

NO. 34140-9

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MARGARET M. COLBURN,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court abused its discretion and violated RCW 10.77.060 when it denied the defendant's motion to continue the trial date based upon defense counsel's belief that the defendant was not competent to stand trial.

2. The trial court denied the defendant her right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refused to admit Dennis Martin's prior sworn statement into evidence under ER 801(d)(1).

3. Trial counsel's failure to object to (1) the admission of a police officer's opinion of guilt, and (2) the admission of witness's opinion on the defendant's credibility denied the defendant her 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 abuse its discretion under RCW 10.77.060 when it fails to determine a defendant's competency after defense counsel states the belief that defendant is not currently competent and moves for a continuance to determine competency?

2. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refuses to admit into evidence under ER 801(d)(1) the prior inconsistent statement of a witness when that prior statement exonerates the defendant?

3. Does a trial counsel's failure to object to the admission of a police officer's opinion of guilt and the admission of a witness's opinion on the defendant's credibility deny the defendant the right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when absent those failures the jury would more likely than not have returned a verdict of acquittal?

STATEMENT OF THE CASE

Factual History

On June 4, 2005, Dennis Martin went to the Longview residence of the defendant Margaret Colburn and asked her to cash a Providian Bank "VISA"¹ check for him. RP 53, 58.² The check bore the name of Robert Farvour whom the defendant knew to be Mr. Martin's brother-in-law. RP 54. According to the defendant and her daughter, Mr. Martin stated that (1) the account belonged to his brother-in-law, (2) his brother-in-law had authorized him to make charges against the account for up to \$3,000.00 as long as he made the regular monthly payments and paid off the balance, and (3) Mr. Martin could not cash the check because he did not have his wallet with him. RP 41-47, 88-89; Exhibit 2. The defendant later reported to the police that she believed the defendant's representations concerning the validity of the check and that the defendant had offered her \$20.00 for her bother. *Id.*

In fact, Mr. Martin had previously used his brother-in-law's name without permission in order to get the Providian VISA card. RP 54. In filing

¹Occasionally when financial institutions issue "VISA" credit cards to customers they also send a number of "checks" with the card along with an invitation to fill out and cash the check with that amount being debited to the customer's credit card account.

²The record in this case includes one volume of verbatim reports and is designated herein as "RP x" with "x" being the page number.

the false application for the card, Mr. Martin had used his own current address which had previously been the address of his brother-in-law. RP 33. Mr. Martin later claimed that he intended to make the payments on the account and had no intent of defrauding either his brother-in-law or the credit card company out of any money. RP 73-75. Shortly after receiving the credit card Mr. Martin filled out one of the "VISA" checks that Providian sent with the card and asked the defendant to cash it. RP 58.

After speaking with Mr. Martin the defendant drove to the "Cash & Go" business in Longview where she is a customer and attempted to cash the check. RP 17. Upon receipt of the check the "Cash & Go" manager called the telephone number of the maker listed on the front of the document. RP 20. She then spoke with Mr. Martin, who stated that he was Robert Favour and that he had written the check. RP 21. Following the call the "Cash & Go" manager checked with directory assistance and found out the Mr. Favour was listed at a different address and telephone number. RP 22. When she called the new number she got a recording. *Id.* She left a message concerning the check, returned the check to the defendant, and told her that she could not cash it because she could not contact the maker at that time. RP 22-23. The defendant then left the store. *Id.* According to the "Cash & Go" manager the defendant did not appear nervous when informed that the manager would have to speak with the maker of the check before cashing it.

RP 25-26.

Later that same evening Mr. Favour returned the "Cash & Go" manager's call. RP 29. He told her to call the police because he had not written the check. *Id.* The manager did call the police and Longview Officer Langlois responded to the "Cash & Go" where he took a report along with a copy of the check and a copy of the defendant's account paperwork. RP 39-40. He then went to the defendant's apartment and spoke with her. R 40. The defendant told the officer that she had believed Dennis Martin's representations that the check was good and that she had tried to cash it. RP 40-42. After the defendant produced the check, Officer Langlois arrested her for forgery and booked her in the jail. *Id.* Once at the jail, the defendant gave the officer a written statement confirming her claim that she believed Dennis Martin's story that the check was good. RP 44; Exhibit 2.

