

NO. 49245-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL GALEANA RAMIREZ,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, substantial evidence does not support the conclusion that the defendant caused “great bodily harm” to Jose Leiva-Aldana as charged in the second alternative in Count I.

2. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it allowed a police officer to speculate that the firearm used in the shooting in this case was associated with the defendant via a third-party.

3. Trial counsel’s failure to object when state introduced irrelevant evidence that implied that a police officer believed that the defendant was guilty denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

4. This court should exercise its discretion and refrain from imposing costs on appeal should the state prevail because the defendant does not have the present or future ability to pay legal-financial obligations.

Issues Pertaining to Assignment of Error

1. Does evidence that a person was shot, went to the hospital, and was later released constitute substantial evidence that the person suffered “great bodily harm” as that phrase is used in the first degree assault statute?

2. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows a police officer over defense objection to speculate that the firearm used in the shooting in the case was associated with the defendant via a third-party?

3. Does a trial counsel’s failure to object when the state introduces irrelevant evidence that implied that a police officer believed that the defendant was guilty deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

4. Should an appellate court exercise its discretion and refrain from imposing costs on appeal when the state substantially prevails but when the defendant does not have the present or future ability to pay legal-financial obligations?

STATEMENT OF THE CASE

Factual History

At about 11:30 pm on Saturday, October 24, 2015, roommates Agustin Morales-Gamez and Jose Leiva-Aldana were returning to their apartment in downtown Aberdeen after having a few beers at a local bar. RP 6/29 90-92¹; RP 6/30 91-93. Before going to the bar they had shared a six-pack of beer in their apartment. RP 6/29 90-92; RP 6/30 105-106. As the two walked in the dark in the alley leading up to their apartment they were accosted by a number of people who tried to rob them. RP 6/29 92-98; RP 6/30 95-96. Mr. Morales-Gamez believed there were four people as did Mr. Leiva-Aldana. RP 6/29 92; RO 6/30 95. During the attempted robbery one or two of the men assaulted Mr. Morales-Gamez while one hit Mr. Leiva-Aldana in the head with some sort of metal object. RP 6/29 92; RP 6/30 95-96. Mr. Morales-Gamez fought back with a small pocket knife that he was carrying. RP 6/29 98-99. At this point the attackers ran away. RP 6/29 92-98; RP 6/30 98. Several people in nearby apartments heard the scuffle in the alley, saw some of what was happening, called the police and then went outside. RP 6/29 18-19, 47-50. One of those people was Nichol Smith, who

¹The record on appeal includes twelve volumes of verbatim reports of six pretrial hearings, the trial, and a post-trial hearing and sentencing. There are not all consecutively numbered and are referred to herein as “RP [date] [page #].”

discovered a cell phone on the ground and handed it over to the police. RP 6/29 23, 54; RP 7/1 249.

When the police arrived they began an investigation, spoke with some of the witnesses, and then took Mr. Morales-Gamez and Mr. Leiva-Aldana a few blocks away to the police station. RP 6/29 104-106; RP 6/30 101-102. Once at the station the police obtained oral and written statements from Mr. Morales-Gamez and Mr. Leiva-Aldana with the aide of a police officer who spoke Spanish as neither Mr. Morales-Gamez nor Mr. Leiva-Aldana was fluent in English. RP 6/29 132; RP 6/30 109; RP 7/1 214-222. After interviewing the two victims the police offered to take them back to their apartment. RP 7/1 221-222. Mr. Morales-Gamez and Mr. Leiva-Aldana declined the offer and decided to walk home. RP 6/29 107; RP 6/30 101; RP 7/1 221-112.

While the police were interviewing Mr. Morales-Gamez and Mr. Leiva-Aldana, two men later identified as co-defendant Steven Russell and the defendant Daniel Galeana-Ramirez were dropping off co-defendant Alejandro Ramirez at the local Grays Harbor Community Hospital in Aberdeen. RP 6/30 159-160. Mr. Alejandro Ramirez had suffered a knife wound and was treated in the emergency room. RP 6/30 161-163.

