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No. 35316-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Henderson,

Appellant.

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CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Grays Harbor Superior Court

Cause No. 05-1-00404-8

The Honorable Judge David Foscue

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... iii

ASSIGNMENTS OF ERROR..... iv

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... v

1. Did the trial court erroneously give the jury inconsistent instructions? Assignment of Error Nos. 1-2. ... v
2. Did the inconsistency in the jury instructions result from a clear misstatement of the law? Assignment of Error Nos. 1-2. v
3. Is the clear misstatement of the law contained in Instruction No. 7 presumed to have prejudiced Mr. Henderson? Assignment of Error Nos. 1-2. v
4. Does the instructional error require reversal because it is not harmless beyond a reasonable doubt? Assignment of Error Nos. 1-2. v
5. Is the error prejudicial because it is neither trivial, nor formal, nor merely academic? Assignment of Error Nos. 1-2. v
6. Did the trial court err by failing to properly determine Mr. Henderson's criminal history? Assignments of Error Nos. 3-8. v
7. Did the prosecuting attorney fail to establish that Mr. Henderson had criminal history? Assignments of Error Nos. 3-8. v

8. Did the trial court err by failing to properly determine Mr. Henderson's offender score? Assignments of Error Nos. 3-8..... vi

9. Did the trial court err by sentencing Mr. Henderson with an offender score of two? Assignments of Error Nos. 3-8. vi

10. Did the trial court err by sentencing Mr. Henderson to 12+ months? Assignments of Error Nos. 3-8..... vi

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 1

ARGUMENT 3

I. The trial court's inconsistent instructions to the jury prejudiced Mr. Henderson. 3

II. The sentencing court failed to properly determine Mr. Henderson's criminal history and offender score..... 5

CONCLUSION 7

TABLE OF AUTHORITIES

STATE CASES

citing State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977)..... 3

Davis v. Microsoft Corp., 149 Wn.2d 521, 70 P.3d 126 (2003)..... 6

Northwest Pipeline Corp. v. Adams County, 132 Wn.App. 470, 131 P.3d 958..... 6

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 97 P.3d 745 (2004) 6, 7

State v. Carlson, 130 Wn. App. 589, 123 P.3d 891 (2005)..... 6

State v. Carter, 127 Wn. App. 713, 112 P.3d 561 (2005)..... 3

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999)..... 5

State v. Ortega, 120 Wn. App. 165, 171, 84 P.3d 935 (2004) 6

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997)..... 3, 4

STATUTES

RCW 9.94A.030(13)..... 5

RCW 9.94A.500(1)..... 5, 6

RCW 9.94A.530(2)..... 5, 6

RCW 9A.82.050 4

ASSIGNMENTS OF ERROR

1. The trial court erred by giving inconsistent instructions.
2. The trial court erred by giving Instruction No. 7, which reads in relevant part:

A person commits the crime of Trafficking in Stolen Property in the First Degree when he recklessly traffics in stolen property.
Instruction No. 7, Supp. CP.
3. The trial court erred by failing to properly determine Mr. Henderson's criminal history and offender score.
4. The prosecutor failed to establish that Mr. Henderson had criminal history.
5. The trial court erred by entering Finding of Fact No. 2.2, which purported to set forth Mr. Henderson's criminal history as follows:

Crime	Date Of Sentence	Sentencing Court (Court and State)	Date Of Crime	Adult or Juvenile	Type Of Crime
VUCSA - Possession of Controlled substance		GHC 04-1-434-1			
PSP 2		GHC 04-1-434-1			

CP 4.

6. The trial court erred by sentencing Mr. Henderson with an offender score of 2.
7. The trial court erred by calculating Mr. Henderson's standard range as 12+ to 14 months.
8. The trial court erred by imposing a sentence of 12+ months.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

David Henderson was charged with one count Trafficking in Stolen Property in the First Degree. Two instructions contained correct definitions of the crime; a third incorrectly stated that "A person commits the crime of Trafficking in Stolen Property in the First Degree when he recklessly traffics in stolen property."

1. Did the trial court erroneously give the jury inconsistent instructions? Assignment of Error Nos. 1-2.
2. Did the inconsistency in the jury instructions result from a clear misstatement of the law? Assignment of Error Nos. 1-2.
3. Is the clear misstatement of the law contained in Instruction No. 7 presumed to have prejudiced Mr. Henderson? Assignment of Error Nos. 1-2.
4. Does the instructional error require reversal because it is not harmless beyond a reasonable doubt? Assignment of Error Nos. 1-2.
5. Is the error prejudicial because it is neither trivial, nor formal, nor merely academic? Assignment of Error Nos. 1-2.

