

NO. 36012-8

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

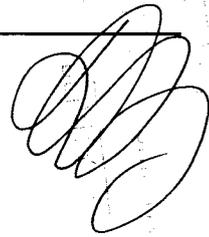
STATE OF WASHINGTON,

Respondent,

vs.

SERGEY SIROTKIN,

Appellant.



BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's ruling allowing the prosecutor to elicit statements the defendant made during custodial interrogation but after invoking his right to silence violated Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. RP 1-33.

2. Trial counsel's failure to object when the state repeatedly elicited evidence that the police officers believed the defendant was guilty and that he had refused to answer certain questions violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. RP 48-51, 101-103, 138, 284-290.

3. The trial court erred when it failed to find that the attempted robbery and kidnaping charges constituted the same criminal conduct for the purpose of determining the correct offender score. CP 72-88.

Issues Pertaining to Assignment of Error

1. Does a trial court's ruling allowing the prosecutor to elicit statements a defendant made during custodial interrogation and after invoking his right to silence violate Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment?

2. Does a trial counsel's failure to object when the state repeatedly elicits evidence that police officers believed a defendant guilty and that the defendant refused to answer certain questions violate that defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when but for those errors the verdict would have been an acquittal?

3. Does a trial court err if it fails to find that two offenses committed against the same person, at the same time, in the same place, and with the same objective intent constitute the same criminal conduct for the purpose of calculating the correct offender score?

STATEMENT OF THE CASE

Factual History

At about 11:30 pm on August 23, 2006, Salvador Zarraga was driving along Bruton Street in Vancouver on his way to visit family members. RP 64-65. He had just got off work. *Id.* As he drove along two persons in a dark, two-door import pulled up next to him and signaled for him to stop. RP 68-69. Although Mr. Zarraga did not positively identify the vehicle, it was a 1995 Acura Legend belonging to the defendant Sergey Sirotkin's father. RP 273-279. The defendant was driving and his friend Sergey Fisticon was in the passenger seat. *Id.* The defendant was 19-years-old at the time and Mr. Fisticon was 22-years-old. RP 215, 273-274. Both are Russian immigrants with little education in Russia, less education in the United States, and poor facility with the English language. RP 215-217, 273-274, 295.

Although Mr. Zarraga did not initially pull over, he did stop at the next red light. RP 66. As he did, the defendant and Mr. Fisticon pulled up next to him and asked if he had any "molta," which is slang for marijuana. *Id.* At this point the light turned green and both vehicles proceeded to drive away from the light. RP 66-67. Eventually the road narrowed to one lane in their direction and Mr. Zarraga drove in front of the defendant and Mr. Fisticon, who followed very closely for a few minutes. RP 68-69. According

to Mr. Zarraga, the dark import eventually pulled up to the left of his vehicle and cut him off. RP 70-71. At this point, Mr. Fisticon got out of the defendant's vehicle and entered Mr. Zarraga's vehicle. *Id.*

Mr. Zarraga later told the police that when Mr. Fisticon entered the vehicle he was carrying a short machine gun, that he threatened Mr. Zarraga with it, and that he ordered Mr. Zarraga to follow the defendant. RP 70-71. From his later description of the weapon, a police officer identified it as an Intertech 9 mm auto pistol. RP 182. At trial Mr. Fisticon testified that it was actually an AirSoft B-B gun that was build to look like an AK 47 and that the police had seized it from his car the next day. RP 217-218. In any event, the defendant and Mr. Zarraga drove to a nearby car wash. RP 71-73. According to Mr. Zarraga and Mr. Fisticon's testimony at trial, Mr. Zarraga followed the defendant. RP 70-71. According to Mr. Fisticon's statements to an investigator for the Clark County Prosecutor's office and the defendant's testimony at trial, the defendant followed Mr. Zarraga. RP 267.

