

NO. 42266-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANDREW ALLAN WRIGHT,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it accepted the jury's verdicts of guilty to first degree robbery and first degree assault because substantial evidence does not support a finding that the defendant acted as an accomplice in the commission of either of these crimes.

2. Trial counsel's failure to object when the state elicited evidence that the defendant had been arrested and jailed, that officers did not believe his statements, and that the officers "had heard" that the defendant was collecting a drug debt from the victim denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it accepts a jury's verdict of guilty to first degree robbery and first degree assault when substantial evidence does not support a finding that the defendant acted as an accomplice in the commission of either of these offenses?

2. Does a counsel's failure to object when the state elicits evidence that the defendant had been arrested and jailed, that officers did not believe the defendant's statements, and that the officers "had heard" that the defendant had a motive to commit the crime, deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, when the trial court would have sustained a timely objection to all of this evidence and the defendant would have been acquitted had the evidence been excluded?

STATEMENT OF THE CASE

Factual History

In January of 2011, Daniel Force was working as both a maintenance man and security guard at a large apartment complex his mother managed in Hazel Dell in Clark County. RP 306-315.¹ At that time there were a number of security cameras in the parking lot connected to monitors in Mr. Force's living room. *Id.* According to Mr. Force, it was not unusual to have many friends and acquaintances visiting his apartment at all times of day or night. *Id.* Around 11:00 pm on the evening of January 21, 2011, a friend of Mr. Force by the name of David Jones stopped by with some other people, who only stayed for a few minutes. RP 316-317. This left Mr. Force and Mr. Jones alone in the living room. *Id.* At the time, they were both looking at laptop computers. *Id.*

After about 10 minutes, both Mr. Force and Mr. Jones noticed on the security monitors that a car pulled up and parked in the lot just outside Mr. Force's apartment. RP 201-206, 317-319. According to Mr. Force, three people got out of the car: Nathan Gadbury, Armando Castillo-Munoz, and the defendant Alan Wright, who had been the driver. RP 317-319. The three then walked up the steps to the apartment together. *Id.* According to Mr.

¹The record on appeal includes 5 continuously-numbered volumes of verbatim reports of the trial and sentencing hearing in this case, referred to herein as "RP [page #]."

Jones, the defendant was alone in the vehicle and was joined by Mr. Gadbury and Mr. Munoz as he walked up to the apartment. RP 201-206. Although Mr. Jones refused to say whether or not he was using any drugs that night that might have affected his ability to accurately remember what had happened, Mr. Force did admit that both he and Mr. Jones had just smoked methamphetamine together. RP 260-261, 344-346. In any event, Mr. Gadbury, Mr. Munoz, and the defendant were all known to both Mr. Force and Mr. Jones, and neither even looked up when the three of them entered Mr. Jones' Apartment. RP 206-210, 323-324.

According to Mr. Force, when the defendant entered the apartment he walked across the living room and sat in a chair while Mr. Gadbury stood near the doorway and Mr. Munoz stood in front of the chair in which Mr. Jones sat. RP 324-328. A confrontation then immediately ensued between Mr. Munoz and Mr. Jones, with Mr. Munoz claiming that Mr. Jones owed him money and demanding that he pay him. *Id.* When Mr. Jones stated that he didn't have any money, Mr. Munoz hit him in the head a couple times with his fist, and then pulled out a gun and hit Mr. Jones a number of times in the head with it. RP 211-218, 244-247, 326-328. According to Mr. Force, Mr. Munoz then pointed the gun at Mr. Jones and ordered that he hand over his ring, watch, and car keys, along with a signed title to his car. RP 326-328. Mr. Jones responded by handing over his gold ring and his watch and

telling Mr. Munoz that the title to the car was not in his name. RP 214-218, 326-328. Around this time, the gun Mr. Munoz was holding “went off,” with the bullet hitting Mr. Jones in the left hand, causing serious damage. RP 326-329.

After the gun went off, Mr. Gadbury, Mr. Munoz, and the defendant left the apartment, although neither Mr. Force nor Mr. Jones remembers seeing them do so. RP 271-273, 358-360. Rather, their attention was in taking Mr. Jones into the bathroom to clean off his head and left hand, which were both bleeding. *Id.* After determining that the wounds were fairly serious, Mr. Force drove Mr. Jones to a local hospital emergency room. RP 219-221. The personnel at the emergency room called the police after Mr. Jones told them that he had been shot. RP 116-119. Once the police arrived, Mr. Jones told them what had happened, he identified Mr. Munoz as the person who shot him, he claimed that Mr. Gadbury had also hit him, and he stated that the defendant had come in and left with them. RP 223-228.

About a week later, a number of Clark County Deputies arrested the defendant in front of his apartment and took him to the “major crimes unit” of the sheriff’s office for questioning. RP 57-60. After the defendant gave a taped statement, the deputies took him to the Clark County Jail where he remained for the entirety of this case. RP 164. While at the Clark County Jail, the defendant called his brother Gabriel Salisbury and asked him to go

to a residence in the Jantzen Beach area of Portland, retrieve a gold ring out of a safe, and destroy it. RP 163-166, 181-182. At the defendant's request, Mr. Salisbury went to the residence of Shannon Tandberg, retrieved the ring and cut it up into pieces. RP 182-191. According to Ms Tandberg, the defendant had previously brought both the safe and the ring to her residence along with a number of other items. RP 372-377. The defendant's brother later gave the pieces of the ring to the police, who showed it to Mr. Jones. RP 189. At trial, Mr. Jones identified them as the ring that Mr. Munoz had taken from him at gun point. RP 214-215.

