to convict" instructions told jurors they "should" acquit if the evidence was insufficient. Did the court's instructions relieve the prosecution of its burden to prove the elements of each offense, in violation of Mr. Smith's state and federal due process rights?

5. To convict Mr. Smith of Possession of a Controlled Substance, the prosecution was required to prove that he possessed a sufficient quantity of drugs to warrant a felony charge. At trial, the evidence established only that he possessed methamphetamine residue. Did Mr. Smith's possession conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?

6. A court may not find that an offender has the ability or likely future ability to pay legal financial obligations, absent some support in the record for the finding. Here, the sentencing court made such a finding in the absence of any supporting evidence in the record. Was the sentencing court's finding clearly erroneous?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Eric Chadwick, Desert Donini and Darrell Smith all lived at the Sage and Sand Motel in Moses Lake. RP (1/20/11) 72-73, 118; RP (1/21/11) 140-141, 143; RP (1/24/11) 311, 319. When Donini became homeless, Chadwick offered to share his room with her, and she stayed with him for a few days. RP (1/21/11) 141-143; RP (1/24/11) 311-312, 449-450.

On the night of February 26, the three of them visited two area Walmarts. They purchased items using Chadwick's debit card, and stole a computer by placing it inside a dog house box, paying only for the dog house when they went through the check-out line. RP (1/24/11) 380-382, 384-391, 420-427, 452, 473-480; RP (1/25/11) 497-499. Video surveillance established that Chadwick entered Walmart unaccompanied by Mr. Smith. RP (1/24/11) 478; RP (1/25/11) 492, 524.

Chadwick later called the police. RP (1/20/11) 55. He claimed that Mr. Smith had threatened him with a knife, had stolen his wallet and money, had tied him up, had forced him to drive to the two Walmarts, and had forced him to assist in the thefts. RP (1/20/11) 55-59, 71, 95; RP (1/24/11) 455-504.

Mr. Smith was arrested and interviewed. The officer who took Mr. Smith's statement used a small audio recording device visible to Mr.

Smith. The interview room was also equipped with a video surveillance system, which recorded the interaction as well. RP (1/21/11) 158; RP (3/22/11) 59-64; Ex 93, 94. At the conclusion of the interview, the officer noted the time and announced that he was stopping the recording. Ex. 93. The video system continued to record Mr. Smith's statements, even after the officer's recording device was turned off. RP (3/22/11) 59-64.

The state charged Mr. Smith with Robbery in the First Degree, Kidnapping in the First Degree, Burglary in the First Degree,¹ Assault in the Second Degree, Possession of Methamphetamine,² Felony Harassment (threats to kill), and Theft in the Second Degree. CP 1-6. Donini was charged with robbery and kidnapping. RP (1/24/11) 309.

At trial, the state offered excerpts of the audio/video recording of Mr. Smith's statement. RP (1/21/11) 198-203, 249-251. The parties agreed to redactions of the video. RP (1/21/11) 130-134, 198-199. Based on the agreed redactions, the prosecutor muted portions of the video when it was played for the jury, and stopped playback at the conclusion of the

¹ Mr. Smith's conviction on the burglary charge was later reversed because of an error in the court's instructions. RP (3/22/11) 56-58.

² This was based on residue found in Mr. Smith's motel room. RP (1/21/11) 170, 189-190; RP (1/24/11) 273-274, 279.

agreed-upon excerpts. RP (1/21/11) 204-205, 237-240, 248-251; RP (3/22/11) 59-64.

The video consisted primarily of statements by the officer. Mr. Smith's contribution to the recording consisted primarily of requests to the officer: the video shows him begging for information and for lenient treatment.³ Ex. 93, 94. When the prosecutor played the recording, the court instructed jurors not to consider muted portions of the video. RP (1/21/11) 248; RP (3/22/11) 60.

Hoping for consideration from the state, Donini testified against Mr. Smith at trial. She told the jury that she and Mr. Smith had planned a kidnapping and robbery together, and denied that Chadwick was involved in the scheme. RP (1/24/11) 309-311, 317-364, 377. Chadwick also denied his own involvement, although he admitted he was motivated to help Donini and acknowledged that he was not held responsible for any of the purchases made with his debit card. RP (1/24/11) 450; (1/25/11) 507, 511-512, 531.

