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COURT OF APPEALS

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STATE OF WASHINGTON

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NO. 34219-7-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JOSEPH ALBERT FULLER,**

**Appellant.**

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**BRIEF OF APPELLANT**

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**John A. Hays, No. 16654  
Attorney for Appellant**

**1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084**

*P. M. 8-10-06*

**ORIGINAL**

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## *ASSIGNMENT OF ERROR*

### *Assignment of Error*

1. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refused to give the defendant's proposed instructions on self defense.

2. The trial court violated Washington Constitution, Article 4, § 16 when it commented on the evidence during the state's rebuttal argument to the jury.

3. Trial counsel's failure to object when the state repeatedly referred to the complaining witness as the "victim of an assault" and when it elicited evidence that the defendant had been arrested and jailed denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

4. The trial court erred when it ordered the defendant to submit a second DNA sample and pay a second DNA fee and when it imposed community custody conditions not authorized by the legislature.

*Issues Pertaining to Assignment of Error*

1. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it refuses to give proposed instructions on self defense when the evidence seen in the light most favorable to the defendant legally supports the claim?

2. Does a trial court violate Washington Constitution, Article 4, § 16 if it comments on the evidence during the state's rebuttal argument to the jury?

3. Does a trial counsel's failure to object when the state repeatedly refers to the complaining witness as the "victim of an assault" and when it elicits evidence that a defendant was arrested and jailed deny the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment when the jury would have returned a verdict of acquittal but for these references?

4. Does a trial court err when it imposes community custody conditions and other conditions in the judgment and sentence not authorized by the legislature?

## STATEMENT OF THE CASE

### *Factual History*

During the later evening of July 6, 2005, Myron Mollendo was sitting in front of a friend's house on Y Street in Vancouver when he saw a person later identified as Anthony Cain running down the street with a second person running after him. RP 159-160. According to Mr. Mollendo, as Mr. Cain ran in front of the house at 2204 Y Street he tripped and fell. RP 162. The second person then kicked Mr. Cain a few times and hit him with some sort of object. *Id.* During this time Jacob Herrington was sitting at a computer in the home he shares with his parents at 2204 Y Street when he heard someone yelling "help me" or "stop it." RP 146-147. Looking out the window he saw someone standing over Mr. Cain hitting him in the head with some object. *Id.* Mr. Herrington then yelled "what the fuck are you doing?" and ran out of the house. RP 147-148. The second person then ran away, leaving Mr. Cain lying in the street. RP 118, 148-150.

As Jacob Harrington approached the person lying in the street, he noted that Mr. Cain was bleeding profusely from cuts to his face and head. RP 153. Mr. Harrington also noticed a gun lying on the ground, later identified as an airsoft plastic pellet pistol. RP 166, 299. At this point Mr. Harrington and his mother, who had also come out of the house, helped Mr. Cain walk over to the porch to await the arrival of the police and an

ambulance. RP 121-124, 166-167. Neither Mr. Mollendo, Mr. Herrington or Mr. Harrington's mother could identify the second person in the incident. RP 119, 128, 154-155. Once the aid personnel arrived they took Mr. Cain to the emergency room where he received two stitches to his wrist and seven to his eyebrow. RP 132-134. He also suffered a concussion as a result of the incident. RP 133. Mr. Cain told the police that the defendant, Joseph Fuller had been the second person. RP 175, 183-185.

In fact, Mr. Cain and the defendant had been friends for a couple years, although right before the incident Mr. Cain had been in the defendant's house and had stolen money, a DVD player, and a digital camera. RP 199-200, 347-348. Mr. Cain had then gone to a mutual friend's house. RP 200. This mutual friend had called the defendant who came over to confront Mr. Cain and recover his property. *Id.* However, when the defendant arrived Mr. Cain ran away and the defendant ran after him, picking up an aluminum table leg out of the mutual friend's yard as he did. RP 200-201. According to the defendant's later statement to the police, while chasing Mr. Cain in order to recover his property Mr. Cain pulled out what the defendant thought was a gun. RP 201. Mr. Cain then threatened to shoot the defendant and the only reason the defendant hit Mr. Cain was to get him to drop the gun. RP 200-202.

### *Procedural History*

By information filed July 12, 2005, the Clark County Prosecutor charged the defendant Joseph Albert Fuller with one count of Second Degree Assault. CP 1. The state also alleged that the defendant committed the offense while armed with a deadly weapon. *Id.* The case later came on for trial with the state calling eight witnesses and the defense recalling one as it's only witness. RP 116, 130, 146, 159, 171, 181, 196, 298, 338. One of the state's witnesses was Vancouver Police Officer Jeff Nichols, who testified that he was the officer who arrested the defendant, took him to jail, and interviewed him in the jail. RP 197-198. This testimony went as follows:

Q. And where did you interview him?

A. At the Clark County Jail.

Q. Okay. Were you the officer that arrested him, or did another officer arrest him?

A. No, Officer McGarrity had actually placed him under arrest. I was doing something else at the time, and then I went and interviewed him at the -- when he was booked into jail. We took him into an interview room and booked him right there.