Procedural History

By information filed January 26, 2011, and later amended, the Clark County Prosecutor charged Armando Castillo-Munoz, Nathan Gadbury and the defendant Andrew Allan Wright each with one count of first degree robbery and one count of first degree assault. CP1-2, 4-5. Both charges included firearms enhancements. *Id.* The defendant later went to a separate jury trial on these charges, during which the state called 14 witnesses in its case-in-chief and two witnesses in rebuttal. RP 45-484, 552-566. The defense called one witness. RP 488-550. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History.

One of the witnesses the state called during its case-in-chief was Detective Lindsay Schultz. RP 45-79. During her testimony, she told the

jury that the defendant had been arrested on January 26, 2011, and taken to the sheriff's office where he gave a taped statement. RP 57-60. According to Detective Schultz, the defendant eventually admitted that he was present when Mr. Jones was shot. *Id.* However, in her opinion, during this interview the defendant "was not forthcoming with the information" he provided to them. RP 60. She repeated this opinion when the state called her as a witness on rebuttal. RP 552. The defense did not object that the evidence of the fact of the defendant's arrest and incarceration was irrelevant and prejudicial. RP 60, 552. Neither did the defense object that the evidence of the officer's opinion on how "forthcoming" the defendant was in his statement was inadmissible and prejudicial. *Id.*

In addition, during its case-in-chief, the state also called Detective Todd Barsness, who told the jury that the defendant was "identified as a suspect" fairly early in the case but was not arrested until later. RP 141-142. The defense made no objection that this evidence was irrelevant and prejudicial. *Id.* When the state inquired about evidence of a potential motive behind the shooting, Detective Barsness stated the following: "We had reason to believe that the reason for the visit by Mr. Wright and Armando was to reclaim a drug debt." RP 145. The defense made no objection that this evidence was inadmissible hearsay, speculation, and unfairly prejudicial. *Id.*

Finally, during its case-in-chief, the state called Gabriel Salisbury to testify concerning the telephone call the defendant made to him to request that he destroy the ring that Mr. Jones later identified was the ring Mr. Munoz took from him at gunpoint. RP 163-197. During this evidence, the state specifically elicited the fact that the defendant was in jail on the current charges when he made the call. RP 164, 166. The state also elicited the fact that the defendant was being held in the jail in the current case from Shannon Tandberg and Detective Kevin Harper. RP 366, 392-292, 459. In none of these instances did the defense object that the evidence of the defendant's incarceration was both irrelevant and unfairly prejudicial. *Id.*

Following the close of evidence in this case, the court instructed the jury without objection or exception from either party. RP 568, 570-589; CP 69-99. The jury then retired for deliberation after hearing argument from counsel, and eventually returned verdicts of guilty on both counts. RP 589-670, 673-677; CP 115-120. However, the jury responded to the special verdicts by rejecting the state's claim that the defendant committed the offenses while armed with a firearm. CP 116, 118. At a later hearing, the court did not sentence the defendant on the first degree robbery charge, ruling that to do so under the facts of the case would violate the defendant's constitutional right to be free from double jeopardy. RP 686-693. The court then imposed a sentence within the standard range on the assault charge. RP

697-705; CP 124-140. Although the defendant filed timely notice of appeal from his conviction and sentence, the state did not file a notice of appeal from the court's ruling refusing to sentence on the robbery charge. CP 141-158.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ACCEPTED THE JURY'S VERDICTS OF GUILT TO FIRST DEGREE ROBBERY AND FIRST DEGREE ASSAULT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING THAT THE DEFENDANT ACTED AS AN ACCOMPLICE IN THE COMMISSION OF EITHER OF THESE CRIMES.

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)). 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 this case, the state charged the defendant as an accomplice to the first degree robbery and first degree assault that Armando Castillo-Munoz committed against David Jones. Indeed, the state requested, and the court gave, an instruction on accomplice liability. *See* Instruction No. 7 at CP 78. In Washington State, accomplice liability is defined under RCW 9A.08.020(3), which states as follows:

(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.08.020(3).

Under this statute, the defendant must take some affirmative action in promoting the offense and mere presence, even if that presence “bolsters” or “gives support” to the perpetrator, does not constitute action sufficient to impose accomplice liability. *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (juvenile’s presence, knowledge of theft and personal acquaintance with active participants was insufficient to constitute abetting crime of reckless endangerment without some showing of intent to encourage criminal conduct). In addition, substantial evidence, whether on the issue of criminal liability as a principal or an accomplice, must be based upon more than mere speculation, surmise and conjecture. *State v. Uglem*, 68 Wn.2d 428, 413 P.2d 643 (1966).

For example, in *State v. Asaeli*, 150 Wn.App. 543, 208 P.3d 1136 (2009), a defendant convicted of second degree murder as an accomplice appealed his conviction, arguing that the evidence only showed mere presence and was insufficient to prove accomplice liability. The facts of this case were as follows. In the early morning hours of October 30, 2004, two

groups of young people, most of Samoan descent, gathered at Thea Foss Park in Tacoma after the bar at which many of them were drinking closed. This park, which is in the Dock Street area of Tacoma's downtown waterfront, was a routine gathering place for young person's of Samoan descent. One of the groups at the park included Faalata Fola, and his cousin James Fola, who had arrived in a green Mercury driven by Tailulu Gago. Breanne Ramaley, Faalata Fola's girlfriend, was also present and had arrived separately with other friends in her red Nissan. Benjamin Asaeli was at the park, having driven there with his girlfriend Rosette Flores in her white Chevrolet Lumina. The defendant Darius Vaielua was present, having arrived driving his girlfriend's Ford Explorer. His girlfriend and Eroni Williams were passengers in that vehicle.

