

NO. 35977-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TERRENCE G. FIELD,

Appellant.

BRIEF OF APPELLANT

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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 evidence that was marginally probative but so unfairly prejudicial that but for the admission of the evidence the jury would have returned a verdict of not guilty.

2. Defense counsel's failure to object when the state repeatedly elicited inadmissible, unfairly prejudicial evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment because absent the admission of that evidence the jury would have returned a verdict of not guilty.

3. The trial court's imposition of a community condition not in existence at the time the defendant committed the instant offense violated the defendant's right to be free from ex post facto punishment under Washington Constitution, Article 1, § 23, and United States Constitution, Article 1, § 10, and it exceeded the trial court's statutory authority.

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 evidence that was marginally probative but was so unfairly prejudicial that absent its admission the jury would have returned a verdict of not guilty?

2. Does a defense counsel's failure to object when the state repeatedly elicits inadmissible, unfairly prejudicial evidence deny a defendant effective assistance of counsel under Washington Constitution Article 1, § 22 and United States Constitution, Sixth Amendment when absent the admission of that evidence the jury would have returned a verdict of not guilty?

3. Does a trial court's imposition of a community condition not in existence at the time a defendant committed an offense violate the right to be free from ex post facto punishment under Washington Constitution, Article 1, § 23, and United States Constitution, Article 1, § 10, and does it exceed a trial court's statutory authority?

STATEMENT OF THE CASE

Factual History

On May 18, 2005, then 14-years-old Lacey Cabrera went out to dinner in Cathlamet with her maternal grandmother Darleen Stensland, her aunt Sherrie Fraly, her cousins 10-year-old Mykall Stensland and 6-year-old Joleen Stensland (children of Angela Stensland, another of Lacey's aunts), and her great-uncle, the defendant Terrance "Butch" Field (Darleen's brother). RP 1-5, 34-37, 107-114. Darleen Stensland, Sherrie Fraly, and the defendant all lived in Cathlamet at different addresses. *Id.* Lacey lives in Gresham, Oregon, with her mother and father. *Id.* She had been staying with her grandmother for two or three weeks so her grandmother could home teach her, as she had been having trouble in school. RP 64. According to Lacey's aunt Sherrie, Lacey's mother Mariah also sent Lacey to live with Mariah and Lacey's mother Darleen because she was a strict disciplinarian and according to Mariah, Lacey had a "bad attitude" and needed to learn a few lessons from "the school of hard knocks." RP 107-110.

After returning from dinner, Darlene and Sherrie left Lacey, and Lacey's two young cousins at the defendant's trailer so they could run an errand. PR 35-36. According to Lacey, the defendant, who was intoxicated from all that he had to drink with dinner, drove her and her two cousins to Darlene's trailer so they could change clothes and get two bicycles from

Lacee's grandmother's trailer. RP 39, 68, 110-112. However, according to Mykall, this did not happen. RP 105-106. Rather, he, Lacee and his sister simply walked to their grandmother's trailer to get a change of clothes and the bicycles. *Id.* In any event, after returning to the defendant's trailer, Mykall and his sister stayed outside to ride the bicycles, and Lacee went into the trailer to use the computer in the defendant's bedroom while the defendant watched a ball game on the television in the living room. RP 39.

According to Lacee, while she was using the computer the defendant entered the room, stuck his hand down her back, and touched her butt. RP 38-41. When she pushed him away and told him to stop, he responded by putting his hand on her leg and grabbing her crotch. *Id.* She claimed that she again pushed him away and told him to stop in a louder voice. *Id.* This time he started laughing and grabbed her breasts, and then kissed her after she had pushed him away a third time. RP 42-43. After this he went back into the living room, sat on the couch in front of the television, and eventually fell asleep. *Id.* Lacee then took his cell phone and went outside. RP 44-45.

Lacee later testified that once she was outside, she asked a neighbor to watch her two cousins, and then got into the defendant's truck in order to plug the cell phone into the truck as it had a dead battery. CP 44-45. After doing so, she looked at the videos on the cell phone and discovered two videos that the defendant had made of himself masturbating and calling her

name. *Id.* Although she stated that she knew her father's cell phone number, her mother's cell phone number, and her neighbor's number, and her best friend's number, for some reason she did not call any of these people or the police. RP 58-61. Rather, after viewing the videos, she called an ex-boyfriend in Vancouver with whom she claimed she had not spoken for over six months. RP 54. In fact, at trial she admitted that she had previously called him with the defendant's cell phone. RP 70-80. In any event, her ex-boyfriend arranged for his father to help him get Lacey in Cathlamet. RP 20-33.