In his testimony at trial, Mr. Zarraga claimed that once they stopped at the car wash, Mr. Fisticon demanded drugs and money from him. RP 72-73. As he did this, the defendant got out of his vehicle and walked over to them with his arms folded and a large knife in one hand, although the defendant said nothing. RP 74-76. When Mr. Zarraga said that he didn't have any money or drugs Mr. Fisticon told him to meet them at a nearby

McDonalds Restaurant to give them money or marijuana the next night. RP 75-77. At this point he acted as if he was taking a picture of Mr. Zarraga's license plate with his cell phone, telling Mr. Zarraga that he had better show up. RP 77. Mr. Zarraga then got into his vehicle and drove away. RP 77-78. A little while later he saw two police officers and reported to them what had happened. RP 83-84.

The next night Mr. Zarraga drove to the McDonald's and saw Mr. Fisticon sitting behind the driver's seat of a white vehicle. RP 79-80. The defendant was in the front passenger seat and a third person was sitting in the rear seat of the car. *Id.* As his drove up Mr. Fisticon asked "What's up?" *Id.* Mr. Zarraga then noted the license plate number of Mr. Fisticon's car and drove away to find some police officers. *Id.* When he found some officer, he gave them the license number to Mr. Fisticon's car and reported what had happened the previous night. RP 83-84. Within a short time the police stopped Mr. Fisticon's car and arrested Mr. Fisticon and the defendant, along with Mr. Fisticon's younger brother who was in the back seat. RP 59-60, 105-111. In this vehicle the police found the AirSoft B-B gun and a knife on the floor boards of the back seat. RP 104-109.

Procedural History

By information filed August 23, 2006, the Clark County Prosecutor charged the defendant Sergey Sirotkin with attempted first degree robbery

and first degree kidnapping out of an incident that occurred on August 18, 2006, and with another count of attempted first degree robbery from the incident on August 19, 2006. CP 1-3. Prior to trial the state entered into an agreement with Mr. Fisticon whereby he pled guilty to reduced charges in exchange for his testimony against the defendant. RP 223-224, 242.

The court later held a hearing under CrR 3.5 at which Vancouver Police Detective Laurence Zapata and the defendant testified. RP 10-20, 23-27. According to Detective Zapata he twice spoke with the defendant at the Central Precinct Police Station following the defendant's arrest. RP 15-16. Prior to the first interview he read the defendant his rights under *Miranda* and the defendant indicated that he understood them. RP 14-15. They then spoke for about 5 minutes during the first interview and about 11 minutes during the second interview. RP 15-16. On cross-examination Detective Zapata admitted that he had no information about the defendant's other contacts with the police that evening. RP 18-19. The defendant testified that (1) he did not remember Detective Zapata reading him anything before their conversations at the police station, and (2) he did remember a police officer reading him something while transporting him in a police car, and (3) he told the officer in the police car that he "didn't want to talk to them." RP 23-24. The court ruled that the defendant's statements were admissible at trial, although it failed to address the fact that the defendant testified that he had invoked his

right to silence prior to his contact with Detective Zapata. RP 27-33.

The case later came on for trial before a jury with the state calling Mr. Zarraga, Mr. Fisticon, Detective Zapata, and four other police officers as witnesses. RP 47-243. Two of these officers testified that on the night of August 18, 2006, they participated in a "high risk" traffic stop of potentially armed robbery suspects who turned out to be the defendant and Mr. Fisticon. RP 48-51, 101-103. They further testified that they took the defendant and Mr. Fisticon out of a vehicle at gunpoint, placed them in handcuffs, and arrested them. *Id.* The defense made no objection that this evidence was irrelevant or that it constituted the officer's improper opinions that Mr. Zarraga had told the truth and the defendant and Mr. Fisticon were guilty of the crimes charged. *Id.*

Neither did the defense object when the state elicited the fact that the defendant had refused to answer some of Detective Zapata's questions about the Acura Legend after the defendant had taken the officer to an apartment complex and the officer had seen the vehicle. RP 138. The question and answer went as follows:

Q. After making this observation of this two-door import that you believed to have seen on the cell phone, what action did you take in relation to this car?

