IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON C. SCHEIBEL, Appellant.	No. 41793-6-II UNPUBLISHED OPINION

Armstrong, P.J. – Jason C. Scheibel appeals his conviction of attempted burglary in the second degree, arguing that (1) the trial court should have suppressed his incriminating statements under the corpus delicti rule, (2) the trial court violated his right to an open and public trial by conducting proceedings behind closed doors, (3) the jury instruction defining "substantial step" relieved the State of its burden of proof, and (4) his attorney represented him ineffectively by failing to object to the erroneous instruction. We affirm.

Facts

James Shannon owns a house with a detached garage and shed on 10 acres in Lewis County. Shannon spends the weekends at his home and the weekdays in Spanaway, attending school. When Shannon leaves for the week, he secures his property, including the shed, which houses his weight room. He has a surveillance camera at his home because of his absence during the week.

Shannon checked the entrance to his shed in mid-October 2009 and found it intact. When he checked it again on December 12, he found that the door frame had been splintered, even

though the door was still locked. He also saw a footprint on the door.

He then checked his surveillance camera, which takes photographs every 15 seconds when activity trips it and also records the time and date. Photographs taken on November 3 showed a vehicle pulling up to Shannon's property and a person at his front door. The person appeared to ring the doorbell. Additional photographs showed that person backing up the vehicle and turning around but then returning to Shannon's property. Shannon had never seen the person or the vehicle before and called the police.

After determining that the car was registered to Scheibel, Deputy Chris VanWick spoke to him. Scheibel initially denied ever being in Lewis County, but when the deputy showed him one of Shannon's photographs, Scheibel admitted that he and his car were pictured. Scheibel said he left the freeway because he needed gas and wound up at Shannon's, looking for directions. He left the residence but then returned, intending to get gas. Scheibel said the shed door was open and that he went inside but did not find any gas. He admitted he did not know Shannon and did not have permission to be on the property or take anything from it.

The State initially charged Scheibel with second degree burglary. At the beginning of trial, the court stated:

> We've had a pre-trial conference and resolved some of the issues here. The state has filed eight motions in limine. They're all stock, and I'm going to, since there is no objection by the defense in the pre-trial conference, I'm inclined to grant all eight of them.

1 Report of Proceedings (RP) at 5. After defense counsel agreed that he had no objection, the court granted all eight motions, adding, "I don't know there is any need to go through and talk about each one of them, but we all know what they are." 1 RP at 5. The court then referred to

one of the motions in excluding all witnesses except Deputy VanWick.

Shannon testified to the facts cited above, adding that the shed door was the only property damaged and that nothing was missing. He explained that the surveillance camera photographed four other people during the period in question. One was a close friend, one was the meter reader, and two were his father and brother, both of whom had keys to the house and shed. Shannon was on good terms with all four.

Deputy Kevin Anderson testified that he found no evidence that anyone had actually entered the shed after damaging its door. After Deputy VanWick testified about the resemblance of the person in the photographs to Scheibel and to the fact that the car in the photographs was registered to him, the State sought to elicit testimony about what Scheibel told him. Defense counsel objected on the basis of corpus delicti and the trial court sustained the objection.

The trial court agreed with the defense that because there was no evidence of an actual entry, the evidence was insufficient to support the burglary charge absent Scheibel's statements. The court rejected Scheibel's argument that the independent evidence supported only malicious mischief or criminal trespass, however, observing that it supported the inference that the door was damaged to facilitate an entry. Finding no reason for a person to come onto the property, kick the door, and leave, the trial court permitted the State to amend the charge to attempted burglary in the second degree.

Deputy VanWick resumed testifying and said that Scheibel identified himself and his car from Shannon's photographs. Scheibel told the deputy he entered the shed looking for a gas can with gas.

After both parties testified, the trial court called a recess. When the trial reconvened, the court stated that the record "should reflect we've had an instruction conference off the record in chambers and established a set of instructions." 2 RP at 52. The parties then discussed the State's proposed change to the "to convict" instruction. As finalized, the instruction required the jury to find that Scheibel "did an act that was a substantial step toward the commission of Burglary in the Second Degree[.]" Clerk's Papers (CP) at 32. An additional instruction defined "substantial step" as "conduct that strongly indicates a criminal purpose and that is more than mere preparation." CP at 34.

The jury found Scheibel guilty as charged, and the trial court imposed a standard range sentence.

