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Court of Appeals
Division III
State of Washington

NO. 33110-5--III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CORBIN BIRD,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. Was there sufficient evidence to convict Appellant of criminal trespass?
2. Did the trial court err when it convicted Appellant of criminal trespass as an accomplice?
3. Did the trial commit err when it entered the Disposition Order and Findings of Fact and Conclusions of Law?
4. The record does not support Findings of Fact -1.3, 1.6, 1.7, 1.10, 1.11, 1.12, 1.13, and 1.14.
5. The court erred when it denied Appellant's motion for recusal.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was sufficient evidence to convict Appellant of criminal trespass as an accomplice.
2. The findings are supported by the record.
3. The trial court committed no error when it entered the Disposition Order and the Finding of Fact and Conclusions of Law. .
4. The discretionary ruling by the trial court regarding recusal was not a violation of discretion by that court.

II. STATEMENT OF THE CASE

It should be noted that during his closing argument Bird referred to and indicted to the trial court that it could consider the probable cause affidavit. Therefore that series of statements and reports is now a portion of the record that was before the trial court when it made it final decision

regarding the guilt of Bird. That affidavit contains information regarding additional acts against the Harris family. RP 294, CP 250-264

The victims Melvin and Trina Harris were sitting at home watching television on June 1, 2013. Mr. Harris is an African-American, his race is listed as “b” for black in the probable cause affidavit. RP 184, 206, 212, 317, CP 250-64. (Jeff Britz testified that everyone knew that Mr. Harris was an African-American. RP 212) It was a warm summer day and the Harris’ had a window open. RP 126-7. According to both of the Harris’ they were both startled when someone rang their doorbell and yelled loudly “Fucking nigger, go back to Africa.” Other witnesses stated that what was yelled was “fucking nigger” RP 121, 126, 192, 198. The person, defendant Jordan Wright, the person who actually rang the doorbell and ran testified for Bird stating that he yelled “fucking nigger.” RP 262 Mrs. Harris testified “[i]t was right at the –the doorbell rang and then it was yelled right at them. It seemed like the same time.” RP 122

Mrs. Harris stated she felt scared...and then nervous and emotional. She further stated that when the person yelled Fucking nigger, go back to Africa her husband dropped his drink. RP 122 Mr. Harris testified that “[i]t scared the hell out of me...It was loud...first I was scared then I was pissed.” RP 127 Mr. Harris initially noticed that two people running away, one was blond the other had dark hair. One was wearing a

red hat. 127, 131, 136, 141-2, 155-6. When Mr. Harris went outside he observed a third individual running away from his residence. RP 136

Mr. Harris was able to later make contact with two of the people who fled from his home, he identified them as “Jordan and Payton.” RP 127, 136

Mr. Harris had previously installed security cameras due to previous harassment, there was a sign up indicating that there were surveillance cameras operating. RP 130, 134-5 Mr. Harris supplied the police with a copy of the video that captured the actions of the two people who ran up to his front door and yelled “fuck you nigger.” There was extensive testimony regarding what Mr. Harris was able to observe when he reviewed the video from those cameras. This video was played for the trial court and Mr. Harris testified regarding various portions of the video surveillance recording. This was admitted as Exhibit 8 and is a portion of the record in this court. RP 137-144, 147-50, 153-56, 157-60, 161-63, 165-67

From that video Mr. Harris was able to identify that the two individuals did not immediately come to his door, ring the bell, yell the racial slur and run. They had in fact crossed in front of his home on more than one occasion and could be seen loitering in camera range for a period of time prior their actual entry onto his property. RP 137-144, 147-50, 153-56, 157-60, 161-63, 165-67

Payton Conner subsequently agreed to a diversion of his criminal charge, did community service, wrote an essay regarding his actions and a letter of apology to Mr. Harris. RP 186-7, The other person charged Jordan Wright was convicted and testified as a witness for Corbin Bird. RP 258-79.

