

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 40584-9-II

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ARLINE DORIS RUNYON,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

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

1. Trial counsel's failure to propose a jury instruction on self-defense denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

2. The trial court's admission of evidence that a police officer believed the defendant was guilty denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

*Issues Pertaining to Assignment of Error*

1. Does a trial counsel's failure to propose a jury instruction on self-defense deny a defendant charged with first degree burglary effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the facts supported the giving of such an instruction, and the defendant's claim that she didn't commit the crime was based upon her claim that she was defending herself from an attack by the person she allegedly assaulted?

2. Does a trial court's admission of evidence that a police officer believed the defendant was guilty and therefore arrested her deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

## STATEMENT OF THE CASE

### *Factual History*

On March 24, 2009, Calla Ray Runyon had her husband Brian served with a restraining order preventing him from having contact with her. RP 6.<sup>1</sup> He had actually left the family home a few days before and moved in with his mother, Defendant Arline Runyon. RP 4-6. Calla had previously informed her husband that she wanted a divorce. *Id.* When Brian moved out, Calla remained in the family home at 804 Wood Avenue in the city of Kelso with the couple's 11-year-old daughter Malaika and 9-year-old son Isaiah. RP 5-6. Calla's adult brother David Bright and his girlfriend Janice Cole also lived in the Runyon family home with their 2-year-old son. *Id.*

By agreement between Calla, Brian, and the defendant Arline, the two children stayed the night of the 24<sup>th</sup> with their father Brian and the defendant at the Defendant's home in Kelso. RP 8-9. The next morning, the defendant was to take them to school and Calla would pick them up at the end of the day. *Id.* In fact, the two children had a close relationship with the defendant, who is their grandmother. RP 102-104. Indeed, Calla also had a long-standing, close relationship with the defendant, almost as if the defendant were her mother. RP 20. At that time, the defendant was 54-years-old and

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<sup>1</sup>The record on appeal includes a single volume of the verbatim reports of the trial and sentencing, referred to herein as "RP [page #]."

had a number of health problems, including a back injury and problems with her legs. RP 102-104, 108. A few weeks prior to the 24<sup>th</sup> of March, the defendant had recently undergone knee surgery, and walked with the aid of a cane. RP 100, 102-104, 108.

On the morning of the 25<sup>th</sup>, the defendant drove her two grandchildren to their home at 804 Wood Avenue to get their backpacks, which they needed for school and had forgotten to bring with them. RP 9. The defendant waited in the car while the two children ran into the house to retrieve the needed items. *Id.* Before they went in, the defendant told Isaiah to tell his mother that once their grandmother dropped them off at school, she would return to talk. RP 101. After the children came back out of the house, the defendant drove them to school and then returned to 804 Wood Avenue. *Id.*

Once back at the house, the defendant walked up to the kitchen door, using her cane and knocked. RP 102-104. Her small dog, who usually accompanies her most places she goes, was with her. *Id.* When the defendant knocked on the door, Calla was sitting at the kitchen table and her brother David was standing near her. RP 9-11. Upon hearing the knock, David looked out, saw it was the defendant, and told Calla who it was. *Id.* Calla told David to tell the defendant that she didn't want to talk about the current domestic situation. *Id.* David then cracked the door open to keep Calla and Brian's dog from running outside, and he told the defendant that

Calla did not want to talk. *Id.* Upon hearing this, the defendant and her dog entered, with the defendant telling Calla that they really needed to talk about the situation. *Id.* According to David, he told the defendant that she was not welcome in the house. RP 35-36. According to the defendant, the only thing he said was that Calla didn't want to talk. RP 105-106.

Once inside, the defendant placed her purse and keys on the kitchen table and repeated to Calla that they needed to talk. RP 37. Calla responded by stating that she did not want to talk and walked into the bathroom and locked the door. RP 13. According to Calla, David, and Janice, at this point, the defendant began to forcefully strike the bathroom door with her cane, while yelling that Calla better come out and talk or she would kill everyone in the house. RP 13-14, 39-40, 65. Upon hearing this, Calla yelled for David to call the police. *Id.* In response, he went into his bedroom and called 911 as his girlfriend Janice Cole came out of the bedroom and yelled "What the fuck is going on?" at the defendant, along with an order that the defendant leave the house. RP 40-41, 76. According to Janice, the defendant then struck her on the arm with her cane. RP 66-69. Although Calla and David did not see this confrontation, they both claimed that they heard a very irate Janice yell that the defendant had hit her and that she was going to have the defendant arrested. RP 14.