Q. Okay.

A. Or, excuse me, interviewed him there.

Q. Okay. All right. So you interviewed him in an interview room at the jail?

A. It wasn't a -- I don't know, it -- it was a -- a room off to the side of the jail, a small room with a table. There was nobody around,

so we use it for purposes of an interview.

RP 217.

The defense did not object to this testimony and did not question what relevance the fact of the defendant's arrest or his presence in jail held. *Id.* In addition, during its case in chief the prosecutor and the police witnesses repeatedly characterized Anthony Cain as the "victim" of the defendant's "assault" while speaking in front of the jury. RP 177-178. The first instance comes from the state's direct examination of Officer Landwehr.

Q. Okay. Did he also tell you that because of the darkness and the distance he could not identify the suspect or the -- or the --

A. He told --

Q. -- victim?

A. -- me he didn't think he would be able to.

RP 177-178.

The state repeated this type of questioning in its direct with Officer Nichols.

Q. Are you familiar with where Mr. Cain was assaulted in this case?

A. Yes.

Q. Okay. How far away from the location where he was assaulted was that collected?

A. Approximately one block to the south.

RP 207.

The state repeated its characterization of Mr. Cain as the “victim” of the defendant’s crime during a brief argument to the bench on the admissibility of a table leg like the one the defendant allegedly held. RP 212. At the end of the argument the prosecutor stated the following in front of the jury:

Well, what are the odds that the one that he collected is just gonna happen to match exactly to the one back at the scene where the defendant said he collected his weapon before chasing the victim? That will be my next exhibit.

RP 212.

Both Officer Nichols and Officer Givens repeated this trend by characterizing Mr. Cain as the “victim” of the defendant’s assault. RP 253, 303. During cross-examination Officer Nichols stated:

A. We had the table leg from the scene that was allegedly used --

Q. Uh-huh.

A. -- per your -- your --

Q. Uh-huh.

A. -- the defendant’s statements, per the victim’s statements.

RP 253.

During cross-examination Officer Givens stated as follows:

Q. And who is she?

A. She is a friend of both the victim and the -- Mr. -- she's a friend of Mr. Fuller and Mr. -- excuse me. Mr. Cain.

RP 303.

Defendant's trial attorney failed to interpose any objection to these repeated characterizations of Mr. Cain as the "victim" of an "assault. RP 177-178, 207, 212, 253, 303.

After the reception of the evidence in this case the court instructed the jury. RP 386. The court refused to give the defendant's proposed instructions on self-defense. RP 372, 382; CP 27-28. During the state's rebuttal argument, the following exchange took place in front of the jury.

What really happened here, defendant admitted it, victim said it happened in the hospital. When is Mr. Cain most likely to be truthful? I submit to you it's shortly after this happens.

MR. KURTZ: Objection, Your Honor, to that. Objection.

THE COURT: It's fair argument. Continue, please.

RP 435-436.

Following deliberation the jury returned a verdict of guilty along with a special verdict finding that the defendant was armed with a deadly weapon during the commission of the crime. CP 53-54. The court later sentenced the defendant within the standard range. CP 121-135. On page 2 of the judgment and sentence the following paragraph is printed as one of many findings the court may enter by checking the box in front of the paragraph:

- The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

CP 122.

In this case the court did not check the box for this finding. Neither did the court enter an oral finding that the defendant was chemically dependant or that such dependency contributed to the offense before the court. RP 447-470. In spite of the failure to enter this finding, the court ordered the defendant to comply with the following as conditions of the 18 to 36 months community custody imposed by the court:

- Defendant shall undergo an evaluation for treatment for  substance abuse  mental health  anger management treatment and fully comply with all recommended treatment.
- Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a  substances abuse  mental health  anger management treatment program as established by the community corrections officer and/or the treatment facility.
- Treatment shall be at the defendant's expense and he/she shall keep his/her account current if it is determined that the defendant is financially able to afford it.

CP 127-128.

The court also imposed a number of other conditions of community custody, including the following:

- . . . The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.

- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.
- ☒ Defendant shall not frequent known drug activity areas or residences.
- ☒ Defendant shall not be in any place where alcoholic beverages are sold by the drink for consumption or are the primary sale item.

CP 127.

In this case the prosecutor filed a sentencing memorandum that included certified copies of the defendant's prior judgment and sentences in order to prove the defendant prior convictions. CP 76-117. One of these was a 2005 Clark County judgment and sentence for one count of delivery of methamphetamine and one count of possession of methamphetamine with intent to deliver. CP 103-117. The defendant committed these crimes on October 28, 2004, and April 12, 2005, and was found guilty of both by a jury on September 6, 2005, approximately two months after the state filed the information in this case. CP 1-2. In the case at bar the defendant requested that his sentence run concurrently with the drug case sentences. RP 457-464. The trial court refused. RP 465.