After Mr. Harris walked outside and observed the three individuals running away from his home he asked two other young people if they knew who the individuals were who had ran onto and away from his home. He was able to ascertain names and possible locations where they lived. RP 144-7, 168 Mr. Harris got his keys and drove his truck to a location that he believed would allow him to intercept the fleeing trespassers. RP 168

Mr. Harris eventually confronted several young men and their parents. Mr. Maxwell, trial counsel for Bird was called and was also present at that initial confrontation. RP 107-9, 170-1. Mr. Harris was able to identify from his observations the two who trespassed onto his property as Payton Conner, he was identified as the person who was wearing the red hat at the time he trespassed onto Mr. Harris' property and Jordan Wright RP 169-70, 174-5. He gave Payton Conner the choice of calling his mother or Mr. Harris would call the police. Eventually Mr. Harris called 911. RP 170-1 This location was near Corbin Birds home.

Mr. Harris testified that he initially encountered “Payton, Jeff, Corbin and two girls” who were walking from the creek area. RP 182. Defendant Bird eventually came out and stated “You don’t have to talk to his fucking ass. I got your fucking attorney on the phone now. Shut up and don t say nothing.” RP 171. Mr. Harris testified that “by that time John and Cat showed up, which is Corbin’s mom and John is his counsel.” Bird’s mother stated to Mr. Harris “Why do you have your big black ass in my neighborhood.” RP 184 Mr. Harris had conversations with both Payton Connor and Jordan Wright’s parents. RP 174-5,184

During part of the confrontation near Bird’s home Payton Conner stated that he had gone to the Harris residence to “sell Ram tickets.” He later testified that this was in fact a lie. RP 183, 200. Mr. Harris testified that Jordan Wright specifically stated to him during this initial conversation between Mr. Harris, Jordan and his parents that he had not gone to the Harris home to sell any Ram tickets. RP 184-5 Mr. Harris testified that Jordan’s parents followed him to the Harris residence and apologized to Mrs. Harris for the actions of their son. RP 185.

Payton Conner testified that he has accepted responsibility for his actions in this case and had had him matter diverted. RP 186-7 Payton testified that he and numerous other where hanging out and he and Jordan were looking for something to do when Corbin Bird suggested that they

should “did dong ditch” a home that Bird pointed out to Payton and Jordan. This was the home of Mr. and Mrs. Harris. Mr. Conner testified that Bird walked over towards the Harris residence and specifically pointed it out. Payton testified that neither he nor Jordan really wanted to do what Appellant suggested. He testified that; “We didn't really want to do it, because we figured since Corbin said specifically that house, that he had done something there before.” RP 190 Bird and the others taunted Payton and Jordan calling them “pussies” for not doing what Bird had suggested. Payton testified that that others nagged them and called them names and eventually they “finally went up and did it to get it over with.” RP 191. Payton testified that it was approximately 30 minutes after the initial discussion and Bird pointing out the Harris residence before he and Jordan trespassed at the Harris home. RP 193-4 Payton testified that he and Jordan “ran up to the door, rang the doorbell. And then the “N word” was said...Corbin had brought up saying the N word.” RP 191 Payton testified that they approached the door and then Jordan yelled “fucking nigger” RP 192. Payton testified that; “Well, we were all sitting and as me and Jordan were about to leave to go do it, since they were calling us names and stuff, Corbin was like, Say the N word, too.” When asked if Corbin came with then Payton testified “He walked part of the way to

show us where it was...And then he pointed and said that house right there.” RP 193-4

Payton identified he and Jordan as being the two people who were recorded on the video surveillance at the Harris home. RP 195 He testified that the reason that he hesitated did not want to get yelled at by Mr. Harris. RP 195. Payton testified that after they rang the doorbell and yelled the racial slur that they met up with Corbin Bird and told him that Mr. Harris had come outside. Appellant told them that “Melvin’s probably going to be coming to look for us” Payton stated after this “we all ran...[b]ecause we were afraid. We didn’t know who it was, and we didn’t know what he could do.” RP 196

On cross-examination Payton admitted that he and Jordan discussed the use of the racial slur before they actually entered the Harris property. And that what was discussed “at the creek” was just the use of the “N word.” RP 204-5

The following is the final question from the State to Payton and his answer:

Q. Okay . Now , you testified that you didn't think it was racial or threatening , you know what happened , what was yelled that day.

Looking back on it now if you put yourself in the shoes of a black person living in a home , just wanting to enjoy the quiet privacy of their home, and someone comes up on their porch and yells

things, including the N word , can you think they might look at that differently than you do?