By the time Mr. Morales-Gamez and Mr. Leiva-Aldana walked back to their apartment it was around 2:00 or 2:30 in the morning. RP 6/29 107-

108; RP 6/30 98-100. As they got near their apartment they encountered two men with guns who were waiting for them. *Id.* The two men opened fire and shot Mr. Leiva-Aldana in the abdomen and Mr. Morales-Gamez in the foot. RP 6/29 106-108; RP 6/30 102. Once the shots were fired the two assailants fled. *Id.* A number of neighbors heard the shots and called for the police and for an ambulance. RP 6/29 23-24, 41, 55-56, 80. Once at the scene ambulance personnel took both Mr. Morales-Gamez and Mr. Leiva-Aldana to the emergency room, where their wounds were treated. RP 6/29 107, 126-127; RP 6/30 103-104, 130. Mr. Leiva-Aldana later identified the defendant Daniel Galeana-Ramirez as the person who shot him. RP 102, 106.

Procedural History

By information filed November 23, 2015, the Grays Harbor County Prosecuting attorney charged the defendant Daniel Galeana Ramirez with two counts of first degree assault, each with a firearm enhancement. CP 1-3. Count I of the information alleged the following:

That the said Defendant, Daniel Galeana Ramirez, in Grays Harbor County, Washington, on or about October 25, 2015, with intent to inflict great bodily harm, did assault another person, to wit: Jose R. Leiva-Aldana, with a firearm or by any force or means likely to produce great bodily harm, and/or did inflict great bodily harm. . .

CP 1.

Count II of the information alleged the following:

That the defendant, Daniel Galeana Ramirez, in Grays Harbor

County, Washington, on or about October 25, 2015, with intent to inflict great bodily harm, did assault another person, to wit: Agustin Morales-Gamez, with a firearm or force or means likely to produce great bodily harm,

CP 2.

The state also charged Alejandro Ramirez and Steven Russell out of the two incidents. RP 7/8 737-747. Alejandro Ramirez was charged with one count of first degree robbery while armed with a firearm, one count of attempted first degree robbery while armed with a firearm, and two counts of fourth degree assault. *Id.* Mr. Ramirez was charged with one count of first degree robbery while armed with a firearm, one count of attempted first degree robbery while armed with a firearm, two counts of first degree assault while armed with a firearm and two counts of fourth degree assault. *Id.* The court later granted a state's motion to consolidate all three cases. RP 1/4 21-23.

The joint cases later came on for trial before a jury, during which the state called 20 different witnesses, including Mr. Morales-Gamez and Mr. Leiva-Aldana, a number of their neighbors, eight police officers, and a number of expert witnesses. RP 6/29 16-204; RP 6/30, 7/1, 7/6 13-498. However, the state did not call any medical professional to testify concerning the extent of the injuries that either Mr. Morales-Gamez or Mr. Leiva-Aldana suffered from their gunshot wounds. *Id.* Following this evidence the defense

called three alibi witnesses. RP 7/6 508-545.

One of the witnesses the state called during its case-in-chief was Aberdeen Officer Jason Capps. RP 7/1 415-439. According to Officer Capps, on November 10, 2015, over two weeks after the shooting in the case at bar, he had occasion to seize a .38 caliber revolver from a person by the name of Josiah Rhoades. RP 7/1 415-417. Eventually, a person by the name of Rigo Rivera was charged with illegally possessing that firearm. RP 7/1 436-437. Following Officer Capps' testimony, the state recalled Aberdeen Officer David Cox. RP 7/6 493-398. He testified as follows during direct examination concerning the pistol Officer Capps seized:

Q. Okay. Detective, now, you were made aware at some point about that gun that Detective Capps had earlier testified about?

A. Yes.

Q. Okay. And were you aware of who he got it from?

A. Yes.

Q. Who made the decision to have that gun sent off to the crime lab with the bullet that you retrieved from the shooting scene?