Upon finding out that the her mother had been arrested the defendant's daughter called Mr. Farvour to speak with him. RP 92. While she was on the phone Dennis Martin walked into the apartment and also spoke with Mr. Farvour over the telephone, telling him that he had duped the defendant into believing that the check was good. *Id.* Mr. Martin then went to the Longview Police Department, confessed to what he had done, and prepared a written statement under oath admitting his guilt and confirming that the defendant had not known that the check was forged. RP 57-58.

Procedural History

By information filed June 8, 2005, the Cowlitz County Prosecutor charged defendant Margaret Marie Colburn with one count of forgery arising out of her actions in trying to cash the check Dennis Martin gave her on June 4, 2005. CP 1-2. The day before trial in this case the defendant appeared before the court and her two attorneys Mayree Grim and Donald Fry and Ms. Grimm moved for a continuance based upon both attorneys' belief that the defendant was "having problems with her medication" and was not currently competent. RP 9. Counsel's statements to the court on this issue were as follows, along with the state's reply:

MS. GRIMM: . . . Ms. Colburn came in today and indicates she's having some severe difficulties with her medications. And it's our opinion and hers, I believe, that she is in a condition that she is not able to assist us at trial tomorrow.

She's actually considering turning herself in to St. Johns. Mr. Frey attempted to call the D.A. to verify an appointment, if she has one.

MS. COLBURN: At 9:30, Thursday, ma'am.

MR. GRIMM: At 9:30, Thursday. But they wouldn't share with him any information due to the Privacy Act. We're asking to continue the trial at this point. We've dis -- Mr. Frey discussed it with Ms. Hunt, and we just think it would be a travesty to attempt to try this thing tomorrow in her mental state.

RP 9.

In fact, the defense had taken the somewhat unusual approach of

inviting the prosecutor to talk with the defendant in order to assess her competency. When the defense moved for the continuance the state replied as follows:

MS. HUNT: Your Honor, Mr. Frey did approach me about 15, 20 minutes ago, maybe more, saying that Mister -- that Ms. Colburn came to him with these issues. He allowed me to discuss things with Ms. Colburn, specifically, whether or not she would be able to sit in on trial, if she felt that she could aid counsel.

Her answers were no. She said that she was having difficulty with her medications, meaning that she would not have the ability to concentrate, that she -- they wanted her to come in for an emergency room visit last night. She declined to do that, but rather made an appointment for Thursday.

At this point, I do not have confirmation of any of these things. The State is ready for trial and we would oppose a continuance.

RP 9-10.

The court then asked the defendant why she had not gone to the hospital the day before as recommended, and she and her attorney replied that the defendant was worried she would be admitted and would not be able to appear in court as ordered. RP 11. Without any further inquiry, the court denied the motion and ordered the parties to be in court the next day for trial.

RP 11-12.

The next day the case came on for trial with the state calling three witnesses: Nashida Cervantes (the Cash & Go manager), Robert Favour, and Longview Officer Mark Langlois. CP 16, 27, 38. The defense called two

witnesses: Dennis Martin and Patricia Colburn (the defendant's daughter).
RP 52-87. These witnesses testified to the facts contained in the preceding
Factual Statement. RP 16-99. In addition, during the direct examination of
Officer Langlois the state twice elicited the fact that the officer had arrested
the defendant based upon his opinion that she had committed the crime of
forgery. RP 41-42. The first question and answer went as follows:

Q. All right. What happened after you went to her apartment?

A. Once she admitted to me that she was there at the Cash & Go and she had tried to cash the check, I advised her that she was under arrest for forgery.

RP 41.

Eight questions later the state again elicited the fact that the officer arrested the defendant based upon his belief that she was guilty. RP 42.

