

NO. 42931-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ELI EDWARD REITER,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iv

B. ASSIGNMENT OF ERROR

 1. Assignment of Error 1

 2. Issue Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE

 1. Factual History 3

 2. Procedural History 6

D. ARGUMENT

**I. THE TRIAL COURT DENIED THE DEFENDANT DUE
 PROCESS UNDER WASHINGTON CONSTITUTION,
 ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION,
 FOURTEENTH AMENDMENT, WHEN IT ENTERED
 JUDGMENT AGAINST HIM FOR RESIDENTIAL
 BURGLARY BECAUSE SUBSTANTIAL EVIDENCE DOES
 NOT SUPPORT THAT CHARGE 9**

**II. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN
 THE STATE ELICITED IRRELEVANT, PREJUDICIAL
 EVIDENCE THAT A WITNESS BELIEVED HE WAS
 GUILTY, THAT THE DEFENDANT WAS A TRANSIENT,
 AND THAT THE POLICE ARRESTED HIM DENIED THE
 DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL
 UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22,
 AND UNITED STATES CONSTITUTION, SIXTH
 AMENDMENT 12**

E. CONCLUSION 21

F. APPENDIX

1. Washington Constitution, Article 1, § 3 22

2. Washington Constitution, Article 1, § 21 22

3. Washington Constitution, Article 1, § 22 22

4. United States Constitution, Sixth Amendment 23

5. United States Constitution, Fourteenth Amendment 23

TABLE OF AUTHORITIES

Page

Federal Cases

Church v. Kinchelse,
767 F.2d 639 (9th Cir. 1985) 12

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 8

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 9

Strickland v. Washington,
466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) 11

State Cases

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 8

State v. Carlin, 40 Wn.App. 698, 700 P.2d 323 (1985) 12-14

State v. Cobb, 22 Wn.App. 221, 589 P.2d 297 (1978) 12

State v. Demos, 94 Wn.2d 733, 619 P.2d 968 (1980) 16

State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967) 12

State v. Johnson, 29 Wn.App. 807, 631 P.2d 413 (1981) 12

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 8

State v. Pittman, 134 Wn.App. 376, 166 P.3d 720 (2006) 9

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 9

State v. Whalon, 1 Wn.App. 785, 464 P.2d 730 (1970) 16

Warren v. Hart, 71 Wn.2d 512, 429 P.2d 873 (1967) 14, 15

Constitutional Provisions

Washington Constitution, Article 1, § 3 8
Washington Constitution, Article 1, § 21 12
Washington Constitution, Article 1, § 22 11, 18, 19
United States Constitution, Sixth Amendment 11, 12, 19
United States Constitution, Fourteenth Amendment 8

Statutes and Court Rules

ER 401 16
ER 402 16

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 entered judgment against him for residential burglary because substantial evidence does not support that charge.

2. Trial counsel's failure to object when the state elicited irrelevant, prejudicial evidence that a witness believed the defendant was guilty, that the defendant was a transient, and that the police arrested him 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 enters judgment against that defendant for residential burglary when substantial evidence does not support that charge?

2. Does a trial counsel's failure to object when the state elicits irrelevant, prejudicial evidence that a witness believes the defendant is guilty, that the defendant is transient, and that the police arrested the defendant deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

John Lewis lives at 1121 87th Avenue in Vancouver with his wife and two daughters, 16-year-old Katie and 10-year-old April. RP 42-45.¹ At this location, 87th Avenue runs north and south and all of the homes are single family residential. *Id.* Mr. Lewis's house is a single level ranch style with an attached double garage on the left as you look at the house from the street (north end of the house). *Id.* The driveway slopes down a little to the street, and there is a short retaining wall between the yard and the sidewalk. RP 53-59. As with many other people, Mr. Lewis has so many items stored in his garage that he can only park his vehicles in the driveway. RP 45-48, 117-121.

On August 6, 2011, Mr. Lewis spent the day working in his yard and in the garage. RP 48-53. At about 8:15 that evening, he left his 10-year-old daughter at the house while he drove to pick up his older daughter at her cheerleader practice. RP 45-48. The round trip took about one-half hour, and when he returned, he backed his vehicle into the driveway in front of the far side of the garage. RP 45-48, 96-104. He left the driveway area closer to the front door open for his wife to use when she returned. *Id.* Both he and

¹The record on appeal includes two volumes of continuously numbered verbatim reports referred to herein as "RP [page #]."

