

NO. 35380-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TYLER EUGENE WORLEY,

Appellant.

BRIEF OF APPELLANT

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 ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it admitted hearsay that the only other possible perpetrator denied committing the crime with which the defendant was charged.

2. Trial counsel's failure to object when the state elicited evidence that a police officer believed that the defendant was guilty of the crime charged denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and under United States Constitution, Sixth Amendment.

3. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of guilt on a malicious mischief charge unsupported by substantial evidence.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it admits hearsay that the only other possible perpetrator denied committing the crime with which the state charged the defendant?

2. Does a trial counsel's failure to object when the state elicits evidence that a police officer believed that the defendant was guilty of the crime charged deny the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and under United States Constitution, Sixth Amendment?

3. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of guilt on a charge unsupported by substantial evidence?

STATEMENT OF THE CASE

Factual History

Late in the evening of October 27, 2003, the defendant Tyler Worley and his girlfriend Jodette Turner went to visit Robert Thomas at the home he shares with his wife Paula at 1412 South 8th Avenue in Kelso. RP 35-36, 62-63. Robert's friend Aaron Adams was also present. *Id.* The visit involved a dispute the defendant had with Mr. Thomas concerning a claim that Mr. Thomas had touched Ms. Turner in an inappropriate manner the previous week. RP 62, 72. Prior to his arrival the defendant had received permission to make the visit, although the defendant had not spoken directly with Mr. Thomas. RP 35-36, 73.

Once at the house the defendant and his girlfriend knocked and were admitted into the living room. RP 37. The parties spoke for a few minutes with the defendant and Ms. Turner becoming angry. RP 64. Eventually Mr. Thomas apologized for his previous actions. RP 38, 64. As this point Mr. Adams asked the defendant if that was "the end of it," and the defendant responded that it was. RP 38, 64. The defendant and Ms. Turner then left. RP 38, 65. Once the door was shut Mr. Thomas and Mr. Adams started to walk out of the living room when they heard a loud noise and saw that a large rock had come through the front window. *Id.* They then ran to the front door and opened it. RP 38, 66.

According to Mr. Adams, as he and Mr. Thomas opened the door they saw the defendant standing in the yard next to Ms. Turner. RP 38-39. They did not see anyone else around. RP 40. The defendant, who was cussing and yelling, then charged the front door, which Mr. Adams and Mr. Thomas closed to prevent the defendant's entry. RP 38-39. According to Ms. Adams, he and Mr. Thomas did not see who threw the rock and neither the defendant nor Ms. Turner said who threw the rock. RP 53. However, according to Mr. Thomas, upon opening the door he asked, "Why did you throw a rock through window" and the defendant responded "Because you f'd with me." RP 66, 69, 79. In any event, after closing the door Mr. Adams and Mr. Thomas called the police, who came out and took a report. RP 38-39, 66-67. According to David Wixon, who owns a home repair business, the cost of repairing the window would be \$340.00 at a minimum, and perhaps more. RP 21-27.

Procedural History

By information filed December 1, 2003, the Cowlitz County Prosecutor charged defendant Tyler Eugene Worley with one count of second degree malicious mischief." CP 1-2. The case later came on for trial before a jury with the state calling five witnesses, and the defendant not calling any witnesses. RP 2-3. Just prior to the beginning of trial the defendant informed the court that he wanted to fire his appointed counsel. RP 5. Upon enquiry

by the court the defendant stated that he had no trust or rapport with his attorney because he had not prepared a defense and his attorney had treated him and his girlfriend in an openly hostile manner. RP 5-6. The defense attorney did not respond to these allegations and the court told the defendant that he had to either go to trial with his attorney or represent himself. RP 6. The defendant responded that he did not want to represent himself. RP 6.

Following voir dire the defendant again complained to the court about his attorney's deficient performance, this time asking for a new attorney. RP 17-18. The court denied the request. 18-19.

During its case-in-chief the state called Kelso Police Officer Tim Gower, who had responded to the scene of the dispute. RP 81. This direct examination included the following, given without objection by the defense.

Q. And did you contact anyone at the home?

A. Mr. Thomas, Robert Thomas.

...

Q. And did you also interview Mr. Adams?

A. Yes, I did.

Q. And did you get a sworn statement from each of them?

A. Yes.

Q. What was the next step of your investigation?

A. I went to Janet and Zachary Elf's house, to try to find out further information about the suspects.

Q. And after you spoke to the Elfs, what was the next step of your investigation?

A. I received another call from Mr. Thomas and Mr. Adams that they had found out further information about where the suspect lived.

Q. All right. And were you able to find the suspect?

A. To find him?

Q. Yes.

A. Yes, later that evening.

Q. And he was placed under arrest?

A. Yes, he was.

RP 83-84.

On cross-examination the defense asked the following question among others:

BY MR. COPELAND:

Q. Mister Gower, I don't see anywhere in your statement where you asked Ms. Turner if she threw the rock and denied it. Do you see a place in here where you asked her if she threw the rock and she denied it?