Q. Did she say anything prior to putting her under arrest about the check?

A. I believe she had told me that she had no idea it was a forged check and she had no knowledge of that. I wanted to give her the benefit of the doubt, but at that time, due to the evidence I had and statements given to me by the Cash & Go, I advised her she was under arrest for forgery.

RP 42.

The defendant's attorney did not offer any objections to this evidence.

RP 41-42.

During the trial the parties had the clerk mark six potential exhibits:

(1) the Providian VISA check Dennis Martin wrote, (2) the defendant's written statement to the police, (3) the Advise of Rights Card the defendant signed at the police station, (4) the defendant's customer information card from Cash & Go, (5) Dennis Martin's written statement under oath to the police, and (6) a copy of Dennis Martin's Oregon Identification card. RP 18, 43, 44, 49, 53 100. During it's state's case-in-chief the court admitted exhibits 1, 2, and 3 without objection from the state. RP 19, 43, 44. The court also admitted exhibit 6 by stipulation of the parties at the end of the trial. RP 100. However, the court refused the defendant's request to admit exhibit 5, which was the sworn written statement that Dennis Martin gave to the police during the evening following the defendant's arrest. RP 49, 55. In this statement Dennis Martin claimed that he had duped the defendant into believing that the check he gave her was good. *See* Exhibit 5. When called to testify he repudiated that portion of the statement that exonerated the defendant. RP 65-83. Rather, he claimed that she knew the check was forged and that he had actually offered her \$500.00 to cash it. RP 65-78.

In addition, during Dennis Martin's testimony the state specifically asked him to review exhibit 2, which was the defendant's written statement to the Longview Police in which she stated that she believed the check to be good, that Dennis Martin had told her that the check was on his relative's VISA account, and that he had permission to use it. *See* Exhibit 2. This

colloquy went as follows:

Q. So, I'm a little confused. I'm handing you what's already been admitted as Exhibit 2.

A. Pardon me?

Q. Exhibit 2.

A. Okay.

Q. And this is Margaret's statement.

A. All right.

Q. Would you read through that?

A. Aloud or?

Q. No, just to yourself.

A. Okay. It's a lie, it's not true.

Q. No, no, no. I didn't ask you any questions.

RP 79-80.

Although the defense posed no objection to this series of questions and answers, particularly the last answer, the court ordered counsel out into the hall for a discussion. RP 80-82. Upon returning to the courtroom the court stated: "On the objection, that last answer is stricken." RP 82. In spite of the court's obvious unease for this line of questioning, the prosecutor persisted with the following questions, again with no objection from the defense:

Q. After reading this statement, did you ever tell Ms. Colburn that it was your uncle's checking account –

A. No.

Q. – yes or no?

A. No.

Q. Okay. Did you ever tell her that your uncle gave you this checking account so long as you made the VISA payments up to \$3,000.00, yes or no?

A. No.

RP 83.

Following the close of testimony in this case the court instructed the jury with neither side making objections or taking exceptions. RP 103-104. During closing, the state remarks included the following, again without objection from defendant's attorney:

A reasonable person in that situation would know that that was a crime, would know to go to that Cash & Go would probably end up causing your arrest because that check was bad. So the issue you have to – to here is, did she have reasonable – would a reasonable person have thought that the check was bad? Yes.

. . .

So what you have to look at is the circumstances. Do the circumstances add up to the point where a reasonable person would say, I wouldn't cash that check? Would a reasonable person say: No, wouldn't catch me in there, something up. I would know that there was something wrong with that.

RP 121-123.

Following deliberation the jury returned a verdict of guilty. CP 38.
The court later sentenced the defendant within the standard range, after which
the defendant filed timely notice of appeal. CP 41-49, 51.

ARGUMENT

I. THE TRIAL COURT ABUSED IT'S DISCRETION AND VIOLATED RCW 10.77.060 WHEN IT DENIED THE DEFENDANT'S MOTION TO CONTINUE THE TRIAL DATE BASED UPON DEFENSE COUNSEL'S BELIEF THAT THE DEFENDANT WAS NOT COMPETENT TO STAND TRIAL.

