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COURT OF APPEALS

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NO. 33731-2-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**BRANDON JAMES HARVILL,**

**Appellant.**

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**BRIEF OF APPELLANT**

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**ORIGINAL**

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## ASSIGNMENT OF ERROR

### *Assignment of Error*

1. The trial court's admission of highly prejudicial prior bad acts under the guise of ER 404(b) denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

2. Trial counsel's failure to object to opinion evidence of guilt and failure to object when the state repeatedly called upon the defendant to comment on the credibility of the complaining witness denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

*Issues Pertaining to Assignment of Error*

1. Does a trial court's admission of highly prejudicial prior bad acts under the guise of ER 404(b) deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when the improper admission of that evidence affects the outcome of the trial?

2. Does a trial counsel's failure to object to opinion evidence of guilt and failure to object when the state repeatedly calls upon the defendant to comment on the credibility of the state's key witness deny a defendant the right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when those errors affect the outcome of the trial?

## STATEMENT OF THE CASE

### *Factual History*

At about 4:30 in the morning on June 14, 2005, 27-year-old Brandi Harvill awoke to the sound of breaking glass. RP 37-39.<sup>1</sup> At the time she assumed her 5-year-old daughter Brittany had gotten up and broken a cup while attempting to get a glass of water in the bathroom. *Id.* Brittany and her 7-year-old sister Breanna slept in separate bedrooms. RP 76. For many years Ms. Harvill had been living with her husband Brandon Harvill and their two daughters in a house at 3408 Jimmer Place in Longview.<sup>2</sup> RP 12-13. However, about four months earlier Brandon had moved out and the couple were in the process of getting a divorce. RP 13, 24-25. The court in the domestic case had entered a mutual restraining order. Exhibit 9. Just the day prior she had been in court and had obtained possession of a vehicle thereby upsetting the defendant. RP 87-88. In fact, that night she went to bed with her cordless phone and a baseball bat for protection. RP 35-36. She had also

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<sup>1</sup>The record in this case includes four volumes of verbatim reports. The first volume includes a pretrial hearing from August 17, 2005. It is referred to herein as "RP 8-17-05." The second and third continuously numbered volumes include the verbatim report of the trial held on August 18, 2005 and are referred to herein as "RP." The fourth volume includes the verbatim report of the second day of trial and is referred to herein as RP 8-19-05.

<sup>2</sup>The defendant is not Breanna's biological father. However he has raised her as if he were and he is the only father she has ever known. RP 12.

hidden her purse under the bed. *Id.*

Upon hearing the breaking glass Brandi took the bat and looked into her daughters' rooms. RP 37-39. Upon seeing that they were in bed she walked down the hall to the kitchen. *Id.* When she entered the kitchen she saw a masked person she did not recognize coming through the broken back window. *Id.* Upon seeing this person she ran back down the hall, grabbed her cell phone out of her bedroom, ran into Brittany's room, locked the door, and frantically called for the police. RP 39-41. As she did the intruder came down the hall and beat on the door to Brittany's room yelling "I'm going to kill you, you fucking bitch." *Id.* Although he turned the handle and kicked at the door, he was unable to get in the bedroom as Brandi had barricaded the door. *Id.* Brandi then heard the intruder "stomping" up and down the hall screaming and yelling "sic her, sic her" as if he were giving a command to a dog. RP 42-44. At this point Brandi claimed that she first recognized the voice of the intruder as that of her husband Brandon Harvill. *Id.*

Within a short period of time Brandi heard the front door alarm sound indicating that the door was open. RP 46. She assumed the intruder was gone and so she opened Brittany's door, checked on Breanna, and then saw that her purse was missing from under the bed. RP 47. According to Brandi it had \$500.00 cash in it along with her cell phone and her credit cards. RP

48. Within a few minutes her mother and grandfather arrived as did the police. RP 54. Brandi later testified that she feared for her life during this incident. RP 42. That next day Brandi noticed that someone had broken the lock on a detached storage shed, rummaged through the contents, but apparently had not taken anything. RP 57.

A little later on the morning of the incident the police went to 613 North Fourth Street in Kelso where the defendant lived with his girlfriend Melissa Brink. RP 148-151, 172-174, 252.. Melissa told the police that Brandon had been with her the entire evening except around midnight when he was gone with a friend of hers a few minutes to buy cigarettes. RP 173-178. The defendant repeated this claim and denied any involvement with the earlier incident at Brandi Harvill's house. 120-124.

