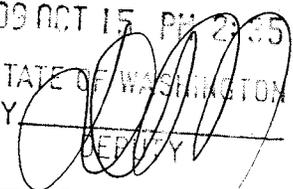


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY



NO. 39262-3-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**BARRY DONALD STRONG,**

**Appellant.**

---

**BRIEF OF APPELLANT**

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*P.M. 10-14-2009*

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The prosecutor violated the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment when he elicited the fact that the defendant refused to answer a question an officer asked him during custodial interrogation. RP 99-100.

2. Trial counsel's failure to object when the state elicited testimony that a police officer arrested the defendant and booked him into jail denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. RP 96-97.

3. The court violated Washington Constitution, Article 4, § 16, when it commented on evidence from one of the state's witnesses. RP 75-76.

4. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when it entered judgment of conviction on an offense unsupported by substantial evidence. RP 1-140.

5. The trial court violated the defendant's right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it held four separate portions of the trial outside the presence of the defendant and the public without entering findings to support this action. RP 49-50, 75-76, 101, 112.

***Issues Pertaining to Assignment of Error***

1. Does a prosecutor violate a defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment if it elicits the fact that the defendant refused to answer a question an officer asked during custodial interrogation?

2. Does a trial counsel's failure to object when the state elicits testimony that a police officer arrested the defendant and booked him into jail deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when that evidence is irrelevant and unfairly prejudicial?

3. Does a court violate Washington Constitution, Article 4, § 16, by commenting on testimony from one of the state's witnesses?

4. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment if it enters judgment of conviction on an offense unsupported by substantial evidence?

5. Does a trial court violate a defendant's right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, if it holds four separate portions of the trial outside the presence of the defendant and the public without entering findings to support this action?

## STATEMENT OF THE CASE

### *Factual History*

Sophany Chen and David Turel work as sales representatives for T-Mobile at a retail outlet at 104 Grand Boulevard in Vancouver. RP 51-53, 65-67. At about 2:00 p.m. on July 15, 2009, they were both at work when the defendant drove into the parking lot in an older white Cadillac DeVille. RP 51-53, 69-71 Upon parking, the defendant and his passenger got out, entered the store, and asked about cell phone services. *Id.* The defendant spoke with Ms Chen and his passenger spoke with Mr. Turel. *Id.* After about 15 minutes, the defendant told Ms Chen that he would return later with a female friend to talk some more about getting a cell phone. *Id.* The defendant and the passenger then left the store, got into the Cadillac, and drove away. *Id.*

About two hours later, the defendant and the same passenger returned to the parking lot in the Cadillac. RP 54-56, 69-73. However, this time they were accompanied by an older woman. *Id.* After they drove up, all three of them entered the T-Mobile store. *Id.* The defendant, who had the female with him, again began to discuss cell phone services with Ms Chen. *Id.* The passenger went back to talking with Mr. Turel. *Id.* After about 15 minutes, the defendant and the female announced that “we’re going to just stick with Cricket.” RP 56-58, 71. They then left the store, got back into the Cadillac, and drove away. *Id.* While they were doing this, the passenger was looking

at some “blue-tooth headsets” with Mr. Turel. *Id.*

According to Mr. Turel, after the defendant and the female left the store, the passenger picked up four headsets that Mr. Turel was showing him and started walking out of the store. RP 56-58, 71-73. The retail price on two of the headsets was \$99.99 each, and the retail price for the other two headsets was \$129.99 each. RP 74. Upon seeing this, Mr. Turel told the passenger that he couldn’t take the headsets out of the store. *Id.* At this point, the passenger ran out the door, turned left, ran down to Grand Boulevard, and turned right, all the time with Mr. Turel in pursuit. *Id.* At about the time the passenger got to Grand Boulevard, the white Cadillac drove up from behind Mr. Turel, passed him, turned right onto Grand Boulevard, stopped, picked up the passenger, and drove away. *Id.*

Two days later, the defendant again drove the white Cadillac into the parking lot by the T-Mobile store. RP 59-61. Ms Chen saw it and called the police, who came to the area and arrested the defendant. RP 59-61, 96-97. In a later interview with the police in the Clark County Jail, the defendant admitted twice to being in the T-mobile store two days previous, although he disavowed any knowledge of the theft. RP 97-100. The police officer performing the interrogation then asked for the identity of the woman who was with the defendant the second time he went to the store. RP 99-100, The defendant refused to answer this question. *Id.*