In the judgement and sentence on the drug case the court ordered the defendant to submit a biological sample for DNA testing and ordered the

defendant to pay a \$100.00 fee for the collection and testing of that sample. CP 105, 107. In spite of this fact in the case at bar the trial court again ordered the defendant to provide a biological sample for DNA testing and ordered the defendant to pay a \$100.00 fee for the collection and testing of that sample. CP 123-125. Following sentencing in this case the defendant filed timely notice of appeal. CP 121-135.

## ARGUMENT

### **I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REFUSED TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTIONS ON SELF DEFENSE.**

While due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory 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). Consequently, the trial court's failure to instruct on a defense allowed under the law and supported by the facts violates due process under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989). "Regardless of the plausibility of th[e] circumstance, the defendant had an absolute right to have the jury consider the lesser included offense on which there is evidence to support an inference it was committed." *State v. Parker*, 102 Wn.2d 161,

166, 683 P.2d 189 (1984). In the case at bar the defense argues that the trial court violated the defendant's right to due process when it refused to give the defendant's proposed instructions on self defense.

In order to properly raise the issue of self defense in the state of Washington a defendant need only produce "any evidence" supporting the claim that the defendant's conduct was done in defense of self, others, or property. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982); RCW 9A.16.020. This evidence need not even raise to the level of sufficient evidence "necessary to create a reasonable doubt in the jurors' minds as to the existence of self-defense." *State v. Adams*, 31 Wn.App. at 395 (citing *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977)). Thus, the court may only refuse an instruction on self defense where no plausible evidence exists in support of the claim. *Id.* The defendant's claim alone of self-defense is sufficient to require instruction on the issue. *State v. Bius*, 23 Wn.App. 807, 808, 599 P.2d 16 (1979).

In determining whether or not "any" evidence exists to justify instructing on self-defense, the court must apply a "subjective" standard. *State v. Adams*, 31 Wn.App. at 396. In other words "the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and 'not by the condition as it might appear to the jury in the light of testimony before

it.”” *State v. Adams*, 31 Wn.App. at 396 (quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves.

*State v. Tyree*, 143 Wash. at 317.

The court also stated:

[T]he amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant.

*State v. Tyree*, 143 Wash. at 316.

In addition, in determining whether or not the defendant is entitled to an instruction of self defense, the court must consider the evidence presented at trial in the light most favorable to the defendant. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983).

In this case, the state may argue that the trial court did not err in failing to give the requested self defense instruction because the defendant’s failure to testify precludes a claim of self defense. However, any such argument would be incorrect for two reasons. First, there is no requirement

that a defendant testify in order to establish the right to an instruction on self defense. Second, in the case at bar there was direct evidence presented at trial supporting a claim of self defense. The following sets out these arguments.

In *State v. Roberts*, 88 Wn.2d 337, 562 P.2d 1259 (1977), the Washington Supreme Court addressed a number of issues regarding self defense including who had the burden of proof, what evidence needed to be presented, and what the source of that evidence could be. In that case the defendant was convicted of Second Degree Murder following a trial in which he claimed self defense. On appeal the defendant argued, among other things, that the trial court erred when it instructed the jury that the defendant had the burden of proving self defense. In addressing this issue, the court held as follows:

This instruction was taken verbatim from a portion of that approved by this court in *State v. Turpin*, 158 Wash. 103, 290 P. 824 (1930). The formulation of our rule of self-defense set forth in *Turpin* has remained essentially unchanged since that time. Lack of justification is an element of the crime of second-degree murder. The challenged instruction places the ultimate burden of persuasion as to that element upon the defendant. He has the burden of creating a reasonable doubt in the mind of the jurors as to the issue if he wishes to avail himself of this defense. The continued use of this instruction is directly in conflict with *State v. Kroll*, [87 Wash.2d 829, 558 P.2d 173 (1976)]. There we held an instruction requiring the defendant to create reasonable doubt as to the existence of the elements of second-degree murder in order to reduce the crime to manslaughter, resulted in a shift of the burden of proof which violated the concept of due process enunciated by the Supreme Court in *Mullaney v.*

*Wilbur*, [421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)]. The self-defense instruction presently before us places precisely the same burden upon the defendant as to the element of absence of justification. In view of the decisions in *Mullaney* and *Kroll*, it is now only permissible to place upon the defendant the obligation to produce evidence, *from whatever source*, tending to establish self-defense. The obligation to prove the absence of self-defense must remain at all times with the prosecution.

*State v. Roberts*, 88 Wn.2d 345 (emphasis added).