#### *Procedural History*

By amended information filed on the day of trial the Cowlitz County Prosecutor charged the defendant with one count of residential burglary, one count of felony harassment and one count of violation of a not contact order all arising out of the incident on June 14, 2005. CP 12-13. The day before trial the parties appeared before the court on both parties' motions in limine, including the defendant's motion to exclude testimony of a number of alleged prior incidents that Brandi Harvill claimed occurred in January and February

of 2005. RP 8-17-05 15-30. The state had previously given the defense written notice that it would seek to use this evidence. *See* Exhibit 1.

These alleged incidents including the following: (1) a claim that in January of 2005 the defendant threw Brandi on the bed, threw her into the wall and hit her, (2) a claim that in February of 2005 in response to Brandi stating that she wanted a divorce the defendant took a handgun, pointed it at her, and threatened to kill her, (3) a claim that later in February the defendant became upset, grabbed Brandi by the throat and squeezed until he left a mark on her throat by pressing with his thumb, (4) a claim that in March the defendant broke into the house and stole her credit cards and made three threatening calls that same night, and (5) a claim that the defendant attempted to use Brandi's credit card information to make a payment on a car that they owned. RP 13-33. In fact, the only incident Brandi reported to the police was the March claim of the burglary and all the evidence the state had to support these claims was Brandi Harvill's testimony. RP 13-33. The court allowed the state to present all of this evidence under ER 404(b) and the first 33 pages of her testimony before the jury deals with these claims of other bad acts. *Id.*

During the trial, in this case, the state called five witnesses: Brandi Harvill, Brianna Harvill, Officer Jeremy Johnson, Officer David Voelker, and

Chris Olson. RP 11, 96, 110, 145, 157. These witnesses testified to the facts contained in the preceding *Factual History*. In addition, Chris Olson testified that on the day that the defendant came back from court after having lost his vehicle to his wife he was very upset and said that he wished someone would go over and “kick her butt,” and that he had a couple of friends that might go over and do it. RP 157-160. On cross-examination, Mr. Olson admitted that he did not believe the defendant who had just be “venting” and that he did not intend to do anything. RP 161.

In addition during their testimony both Officer Voelker and Officer Johnson testified that to their actions in arresting the defendant at his house and to interviewing him in the jail. RP 120-124, 148. The state also pointed out to jury that the defendant had been in jail when it asked him on cross-examination during the defense case whether or not he had spoke with Melissa Brink “while you were in jail.” RP 278. Officer Voelker also testified that when interviewing the defendant he told him that a Longview officer had “established probable cause” to arrest him for felony harassment. RP 152. The defense made no objection that the evidence concerning the arrest of the defendant, concerning his incarceration as well as the evidence of the officer having “established probable cause” was both irrelevant to any fact before the jury and was prejudicial. RP 120-124, 148, 152, 278.

Following the close of the state's case the defense called Melissa Brink, who testified that on the night in question the defendant had been at home with her and her friends except for a space of about 5 minutes when he went to the store with one of her friends. RP 172-192. The defendant then called Charles Wynn. RP 192. Mr. Wynn testified that prior to the burglary he had met with a person by the name of Ken Cooley who solicited him to burglarize Brandi Harvill's house in order to steal some spoked car wheels and a firearm that Mr. Cooley believed were in the house. RP 195-196. According to Mr. Wynn, Mr. Cooley showed him the house and on June 14, 2005 he went to the house, broke into the shed looking for the wheels, and then broke into the back window of the house in order to try to find the gun. RP 196-202. He thought the house was unoccupied. *Id.* Once inside he saw Brandi Harvill, chased her down the hall, threatened her to keep her from calling the police, and then stole her purse as he looked for the firearm. RP 202-206. Mr. Wynn also testified that when he found out that the defendant had been charged with this crime he eventually came forward to tell the truth. RP 208-109.

Following Mr. Wynn's testimony the defendant took the stand on his own behalf. RP 237. He denied any involvement with or knowledge of the crime and repeated Melissa Brink's alibi evidence. RP 237-260. On cross-

examination the state repeatedly called upon the defendant to comment on the credibility of Brandi Harvill's testimony. RP 260-280. The following gives some examples of these questions and answers.