### ***Procedural History***

By information filed July 30, 2008, the Clark County Prosecutor charged the defendant Barry Donald Strong with one count of Second Degree Theft. RP 1. At arraignment, the court set a number of conditions of release for the defendant, including a requirement that he return to court for a readiness hearing on September 25, 2008. RP 102-109, 109-117. The defendant did not appear on that date. *Id.* At that time, he was at home taking care of his wife, who had recently returned from the hospital after being in a diabetic coma. RP 124-140. Based upon the defendant's failure to appear at the readiness hearing, the prosecutor filed a new information adding a charge of bail jumping from a class B or C felony. CP 2-3.

The state later filed a second and a third amended information, adding the following allegations of four aggravating circumstances to the defendant's charges:

Further, the State of Washington notifies the Defendant that it is seeking a sentence above the standard sentencing range based upon the following aggravating circumstance(s):

The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient. RCW 9.94A.535(2)(b).

The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c).

The failure to consider the defendant's prior criminal history, which

was omitted from the offender score calculation pursuant to RCW 9.94A.525, results in a presumptive sentence that is clearly too lenient. RCW 9.94A.535(2)(d).

The defendant committed the current offense shortly after being released from incarceration. RCW 9.94A.535(3)(t).

CP 29-30, 40-41.

The case later came on for trial before a jury with the state calling six witnesses, including Sophany Chen, David Turel, two police officers, and two deputy prosecuting attorneys. RP 51, 65, 90, 94, 102, 109. One of the two police officers called to the stand was Officer Brenski, who had arrested the defendant and interviewed him in the jail. RP 94. Initially, the state elicited the facts that the officer had arrested the defendant and had booked him into the jail. RP 96-97. The state did not explain to the court why these two facts were relevant to any issue before the jury, and the defendant's attorney did not lodge an objection that this evidence was both irrelevant and unfairly prejudicial as an opinion of guilt by the officer. *Id.*

During Officer Brenski's testimony, the state also elicited the fact that (1) during the interrogation, Officer Brenski had asked the defendant who the woman was with him the second time he went to the T-Mobile store, and (2) that the defendant had refused to answer the question. RP 99-100. When eliciting this testimony, the state did not argue to the court any legal theory as to why the defendant's refusal to answer a question during interrogation

was admissible, and the defendant's attorney made no objection or motion for a mistrial upon an argument that this evidence violated the defendant's right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. *Id.*

During David Turel's testimony, the state asked him concerning the value of the four headsets that the passenger had taken out of the store. RP 74. Initially, Mr. Turel testified that two of the headsets cost \$99.99 each, and that the other two headsets costs \$129.99 each. RP 74. The state then asked Mr. Turel three times what the combined value was of the four items that the passenger had stolen from the store. RP 74-75. At each question, Mr. Turel responded that the combined value of all of the headsets was "around \$135.00." *Id.* Mr. Turel then expressed some confusion about the combined value of the headsets. *Id.* In response, the judge handed Mr. Turel a calculator for him to use. RP 75. The record on this issue states as follows:

Q. Okay. What was the total value for all four of them together?

A. Around \$139.

Q. All four together?

A. Correct.

Q. Yeah. Let me follow up again.

A. I'm sorry, I'm not doing my math correct at all. Excuse me, no. Two headsets. One model was 99.99. The other model was 119.99.

THE COURT: (Handing calculator to witness.)

THE WITNESS: Thank you. Thank you. Oh, my goodness, let me just make sure my math is accurate here. This is embarrassing. (making computation on calculator).

That would total \$439.96.

MR. PETERSEN: Okay. Thanks. All right. No further –

THE WITNESS: Thank you (returning calculator to the Court.) Thank you.

MR. PETERSEN: No further questions, Your Honor.

THE COURT: Cross.

MR. ANDERSON: Your Honor, sidebar.

THE COURT: Oh, let's step into the hallway, gentlemen.

(Hallway conference; not recorded.)

RP 75-76.