Once at the park, several persons, including the defendant Darius Vaielua, walked around and asked people if Faalata Fola was present. After a short time, Eroni Williams located Faalata Fola sitting in the driver's seat of the Nissan, which was parked between Gago's Mercury and the Lumina driven by the defendant Darius Asaeli. At this point, Eroni Williams challenged Faalata Fola to a fight, but moved back, claiming that Fola had a gun. As he stepped back, Benjamin Asaeli immediately stepped forward and fatally shot Fola multiple times as Fola remained seated in the Nissan. Benjamin Asaeli later confessed to shooting Fola, but claimed that he had

acted in self defense after Fola pulled a gun, shot at Benjamin Williams, and then pointed the gun at him.

The state charged Benjamin Asaeli with first degree murder. The state also charged Benjamin Williams and the defendant Darius Vaielua with murder under the theory that they acted as accomplices to Benjamin Asaeli when he shot Fola. Following a lengthy joint trial, all three defendants were convicted. They appealed, urging a number of common arguments on appeal. The defendant Darius Vaielua also argued that the evidence presented at trial only showed mere presence on his behalf and was not legally sufficient to sustain a conviction as an accomplice. In addressing this latter claim, the court summarized the evidence against the defendant as follows:

The trial testimony showed that (1) Asaeli, Asi, and Williams witnessed Fola shoot at a car with Asian men in it at Thea Foss Park a week before Asaeli shot Fola but that Vaielua was not present at the time; (2) a week later, Vaielua was at Papaya's Bar at the same time as Williams and Asaeli; (3) Vaielua spoke to Williams and Asaeli either at the bar or as they were all leaving the bar at closing time; (4) Asaeli did not ask Flores if she wanted to go to the waterfront until after speaking to the others as they were leaving the bar; (5) Vaielua did not normally go to the waterfront after the bars closed when he was with Ishmail; (6) after leaving the bar, talking to the others, and dropping Ishmail off, Vaielua drove the Explorer to Thea's Park at the same time Asaeli, Van Camp, and Asi drove to the park; (7) the three cars arrived at approximately the same time; (8) when Vaielua arrived, he had four passengers with him, including Williams; (9) before the shooting, Vaielua and the others exited the Explorer and Vaielua spoke and motioned to the people in the Explorer for several minutes; (10) also before the shooting, some of those who arrived

with Vaielua spoke to Asaeli; (11) immediately before the shooting, Vaielua approached James, who he knew from prior peaceful encounters; and (12) after greeting James, Vaielua asked where “Blacc” was and then stood with James (with a car between them and Ramaley’s car) until the shooting. Importantly, the evidence did not show what was said during any conversations Vaielua may have had or overheard that evening nor was there any evidence that any of these conversations related in any way to a plan to shoot or assault Fola.

State v. Asaeli, 150 Wn.App. at 568-569 (footnote omitted).

With this recitation of the facts in mind, the court reviewed the law on accomplice liability, and concluded that the facts were legally insufficient to support a conviction. The court held:

To prove Vaielua was an accomplice to Fola’s murder, the State had to prove beyond a reasonable doubt that Vaielua (1) knew his actions would promote or facilitate this crime, (2) was present and ready to assist in some manner, and (3) was not merely present at the scene with some knowledge of potential criminal activity. RCW 9A.08.020(3). Taking the evidence in the light most favorable to the State, we conclude that, although there was evidence that Vaielua was present at the park, that he drove Williams and others to the park, and that he was aware that some members of the group he was with were trying to locate Fola, the evidence failed to show that Vaielua was present at the scene with more than mere knowledge of some potential interaction with Fola.

. . . .

At best, this evidence is sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate Fola. But the record contains no evidence, direct or indirect, establishing that Vaielua was aware of any plan, by Asaeli, Williams, or anyone else, to assault or shoot Fola.

State v. Asaeli, 150 Wn.App. at 569.

The evidence presented in the case at bar is similar to the particulars of the evidence presented in *Asaeli*. In both cases, the defendants were identified as the driver of the vehicle in which the person who committed the offenses rode to the scene of the crime. In both cases the defendants were acquainted with the shooter. In both cases, there were at least claims of motive for the defendant to participate in the offenses. Indeed, in some particulars, the evidence from the case at bar was even less persuasive than the evidence from *Asaeli*. Specifically, in the case at bar, there was no evidence that the defendant did anything at all when he entered Mr. Force's apartment other than sit in a chair across the room. He did not speak or in any way participate or aide the commission of the crime. By contrast, in *Asaeli*, the defendant at least got out of the car and tried to find the person his co-defendant shot. Thus, in the same manner that the evidence in *Asaeli* was legally insufficient to support a conviction under the accomplice liability statute, so the evidence in the case at bar was legally insufficient to support a conviction under the accomplice liability statute. Thus, in the case at bar, this court should vacate the defendant's conviction and remand with instructions to dismiss as did the court in *Asaeli*.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED EVIDENCE THAT THE DEFENDANT HAD BEEN ARRESTED AND JAILED, THAT OFFICERS DID NOT BELIEVE HIS STATEMENTS, AND THAT THE OFFICERS "HAD HEARD" THAT THE DEFENDANT WAS COLLECTING A DEBT FROM THE VICTIM DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

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

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

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

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when the state elicited evidence that (1) the defendant had been arrested and jailed and that the officers did not believe the defendant’s statements, and (2) that the officers “had heard” that the defendant was collecting a debt from the victim. The following presents these arguments.

(1) Evidence of the Defendant’s Arrest and Incarceration Was Irrelevant, Inadmissible, and Prejudicial as Was the Evidence That the Officers Did Not Believe the Defendant’s Statements.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial the prosecutor must refrain from any statements or conduct that express his/her personal belief as to the

credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a “substantial likelihood” that any such conduct, comment, or questioning has affected the jury’s verdict, then the defendant’s right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the jury he refused to testify concerning his conversation with Walker as he didn’t want to be labeled a “snitch.” Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred

when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the following.

Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. *See State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

State v. Denton, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant knifed another person during a fight outside a bar. The defendant testified and claimed self defense. During cross-examination, the prosecutor repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor never made part of the record. In setting out the law on this issue,

the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate for him Ed Frazier, deputy county attorney, a lawyer of high standing of integrity and ability. These questions were not put, as the court assumed 'as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he may possess under the guise of cross-examination, as in this case.

* * *

To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

State v. Yoakum, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at 311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

State v. Yoakum, 37 Wn.2d at 144.

Similarly, no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

In *State v. Carlin*, the court put the principle as follows:

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

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

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

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

Under this rule the fact of an arrest is not evidence because it

constitutes the arresting officer's opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant's vehicle hit the plaintiff's vehicle. Following a defense verdict the plaintiff appealed arguing that defendant's argument in closing that the attending officers' failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. The court agreed and granted a new trial.

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

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

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

In the case at bar, the state repeatedly elicited evidence that the sheriff's deputies had arrested the defendant and that the defendant was in

jail during the entirety of the case. The state might make an ostensible argument that the defendant's status as an inmate was admissible to show how the state obtained a recording of the defendant's telephone conversation with his brother. However, the argument is ostensible only. The reason is that how the state obtained the recording was not a fact at issue at trial. The defense during the trial, and the defendant while on the witness stand, admitted that he had made the call and that the recording was accurate. Thus, how the call was recorded and where the defendant was at the time he placed the call was irrelevant and prejudicial. Rather, the state's purpose in eliciting it was to reinforce an argument to the jury that the defendant must be guilty because the officers believed him guilty and put him in jail, where the court kept him.

The implicit evidence of the officers' beliefs that the defendant was guilty was improperly reinforced when the state repeatedly elicited the opinion of the officers that the defendant was not truthful during their interview with him. While the officer's did not use the word "untruthful," this was the import of their repeated statements to the jury that the defendant was not "forthcoming" and would only say something when confronted with facts the officers had. By eliciting this evidence, along with the evidence of arrest and incarceration, the state violated the defendant's right to a fair trial in which all the witnesses should have been precluded from expressing

opinions of guilt.

(2) Evidence That the Officer “Heard” That the Defendant Was Collecting a Debt at the Time of the Incident was Inadmissible Hearsay and Prejudicial.

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

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

ER 801(c).

The phrase “other than one made by the declarant while testifying at the trial or hearing” includes an out-of-court statement made by an in-court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). In the case at bar, the state elicited inadmissible hearsay when it questioned the officers concerning what they “had heard” about the defendant’s purpose in going to visit David Jones.

In the case at bar, the state elicited inadmissible hearsay during an exchange in its direct examination of Detective Todd Barsness, when the prosecutor inquired about evidence of potential motive behind the shooting. Detective Barsness’s statement was the following: “We had reason to believe that the reason for the visit by Mr. Wright and Armando was to

reclaim a drug debt.” RP 145. At best, the officers obtained this information from a third party or parties. At worst, it was simply speculation on their part. However, what is clear is that this evidence was not admissible.

(3) Trial Counsel’s Failure to Object Fell below the Standard of a Reasonably Prudent Attorney and Caused Prejudice to the Defendant.

Not every failure to object to inadmissible evidence falls below the standard of a reasonable prudent attorney. *State v. Neidigh*, 78 Wn.App. 71, 77, 895 P.2d 423 (1995). For example, defense counsel may refrain from objecting because the otherwise inadmissible evidence might benefit the defendant’s case or provide some other tactical advantage. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). However, in instances in which (1) there is no tactical advantage to gain, and (2) the inadmissible evidence causes prejudice to the defendant’s case, then counsel’s failure to object does fall below the standard of a reasonable prudent attorney because a reasonably prudent attorney would always object in such circumstances. *Id.*

In the case at bar, there was no tactical advantage for the defense to fail to object to the evidence of the defendant’s arrest and incarceration, the evidence that the officers did not believe the defendant’s statement, and particularly the evidence that officers had “heard” that the defendant had motive to participate in the offense. Thus, trial counsel’s failure to object fell below the standard of a reasonably prudent attorney.

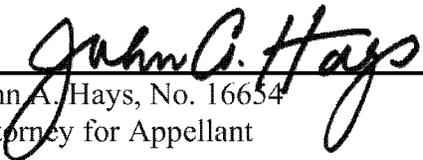
In addition, a review of this case supports the argument that the evidence against the defendant was exceptionally weak that he was an accomplice to the shooting. While he was present, he did not say anything and he did not offer any help to the person who committed the offense. Thus, the state's elicitation of inadmissible, prejudicial evidence caused prejudice because this was the very evidence upon which the jury relied when returning a verdict of conviction. Thus, trial counsel's failures denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment and the defendant is entitled to a new trial.

CONCLUSION

This court should vacate the defendant's conviction and remand with instructions to dismiss with prejudice because there is no evidence that the defendant acted as an accomplice to the crimes Mr. Munoz committed. In the alternative, the court should vacate the defendant's conviction and remand for a new trial based upon ineffective assistance of counsel.

DATED this 27th day of February, 2012.

Respectfully submitted,



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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, § 21**

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

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the 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.

RCW 9A.08.020
Liability for Conduct of Another — Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she 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 or she causes an innocent or irresponsible person to engage in such conduct; or

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

(c) He or she 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 or she:

(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 or her conduct is expressly declared by law to establish his or her complicity.

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

(b) He or she terminates his or her 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 or her 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.

ER 801

The following definitions apply under this article:

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

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

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

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 802

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

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/S/

Cathy Russell
Legal Assistant to John A. Hays

NO. 42266-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANDREW ALLAN WRIGHT,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it accepted the jury's verdicts of guilty to first degree robbery and first degree assault because substantial evidence does not support a finding that the defendant acted as an accomplice in the commission of either of these crimes.