The trial judge prepared his own instruction packet. RP (1/21/11) 254. The court's introductory instruction differed from the standard

³ The trial judge noted this later in the case, stating that the recording was predominantly statements by the officer in an attempt to get Mr. Smith to confess, and contained very little in the way of actual statements from the defendant. RP (3/22/11) 62.

pattern introductory instruction. CP 47-51. In addition, each “to convict” instruction included the following language: “On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then you *should* return a verdict of not guilty as to Count [].” Emphasis added, CP 52-53, 60, 62, 64, 66, 71, 74. Defense counsel did not object to this language. RP (1/25/11) 551-552

After deliberating some time, the jury asked to watch Mr. Smith’s recorded statement again. RP (1/26/11) 670; CP 79. The trial judge initially responded “No.” CP 79. After more time had passed, the jury submitted the following statement:

We have come to a stand-still and don’t believe we can get any closer to a unanimous decision without seeing the parts of the interview video between Officer Loyd and Darrell Smith that we viewed during the trial.

CP 80.

At this point, the judge decided to allow the state to replay the recording for the jury. Defense counsel objected. RP (1/26/11) 677-679, 683-684.

The video was replayed; however, playback was not stopped at the point agreed upon by the parties, and jurors heard and saw additional material that had not been admitted into evidence. RP (1/26/11) 688-693; CP 117-121. This additional material included statements recorded by the video surveillance system after the officer had announced that he was turning off his recording device. CP 120-121. The court denied Mr.

Smith's request that the jury be instructed to disregard the additional portion of the recording. RP (1/26/11) 690-693.

Mr. Smith was convicted of first-degree robbery, unlawful imprisonment (a lesser of the kidnapping charge), second-degree assault, possession of methamphetamine, misdemeanor harassment (a lesser of the felony harassment charge), and second-degree theft.⁴ CP 81-94.

Mr. Smith moved for a new trial, based on the jury's exposure to portions of the video that had not been admitted into evidence. CP 99-101; RP (3/22/11) 45-64. The court denied the motion. RP (3/22/11) 64.

At sentencing, without evidence, argument, or comment on the subject, the court made a finding "[t]hat the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." RP (3/29/11) 2-36; CP 148.

Mr. Smith timely appealed. CP 163.

⁴ Mr. Smith's conviction for burglary was reversed by the trial court, because of an error in the instructions. RP (3/22/11) 56.

ARGUMENT

I. THE JURY’S CONSIDERATION OF EXTRINSIC EVIDENCE NOT ADMITTED AT TRIAL VIOLATED MR. SMITH’S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Denial of a motion for a new trial is reviewed for abuse of discretion. *State v. Pete*, 152 Wash.2d 546, 552, 98 P.3d 803 (2004). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or basing a ruling on an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

B. Mr. Smith’s convictions must be reversed because the jury’s consideration of extrinsic evidence “could have” influenced the verdicts.

A trial court may grant a new trial “when it affirmatively appears that a substantial right of the defendant was materially affected.” CrR

7.5(a). The grounds for a new trial include, in relevant part:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court...

- (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;
- (6) Error of law occurring at the trial and objected to at the time by the defendant.

CrR 7.5(a).

A new trial may be required when the jury considers extrinsic evidence, which is defined as information outside the evidence admitted at trial. *Pete*, at 553. Such evidence is improper because it is not subject to objection, cross-examination, explanation, or rebuttal. *Id.*

The jury's consideration of extraneous evidence entitles a defendant to a new trial "if there are reasonable grounds to believe a defendant has been prejudiced." *State v. Johnson*, 137 Wash.App. 862, 870, 155 P.3d 183 (2007); see also *Pete*, at 555 n. 4. Any doubts must be resolved against the verdict. *Johnson*, at 870. The test is an objective one: "[t]he question is whether the extrinsic evidence could have affected the jury's determinations." *State v. Boling*, 131 Wash.App. 329, 333, 127 P.3d 740 (2006). A new trial must be granted unless the court can conclude beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict. *Johnson*, at 870.