As the report of the proceedings reflects, there is no way to tell what happened in the hallway conference because the court held it outside the presence of the defendant, the public, and any recording devices. *Id.* In fact, on three other occasions, the court shifted proceedings in the trial out of the presence of the defendant, the public, and any recording devices. RP 49-50, 101, 112. Apparently two of these private, unrecorded portions of the trial occurred in chambers and one in the hallway. *Id.*

Following the close of the state's case, the defense called the

defendant's wife, who testified concerning her illness and why the defendant missed his scheduled readiness hearing. RP 124-140. The defense then rested its case, and the court instructed the jury without objection from the defense. CP 75-95; RP 124-173. However, the state did object to the court giving an instruction on the defendant's justification claim on the bail jump charge. RP 117-125, 148-151. The parties then presented their closing arguments, and the jury retired for deliberation, later returning "guilty" verdicts on both counts. RP 173-203.

Following reception of the verdicts, the state called Officer Jennifer Bell as its sole witness offered to prove its claims on the fourth aggravating factor it had alleged in the information that the defendant had "committed the current offense shortly after being released from incarceration." RP 219-223. After her testimony, the court instructed the jury on this aggravating factor, counsel presented short argument, and the jury retired again. RP 223-235. Following its second deliberation, the jury returned a special verdict finding the aggravating factor proven beyond a reasonable doubt. RP 108-109.

About two weeks after the trial, the court called this case for sentencing. RP 234-264. Following argument by counsel, the court sentenced the defendant to 29 months on the theft charge, and 60 months on the bail jump charge. CP 116-131. Both sentences were within the standard range, and the court ordered both sentences to run concurrently. *Id.*

However, based upon the aggravating factor found by the jury, and the other three alleged aggravating factors which the court found proven, the court ordered these two sentences to run consecutively to a 24 month sentence imposed against the defendant on the same day on convictions for first degree criminal impersonation and possession of cocaine in Clark County cause number 09-1-00464-1. CP 132-135. The defendant thereafter filed timely notice of appeal. CP 135.

## ARGUMENT

### I. THE PROSECUTOR VIOLATED THE DEFENDANT'S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT WHEN HE ELICITED THE FACT THAT THE DEFENDANT REFUSED TO ANSWER A QUESTION AN OFFICER ASKED HIM DURING CUSTODIAL INTERROGATION.

The United States Constitution, Fifth Amendment states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9, contains an equivalent protection. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). 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, these constitutional provisions prohibit the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). They further preclude the state from eliciting comments from witnesses or making closing arguments inviting the jury to infer guilt from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls, supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285

(1996), the state charged the defendant with multiple counts of vehicular homicide. At trial the chief investigating officer testified that he found the defendant in a gas station bathroom shortly after the accident and the defendant “totally ignored” him when he asked what happened. The police officer also testified that upon further questioning the defendant looked down, “once again ignoring me, ignoring my questions.” Following conviction the defendant appealed, arguing that this testimony violated his Fifth Amendment right to silence.

In addressing this issue the Washington Supreme Court first reviewed the rights protected under both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, stating as follows:

The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. To enforce this principle, upon arrest, an accused must be advised he or she can remain silent.

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.” 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. Easter*, 130 Wn.2d at 235-236 (citations omitted).

In *Easter*, the prosecution tried to take the statements admitted at trial out of Fifth Amendment analysis by arguing that they were “pre-arrest,” and thus not constitutionally protected. The court noted: “[t]he State argues pre-arrest silence may be used to support the State’s case in chief because the Fifth Amendment is designed to deal only with ‘compelled’ testimony, and Easter was under no compulsion to speak at the accident scene prior to his arrest.” *Easter*, 130 Wn.2d at 237-38. The Court rejected this argument, holding as follows:

We decline to read the Fifth Amendment so narrowly as the State urges. An accused’s right to silence derives, not from *Miranda*, but from the Fifth Amendment itself. The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding. Indeed, the *Miranda* warning states the accused is entitled by the Fifth Amendment to remain silent; *Miranda* indicates the right to silence exists prior to the time the government must advise the person of such right when taking the person into custody for interrogation. When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence. A “bell once rung cannot be unring.” The State’s theory would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant’s pre-arrest silence as evidence of guilt.

The State’s belief that the Fifth Amendment applies only to “compelled testimony” also implies that an accused acquires the right to silence only when advised of such right at the time of arrest. This is not so. No special set of words is necessary to invoke the right. In fact, an accused’s silence in the face of police questioning is quite expressive as to the person’s intent to invoke the right regardless of whether it is pre-arrest or post-arrest. If silence after arrest is “insolubly ambiguous” according to the *Doyle* Court, it is equally so before an arrest.