Analysis

I. Corpus Delicti

Scheibel first challenges the sufficiency of the evidence under the corpus delicti rule, arguing that the trial court should have excluded his incriminating statements because the independent evidence failed to establish that he committed attempted second degree burglary. We review this issue de novo. *State v. McPhee*, 156 Wn. App. 44, 60, 230 P.3d 284, *review denied*, 169 Wn.2d 1028 (2010).

The corpus delicti rule tests the sufficiency of evidence, other than the defendant's confession, to corroborate that confession. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). A defendant's incriminating statement is not sufficient to establish that a crime occurred. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). The purpose of the corpus delicti

rule is to prevent defendants from being unjustly convicted based on confessions alone. *Dow*, 168 Wn.2d at 249.

To satisfy the corpus delicti rule, the State must present evidence independent of the incriminating statement that shows the crime described in the defendant's statement occurred. *Brockob*, 159 Wn.2d at 328. In determining whether this standard is satisfied, we review the evidence in the light most favorable to the State. *Brockob*, 159 Wn.2d at 328. The independent evidence need not be sufficient to support a conviction but must provide prima facie corroboration of the crime described in a defendant's incriminating statement. *Brockob*, 159 Wn.2d at 328. Prima facie corroboration exists if the independent evidence supports a "logical and reasonable inference" of the facts the State seeks to prove. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). The corpus delicti can be proved by direct or circumstantial evidence. *State v. Aten*, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). Circumstantial evidence proving the corpus delicti must be consistent with guilt and inconsistent with innocence. *Aten*, 130 Wn.2d at 660.

To convict Scheibel of attempted second degree burglary, the jury had to find that he took a substantial step toward entering or remaining unlawfully in a building with the intent to commit a crime against a person or property therein. Scheibel argues that the independent evidence proved only that he damaged the shed door and that apart from his statement, nothing suggested that he acted with the specific intent to commit burglary or any other crime against a person or property therein. Scheibel also contends that the independent evidence is not inconsistent with innocence: he could have intended only to damage the door, thereby committing malicious

mischief; he could have intended only to seek shelter, thereby committing criminal trespass; or he could have entered with the intent to commit a drug offense.

The fact that the independent evidence could support other crimes does not alter our conclusion that it supports a logical and reasonable inference that Scheibel attempted to commit burglary. As stated, the independent evidence need not prove the crime the defendant described; prima facie corroboration is sufficient. Here, the independent evidence showed that the car photographed on Shannon's property was licensed to Scheibel. The independent evidence also showed that the person pictured left the property after discovering that it was unoccupied but then returned. Scheibel was the only stranger on the property during the period in question, and the independent evidence supports the inference that he tried to gain entry to the shed by force. When viewed in the light most favorable to the State, the independent evidence is sufficient to support the reasonable inference that Scheibel attempted to gain entry to the shed so that he could commit a crime therein. The trial court did not err in ruling that the independent evidence was sufficient to satisfy the corpus delicti rule.

II. Open and Public Trial

Scheibel complains that the trial court violated his and the public's right to an open and public trial by conducting proceedings behind closed doors. At issue are the proceedings addressing the State's motions in limine and the jury instructions.

Whether a violation of the public trial right exists is a question of law that we review de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010). The state and federal constitutions guarantee criminal defendants and the public the right

to open and public trials. U.S. Constitution amends. I, VI; Wash. Constitution art. I, §§ 10, 22. It is well settled that a criminal defendant may raise this issue for the first time on appeal. *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009).

We recently examined the relevant case law and found no per se rule that issues raised during in-chambers conferences are not subject to public scrutiny and the public's right to be present. *State v. Bennett*, 168 Wn. App. 197, 275 P.3d 1224, 1228-29 (2012). We then addressed the defendant's claim that the trial court's in-chambers conference about jury instructions violated public trial guarantees. The trial court observed only that the conference had presented an opportunity to go over the instructions, which had been copied and collated. *Bennett*, 275 P.3d at 1229. We rejected any claim of error and held that to obtain effective review of an in-chambers conference, the parties should make an adequate record about what transpired so that we can determine whether the conference dealt with ministerial issues such as collating or numbering sets of instructions, which would not trigger open and public trial rights, or whether the conference involved a discussion or resolution of disputed facts or legal issues, which would implicate constitutional guarantees. *Bennett*, 275 P.3d at 1229. Because the record in *Bennett* did not reflect that the in-chambers conference involved anything beyond purely ministerial matters, we held that the trial court did not violate Bennett's or the public's right to an open and public trial.