After David called 911, he returned to the hall and kitchen to find the

defendant and Janice in what he described as a “cat fight.” RP 42. Although he tried to intervene, both he and Janice claim that the defendant hit Janice on the leg with her cane, pushed Janice down on some boxes and then stood over her, yelling that Janice should stay out of other people’s business. RP 42-44. Janice then kicked the defendant away from her, and the defendant left the house, returned to her car, and drove away. RP 15-16.

The defendant’s side of the story was substantially different than that of Calla, David, and Janice. RP 99-128. According to the defendant, she did follow Calla to the bathroom, but she didn’t hit the door with her cane. RP 198-111. Rather, she tapped on the door a couple of time and asked Calla to come out to talk. *Id.* When she did, Janice came storming out of her bedroom and said, “You fucking bitch, I’m going to kill you,” “I’m going to kill you,” and “I’m going to beat your head in and punch out your lights.” RP 111-112. As she said these things, she attacked the defendant, who tried to push her off. *Id.* At this point, David got between the defendant and Janice, although Janice was able to get around David and again jump on the defendant. RP 112. As Janice did this, she said “No, I’m going to beat that “F”-ing bitch in the head.” *Id.* The defendant then pushed Janice away, and Janice fell into some boxes. At this point, the defendant fled the house. *Id.* The defendant denied ever striking Janice with her cane or anything else. *Id.*

Regardless of which story was more accurate, as the defendant was

driving away, a Kelso Police Officer drove up and took a report from Calla, David, and Janice. RP 79-84. Within a few minutes, a second Kelso Police Officer stopped the defendant's vehicle, arrested her, and seized her cane as evidence. PR 85-95. However, prior to taking the cane, this second officer let the defendant use it to so she could get from her car to the back of the patrol car. RP 92-93.

### ***Procedural History***

By information filed March 27, 2009, and amended August 26, 2009, the Cowlitz County Prosecutor charged the defendant with one count of first degree burglary, alleging that on March 25, 2009, the defendant had unlawfully entered or remained in "the building of Calla Runyon" at 804 Wood Avenue in Kelso, and that "while in such building," the defendant "did intentionally assault Janice Cole, by striking her." CP 1, 9. The defendant responded to the charge by endorsing an affirmative claim of self-defense. CP 4-5. The case later came on for trial with the state calling five witnesses: Calla Runyon, David Bright, Janice Cole, Richard Fletcher, the officer who responded to the Runyon home, and Sergeant Michael Dalen, the officer who arrested the defendant and seized her cane. RP 4, 30, 63, 79, 85. The defendant then testified on her own behalf as the only witness for the defense. RP 99. All of these witnesses testified to the facts contained in the preceding Factual History. *See* Factual History.

In addition, during the testimony of Sergeant Dalen, the state specifically elicited the fact that after he had stopped the vehicle the defendant was driving and spoke with her, he placed her under arrest for burglary. RP 88. This question and answer went as follows:

Q. Now, did you ultimately arrest the defendant for burglary?

A. Yes, I did.

RP 88.

At this point, the defense objected, arguing that this evidence was irrelevant. RP 89. Although the court overruled the objection, it did acknowledge that this evidence constituted an improper opinion of guilt. *Id.*

The court noted as follows on this point:

JUDGE WARME: Well, ordinarily the fact that he arrested her for a particular crime is not relevant. It is sort of the police officer's opinion that she committed a crime. On the other hand, if he is seizing some evidence pursuant to the arrest, then the jury is entitled to know that she was arrested, that's why he seized the evidence or how he seized the evidence.

CP 89.

In addition, on the day of trial, the defendant's attorney filed proposed instructions with the court, including a request that the court give WPIC17.02 on the lawful use of force. CP 36-40. However, in spite of the fact that the defendant claimed self-defense in her testimony, counsel withdrew the requested instruction, claiming that he was doing so to avoid a lesser included

instruction of residential burglary, which the court said it would give if the defendant persisted in her claim of self defense. RP 127-128. The statement from the court and the statement from defense counsel were as follows:

JUDGE WARME: Let's see. Number the instructions. Number 1, it is your duty. Number 2, as jurors. Number 3, the plea of not guilty. Number 4, direct or circumstantial evidence. Number 5, first degree burglary. Six, definition of enters or remains unlawful. Seven is the definition of an assault. Eight is definition of intentional. Nine is to convict. Ten is upon retiring.