A. I initially went back to Mr. Sirotkin and asked him if this was the same – the same vehicle. He – he – he didn't want to answer the question. . . .

RP 138.

The defense also failed to object when the state asked the defendant why he refused to answer Detective Zapata's question about the vehicle. RP 284. During cross-examination the state asked the defendant the following question:

And when later you took Detective Zapata to the place where you lived and you pointed out the car, you wouldn't answer any questions about it, would you?

RP 284-290.

This question so alarmed the judge that he sent the jury out, questioned the state about what legal authority it thought existed for asking such a question, and then ruled that it was an improper comment on the defendant's exercise of his right to silence. RP 284-290. The court also noted that the state had already improperly elicited this evidence from Detective Zapata, that the defense had failed to object at that point, and that the court did not want any reversals from the court of appeals based upon these type of improper comments on the defendant's right to silence and defense counsel's failures to object to them. *Id.* However, when the trial resumed, the court did not instruct the jury to disregard both the state's question as well as the prior testimony of Detective Zapata on the fact that the defendant had invoked his right to silence. *Id.*

Following the close of the state's case the defense called two initial

witnesses. RP 265-294. The defendant then took the stand and admitted that he was driving his father's Acura on the evening in question along with Mr. Fisticon. RP 273-275. However, he denied any intent to or attempt to rob Mr. Zarraga. RP 273-294. After the defendant completed his testimony the defense rested its case. RP 294. The court then instructed the jury with no objections or exceptions, and both parties then presented their closing arguments. RP 299-300; CP 37-63, RP 301-339.

During deliberations, the jury sent out two questions. CP 64-65. The first asked why Detective Zapata had sat next to the prosecutor during the entire trial. CP 64. The court refused to answer this question. *Id.* The second asked what the jury should do if it was undecided on one count. CP 65. At the defendant's request, the court responded that the jury should "[c]omplete the verdict form or forms as to any count on which you are able to reach an agreement." CP 65, RP 345-348. The jury later returned verdicts of "guilty" on counts one and two. CP 66-67. However the jury was unable to agree on Count III, and the court declared a mistrial on this count upon the defendant's motion. RP 351-353. The state later moved to dismiss this count. CP 70

At sentencing, the court failed to find that the robbery and kidnaping charges constituted the "same criminal conduct" for the purpose of calculating the defendant's offender score. CP 73-74, 88. As a result, the

court assigned one point for two prior non-violent juvenile felonies and two points for concurrent offenses for a total offender score of three points on each crime. *Id.* The court then sentenced the defendant to 45 $\frac{3}{4}$ months in prison on Count I concurrent to 70 months in prison on Count II. CP 77. The defendant thereafter filed timely notice of appeal. CP 90.

ARGUMENT

I. THE TRIAL COURT'S RULING ALLOWING THE PROSECUTOR TO ELICIT STATEMENTS THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION AFTER INVOKING HIS RIGHT TO SILENCE VIOLATED WASHINGTON CONSTITUTION, ARTICLE 1, § 9 AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

The United States Constitution, Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.” Similarly, Washington Constitution, Article 1, § 9 states that “[n]o person shall be compelled in any criminal case to give evidence against himself.” The protection of Washington Constitution, Article 1, § 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

In order to effectuate this right, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant’s “custodial statements” may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: “ (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384

U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly inform the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, *supra*. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of his or her rights under *Miranda* is "custodial interrogations." Just what the words "custodial" and "interrogation" mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). Generally speaking, an interrogation is "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Once an accused asserts his or her right to remain silent and right to counsel, all interrogation must cease until an attorney is present "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005

(1987). At this point, the right to silence and counsel must be “scrupulously honored.” *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975); *State v. Grisby*, 97 Wn.2d 493, 504, 647 P.2d 6 (1982).