2. Trial counsel's failure to object when the state elicited evidence that the defendant had been arrested and jailed, that officers did not believe his statements, and that the officers "had heard" that the defendant was collecting a drug debt from the victim denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it accepts a jury's verdict of guilty to first degree robbery and first degree assault when substantial evidence does not support a finding that the defendant acted as an accomplice in the commission of either of these offenses?

2. Does a counsel's failure to object when the state elicits evidence that the defendant had been arrested and jailed, that officers did not believe the defendant's statements, and that the officers "had heard" that the defendant had a motive to commit the crime, deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, when the trial court would have sustained a timely objection to all of this evidence and the defendant would have been acquitted had the evidence been excluded?

STATEMENT OF THE CASE

Factual History

In January of 2011, Daniel Force was working as both a maintenance man and security guard at a large apartment complex his mother managed in Hazel Dell in Clark County. RP 306-315.¹ At that time there were a number of security cameras in the parking lot connected to monitors in Mr. Force's living room. *Id.* According to Mr. Force, it was not unusual to have many friends and acquaintances visiting his apartment at all times of day or night. *Id.* Around 11:00 pm on the evening of January 21, 2011, a friend of Mr. Force by the name of David Jones stopped by with some other people, who only stayed for a few minutes. RP 316-317. This left Mr. Force and Mr. Jones alone in the living room. *Id.* At the time, they were both looking at laptop computers. *Id.*

After about 10 minutes, both Mr. Force and Mr. Jones noticed on the security monitors that a car pulled up and parked in the lot just outside Mr. Force's apartment. RP 201-206, 317-319. According to Mr. Force, three people got out of the car: Nathan Gadbury, Armando Castillo-Munoz, and the defendant Alan Wright, who had been the driver. RP 317-319. The three then walked up the steps to the apartment together. *Id.* According to Mr.

¹The record on appeal includes 5 continuously-numbered volumes of verbatim reports of the trial and sentencing hearing in this case, referred to herein as "RP [page #]."

Jones, the defendant was alone in the vehicle and was joined by Mr. Gadbury and Mr. Munoz as he walked up to the apartment. RP 201-206. Although Mr. Jones refused to say whether or not he was using any drugs that night that might have affected his ability to accurately remember what had happened, Mr. Force did admit that both he and Mr. Jones had just smoked methamphetamine together. RP 260-261, 344-346. In any event, Mr. Gadbury, Mr. Munoz, and the defendant were all known to both Mr. Force and Mr. Jones, and neither even looked up when the three of them entered Mr. Jones' Apartment. RP 206-210, 323-324.

According to Mr. Force, when the defendant entered the apartment he walked across the living room and sat in a chair while Mr. Gadbury stood near the doorway and Mr. Munoz stood in front of the chair in which Mr. Jones sat. RP 324-328. A confrontation then immediately ensued between Mr. Munoz and Mr. Jones, with Mr. Munoz claiming that Mr. Jones owed him money and demanding that he pay him. *Id.* When Mr. Jones stated that he didn't have any money, Mr. Munoz hit him in the head a couple times with his fist, and then pulled out a gun and hit Mr. Jones a number of times in the head with it. RP 211-218, 244-247, 326-328. According to Mr. Force, Mr. Munoz then pointed the gun at Mr. Jones and ordered that he hand over his ring, watch, and car keys, along with a signed title to his car. RP 326-328. Mr. Jones responded by handing over his gold ring and his watch and

telling Mr. Munoz that the title to the car was not in his name. RP 214-218, 326-328. Around this time, the gun Mr. Munoz was holding “went off,” with the bullet hitting Mr. Jones in the left hand, causing serious damage. RP 326-329.

After the gun went off, Mr. Gadbury, Mr. Munoz, and the defendant left the apartment, although neither Mr. Force nor Mr. Jones remembers seeing them do so. RP 271-273, 358-360. Rather, their attention was in taking Mr. Jones into the bathroom to clean off his head and left hand, which were both bleeding. *Id.* After determining that the wounds were fairly serious, Mr. Force drove Mr. Jones to a local hospital emergency room. RP 219-221. The personnel at the emergency room called the police after Mr. Jones told them that he had been shot. RP 116-119. Once the police arrived, Mr. Jones told them what had happened, he identified Mr. Munoz as the person who shot him, he claimed that Mr. Gadbury had also hit him, and he stated that the defendant had come in and left with them. RP 223-228.

About a week later, a number of Clark County Deputies arrested the defendant in front of his apartment and took him to the “major crimes unit” of the sheriff’s office for questioning. RP 57-60. After the defendant gave a taped statement, the deputies took him to the Clark County Jail where he remained for the entirety of this case. RP 164. While at the Clark County Jail, the defendant called his brother Gabriel Salisbury and asked him to go

to a residence in the Jantzen Beach area of Portland, retrieve a gold ring out of a safe, and destroy it. RP 163-166, 181-182. At the defendant's request, Mr. Salisbury went to the residence of Shannon Tandberg, retrieved the ring and cut it up into pieces. RP 182-191. According to Ms Tandberg, the defendant had previously brought both the safe and the ring to her residence along with a number of other items. RP 372-377. The defendant's brother later gave the pieces of the ring to the police, who showed it to Mr. Jones. RP 189. At trial, Mr. Jones identified them as the ring that Mr. Munoz had taken from him at gun point. RP 214-215.

Procedural History

By information filed January 26, 2011, and later amended, the Clark County Prosecutor charged Armando Castillo-Munoz, Nathan Gadbury and the defendant Andrew Allan Wright each with one count of first degree robbery and one count of first degree assault. CP1-2, 4-5. Both charges included firearms enhancements. *Id.* The defendant later went to a separate jury trial on these charges, during which the state called 14 witnesses in its case-in-chief and two witnesses in rebuttal. RP 45-484, 552-566. The defense called one witness. RP 488-550. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History.