Now, it is my understanding, I think this should be on the record, we have discussed the issue of whether it is appropriate to give a – an instruction on self-defense as it relates to the assault element of burglary in the first degree. If we are going to give – if I were to give an element – a definition or an instruction on self-defense for burglary in the first degree, I would also give a lesser-included offense instruction of burglary in the second degree as an alternative. It's my understanding, Mr. Hanify, that after you have thought about this it is your decision not to ask for a self-defense instruction?

MR. HANIFY: That's correct, Your Honor. I felt that I would be doing my client a disservice if I – if I succeeded in getting the self-defense in. That would give the prosecution an opportunity to get a lesser-included for a residential burglary, which wouldn't help my client at all.

RP 127.

Following the defendant's testimony, the court instructed the jury without including a version of WPIC 17.02 as originally proposed by the defendant's attorney but withdrawn at the last moment. RP 129-139. Counsel then presented closing argument. RP 139-155. The jury then retired for deliberations and later returned a verdict of guilty to the sole charge of

first degree burglary. CP 56. The court later sentenced the defendant to 21 months in prison, which was within the standard range. CP 70-81.

## ARGUMENT

### **I. TRIAL COUNSEL'S FAILURE TO PROPOSE A JURY INSTRUCTION ON SELF-DEFENSE 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 that trial counsel's failure to propose a proper instruction on self-defense fell below the standard of a reasonably prudent attorney, and caused her prejudice, thereby denying her effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. In making this claim, the first issue presented to the court is whether or not the defendant was even entitled to an instruction on self-defense. As the following explains, she was entitled to such an instruction.

While due process does not guarantee every person a perfect trial, under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, due process does guarantee every person charged with a crime a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). This right to a fair trial includes the right to raise any defense supported by the law and facts, such as self-defense or justified use

of force. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

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

In determining whether or not “any” evidence exists to justify instructing on self-defense, the court must apply a “subjective” standard. *State v. Adams*, 31 Wn.App. at 396. In other words, “the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and ‘not by the condition as it might appear to the jury in the light of testimony before it.’” *State v. Adams*, 31 Wn.App. at 396 (quoting *State v. Tyree*, 143 Wash.

313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

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

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

The court also stated:

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

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

The decisions in *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977) and *State v. Adams, supra*, also illustrate the quantum of evidence that must exist in the record before a defendant is entitled to have the court force the state to disprove self-defense, beyond a reasonable doubt, as part of the elements of the offense. The following examines these cases.

In *State v. Wanrow, supra*, the defendant was in an apartment with a woman and a man, as well as a number of small children. At some point during the evening, the man went and got the decedent, whom the other woman believed had molested one of her children. The Supreme Court gave

the following outline for the facts as they followed this point.

It appears that Wesler, a large man who was visibly intoxicated, entered the home and when told to leave declined to do so. A good deal of shouting and confusion then arose, and a young child, asleep on the couch, awoke crying. The testimony indicates that Wesler then approached this child, stating, 'My what a cute little boy,' or words to that effect, and that the child's mother, Ms. Michel, stepped between Wesler and the child. By this time Hooper was screaming for Wesler to get out. Ms. Warrow, a 5'4" woman who at the time had a broken leg and was using a crutch, testified that she then went to the front door to enlist the aid of Chuck Michel. She stated that she shouted for him and, upon turning around to reenter the living room, found Wesler standing directly behind her. She testified to being gravely startled by this situation and to having then shot Wesler in what amounted to a reflex action.

*State v. Warrow*, 88 Wn.2d at 226.

The defendant was later charged and convicted of murder. She then appealed, arguing, among other things, that the trial court incorrectly instructed the jury on self-defense. One of these instructions read in part as follows:

However, when there is no reasonable ground for the person attacked to believe that *his* person is in imminent danger of death or great bodily harm, and it appears to *him* that only an ordinary battery is all that is intended, and all that *he* has reasonable grounds to fear from *his* assailant, *he* has a right to stand *his* ground and repel such threatened assault, yet *he* has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless *he* believes, and *has reasonable grounds* to believe, that *he* is in imminent danger of death or great bodily harm.

*State v. Warrow*, 88 Wn.2d at 239 (italics in original).

In *Warrow*, the court reversed, based in part upon this erroneous

instruction. The court's comments were as follows.