A. I did.

Q. Why?

A. Because I know that they - that person and Mr. Galeana know each other.

MR. KARLSVIK [representing Defendant Daniel Galeana Ramirez]: Your Honor, I am going to object to that on foundation and

also from the hearsay.

THE COURT: Overruled.

Q. (BY MR. WALKER) Go ahead.

A. And given we didn't have any casings that were located at the crime scene, which led me to believe that it was more than likely a revolver that was used. For those reasons that was why I requested it be sent to the crime lab, along with the recovered bullet.

Q. Now, to your knowledge, was the case where Officer Capps received that bullet, did that have anything to do with the shooting case?

A. No.

RP 7/1 403-404.

Officer Capps went on to clarify that the person he associated with the defendant was Rigo Rivera, because his name, the defendant's name, and the co-defendant Alejandro Ramirez's name all appeared on the cell phone belonging to co-defendant Steven Russell, which was found at the scene of the robbery. RP 7/1 494-496. Just prior to recalling Officer Capps, the state called a forensic scientist who had tested a bullet found at the scene of the shooting. RP 7/1 464-492. He testified that the slug from the scene had been shot out of the .38 caliber pistol Officer Capps took from Josiah Rhoades, which Rigo Rivera was later charged with possessing.

In addition, during the testimony of Aberdeen Officer Green, the state elicited the fact that an officer had seen a white Ford Escort drive up to the

hospital and pick up the defendant and co-defendant Steven Russell after they dropped co-defendant Alejandro Ramirez off at the hospital. RP 6/30 159-160; RP 7/1 264. According to Officer Green he later saw a similar white Ford Escort parked at a house nearby. RP 7/1 264. At this point in Officer Green's direct examination, the following exchange took place between him and the prosecutor:

Q. So you saw the car there and later that day, did you have occasion to ref - to refer to that car and where you had seen it?

MR. BAUM: Objection as to form of the question.

THE COURT: That's - overruled.

A. Well, when I observed the car, I knew it was the same car that came up the hill that was associated with Daniel, it picked up Alejandro at the hospital. So I advised other officers that the car was parked at this location, at 113 North Alder Street, and other officers arrived at the location. And we kind of took perimeter around the house and Daniel was arrested at the house.

Q. Okay. So you were looking for him at that point?

A. Yes.

Q. Why?

A. We were advised that there was –

MR. BAUM: Objection. Hearsay.

MR. KARLSVIK: Objection. Hearsay.

MR. WALKER: Offer to prove why he did what he did and not for the truth.

THE COURT: Overruled.

Q. (BY MR. WALKER) Go ahead. Why were you looking for him?

A. Daniel Galeana Ramirez was - we were advised that he had - we had probable cause for his arrest for the shooting.

Q. Okay. So were you there when he was arrested?

A. Yes.

Q. Okay.

RP 7/1 264-265.

Although defendant's counsel as well as counsel for the two co-defendant's eventually objected to this evidence as hearsay, neither defendant's counsel nor the co-defendants' counsel objected that this evidence was irrelevant or that it constituted an inadmissible opinion on guilt.

RP 7/1 264-265.

Following the close of the state's case the defendant moved to strike the "great bodily harm" alternative from the first degree assault charge in Count I on the basis that it was not supported by substantial evidence. RP 7/6 504-505. The trial court denied the motion. *Id.* The court later instructed the jury on both alternative methods of committing the offense charged in Count I. CP 107-108. This instruction, No. 15, stated as follows in relevant part:

(1) That on or about October 25, 2015, the Defendant assaulted José Leiva-Aldana;

- (2) That the assault:
 - (a) Was committed with a firearm; or
 - (b) Resulted in the infliction of great bodily harm; and
- (3) That the Defendant acted with intent to inflict great bodily harm; and
- (4) That this act occurred in the State of Washington.

CP 107-108.