In order to implement the requirements the Supreme Court created in *Miranda*, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of a defendant’s post-arrest statements given in response to police interrogation. This procedure is found in CrR 3.5, which states in part:

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.5.

As CrR 3.5(c) states, the trial court has the duty to enter written findings of fact and conclusions of law following a CrR 3.5 hearing. These written findings and conclusions facilitate and expedite appellate review of the issues. *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). As a result, the court's failure to enter such findings and conclusions as required under CrR 3.5(c) is error and is not harmless unless the court's oral findings are sufficient for appellate review of the issue. *State v. Miller*, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998).

In the case at bar the trial court has not entered written findings of fact and conclusions of law on the CrR 3.5 hearing. This failure prevents adequate appellate review for the following reason. The court's oral ruling fails to even address the defendant's claim in his testimony that following his arrest and while he was being placed in a patrol vehicle, he unequivocally invoked his right to silence. According to the defendant's testimony, while being placed in a patrol vehicle following his arrest he told the officer that he "didn't want to talk to them." RP 24. This statement constituted an unequivocal invocation of the right to silence. Thus, at the time that Detective Zapata arrived at the police station, the defendant had already invoked his right to silence. Even if Detective Zapata did not know this fact, his initiation of questioning after reading the defendant his *Miranda* rights constituted a violation of the defendant's right to silence. It certainly did not

constitute a “scrupulous” honoring of the defendant’s right to silence and counsel. Thus, since the defendant did not initiate a conversation with Detective Zapata, the detective’s contact with the defendant violated the defendant’s right to silence as this right is protect under *Miranda* and its progeny.

It is true that the trial court in this case was clear in its oral ruling that the state had proven that (1) Detective Zapata had properly informed the defendant of his *Miranda* rights, and (2) that the defendant knowingly and voluntarily waived those rights. However, these findings do not address the defendant’s claim that he had already invoked his right to silence. Thus, the failure to enter these written findings was not harmless error because this court cannot resolve the defendant’s factual claim that he had already invoked his right to silence.

In addressing the issue of harmless error, the defendant points to the following evidence that was presented to the jury as a direct result of Detective Zapata’s interrogation of the defendant: (1) the defendant’s eventual admission that he was driving the dark import on the night in question and that Mr. Fisticon was with him, (2) the defendant’s inconsistent statements concerning the ownership of the Lexus, (3) the officer’s review of the defendant’s cell phone pictures, (4) the defendant’s actions in showing the officer where he lived, (5) the officers’ discovery of the Lexus, and (6) the

officers' search of the Lexus and the evidence found during the search of that vehicle. All of this evidence would have been subject to exclusion had the court found that the defendant had previously invoked his right to silence, thereby making Detective Zapata's interrogation improper in spite of the fact that he preceded it with *Miranda* warnings. Defendant submits that absent this evidence the court cannot say beyond a reasonable doubt that the jury would have returned the verdicts of guilty. As a result, the defendant is entitled to a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE REPEATEDLY ELICITED EVIDENCE THAT THE POLICE OFFICERS BELIEVED THE DEFENDANT WAS GUILTY AND THAT HE HAD REFUSED TO ANSWER CERTAIN QUESTIONS VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

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

assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when (1) the state repeatedly elicited irrelevant and prejudicial evidence that two police officers thought the defendant guilty in that they performed a "high-risk" stop of his vehicle, arrested him at gun point, handcuffed him, read him his *Miranda* rights, and took him to the police station for interrogation, and (2) when the state twice

elicited evidence that the defendant had invoked his right to silence. The following presents these arguments.