After Lacey made the telephone call to her ex-boyfriend, her grandmother Darlene and Aunt Sherrie returned to the defendant's residence to pick up Lacey and her two cousins. RP 54-55. According to Lacey's aunt, Lacey was in a good mood and didn't seem distressed at all. RP 111. Although she initially told them that the defendant had driven them back to her grandmother's to get the bicycles, she later changed her story and said that she and her cousins had walked over to get the bicycles. RP 112. Just prior to leaving, Lacey volunteered to go back into the defendant's trailer to retrieve some movies and did not seem reticent at all to reenter the trailer alone while the defendant was still in it. RP 113-114.

After Lacey returned with the videos they drove to Darleen's trailer for the night. RP 55. After everyone went to bed Lacey snuck out the

window and met her ex-boyfriend and his father, who drove her to Vancouver where she met her mother and father. RP 24-27, 55. Her mother and father later reported the incident to the Wahkiakum County Sheriff's Office. RP 85-86.

Procedural History

By information filed June 5, 2005, the Wahkiakum County Prosecutor charged defendant Terrence G. Field with one count of indecent liberties with forcible compulsion. CP 4-5. The court later allowed the state to amend this charge to add a count of child molestation in the third degree in the alternative. CP 51-54. Prior to trial the defense moved to suppress the cell phone videos on the basis that the police had seized them in violation of the defendant's right to privacy, and on the basis that they were more prejudicial than probative. RP 12-22. The court later issued a written decision denying the defendant's motion. RP 37-43. At trial the defense renewed its objection to this admission of the cell phone videos on the basis that they were more prejudicial than probative. RP 98-102. The court overruled the objection and stated that it was adhering to its pretrial ruling that the videos were more probative than prejudicial. *Id.*

The case later came on for trial with the state calling five witnesses, including Lacey Cabrera, her mother, the defendant's neighbor with whom Lacey spoke, and Lacey's ex-boyfriend Steven Kaji. RP 2, 15, 20, 33. These

witnesses testified to the facts contained in the preceding factual history. *See* Factual History, *supra*.

In addition, the state called Deputy Howell of the Wahkiakum County Sheriff's office. RP 85. Deputy Howell told the jury that the defendant had been arrested in Portland and that he had traveled to the Multnomah County jail to interview the defendant. RP 86-89. Once at the jail he read the defendant his *Miranda* rights and then spoke with the defendant about Lacey's allegations. *Id.* The defense did not object to this evidence and the state did not offer any argument as to why the fact of the defendant's arrest or his incarceration in jail was relevant. RP 85-97. According to Deputy Howell's direct testimony, the defendant admitted making the cell phone videos but stated that it was his "private fantasy" and no one was supposed to know about them. RP 92. Deputy Howell also testified that he asked the defendant if he had "accidentally" taken things further with Lacey that he should have, and the defendant responded by nodding his head up and down. RP 92-93. However, on cross-examination Deputy Howell admitted that the defendant had denied grabbing Lacey's crotch, had denied that he had kissed her, and he denied that she had ever pushed him away. RP 94-95.

During the trial the state repeatedly elicited evidence from three witnesses that Lacey told them that the defendant had molested her, or that other people had told them that Lacey had said that the defendant had

molested her. RP 5, 17, 23, 27. First, the state elicited evidence from Lacey's mother that her husband had spoke with Lacey on the phone and he told her that Lacey told him that the defendant had molested her at his house. RP 5. Second, the state also elicited evidence from the defendant's neighbor that when Lacey came over to ask her to watch her two cousins, Lacey told her that the defendant was drunk and that "he gets very touchy 'feely' when he's drunk." RP 17. Following this evidence, the state elicited evidence from the third witness, Steven Kaji, that Lacey had told him over the telephone and then later in the car that the defendant had molested her. RP 23, 27. The defense did not object to the admission of any of this evidence. RP 5, 17, 23, 27.