A. Yes.

RP 206-7

Jeffery Britz testified that he was with this same group hanging out at the Wide Hollow Creek and that it was sunny and warm on the day in question. RP 211. He testified that he knew Mr. Harris but not very well and that he knew that Mr. Harris was an African American and so did everyone else. RP 211-2. He testified that Corbin Bird was the person who had come up with the idea to ring the Harris doorbell and run. RP 212 He confirmed that Payton and Jordan had hesitated before they went and entered the Harris property. He stated that he watched Jordan, Payton and Corbin walk off to do this act. That Corbin Bird walked about midway or maybe a little further than that towards the Harris home. RP 213-4

The defense presented several witnesses one of them was the individual who actually rang the Harris' doorbell, Jordan Wright.

Mr. Wright testified that he and this same group previously described were hanging out near the creek. He testified that he remembered ringing the doorbell at the Harris home. He stated that he had heard of Mr. Harris but had not met him. He did not know where the Harris home was that he knew the "general area." RP 260 He testified that

he had discussed ringing and running at the Harris home with “Corbin Bird and Payton Conner.” The stated that “...Corbin dared me and my friend Payton to ring the doorbell.” Wright denied that Corbin Bird had indicated that it would be funny to use the N word. RP 261 He stated that he was on the sidewalk leading to the house when he yelled “fucking nigger.” RP 262 Mr. Wright knew that Mr. Harris was an African-American. And that the original story that they had gone to the Harris home to sell him football tickets but that story was in fact a lie. RP 264

Mr. Wright testified that he had pled guilty to Criminal Trespass 2 as a result of his actions. RP 266-7 Wright testified that there was discussion about this act. Responding to defense counsel question as to who was the last person he discussed this act with before going to do it Wright stated “I do believe it was Corbin.” PR 274. When asked by the state on cross “So your conversation with Corbin gave you the idea of doing it?” Mr. Wright state “Correct.”

III. ARGUMENT

SUFFICIENCY OF THE EVIDENCE

The error in Bird’s argument from the start is that these acts were just the actions of some innocent juveniles who are running up and ringing Mr. Harris’s doorbell as a “joke.” Bird’s line of reasoning is that if you place a catchy name on an action “ding dong ditching” and the act is done

by everyone and that those who perpetrate it are just kids that it is then not a crime. This reasoning is that all kids do it and so therefore all juveniles should be exempt from any type of punishment because, well they all do it. The law states that there is allowance for people to come and go through areas that are impliedly open to the “public” for legitimate purpose. That the UPS driver or the sales person or the police officer can walk up to the front door of a residence along the path that all have and can travel.

The problem with the strategy being used here is that Mr. Harris did not “invite” these young men to run up and ring his door bell and yell “fucking nigger” or as the Harris’ testified “fucking nigger, go back to Africa.” Mr. Harris and his wife confirmed this with their testimony indicating that Mrs. Harris was scared and nervous and emotional, that Mr. Harris dropped his drink and that it “scared the hell out of me.” This is not the actions or reactions a person in their home has when an invitee knocks on their door to sell them football tickets.

"Enters unlawfully" and "remains unlawfully" are alternative means of committing criminal trespass. See State v. Allen, 127 Wn.App. 125, 131-32, 110 P.3d 849 (2005) (interpreting similar language in the burglary in the second degree statute). A person enters or remains

unlawfully when he "is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(5).

Mr. Harris made it clear that he was not inviting these kids to his front door in order to allow them to harass him. The idea of the open access by the public to certain areas of a is based on the "legitimate" acts that are done by the "public" every day and which benefit the person who lives at the home or society or are at least not harmful or offensive to the home owner. Here it is clear that this was an ongoing situation were a group had been doing acts against Mr. Harris and his home. He went so far as to install a camera system to record the actions of those people, clearly manifesting his desire to not have this very specific act perpetrated at his home.