The defendant did not object to any other instructions. RP 7/7 576-577. Following instruction, the parties presented closing arguments, after which the jury retired for deliberation. RP 7/7 628-723. The jury eventually returned verdicts of guilty on both counts of first degree assault, as well as verdicts that the defendant had committed the offenses while armed with a firearm. RP 7/8 731-736. The jury also returned guilty verdicts on all charges against the co-defendants, although the jury did not find the firearm enhancements in the robbery and attempted robbery charges against the co-defendants. RP 7/8 737-747.

The court later sentenced the defendant to 116 months on each count on a range of 93 to 123 months, added a 60 month firearm enhancement to each crime for a total of 176 months on each count. RP 151-161. The court then ran the sentences consecutively under RCW 9.94A.589(1)(b) for a total sentence of 352 months. *Id.* The defendant thereafter filed timely notice of appeal. CP 169-170.

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT CAUSED “GREAT BODILY HARM” TO JOSE LEIVA-ALDANA AS CHARGED IN COUNT I.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3, and the 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.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d

549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant in Count I with first degree assault “CONTRARY TO RCW 9A.36.011(1)(a) and/or (c),” under an information that alleged the following:

That the said Defendant, Daniel Galeana Ramirez, in Grays Harbor County, Washington, on or about October 25, 2015, with intent to inflict great bodily harm, did assault another person, to wit: Jose R. Leiva-Aldana, with a firearm or by any force or means likely to produce great bodily harm, and/or did inflict great bodily harm. . .

CP 1.

Following the presentation of evidence in this case, the court, over defense objection, instructed the jury on both alternatives alleged, using the following language in part:

(1) That on or about October 25, 2015, the Defendant assaulted

José Leiva-Aldana;

(2) That the assault:

- (a) Was committed with a firearm; or
- (b) Resulted in the infliction of great bodily harm; and

(3) That the Defendant acted with intent to inflict great bodily harm; and

(4) That this act occurred in the State of Washington.

CP 107.

The defense had unsuccessfully objected to the “great bodily harm” alternative element as unsupported by substantial evidence. CP 504-501. In fact, the trial court erred when it overruled this objection. Although substantial evidence supports the conclusion that the defendant shot both Mr. Morales-Gamez and Mr. Leiva-Aldana, substantial evidence does not support the conclusion that they suffered “the infliction of great bodily harm” as that term is used in the assault statute. The following examines this argument.

The phrase “great bodily harm” as it is used in Washington assault statutes is defined under RCW 9A.04.110(4)(c), which states:

(c) “Great bodily harm” means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ;

RCW 9A.04.110(4)(c).

In this case there was no evidence in the record concerning the extent

of Mr. Leiva-Aldana's injuries other than the bare recitation that he was shot "in the abdomen." No witnesses, expert or other wise, claimed that the injury created a "probability of death," that it caused a "significant serious permanent disfigurement," or that it caused "a significant permanent loss or impairment of the function of any bodily part or organ." Neither was there any evidence in the record concerning how long Mr. Leiva-Aldana was in the hospital. For all the court can say Mr. Leiva-Aldana suffered a glancing gunshot wound that entered his abdomen at an angle and then exited without hitting muscle, internal organs, or major blood vessels, that he was treated in the emergency room, gave a statement to the police, and then was sent home. Thus, in this case, there is only speculation that Mr. Leiva-Aldana's gunshot wound caused him "great bodily harm."

It is true that there is substantial evidence to support the first alternative method of committing Count 1 in this case. Specifically, substantial evidence supports the conclusion that the defendant shot Mr. Leiva-Aldana. However, where a single offense may be committed by two or more means, and when both of those means are submitted to the jury, error occurs when substantial evidence does not support both alternative methods of committing the crime. *State v. Ortega-Martinez*, 124 Wn.2d 702, 881 P.2d 231 (1994). A conviction obtained under these circumstances must be reversed unless the state proves that the error was harmless. *State v.*

Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970).