*State v. Easter*, 130 Wn.2d 238-239 (citations omitted).

Given this analysis, the Supreme Court reversed, finding an error of constitutional magnitude, and insufficient proof by the state that the error was harmless beyond a reasonable doubt.

In the case at bar, there is no question that the defendant was under arrest and in custody at the time the police officer interrogated him. This questioning took place in the jail, and it was preceded by proper *Miranda* warnings. Although the defendant did answer the initial questions by the officer, he finally did unequivocally exercise his right to silence when he refused to answer the officer's questions concerning the identity of the woman who was with him the second time he went into the T-Mobil store. By eliciting the fact that the defendant exercised his right to silence as to this question, the state violated the defendant's right to silence under both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment.

In the case at bar, this violation also caused the defendant significant prejudice. The evidence the state presented against the defendant was equivocal at best. While there was no question that there had been a theft, the defendant's knowledge of that theft was very much at issue. Given the equivocal nature of the state's evidence concerning the defendant's knowledge of or participation in the passenger's theft of the headsets, it is

likely that but for the introduction of this improper statement, the jury would have returned verdicts of acquittal. At a minimum, the error was not harmless beyond a reasonable doubt as it must be for this court to rule that a violation of the defendant's right to silence was harmless. *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 927 (2009) ("The court does not tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt").

**II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED TESTIMONY THAT A POLICE OFFICER ARRESTED THE DEFENDANT AND BOOKED HIM INTO JAIL DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

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

First, a convicted defendant must show that trial counsel's

performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's 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 counsels failure to object when the state elicited irrelevant, prejudicial evidence that a police officer had arrested the defendant and had booked him into the jail. The following sets out this argument.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain

this fundamental constitutional guarantee to a fair trial 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 that was 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, one is left to ask the following question: what was the relevance of the fact that an officer arrested the defendant, that he read him his *Miranda* rights, and that he booked him into the jail? Put another way, what fact at issue at trial does the fact of the arrest make or the fact that he was booked into the jail make more or less likely? The answer is that the only relevance in this evidence lies in the inference that the officer believed the defendant guilty. However, as was set out above, eliciting and arguing this evidence violates the defendant's right to a fair trial.

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. In addition as was set out in the previous argument, the state's case against the defendant was equivocal at best. Thus, it is more than likely that the admission of these improper facts change what would have been a verdict of acquittal into a verdict of conviction. Consequently, trial counsel's failure to object to this irrelevant and prejudicial evidence caused prejudice and violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States

Constitution, Sixth Amendment, thereby entitling him to a new trial.

**III. THE COURT VIOLATED WASHINGTON CONSTITUTION, ARTICLE 4, § 16, WHEN IT COMMENTED ON EVIDENCE FROM ONE OF THE STATE'S WITNESSES.**

Under Washington Constitution, Article 4, § 16, “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A statement made by the court in front of the jury constitutes an impermissible “comment on the evidence” if a reasonable juror hearing the statement in the context of the case would infer the court’s attitude toward the merits of the case, or would infer the court’s evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crofts*, 22 Wash. 245, 60 P. 403 (1900), the Washington Supreme Court wrote the following concerning the purpose behind this constitutional provision.

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

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

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

*State v. Bogner*, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125

Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

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

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

In the case at bar, the trial court violated this constitutional provision when it handed one of the witnesses a calculator, thereby implying that he should revise his testimony to reflect that which the judge thought to be correct. This happened during the testimony of David Turel. While he was on the stand, the state asked him concerning the value of the four headsets that the passenger had taken out of the store. RP 74. Initially, Mr. Turel testified that two of the headsets cost \$99.99 each, and that the other two headsets costs \$129.99 each. RP 74. The state then asked Mr. Turel three times what the combined value was of the four items that the passenger had stolen from the store. RP 74-75. At each question, Mr. Turel responded that the combined value of all of the headsets was "around \$135.00." *Id.* Mr. Turel then expressed some confusion about the combined value of the

headsets. *Id.* In response, the judge handed Mr. Turel a calculator for him to use. RP 75. The record on this issue states as follows:

Q. Okay. What was the total value for all four of them together?

A. Around \$139.

Q. All four together?

A. Correct.

Q. Yeah. Let me follow up again.

A. I'm sorry, I'm not doing my math correct at all. Excuse me, no. Two headsets. One model was 99.99. The other model was \$119.99.