Q. Now, just so I get this straight, you're not denying that somebody broke into Brandi's house; right?

A. Obviously, they did [inaudible].

Q. So, you're agreeing that somebody broke into Brandi's house.

A. Obviously, I'm here.

Q. Okay. And they did so without permission; right?

A. Yes

Q. Okay. And that the house was a dwelling, clearly?

A. A dwelling?

Q. Yeah.

A. Is it?

Q. Somebody sleeps there?

A. Yes.

Q. Okay. And the person who entered that house, entered it with the intent to commit a crime?

A. Yes.

RP 250-261.

The prosecutor then continued with this line of questioning by asking

the defendant if he agreed with both Brandi Harvill and Charles Wynn's testimony. RP 262-263.

Q. Let me just rephrase it. The person who entered the house threatened to kill Brandi; right? You're not disagreeing with that?

A. From the statement.

Q. Is that a "yes"?

A. Well, yeah.

Q. Okay. And that somebody stole her purse? You're not disagreeing with that?

A. No, I don't know what's going through his mind when he did this. Is there a purse stolen? That's what she said, yeah, there was a purse stolen.

Q. Okay. So, you're agreeing that her purse was stolen, right?

A. Yeah -

Q. Okay.

A. - there was a purse stolen, I guess. That's what the police say and that's what she's saying.

RP 260-262.

At this point the defense finally made an objection that these matters were outside the defendant's "personal knowledge." RP 262. The court sustained this objection. *Id.* In spite of the fact that this one objection was sustained the prosecutor's next question was as follows:

Q. Are you contradicting that Brandi was frightened at all?

A. Well I would've been frightened myself.

Q. And that fear was reasonable?

A. Well, yeah, because I would've been scared - scared too, if someone was in my house.

RP 262-263.

The state later renewed this line of cross-examination with the following questions:

Q. Now, it's your testimony that everything that Brandi described as happening in the house is correct, other than it wasn't you; right.

RP 280.

At this point the defense finally objected on the basis that the state was asking the defendant to comment on the credibility of a witness and the court sustained the objection. RP 280-281. In spite of the fact that this objection was sustained the prosecutor simply repeated the question, this time with no objection. RP 281.

Q. You're not disagreeing that the burglary happened?

A. I don't know what to tell you what was going on in the house.

Q. Okay. You've just saying it's not you?

A. Yes.

RP 281.

After the end of the defendant's case the state called brief rebuttal

evidence and the court then instructed the jury without any objections or exceptions from the defense. RP 5-19-05 5-6. The jury returned verdicts of “guilty” on all three counts. CP 45-47. Following sentencing within the standard range the defendant filed timely notice of appeal. CP 52-61, 63.

## ARGUMENT

### I. THE TRIAL COURT'S ADMISSION OF HIGHLY PREJUDICIAL PRIOR BAD ACTS UNDER THE GUISE OF ER 404(b) DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

It is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. See 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a "criminal type," and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited

circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim

that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

*State v. Pogue*, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed the conviction and remanded the case for a new trial.

As Tegland notes, even if the state can prove some relevance in evidence that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weigh the prejudicial effect of that evidence under ER 403. This rule states:

Although relevant, evidence may be excluded if its probative

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent

an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), Acosta was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential

fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

*State v. Acosta*, 123 Wn.App. at 426 (footnote omitted).

In the case at bar the court allowed the state to elicit the following evidence of other crimes over defense objection: that some four or five months before the incident here at issue the defendant allegedly twice physically assaulted the complaining witness, that the defendant had once threatened to kill her while pointing a handgun at her, that the defendant had burglarized her house, and the defendant had attempted to illegally use her credit card. The only relevance to this highly inflammatory testimony was how it bore upon the reasonableness of Brandi Harvill's claim that she believed the threats to kill she claimed the defendant made on the night of the burglary.

Had the defense to the felony harassment charge been to question the reasonableness of her fears then the evidence of the prior acts might well have been admissible even given its highly prejudicial nature. However, the defense in this case never questioned the reasonableness of her fears. Indeed, the defendant took the stand and admitted that had he been in her situation he

would have been in fear for his life as would have any reasonable person. Even absent this admission by the defendant, the facts of this case were overwhelming that Brandi Harvill felt reasonable fear for her life. Given the overwhelming evidence on this point as well as the defendant's admission one is left to wonder what the state's purpose was in eliciting these alleged prior acts. This purpose should be clear. The state elicited this evidence in order to convince the jury that the defendant was guilty of the charged crime because he had allegedly committed similar crimes in the past. As such this evidence was inadmissible and the trial court erred when it refused to grant the defendant's motion in limine.