In this case, a new trial is warranted under CrR 7.5(a)(1), (5), and (6). Defense counsel objected to the trial judge's decision to replay the video. RP (1/26/11) 676, 679. Further, jurors heard material that was not

a part of the exhibit (including Mr. Smith's statement that he sat behind "that guy" and apologized to him), and the trial judge refused to instruct jurors to disregard the extrinsic evidence. RP (1/26/11) 679, 690-691; CP 117-121; Ex. 93. Under these circumstances, the trial judge abused his discretion by denying Mr. Smith's motion for a new trial, because there is a reasonable probability the extrinsic evidence influenced the verdict.

Mr. Smith admitted that he stole from Walmart, but denied restraining, robbing, or assaulting Chadwick. Ex. 93. His theory regarding the video was that his recorded admissions related only to the theft, not to the offenses against Chadwick. Those portions of the video admitted at trial were ambiguous, and could have related only to the theft. However, upon hearing the extrinsic evidence—especially Mr. Smith's statement that he'd apologized to "that guy" (Chadwick) while sitting behind him in a vehicle—jurors likely concluded that his confession referred to more than just the shoplifting incident. This is especially true when combined with his anxiety about going to prison.

Thus, the extrinsic evidence "could have affected the jury's determinations." *Boling*, 333. The convictions violated his right to due process under the Fourteenth Amendment and Article I, Section 3. Accordingly, Mr. Smith's convictions must be reversed and the case remanded for a new trial. *Id.*

II. THE PROSECUTOR VIOLATED THE PRIVACY ACT BY PLAYING FOR THE JURY AN ILLEGALLY RECORDED CONVERSATION.

A. Standard of Review

Questions of statutory interpretation are reviewed *de novo*. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009). The Court of Appeals has discretion to accept review of any issue argued for the first time on appeal, including issues that do not implicate a constitutional right. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

B. The police unlawfully recorded Mr. Smith’s statements without his knowledge or consent.

Washington’s Privacy Act “puts a high value on the privacy of communications.” *State v. Christensen*, 153 Wash.2d 186, 201, 102 P.3d 789 (2004). The legislature “intended to establish protections for individuals’ privacy and to require suppression of recordings of even conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements.” *State v. Williams*, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980) (“*Williams I*”). Recordings made in violation of the Privacy Act are inadmissible in court. RCW 9.73.050. A conviction based in part on a violation of the Privacy Act must be reversed unless, “within reasonable probability, the [error] did not materially affect

the outcome of the trial.” *State v. Porter*, 98 Wash.App. 631, 638, 990 P.2d 460 (1999).

The Act must be strictly construed in favor of the right to privacy.

Williams I, at 548; *see also Christensen*, at 201. The Act permits

[v]ideo and/or sound recordings [to] be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

- (i) The arrested person shall be informed that such recording is being made and the statement so informing him or her shall be included in the recording;
- (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
- (iii) At the commencement of the recording the arrested person shall be fully informed of his or her constitutional rights, and such statements informing him or her shall be included in the recording;
- (iv) The recordings shall only be used for valid police or court activities.

RCW 9.73.090. Failure to comply renders any recording inadmissible under RCW 9.73.050, unless they are made in compliance with RCW 9.73.030 (which requires consent before a private conversation may be recorded).

In this case, officer Loyd finished his interview with Mr. Smith, announced that he was terminating the recording, and turned off the machine. CP 119. At that point, Mr. Smith was entitled to believe that he

was not being recorded. The recording produced after that point violated RCW 9.73.030 and RCW 9.73.090, was inadmissible under RCW 9.73.050, and should not have been played for the jury.

The error materially affected the outcome of trial. The recording included Mr. Smith's expressions of anxiety about going to prison and his statements that he'd apologized to "that guy" (Chadwick) while sitting behind him in a vehicle. Ex. 93. This provided some corroboration of Chadwick's version of events, and undermined Mr. Smith's theory of the case.

Accordingly, Mr. Smith's convictions must be reversed. *Porter, at* 638. The case must be remanded for a new trial, with instructions to exclude those portions of the recording that were made in violation of the Privacy Act. *Id.*

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

A. Standard of Review

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

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

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

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

The strong presumption of adequate performance is only overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). In keeping with this, “[r]easonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

C. Defense counsel provided ineffective assistance by failing to object to the extrinsic evidence on Privacy Act grounds.