Katie remember that the garage doors were shut when they came home. *Id.*

After returning home, Katie Lewis went inside, made herself dinner, and started eating it in front of the computer in the front room. RP 96-104. Mr. Lewis came in the house, sat on the couch not far from Katie, and watched the television. *Id.* After a few minutes, both of them heard an unusual noise that appeared to be coming from outside the front of the house. RP 53-59. Up to that point, Mr. Lewis had heard the occasional car pass on 87th Avenue, as well as his neighbors across the street standing in the driveway talking. RP 51-53. Upon hearing the unusual noise, which he thought might be a garage door opening, Mr. Lewis went to the front door and looked out. RP 53-55. He could see that the garage door closest to him was closed. *Id.* As he looked out, he heard a strange noise that appeared to be coming from inside the garage area itself. RP 55-58.

Upon hearing this second noise, Mr. Lewis walked out the front door and stood in the driveway. RP 55-59. As he did, he saw a man by his parked vehicle walking down the driveway. *Id.* Mr. Lewis later identified this man as the defendant, Eli Reiter. RP 79-81. As he saw the defendant, Mr. Lewis also saw that the garage door was open a few feet. RP 64-65. At this point, Mr. Lewis began calling to the defendant, telling him to stop and state what he had been doing. RP 55-59. However, the defendant did not respond. *Id.* Rather, he walked to the end of the driveway, turned left on the sidewalk and

proceeded south on 87th Avenue. *Id.* Mr. Lewis then called out to his daughter Katie as he cut across his lawn and confronted the defendant as he walked by the south side of the front of the house. RP 59-61.

When Mr. Lewis confronted the defendant, he noticed that he was carrying what appeared to be an empty backpack and a bottle with a sports drink in it. RP 59-61. At this point, Katie Lewis walked up and began yelling at the defendant, demanding to know what he was doing. RP 61-64, 100-104. The defendant then started walking off while responding that he had not been doing anything. RP 100-104. As he walked away, Katie Lewis followed, all the time demanding to know what Mr. Lewis had been doing. *Id.* After she arrived, Mr. Lewis went back in the house and called the police, who arrived within a couple minutes. RP 61-64.

As the police arrived, Katie Lewis walked back to her house and told them what she had seen, as did her father. RP 121-123. Within a few minutes, the police found the defendant walking south on 87th Avenue and they arrested him. RP 121-123, 135. They then took Katie to the scene where she identified the defendant as the person her father had confronted. RP 121-123. Upon being arrested, the defendant denied that he had entered the Lewis's garage, although he did admit that he had been looking for a blanket with which to keep warm and sleep. RP 140, 143-144. When arrested, the defendant was not in possession of any property belonging to

the Lewis family and they did not report any item(s) missing from their garage. RP 114-117, 137-140. However, they did notice that a fertilizer spreader that had been sitting in the front of the garage had been knocked over. RP 113, 116, 119.

Procedural History

By information filed September 12, 2011, the Clark County Prosecutor charged the defendant with one count of residential burglary. CP 1-2. Following a brief hearing under CrR 3.5, the trial court found all of the defendant's statements admissible under the Court Rule. RP 31-36. The case then went to trial before a jury, with the state calling four witnesses: John Lewis, Katie Lewis, and two of the police officers who had responded to Mr. Lewis's call. RP 42, 95, 117, 126. They testified to the facts in the preceding factual history. *See Factual History.*

In addition, during her direct testimony, Katie Lewis stated as follows:

Q. Okay. And so, you were talking to the man?

A. Yes.

Q. Okay. What were you saying to him?

A. I said – at first I was like, “What are you doing?” And, he was like, “What are you talking about?” And, I said, “Why were you in my house? Why were you in the garage? What were you doing on my property?” He was like, “I wasn't there. I don't know what you are talking about.” And then, he kept walking and I said, “Yes, you

were. I saw you on my driveway.” Because by the time I was outside he was still on my – on our driveway with my dad.

Q. Uh-huh.

A. And, I kept asking him, “What did you take? Why were you in my garage? Why were you on my property?” This –

Q. And, what was he saying?

A. He was denying that he was on my property – on the property of our house, ever in my garage and he said he didn’t take anything. And, I was – and, I said, “Well, how would you feel if someone was intruding on your property?” And, he was like, “I – I was never in your house. I didn’t go on your property. I don’t know what you are talking about.”