In turning to the first proceeding at issue, which occurred before the trial began, we note that the trial court observed initially that "[w]e've had a pre-trial conference and resolved some of the issues here." 1 RP at 5. The court then observed that the State had filed eight motions in

limine and that because there were no defense objections during the pre-trial conference, it would grant them all. These observations do not show that the conference was held in chambers or that either Scheibel or the public was excluded. It is possible that this conference took place during a pretrial hearing in open court that was not transcribed. Scheibel has the burden on appeal of showing a violation of either his or the public's right to an open and public trial, and he does not meet that burden here. *See Bennett*, 275 P.3d at 1229.

Scheibel also complains about the instruction conference, which occurred in chambers after both parties had rested. Neither party has submitted the proposed instructions or described the issues discussed during that proceeding. Consequently, we cannot determine on this record whether the in-chambers discussion was simply ministerial or whether it involved a discussion of disputed facts or issues. *See Bennett*, 275 P.3d at 1229. Because of the inadequate record on this issue, we find no violation of either Scheibel's or the public's right to an open and public trial.

III. Substantial Step Instruction

Scheibel argues that instruction 6 defined "substantial step" in a manner that relieved the State of its burden to prove this essential element of attempted burglary.

Scheibel did not object to this instruction at trial, and he may raise this claim of error for the first time on appeal only if it constitutes a manifest error affecting a constitutional right. *See State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008) (error raised for first time on appeal may be considered if it unmistakably or indisputably affects a constitutional right).

We review alleged errors of law in jury instructions de novo. *State v. Hayward*, 152 Wn. App. 632, 641, 217 P.3d 354 (2009). Jury instructions are proper when they permit the parties to

argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Hayward*, 152 Wn. App. at 641. It is reversible error to instruct the jury in a manner that would relieve the State of its burden to prove every essential element of a criminal offense beyond a reasonable doubt. *Hayward*, 152 Wn. App. at 641-42. We analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. *Hayward*, 152 Wn. App. at 642.

Instruction 6 defined "substantial step" as "conduct that strongly indicates a criminal purpose and that is more than mere speculation." CP at 34. Scheibel first complains that by using the word "indicates," this instruction conflicted with the definition of "substantial step" set forth in *State v. Workman*, 90 Wn.2d 443, 451, 584 P.2d 382 (1978). In *Workman*, 90 Wn.2d at 452, our Supreme Court stated that for conduct to be a substantial step, "it must be strongly corroborative of the actor's criminal purpose." We see no real distinction between "indicate" and "corroborate" and note that Division One of this court has found the language in instruction 6 consistent with *Workman*. *State v. Gatalski*, 40 Wn. App. 601, 613, 699 P.2d 804 (1985); *see also* 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 100.05, at 390 (3d ed. 2008) (using "indicates" to define "substantial step").

Scheibel also complains that by referring to "a" criminal purpose rather than "the" criminal purpose, instruction 6 allowed the jury to find a substantial step if the evidence showed that he attempted to commit any offense, not just the charged offense, and thus ran afoul of *State v. Roberts*, 142 Wn.2d 471, 509-13, 14 P.3d 713 (2000). Appellant's Brief at 17. In *Roberts*, 142 Wn.2d at 509-13, our Supreme Court addressed erroneous accomplice liability jury instructions

that would have allowed the jury to convict the defendants as accomplices had they known their actions would promote any potential crime rather than the charged crime.

We recently rejected this argument, reasoning that it read the substantial step instruction in isolation. *State v. Eplett*, 167 Wn. App. 660, 666, 274 P.3d 401 (2012). When we read the substantial step instruction in *Eplett* with the instruction defining the charged offense of attempted second degree child rape, the two instructions clearly required the jury to find that there was evidence demonstrating that the defendant took a substantial step toward committing the charged offense. *Eplett*, 167 Wn. App. at 666.

This reasoning applies with equal force here. Reading the instructions as a whole, as we must, we conclude that they properly required the jury to find that Scheibel took a substantial step toward committing attempted second degree burglary. We see no manifest constitutional error and decline to consider this issue further.

We also reject Scheibel's related claim of ineffective assistance of counsel, as he fails to show that his attorney was deficient in failing to object to instruction 6 or propose an alternative. *See State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (to prove ineffective assistance of counsel, defendant must show that counsel's representation was both deficient and prejudicial).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Penoyar, J.