One of the witnesses the state called during its case-in-chief was Detective Lindsay Schultz. RP 45-79. During her testimony, she told the

jury that the defendant had been arrested on January 26, 2011, and taken to the sheriff's office where he gave a taped statement. RP 57-60. According to Detective Schultz, the defendant eventually admitted that he was present when Mr. Jones was shot. *Id.* However, in her opinion, during this interview the defendant "was not forthcoming with the information" he provided to them. RP 60. She repeated this opinion when the state called her as a witness on rebuttal. RP 552. The defense did not object that the evidence of the fact of the defendant's arrest and incarceration was irrelevant and prejudicial. RP 60, 552. Neither did the defense object that the evidence of the officer's opinion on how "forthcoming" the defendant was in his statement was inadmissible and prejudicial. *Id.*

In addition, during its case-in-chief, the state also called Detective Todd Barsness, who told the jury that the defendant was "identified as a suspect" fairly early in the case but was not arrested until later. RP 141-142. The defense made no objection that this evidence was irrelevant and prejudicial. *Id.* When the state inquired about evidence of a potential motive behind the shooting, Detective Barsness stated the following: "We had reason to believe that the reason for the visit by Mr. Wright and Armando was to reclaim a drug debt." RP 145. The defense made no objection that this evidence was inadmissible hearsay, speculation, and unfairly prejudicial. *Id.*

Finally, during its case-in-chief, the state called Gabriel Salisbury to testify concerning the telephone call the defendant made to him to request that he destroy the ring that Mr. Jones later identified was the ring Mr. Munoz took from him at gunpoint. RP 163-197. During this evidence, the state specifically elicited the fact that the defendant was in jail on the current charges when he made the call. RP 164, 166. The state also elicited the fact that the defendant was being held in the jail in the current case from Shannon Tandberg and Detective Kevin Harper. RP 366, 392-292, 459. In none of these instances did the defense object that the evidence of the defendant's incarceration was both irrelevant and unfairly prejudicial. *Id.*

Following the close of evidence in this case, the court instructed the jury without objection or exception from either party. RP 568, 570-589; CP 69-99. The jury then retired for deliberation after hearing argument from counsel, and eventually returned verdicts of guilty on both counts. RP 589-670, 673-677; CP 115-120. However, the jury responded to the special verdicts by rejecting the state's claim that the defendant committed the offenses while armed with a firearm. CP 116, 118. At a later hearing, the court did not sentence the defendant on the first degree robbery charge, ruling that to do so under the facts of the case would violate the defendant's constitutional right to be free from double jeopardy. RP 686-693. The court then imposed a sentence within the standard range on the assault charge. RP

697-705; CP 124-140. Although the defendant filed timely notice of appeal from his conviction and sentence, the state did not file a notice of appeal from the court's ruling refusing to sentence on the robbery charge. CP 141-158.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ACCEPTED THE JURY'S VERDICTS OF GUILT TO FIRST DEGREE ROBBERY AND FIRST DEGREE ASSAULT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING THAT THE DEFENDANT ACTED AS AN ACCOMPLICE IN THE COMMISSION OF EITHER OF THESE CRIMES.

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)). 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 this case, the state charged the defendant as an accomplice to the first degree robbery and first degree assault that Armando Castillo-Munoz committed against David Jones. Indeed, the state requested, and the court gave, an instruction on accomplice liability. *See* Instruction No. 7 at CP 78. In Washington State, accomplice liability is defined under RCW 9A.08.020(3), which states as follows:

(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.08.020(3).

Under this statute, the defendant must take some affirmative action in promoting the offense and mere presence, even if that presence “bolsters” or “gives support” to the perpetrator, does not constitute action sufficient to impose accomplice liability. *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (juvenile’s presence, knowledge of theft and personal acquaintance with active participants was insufficient to constitute abetting crime of reckless endangerment without some showing of intent to encourage criminal conduct). In addition, substantial evidence, whether on the issue of criminal liability as a principal or an accomplice, must be based upon more than mere speculation, surmise and conjecture. *State v. Uglem*, 68 Wn.2d 428, 413 P.2d 643 (1966).

For example, in *State v. Asaeli*, 150 Wn.App. 543, 208 P.3d 1136 (2009), a defendant convicted of second degree murder as an accomplice appealed his conviction, arguing that the evidence only showed mere presence and was insufficient to prove accomplice liability. The facts of this case were as follows. In the early morning hours of October 30, 2004, two

groups of young people, most of Samoan descent, gathered at Thea Foss Park in Tacoma after the bar at which many of them were drinking closed. This park, which is in the Dock Street area of Tacoma's downtown waterfront, was a routine gathering place for young person's of Samoan descent. One of the groups at the park included Faalata Fola, and his cousin James Fola, who had arrived in a green Mercury driven by Tailulu Gago. Breanne Ramaley, Faalata Fola's girlfriend, was also present and had arrived separately with other friends in her red Nissan. Benjamin Asaeli was at the park, having driven there with his girlfriend Rosette Flores in her white Chevrolet Lumina. The defendant Darius Vaielua was present, having arrived driving his girlfriend's Ford Explorer. His girlfriend and Eroni Williams were passengers in that vehicle.

Once at the park, several persons, including the defendant DariusVaielua, walked around and asked people if Faalata Fola was present. After a short time, Eroni Williams located Faalata Fola sitting in the driver's seat of the Nissan, which was parked between Gago's Mercury and the Lumina driven by the defendant Darius Asaeli. At this point, Eroni Williams challenged Faalata Fola to a fight, but moved back, claiming that Fola had a gun. As he stepped back, Benjamin Asaeli immediately stepped forward and fatally shot Fola multiple times as Fola remained seated in the Nissan. Benjamin Asaeli later confessed to shooting Fola, but claimed that he had

acted in self defense after Fola pulled a gun, shot at Benjamin Williams, and then pointed the gun at him.