A. No. That's not in my report.

RP 85.

The following then occurred during the state's re-direct examination of Officer Gower:

Q. Did she say whether she had seen the Defendant throw the rock through the window?

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A. She said she didn't see him throw it through the window.

Q. She did not respond that he didn't throw it through the window?

MR. COPELAND: Objection; hearsay.

MS. SHAFER: He's opened that door, Your Honor.

THE COURT: Overruled.

Q. (By Ms. Shafer:) Did she say that he did not throw the rock through the window?

A. No.

RP 85-86.

Following instruction by the court, given without objection, the parties presented their closing arguments. RP 88. The state began its closing argument with the characterization of the case the state as one involving the question of "who threw the rock." RP 98.

The state then argued the following:

But [the officer] did not ask [her], did you see the Defendant throw the rock, and her response was "No." Again, it wasn't that he didn't throw a rock, the response was, "No, I didn't see that."

RP 101.

After argument the jury deliberated and returned a verdict of guilty. CP 33. The court later sentenced the defendant within the standard range, from which the defendant filed timely notice of appeal. CP 47.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ADMITTED HEARSAY THAT THE ONLY OTHER POSSIBLE PERPETRATOR DENIED COMMITTING THE CRIME.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999).

For example, in *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999), the prosecutor filed a motion to revoke a defendant's SOSSA sentence, based in large part on a claim that he had exposed himself to a 13-year-old and a 14-year-old girl. During the revocation hearing, the state relied upon hearsay to establish the facts of the alleged exposure, and the state did not present any evidence as to why it failed to call the two girls themselves. After the court granted the motion and revoked the sentence, the defendant appealed arguing in part that the trial court denied him due process when it admitted the hearsay account of the incident without presenting any evidence on the reliability of the hearsay. The Washington Supreme Court agreed, holding

that the trial court had violated the defendant's due process rights when it based its decision at least in part upon unreliable evidence.

In the case at bar, the trial court admitted evidence over defense objection that a police officer took a statement from the defendant's girlfriend, who was the only other possible perpetrator of the crime charge, and that while she said that she didn't see the defendant throw the rock that went through the window, she did not say that the defendant did not throw it. As the following explains, this evidence was inadmissible hearsay and its use denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

Under ER 802, hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase "other than one made by the declarant while testifying at the trial or hearing" includes an out of court statement made by an in court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). This restriction arises from the "unwillingness to countenance the general use of prior prepared statements" as substantive evidence. *See* Advisory Committee's

Note to Federal Rules of Evidence 801(d)(1).

In the case at bar the defense objected to the police officer's testimony that he took a statement from the defendant's girlfriend, who was the only other possible perpetrator of the crime charge, and that while she said that she didn't see the defendant throw the rock that went through the window, she did not say that the defendant did not throw it. The state specifically elicited this evidence in an attempt to convince the jury that the defendant and not his girlfriend had thrown the rock that went through the window. This testimony went as follows:

Q. Did she say whether she had seen the Defendant throw the rock through the window?

A. She said she didn't see him throw it through the window.

Q. She did not respond that he didn't throw it through the window?

MR. COPELAND: Objection; hearsay.

MS. SHAFER: He's opened that door, Your Honor.

THE COURT: Overruled.

Q. (By Ms. Shafer:) Did she say that he did not throw the rock through the window?

A. No.

RP 85-86.

The problem with this evidence is that it was inadmissible hearsay.

The police officer was simply testifying to a statement that the defendant's girlfriend made. The defense is unaware of any possible hearsay exception that would allow such testimony. Although the state did claim at trial that the defense on cross-examination had opened the door to this evidence, presumably by asking the witness to testify to the girlfriend's hearsay statements, a careful review of the record reveals otherwise. In fact, the evidence the defense elicited was directed towards the officer's actions, not another person's statements. This occurred at the end of cross-examination just before the state elicited the inadmissible hearsay on redirect. This testimony went as follows:

BY MR. COPELAND:

Q. Mister Gower, I don't see anywhere in your statement where you asked Ms. Turner if she threw the rock and denied it. Do you see a place in here where you asked her if she threw the rock and she denied it?

A. No. That's not in my report.

RP 85.

The effect of the defendant's cross-examination was to throw doubt on the accuracy of the officer's report, not to elicit inadmissible hearsay that amounted to a denial by the only other person who might have committed the crime charged. Thus, the defense opened no door to this evidence and the

trial court erred when it admitted these hearsay statements. In addition, the admission of this hearsay evidence denied the defendant a fair trial because it allowed the state to argue in closing that the defendant was guilty because his girlfriend was not, and this is precisely what the state argued. First, in its characterization of the case the state argued:

The real question is “who threw the rock.”

RP 98.

The state then argued the following:

But [the officer] did not ask [her], did you see the Defendant throw the rock, and her response was “”No.” Again, it wasn’t that he didn’t throw a rock, the response was, “No, I didn’t see that.”