(1) Arresting Officers' Opinions of Guilt

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 both defense counsel and the prosecutor, as well as the witnesses, must refrain from any statements or conduct that express their 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 that officers performed a “high risk” traffic stop, arrested the defendant, placed him in handcuffs, and took him to the police station or the jail is not evidence because it constitutes the arresting officer’s opinions that the defendant is guilty. For example, in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant’s vehicle hit the plaintiff’s vehicle. Following a defense verdict the plaintiff appealed arguing that defendant’s argument in closing that the attending officers’ failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent’s negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very

matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant's vehicle falls into this category. Therefore, the witness' opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

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

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

In this case the prosecutor repeatedly violated the defendant's right to a fair trial when the state elicited irrelevant evidence that two police officers arrested the defendant, handcuffed him, took him to the police station, read the *Miranda* warnings to him, and then took a statement from him. This occurred during the state's direct examination of Officers Viles and Janisch when the state elicited the facts that on the night of August 18, 2006, these two officers participated in a "high risk" traffic stop of potentially armed robbery suspects who turned out to be the defendant and Mr. Fisticon. RP 48-51, 101-103. They further testified that they took the defendant and Mr. Fisticon out of a vehicle at gunpoint, placed them in handcuffs, and arrested them. *Id.* The defense made no objection that this evidence was irrelevant or that it constituted the officers' improper opinions that Mr. Zarraga had told

the truth and the defendant and Mr. Fisticon were guilty of the crimes charged. *Id.* No possible tactical advantage exists for the defense to fail to object to this evidence which is both irrelevant and prejudicial to the defense. Consequently, the failure to object fell below the standard of a reasonably prudent attorney.

(2) Improper Comment on the Defendant's Invocation of His Right to Silence

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9 contains and equivalent right. *State v. Earls, supra.* The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify, *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979), and precludes the state from eliciting comments from witnesses or making closing arguments relating to a defendant's silence to infer guilt from such silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979).

In *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the court states this proposition as follows:

At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. As the United

States Supreme Court said in *Miranda*, “[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation.” *Miranda*, 384 U.S. at 468 n. 37, 86 S.Ct. at 1624 n. 37. The purpose of this rule is plain. An accused’s Fifth Amendment right to silence can be circumvented by the State “just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.” *State v. Fricks*, 91 Wash.2d 391, 396, 588 P.2d 1328 (1979).

State v. Easter, 130 Wn.2d at 236 (some citations omitted).

For example, in *State v. Easter*, the defendant was prosecuted for multiple counts of vehicular homicide. At trial, the state, in its case in chief, elicited testimony from its investigating officer that shortly after the accident, he found the defendant in the bathroom of a gas station at the intersection, and that the defendant “totally ignored” him when he asked what happened. The police officer also testified that when he continued to ask questions, the defendant looked down, “once again ignoring me, ignoring my questions.” Following conviction, the defendant appealed, arguing that this testimony violated his right to remain silent. The Washington Supreme Court agreed and reversed, stating as follows:

Accordingly, Easter’s right to silence was violated by testimony he did not answer and looked away without speaking when Officer Fitzgerald first questioned him. It was also violated by testimony and argument he was evasive, or was communicative only when asking about papers or his friend. Moreover, since the officer defined the term “smart drunk” as meaning evasive behavior and silence when interrogated, the testimony Easter was a smart drunk also violated Easter’s right to silence.

State v. Easter, 130 Wn.2d at 241.

In the case at bar, the state also twice elicited evidence concerning the defendant's exercise of his right to silence. It did so when it elicited the fact that the defendant had refused to answer some of Detective Zapata's questions about the Acura Legend after the defendant had taken him to his apartment complex and the officer had seen the vehicle. RP 138. The question and answer went as follows:

Q. After making this observation of this two-door import that you believed to have seen on the cell phone, what action did you take in relation to this car?

A. I initially went back to Mr. Sirotkin and asked him if this was the same – the same vehicle. He – he – he didn't want to answer the question. . . .

RP 138.

Then, during cross-examination, the state asked the defendant the following question:

And when later you took Detective Zapata to the place where you lived and you pointed out the car, you wouldn't answer any questions about, would you?

RP 284-290.