RP 103-104.

The defendant’s attorney did not object and did not argue that this testimony was irrelevant, inadmissible hearsay, and an improper opinion of guilt. RP 103-104.

In addition, during the testimony of one of the officers, the state elicited the fact that (1) the defendant had admitted that he was a transient, and (2) after interrogating the defendant, the officers arrested him and took him to the Clark County jail. RP 126-134, 135. Once again, the defense made no objection to this evidence and did not argue that the former fact was prejudicial and irrelevant, and that the latter fact was irrelevant and constituted an improper opinion of guilt by the officers. *Id.*

Following the close of the state’s case the defense closed without

calling any witnesses. RP 144, 152. The court then instructed the jury without objection from either party. RP 158-167, 167-178. After argument by counsel, the jury retired for deliberation and eventually returned a verdict of guilty. RP 178-190, 190-196, 196-203, 210; CP 92. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. RP 215-235; CP 106-120, 125-140.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST HIM FOR RESIDENTIAL BURGLARY BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THAT CHARGE.

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 with residential burglary under RCW 9A.52.025(1), which states as follows:

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.52.025.

This offense has two essential elements: (1) an unlawful entry or remaining in a residence (*e.g.* a criminal trespass), and (2) a concurrent intent to commit a crime therein. *State v. Pittman*, 134 Wn.App. 376, 384, 166 P.3d 720 (2006). If the latter element is not proven beyond a reasonable doubt but the former is, substantial element only supports a conviction for the lesser included offense of trespass. *Id.*

In the case at bar, the state did present substantial evidence that the defendant had actually entered the Lewis's garage. First, Mr. Lewis saw the defendant walking away from the open garage door, he heard a sound in the garage, and a fertilizer spreader had been upset in the garage. Although not compelling, it was sufficient for a fair minded juror to conclude that the defendant had entered the front of the garage. However, even seen in the light most favorable to the state, there is no substantial evidence that the defendant intended to commit a crime in the garage. No items were missing from the garage, much less in the defendant's possession, the defendant had no burglary tools in his possession, the defendant did not flee or resist apprehension, and no items had even been moved in the garage other than the fertilizer spreader which had been knocked over in the very dark room. Thus, in the case at bar, the trial court erred when it accepted the jury's verdict on the original charge of residential burglary. Instead of accepting the jury's verdict on this charge, the court should have entered judgment on the lesser included offense of criminal trespass.

II. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE ELICITED IRRELEVANT, PREJUDICIAL EVIDENCE THAT A WITNESS BELIEVED THE DEFENDANT WAS GUILTY, THAT THE DEFENDANT WAS A TRANSIENT, AND THAT THE POLICE ARRESTED THE DEFENDANT 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 irrelevant, prejudicial evidence that (1) the witness Katie Lewis believed the defendant was guilty as did the police, and (2) that the defendant was a transient. The following sets out these arguments.

(1) Failure to Object to Improper Opinion of Guilt from Katie Lewis and the Police.

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). As a result no witness whether a lay person or expert may give an opinion as to the defendant’s guilt either directly or inferentially “because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.” *State*

v. Carlin, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

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

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

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

For example, in *State v. Carlin*, *supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a “fresh

guilt scent.” On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that “[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

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

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

issued, would not be acceptable as opinion evidence.

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

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

In the case at bar, the state elicited testimony from Katie Lewis that she believed the defendant was guilty and from the officers that they had arrested the defendant. The former testimony went as follows:

Q. Okay. And so, you were talking to the man?

A. Yes.

Q. Okay. What were you saying to him?

A. I said – at first I was like, “What are you doing?” And, he was like, “What are you talking about?” And, I said, “Why were you in my house? Why were you in the garage? What were you doing on my property?” He was like, “I wasn’t there. I don’t know what you are talking about.” And then, he kept walking and I said, “Yes, you were. I saw you on my driveway.” Because by the time I was outside he was still on my – on our driveway with my dad.

Q. Uh-huh.

A. And, I kept asking him, “What did you take? Why were you in my garage? Why were you on my property?” This –

Q. And, what was he saying?

A. He was denying that he was on my property – on the property of our house, ever in my garage and he said he didn’t take anything.

And, I was – and, I said, “Well, how would you feel if someone was intruding on your property?” And, he was like, “I – I was never in your house. I didn’t go on your property. I don’t know what you are talking about.”

RP 103-104.