Following reception of evidence the defense objected to the state's proposed instructions on the lesser included offense of attempted indecent liberties with forcible compulsion. RP 118-125. The court overruled the objection and then instructed the jury on the crimes of indecent liberties, attempted indecent liberties, and the alternative charge of third degree child molestation. CP 57-76, RP 127-136. Following argument, the jury retired for deliberation. CP 86. The jury later sent out the following question.

Deputy Howel —

We need the wording used by Deputy Howel when asking Butch if did or could have gone to far —

And the reply by Butch —

CP 77.

The court replied to this question with the following statement: “You will need to rely on your notes and memory as to the testimony presented in this case.” *Id.*

The jury eventually returned a verdict of “not guilty” to indecent liberties with forcible compulsion and “guilty to the lesser included offense of attempted indecent liberties with forcible compulsion. CP 78. After the preparation of a mandatory presentence investigation report, the court sentenced the defendant under RCW 9.94A.712 to life in prison with a minimum mandatory time to serve of 44½ months on a range of 38¼ to 51 months. CP 99-111. The court also imposed community custody for life and included the following community custody condition among others:

- ☒ Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8)).

CP 106.

Following imposition of sentence, the defendant filed timely notice of appeal. CP 114-115.

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 EVIDENCE THAT WAS MORE UNFAIRLY PREJUDICIAL THAN PROBATIVE, AND WITHOUT WHICH THE JURY WOULD HAVE ACQUITTED THE DEFENDANT.

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, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

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

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

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

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

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

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the state charged the defendant with first degree robbery, second

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

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

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

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

In the case at bar the trial court allowed the state to elicit testimony

from Lacey Cabrera and her mother that they had viewed two videos the defendant made with his cell phone, and that the two videos showed the defendant masturbating while stating Lacey's name. Over defense objection the court also admitted these videos into evidence and allowed the jury to view them. The grossly prejudicial effect of this evidence should have been apparent to the trial court. The defense argues that any reasonable juror would find these videos so repugnant, and thereby find the defendant so repugnant, that he or she would vote for conviction based solely upon the conduct shown in the video, even if he or she was not convinced beyond a reasonable doubt that the defendant had committed the crime charged. In other words, after viewing these videos, a juror would probably reasonably conclude that the defendant wanted to commit the crime charged, and that he deserved to be convicted whether or not the state had actually proven that he had committed the offense.

It is true that the videos are relevant in that they prove motive, intent, and absence of mistake. Had the defendant argued at trial that (1) he did have physical contact with Lacey Cabrera similar to that which she claimed, but (2) the defendant acted without sexual intent and Lacey simply misinterpreted what had happened, then the probative nature of the videos might have been sufficient great to outweigh the prejudicial effect. However, the defense did not present such an argument. Rather, the defense argued that Lacey had

invented the claim in an attempt to find a way to return home and reestablish a relationship with her ex-boyfriend. The defense never argued that the conduct Lacey described, if true, was anything other than the crime charged.

In addition, there can be no question in a reasonable person's mind that the defendant acted with sexual intent, if he did what Lacey claimed he did. She described him putting his hands down her pants, grabbing her breasts, grabbing her crotch, and trying to kiss her as she repeatedly tried to push him away. This conduct is obviously sexually motivated and no reasonable person would find otherwise. Thus, under the facts of this case motive, intent, or mistake was not in question, and the defense never attempted to put it in question. Rather, the sole issue before the jury was whether or not the state had proven that the defendant did what Lacey said he did. Under these facts, the videos had very little probative value. Had the facts been such that motive, intent, or accident were at issue, then the probative value of the videos might have outweighed their prejudicial effect. However, in this case there was no need to admit the videos to prove an uncontested element already adequately proven. Consequently, in this case the trial court abused its discretion when it found the probative value of the videos outweighed the prejudicial effect.