At sentencing, the prosecuting attorney alleged that Mr. Henderson had two prior convictions. Mr. Henderson did not admit or acknowledge any prior convictions. No presentence report was requested or submitted, and the prosecution did not offer any evidence supporting its allegations of prior convictions. Despite this, the court found that Mr. Henderson had two prior felonies. The court determined that Mr. Henderson had an offender score of two, but did not explain on the record how it reached this result.

6. Did the trial court err by failing to properly determine Mr. Henderson's criminal history? Assignments of Error Nos. 3-8.
7. Did the prosecuting attorney fail to establish that Mr. Henderson had criminal history? Assignments of Error Nos. 3-8.

8. Did the trial court err by failing to properly determine Mr. Henderson's offender score? Assignments of Error Nos. 3-8.

9. Did the trial court err by sentencing Mr. Henderson with an offender score of two? Assignments of Error Nos. 3-8.

10. Did the trial court err by sentencing Mr. Henderson to 12+ months? Assignments of Error Nos. 3-8.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

David Henderson was charged with Trafficking in Stolen Property in the First Degree on July 20, 2005. CP 1. The case proceeded to a jury trial, where Mr. Henderson presented evidence that he was not aware that the property had been stolen. RP (5/30/06) 12-78. Although the evidence suggested that Mr. Henderson's stepson stole the property, neither he nor anyone else was ever charged with theft. RP (8/7/06) 86.

The court gave the following instructions to the jury, defining Trafficking in Stolen Property in the First Degree:

The defendant, David M. Henderson, is charged with the crime of Trafficking in Stolen Property in the First Degree. A person commits the crime of Trafficking in Stolen Property in the First Degree when he knowingly traffics in stolen property. Instruction No. 2, Supp CP.

To convict the defendant, David M. Henderson, of the crime of Trafficking Stolen Property in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about July 5, 2005, the defendant trafficked in stolen property.
- 2) That the defendant acted knowingly.
- 3) The acts occurred in Grays Harbor County.

If you find from the evidence that each of these elements has 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 one of these elements, then it will be your duty to return a verdict of not guilty. Instruction No. 4, Supp CP.

The court also instructed the jury on the lesser offense of Trafficking in the Second Degree. That instruction included the following erroneous language:

A person commits the crime of Trafficking in Stolen Property in the First Degree when he recklessly traffics in stolen property.
Instruction No. 7, Supp. CP.

The jury convicted Mr. Henderson as charged. CP 3.

At sentencing, the state filed a Statement of Prosecuting Attorney, outlining the state's argument on Mr. Henderson's criminal history and sentencing. Supp. CP. No exhibits, such as Judgments, were attached to this document. The state alleged that Mr. Henderson had been convicted of 2 prior felonies, without indicating the dates of sentence or crimes. Supp. CP. The court entered the following findings with respect to criminal history:

Crime	Date Of Sentence	Sentencing Court (Court and State)	Date Of Crime	Adult or Juvenile	Type Of Crime
VUCSA - Possession of Controlled substance		GHC 04-1-434-1			
PSP 2		GHC 04-1-434-1			

CP 4.

The court calculated Mr. Henderson's offender score as two, and sentenced Mr. Henderson to 12 months plus one day in the Department of Corrections. CP 3-10; RP (8/7/06) 87. This timely appeal followed. CP 11.

ARGUMENT

I. THE TRIAL COURT'S INCONSISTENT INSTRUCTIONS TO THE JURY PREJUDICED MR. HENDERSON.

When jury instructions are inconsistent, a reviewing court must determine whether the jury was misled as to its function and responsibilities. *State v. Walden*, 131 Wn.2d 469 at 478, 932 P.2d 1237 (1997), citing *State v. Wanrow*, 88 Wn.2d 221 at 239, 559 P.2d 548 (1977); see also *State v. Carter*, 127 Wn. App. 713 at 718, 112 P.3d 561 (2005). Where the inconsistency is the result of a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant. *Walden, supra*, at 469. In such circumstances, the defendant is entitled to a new trial unless the error can be shown to be harmless beyond a reasonable doubt. *Walden, supra*, at 478. Instructional error is harmless only if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the

party assigning it, and in no way affected the final outcome of the case.