Initially, one is left to ask the relevance of this evidence. Under ER 401, “relevance” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In other words, for evidence to be relevant, there must be a “logical nexus” between the evidence and the fact to be established. *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a “tendency” to prove, qualify, or disprove an issue for it to be relevant. *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980).

Under ER 402, irrelevant evidence is not admissible. This court rule states:

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

ER 402.

In the case at bar, there was no “logical nexus” between the fact at issue (whether or not the defendant had entered the garage with the intent to commit a crime) and the facts presented by Katie Lewis (that she repeatedly

accused the defendant of entering with the intent to steal and that she believed that he had done so). Rather, the inference that the state was attempting to have the jury draw was that the defendant had entered the garage with the intent to steal because Katie Lewis accused him of doing so and believed he had done so. As such, the state did not seek to introduce this evidence because it was relevant. Rather, the state sought to introduce this evidence because of its unfair prejudicial effect. This is not to say that an accusation cannot be relevant. It is if the defendant admits its truth. It then becomes an admission by the defendant. However, in the case at bar, the defendant repeatedly denied the accusations. Thus, the accusations themselves had no relevance.

Similarly, the testimony from the officers that they ultimately arrested the defendant was also irrelevant and prejudicial. As with Katie Lewis's testimony, this evidence did not make any fact at issue before the jury either less or more likely. Thus, there was no "logical nexus" between the fact of the arrest and the issues the jury was called upon to decide.

Given both the lack of relevance of Katie's Lewis's accusations and the officer's evidence of arrest on the one hand, and the unfair prejudice on the other hand, there was no possible tactical reason for the defendant's attorney to refrain from objecting to Katie Lewis's testimony concerning her repeated accusations to the defendant or the officers' testimony that they

arrested the defendant. Thus, the failure to object fell below the standard of a reasonably prudent attorney. In addition, given the facts that (1) no items were taken from the garage, (2) the defendant had no burglary tools, and (3) the defendant did not flee when accused, there is a high likelihood that absent Katie Lewis's irrelevant and prejudicial accusations and avowals of guilt, the jury would have acquitted the defendant. As a result, trial counsel's failure to object to this evidence denied the defendant effective assistance of counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment and he is entitled to a new trial.

(2) Failure to Object to Evidence that the Defendant Was a Transient.

In the case at bar, the state took pains to elicit evidence from all of its witnesses that the defendant was "scruffy" looking, that he smelled bad, and that he had admitted that he was "transient." This evidence was also irrelevant and prejudicial. The only "logical nexus" that this evidence contained was in implied argument that transients are more likely to be thieves than are non-transients. The state presented no evidence to support such a claim. Rather, it was a simple attempt to invoke prejudice against the defendant for his status as a homeless person instead of arguing from the relevant evidence. Thus, counsel's failure to object to this evidence fell below the standard of a reasonably prudent attorney. As with the improper

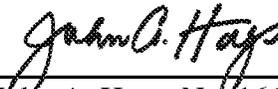
opinion evidence on guilt, this irrelevant, prejudicial evidence also denied the defendant effective assistance of counsel because of the lack of evidence on the element of an intent to commit a crime. As a result, trial counsel's failure to object to this evidence also denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

CONCLUSION

This court should vacate the defendant's conviction for burglary and remand with instructions to enter judgment for criminal trespass. In the alternative, the court should remand for a new trial based upon the denial of the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

DATED this 19th day of July, 2012.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 3

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

WASHINGTON CONSTITUTION ARTICLE 1, § 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.

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

STATE OF WASHINGTON,
Respondent,

vs.

ELI EDWARD REITER,
Appellant.

NO. 42931-4-II

AFFIRMATION OF
OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On July 19, 2012, I personally placed the United States Mail and/or e-filed the following documents to the indicated parties:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

Eli E. Reiter #738203
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA 99326-0769

Anne Mowry Cruser
Deputy Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666-5000

Dated this 19th day of July, 2012, at Longview, Washington.

/S/

Cathy Russell
Legal Assistant to John A. Hays
Attorney at Law

HAYS LAW OFFICE

July 19, 2012 - 4:44 PM

Transmittal Letter

Document Uploaded: 429314-Appellant's Brief.pdf

Case Name: State v. Eli E. Reiter

Court of Appeals Case Number: 42931-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- 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: _____

Comments:

No Comments were entered.

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

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

jennifer.casey@clark.wa.gov