Although the court intervened at this point and did not require that the defendant answer this question it was by this time far too late. The state had twice rung the bell, and the jury already knew the answer to this question given Detective Zapata's testimony. Once again, no tactical reason exists for

defense counsel's failure to object. As the trial court pointed out to both counsel after sending the jury out, there was no legal basis for the admission of this type of evidence. Thus, counsel's failure to object fell below the standard of a reasonable prudent attorney.

In the case at bar the state's case rested solely upon the credibility of Mr. Zarraga and Mr. Fisticon. The latter's testimony was compromised by both his inconsistent prior statements that exculpated both him and the defendant, as well as his motive to testify consistent with what the state desired. The former's credibility was compromised by the inconsistency in his claim that (1) he was so afraid for the safety of his family that he went to meet with the defendant and Mr. Fisticon the next night, but (2) he had gone to the police both on the first night and on the second night. These inconsistencies obviously caused problems for the jury, which was unable to even render a verdict on Count III. Under these circumstances, the admission of both the improper opinion evidence and the improper comment on the defendant's right to silence, both coming before the jury based upon defense counsel's failure to object, made the difference between what would more likely than not been a verdict of not guilty based upon reasonable doubt. Thus, trial counsel's errors caused prejudice and denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

III. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT THE ATTEMPTED ROBBERY AND KIDNAPING CHARGES CONSTITUTED THE SAME CRIMINAL CONDUCT FOR THE PURPOSE OF DETERMINING THE CORRECT OFFENDER SCORE.

Under RCW 9.94A.589(1)(a), at sentencing on two or more offenses, if “some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.”¹ *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994). Under this statute, the term “same criminal intent” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). The term “same criminal intent” as used in this definition does not mean the same “specific intent.” *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Rather, it means the same “objective intent.” *Id.*

For example, in *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269 (1998), the trial court convicted the defendant of Delivery of Heroin, and Conspiracy to Deliver Heroin. At sentencing, the trial court found that while these two offenses had the same victim and were committed at the same time and place. However, the court ruled that these two offenses did not constitute the “same criminal conduct” for the purpose of sentencing because they had

¹Formerly RCW 9.94A.400.

different intent elements. The defendant appealed this ruling.

The Court of Appeals reversed the trial court on the sentencing issue, holding as follows:

[T]he present case, the “objective intent” underlying the two charges is the same - to deliver the heroin in one or both conspirators’ possession. Possessing that heroin was the “substantial step” used to prove the conspiracy. Since both crimes therefore involved the same heroin, it makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later. Under the reasoning in *Porter*, the two crimes should be treated as encompassing the same criminal conduct.

State v. Deharo, 136 Wn.2d at 858.

Similarly, in *State v. Saunders*, 120 Wn.App. 80, 86 P.3d 232 (2004), a defendant convicted of murder, robbery, kidnaping, and rape out of the same incident argued that his trial counsel had been ineffective when he failed to argue that the rape and the kidnaping constituted the “same criminal conduct” for the purpose of determining his offender score. The court agreed, holding as follows:

Under the facts here, it appears that Williams’s primary motivation for raping Grissett by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Further, as the case law provides strong support to this argument, the failure was prejudicial. See *State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *Edwards*, 45 Wn.App. at 382, 725 P.2d 442; *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 526 (1998).

Thus, counsel's decision not to argue same criminal conduct as to the rape and kidnaping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where defense counsel can make this argument.

State v. Saunders, 120 Wn.App. at 825.

In the case at bar, the defendant was convicted of both attempted robbery and kidnaping out of the same incident in which, according to the state's theory of the case, Mr. Fisticon jumped out of the defendant's vehicle, entered Zarraga's vehicle, and then forced Mr. Zarraga to drive to a car wash where the two defendant's attempted to get money or drugs from Mr. Zarraga. Under these facts, both crimes were committed at the same time, at the same place, and upon the same victim. Further the objective intent, as in *Saunders*, was the same. Thus, the trial court abused its discretion when it failed to find that these two offenses constituted the same criminal conduct under RCW 9.94A.589.