RP 101.

Thus, from the inadmissible hearsay the state was able to argue by inference that the defendant had to have been guilty of throwing the rock because his girlfriend’s statements presuppose that she didn’t throw the rock and the defendant was the only other alternative. No other evidence supported this conclusion. Thus, in the case at bar it is more likely than not that but for this evidence the jury would have returned a verdict of “not guilty” on the malicious mischief charge. As a result, the admission of this evidence denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, and the defendant is entitled to a new trial.

II. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE ELICITED EVIDENCE THAT A POLICE OFFICER BELIEVED THAT THE DEFENDANT WAS GUILTY OF THE CRIME CHARGED 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 when the state elicited irrelevant and prejudicial evidence that the police officer thought the defendant guilty in that he took statements from the witnesses, found the defendant, and then arrested him. The following presents this argument.

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 violated the defendant's right to a fair trial when she elicited irrelevant evidence that the police officer took statements from the witnesses and then arrested the defendant based upon those statements. This testimony was presented as follows:

Q. And did you contact anyone at the home?

A. Mr. Thomas, Robert Thomas.

...

Q. And did you also interview Mr. Adams?

A. Yes, I did.

Q. And did you get a sworn statement from each of them?

A. Yes.

Q. What was the next step of your investigation?

A. I went to Janet and Zachary Elf's house, to try to find our further information about the suspects.

Q. And after you spoke to the Elfs, what was the next step of your investigation?

A. I receive another call from Mr. Thomas and Mr. Adams that they had found out further information about where the suspect lived.

Q. All right. And were you able to find the suspect?

A. To find him?

Q. Yes.

A. Yes, later that evening.

Q. And he was placed under arrest?

A. Yes, he was.

RP 83-84.

After reading this testimony one is left to ask what fact at issue at trial was made even a little more or less likely by the fact that a police officer spoke with the witnesses, then searched for the defendant, and then arrested

him. In other words, what relevance did this evidence have. The response is that this evidence was relevant in only one way: to convey to the jury that which the officer was forbidden to voice on the witness stand: that he believed the witnesses told the truth and he believed that the defendant was guilty.

No possible tactical advantage could be obtained from this evidence. Thus, trial counsel's failure to object fell below the standard of a reasonable prudent attorney. In addition, as was mentioned in Argument I, the real issue in this case was whether the defendant or his girlfriend threw the rock through the window. Under these facts it is more likely than not that the state's actions in eliciting the officer's inferred opinion that the defendant was guilty changed what would have been an acquittal to a conviction. Consequently, counsel's failure to object caused prejudice. As a result, the defendant is entitled to a new trial based upon ineffective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

III. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF GUILT ON A CHARGE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution,

Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the

crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that the defendant’s fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

State v. Mace, 97 Wn.2d at 842 (emphasis added).

In the case at bar the state charged the defendant with one count of second degree malicious mischief under RCW 9A.48.080. This statute provides:

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding two hundred fifty dollars; or

(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

(2) Malicious mischief in the second degree is a class C felony.

RCW 9A.48.080.

In this case the state did present substantial evidence that someone had damaged the window and that the damage exceeded \$250.00, although

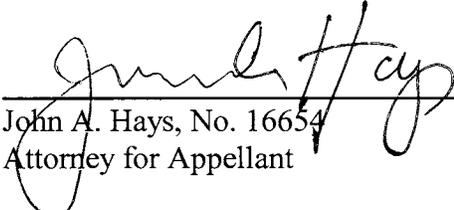
the jury could have found otherwise on the latter issue. However, the evidence presented at trial does not solve the question of who of the two people present threw the rock. In this circumstance, the defendant's girlfriend is just as likely to have been the guilty party. Thus, the evidence that is equally consistent with the defendant's innocence as it is with the defendant's guilt. As was stated in *Aten, supra*, this is not substantial evidence. As a result, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction in this case.

CONCLUSION

This court should vacate the defendant's conviction and remand for dismissal because that conviction is unsupported by substantial evidence. In the alternative, the defendant is entitled to new trial based upon the erroneous admission evidence and ineffective assistance of counsel.

DATED this 22nd day of March, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 3

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

WASHINGTON CONSTITUTION ARTICLE 1, § 22

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

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

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

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

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

ER 801

The following definitions apply under this article:

(a) Statement. A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A 'declarant' is a person who makes a statement.

(c) Hearsay. 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(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; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized

by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 802

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON,)
Respondent,)
vs.)
TYLER EUGENE WORLEY,)
Appellant.)

NO. 03-1-01527-7
COURT OF APPEALS NO:
35380-6-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
COUNTY OF COWLITZ) ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 22ND day of MARCH, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

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

TYLER EUGENE WORLEY
2124 CALIFORNIA WAY, S.W., #2
SEATTLE, WA 98116

and that said envelope contained the following:

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

DATED this 22ND day of MARCH, 2007.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 22nd day of MARCH, 2007.



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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