THE COURT: (Handing calculator to witness.)

THE WITNESS: Thank you. Thank you. Oh, my goodness, let me just make sure my math is accurate here. This is embarrassing. (making computation on calculator).

That would total \$439.96.

MR. PETERSEN: Okay. Thanks. All right. No further –

THE WITNESS: Thank you (returning calculator to the Court.) Thank you.

MR. PETERSEN: No further questions, Your Honor.

THE COURT: Cross.

MR. ANDERSON: Your Honor, sidebar.

THE COURT: Oh, let's step into the hallway, gentlemen.

RP 75-76.

The inference the jury obviously drew from this exchange was that the court did not agree with Mr. Turel's repeated testimony that the combined value of the property taken was under \$250.00. Thus, the trial court violated Washington Constitution, Article 4, § 16, by commenting on the evidence. As the prior case law explains, this error is presumed prejudicial and entitles the defendant to a new trial unless the state can affirmatively demonstrate from the evidence that no prejudice could have resulted. In the case at bar, the state cannot meet such a high standard since the only evidence on valuation came from the Mr. Turel.

**IV. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION ON AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the

criminal law.” *In re Winship*, 397 U.S. at 364.

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

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the state charged the defendant with second degree theft as an accomplice. Indeed, the state requested, and the court gave, an instruction on accomplice liability. *See* Instruction No. 16 at CP 89.

Accomplice liability is defined under RCW 9A.08.020(3), wherein it states:

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

RCW 9A.08.030(3).

Thus, to secure a conviction on the charge of second degree theft, the state in this case had the burden of proving beyond a reasonable doubt that the defendant, commanded, encouraged, requested, or aided the unidentified man in committing the theft of the headsets. While the state's evidence does lead to a suspicion that the defendant at least knew that the passenger from the vehicle was going to commit the theft, the evidence does not rise to a level beyond mere suspicion. Seen as a whole, the evidence is as or more consistent with the conclusion that the theft of the headsets was spur of the

motion action by another person that the defendant did not know would happen, and that the defendant did not aid. As the court noted in *Aten, supra*, evidence such as this, which is equally consistent with innocence as it is with guilt, is not sufficient to support a conviction; it is not substantial evidence. Thus, the trial court in the case at bar violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment of conviction against him on the charge of second degree theft.

**V. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT HELD FOUR SEPARATE PORTIONS OF THE TRIAL OUTSIDE THE PRESENCE OF THE DEFENDANT AND THE PUBLIC WITHOUT ENTERING FINDINGS TO SUPPORT THIS ACTION.**

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, every person charged with a crime is guaranteed the right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006). In addition, Washington Constitution, Article 1, § 10, also guarantees the public the right to open accessible proceedings. *Id.* This latter constitutional provision states: "Justice in all cases shall be administered openly." *State v. Easterling*, 157 Wn.2d at 174. The right to a public trial under these constitutional provisions ensures the defendant a fair trial, reminds officers of the court of the importance of their functions, encourages

witnesses to come forward, and discourages perjury.” *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Although a defendant’s right to a public trial is not absolute, the “protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Thus, under the decision in *Bone-Club*, a court must weigh the following five factors to determine whether it may properly close a portion of a trial:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

*State v. Bone-Club*, 128 Wn.2d at 258-59.

When ordering a hearing closed, the court must also enter specific findings of fact justifying the decision to close the courtroom. *State v. Easterling*, 157 Wn.2d at 175. These rules also apply when the plain

language or the effect of the trial court's ruling imposes a closure, and the burden is on the State to overcome the strong presumption that the courtroom was closed. *State v. Brightman*, 155 Wn.2d at 516; *see e.g.*, *State v. Duckett*, 141 Wn.App. 797, 807 n. 2, 173 P.3d 948 (2007) (On appeal, the burden is on the state to show that the closing did not occur where the "trial judge stated she intended to interview the selected jurors in a jury room.").