As the court clarifies in this case the defendant only has the burden of “producing” some evidence to support a claim of self defense. However, as the defendant clause “from whatever source” clarifies, the use of the term “producing” is somewhat deceptive. The defendant need not offer the evidence. Rather, the evidence can come “from whatever source.” Thus, the defendant need not testify in order to obtain a self defense instruction, provided some competent evidence (testimonial or otherwise; direct or indirect) supports an inference that the defendant acted in self defense. *See also, State v. L.J.M.*, 129 Wn.2d 386, 918 P.2d 898 (1996) (“[T]he amount of evidence necessary to create a reasonable doubt in the minds of the jurors on [self-defense] ... need only be some evidence, admitted in the case from whatever source to raise the issue of self-defense.”)

This rule illustrates a more general principle in common law jurisprudence that when any party in a trial endeavors to present competent evidence to the trier of fact, be that party plaintiff or defendant in a civil

action or prosecutor or defendant in a criminal case, he or she does so at the risk that the opposing side may well find a better use for the evidence presented. This principle is embodied in Evidence Rules 401 and 402 which state that (1) “‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable” (ER 401), and (2) “[a]ll relevant evidence is admissible . . .” It matters not the proponent nor source of the evidence. In fact this principle is so well established in the law that an evidence rule has been adopted for those situations in which evidence has limited admissibility, under which circumstances the court, if requested, must instruct the jury of the limitation. This rule states:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

ER 105.

This principle is also embodied in the rule on appellate review that the court of appeals must consider all of the evidence presented at trial, both by the state as well as the defense, when evaluating a defendant’s claim that the state failed to present substantial evidence to support a conviction. *See e.g. State v. Leach*, 113 Wn.2d 735, 752, 782 P.2d 1035 (1989) (“Defendant’s own testimony is enough to sustain his conviction on count . . .”). Thus, in

the case at bar the defendant was entitled to a self defense instruction if there was evidence in the record to support it. In this case there was substantial evidence in the record to support a claim of self defense.

In the case at bar the evidence, seen in the light most favorable to the defendant, includes the following facts: (1) just before the incident out of which the charges arise Anthony Cain had stolen money and property from the defendant's house, (2) the defendant went to confront Anthony Cain to retrieve his property, (3) at the time Anthony Cain was armed with what appeared to the defendant to be a handgun, (4) when the defendant chased Anthony Cain he armed himself with a hollow aluminum table leg, (5) Anthony Cain stated he was armed with a handgun and threatened to shoot the defendant, and (6) when the defendant struck Anthony Cain with the table leg he was doing so in an attempt to prevent Anthony Cain from shooting him with what the defendant thought was a handgun. Seen in the light most favorable to the defense these facts rise to the level sufficient to require the trial court to give the defendant's proposed instruction on self defense.

In this case the state may argue that this evidence, even seen in the light most favorable to the defense does not constitute "substantial evidence" that the defendant acted in self defense. While this may or may not be the case, the standard for determining a defendant's right to an instruction on self defense is not "substantial evidence." Rather, as the court clarified in *State*

*v. Adams, supra*, the standard for determining a defendant's right to an instruction on self defense is "any evidence." In this case the evidence that Anthony Cain was armed with what appeared to the defendant to be a handgun, coupled with the defendant's claims that Anthony Cain threatened him with it and the defendant's claim that he only struck Anthony Cain to prevent him from shooting the defendant (entered into evidence though the testimony of the officer who interrogated the defendant) constitutes more than "any evidence" that the defendant acted in self defense. Thus, the trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refused to give the defendant's requested instruction on self defense.

Since the trial court's refusal to give the requested instruction on self defense violated the defendant's constitutional right to due process, the error is presumed prejudicial and this court should reverse and remand for a new trial unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). In the case at bar the error was far from harmless beyond a reasonable doubt. The defendant's claim to the police that Anthony Cain threatened him with a firearm and that he only struck him to disarm him is

supported by the fact that the witnesses and the police found what appeared to be a handgun at the scene of the incident. While this object ended up being a pellet pistol the incident took place at night and in the dark to the point that the witnesses could not even identify the defendant.

Under these circumstances the defendant's claim to the police that he was acting to disarm Anthony Cain is quite reasonable. Thus, it is likely that had the court properly instructed on self defense the jury would have returned a verdict of acquittal. Under these facts the error was prejudicial by any standard and certainly prejudicial under the presumptive standard for constitutional errors. As a result the defendant is entitled to a new trial.

## **II. THE TRIAL COURT VIOLATED WASHINGTON CONSTITUTION, ARTICLE 4, § 16 WHEN IT COMMENTED ON THE EVIDENCE DURING THE STATE'S REBUTTAL ARGUMENT TO THE JURY.**

Under Washington Constitution, Article 4, § 16, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A statement made by the court in front of the jury constitutes an impermissible "comment on the evidence" if a reasonable juror hearing the statement in the context of the case would infer the court's attitude toward the merits of the case, or would infer the court's evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crotts*, 22 Wn. 245, 60 P. 403 (1979), the Washington

Supreme Court wrote the following concerning the purpose behind this constitutional provision.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

*State v. Crotts*, 22 Wash. at 250-51.