Under RCW 10.77.050 mental incapacity stands as an absolute bar to trying a case, receiving a verdict, or sentencing a defendant on a criminal matter. This statute states: "No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues. RCW 10.77.050.

Under RCW 10.77.010(14) the legislature has defined the term "incompetency" as follows:

(14) "Incompetency" means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.

RCW 10.77.010(14).

In the first part of RCW 10.77.060(1)(a) the legislature created the following procedure for raising questions of competency.

(1)(a) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

RCW 10.77.060(1)(a) (in part).

The ultimate decision whether or not a person is competent lies within the sound discretion of the trial court. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). In *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001) the court stated the following about competency and the court discretion in ultimately determining this issue:

It is fundamental that no “incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050. Indeed, “the conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the Fourteenth Amendment’s due process clause.” A defendant is competent if he has the capacity to understand the nature of the proceedings against him and to assist in his own defense. In reviewing a trial court’s decision on competency, we grant the trial court great deference. We will not reverse the trial court unless we find that the court abused its discretion.

State v. Lawrence, 108 Wn.App. at 231-232.

However, while the ultimate decision on competence for the purposes of RCW 10.77.050 lies within the discretion of the trial court, this is not true of the decision whether or not to perform an evaluation under RCW 10.77.060(1)(a). The language is specific and states that the court “shall” order a competency evaluation “on its own motion or on the motion of any party.” Although the language of this statute appears to make the “motion of any party” sufficient to trigger the required evaluation this reading is incorrect. Rather, the moving party bears the burden of producing evidence sufficient to call the defendant’s competency into question, thereby triggering

the required evaluation under RCW 10.77.060(1)(a). In *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046 (2001) the Washington Supreme Court stated the following on this issue:

A defendant is “incompetent” if he or she “lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(14). As we noted in *Lord*, the defense bears the “threshold burden” of establishing that there is reason to doubt the defendant’s competency. *Lord*, 117 Wn.2d at 903, 822 P.2d 177. We further observed in that case that although “considerable weight” should be given to the attorney’s opinion regarding the client’s competency, that opinion is not necessarily dispositive. *Id.* Instead, the ultimate question for the trial court is whether there is a “factual basis” to doubt the defendant’s competence. The question before us, then, is whether the record reflects that there was a “factual basis” for the trial court to doubt the competency of Woods. If there was such a basis, the trial court should have granted the continuance. If not, there was no error in denying the motion for continuance.

State v. Woods, 143 Wn.2d at 604-605.

While the trial court “shall” order an evaluation if the moving party meets the “threshold burden of establishing that there is reason to doubt the defendant’s competency,” the decision whether or not the evidence rises to this level does lie within the trial court’s discretion. *Seattle v. Gordon*, 39 Wn.App. 437, 441, 693 P.2d 741 (1985). 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 *Woods* the defendant had been convicted of aggravated first degree murder and the state was seeking the death penalty.

After the guilt phase of the trial the defendant's attorney requested a continuance to seek an evaluation on the defendant's competency. The only facts counsel gave for making the request was that the defendant had instructed the attorney to not present mitigating evidence during the penalty phase and had informed the media of the same. The court found this insufficient evidence to meet the "threshold burden" that would trigger a required competency evaluation under RCW 10.77.060(1)(a).

By contrast, in the case at bar trial counsel specifically indicated their belief that the defendant's mental state had deteriorated sufficiently that (1) the defendant wanted to check herself into the hospital, (2) the hospital staff apparently wanted to admit the defendant, (3) the defendant was on some type of medication that affected her mental ability and her capacity to assist in her defense, and (4) trial counsels' recent communications with the defendant supported their belief that the defendant was not currently competent. Counsel even took the unusual step of having the prosecutor interview the defendant. The prosecutor's statement to the court is interesting in that she opposed the continuance but did not give an opinion contrary to that of the defense attorneys. This itself stood a negative pregnant with admission that the defendant was having mental difficulties sufficient to prevent her from aiding in her own defense. This evidence more than meets the defendant's burden of production. As a result, the trial court did abuse

it's discretion when it denied the defendant's motion for a continuance and competency evaluation.