In our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons. Instruction No. 12 does indicate that the relative size and strength of the persons involved may be considered; however, it does not make clear that the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable.

*State v. Wanrow*, 88 Wn.2d at 239-240 (footnote omitted).

Similarly, in *State v. Adams, supra*, the defendant shot and killed a burglar who, with a companion, was removing items from his neighbors unattended trailer. These items included firearms. The area in which the defendant lived was remote, and the defendant did not have a telephone. The defendant was eventually charged with murder, and convicted of a lesser included offense of manslaughter. He then appealed, arguing that the trial court erred when it refused to give an instruction on self-defense. The Court of Appeals agreed and reversed, stating as follows.

In the case at bar, Adams [the defendant] testified that when he saw Chard and Cox jog toward the house, he thought they had come to injure him. Adams recognized Chard, who had burglarized the premises a week earlier and who had been shot at by Goard [Defendant's neighbor] during the crime. Adams stated that he expected a confrontation with Chard and Cox, so to protect himself, he fled the trailer, taking a rifle with him for his own safety. After Adams had seen Chard and Cox make a forcible entry of Goard's trailer and remove property therefrom, Adams moved his position to obtain a better idea of what was transpiring. Adams observed Cox running while holding port arms a shotgun which Adams knew was loaded. Adams testified that he was "very scared ... in fear of my

life....” Adams knew there were other guns in the trailer. He didn’t know where Chard was at that time. Cox was about 70 feet away. Adams felt a sense of duty to protect the property and to apprehend Cox, but stated that he didn’t intend to shoot Cox. While in this emotional state of fear, Adams fired a shot which struck Cox in the back and caused Cox’s death.

Considering these circumstances and Adams’ testimony-he thought Chard and Cox had come to do him harm because Goad fired a shot at Chard a week earlier, he was very scared and in fear of his life, he knew he was in a remote area after 8 p. m. with no nearby telephone, and he did not know whether he had been discovered by either burglar, nor where Chard was, nor whether Chard also had a loaded gun. A jury could have found Adams reasonably believed himself to be in imminent danger. Since the evidence could have led a reasonable jury to find self-defense, a fortiori, Adams met the lesser burden of producing “any evidence.” Accordingly, the trial judge should have given a self-defense jury instruction.

*State v. Adams*, at 397-98.

Turning to the case at bar, the facts, seen in the light most favorable to the defense, show that on the day in question, the defendant was attempting to talk to her daughter-in-law, who was in the bathroom and didn’t want to talk, when Janice Cole came out of the bedroom, yelled a number of profane threats against the defendant, and then twice attacked her. The defendant denied ever striking Janice Cole, and testified that the sum total of her contact with Janice Cole was to twice push her away as Janice Cole tried to injure her. Under the decisions in *Wanrow* and *Adams*, the defendant’s claims were more than sufficient to entitle her to a claim of self-defense. Thus, as to the first part of the defendant’s argument on ineffective assistance, the law is

clear that she was entitled to an instruction on self-defense.

The second part of the defendant's argument on ineffective assistance of counsel is that counsel's failure to propose an instruction on self-defense fell below the standard of a reasonably prudent attorney. The decision in *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), provides an example of a case in which the court found that counsel's failure to propose an instruction that was necessary to allow the defense to argue its theory of the case did fall below the standard of a reasonably prudent attorney. The following examines this case.

In *State v. Thomas, supra*, a defendant charged with felony eluding elicited evidence that she was so intoxicated while driving that she was unable to form the requisite intent of wilfully failing to stop and driving in wanton and wilful disregard of the safety of others. In spite of the presentation of evidence on this point, defense counsel failed to propose an instruction explaining the law on diminished capacity. Following conviction, the defendant appealed, arguing that trial counsel's failure to propose such an instruction denied her effective assistance of counsel.

After reviewing the facts of the case, the court first noted that under its prior decisions, diminished capacity claim through voluntary intoxication could be used to answer a charge of felony eluding. The court stated as follows on this point:

In [*State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982)], we held that RCW 46.61.024 requires that the defendant both subjectively and objectively act with wanton and willful disregard of others. We concluded that juries should be instructed that the circumstantial evidence of defendant's manner of driving only creates a rebuttable inference of "wanton and wilful disregard for the lives or property of others ..." *Sherman*, at 59, 653 P.2d 612. Therefore, *Sherman* indicates that objective conduct by the defendant indicating disregard is only circumstantial evidence and may be rebutted by subjective evidence pertaining to defendant's mental state.