For example, in *State v. Heath*, — Wn.App. —, 206 P.3d 712 (2009), the state charged the defendant with two counts of unlawful possession of a firearm. When the case came on for trial before a jury, the court held portions of pretrial motions and portions of voir dire in chambers without performing any analysis under *Bone-Club*. The judge, the prosecutor, the defense attorney, and the defendant, were the only persons present in chambers during these hearings (except for the various prospective jurors who were examined). At one point, the defense attorney stated that he had no objection to this procedure. Following conviction, the defendant appealed, arguing that the trial court had violated her right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it held portions of the pretrial motions and portions of voir dire in chambers to the exclusion of those sitting in the courtroom.

The state responded to these claims by arguing that no *Bone-Club*

analysis was necessary because (1) the trial court did not explicitly close the hearings, and (2) neither party had moved to close the hearings. The State also argued that even if there was a closure, the defendant either invited the error or waived her right to public hearings. In addressing these arguments, this division of the Court of Appeals first addressed the standard of review that applied, and the claim of waiver. This court held:

Whether a trial court procedure violates the right to a public trial is a question of law we review de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The remedy for such violation is reversal and remand for new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). A defendant who fails to object at the time of the closure does not waive the right.

*State v. Heath*, 206 P.3d at 714.

The court then went on to address the applicability of *Bone-Club* by first noting that in *State v. Erickson*, 146 Wn.App. 200, 11, 189 P.3d 245 (2008), the court specifically held that conducting *voir dire* out of the courtroom constitutes a “closure” that mandates a *Bone-Club* analysis even when the trial court has not explicitly closed the proceedings. The court also noted the Division III was in accord but that Division I was contrary. *See State v. Frawley*, 140 Wn.App. 713, 720, 167 P.3d 593 (2007) (Division III holding the same); *but see State v. Momah*, 141 Wn.App. 705, 714, 171 P.3d 1064 (2007), *affirmed*, (filed October 8, 2009) (Court properly balance need for fair trial with need for public trial in closing part of *voir dire*). In

accordance with its prior ruling in *Erickson*, the court held that *Bone-Club* applied. As a result, it reversed the defendant's convictions and remanded for a new trial. The court also held the following on the state's claim that (1) the trial court's *sua sponte* decision to close a portion of the trial did not invoke *Bone-Club*, and (2) that the defense attorney's statement that he did not object to the procedure constituted a waiver by the defendant. The court stated:

The State argues that the trial court was not required to engage in a *Bone-Club* analysis because neither party moved to close the hearings, thereby triggering the need for such an analysis. This argument fails because a trial court's *sua sponte* decision to close public hearings triggers the need for a *Bone-Club* analysis.

The State also argues that Heath waived her right to public hearings on the disputed issues. But a defendant, by failing to object, does not waive her constitutional rights to a public trial. Heath did not waive the right by failing to object.

We conclude that the trial court violated Heath's right to a public trial by hearing pretrial motions and interviewing juror eight in chambers without first engaging in a *Bone-Club* analysis. Because we presume prejudice, we reverse and remand for a new trial.

*State v. Heath*, 206 P.3d at 716 (citations and footnote omitted).

The Washington Supreme Court has recently reaffirmed the application of this principles in *State v. Strode*, No. 80849-0 (filed October 8, 2009). In this case, the state charged the defendant with first degree rape of a child, first degree attempted rape of a child, and first degree child molestation. During *voir dire*, the court gave the prospective jurors a confidential juror questionnaire, which included a question as to whether or

not they or someone close to them, had ever been the victim of sexual abuse. At least 11 prospective jurors answered in the affirmative and were taken one at a time into chambers to determine whether or not their past experiences would preclude them from impartiality. The judge, the prosecutor, the defense attorney, and the defendant were the only people allowed into chambers along with the prospective juror. The trial judge held no *Bone-Club* hearing prior to holding this portion of *voir dire* in chambers. Following convictions on all counts, the defendant appealed, arguing that the trial court had denied him the right to a public trial.

On appeal, the state argued that (1) the trial was not closed because it did not begin until after *voir dire*, (2) the court on appeal could itself perform the *Bone-Club* analysis in the place of the trial court, (3) the defendant invited or waived his right to challenge the closure when he failed to object and when he participated in the procedure the court used, and (4) that the error was harmless beyond a reasonable doubt. The court rejected the state's first argument, noting that *voir dire* is part of a jury trial and is subject to the public trial requirements of the state and federal constitutions. The court also rejected the state's second argument, noting that when the trial court did not address any of the *Bone-Club* factors, an appellate court has no basis upon which to perform the analysis itself.