II. THE TRIAL COURT DENIED THE DEFENDANT HER RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REFUSED TO ADMIT DENNIS MARTIN'S PRIOR SWORN STATEMENT INTO EVIDENCE UNDER ER 801(d)(1).

Under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, a defendant charged with a crime is guaranteed a fair trial, including the right to present evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Thus, it is a fundamental principle of due process that a defendant in a criminal proceeding a defendant must be permitted to argue any defense allowed under the law and supported by the facts. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). However, the right to present evidence in one's own defense is not absolute, as the evidence must be relevant and otherwise admissible. *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996).

For example, in *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 843 (1998), the defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion,

the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

In argument before the Supreme Court, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his right under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth and Fourteenth Amendments to present a defense.

In the case at bar, the defense sought the admission of Exhibit 5 which was Dennis Martin's sworn statement to the police on the night the defendant was arrested in which he incriminated himself and exonerated the defendant.

The defense sought the admission of this statement because it was directly contrary to the incriminating testimony that Mr. Martin gave at trial. The trial court refused to admit this exhibit based upon the state's hearsay objection. However, as reference to ER 801(d)(1)(i) reveals, the trial court erred in this ruling.

Evidence Rule 801(d)(1)(i) states the following::

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person;

ER 801(d)(1)(i).

In order for a statement such as the one found in Exhibit 5 to qualify under ER 801(d)(1)(i), the statement must first be contrary to the declarant's testimony. This requirement is met in this case. In Exhibit 5 Dennis Martin stated that (1) the defendant hesitated to cash the check, (2) that she had no idea that he was lying about the validity of the check, (3) that she had nothing to do with the forgery, and (4) that she was innocent. His testimony at trial was exactly at odds with his prior statement on each one of these critical

points. Thus the first requirement ER 801(d)(1)(i) is met.

The second requirement under ER 801(d)(1)(i) is that the statement must have been “given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding.” In *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003), the court addressed this issue under facts in which the state charged the defendant with indecent liberties against his 16-year-old and 19-year-old daughters. At the time of the complaint, each daughter “wrote a statement on a printed form” at the request of the police. The statements affirmed the oral complaints, and each daughter signed her written statement following a printed paragraph that stated as follows:

The above is a true and correct statement to the best of my knowledge. No threats or promises have been made to me nor any duress used against me.

State v. Sua, 115 Wn.App. at 33.

At a subsequent trial, both daughters took the witness stand and testified that their father had not abused them. Although they both admitted making oral and written statements claiming abuse, they testified that these prior statements were a “cry for attention” and untrue. Upon motion by the state, the trial court admitted the written statements under ER 801(d)(1)(i) as substantive evidence. Following conviction, the defendant appealed.

On appeal, the state argued that the trial court had not erred when it admitted the written statements because (1) they qualified under ER

801(d)(1)(i) as a prior inconsistent statement, (2) the statements were admissible under the decisions in *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982), and *State v. Nelson*, 74 Wn.App. 380, 874 P.2d 170 (1994), and (3) to the extent the statements did not meet the requirements of ER 801(d)(1)(i) they were otherwise reliable and thereby admissible. However, the Court of Appeals rejected each argument, first noting that while the statements had been given under a promise that they “were true and correct statement to the best of my knowledge,” they were neither sworn before a notary nor given in compliance with RCW 9A.72.085. The court then stated:

[W]e cannot just ignore ER 801(d)(1)(i)’s requirement that the out-of-court statement of an in-court witness be “given under oath subject to the penalty of perjury.” We are obligated to construe ER 801(d)(1)(i) according to its plain meaning, and to give effect to all of its language. To do that, we must hold that Exhibits 1 and 2 do not satisfy ER 801(d)(1)(i), because they were not “given under oath subject to the penalty of perjury.”