In the case at bar the state cannot prove that the error was harmless. While the jury was certainly entitled to believe Mr. Leiva-Aldana's testimony that the defendant shot him, there were no other witnesses to make this claim. Mr. Leiva-Aldana did not state that he was acquainted with the defendant and at the time of the incident Mr. Leiva-Aldana had been up all day and all night, he had alcohol in his system, and he was suffering from the effects of an assault a few hours previous. In addition, the identification was made at night with poor lighting. Finally, as was pointed out on cross-examination, Mr. Leiva-Aldana's prior statements to the police contained a number of inconsistencies with his trial testimony, including that facts that he had originally claimed that three, not four people tried to rob him as he said during trial, that he had originally claimed that one of his attackers was blond whereas he denied this at trial, and that he had previously said that he had shared a 12 pack of beer before going to the bar, not a 6 pack as stated at trial. *See* RP 6/30 108-110, 125.

Given the foregoing inconsistencies in Mr. Leiva-Aldana's testimony, as well as the circumstances surrounding his questionable identification of the defendant, the state cannot prove that the trial court's error in instructing on an alternative method of committing the crime unsupported by substantial evidence was harmless. As a result, this court should reverse the defendant's

conviction on Count I and remand for a new trial.

II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT ALLOWED A POLICE OFFICER TO SPECULATE THAT THE FIREARM USED IN THE SHOOTING IN THIS CASE WAS ASSOCIATED WITH THE DEFENDANT VIA A THIRD-PARTY.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial both defense counsel and the prosecutor, as well as the witnesses, must refrain from any statements or conduct that express their personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a “substantial likelihood” that any such conduct, comment, or questioning has affected the jury’s verdict, then the defendant’s right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted to previously beating the defendant, but he denied having threatened to have

the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

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

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

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

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

Similarly in *State v. Yoakum, supra*, the defendant was charged with

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

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor that was never made part of the record. In setting out the law on this issue, the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936). The following examines that case.

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

It can at once be seen that these questions must have been

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

* * *

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

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

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

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

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

In the case at bar the trial court also erred when it allowed a police

officer to speculate that there was a connection between the defendant and the person later charged with illegal possession of a firearm the officer obtained from a third party. This evidence came in through Aberdeen Officer Capps and Aberdeen Officer Cox. The former officer testified that on November 10, 2015, over two weeks after the shooting in the case at bar, he had occasion to seize a .38 caliber revolver from a person by the name of Josiah Rhoades and that later a person by the name of Rigo Rivera was charged with illegally possessing that firearm. Following Officer Capps' testimony, Officer Cox gave the following testimony concerning that firearm:

Q. Okay. Detective, now, you were made aware at some point about that gun that Detective Capps had earlier testified about?

A. Yes.

Q. Okay. And were you aware of who he got it from?

A. Yes.

Q. Who made the decision to have that gun sent off to the crime lab with the bullet that you retrieved from the shooting scene?

A. I did.

Q. Why?

A. Because I know that they - that person and Mr. Galeana know each other.

MR. KARLSVIK [representing Defendant Daniel Galeana Ramirez]: Your Honor, I am going to object to that on foundation and also from the hearsay.

THE COURT: Overruled.

Q. (BY MR. WALKER) Go ahead.

A. And given we didn't have any casings that were located at the crime scene, which led me to believe that it was more than likely a revolver that was used. For those reasons that was why I requested it be sent to the crime lab, along with the recovered bullet.

Q. Now, to your knowledge, was the case where Officer Capps received that bullet, did that have anything to do with the shooting case?

A. No.

RP 7/1 403-404.

Officer Cox went on to clarify that the person he associated with the defendant was Rigo Rivera, because his name, the defendant's name, and the co-defendant Alejandro Ramirez's name all appeared on the cell phone belonging to co-defendant Steven Russell, which was found at the scene of the robbery. These state's witnesses attempted to associate the pistol that Officer Capps seized from Josiah Rhoades to the defendant via (1) a charge against a person by the name of Rigo Rivera for illegal possession of that firearm, and (2) the fact that both the defendant and Rigo Rivera's name appeared in cell phone logs of one of the co-defendants was pure speculation.