In this case the evidence was far from overwhelming that the defendant committed the crime charged. While an initial reading of Lacey

Cabrera's direct evidence appears to present strong that the defendant committed the crime, that initial impression is quickly dispelled after cross-examination and the presentation of the remainder of the evidence, which calls Lacey's credibility into question. Her claim that her ex-boyfriend's telephone number just happened to be the only number she could find was hard to believe given her admission that she knew her mother, father, neighbor, and best friend's telephone numbers from memory. Her claim that she had not spoken to him for many months was flatly contradicted by the cell phone records. Her claim to the police that (1) the defendant had driven her and her cousins to their grandmother's trailer to get the bicycles and (2) that her grandmother was mad when she found out because the defendant had been intoxicated was shown at trial to be false, and she eventually denied making the claim that the defendant had driven her to her grandmother's trailer. Further, her claim that she was afraid of the defendant and very upset when her grandmother and aunt returned was flatly contradicted by the aunt. Given this evidence, it is more likely than not that had the court not improperly admitted the videos, the jury would have returned a verdict of not guilty. As a result, the defendant is entitled to a new trial.

II. DEFENSE COUNSEL'S FAILURE TO OBJECT WHEN THE STATE REPEATEDLY ELICITED INADMISSIBLE, UNFAIRLY PREJUDICIAL EVIDENCE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

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

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v.*

Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar the defendant claims ineffective assistance based upon trial counsel's failure to object when the state elicited inadmissible hearsay from two witnesses that Lacey Cabrera told them or someone else that the defendant had molested her, and counsel's failure object when the state elicited inadmissible evidence from Deputy Howell that the defendant had been arrested and that he had interviewed him in the jail. The following presents this argument.

(1) Inadmissible Hearsay

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). Thus, in the case at bar, all statements Lacey Cabrera allegedly made to her father and ex-boyfriend on prior occasions were inadmissible hearsay and could not be admitted as substantive evidence unless some exception to the hearsay rule applies. One of these exceptions is found under ER 803(2) for “excited utterances.”

Under ER 803(2), an “excited utterance,” is a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Given the particular indicia of reliability that surrounds the lack of opportunity to reflect or speak from self-interest, “excited utterances” are not excluded by the hearsay rule, and can be received as substantive evidence. *State v. Brown*, 127 Wn.2d 749, 903 P.2d 459 (1995). In *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992), the court, quoting Wigmore, states the proposition as follows:

“[U]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” The utterance of a person in such a state is believed to be “a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,” rather than an expression based on reflection or self-interest.

State v. Chapin, 118 Wn.2d at 686 (quoting 6 J. Wigmore, Evidence § 1747, at 195 (1976)).

For example, in *State v. Brown, supra*, the defendant was convicted of first degree rape, and appealed, arguing, *inter alia*, that the trial court erred when it admitted a “911” tape into evidence and played it to the jury. Specifically, the defendant argued that since the alleged victim admitted that she had decided to lie in her statement to the “911” operator, and in fact did then lie about a portion of what she said during the “911” call, it could not be an excited utterance, regardless of how excited or upset she sounded on the tape. However, the Court of Appeals disagreed, and affirmed.

Upon further review, the Washington Supreme Court reversed, stating as follows:

[T]he “key determination is ‘whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.’” *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)). It is thus apparent that T.G.’s testimony that she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call renders erroneous the trial court’s conclusion that the content of her call was admissible as an excited utterance. Therefore, the 911 tape is to be excluded on remand.

State v. Brown, 127 Wn.2d 758-59.

In the case at bar, defense counsel did not object when Mariah Cabrera testified that her husband told her that Lacey had just called and claimed that the defendant had molested her. While Lacey might have been sufficiently “under the influence of the event to the extent that [the] statement

could not be the result of fabrication, ” her father was not. Thus, even if Lacey’s statements to her mother qualified as excited utterances, Lacey’s father’s statement of what Lacey supposedly said do not qualify under this exception. Similarly, by the time Lacey’s ex-boyfriend and his father drove from Vancouver to Cathlamet, Lacey had more than sufficient time to reflect upon her statements to these two people. Thus, her statements to her ex-boyfriend would not qualify as excited utterances.

In this case there was no tactical reason for defense counsel to fail to object when Lacey’s Mother and ex-boyfriend testified on direct as to what Lacey told them. Had Lacey’s claims to these witnesses varied significantly with her version on the witness stand, then there might well have been a tactical reason to fail to object. However, this was not true in the case at bar. Rather, by failing to object, defense counsel allowed the state to bolster Lacey’s credibility with inadmissible hearsay. As a result, trial counsel’s failure to object fell below the standard of a reasonable prudent attorney.

(2) Testimony of Arrest and Incarceration in Jail.