*State v. Thomas*, 109 Wn.2d at 227.

The court then went on to review evidence presented at trial, including the evidence that supported the defendant's claim that she was highly intoxicated at the time she was driving. Following this review, the court agreed with the defendant's argument. The court stated as follows concerning the question whether or not counsel's failure fell below the standard of a reasonably prudent attorney:

Defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is. Here, defendant's proposed "to convict" instruction did not indicate that there is a subjective component to RCW 46.61.024, nor did any other instruction offered by the defense. Furthermore, the record does not contain a proposed defense instruction on the relevance of intoxication as to the mental element of the crime charged. The lack of a *Sherman* instruction allowed the prosecutor to argue that Thomas' drunkenness caused her mental state. In contrast, defense counsel argued that Thomas' drunkenness negated any guilty mental state. Therefore, in closing argument, opposing counsel argued conflicting rules of law to the jury. Accordingly, we conclude that in failing to offer a *Sherman* instruction, defense counsel's performance was deficient.

*State v. Thomas*, 109 Wn.2d at 229 (citations omitted).

In *Thomas, supra*, the court found that trial counsel's failure to provide a proper instruction that correctly set out the law and thereby allowed the defendant to effectively argue her theory that the case did fall below the standard of a reasonably prudent attorney. The same conclusion applies in the case at bar because (1) the defendant was entitled to the instruction on self-defense, and (2) her theory of the case was that she acted in self-defense in all of her physical contact with Janice Cole. Thus, by withdrawing the self-defense instruction that he had already filed, trial counsel denied the defendant the ability to effectively argue her theory of the case. In the same manner that trial counsel fell below the standard of a reasonably prudent attorney in *Thomas*, so in the case at bar trial counsel fell below the standard of a reasonably prudent attorney.

In the case at bar, the state may argue that the decision to withdraw the proposed instruction on self-defense was a tactical decision by trial counsel and cannot be seen as ineffective. The statements by the court and defense counsel at the end of the trial certainly give the appearance of a tactical decision. This exchange went as follows:

JUDGE WARME: Let's see. Number the instructions. Number 1, it is your duty. Number 2, as jurors. Number 3, the plea of not guilty. Number 4, direct or circumstantial evidence. Number 5, first degree burglary. Six, definition of enters or remains unlawful. Seven is the definition of an assault. Eight is definition of intentional. Nine is .to convict. Ten is upon retiring.

Now, it is my understanding, I think this should be on the record, we have discussed the issue of whether it is appropriate to give a – an instruction on self-defense as it relates to the assault element of burglary in the first degree. If we are going to give – if I were to give an element – a definition or an instruction on self-defense for burglary in the first degree, I would also give a lesser-included offense instruction of burglary in the second degree as an alternative. It’s my understanding, Mr. Hanify, that after you have thought about this it is your decision not to ask for a self-defense instruction?

MR. HANIFY: That’s correct, Your Honor. I felt that I would be doing my client a disservice if I – if I succeeded in getting the self-defense in. That would give the prosecution an opportunity to get a lesser-included for a residential burglary, which wouldn’t help my client at all.

RP 127.

The problem with this argument is twofold. The first is that the state was not entitled to an instruction on the lesser-included offense of residential burglary because the facts did not support a conclusion that the defendant committed a residential burglary. That is to say, the facts either proved a first degree burglary by the commission of an assault while unlawfully entering or remaining in a building, or they proved a trespass, since the only crime that the defendant was alleged to have committed was the assault. *See State v. Gamboa*, 137 Wn.App. 650, 154 P.3d 312 (2007) (defendant charged with first degree burglary not entitled to instruction on lesser included offense of residential burglary because “[t]he evidence does not raise an inference that only the lesser included offense was committed to the exclusion of the charged offense of first degree burglary.”)

However, the argument that trial counsel made a tactical decision to withdraw the claim of self-defense in order to avoid a lesser included instruction on residential burglary is erroneous for a much more fundamental reason. That reason is that the defendant's claim of self-defense was just as valid under a charge of residential burglary as it was under a charge of first degree burglary. The defendant's argument presented through her testimony was that she did not commit any crime at all when she entered the house, and that the entirety of her physical encounter with Janice Cole constituted self-defense. Thus, the only possible way to allow the defendant to properly argue her case to the jury was to continue with the claim of self-defense, regardless of the decision of the court on presenting any lesser included offense instructions. As a result, trial counsel's decision to withdraw the self-defense request fell below the standard of a reasonably prudent attorney.