Walden, at 478.

Under RCW 9A.82.050, a person is guilty of Trafficking in Stolen Property in the First Degree if she or he “knowingly traffics in stolen property.”

In this case, the trial court properly defined Trafficking in Stolen Property in two instructions (Instruction Nos. 2 and 4). However, Instruction No. 7 included one sentence that incorrectly told the jury that “A person commits the crime of Trafficking in Stolen Property in the First Degree when he *recklessly* traffics in stolen property.” Instruction No. 7, Supp. CP, *emphasis added*.

The inconsistency between Instructions Nos. 2 and 4 on the one hand, and Instruction No. 7 on the other, results from a clear misstatement of the law in Instruction No. 7. Accordingly, the misstatement is presumed to have prejudiced the jury. *Walden, supra*, at 469. The misstatement is not trivial, or formal, or merely academic, and therefore the error cannot be considered harmless beyond a reasonable doubt. *Walden, supra*. Because of this, the conviction must be reversed, and Mr. Henderson is entitled to a new trial. *Walden, supra*.

II. THE SENTENCING COURT FAILED TO PROPERLY DETERMINE MR. HENDERSON'S CRIMINAL HISTORY AND OFFENDER SCORE.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing "before imposing a sentence upon a defendant." Furthermore, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record..."

RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and "shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration." RCW 9.94A.030(13). To establish criminal history, "the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). Acknowledgement includes "not objecting to information stated in the presentence reports." RCW 9.94A.530(2). Presentence reports are documents prepared by the Department of Corrections (at the court's request) under RCW 9.94A.500.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472 at 477, 973 P.2d 452 (1999).

The appellate court reviews the calculation of an offender score *de novo*.
State v. Ortega, 120 Wn. App. 165, 171, 84 P.3d 935 (2004).

A trial court's findings are reviewed for substantial evidence.
Rogers Potato v. Countrywide Potato, 152 Wn.2d 387 at 391, 97 P.3d 745
(2004). Substantial evidence is evidence sufficient to persuade a fair-
minded, rational person of the truth of the finding. *Rogers Potato*, at 391;
State v. Carlson, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005). It is
more than "a mere scintilla" of evidence, and must convince an
unprejudiced thinking mind of the truth of the fact to which the evidence
is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App.
470, 131 P.3d 958 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521
at 531, 70 P.3d 126 (2003).

In this case, the state filed a "Statement of Prosecuting Attorney,"
which alleged that Mr. Henderson had two prior felony convictions. Supp.
CP. Mr. Henderson's did not admit or acknowledge any prior convictions.
RP (8/7/06) 85-89. No presentence report was ordered or prepared under
RCW 9.94A.500, and so Mr. Henderson's failure to object to the
prosecutor's allegations cannot be held against him under RCW
9.94A.530(2).

Despite the absence of any evidence, the judgment and sentence
included a finding that Mr. Henderson had two prior felony convictions.

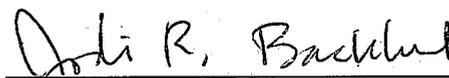
CP 4. There is no indication in the record of how the court arrived at this finding. RP (8/7/06) 85-89. Because the state produced no evidence establishing these convictions, and because Mr. Henderson never admitted or acknowledged them, the court's finding is unsupported and must be stricken. *Rogers Potato, supra*. Accordingly, the sentence must be vacated, and the case remanded for resentencing.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and Mr. Henderson must be granted a new trial. In the alternative, the sentence must be vacated and the case remanded for a new sentencing hearing.

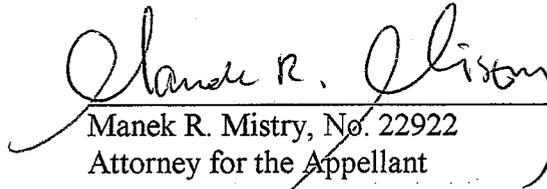
Respectfully submitted on February 5, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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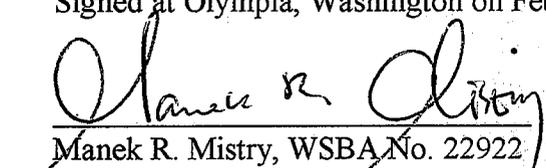
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 5, 2007.

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 5, 2007.


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