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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 35316-4-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Henderson,

Appellant.

Grays Harbor Superior Court

Cause No. 05-1-00404-8

The Honorable Judge David Foscue

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

**I. Respondent applies the wrong legal standards in
addressing the inconsistent jury instructions..... 1**

**II. Respondent’s argument unconstitutionally shifts the
burden of proof at sentencing 3**

CONCLUSION 5

TABLE OF AUTHORITIES

STATE CASES

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) 3, 4

State v. Garza, 123 Wn.2d 885, 872 P.2d 1087 (1994) 4

State v. Handley, 115 Wn.2d 275, 796 P.2d 1266 (1990) 4

State v. Mail, 121 Wn.2d 707, 854 P.2d 1042 (1993)..... 4

State v. Sanchez, 122 Wn. App. 579, 94 P.3d 384 (2004) 2

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997)..... 1, 2

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

STATUTES

Former RCW 9.94A.370 4

RCW 9.94A.500..... 3

RCW 9.94A.530..... 3, 4

OTHER AUTHORITIES

CrR 7.1 3

ARGUMENT

I. RESPONDENT APPLIES THE WRONG LEGAL STANDARDS IN ADDRESSING THE INCONSISTENT JURY INSTRUCTIONS.

Respondent concedes that Instruction No. 7 contained what Respondent characterizes as an unfortunate “typographical error.” Brief of Respondent, p. 4. Regardless of the source of the error, the standard for reviewing inconsistencies in an instruction remains the same: where there is a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant. *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997). The burden is on Respondent to establish that the error was harmless beyond a reasonable doubt. *Walden, supra*, at 478. In other words, Respondent must demonstrate beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice Mr. Henderson, and that it in no way affected the final outcome of the case. *Walden*, at 478.

Respondent has failed to address this standard, except to assert that “[t]he jury was not confused by this minor error.” Brief of Respondent, p. 5. Respondent goes on to cite cases that do not pertain to inconsistencies in jury instructions, and thus applies the wrong legal standards to the error, urging this court to review the improper instruction in context. Brief of

Respondent, p. 5-6. This is the same argument made by the state in *Warden*. The Supreme Court rejected the argument in that case, and outlined the standard set forth above. *Walden at 478, citing State v. Wanrow*, 88 Wn.2d 221 at 239, 559 P.2d 548 (1977).

Respondent also points out that the trial court omitted the phrase “in the first degree” when reading Instruction 7 to the jury. Brief of Respondent, p. 5; Supplemental RP 7. But this does not save the conviction. First, by telling the jury that a person “commits the crime of Trafficking in Stolen Property when he recklessly traffics in stolen property,” the court compounded the problem rather than solving it. When the judge read the instruction, he reinforced the idea that a conviction required only proof of recklessness. Second, some jurors may have been hard of hearing and, and thus relied primarily on their ability to read the instructions, rather on the judge’s oral recitation. *See State v. Sanchez*, 122 Wn. App. 579 at 591, 94 P.3d 384 (2004) (court’s inadvertent failure to read an instruction requires reversal, because the court “will not indulge any general assumption of literacy of jurors.”)

The misstatement in Instruction 7 relieved the prosecution of its burden of proving that Mr. Henderson knowingly trafficked in stolen property. It is possible that one or more jurors believed they could vote to

convict upon proof of recklessness. Accordingly, the conviction must be reversed.

II. RESPONDENT'S ARGUMENT UNCONSTITUTIONALLY SHIFTS THE BURDEN OF PROOF AT SENTENCING.

To support the trial court's determination of criminal history and offender score, Respondent relies on Mr. Henderson's failure to object at the sentencing hearing. Brief of Respondent, p. 7. But 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). By statute, a failure to object may be held against a defendant only where the information is included in a presentence report prepared by the Department of Corrections. RCW 9.94A.500; RCW 9.94A.530(2); CrR 7.1(a).

The Statement of Prosecuting Attorney and the prosecutor's remarks were nothing more than "bare assertions." Allowing such bare assertions to constitute proof would unconstitutionally shift the burden of proof, as the Supreme Court made clear in *State v. Ford*:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.
State v. Ford, supra, at 482.

Respondent also asserts that “[t]he sentencing court could have reviewed the file concerning prior convictions listed as criminal history...” Brief of Respondent, p. 7, citing *State v. Mail*, 121 Wn.2d 707, 854 P.2d 1042 (1993). But what the trial judge could have done is not relevant to this appeal. The trial judge could have ordered an evidentiary hearing or he could have consulted an astrologer. He did none of these things.

Finally, Respondent repeats that Mr. Henderson should have made a specific and timely objection. Brief of Respondent, p. 7, citing *State v. Garza*, 123 Wn.2d 885, 872 P.2d 1087 (1994) and *State v. Handley*, 115 Wn.2d 275, 796 P.2d 1266 (1990). But *Garza* involved a failure to object to information contained in a presentence report (as required under former RCW 9.94A.370), and both cases predate *State v. Ford, supra*.

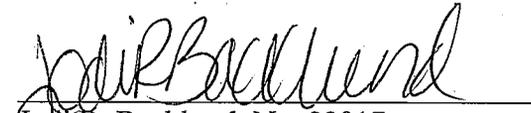
Certainly it would have been preferable for defense counsel to object. However, a failure to object cannot be equated with acknowledgment unless the relevant information is contained in a presentence report prepared by DOC. RCW 9.94A.530(2); *State v. Ford, supra*. The sentence must be vacated and the case remanded for a new sentencing hearing.

CONCLUSION

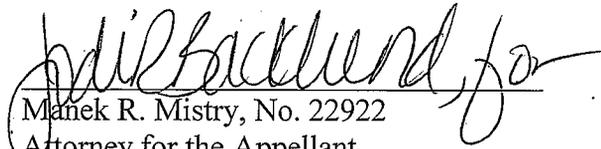
For the foregoing reasons, Mr. Henderson's conviction must be reversed. In the alternative, the sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on April 18, 2007.

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CERTIFICATE OF MAILING

STATE OF WASHINGTON
BY DM
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I certify that I mailed a copy of Appellant's Reply Brief to:

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and to:

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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 April 18, 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 April 18, 2007.



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