Put another way, the state's argument was as follows: (1) a little over two weeks after the shooting, Officer Capps seized the gun used in the shooting from Josiah Rhoades, (2) the Prosecutor later charged a person by

the name of Rigo Rivera with illegal possession of that firearm, (3) the name Rigo Rivera as well as the defendant's name appeared on the cell phone logs of a co-defendant, therefore (4) the defendant must have used the gun to shoot the two victims, and then given it to Rigo Rivera. The problem is that the conclusion does not follow from the stated facts. Thus, the trial court in this case erred when it allowed the state to present this evidence.

As was mentioned in the preceding argument, the critical evidence against the defendant was Mr. Leiva-Aldana's testimony that the defendant was the one who shot him and Mr. Morales-Gamez. However, as was also pointed out in the preceding argument, this testimony was anything but overwhelming, given the surrounding facts and Mr. Leiva-Aldana's inconsistencies. As a result, the error in this case in allowing Officer Capps and Officer Cox to speculate that the firearm used in the shooting was associated with the defendant denied the defendant a fair trial. Consequently, this court should reverse the defendant's convictions and remand for a new trial.

III. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE INTRODUCED IRRELEVANT EVIDENCE THAT IMPLIED THAT A POLICE OFFICER BELIEVED THAT THE DEFENDANT WAS GUILTY DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal

prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

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

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state elicited irrelevant, prejudicial evidence that a police officer believed he had probable cause to arrest the defendant and that he and other officers have arrested the defendant. The following sets out this argument.

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.

In the case at bar, the state similarly presented opinion testimony when it called police officers to testify that they had surrounded a house where they believed the defendant was present, that they had probable cause to arrest him, and that they found the defendant in the house and arrested him. In making this argument it should first be pointed out that this evidence concerning probable cause to arrest and concerning the arrest itself did not

meet the test for relevance.

Under ER 401, “relevant evidence means 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.” Under ER 402, “all relevant evidence is admissible” with certain limitations. By contrast, under this same rule “[e]vidence which is not relevant is not admissible.” Thus, before testimony can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the “existence of any fact” as that term is used in these two rules cannot rest upon guess, speculation, or conjecture. *State v. Golladay, supra*.

For example, in *State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986), the defendant was charged with two counts of robbery, and he offered a diminished capacity defense, arguing that his voluntary drug usage prevented him from forming the requisite intent to commit the crime. During trial, he attempted to call a jail nurse as a lay witness to testify concerning her personal observations of the defendant following his arrest. However, the court excluded this witness and the defendant was convicted. The defendant then appealed, arguing that the trial court denied him a fair trial when it excluded his proposed witness.

In addressing the defendant’s arguments, the court first noted that lay

witnesses may testify concerning the mental capacity of a defendant so long as the witness' opinion is based on facts the witness personally observed. The court then noted that the trial court did not abuse its discretion when it excluded the defendant's proposed witness because she did not meet these criteria as she had never observed the defendant when it was abusing drugs.

As the following points out, the testimony concerning probable cause and the fact of the arrest in no way made a fact at issue before the jury at least slightly more or less likely. Thus, it was not admissible because it was not "relevant." If it was not relevant, then one is left to ask why the state would offer it. The answer lies in the fact that a reasonable juror could well infer from it that the officers involved had formed an opinion that the defendant was guilty of the crimes charged. In *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), although a civil case, the court recognized just such a tendency. In that case the plaintiff sued the defendant for injuries that occurred when the defendant's vehicle hit the plaintiff's vehicle. Following a non-favorable 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 of Appeals agreed and granted a new trial, stating as follows:

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.