The courts of this state “rigorously” apply the prohibition found in Article 4, § 16 and presume prejudice from any violation of this provision.

*State v. Bogner*, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, Sec. 16. Once it has been demonstrated that a trial judge’s conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, “[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment”. *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff’d in part, rev’d in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253-54, 382 P.2d 254.

*State v. Lane*, at 838-839.

For example, in *State v. Bogner, supra*, the defendant was charged with robbery after being arrested near a housing project shortly after an

employee of the project called the police to report that a person had just entered their office and robbed them of about \$1,400.00 cash receipts. At trial the following colloquy took place before the jury during the state's examination of a police officer.

Q. Upon arriving at the office of the Project what did you find?

A. Well, on our arrival we discovered Detective Panton had already arrived and that the person that had performed the stick-up had left.

Mr. Haley: I will object to the conclusion of the officer here. Mr.

Sullivan : He can state this. Perhaps he was still there then. The

Court: Are you denying that there was a robbery at the housing project at that time on that date? Mr. Haley: I don't know, your

Honor. I think that is what we are here to determine. The Court: We are here to determine, as I understand it, who did it, if anyone. Mr.

Haley: Of course, we have a twofold purpose. We are trying to determine whether or not there was a robbery and the second point is,

who committed the robbery. The Court: Don't you think we are getting a little ridiculous, or aren't we?

*State v. Bogner*, 62 Wn.2d at 249.

Following conviction the defendant appealed arguing that the court violated Article 4, § 16 of the Washington Constitution by making the above comments. The Washington Supreme Court agreed and reversed. The court stated:

Whether or not the above quoted remarks were correctly held not to indicate the trial court's opinion as to the truth of the evidence, it is certain that the remarks of the trial court in the instant case constituted a comment upon the evidence, because they indicated to the jury that the corpus delicti had been established beyond cavil. .

In our opinion, the remarks of the trial court clearly violated the constitutional mandate. The situation described previously might reasonably have appeared ridiculous to the court, but to communicate its feeling to the jury is forbidden by the constitution, whether reasonable or not.

...

We cannot say that it affirmatively appears that the jury could not have been influenced by the comments of the trial judge. We hold that the violation of Art. 4, Sec. 16, of the Washington Constitution constituted reversible error in this case.

*State v. Bogner*, 62 wn.2d at 252-252, 256.

In the case at bar the following exchange took place in front of the jury during the state's rebuttal argument.

What really happened here, defendant admitted it, victim said it happened in the hospital. When is Mr. Cain most likely to be truthful? I submit to you it's shortly after this happens.

MR. KURTZ: Objection, Your Honor, to that. Objection.

THE COURT: It's fair argument. Continue, please.

RP 435-436.

Undoubtedly what the court meant when it said "it's fair argument" was that these were conclusions that the state was entitled to argument from the evidence as part of closing. In other words, the court was holding that the prosecutor's argument was within that type of argument allowed under our law given the disputed and undisputed facts of the case. In this context the phrase "it's fair argument" is a term of art to convey the court's ruling on the law. The problem with the phrase in the context in which the

court made it is that the jury is not schooled in the law and had no way to know that "it's fair argument" was a term of art for a purely legal ruling on the defendant's objection. Rather, the jury would accept this phrase as the court's comment on the merits of the state's factual claim just made. In essence, the jury would interpret the court as saying that it agreed with the state's factual argument that Mr. Cain spoke the truth at the hospital and lied when he testified on the witness stand. Thus, by making the statement in the form it did the court commented on the credibility of Anthony Cain to the benefit of the state's case and to the detriment of the defendant's case.

In the context of the state's case the court's comment was similar to the court's comment in *Bogner*. As was mentioned above, in *Bogner* the court relieved the state's burden of proving that a robbery occurred by commenting that the case before it was only a question of whether or not the defendant was the person had committed the robbery. Similarly, in the case at bar, the court's comment eliminated the state's burden of proving that the defendant was the person who was in the physical confrontation with Mr. Cain by agreeing with the state's argument that Mr. Cain had told the truth when he told the police at the hospital that the defendant was the person who hit him. Thus, in the same manner that the court's comment in *Bogner* violated Washington Constitution, Article 4, § 16 thereby entitling the defendant to a new trial, so the comment in this case violated Washington

Constitution, Article 4, § 16 and entitles the defendant to a new trial.

**III. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE REPEATEDLY REFERRED TO THE COMPLAINING WITNESS AS THE "VICTIM OF AN ASSAULT" AND WHEN IT ELICITED EVIDENCE THAT THE DEFENDANT HAD BEEN ARRESTED AND JAILED DENIED THE DEFENDANT 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 (1) when the state and its witnesses commented upon the credibility of the evidence by repeatedly referring Anthony Cain as the “victim of an assault”, and (2) when the state elicited irrelevant and prejudicial evidence of the defendant’s arrest and incarceration. The following presents these arguments.