As was stated above, errors in admitting improper propensity evidence such as occurred in *Acosta* and in the case at bar require reversal and a new trial if there is a "reasonable probability that the error materially affected the outcome." *Pogue, supra*. In the case at bar two facts support the conclusion that there is such a reasonable probability. The first fact is the plausibility of the defendant's alibi defense and alibi witness. The second and stronger fact was the unusual circumstance in which another person took the witness stand for the defense and freely confessed that he had committed the crime alone and without the knowledge of the defendant. Thus, the trial court's error in allowing the state to elicit improper propensity evidence

denied the defendant a fair trial. As a result, this court should vacate the verdict and remand for a new trial.

**II. TRIAL COUNSEL'S FAILURE TO OBJECT TO OPINION EVIDENCE OF GUILT AND FAILURE TO OBJECT WHEN THE STATE REPEATEDLY CALLED UPON THE DEFENDANT TO COMMENT ON THE CREDIBILITY OF THE COMPLAINING WITNESS DENIED THE DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a

reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar the defendant claims ineffective assistance based upon trial counsel's failure to object to the admission of opinion evidence of guilt and trial counsel's failure to object to the state's repeated attempts on cross-examination to get the defendant to comment upon the credibility of the state's key witness. The following sets out these arguments.

***(1) Trial Counsel's Failure to Object to Opinion Evidence of Guilt Denied the Defendant His Right to Effective Assistance of Counsel.***

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness

whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

*State v. Carlin*, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that “[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Under this rule the fact of an arrest is not evidence because it constitutes the arresting officer’s opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967) the plaintiff sued the defendant for injuries that occurred when the defendant’s vehicle hit the plaintiff’s vehicle. Following a defense verdict the plaintiff appealed arguing that defendant’s argument in closing that the attending officers’ failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent’s

negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness found his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant's vehicle falls into this category. Therefore, the witness' opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

*Warren v. Hart*, 71 Wn.2d at 514.

Although *Warren* was a civil case the same principle applies in criminal cases: the fact of an arrest is not admissible evidence because it constitutes the opinion of the arresting officer on guilt which is the very fact the jury and only the jury must decide.

In this case, the state repeatedly and unnecessarily elicited the fact that following Brandi Harvill's call to the police and claims against the defendant the police immediately went to the defendant's house and arrested him. The prosecutor elicited this evidence from the arresting officer, thereby giving the jury the officer's opinion that the defendant was guilty. This improper evidence was reinforced when the state repeatedly elicited the fact that the officer took the defendant to jail and that the defendant remained there in custody. Put another way, what was the relevance of the fact that the officer arrested the defendant, that the defendant was held in jail, and that the defendant's girlfriend spoke with the defendant while he was in the jail? The

purpose of eliciting these facts is to embarrass the defendant and try to get the jury to believe that the defendant was guilty because the officer and the court believed he was guilty.

No tactical reason exists for the failure to object to a police officer's opinion that a defendant is guilty whether stated directly or impliedly through testimony concerning the fact of arrest and the fact that the defendant was held in jail. Indeed, what tactical advantage could be gained from allowing the state to elicit improper evidence that prejudices the defendant? Thus trial counsel's failure to object when the state repeatedly elicited evidence that the police arrested the defendant and that the defendant was then held in jail falls below the standard of a reasonably prudent attorney. In addition, given both the fact of the defendant's alibi defense and the fact of the highly unusual circumstance in which another person confessed on the stand to having committed the crime it is more probable than not that but for trial counsel's error in failing to object to the state's improper opinion evidence of guilt the trial would have resulted in an acquittal. Thus, trial counsel's failures denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment and the defendant is entitled to a new trial.

***(2) Trial Counsel's Failure to Object to the State's Attempts on Cross-examination to Get the Defendant to Comment on the Credibility of the State's Key Witness Denied the Defendant His Right to Effective Assistance of Counsel.***

Under both Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, a defendant is entitled to have his or her case decided upon the evidence adduced at trial, not upon the opinions of attorneys, the courts or the witnesses concerning the credibility of witnesses, the evidence, or the guilt of the defendant. *State v. Casteneda-Perez*, 61 Wn.App. 354, 360, 810 P.2d 74 (1991). Thus, it is improper for the prosecutor to elicit evidence of any person's personal opinion about a witness's credibility. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). As part of this right, it is also improper for the state to attempt to get the defendant to comment on the credibility of the state's witnesses. *State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994).

For example, in *State v. Jerrels*, 83 Wn.App. 503, 925 P.2d 209 (1996), the defendant was convicted of Rape of a Child and Child Molestation after a trial in which the trial court permitted the state to ask the defendant's wife whether or not she believed that her children were telling the truth. The defendant appealed his convictions arguing that this line of questioning denied him his right to a fair trial. In addressing this argument, the Court of Appeals first noted that it was error for the court to allow a

witness to comment on the credibility of another witness. The court stated:

A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. Such questioning invades the jury's province and is unfair and misleading. The questions asked of Mrs. Jerrels were clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred. In another sexual abuse case, we held recently that reversible error occurred when a pediatrician was allowed to testify that, based on the child's statements, she believed the child had been abused.

*State v. Jerrels*, 83 Wn.App. at 507-508 (citations omitted).

As the court states: "A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth." Thus, it was error in *Jerrels* for the prosecutor to ask the defendant's wife whether or not she believed her children. In the same manner, it was error in the case at bar for the prosecutor to seek to compel the defendant to either agree with Brandi Harvill's version of events or refute it. In the same way that the prosecutor in *Jerrels* committed misconduct by inquiring whether or not the defendant believed the complaining witnesses were telling the truth so the prosecutor in the case at bar committed misconduct by inquiring whether or not the defendant believed the complaining witness was telling the truth.

In the case at bar there was no tactical reason for the defense attorney to fail to object to the prosecutor's repeated questions calling upon the

defendant to comment on the credibility and accuracy of Brandi Harvill's claims. Indeed the defense attorney did rouse himself sufficiently to offer two objections both of which were immediately sustained by the court. However, the defendant's attorney then sat mute as the prosecutor again asked the same objectionable questions. No tactical advantage could be gained by allowing the prosecutor to again ask a question that the court had just agreed was improper.

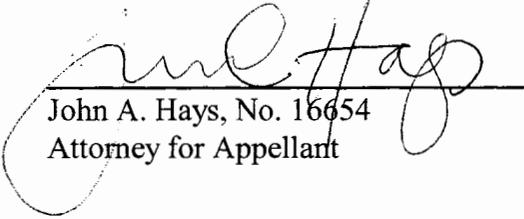
The case at bar is certainly an unusual one based upon the fact that the defense called a witness who fully and frankly confessed to the serious crimes for which the defendant was charged. Coupled with plausibility of the alibi defense there is a reasonable probability that but for the state's repeated improper questions to the defendant the jury would have returned a verdict of not guilty. Thus, counsel's failure to object in the face of repeated acts of prosecutorial misconduct not only fell below the standard of a reasonable prudent attorney, it also caused prejudice. Consequently trial counsel's failures denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment and the defendant is entitled to a new trial.

## CONCLUSION

The defendant is entitled to a new trial based upon the state's introduction of improper propensity evidence, based upon trial counsel's failure to object to improper opinion evidence of guilt, and based upon the prosecutor's misconduct in repeatedly calling upon the defendant to comment on the credibility of the state's key witness.

DATED this 26<sup>th</sup> day of June, 2006.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

## **APPENDIX**

### **WASHINGTON CONSTITUTION ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

### **WASHINGTON CONSTITUTION ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

### **ER 403**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

### **ER 404**

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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COURT OF APPEALS  
06 JUN 28 PM 2:32  
STATE OF WASHINGTON  
BY [Signature]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
Respondent, )  
vs. )  
BRANDEN JAMES HARVILL, )  
Appellant. )

NO. 05-1-00713-1  
COURT OF APPEALS NO:  
33731-2-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON )  
COUNTY OF COWLITZ ) ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 26<sup>TH</sup> day of JUNE, 2006, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR  
COWLITZ COUNTY PROSECUTING ATTORNEY  
312 S.W. 1ST STREET  
KELSO, WA 98626

BRANDEN JAMES HARVILL  
613 N. 4<sup>TH</sup> AVE.  
KELSO, WA 98626

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 26<sup>TH</sup> day of JUNE, 2006.

[Signature]  
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 26<sup>th</sup> day of JUNE 2006.

[Signature]  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: Kelso, WA 98626  
Commission expires: 10-24-09