The court then rejected the state's third argument, noting as follows

concerning the waiver argument:

[T]he public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. We have held that a “defendant’s failure to lodge a contemporaneous objection at trial [does] not effect a waiver.” Strode’s failure to object to the closure or his counsel’s participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial. The right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.

Additionally, Strode cannot waive the public’s right to open proceedings. As we observed in *Bone-Club*, the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a *Bone-Club* analysis. The record reveals that the public was not afforded the opportunity to object to the closure, nor was the public’s right to an open courtroom given proper consideration.

*State v. Strode*, at page 7-8.

Finally, the court rejected the state’s fourth argument, finding that the error in closing a trial without a proper *Bone-Club* analysis was a structural error that was conclusively presumed to be prejudicial. Thus, the court reversed the defendant’s convictions and remanded for a new trial.

Although the case at bar did not deal with the exclusion of the public during portions of *voir dire*, the record on this case shows that the court held four hearings outside the presence of the defendant and the public during trial testimony in order to determine the admissibility of evidence and in order to

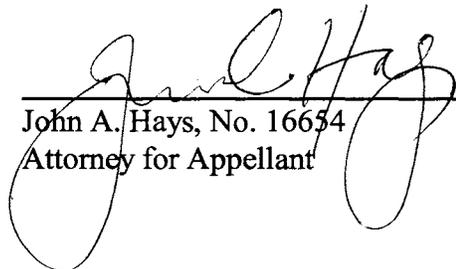
transact some other issues that cannot be inferred from the record. While the court in *Heath* and *Strode* spoke primarily in terms of holding portions of *voir dire* in private, the court was also addressing the issue of holding pretrial motions in private. Thus, in the same manner that the trial court in *Heath* and *Strode* violated the defendant's right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, by holding portions of *voir dire* and pretrial motions outside the presence of the public, so the trial court in the case at bar violated the defendant's right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it held four hearings outside the presence of the public and the defendant. As a result, the defendant is entitled to a new trial.

## CONCLUSION

The defendant's conviction for second degree theft should be vacated and the charge remanded with instructions to dismiss based upon the lack of substantial evidence to support this charge. In the alternative, this court should vacate the defendant's convictions and remand for retrial based upon the violation of the defendant's right to silence, the introduction of irrelevant and prejudicial evidence, and the trial court violation of the defendant's right to a public trial.

DATED this 13<sup>th</sup> day of October, 2009.

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, § 10**

Justice in all cases shall be administered openly, and without unnecessary delay.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

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

**WASHINGTON CONSTITUTION  
ARTICLE 4, § 16**

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

**UNITED STATES CONSTITUTION,  
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.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

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

**RCW 9A.08.040**

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

(4) A person who is legally incapable of committing a particular crime himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

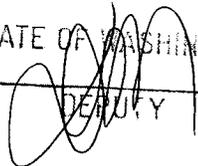
(a) He is a victim of that crime; or

(b) He terminates his complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

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

**STATE OF WASHINGTON,**  
Respondent,

**NO. 39262-3-II**

vs.

**AFFIRMATION OF SERVICE**

**BARRY DONALD STRONG,**  
Appellant.

STATE OF WASHINGTON )  
County of Clark ) : ss.

**CATHY RUSSELL**, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On **October 13<sup>th</sup>, 2009** , I personally placed in the mail the following documents

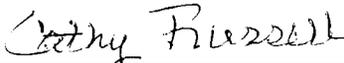
- 1. BRIEF OF APPELLANT
- 2. AFFIRMATION OF SERVICE

to the following:

**ARTHUR D. CURTIS**  
**CLARK COUNTY PROSECUTING ATTY**  
1200 FRANKLIN ST.  
P.O. BOX 5000  
VANCOUVER, WA 98666-5000

**BARRY D. STRONG #816886**  
**WASH STATE PENITENTIARY**  
1313 N. 13<sup>TH</sup> AVE.  
WALLA WALLA, WA 99362

Dated this 13<sup>th</sup> day of **OCTOBER, 2009** at **LONGVIEW, Washington.**

  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS