

FILED

AUG 24 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 331105-III

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

STATE OF WASHINGTON, Plaintiff/Respondent,

Vs.

CORBIN BIRD, Defendant/Appellant.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

This is a case that involves a criminal conviction that has more to do with an emotional response to a racially charged word than it does to the actual evidence and law.

Appellant Corbin Bird, a juvenile, appeals the trial court's judgment convicting him, as an accomplice, of second degree criminal trespass for allegedly encouraging two juveniles to knock on the front door of an African-American man, Melvin Harris, yell the word "nigger", and run away. The trial court determined that the use of a racial comment transformed the conduct into a criminal trespass.

The trial court erred in finding Mr. Bird guilty, because there is insufficient evidence to conclude beyond a reasonable doubt that a criminal trespass ever occurred. Mr. Harris' door was open to the public, no "no trespassing" signs were posted on the premises, and Mr. Harris had never requested that the youths refrain from entering his property. In finding Mr. Bird guilty, the trial court essentially created a new crime by adding a racial

language element. However ill-advised the youths' actions may have been, they were not criminal.

Mr. Bird also appeals the trial court's order denying a motion to recuse Judge Federspiel. The record establishes substantial evidence reasonably questioning Judge Federspiel's impartiality. At a minimum, Judge Federspiel should have granted the motion to avoid the appearance of impropriety.

Accordingly, the Court should reverse the order of the trial court and vacate the Findings and Fact and Conclusions of Law and Disposition. If it decides not to reverse the judgment, it should grant the motion for recusal and remand for a new trial.

II. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove the essential elements of trespass in the second degree.
2. The trial court erred in convicting Appellant as an accomplice to trespass in the second degree.
3. The trial court erred in entering the January 14, 2015 *Disposition Order* and *Findings of Fact and Conclusions of Law*.

4. The record does not support Finding of Fact No. 1.3.
5. The record does not support Finding of Fact No. 1.6 and 1.7.
6. The record does not support Finding of Fact No. 1.10, 1.11, and 1.12.
7. The record does not support Finding of Fact No. 1.13 and 1.14.
8. The trial court judge erred in denying the October 21, 2014 motion for recusal.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Can a trespass occur when the premises are open to the public and no “no trespassing” signs are posted?
- B. Does the utterance of a racial comment transform an otherwise lawful activity into a trespass in the absence of a “true threat?”
- C. Should a judge recuse himself from presiding when he admits he has personal feelings about the case?

IV. STATEMENT OF CASE

A. Procedural Facts

This prosecution arose from charges that Corbin Bird, a juvenile, was an accomplice to a criminal trespass in the second degree. The testimony established the following facts:

On June 1, 2013, Melvin Harris, an African-American man, was watching television at home with his wife and daughter in Yakima, Washington. (RP 125-26).¹ He heard an unknown person ring his front doorbell and then he heard someone yell, “You fucking Nigger, Go back to Africa!” (RP 126).

Mr. Harris at first was scared but then he was mad. (RP 126). He got up and walked outside. He never ran outside. (Id.). He saw two kids running away from his house: Mr. Wright and Mr. Conner. (CP 262).² He did not claim Corbin Bird was

¹ Unless otherwise noted, all references to the “RP” are to the December 15, 2014 Report of Proceedings.

² At trial, he later changed his testimony and testified that he saw three youths, two of them later identified as Payton Connor and Jordan Wright, jumping a fence across the street. (RP 127, 129-30). Mr. Harris testified that he contacted several youths after the incident, including Payton Connor, Jordan Wright, and Corbin Bird, and he noted that Corbin Bird was wearing similar clothing to the third person he could not identify he had seen running across the street after the incident. (RP 177).

present. (CP 262). Mr. Harris subsequently contacted law enforcement to report the incident. (CP 262-263).

Mr. Harris did not have any “no trespassing” signs posted on or around his property. (RP 132). His driveway, walkway, and front door were open to the public. (RP 179). There was no gate restricting access to the front door. (RP 179). There was no evidence presented at trial that he ever warned any of the youths to stay off his property. There is no evidence at trial that Mr. Bird actually entered onto Mr. Harris’ property or that he made the racial comment.

Mr. Conner and Mr. Wright were later charged with Criminal Trespass in the Second Degree. (CP 254).

On May 22, 2014, over 11 months after the alleged incident, the State charged Mr. Bird by Information with one count of Second Degree Criminal Trespass, his first offense. (CP 266). The basis of the charge was that Mr. Bird encouraged Mr. Conner and Mr. Wright to knock on Mr. Harris’ door and

yell the racial comment. (CP 254). Thus, the sole basis was accomplice liability.

B. Trial

The case went to trial on December 14, 2014. The State's witness, Payton Connor, testified that, on the day in question, he, Mr. Wright, Mr. Bird, and five other youths were socializing together near Mr. Harris' house. (RP 188-189). He testified that Mr. Bird had suggested "ding dong ditching the house" without expressly identifying to whom the house belonged. (RP 190). At first, Mr. Connor and Mr. Wright did not do it, but then all of the youths present kept nagging them to do it. (RP 191). Mr. Connor testified that Corbin Bird "brought up saying the 'N word'", but nothing specific beyond that. (RP 191, 205).

Mr. Connor and Mr. Wright then went to Mr. Harris' house. They hesitated several times: on the third try, they ran up to the front door and rang the doorbell and Mr. Wright yelled "Fucking Nigger" as the two ran from the house. (RP 191-92).

Corbin Bird was not present at Mr. Harris' house. (RP 193-94, 196).

Mr. Connor testified that he had no intention of yelling any racial comments, and did not actually expect Mr. Wright to yell any racial comments either. (RP 198-99, 201). He also did not even know that Mr. Wright was going to ring the doorbell until he actually touched the doorbell. (RP 198).

Critically, Mr. Connor testified that the racial comment was not intended to be used in a hateful or threatening way because it was more of a joke than a racial issue. (RP 202-03). He did not expect the racial comment or the action of ringing Mr. Harris' doorbell and running to excite any type of reaction other than annoyance. (RP 203-204). He expected that Mr. Harris "wouldn't think anything of it. He would just come outside, see nothing there and walk back inside. And that would be the end of everything." (RP 204).

Further, he testified that no one — including Mr. Bird — suggested that he or Mr. Wright use the term “fucking nigger” or “fucking nigger, go back to Africa.” (RP 205).

Jeff Britz was one of the eight youths who had been with Mr. Connor and Mr. Wright before they went to Mr. Harris’ house. He testified that Mr. Bird introduced the idea of ringing Mr. Harris’ doorbell and running and then everyone agreed. (RP 211-12). Mr. Britz did not hear any discussion regarding the “N word.” (RP 214).

Another one of the eight youths, Elijah Jackson, testified that Mr. Bird had never suggested that anyone ring Mr. Harris’s doorbell or call him a “nigger.” (RP 223).

Mr. Wright testified that Mr. Bird dared him and Mr. Connor to ring the doorbell but did not talk about saying the “N word.” (RP 261, 271). Mr. Wright never felt pressured or influenced by Mr. Bird to perform the act at issue. (RP 275). Mr. Wright testified that he was the one who made the racial

comment after ringing the doorbell while he was running away from the house. (RP 262).

The trial court found Mr. Bird guilty of second degree trespass, finding that the use of the racial comment by Mr. Wright exceeded the “scope of the license of this easement on the sidewalk leading up through a gated yard into the front porch of Mr. and Mrs. Harris’ home.” (RP 316). The trial court held that it was the act of yelling the comment that transformed the activity into a crime. (RP 316). Dismissing the defense witnesses, the trial court only found Payton Conner credible, even though he admitted at trial that he had lied about his involvement. (RP 200, 205-206, CP 31, 36).

The trial court entered Findings of Fact and Conclusions of Law on January 14, 2015. (CP 12-20). Curiously, Judge Federspiel did not use the findings proposed by the parties; instead, he drafted his own findings. He found that the act in question was racially motivated. Finding of Fact No. 1.3 states:

Corbin Bird walked with them from the creek across the sports field and specifically pointed out Mr. Harris' home for the boys to target. Corbin Bird knew Mr. Harris, knew he was African American, knew where he lived, and directed the boys to target and "ding dong ditch" Mr. Harris' home.

(CP 14).

Judge Federspiel made several findings directly contrary to the testimony at trial. Finding of Fact No. 1.6 states that Mr. Harris had run from the house:

1.6 Mr. Harris ran out the front door and into the street in front of their home to attempt to see who had shouted the racial slur

(CP 16).

Findings of Fact No. 1.7 and 11.4 state that Mr. Harris' front door was not open to the public and that his property was gated:

1.7 Mr. Harris' front yard is completely fenced. Mr. Harris' mailbox is located across the street and not within their [sic] front yard. There is a driveway from the street to their [sic] garage. There is an entrance gate adjacent to the home and, inside the gate there is a private sidewalk (within the fenced yard) leading from there to the front porch and their [sic] front door

1.14 The property was not posted with “no trespassing” signs, however the front doorway was not a public area and was not open to the public for the purpose of ringing the doorbell and running away while yelling offensive language which could be heard by persons inside the private residence.

(CP 16, 18).

The trial court also entered a Disposition Order the same day. (CP 6).

On January 28, 2015, Mr. Bird filed a timely notice of appeal. (CP 4).

C. Facts Relating to Failure to Recuse

In September, 2014, Mr. Bird was offered a diversion by the Yakima County probation department. Mr. Bird’s attorney communicated Mr. Bird’s acceptance of the diversion to the prosecuting attorney, David Soukup, on September 23, 2014. (CP 200). Despite having no factual or legal basis to do so, Mr. Soukup stated he would object to the diversion. (CP 187, 200).

On September 29, 2014, Mr. Bird filed a motion to compel a diversion, noting that the prosecuting attorney has no legal right or standing under RCW 13.40.070 to object to a diversion and that the law required the prosecutor to divert the case. (CP 199). Again, despite lacking any legal basis or authority, Mr. Soukup objected on October 10, 2014, stating that he had spoken to the probation department and attempted to convince it to change its position. (CP 190). He specifically noted that the probation department did not change its position. (CP 193).

The hearing on the motion occurred on October 13, 2014. Despite unopposed evidence to the contrary and the State's admission that a diversion had been offered, the juvenile court found that no diversion had in fact been offered and ordered the probation department to reissue an opinion. (10/13/14 RP 35-38, 52).

During the hearing, Judge Federspiel made several comments about the case that reflected a lack of partiality and potential, if not actual, bias against Mr. Bird. For example, he

refused to accept that a diversion had been offered despite uncontested evidence.

Second, Judge Federspiel at several points indicated he had personal opinions relating to the case, which demonstrated his impartiality. When discussing the diversion, he stated: “Regardless of how I feel about the case, do I have discretion to override the decision of the diversionary unit?” (10/13/14 RP 49). Again, discussing whether a diversion was appropriate, he expressed that he has his own personal opinions about the case: “Well, I--I have my personal thoughts about this case” (10/13/14 RP 50). Finally, he seemed to state his displeasure that a diversion might be entered:

Well, this process was butchered the whole way through I am denying the motion to demand that it be deferred [sic]. What has to happen is this has to be referred to the diversionary unit. The diversionary unit gets to make a decision. And that decision is within their [sic] discretion, granted by our state’s legislature. **Do I like it? No.** but I am bound to follow the law of the legislature.

(10/13/14 RP 51) (emphasis added).

As a result, Mr. Bird filed a motion for recusal on October 20, 2014. (CP 267). The hearing occurred on October 27, 2014. (See 10/13/14 RP). Judge Federspiel denied the motion. (10/27/14 RP 71).

V. **ARGUMENT**

A. DUE PROCESS REQUIRES THE STATE TO PROVIDE EVIDENCE OF A CRIMINAL OFFENSE BEYOND A REASONABLE DOUBT

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 796 (1995). A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980).

B. THE JUVENILE COURT ERRED IN CONVICTING MR. BIRD BECAUSE THE FACTS AND LAW ARE INSUFFICIENT TO SUPPORT THE CHARGES

The State charged Mr. Bird with being an accomplice to Second Degree Criminal Trespass. The crime of trespass in the second degree, as prosecuted by the State, required the State to prove that Mr. Bird “knowingly enter[ed] or remain[ed] unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.” RCW 9A.52.080(1).

The State’s theory relied completely on accomplice liability. A person is legally responsible for another’s actions 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.

RCW 9A.080.020(3).

The trial court erred in finding that the State met its burden of proof because, even viewed in the light most favorable to the State, insufficient evidence was provided to establish the essential elements of trespass.

1. The State Did Not Prove A Trespass Occurred

RCW 9A.52.090(2) provides a defense to the charge of criminal trespass as long as “[t]he premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises.” The State bears the burden to prove the absence of the defense beyond a reasonable doubt. State v. R.H., 86 Wn. App. 807, 8, 12, 939 P.2d 217 (1997). A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon premises of another. (“The defense therefore negates an element of the crime, and cannot be deemed an affirmative defense because to do so would relieve the State of its burden of proof.”). See also State v. Finley, 97 Wn. App. 129, 138, 982 P.2d 681 (1999).

It was undisputed at trial that Mr. Harris' front door was open to members of the public. Mr. Harris testified there was no gate or any "no trespassing" signs posted on the property. This is a critical fact. It is well-settled law that a person's front door is impliedly open to members of the public. See, e.g., State v. Hoke, 72 Wn. App. 869, 866 P.2d 670 (1994); State v. Ferro, 64 Wn. App. 181, 824 P.2d 500 (1992). Ringing someone's doorbell and running away is not a crime, and no case was cited to the trial court supporting that conclusion. Thus, no trespass actually occurred.

2. A Racial Comment Does Not Transform An Otherwise Legal Activity into A Trespass

The State's theory at trial, and the juvenile court's ruling, was that the use of the racial comment by Mr. Wright while he was allegedly on Mr. Harris' property exceeded any implied license to be on the property and transformed an otherwise unlawful activity into a crime. Thus, in finding Mr. Bird guilty, the juvenile court essentially created a new crime by adding a

speech element. The juvenile court's decision was error for at least three reasons.

a. Mr. Connor and Mr. Wright Had No Notice Their Conduct Would Constitute A Crime

First, there is no evidence of any explicit ban on the language communicated to the two juveniles by Mr. Harris. Thus, they did not have notice that they were not allowed to approach the door and there was no barrier in their way to approach the area (*e.g.*, a gate).

In order for the comment to be criminalized in this setting, there must be adequate and explicit notice to the youths that such speech would amount to an unlawful condition of being on the property which was not done in this case. Due process requires a person have notice that an act is unlawful before the State may charge that person with a crime for doing the forbidden act. The law prohibits the State from criminally punishing a person for violating a vague law because it is unfair to make a person guess

at whether an act is a crime. If the government wishes to prohibit an action, it must provide clear notice of prohibition:

No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law . . .

Lanzetta v. State of N.J., 306 U.S. 451, 453, 59 S.Ct. 618 (1939) (citations omitted).

The prohibition against vague statutes and the demand for clear language is strongest when the law threatens to inhibit the exercise of other constitutionally protected rights, specifically First Amendment liberties. Smith v. Goguen, 415 U.S. 566, 573 (1974); Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

The law cannot assume that the public has an automatic notice of trespass upon utterance of certain phrases or upon certain actions that may be offensive to some but not others. For

example, if the Ku Klux Klan was soliciting donations and membership door to door, would it constitute criminal trespass if the homeowner was offended by such actions? What would be a harmless solicitation to one house would be a criminal action on the next home. Likewise, is a Jehovah's Witness guilty of criminal trespass for ringing an atheist's door and claiming God exists? The law does not criminalize behavior simply because it can be deemed offensive to certain groups.

The State did not meet its burden in showing that the juveniles knew that their presence on the property was forbidden. Thus, they could not have "knowingly" trespassed onto Mr. Harris' property.

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b. The Law Does Not Criminalize Racial Comments Except When Accompanied by “True Threats”

Second, contrary to the juvenile court’s suggestion, yelling a racial comment is, by itself, not unprotected speech or a crime.³ (RP 315). Washington only criminalizes racially motivated conduct and speech when it causes physical injury or is accompanied by a “true threat” of violence. See RCW 9A.36.080; State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004) (the only speech the law criminalizes is true threats, not offensive comments that do not contain threats . . .”). The Legislature has chosen not to criminalize racially motivated speech outside of very limited categories.

A “true threat” is defined as “a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious

³ Indeed, it *is* protected speech. See State v. Talley, 122 Wn.2d 192, 858 P.2d 217 (1993) (racial speech, “[h]owever objectionable . . . is protected by article 1, section 5 of the Washington Constitution and the first and fourteenth amendments to the United States Constitution.”). A ruling which assumes that racial speech would automatically be an unlawful condition would be completely expanding the criminal trespass statute and impeding on a person’s right to free speech.

expression of intention to inflict bodily harm upon or to take the life of another person.” State v. Schaler, 169 Wn.2d 274, 283, 236 P.3d 858 (2010).

The United States Supreme Court held the Constitution does not protect “fighting words,” defined as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Chaplinsky v. N.H., 315 U.S. 568, 572, 62 S.Ct. 766 (1942) (emphasis added.) “Fighting words” are excluded from the protections of the First Amendment because they form “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Id. at 572.

While racial comments, including “nigger,” may be considered “fighting words,” Id. at 572, there is a large caveat. “The potential to elicit an immediate violent response exists only where the communication occurs face-to-face or in close physical proximity.” City of Billings v. Nelson, 374 Mont. 444,

449, 322 P.3d 1039 (2014). Thus, “[t]elephone communications are not included within the fighting words doctrine, because there is no possibility the listener will react with immediate violence against the speaker.” Id.

“Unless there is personally abusive language which is likely to lead to imminent retaliation in a face-to-face encounter, words cannot be proscribed under *Chaplinsky*’s fighting words approach.” City of Seattle v. Camby, 38 Wn. App. 462, 466, 685 P.2d 665 (1984) rev’d, 104 Wn.2d 49, 701 P.2d 499 (1985).

Importantly, there was no evidence or testimony presented that the racial comment was accompanied by anything remotely resembling a “true threat” nor was that accusation ever leveled at Mr. Bird. In addition, no evidence exists that shows an immediate threat to Mr. Harris or his family. Mr. Harris testified he was inside the house. He was not face to face with Mr. Wright or Mr. Conner when Mr. Wright yelled the comment. He did not even see the juvenile’s faces as they were running away. Moreover, he did not even run from the house—as the trial court

erroneously found. He walked out of the house. That is hardly the action of someone faced with an immediate breach of the peace.

Given the specific context in which the words were spoken, it was unlikely that a breach of the peace would occur, and therefore the trial court's reliance on the fighting words doctrine was erroneous at best. See City of Seattle v. Camby, 104 Wn.2d 49, 54, 701 P.2d 499 (1985) (no fighting words). Neither the State nor the trial court cited a case suggesting the use of the word "nigger" under the present circumstances would constitute fighting words, or that this would create an exception to the "true threat" requirement under RCW 9A.36.080. If that were true, the Legislature would have included a "presence on the property of another" element rather than requiring a "true threat" before criminalizing racial speech. This is something the Legislature did not criminalize.

As unsettling as one may find racial comments, their mere use does not transform an otherwise legal activity into a crime.

They are still protected under the First Amendment, and therefore lawful speech entitled to constitutional protections. See State v. Talley, 122 Wn.2d 192, 858 P.2d 217 1993) (racial speech, “[h]owever objectionable . . . is protected by article 1, section 5 of the Washington Constitution and the first and fourteenth amendments to the United States Constitution.”).