The state charged Benjamin Asaeli with first degree murder. The state also charged Benjamin Williams and the defendant Darius Vaielua with murder under the theory that they acted as accomplices to Benjamin Asaeli when he shot Fola. Following a lengthy joint trial, all three defendants were convicted. They appealed, urging a number of common arguments on appeal. The defendant Darius Vaielua also argued that the evidence presented at trial only showed mere presence on his behalf and was not legally sufficient to sustain a conviction as an accomplice. In addressing this latter claim, the court summarized the evidence against the defendant as follows:

The trial testimony showed that (1) Asaeli, Asi, and Williams witnessed Fola shoot at a car with Asian men in it at Thea Foss Park a week before Asaeli shot Fola but that Vaielua was not present at the time; (2) a week later, Vaielua was at Papaya's Bar at the same time as Williams and Asaeli; (3) Vaielua spoke to Williams and Asaeli either at the bar or as they were all leaving the bar at closing time; (4) Asaeli did not ask Flores if she wanted to go to the waterfront until after speaking to the others as they were leaving the bar; (5) Vaielua did not normally go to the waterfront after the bars closed when he was with Ishmail; (6) after leaving the bar, talking to the others, and dropping Ishmail off, Vaielua drove the Explorer to Thea's Park at the same time Asaeli, Van Camp, and Asi drove to the park; (7) the three cars arrived at approximately the same time; (8) when Vaielua arrived, he had four passengers with him, including Williams; (9) before the shooting, Vaielua and the others exited the Explorer and Vaielua spoke and motioned to the people in the Explorer for several minutes; (10) also before the shooting, some of those who arrived

with Vaielua spoke to Asaeli; (11) immediately before the shooting, Vaielua approached James, who he knew from prior peaceful encounters; and (12) after greeting James, Vaielua asked where “Blacc” was and then stood with James (with a car between them and Ramaley’s car) until the shooting. Importantly, the evidence did not show what was said during any conversations Vaielua may have had or overheard that evening nor was there any evidence that any of these conversations related in any way to a plan to shoot or assault Fola.

State v. Asaeli, 150 Wn.App. at 568-569 (footnote omitted).

With this recitation of the facts in mind, the court reviewed the law on accomplice liability, and concluded that the facts were legally insufficient to support a conviction. The court held:

To prove Vaielua was an accomplice to Fola’s murder, the State had to prove beyond a reasonable doubt that Vaielua (1) knew his actions would promote or facilitate this crime, (2) was present and ready to assist in some manner, and (3) was not merely present at the scene with some knowledge of potential criminal activity. RCW 9A.08.020(3). Taking the evidence in the light most favorable to the State, we conclude that, although there was evidence that Vaielua was present at the park, that he drove Williams and others to the park, and that he was aware that some members of the group he was with were trying to locate Fola, the evidence failed to show that Vaielua was present at the scene with more than mere knowledge of some potential interaction with Fola.

. . . .

At best, this evidence is sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate Fola. But the record contains no evidence, direct or indirect, establishing that Vaielua was aware of any plan, by Asaeli, Williams, or anyone else, to assault or shoot Fola.

State v. Asaeli, 150 Wn.App. at 569.

The evidence presented in the case at bar is similar to the particulars of the evidence presented in *Asaeli*. In both cases, the defendants were identified as the driver of the vehicle in which the person who committed the offenses rode to the scene of the crime. In both cases the defendants were acquainted with the shooter. In both cases, there were at least claims of motive for the defendant to participate in the offenses. Indeed, in some particulars, the evidence from the case at bar was even less persuasive than the evidence from *Asaeli*. Specifically, in the case at bar, there was no evidence that the defendant did anything at all when he entered Mr. Force's apartment other than sit in a chair across the room. He did not speak or in any way participate or aide the commission of the crime. By contrast, in *Asaeli*, the defendant at least got out of the car and tried to find the person his co-defendant shot. Thus, in the same manner that the evidence in *Asaeli* was legally insufficient to support a conviction under the accomplice liability statute, so the evidence in the case at bar was legally insufficient to support a conviction under the accomplice liability statute. Thus, in the case at bar, this court should vacate the defendant's conviction and remand with instructions to dismiss as did the court in *Asaeli*.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED EVIDENCE THAT THE DEFENDANT HAD BEEN ARRESTED AND JAILED, THAT OFFICERS DID NOT BELIEVE HIS STATEMENTS, AND THAT THE OFFICERS "HAD HEARD" THAT THE DEFENDANT WAS COLLECTING A DEBT FROM THE VICTIM DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

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

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

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

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when the state elicited evidence that (1) the defendant had been arrested and jailed and that the officers did not believe the defendant’s statements, and (2) that the officers “had heard” that the defendant was collecting a debt from the victim. The following presents these arguments.

(1) Evidence of the Defendant’s Arrest and Incarceration Was Irrelevant, Inadmissible, and Prejudicial as Was the Evidence That the Officers Did Not Believe the Defendant’s Statements.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial the prosecutor must refrain from any statements or conduct that express his/her personal belief as to the

credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a “substantial likelihood” that any such conduct, comment, or questioning has affected the jury’s verdict, then the defendant’s right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the jury he refused to testify concerning his conversation with Walker as he didn’t want to be labeled a “snitch.” Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred

when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the following.

Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. *See State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

State v. Denton, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant knifed another person during a fight outside a bar. The defendant testified and claimed self defense. During cross-examination, the prosecutor repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor never made part of the record. In setting out the law on this issue,

the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate for him Ed Frazier, deputy county attorney, a lawyer of high standing of integrity and ability. These questions were not put, as the court assumed 'as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he may possess under the guise of cross-examination, as in this case.