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).

In addition, under this rule 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, or the fact that the defendant is currently incarcerated in a charge, is not evidence because it constitutes the arresting officer's opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant's vehicle hit the

plaintiff's vehicle. Following a defense verdict the plaintiff appealed arguing that defendant's argument in closing that the attending officers' failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

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

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

Although *Warren* was a civil case the same principle applies in criminal cases: the fact of arrest and incarceration 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 he elicited irrelevant evidence that the defendant was arrested under a warrant, that the defendant was then held in the Multnomah County Jail, and that Deputy Howell interview the defendant in that jail. The fact of arrest and incarceration was not relevant to any issue before the jury.

It not only constituted a *sotto voce* statement that the officer believed the defendant was guilty, but it constituted a similar statement that the court that issued the arrest warrant believed the defendant was guilty. No tactical reason existed to accede to the admission of this damaging evidence. As a result, trial counsel's failure to object to this evidence fell below the standard of a reasonable prudent attorney.

(3) Prejudice

As stated earlier, in order to prevail on a claim of ineffective assistance of counsel, the defendant must further show that counsel's conduct caused prejudice. In other words, the defense had the burden of proving that but for counsel's errors, the result of the trial would have been different. In this case the admission of the improper hearsay and the improper opinion testimony did cause prejudice because of the facts that (1) the state's case stood or fell upon the credibility of Lacey Cabrera, and (2) the defense had been successful in calling her credibility into question. As was outlined in the previous argument, the defense was able to show serious questions concerning Lacey's credibility. In such a close case the admission of improper evidence such as the inadmissible hearsay and the improper opinion was sufficient to change what would have been an acquittal on reasonable doubt into a conviction. Thus, under the facts of this case, defense counsel's errors did cause prejudice. Consequently the defendant is entitled to a new

trial based upon ineffective assistance of counsel.

III. THE TRIAL COURT'S IMPOSITION OF A COMMUNITY CONDITION NOT IN EXISTENCE AT THE TIME THE DEFENDANT COMMITTED THE INSTANT OFFENSE VIOLATED THE DEFENDANT'S RIGHT TO BE FREE FROM EX POST FACTO PUNISHMENT UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 23, AND UNITED STATES CONSTITUTION, ARTICLE 1, § 10, AND IT EXCEEDED THE TRIAL COURT'S STATUTORY AUTHORITY.

Under Washington Constitution, Article 1, § 23, and United States Constitution, Article 1, § 10, the government is prohibited from passing ex post facto laws. The prohibition in the Washington Constitution is absolute and states as follows:

No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

Washington Constitution, Article 1, § 23.

The prohibition in the federal constitution is similarly worded, and unlike other guarantees from the bill of rights which only find application against the state by incorporation through the Fourteenth Amendment, the ex post facto prohibition is specific prohibition of state conduct. It states:

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

United States Constitution, Article 1, § 10

A law violates the ex post facto prohibitions in the state and federal

Constitution if it does any one of the following three things: (1) criminally punishes an act that was not a crime at the time it was committed, (2) makes the punishment for a crime more burdensome after its commission, or (3) deprives an accused of a defense previously available under the law in effect at the time the accused committed the alleged crime. *State v. Ward*, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994); *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

Just what constitutes “punishment” and just what makes punishment “more burdensome” under ex post facto analysis has been the subject of significant argument. For example, in *State v. Young*, 122 Wn.2d 1, 857 P.2d 989 (1993), the defendant argued that civilly committing him as a sexually violent predator under a commitment statute enacted after his conviction but prior to his release after completing his sentence constituted further punishment in violation of ex post facto prohibitions found in the state and federal constitutions. The court rejected this argument, finding that the legislative purpose behind the commitment statute was not punitive. As a result, the ex post fact prohibitions did not apply. By contrast, in *In re Crowder*, 97 Wn.App. 598, 985 P.2d 944 (1999), the court addressed whether the imposition of community custody constituted a form of punishment. The court found that it did, holding as follows:

Community custody is the intense monitoring of an offender in

the community for a period of at least one year after release or transfer from confinement. Although it has other purposes, community custody continues in the nature of punishment, and is not equivalent to general release. This custody and placement begins upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release awarded pursuant to RCW 9.94A.150(1) and (2). As noted in RCW 9.94A.120(9)(b), for sex offenders who committed their offenses after July 1, 1990, but before June 6, 1996, the mandatory period of community placement is two years, or up to the period of earned early release credits awarded, whichever is longer.