In *Saunders* counsel on appeal presented the argument through the medium of ineffective assistance, apparently based upon a belief that this argument could not be raised for the first time on appeal. While the Washington Supreme Court has yet to address this issue, the three divisions of the court of appeal are unanimous that this issue may be raised for the first time appeal. In *State v. Soper*, 135 Wn.App. 89, 143 P.3d 335 (2006), this division of the court of appeals allowed the defendant to argue for the first

to 75 months in prison, not 67 to 89 months as calculated by the sentencing court. Thus, the defendant is entitled to be resentenced under the correct offender score and ranges.

time on appeal that the trial court had erred when it failed to find that two offenses constituted the same criminal conduct for the purposes of calculating the correct offender score. The court stated the following on this issue in a footnote:

Soper raises this argument for the first time on appeal. A challenge to an offender score calculation may be raised for the first time on appeal because the sentencing court acts without statutory authority when it imposes a sentence based on a miscalculated offender score. *See State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

While our Supreme Court has not addressed whether the same criminal conduct issue may be raised for the first time on appeal, Division One and Division Three of this court have permitted review where the defendant did not ask the trial court to consider whether his crimes constituted the same criminal conduct. *See State v. Nitsch*, 100 Wn.App. 512, 521, 997 P.2d 1000, review denied, 141 Wn.2d 1030, 11 P.3d 827 (2000).

State v. Soper, 135 Wn.App. at 105, footnote 11.

Consequently, even if the issue was not properly raised before the trial court, defendant may not raise it on appeal.

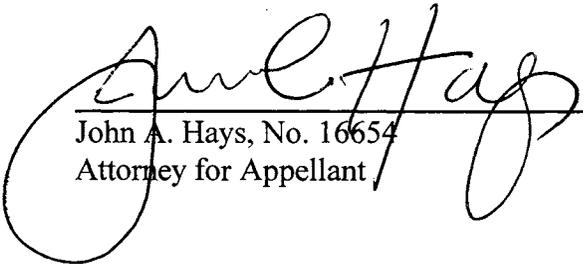
In this case the court calculated the defendant's offender score at three points, two of which came from the concurrent offense. Thus, the correct offender score based upon the same criminal conduct analysis was actually one point. With one point, the defendant's correct sentencing range on Count I was from 27 to 36 months in prison, not 34½ to 45¾ months as calculated by the sentencing court. Similarly, the correct range on Count II was from 57

CONCLUSION

The defendant is entitled to a new trial based upon (1) the trial court's error in allowing the state to elicit statements the defendant made after invoking his right to silence, and (2) trial counsel's failure to object when the state elicited inadmissible, prejudicial evidence. In the alternative, the defendant is entitled to be resentenced based upon the trial court's failure to find that both crimes constituted the same criminal conduct.

DATED this 4th day of September, 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, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**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,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**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.

RCW 9.94A.589
Consecutive or concurrent sentences

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(2)(a) Except as provided in (b) of this subsection, whenever a person

while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

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

STATE OF WASHINGTON,)
Respondent,)

CLARK CO. NO: 06-1-01591-6
APPEAL NO: 36012-8-II

vs.)

AFFIDAVIT OF MAILING

SERGEY K. SIROTKIN,)
Appellant,)

STATE OF WASHINGTON)
) vs.
COUNTY OF CLARK)

CATHY RUSSELL, being duly sworn on oath, states that on the 4th day of SEPTEMBER, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

SERGEY K. SIROTKIN DOC #303637
WASH STATE PENITENTIARY
1313 N. 13TH AVE.
WALLA WALLA, WA 99362-1065

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. MOTION TO SUPPLEMENT STATEMENT OF ARRANGEMENTS
- 3. AFFIDAVIT OF MAILING

DATED this 4TH day of SEPTEMBER, 2007.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 4th day of SEPTEMBER, 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

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