* * *

To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

State v. Yoakum, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at 311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

State v. Yoakum, 37 Wn.2d at 144.

Similarly, no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

In *State v. Carlin*, the court put the principle as follows:

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

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

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

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

Under this rule the fact of an arrest is not evidence because it

constitutes the arresting officer's opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant's vehicle hit the plaintiff's vehicle. Following a defense verdict the plaintiff appealed arguing that defendant's argument in closing that the attending officers' failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. The court agreed and granted a new trial.

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

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

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

In the case at bar, the state repeatedly elicited evidence that the sheriff's deputies had arrested the defendant and that the defendant was in

jail during the entirety of the case. The state might make an ostensible argument that the defendant's status as an inmate was admissible to show how the state obtained a recording of the defendant's telephone conversation with his brother. However, the argument is ostensible only. The reason is that how the state obtained the recording was not a fact at issue at trial. The defense during the trial, and the defendant while on the witness stand, admitted that he had made the call and that the recording was accurate. Thus, how the call was recorded and where the defendant was at the time he placed the call was irrelevant and prejudicial. Rather, the state's purpose in eliciting it was to reinforce an argument to the jury that the defendant must be guilty because the officers believed him guilty and put him in jail, where the court kept him.

The implicit evidence of the officers' beliefs that the defendant was guilty was improperly reinforced when the state repeatedly elicited the opinion of the officers that the defendant was not truthful during their interview with him. While the officer's did not use the word "untruthful," this was the import of their repeated statements to the jury that the defendant was not "forthcoming" and would only say something when confronted with facts the officers had. By eliciting this evidence, along with the evidence of arrest and incarceration, the state violated the defendant's right to a fair trial in which all the witnesses should have been precluded from expressing

opinions of guilt.

(2) Evidence That the Officer “Heard” That the Defendant Was Collecting a Debt at the Time of the Incident was Inadmissible Hearsay and Prejudicial.

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

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

ER 801(c).

The phrase “other than one made by the declarant while testifying at the trial or hearing” includes an out-of-court statement made by an in-court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). In the case at bar, the state elicited inadmissible hearsay when it questioned the officers concerning what they “had heard” about the defendant’s purpose in going to visit David Jones.

In the case at bar, the state elicited inadmissible hearsay during an exchange in its direct examination of Detective Todd Barsness, when the prosecutor inquired about evidence of potential motive behind the shooting. Detective Barsness’s statement was the following: “We had reason to believe that the reason for the visit by Mr. Wright and Armando was to

reclaim a drug debt.” RP 145. At best, the officers obtained this information from a third party or parties. At worst, it was simply speculation on their part. However, what is clear is that this evidence was not admissible.

(3) Trial Counsel’s Failure to Object Fell below the Standard of a Reasonably Prudent Attorney and Caused Prejudice to the Defendant.

Not every failure to object to inadmissible evidence falls below the standard of a reasonable prudent attorney. *State v. Neidigh*, 78 Wn.App. 71, 77, 895 P.2d 423 (1995). For example, defense counsel may refrain from objecting because the otherwise inadmissible evidence might benefit the defendant’s case or provide some other tactical advantage. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). However, in instances in which (1) there is no tactical advantage to gain, and (2) the inadmissible evidence causes prejudice to the defendant’s case, then counsel’s failure to object does fall below the standard of a reasonable prudent attorney because a reasonably prudent attorney would always object in such circumstances. *Id.*

In the case at bar, there was no tactical advantage for the defense to fail to object to the evidence of the defendant’s arrest and incarceration, the evidence that the officers did not believe the defendant’s statement, and particularly the evidence that officers had “heard” that the defendant had motive to participate in the offense. Thus, trial counsel’s failure to object fell below the standard of a reasonably prudent attorney.

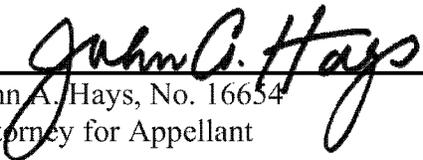
In addition, a review of this case supports the argument that the evidence against the defendant was exceptionally weak that he was an accomplice to the shooting. While he was present, he did not say anything and he did not offer any help to the person who committed the offense. Thus, the state's elicitation of inadmissible, prejudicial evidence caused prejudice because this was the very evidence upon which the jury relied when returning a verdict of conviction. Thus, trial counsel's failures denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment and the defendant is entitled to a new trial.

CONCLUSION

This court should vacate the defendant's conviction and remand with instructions to dismiss with prejudice because there is no evidence that the defendant acted as an accomplice to the crimes Mr. Munoz committed. In the alternative, the court should vacate the defendant's conviction and remand for a new trial based upon ineffective assistance of counsel.

DATED this 27th day of February, 2012.

Respectfully submitted,



John A. Hays, No. 16654
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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, § 21

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

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the 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.

RCW 9A.08.020
Liability for Conduct of Another — Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she 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 or she causes an innocent or irresponsible person to engage in such conduct; or

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

(c) He or she 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 or she:

(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 or her conduct is expressly declared by law to establish his or her complicity.

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

(b) He or she terminates his or her 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 or her 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.

ER 801

The following definitions apply under this article:

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

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

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

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Oponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 802

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

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Dated this 27th, day of FEBRUARY, 2012 at LONGVIEW, Washington.

/S/

Cathy Russell
Legal Assistant to John A. Hays

HAYS LAW OFFICE

February 27, 2012 - 2:58 PM

Transmittal Letter

Document Uploaded: 422662-Appellant's Brief.pdf

Case Name: State v. Wright

Court of Appeals Case Number: 42266-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Cathy E Russell - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

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