Once again, in this case one is left to ask the following question: what was the relevance of the fact that an officer believed he had probable cause to arrest the defendant, that he and other officers then surrounded a house where they believed the defendant was present, and that they then arrested the defendant when they found him in the house? Put another way, what fact at issue at trial was made more or less likely from the facts that the officer believed he had probable cause to arrest the defendant, that he believed the defendant was in a house, that he and other officers then surrounded the house and arrested the defendant? The answer is that the only relevance in this evidence lies in the inference that the officers believed the defendant guilty. However, as was set out above, eliciting and arguing this evidence

violates the defendant's right to a fair trial.

No possible tactical advantage exists for the defense failing to object to this evidence which is both irrelevant and prejudicial to the defense. Consequently, the failure to object fell below the standard of a reasonably prudent attorney. In addition as was set out in the previous argument, the state's case against the defendant was equivocal at best. Thus, it is more than likely that the admission of these improper facts changed what would have been a verdict of acquittal into a verdict of conviction. Consequently, trial counsel's failure to object to this irrelevant and prejudicial evidence caused prejudice and violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, thereby entitling him to a new trial.

IV. THIS COURT SHOULD EXERCISE ITS DISCRETION AND REFRAIN FROM IMPOSING COSTS ON APPEAL SHOULD THE STATE PREVAIL BECAUSE THE DEFENDANT DOES NOT HAVE THE PRESENT OR FUTURE ABILITY TO PAY LEGAL-FINANCIAL OBLIGATIONS.

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal.

State v. Sinclair, supra. In the case at bar the trial court found the defendant indigent and entitled to the appointment of counsel at the original trial and for the purposes of this appeal. CP 4-5, 165-168, 169-170. In the same matter this Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. In *State v. Nolan, supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of

appellate costs. Subsection one of this statute states: “[t]he court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs.” (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing “cannot displace the court’s obligation to exercise discretion when properly requested to do so.” *Supra*.

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant’s ability to pay, as remand to the trial court not only “delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties.” *State v. Sinclair*, 192 Wn. App. at 388. Thus, “it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief.” *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a

criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair, supra*. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, “[i]t is entirely appropriate for an appellate court to be mindful of these concerns.” *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis*, to have appointment of counsel, and to have the preparation of the necessary record, all at State expense upon its findings that the defendant was “unable by reason of poverty to pay for any of the expenses of appellate review” and that the defendant “cannot contribute anything toward the costs of appellate review.” *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant’s indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. In fact, the defendant’s Motion for Order of Indigency reveals that he has no money or assets and that he is currently serving two

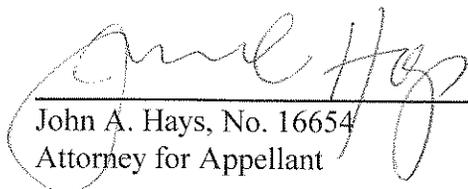
consecutive sentences on serious violent offenses for a total of 352 months (over 29 years) of which 120 months constitutes firearms enhancements. CP 151-161. Given these facts it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

CONCLUSION

This court should vacate the defendant's convictions and remand for a new trial based upon (1) the trial court's error in instructing the jury on an alternative method of committing the crime charged in Count I when that alternative was not supported by substantial evidence, (2) the trial court's error in failing to sustain an objection when the state elicited speculative evidence from a states witnesses, and (3) trial counsel's failure to object when the state elicited improper, irrelevant opinion evidence on the guilt. In the alternative this court should refrain from imposing costs on appeal because the defendant does not have the present or future ability to pay.

DATED this 30th day of May, 2017.

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 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 WASHINGTON, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL GALEANA RAMIREZ,

Appellant.

NO. 49245-8-II

**AFFIRMATION
OF SERVICE**

The under signed states under penalty of perjury under the laws of Washington State that on the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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June 15, 2017 - 1:08 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49245-8
Appellate Court Case Title: State of Washington, Respondent v. Daniel Ramirez, Alejandro Ramirez, and Steven Russell, Appellants
Superior Court Case Number: 15-1-00467-3

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