State v. Sua, 115 Wn.App. at 48 (footnote omitted).

The court then rejected the state’s second argument:

[N]either *Smith* nor *Nelson* supports the State’s request. The declarant in *Smith* gave her statement under oath subject to penalty of perjury, for she actually took an oath from a notary public. The declarant in *Nelson* gave her statement under oath subject to penalty of perjury, for she complied with RCW 9A.72.085. Neither declarant in this case actually took an oath, complied with RCW 9A.72.085, or in any other way gave her statement “under oath subject to the penalty of perjury.”

State v. Sua, 115 Wn.App. at 48.

In the case at bar Exhibit No. 5 Contains the following at the end:

I Dennis Martin have read the above statement and I certify and declare it be true and correct under penalty of perjury under the laws of the state of Washington.

Exhibit 5.

In fact, in the criminal law, the term "oath" is defined as "an affirmation and every other mode authorized by law of attesting to the truth of that which is stated." RCW 9A.72.010(2). The term "authorized by law" is itself defined as follows:

(3) An oath is "required or authorized by law" when the use of the oath is specifically provided for by statute or regulatory provision or when the oath is administered by a person authorized by state or federal law to administer oaths.

RCW 9A.72.010(3).

One type of oath "authorized by law" is found under RCW 9A.72.085. Under this statute, an affirmation constitutes an oath if it meets the following four requirements.

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the state of Washington.

RCW 9A.72.085.

In the case at bar, in contrast to the facts in *Sua*, Exhibit No. 5 meets all the requirements of a sworn statement for the purposes of under RCW 9A.72.085. It states the place and date of signing, it is signed and subscribed by Mr. Martin, and it was given under penalty of perjury under the laws of Washington State. Thus, it meets the second requirement of ER 801(d)(1)(i).

The third requirement under ER 801(d)(1)(i) is that the oath be given as part of a “trial, hearing, or other proceeding, or in a deposition.” Whether or not a written statement given to a police officer concerning the commission of a crime can qualify as “other proceeding” depends upon the particular indicia of reliability under the facts of the particular case. *Sua, supra*. Once case finding such sufficient indicia was *State v. Nelson, supra*.

The *Sua* court summarized the facts of *Nelson* as follows:

In 1994, in a case called *State v. Nelson*, Division One seems to have addressed the rule's requirement that the offered statement have been “given under oath subject to the penalty of perjury,” as well as the rule's requirement that the offered statement have been “given ... at a trial, hearing, or other proceeding.” A woman told police that she was a prostitute and that the defendant was her pimp. An officer reduced her statement to a writing that she signed before a notary public. Although the notary did not administer an oath, the writing apparently recited, pursuant to RCW 9A.72.085, “that it is certified or declared by the person to be true under penalty of perjury[.]” Concluding that the statement could “be regarded as ... sworn” because RCW 9A.72.085 had been complied with, Division One held that the statement had been given in an “other proceeding,” and that the statement fell within the scope of ER 801(d)(1)(I).

State v. Sua, 115 Wn.App. at 47.

In the case at bar, the facts surrounding Dennis Martin's statement are even more compelling than those in *Nelson*. In this case the defendant not only gave the statement to the police, but he did not try to minimize his criminal involvement. Rather, he gave a sworn statement under oath to a police officer concerning a crime he had just committed. As in *Nelson*, these facts indicate that the sworn statement given her was at an "other proceeding." Consequently, Exhibit 5 met all the requirements for admissibility under ER 801(d)(1) and the trial court erred when it denied the defendant's motion to admit this exhibit.