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). In order to sustain this fundamental constitutional guarantee to a fair trial the prosecutor must refrain from any statements or conduct that express his/her personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49

Wn.2d 66, 298 P.2d 500 (1956). If there is a "substantial likelihood" that any such conduct, comment, or questioning has affected the jury's verdict, then the defendant's right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the jury he refused to testify concerning his conversation with Walker as he didn't want to be labeled a "snitch." Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the following.

Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. See *State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

*State v. Denton*, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant knifed another person during a fight outside a bar. During the trial the defendant testified and claimed self defense. During cross examination the prosecutor repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor never made part of the record. In setting out the law on this issue, the Washington Supreme Court relied upon and quoted extensively from the

Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate him Ed Frazier, deputy county attorney, a lawyer of high standing for integrity and ability. These questions were not put, as the court assumed 'as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he may possess under the guise of cross-examination, as in this case.

\* \* \*

To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

*State v. Yoakum*, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at

311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

*State v. Yoakum*, 37 Wn.2d at 144.

Similarly, 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. The court 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 prosecutor repeatedly violated the defendant's right to a fair trial when it referred to Anthony Cain as the "victim of an assault," when the police witnesses did the same, and when the state elicited evidence

that the defendant had been arrested and was lodged in the county jail. The first instance comes from the state's direct examination Officer Landwehr.

Q. Okay. Did he also tell you that because of the darkness and the distance he could not identify the suspect or the -- or the --

A. He told --

Q. -- *victim*?

A. -- me he didn't think he would be able to.

RP 177-178 (emphasis added).

The state repeated this type of questioning in its direct with Officer Nichols.

Q. Are you familiar with *where Mr. Cain was assaulted* in this case?

A. Yes.

Q. Okay. How far away from the location where he was assaulted was that collected?

A. Approximately one block to the south.

RP 207 (emphasis added).

The state repeated its characterization of Mr. Cain as the "victim" of the defendant's crime during a brief argument to the bench on the admissibility of a table leg like the one the defendant held. RP 212. At the end of the argument the prosecutor stated the following in front of the jury:

Well, what are the odds that the one that he collected is just gonna happen to match exactly to the one back at the scene where the

defendant said *he collected his weapon before chasing the victim?*  
That will be my next exhibit.

RP 212 (emphasis added).

Both Officer Nichols and Officer Givens repeated this trend by characterizing Mr. Cain as the “victim” of the defendant’s assault. RP 253, 303. During the cross-examination Officer Nichols stated:

A. We had the table leg from the scene that was allegedly used --

Q. Uh-huh.

A. -- per your -- your --

Q. Uh-huh.

A. -- the defendant’s statements, *per the victim’s statements.*

RP 253 (emphasis added).

During cross-examination Officer Givens stated as follows:

Q. And who is she?

A. *She is a friend of both the victim* and the -- Mr. -- she’s a friend of Mr. Fuller and Mr. -- excuse me. Mr. Cain.

RP 303.

Defendant’s trial attorney failed to interpose any objection to these repeated characterizations of Mr. Cain as the “victim” of an “assault. RP 177-178, 207, 212, 253, 303. In addition, defense counsel failed to object when the state specifically elicited evidence of the defendant’s arrest and the fact that the defendant was held in jail. This testimony occurred during the

state's direct examination of the officer who interrogated the defendant.

Q. And where did you interview him?

A. *At the Clark County Jail.*

Q. Okay. *Were you the officer that arrested him, or did another officer arrest him?*

A. No, *Officer McGarrity had actually placed him under arrest.* I was doing something else at the time, and then I went and interviewed him at the -- *when he was booked into jail.* We took him into an interview room *and booked him right there.*

Q. Okay.

A. Or, excuse me, interviewed him there.

Q. Okay. All right. *So you interviewed him in an interview room at the jail?*

A. It wasn't a -- I don't know, it -- *it was a -- a room off to the side of the jail,* a small room with a table. There was nobody around, so we use it for purposes of an interview.

RP 217.

The fact that the police officer had interviewed the defendant and that the defendant had made certain statements was certainly relevant to the issue before the jury in this case. However, the fact that the two officers believed the defendant guilty and thus arrested and took him to jail was completely irrelevant. Its sole purpose was to convey to the jury that the officers were of the opinion that the defendant was guilty. This improper opinion testimony on the issue of guilt was greatly exacerbated by the officers and

prosecutor's repeated referrals to Mr. Cain as the "victim of an assault." These comments violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

No tactical reason exists for the failure to object to a prosecutor or 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. Similarly, no tactical advantage exists for allowing the prosecutor to repeatedly give his or her opinion that the defendant is guilty in that its complaining witness is the "victim of an assault." Indeed, what tactical advantage could be gained from allowing the state to elicit improper evidence that prejudices the defendant? Thus, in this case trial, counsel's failure to object to this improper evidence falls below the standard of a reasonably prudent attorney. In addition, given the fact of the defendant's claims of self defense were substantially supported by Anthony Cain's possession of and threats to use what appeared to be a firearm, 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.