There is no testimony that Corbin Bird entered the Harris property, the State throughout presented this case as one where the Appellant was being held legally accountable based on the theory that he was an accomplice. And as can be seen above he was in many ways not some peripheral participant. It is clear from the testimony of both Payton Conner and Jordan Wright that the entire idea to do the criminal act that they were found to have committed came not from them but from Corbin Bird. That they did not even know the exact location of the Harris home, Corbin Bird had to physically walk with the two other actors and point out

the target of the crime. He then told them it would be “funny” to yell “nigger” a word that any person who is aware of the world today would know is an extremely offensive word. It is clear that "principal and accomplice liability are not alternative means of committing a single offense." State v. McDonald, 138 Wash.2d 680, 687, 981 P.2d 443 (1999). The McDonald court held because there was substantial evidence of the defendant's accomplice liability, the evidence need not also support principal liability. McDonald, 138 Wash.2d at 686-87, 981 P.2d 443. There is no doubt that substantial evidence shows that Bird acted as Conner and Wright’s accomplice in this Criminal Trespass. It is arguable that he was a principle in that but for Bird’s actions there would not have been a crime. Misters Conner and Wright both said they were looking for something to do and Bird told them about the Harris home, what to do the Harris home and what to say.

Bird cites State v. Hoke, 72 Wn.App. 869, 866 P.2d 670 (Wash.App. Div. 1 1994) however this court in State v. Posenjak, 127 Wn.App. 41, 111 P.3d 1206 (Wash.App. Div. 3 2005) citing Hoke ruled as follows;

Police who have legitimate business may enter areas of the curtilage which are impliedly open to the public. Rose, 128 Wash.2d at 392, 909 P.2d 280 (quoting State v. Seagull, 95 Wash.2d 898, 902, 632 P.2d 44 (1981)). However, the police may not make a "substantial

and unreasonable departure" from the curtilage. *Hoke*, 72 Wash.App. at 874, 866 P.2d 670. **The court determines the scope of the implied invitation by looking at the facts and circumstances of each case. *Id.* "An officer is permitted the same license to intrude as a reasonably respectful citizen."** *Seagull*, 95 Wash.2d at 903, 632 P.2d 44. (Emphasis mine.)

Addressing this the court in *State v. Seagull*, 95 Wash.2d 898, 903, 632 P.2d 44 (1981) stated the following;

What is reasonable cannot be determined by a fixed formula. It must be based on the facts and circumstances of each case. *Ker v. California*, 374 U.S. 23, 33, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963).

This is exactly what the trial court did. The court took into consideration not just the fact that there was a sidewalk to the Harris front door that was for the use of the postman or the neighbor, but who the actors were in this crime, their intentions, their actions while they were getting ready to enter the property, the method of entry and exit, the actions they took while on the property and the words spoken at the time they were on the property. The court took those facts in totality and found that the actions of the three defendants and Corbin Bird in particular were not those of a "respectful citizen."

In this analysis the court took into consideration the actions of the individuals involved. Flight one factor that may be and was considered by the court as additional evidence of guilt. The testimony indicated that

not only did the two defendants when up the Harris house fled but all of the people including Bird fled the area and where found by Mr. Harris near Bird's home. Testimony indicates that it was Bird himself who stated that Mr. Harris would be looking for them. State v. Price, 126 Wn. App. 617, 645, 109 P.3d 27 (2005), review denied 155 Wn.2d 1018, 124 P.3d 659 (2005):

Evidence of flight is generally admissible as tending to show guilt, but the inference of flight must be "substantial and real" not "speculative, conjectural, or fanciful." State v. Bruton, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). The evidence must be sufficient so as to create a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. Bruton, 66 Wn.2d at 112-13.

State v. McChristian, 158 Wn.App. 392, 400-01, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011):

Washington's complicity statute, RCW 9A.08.020, provides that a person is guilty of a crime if he is an accomplice of the person that committed the crime. A person is an accomplice under the statute if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it. RCW 9A.08.020. General knowledge by an accomplice that a principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. State v. Roberts, 142 Wash.2d 471, 513, 14 P.3d 713 (2000). Our Supreme Court has made clear, however, that an

accomplice need not have knowledge of each element of the principal's crime to be convicted under RCW 9A.08.020; general knowledge of " the crime" is sufficient. Roberts, 142 Wash.2d at 513, 14 P.3d 713 (citing State v. Rice, 102 Wash.2d 120, 683 P.2d 199 (1984); State v. Davis, 101 Wash.2d 654, 682 P.2d 883 (1984)). " [A]n accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." Davis, 101 Wash.2d at 658, 682 P.2d 883. In other words, "an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, and need not have known that the principal was going to use deadly force or that the principal was armed." In re Pers. Restraint of Sarausad, 109 Wash.App. 824, 836, 39 P.3d 308 (2001).

Bird argues insufficient evidence supports his conviction. Evidence is sufficient to support a guilty finding if "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." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)), State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). An evidence sufficiency challenge "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), State v. Drum, 168 Wn.2d 23, 35, 225 P.3d 237 (2010) We defer to the

jury's assessment of evidence weight and witness credibility. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989), State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Following a bench trial, this court's review is limited to determining whether substantial evidence supports the findings of fact, and if so, whether the findings support the conclusions of law. State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Homan, 181 Wn.2d at 106. We review challenges to a trial court's conclusions of law de novo. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

In this case the sufficiency of the evidence survived a "Knapstad"¹ motion to dismiss RP 3-31 as well as a "half-time" motion to dismiss on the grounds that the State had failed to present sufficient evidence to support the charges file. RP 227-54 The court's ruling at the close of the State's case is noteworthy this lengthy ruling by the court is contained in Appendix A. The court's oral ruling finding Corbin Bird guilty as charged is nearly seven pages of the report of proceedings. RP 313-19 The court then filed findings of fact and conclusions of law as required by court rule that are ten pages in length, Appendix B, this is in addition to the

¹ State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

approximately four pages of ruling at the time of the Knapstad motion.

RP 22-6.

The issue of the sufficiency in this case has been addressed three times and each time the court correctly found that the evidence supported the crime charged. The evidence presented was more than sufficient to support the charges against Appellant.

Appellant argues that the State had a duty to negate the defense set out in RCW 9A.52.090(2) which 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." While not specifically raised as a defense in the case in chief the State will address this allegation.

Once again the actions of the three defendants in entering the property owned by Mr. Harris was not some joke, some childish lark. The actions were not in compliance with all the lawful conditions imposed on access to or remaining in the premises. The Harris' made it clear by their acts and reactions to the actions of these three people that the lawful condition to enter or remain on their property was premised a legitimate reason for the entry and most certainly one of the "lawful" conditions was not that these defendant's be allowed to continue to vex and annoy the

Harris family nor was the yelling of the phrase “Fucking nigger, go back to Africa” compliance with all of the lawful conditions which Mr. Harris, an African-American had placed on entry to his residence.

The case cited by Bird, State v. R.H., 86 Wn. App. 807, 939 P.2d 217 (1997) is distinguishable, R.H. was charged and convicted of actions that took place in a fast food restaurant not a residence.

Throughout this case Bird has attempted to use the racial slur that was uttered in an attempt to show that the State was somehow making this innocent act into a crime. Both the State and the court on more than one occasion set out that this was not what was being done. The racial slur was taken in conjunction with the illegal acts of the defendants. As the court said at the denial to dismiss at the close of the State’s case;

The other issue I did want to touch upon is I think it's important for the court to reiterate my position that this - - this is not a crime about the statement, this crime is not the statement. This crime is based on criminal trespass in the second degree, which is exceeding the scope of the license or permission of this easement. The - - this isn't the sidewalk that's adjacent to and incorporating a public sidewalk that 's part of a roadway system , this is a side walk from that public sidewalk up to this gentleman ' s and his family ' s porch inside a gated yard . And those are I would think less license for conduct than might be on a side walk. RP 253

And then again in finding Bird guilty as charged;

I reject the idea that Mr. Harris has to put up a sign on his front porch that he does not want anybody to come up

onto his porch and not yell racial slurs into his home in through - - loudly in through an open window . This is not a situation where you or your friends were donning a button with a statement to that effect. This was a yelled racial slur or epithet into their home.

The property as we saw in the various pictures and as evidenced in quite some detail in the video showed a home on a corner where the front yard was surrounded by a street and adjacent sidewalk that was part of the street system open to the public for public use . Then a fence - - a fenced off yard , a driveway and alongside the driveway a - -a sidewalk leading up to a gate that entered into the fenced yard of Mr. Harris and his family.

The videotape showed great hesitation and initial movement toward then back, then toward , then running in and then running from the scene. I adopt and accept as true and proven beyond a reasonable doubt the wording of the racial slur as testified to by both Mr. and Mrs. Harris, " You fucking nigger, go back to Africa . " I find that that was proven beyond a reasonable doubt and nothing less than that. That is not constitutionally protected speech. Offensive ideas may be protected speech under the First Amendment, but not racial slurs. That exceeded the scope of the license of this easement on the sidewalk leading up through a gated yard on to the front porch of Mr. and Mrs. Harris ' s home.