In the case the trial court's error also denied the defendant a fair trial. Exhibit 5 was not merely a statement concerning some peripheral facts of the case. Rather, it went to the heart of the defendant's case in that it (1) supported her claim of lack of knowledge, and (2) it impeached Dennis Martin's testimony to the contrary. Given the facts that (1) the defendant acted openly in trying to cash the check, (2) that the defendant cooperated fully with the police, including producing the check at their request, and (3) the defendant's consistent denials of wrongdoing, it is highly likely that had the trial court admitted Exhibit 5 the jury would have returned a verdict of acquittal. Thus, the error was not harmless under any standard of review and the defendant is entitled to a new trial.

III. TRIAL COUNSEL'S FAILURE TO OBJECT TO (1) THE ADMISSION OF A POLICE OFFICER'S OPINION OF GUILT, AND (2) THE ADMISSION OF A WITNESS'S OPINION ON THE DEFENDANT'S CREDIBILITY DENIED THE DEFENDANT HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, 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 professional 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 when (1) the state elicited in improper opinion of guilt, and (2) the state asked a witness to comment on the credibility of a witness. The following presents these arguments:

(1) The Prosecutor Improperly Elicited the Opinion of a Police Officer That the Defendant Was Guilty.

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 founds 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 Officer Langlois believed the defendant to be guilty. This evidence came into the record during the direct examination of the officer.

Q. All right. What happened after you went to her apartment?

A. Once she admitted to me that she was there at the Cash & Go and she had tried to cash the check, I advised her that she was under arrest for forgery.

RP 41.

Eight questions later the state again elicited the fact that the officer arrested the defendant based upon his belief that she was guilty.

Q. Did she say anything prior to putting her under arrest about the check?

A. I believe she had told me that she had no idea it was a forged check and she had no knowledge of that. I wanted to give her the benefit of the doubt, but at that time, due to the evidence I had and statements given to me by the Cash & Go, I advised her she was under arrest for forgery.

RP 42.

In looking at this testimony the first question that arises is this: Why was it relevant that Officer Langlois arrest the defendant? It was unimportant

to any fact at issue before the court. It certainly was not necessary as a preliminary to having the officer testify to the defendant's statements. It's relevance comes from the fact that it constitutes the officer's opinion of guilt based upon his analysis of the evidence. In fact, the last statement of the police officer concerning wanting to give the defendant "the benefit of the doubt" is particularly damaging because it's meaning is that the evidence "compelled" the officer to conclude that the defendant 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 actions consistent with innocence and the unusual circumstance in which another person confessed in a prior sworn statement 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) The Prosecutor Improperly Elicited the Opinion of a Witness on the Defendant's Credibility.

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 have Dennis Martin render an opinion on the credibility of the defendant's prior sworn statement concerning the charges. This occurred at following two places in the state's cross- examination of Dennis Martin.

Q. So, I'm a little confused. I'm handing you what's already been admitted as Exhibit 2.

A. Pardon me?

Q. Exhibit 2.

A. Okay.

Q. And this is Margaret's statement.

A. All right.

Q. Would you read through that?

A. Aloud or?

Q. No, just to yourself.

A. Okay. It's a lie, it's not true.

Q. No, no, no. I didn't ask you any questions.

RP 79-80.

In spite of the fact that the court *sua sponte* ruled this answer improper, the prosecutor persisted with the following questions.

Q. After reading this statement, did you ever tell Ms. Colburn that it was your uncle's checking account –

A. No.

Q. – yes or no?

A. No.

Q. Okay. Did you ever tell her that your uncle gave you this checking account so long as you made the VISA payments up to \$3,000.00, yes or no?

A. No.

RP 83.

The prosecutor's initial response that she was not trying to get the witness to comment on the defendant's credibility rings hollow in light of her

last few questions and her reference to Exhibit 2 which was the defendant's written statement. 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 inducing Dennis Martin to testify that the defendant had lied in her statement to the police.