**IV. THE TRIAL COURT ERRED WHEN IT ORDERED THE DEFENDANT TO SUBMIT A SECOND DNA SAMPLE AND PAY A SECOND DNA FEE AND WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.**

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar, the defendant argues that the trial court exceeded its statutory authority when it ordered the defendant to submit a second DNA sample and pay a second DNA fee and when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out these arguments.

***(1) RCW 43.43.754 Does Not Authorize the Trial Court to Order a Defendant to Submit Multiple DNA Samples or Pay Multiple DNA Fees.***

Under RCW 43.43.754 the trial court is authorized to require that a defendant convicted of a felony give a DNA sample for identification analysis. Under RCW 43.43.7541 the trial court has authority to impose a fee

for the collection of the biological sample. Subsection (1) of the former statute states:

(1) Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis in the following manner:

RCW 43.43.754.

Under this statute the question arises whether or not the phrase “convicted of a felony” means “every time a person is convicted of a felony” even if a biological sample and fee have previously been collected as part of another judgment and sentence. Since the statute does not use the phrase “every time a defendant is convicted of a felony” it is susceptible to two equally reasonable interpretations: first, that the process should be repeated with every judgment and sentence, and second, that the process should only be performed once.

The court’s primary duty when interpreting any statute is to discern and implement the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003). Under RCW 43.43.753 the legislature has stated it’s intent as regards the collection of biological samples of DNA. This purpose is to create a forensic DNA database of all offenders which can be checked against DNA samples taken as evidence in crime scenes, thereby aiding in the

identification of the perpetrators of new crimes. The reason such a database is effective is that each person's DNA is unique and once obtained functions like fingerprints do in aiding to identify the perpetrators of crimes and exclude innocent persons. *See State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995).

In addition, part of the theory behind DNA analysis is that DNA does not change over time. Once a sample is taken, analyzed and the results placed in a database, there is no need to take a new sample if the defendant is convicted of a new felony. Interpreting RCW 43.43.754 to require the taking of a new sample for each subsequent felony conviction does not further the purpose of DNA testing. In fact, requiring a new sample and subsequent testing for each new felony sentence has a detrimental effect upon the creation of a state database because it wastes scarce state resources in the analysis of duplicate samples. Consequently, the interpretation of RCW 43.43.754 that best implements the intent of the legislature is the one that limits its application to the collection of a single DNA sample.

In the case at bar, the defendant's criminal history includes a Clark County conviction for two drug charges sentenced during the pendency of the case at bar. The judgment and sentence in that case, made part of the record in the state's sentencing memorandum, reveals that the court had already ordered the defendant to provide a biological sample and pay a DNA fee.

Consequently the State of Washington had already gathered the defendant's DNA sample and placed the results of the test in the state data bank. As a result, there is neither a need nor authority for gathering a second sample and imposing a second fee. Thus, the trial court in this case erred when it imposed a second DNA test and fee.

***(2) The Trial Court May Only Order Community Custody Conditions Specifically Authorized under the Sentencing Reform Act.***

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and

determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were “reasonably related” to the defendant’s commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar the defendant was found guilty of second degree assault under RCW 9A.36.021. Under RCW 9.94A.030(48)(a)(viii) this crime is defined as a violent offense. At sentencing the court imposed 60 months in prison and 18 to 36 months community custody. For offenders sentenced to over 12 months confinement on a violent offense, RCW 9.94A.715 controls the imposition of community custody conditions. This statute states as follows in relevant part:

(1) When a court sentences a person to the custody of the department for . . . a violent offense . . . the court shall in addition to the other terms of the sentence, sentence the offender to community custody . . .

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the

offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

RCW 9.94A.715(1)-(2).

As RCW 9.94A.715(2)(a) states, "the conditions of community custody shall include those provided for in RCW 9.94A.700(4)." In addition, "[t]he conditions may also include those provided for in RCW 9.94A.700(5)." Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

Section (5) of this same statute states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.700(5).

Under these provisions no causal link need be established between the condition imposed and the crime committed so long as the condition

relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8<sup>th</sup> ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In the case at bar the trial court imposed the following conditions among others:

- Defendant shall undergo an evaluation for treatment for  substance abuse  mental health  anger management treatment and fully comply with all recommended treatment.
- Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a  substances abuse  mental health  anger management treatment program as established by the community corrections officer and/or the treatment facility.
- Treatment shall be at the defendant’s expense and he/she shall keep his/her account current if it is determined that the defendant is financially able to afford it.
- . . . The defendant shall notify his/her community corrections

officer on the next working day when a controlled substance or legend drug has been medically prescribed.

- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling or data storage devices.
- ☒ Defendant shall not frequent known drug activity areas or residences.
- ☒ Defendant shall not be in any place where alcoholic beverages are sold by the drink for consumption or are the primary sale item.

CP 127-128.

The first three conditions listed above are not related to the offense the defendant committed in any way. Indeed the court itself failed to enter any finding that the defendant had a substance abuse problem. Thus, the trial court erred when it imposed the first three conditions relating to the imposition of an evaluation and treatment requirements.

Under RCW 9.94A.700(4)(c) the court does have authority to prohibit a defendant from possessing or consuming controlled substances "except pursuant to lawfully issued prescriptions." However, there is nothing in this section that allows the court to require that the defendant notify the department upon receiving a valid prescription for a controlled substance. Neither is there anything in this section that allows the trial court to prohibit

a defendant from possessing or using “any paraphernalia that can be used for the ingestion of controlled substance” such as “pagers, cell phone, and police scanners.” Thus, the trial court exceeded its authority when it imposed the fourth and fifth conditions listed above.

The same conclusion applies to the last two conditions listed above wherein the court purports to prohibit the defendant from frequenting “known drug activity areas or residences” and from entering places “where alcoholic beverages are sold by the drug for consumption or are the primary sale item.” Nothing within RCW 9.94A.700 authorizes these prohibitions. In fact, these conditions are so vague as to be unworkable as it is impossible for a person of common understanding to know what a “known drug activity area” is or which businesses have alcohol as their primary sale item.

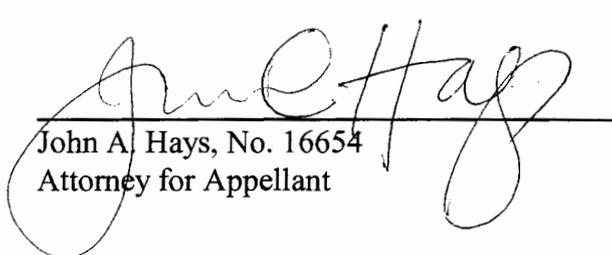
It is true that RCW 9.94A.700(5)(e) authorizes the court to impose “crime-related prohibitions.” However as the decision in *Jones* explains the trial court must have facts to support the conclusion that the condition imposed “relates to the circumstances of the crime” before it may impose the condition. In the case at bar the defendant committed the crime of second degree assault. The state did not allege, the defendant did not admit and the court did not find any facts that related “to the circumstances of the crime.” Thus, the conditions here at issue cannot be saved under RCW 9.94A.700(5)(e). The trial court erred when it imposed them.

## CONCLUSION

The defendant is entitled to a new trial based upon the trial court's failure to give a proposed instruction on self defense, based upon the trial court's comment on the evidence, and based upon ineffective assistance of counsel. In the alternative, this court should vacate that portion of the sentence in this case imposing a second DNA fee and those conditions of community custody not authorized by statute.

DATED this 17<sup>th</sup> day of August, 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.

**Washington Constitution,  
Article 4, § 16**

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**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 9.94A.700**

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education,

employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

### **RCW 9.94A.715**

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a

quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community.

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY [Signature]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

6 STATE OF WASHINGTON, )  
7 Respondent, )  
8 vs. )  
9 JOE ALBERT FULLER, )  
10 Appellant, )

CLARK CO. NO.05-1-01525-0  
APPEAL NO: 4219-7-II  
Consolidated Under 34702-4-II

AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON )  
12 COUNTY OF CLARK ) vs.

13 CATHY RUSSELL, being duly sworn on oath, states that on the 7<sup>TH</sup> day of AUGUST,  
14 2006, affiant deposited into the mails of the United States of America, a properly stamped  
15 envelope directed to:

15 ARTHUR CURTIS  
16 CLARK COUNTY PROSECUTING ATTORNEY  
17 1200 FRANKLIN ST.  
VANCOUVER, WA 98668

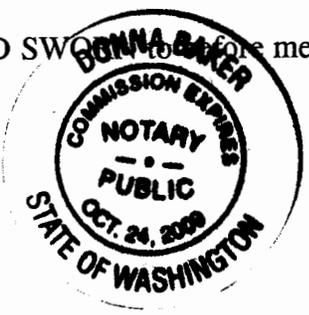
JOE ALBERT FULLER - #727823  
WASH CORRECTION CENTER  
R - 5 D - 3  
P.O. Box 900  
SHELTON, WA 98584

and that said envelope contained the following:  
18 1. BRIEF OF APPELLANT  
19 2. AFFIDAVIT OF MAILING

DATED this 7TH day of AUGUST, 2006.

20  
21 Cathy Russell  
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 7th day of AUGUST, 2006.



23  
24 [Signature]  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
25 Commission expires: 10-24-09