In short, the trial court incorrectly found that the use of a racial comment is unprotected speech and rendered the juveniles’ otherwise lawful presence a trespass because they tend to incite violence. (RP 252-253). This ruling, which assumes that racial speech would automatically be an unlawful condition, completely expands the criminal trespass statute, ignores the limitations of RCW 9A.36.080, and impedes on a person’s right to free speech.

c. There Is No Evidence Mr. Wright Made the Comment While Remaining on the Premises

Third, even if this Court was to believe that, upon utterance of a racial comment, a person’s lawful presence upon a private

owner's property is automatically revoked, there was no evidence that the racial comment was actually made while Mr. Wright and Mr. Conner were "enter[ing] or remain[ing] unlawfully" on Mr. Harris' property. RCW 9A.52.080(1). It is clear from the trial testimony that the two juveniles were not in fact "enter[ing] or remain[ing]" upon Mr. Harris' premises at that time. The testimony was that the two juveniles were running from (i.e., not entering and not remaining) the property. (RP 261-262). Thus, there is insufficient evidence to find them guilty of criminal trespass. See RCW 9A.52.080(1).

In short, Mr. Connor and Mr. Wright did not commit the crime of second degree criminal trespass when they went to Mr. Harris' door, rang the doorbell, and yelled a racial comment, and therefor Mr. Bird was not an accomplice. It was error for the juvenile court to find him guilty.

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C. THE JUVENILE COURT JUDGE'S REFUSAL TO RECUSE HIMSELF WAS AN ABUSE OF DISCRETION

The juvenile court judge also erred in denying the motion for recusal. Judge Federspiel abused his discretion when he failed to recuse himself after Mr. Bird presented substantial evidence questioning his partiality. The trial court judge's failure taints the entire trial process and mandates reversal of the trial court judgment.

An impartial, unbiased judge is a critical part of our judicial system. It is well established that "Due process, the appearance of fairness, and Canon 3(D)(1) of the Code of Judicial Conduct require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned." Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wn. App. 836, 841, 14 P.3d 877 (2000). Proof of actual bias is not required: "Evidence of a judge's actual or potential bias is required before the appearance of fairness doctrine will be applied." State v. Dominguez, 81 Wn. App. 325, 329, 914 P.2d

141 (1996)(emphasis added). “The test is whether a reasonably prudent and disinterested observer would conclude . . . [Mr. Bird] obtained a fair, impartial, and neutral trial.” Id. at 330.

Washington cases have long recognized that judges must recuse themselves when the facts suggest that they are actually or potentially biased. See Diimmel v. Campbell, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966) (“It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties.”).

In State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 548, 202 P.2d 927 (1949), the Supreme Court stated “[t]here can be no question but that the common law and the Federal and our state constitution guarantee to a defendant a trial before an impartial tribunal, be it judge or jury.” It quoted its decision in State ex rel. Barnard v. Board of Education for its observation that “[t]he principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts.” Id. at 549 (quoting State

ex. rel. Barnard v. Bd. of Educ., 19 Wash. 8, 17, 52 P. 317 (1898)); Tatham v. Rogers, 170 Wn. App. 76, 93, 283 P.3d 583, 593 (2012).

In the present case, Mr. Bird presented evidence of potential, if not actual, bias against Judge Federspiel. Judge Federspiel made multiple comments on the record that demonstrated personal feelings about this case and a lack of appearance of fairness which allowed one to reasonably question his impartiality in this case. The fact that Judge Federspiel admitted he had personal feelings and thoughts about the case, that it is “emotional”, (10/13/14 RP 51), and the fact the he suggested that he did not like the fact that the case might be diverted indicates a personal bias, lack of an appearance of fairness, and a lack of impartiality.

Our state constitution guarantees to a defendant a trial before an impartial tribunal. Judge Federspiel should have recused himself to avoid the suspicion of partiality. His failure to do so in was an abuse of discretion.

VI. CONCLUSION

The Court should overturn the findings of fact and disposition entered by the trial court and reverse the conviction. The Court should also reverse the decision of the trial court denying the motion for recusal.

Respectfully submitted this 20th day of August, 2015.


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CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the state of Washington that the undersigned sent to the attorneys of record a copy of this document addressed to the following:

For Plaintiff: Mr. David Trefry Yakima County Prosecuting Attorney's Office Appellate Division P.O. Box 4846 Spokane, WA 99220	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via fax <input checked="" type="checkbox"/> via e-mail <input type="checkbox"/> via hand delivery
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Executed this 20th day of August, 2015, at Yakima, Washington.


DEANNA M. BOSS