In re Crowder, 97 Wn.App. at 600-601 (footnotes omitted).

The decision in *Crowder* was based upon the following holding from

State v. Ross, 129 Wn.2d 279, 285, 916 P.2d 405 (1996):

Community placement imposes a punishment as well. To identify a punishment in the context of a direct consequence of a guilty plea, we examine whether the effect enhances the defendant's sentence or alters the standard of punishment. The State mischaracterizes the purposes of community placement as merely rehabilitative and regulatory. Community placement primarily furthers the punitive purposes of deterrence and protection.

State v. Ross 129 Wn.2d at 278-279.

In the case at bar the trial court imposed the following as one of the conditions of the defendant's community custody:

- ☒ Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8)).

CP 106.

The legislature created this community custody provision as part of the Laws of 2005, Chapter 436, § 1 (eff. July 24, 2005). This provision

added the term “community protection zone” and a definition as RCW 9.94A.030(8), and authorized its application by adding subsection (ii) to RCW 9A.44.712(6)(a). This subsection provides:

(ii) If the offense that caused the offender to be sentenced under this section was an offense listed in subsection (1)(a) of this section and the victim of the offense was under eighteen years of age at the time of the offense, the court shall, as a condition of community custody, prohibit the offender from residing in a community protection zone.

RCW 9.94A.712(6)(a)(ii).

In the case at bar the defendant was convicted of “an offense listed in subsection (1)(a).” Thus, this section would specifically apply to his case but for one two salient facts. First, the crime here at issue was committed on May 25, 2005, and second, RCW 9.94A.712(6)(a)(ii) became effective on July 24, 2005. Thus, the trial court’s imposition of this provision against the defendant violated the defendant’s state and federal constitutional right to be free from the ex post fact application of a punitive law since, as the decisions in *Ross* and *Crowder* clarify, community custody and its conditions are “punishment.” As a result, this court should strike this condition of community custody.

In addition, 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,

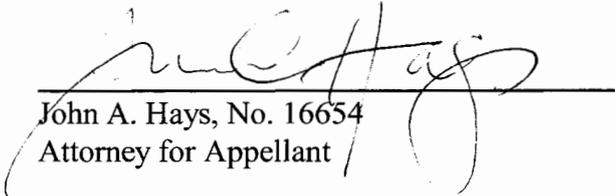
amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). As was just explained, on the day the defendant committed the offense alleged in the information, RCW 9.94A.712(6)(a)(ii) was not in effect. As a result, as of that date the court did not have statutory authority to impose this condition of community custody, and the court erred when it imposed it.

CONCLUSION

The defendant is entitled to a new trial based upon the trial court's erroneous admission of evidence that was more prejudicial than probative, and based upon trial counsel's failure to object to inadmissible evidence. In the alternative, the trial court erred when it imposed a community custody conditions that the legislature had not authorized and that constituted an ex post facto law.

DATED this 17th day of August, 2007.

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 1, § 23**

No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

**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.

. . . .

UNITED STATES CONSTITUTION
ARTICLE 1, § 10

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

RCW 9.94A.712

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(32)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(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 and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435.

EVIDENCE RULE 401 DEFINITION OF "RELEVANT EVIDENCE"

"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 probable or less probable than it would be without the evidence.

RULE 402 RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

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.

ER 803(a)(2)

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

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.)
TERENCE G. FIELD, SR,)
Appellant,)

CLARK CO. NO: 05-1-00012-6
APPEAL NO: 35977-4-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
COUNTY OF WAHKIAKUM) vs.

CATHY RUSSELL, being duly sworn on oath, states that on the 17TH day of AUGUST, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

DAN BIGELOW
WAHKIAKUM CO. PROSECUTING ATTY
P.O. BOX 397
CATHLAMET, WA 98612

TERENCE FIELD, SR. #301401
MCC - TRU
P.O. BOX 888
MONROE, WA 98272

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING
- 3. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS

DATED this 17TH day of AUGUST, 2007.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 17th day of AUGUST, 2007.

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



AFFIDAVIT OF MAILING - 1

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