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 Dennis Martin to call the defendant's sworn statement a lie. Indeed, the court itself found the line of questioning improper. 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 Dennis Martin had previously confessed to the crime for which the defendant was charged. Coupled with defendant's consistent denials and her actions consistent with innocence, there is a reasonable probability that but for the state's repeated improper questions to Dennis Martin 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

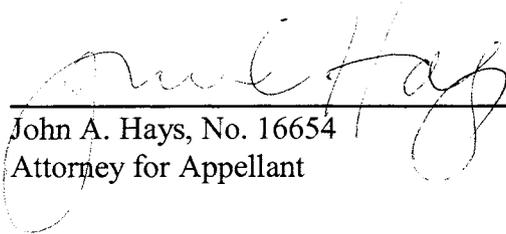
counsel's failures denied the defendant her right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment and the defendant is entitled to a new trial.

CONCLUSION

The defendant is entitled to a new trial based upon the trial court's error in not ordering a competency evaluation and in refusing to admit an exhibit critical to the defense. In addition, the defendant is entitled to a new trial based upon trial counsel's prejudicial errors in failing to object to prosecutorial misconduct in eliciting opinion evidence of guilty and comments on the credibility of the defendant.

DATED this 6th day of July, 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.

RCW 10.77.050

No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.

RCW 10.77.060

(1)(a) Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. The signed order of the court shall serve as authority for the experts to be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional, or physical condition of the defendant. At least one of the experts or professional persons appointed shall be a developmental disabilities professional if the court is advised by any party that the defendant may be developmentally disabled. Upon agreement of the parties, the court may designate one expert or professional person to conduct the examination and report on the mental condition of the defendant. For purposes of the examination, the court may order the defendant committed to a hospital or other suitably secure public or private mental health facility for a period of time necessary to complete the examination, but not to exceed fifteen days from the time of admission to the facility. If the defendant is being held in jail or other detention facility, upon agreement of the parties, the court may direct that the examination be conducted at the jail or other detention facility.

(b) When a defendant is ordered to be committed for inpatient examination under this subsection (1), the court may delay granting bail until the defendant has been evaluated for competency or sanity and appears before the court. Following the evaluation, in determining bail the court shall consider: (i) Recommendations of the expert or professional persons regarding the defendant's competency, sanity, or diminished capacity; (ii) whether the defendant has a recent history of one or more violent acts; (iii) whether the defendant has previously been acquitted by reason of insanity or found incompetent; (iv) whether it is reasonably likely the defendant will fail to appear for a future court hearing; and (v) whether the defendant is a threat to public safety.

(2) The court may direct that a qualified expert or professional person retained by or appointed for the defendant be permitted to witness the examination authorized by subsection (1) of this section, and that the defendant shall have access to all information obtained by the court appointed experts or professional persons. The defendant's expert or professional

person shall have the right to file his or her own report following the guidelines of subsection (3) of this section. If the defendant is indigent, the court shall upon the request of the defendant assist him or her in obtaining an expert or professional person.

(3) The report of the examination shall include the following:

(a) A description of the nature of the examination;

(b) A diagnosis of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, or is developmentally disabled, an opinion as to competency;

(d) If the defendant has indicated his or her intention to rely on the defense of insanity pursuant to RCW 10.77.030, an opinion as to the defendant's sanity at the time of the act;

(e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged;

(f) An opinion as to whether the defendant should be evaluated by a county designated mental health professional under chapter 71.05 RCW, and an opinion as to whether the defendant is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions.

(4) The secretary may execute such agreements as appropriate and necessary to implement this section.

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 MARGARET M. COLBURN,)
 Appellant.)

NO. 05-1-00671-1
COURT OF APPEALS NO:
34140-9-II

AFFIDAVIT OF MAILING

06 JUL 10 PM 12:38
COURT OF APPEALS
KRM

STATE OF WASHINGTON)
) ss.
COUNTY OF COWLITZ)

CATHY RUSSELL, being duly sworn on oath, states that on the 7TH day of JULY, 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

MARGARET M. COLBURN
C/O STEVE COLBURN
2030 44TH AVE.
LONGVIEW, WA 98632

and that said envelope contained the following:

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

DATED this 7TH day of JULY, 2006.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 6 day of JULY 2006.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2009

AFFIDAVIT OF MAILING - 1

John A. Hays
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