In addition, in the case at bar, trial counsel's decision to withdraw the proposed self-defense instruction also caused prejudice. This conclusion follows from two facts. The first is that had counsel refrained from withdrawing the instruction, then the burden would have been upon the state to prove the absence of self-defense. The second is that under the evidence as presented to the jury, it is highly unlikely that the state would have been able to meet this burden. As is set out in the following argument, the strength of the state's case depended primarily upon the credibility of the witnesses.

The only physical evidence was some damage to the bathroom door and a bruise on Janice's leg, and this evidence was explained by the defendant's claim that the bruising happened when she was defending herself from Janice Cole's attacks.

In addition, the state's own witnesses testified to Janice Cole confronting the defendant and David Bright telling both women to stop what they were doing. Under these facts, it is highly likely that the state would not have been able to overcome its burden of disproving self-defense had counsel simply not withdrawn the request for the instruction. Thus, trial counsel's decision to withdraw the request for the instruction fell below the standard of a reasonably prudent attorney and caused prejudice, thereby denying the defendant her right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, she is entitled to a new trial.

**II. THE TRIAL COURT'S ADMISSION OF EVIDENCE THAT A POLICE OFFICER BELIEVED THE DEFENDANT WAS GUILTY DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

Under Washington Constitution, Article 1, § 3, 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). As a result no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

*State v. Carlin*, 40 Wn.App. 701; *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

Under this rule the fact of an arrest is not evidence because it constitutes the arresting officer's opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967) the plaintiff sued the defendant for injuries that occurred when the defendant's vehicle hit

the plaintiff's vehicle. Following a defense verdict the plaintiff appealed arguing that defendant's argument in closing that the attending officers' failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. 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 the case at bar, the strength of the state's case depended primarily upon the credibility of the witnesses. If the jury believed Calla, David, and Janice, then the defendant undoubtedly committed the crime of first degree burglary. However, if the jury believed the defendant's claim of self-defense, even if only to the point of raising reasonable doubt, then the jury would have

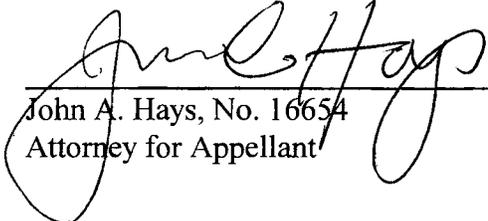
been forced to acquit. The only physical evidence was some damage to the bathroom door and a bruise on Janice's leg, although this evidence was also explained by the defendant's claim that both things happened when she was defending herself from Janice Cole's attacks. In such a case with little corroborating evidence, the improper evidence of the officer's opinion of guilt, entered by allowing him to testify that had arrested the defendant on a burglary charge, was sufficient to change what would have been a verdict of acquittal to a verdict of guilt. As a result, the admission of this improper evidence was not only error, but it caused prejudice and entitles the defendant to a new trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

**CONCLUSION**

The defendant is entitled to a new trial based upon her claims of ineffective assistance of counsel, and the denial of a fair trial.

DATED this 23<sup>rd</sup> day of November, 2010.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

## **APPENDIX**

### **WASHINGTON CONSTITUTION ARTICLE 1, § 3**

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

### **WASHINGTON CONSTITUTION ARTICLE 1, § 22**

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

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

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

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

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

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STATE OF WASHINGTON  
BY Yon  
DEPUTY

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

STATE OF WASHINGTON,  
Respondent

vs.

ARLENE D. RUNYON,  
Appellant

NO. 09-1-00354-5  
COURT OF APPEALS NO:  
40584-9-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON )  
County of Cowlitz ) : 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 November 23<sup>rd</sup>, 2010, I personally placed in the mail the following documents

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

to the following:

ARTHUR D. CURTIS  
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ARLENE D. RUNYON, #912871  
WA STATE CORRECTION  
CENTER FOR WOMEN  
9601 BUJACICH RD., NW  
GIG HARBOR, WA 98355-0017

Dated this 23<sup>RD</sup> day of NOVEMBER, 2010 at LONGVIEW, Washington.

Cathy Russell  
CATHY RUSSELL  
LEGAL ASSISTANT TO JOHN A. HAYS