Although defense counsel objected to the extrinsic material and asked for a corrective instruction, he neglected to argue a violation of the Privacy Act. As described in the preceding section, Mr. Smith’s statements were illegally recorded in violation of RCW 9.73.090. There was no strategic reason for counsel’s failure to argue the Privacy Act violation; furthermore, counsel’s objections show that he did not seek admission of the illegal recording for tactical reasons.

Accordingly, counsel's failure to argue the Privacy Act violation was unreasonable under the first prong of the *Strickland* test. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

The error was prejudicial, because the illegally recorded portion of the conversation included damaging material, such as Mr. Smith's statement that he'd apologized to "that guy" (Chadwick) while sitting behind him in the vehicle, and his clear expressions of anxiety about being sent to prison. There is a reasonable probability that the outcome of the trial would have been different had counsel argued the Privacy Act violation and persuaded the judge to instruct jurors to disregard the illegally recorded conversation. Accordingly, counsel's failure to seek suppression of the illegal recordings violated Mr. Smith's right to the effective assistance of counsel. *Saunders*, at 578.

IV. ERRORS IN THE COURT'S INSTRUCTIONS INFRINGED MR. SMITH'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND ARTICLE I, SECTION 3.

A. Standard of Review

Constitutional violations are reviewed *de novo*; jury instructions are also reviewed *de novo*. *E.S.*, at 702; *State v. Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010). Instructions must make the correct legal standard manifestly apparent to the average juror. *See, e.g., Kyllo*, at 864.

B. The court's nonstandard "to convict" instructions allowed the jury to convict even in the absence of proof beyond a reasonable doubt.

In a criminal case, the jury must be instructed that the state has the burden to prove each essential element of the crime beyond a reasonable doubt. U.S. Const. Amend. XIV; *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Proper instruction on the reasonable doubt standard is crucial because that standard "provides concrete substance for the presumption of innocence," which is the cornerstone of our criminal justice system. *Winship*, at 363. It is reversible error to instruct the jury in a manner relieving the prosecution of its burden to prove every element beyond a reasonable doubt. *Sullivan*, at 280-281.

Washington has adopted pattern jury instructions for use in criminal trials. *State v. Bennett*, 161 Wash.2d 303, 307-308, 165 P.3d 1241 (2007). These instructions "are drafted and approved by a committee that includes judges, law professors, and practicing attorneys;" furthermore, they "have the advantage of thoughtful adoption and provide some uniformity in instructions throughout the state." *Id.*

The pattern "to convict" instructions conclude by explaining to the jury their obligations following deliberation:

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

See, e.g., WPIC 35.19.

Here, the court's "to convict" instructions couched the jury's duty to acquit in language that was not mandatory: "if, after weighing the evidence, you have a reasonable doubt as to [any of the elements] then you should return a verdict of not guilty." CP 52-53, 60, 62, 64, 66, 71, 74. Because the word "should" connotes what is proper rather than what is required, the effect of the "to convict" instructions was to leave jurors with the impression that they ought to acquit when possessed of reasonable doubt, but that acquittal was not obligatory.

As one court has put it, the "use of the permissive 'should' rather than the mandatory 'must'" is a serious misstep that "goes to the heart of the [matter]: where reasonable doubt remains, acquittal is mandatory." *Massachusetts v. Caramanica*, 729 N.E.2d 656, 659 (2000). *But see Torrence v. Florida*, 574 So.2d 1188, 1189 (1991) (rejecting challenge to use of the word "should").

The court's instructions failed to make the proper standard manifestly apparent to the average juror. *Kyllo*, at 864. Because the error

fundamentally undermined Mr. Smith's right to a fair trial, it is structural error, and cannot be analyzed for harmlessness. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (describing structural error).

Allowing jurors to convict despite the existence of reasonable doubt "deprived [Mr. Smith] of 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Connecticut v. Johnson*, 460 U.S. 73, 88, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983) (addressing an erroneous conclusive presumption) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Accordingly, Mr. Smith's convictions must be reversed and the case remanded for a new trial. *Sullivan, supra; Winship, supra.*

C. The court's nonstandard introductory instructions failed to provide adequate guidelines for the jury's deliberations.

The court's introductory instructions consisted of excerpts from the standard instruction (WPIC 1.02), combined with other instructions specific to consideration of certain evidence (i.e. WPIC 6.51 relating to expert testimony and WPIC 5.01 relating to circumstantial and direct evidence). Although some of the language in the court's introductory instructions paralleled the text of WPIC 1.02, much of the standard

instruction was omitted. Thus, for example, the trial court neglected to tell

jurors:

- To accept the law “regardless of what [they] personally believe the law is.”
- To “apply the law from [the court’s] instructions to the facts that [they] decide have been proved, and in this way decide the case.”
- To “[k]eep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true.”
- That their “decisions as jurors must be made solely upon the evidence presented during these proceedings.”
- That “[i]f evidence was not admitted...then [the jury is] not to consider it in reaching [its] verdict.
- That “[e]xhibits may have been marked by the court clerk and given a number, but they do not go [into] the jury room during [the jury’s] deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available...in the jury room.”
- That “[o]ne of [the judge’s] duties has been to rule on the admissibility of evidence,” and that they should “not be concerned during [their] deliberations about the reasons for [the court’s] rulings on the evidence. “
- That, with regard to evidence ruled inadmissible, they “must not discuss that evidence during [their] deliberations or consider it in reaching [their] verdict,” and that they were not to “speculate whether the evidence would have favored one party or the other.”
- That they “are the sole judges of the credibility of each witness [and] also the sole judges of the value or weight to be given to the testimony of each witness.”
- That the “state constitution prohibits a trial judge from making a comment on the evidence.”

- That “[i]t would be improper for [the judge] to express, by words or conduct, [a] personal opinion about the value of testimony or other evidence.”
- That the judge has not intentionally expressed a personal opinion.

Compare CP 47-49 with WPIC 1.02.

These omissions left the jury with only a partial understanding of the rules that were to guide their deliberations. In the absence of these provisions, jurors might have believed they could supplement the court’s instructions with their own legal knowledge, that they could consider the information as evidence against Mr. Smith, that they could discuss and speculate about exhibits and testimony not admitted into evidence, that they could consider the court’s evidentiary rulings, and that they could look to others for guidance regarding witness credibility.

Because of these omissions, the instruction did not make the relevant guidelines manifestly apparent to the average juror. *Kyllo, at 864.* Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

V. MR. SMITH’S CONVICTION IN COUNT V VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *E.S., at 702*. The interpretation of a statute is reviewed *de novo*, as is the application of law to a particular set of facts. *Engel, at 576; In re Detention of Anderson, 166 Wash.2d 543, 555, 211 P.3d 994 (2009)*. Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel, at 576*.

B. The evidence was insufficient to prove that Mr. Smith possessed a measurable amount of methamphetamine.

1. No other state permits conviction of a felony based on possession of drug residue without proof of knowledge.

To obtain a conviction for Possession of a Controlled Substance, the prosecution is required to prove beyond a reasonable doubt that the accused person possessed a controlled substance. RCW 69.50.4013. The statute does not specify a minimum amount necessary for conviction; however, common sense dictates that the prosecution must prove the possession of some minimum amount in order to sustain a conviction. Otherwise, guilt would be determined not by the actions of the accused

person but by the sensitivity of the equipment used to detect the presence of the substance. *See, e.g., Lord v. Florida*, 616 So.2d 1065, 1066 (1993) (“It has been established by toxicological testing that cocaine in South Florida is so pervasive that microscopic traces of the drug can be found on much of the currency circulating in the area.”)

Other states fall into two categories when it comes to dealing with the problem of residue. First, a number of jurisdictions have held that residue or trace amounts of a controlled substance cannot sustain a conviction. *See, e.g., Costes v. Arkansas*, 287 S.W.3d 639 (2008) (Possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.*, 198 F.R.D. 325 (2001) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *California v. Rubacalba*, 859 P.2d 708 (1993) (“Usable-quantity rule” requires proof that substance is in form and quantity that can be used).

Second, most jurisdictions require proof of knowing possession, and allow conviction for mere residue if that mental element is established.⁵ *See, e.g., Louisiana v. Joseph*, 32 So.3d 244 (2010) (Cocaine residue that is visible to the naked eye is sufficient for conviction if

⁵ Often, the element of knowledge can be established, in part, by proof that the residue is visible to the naked eye.

requisite mental state established; statute requires proof that defendant “knowingly or intentionally” possessed a controlled substance); *Finn v. Kentucky*, 313 S.W.3d 89 (2010) (possession of residue sufficient because prosecution established defendant’s knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (possession of a mere trace is sufficient for conviction, if state proves the elements of “awareness” and “conscious intent to possess”).⁶ For at least one state in this category, knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony. See *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988).

The relationship between the mental element and the quantity required for conviction is best illustrated by the evolution of the law in

⁶ See also, e.g., *Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant’s knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of residue established by defendant’s statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession, even of a “miniscule” amount of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *New Jersey v. Wells*, 763 A.2d 1279 (2000) (residue sufficient; statute requires proof that defendant “knowingly or purposely” obtain or possess a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (rejecting “usable quantity” rule, but noting that prosecution must prove knowledge); *Lord, supra* (mere presence of trace amounts of cocaine on circulating currency insufficient to support felony conviction); *Garner v. Texas*, 848 S.W.2d 799, 801 (1993) (“When the quantity of a substance possessed is so small that it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a controlled substance”); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (prosecution need not prove a “measurable amount” of controlled substance, so long as knowledge is established).

Arizona. In that state, the judiciary decided that a conviction for simple possession required proof of a “usable quantity” of a controlled substance. *See Arizona v. Moreno*, 374 P.2d 872 (1962). *Moreno* was decided under a 1935 statute which criminalized possession, and which required no proof of knowledge. *Arizona v. Cheramie*, 189 P.3d 374, 377 (2008). The statute was subsequently amended, adding a knowledge requirement to the crime of simple possession. *Id.*, at 377-378. In response, the Arizona Supreme Court removed the requirement that the state prove a “usable quantity.” *Id.* The court explained the basis for the “usable quantity” rule and the subsequent change in the law as follows:

Moreno’s “usable quantity” statement affirmed that Arizona’s narcotic statute requires something more than mere possession: it requires *knowing* possession. Thus, if the presence of the drug can be discovered only by scientific detection, to sustain a conviction the state must show the presence of enough drugs to permit the inference that the defendant knew of the presence of the drugs.... Because *Moreno* and its progeny were decided under a statute that imposed no mental state, proof of a “usable quantity” helped to ensure that defendants were convicted only after knowingly committing a proscribed act. The statute now expressly requires a knowing mental state, and establishing a “usable quantity” remains an effective way, in a case involving such a small amount that one might question whether the defendant knew of the presence of drugs, to show that the defendant “knowingly” committed the acts described...

Id., at 377-378.

2. Washington should not become the only state to permit conviction of a felony based on possession of drug residue without proof of knowledge.

In Washington, the Supreme Court has held that knowledge is not an element of simple possession.⁷ *State v. Bradshaw*, 152 Wash.2d 528, 536, 98 P.3d 1190 (2004). Because of this, it cannot fall into the second category of jurisdictions, which allow conviction for mere residue upon proof of knowing possession.

The Supreme Court has never directly addressed the validity of a conviction based on mere residue. However, the Court has rejected a “usable quantity” test, and affirmed a conviction for possession of what it described as “a measurable amount” of a controlled substance. *State v. Larkins*, 79 Wash.2d 392, 395, 486 P.2d 95 (1971).

If Washington were to permit conviction for possession of residue, it would be the only state in the country to impose criminal liability for *de minimis* possession without proof of knowledge.⁸ Division II should reject

⁷ The only other state without a *mens rea* requirement is North Dakota. See *Dawkins v. Maryland*, 547 A.2d 1041, 1045 (1988) (surveying statutes and court decisions in the 50 states).

⁸ North Dakota has apparently not yet had the opportunity to decide whether or not possession of residue is a felony.

this approach.⁹ It would be unduly harsh to convict someone of a felony for possessing something in a quantity so small as to be unnoticeable under most circumstances, especially when the substance possessed cannot be identified without the aid of chemical tests or sophisticated machinery.

Both the *Rowell* court and the *Malone* court concluded that conviction was permitted for any quantity of drugs; however, neither case engaged in a full analysis. In *Malone*, Division I relied on *dicta* from an earlier case without even analyzing the plain language of the statute.¹⁰ *Malone*, at 439. The basis for the court’s conclusion in *Rowell* is even less clear; Division III’s decision in *Rowell* relied on two cases that did not even tangentially address the quantity issue in *dicta*.¹¹ *See Rowell*, at 786

⁹ Divisions I and III of the Court of Appeals have imposed such liability; Division II has not issued a published opinion on the subject. *See State v. Rowell*, 138 Wash.App. 780, 786, 158 P.3d 1248 (2007); *State v. Malone*; 72 Wash.App. 429, 438-440, 864 P.2d 990 (1994).

¹⁰ The *Malone* court relied on *State v. Williams*, 62 Wash.App. 748, 749-750, 815 P.2d 825 (1991), *review denied*, 118 Wash.2d 1019, 827 P.2d 1012 (1992) (*Williams II*). In *Williams II*, the court suggested in *dicta* that “There is no minimum amount of narcotic drug which must be possessed in order to sustain a conviction.” *Id.*, at 751 (citing *Larkins*, at 394). As noted previously, *Larkins*, upon which *Williams II* relied, was not a residue case; instead, it involved a “measurable quantity” of drugs.

¹¹ At the conclusion of the opinion, the court also cited to *Williams II*, *supra*. Thus, at best, *Rowell* suffers from the same infirmity as the opinion in *Malone*, as pointed out in the preceding footnote.

(citing *Bradshaw, supra*, and *State v. Staley*, 123 Wash.2d 794, 872 P.2d 502 (1994)).

Neither *Rowell* nor *Malone* acknowledged the judiciary's power to recognize common law elements of an offense or even to create defenses. *See, e.g., State v. Goodman*, 150 Wash.2d 774, 786, 83 P.3d 410 (2004) (“the identity of the controlled substance is an element of the offense where it aggravates the maximum sentence”); *State v. Cleppe*, 96 Wash.2d 373, 381, 635 P.2d 435 (1981) (recognizing the judicially created affirmative defense of unwitting possession to “ameliorate[] the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance”); *State v. Chavez*, 163 Wash.2d 262, 180 P.3d 1250 (2008) (upholding the common law definition of assault in the face of separation of powers challenge). Indeed, the legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are “not inconsistent with the Constitution and statutes of this state...” RCW 9A.04.060.

Instead of following *Malone* and *Rowell*, Division II should exercise this authority and supplement the statutory offense. Nothing in

Washington's statute is inconsistent with requiring proof of a minimum quantity, in order to obtain a conviction for simple possession.¹²

To convict a person of simple possession under RCW 69.50.4013, the prosecution must be required to prove some quantity beyond mere residue. In light of *Larkins*, it need not be a usable quantity, but it should be at least a measurable amount.¹³ If such a common-law element is not recognized, Washington will be the only state in the nation that permits conviction of a felony for possession of residue, without proof of knowledge.

3. Mr. Smith's possession of mere residue was insufficient for conviction.

Here, the prosecution did not prove that Mr. Smith possessed more than mere residue. The conviction was based on insufficient evidence, and therefore violated Mr. Smith's right to due process. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116

¹² In some states, for example, the statute permits conviction if a person knowingly possesses "any quantity" or "any amount" of a controlled substance. *See, e.g.*, Kentucky Revised Statutes §218A.1415 ("A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains *any quantity* of methamphetamine...") (emphasis added).

¹³ The problem with defining the amount solely in terms of whether or not it is "measurable" is that the standards for measurability will always be in flux as technology improves.

(1986). Accordingly, his possession conviction must be reversed and the case dismissed with prejudice. *Id.*

VI. THE SENTENCING COURT’S FINDING REGARDING MR. SMITH’S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, ___ Wash.App. ___, ___, 267 P.3d 511 (2011). In this case, the sentencing court entered such a finding without any support in the record. CP 147-148. Indeed, the record suggests that Mr. Smith lacks any ability to pay the amount ordered, given his lengthy prison sentence and his slim prospects for employment. Accordingly, Finding No. 2.5 of the Judgment and Sentence must be vacated. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Smith’s convictions must be reversed. Counts IV and V must be dismissed with prejudice, and the remaining counts must be remanded to the trial court for a new trial.

Respectfully submitted on February 28, 2012,

BACKLUND AND MISTRY

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

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

A handwritten signature in blue ink that reads "Manek R. Mistry". The signature is written in a cursive style with a large initial "M".

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:

Darrell Smith, DOC #823567
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

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

Grant County Prosecuting Attorney
kburns@co.grant.wa.us.

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 February 28, 2012.

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

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