The criminal trespass is not the presence on the dominant easement overriding the servient estate or its - - what tipped the scales and made it an ingress and egress protected under the law and licensing permission of that easement was yelling the racial slur that was not protected speech. That was the acting or intentionally entering or remaining unlawfully component that transferred it from a legal activity to a crime.

Bird argues that there is no evidence that the racial slur was made while on the property. This is incorrect. Both Mr. and Mrs. Harris

testified that the doorbell ringing and the yelled racial slur where in essence simultaneous. Mrs. Harris testified “[i]t was right at the –the doorbell rang and then it was yelled right at them. It seemed like the same time.” RP 122 Payton testified that he and Jordan “ran up to the door, rang the doorbell. And then the “N word” was said....Corbin had brought up saying the N word.” RP 191 Payton testified that they approached the door and then Jordan yelled “fucking nigger” RP 192.

RESPONSE TO ALLEGATION TWO - FINDINGS

Bird challenges numerous findings of fact in the opening section of his brief however he does not address those challenged findings in the body of his brief. This court will not review issues that have been inadequately briefed or which have received only passing treatment.

Habitat Watch v. Skagit County, 155 Wn.2d 397, 416, 120 P.3d 56 (2005) (quoting State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004)).

Thomas also indicates that this court will defer to the trier of fact on issues of credibility and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). “The trial court's findings are supported by the evidence.” See, State v. Earls, 116 Wn.2d 364, 372 fn. 3, 805 P.2d 211 (1991); State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940 (1987); State v. Christian, 95 Wn.2d 655, 656, 628 P.2d 806 (1981).

The findings in totality are contained in Appendix B

The challenged findings;

1.3 is clearly supported by the testimony of the Payton Conner, Jordan Wright and Jeffrey Britz. The State has set out the facts from the verbatim report of proceeding above and this finding is set forth within those facts.

1.6 It would appear from Bird's brief that the challenged fact was that Mr. Harris "ran" from his home when the record indicates he "walked" while it would appear that this one word is inaccurate it does not change the finding nor the outcome. There is no need to remand to address this "error."

1.7 The record reflects that this is what occurred. This finding is an accurate reflection of the record. It must be remembered that the court was sitting as the trier of fact and watched the video, Exhibit 8, while it was played in court.

Because Bird does not address his challenge anywhere in his brief the State is uncertain what he alleges was not found in the record.

The record from RP 132- 146, 147-151, 153-67, contains the direct and cross examination of Mr. Harris wherein he tells of having cameras installed to stop the harassment, what areas are covered by the camera's, the method he transferred the video to get it to the court and he describes

what he was able to observe about the actions of Payton and Jordan on the video, those actions comport with finding 1.7.

1.10 This finding once again comports with the record. The only portion that may not be a “fact” is where the court concludes that based on the statement by Bird’s mother asking Mr. Harris “What is your black ass doing in my neighborhood” was actually “Why do you have your big black ass in my neighborhood.” RP 184.

This may also be a conclusion of law however, State v. Niedergang, 43 Wn. App. 656, 658-9, 719 P.2d 576 (1986) addresses what this court will do if the findings and conclusions have been mixed;

If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact, but if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law. Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc., 21 Wn. App. 194, 197 n.5, 584 P.2d 968 (1978). When findings of fact in reality pronounce legal conclusions, they may be treated as such. Fine v. Laband, 35 Wn. App. 368, 374, 667 P.2d 101 (1983).

1.11 Once again this court must take into account that the trial court had the benefit of observing the actual recording of the crime as well as the narrated testimony of Mr. Harris regarding this video. Clearly a review of the totality of the testimony from Mr. Harris, Payton Conner,

Jordan Wright, Jeffery Britz as well as actually watching the video with the testimonial narration supports this finding.

1.12 This finding once again appears to either be a mix of finding and conclusion or is purely a conclusion. As stated above this does not negate this portion of the court's ruling it may mean it should be considered a conclusion for purposes of review and once again it does not change the outcome of this court's decision no matter whether this is a "fact" or a "conclusion."

1.13 Once again the facts set out in Mr. Harris' testimony as well as the "PC sheet" information that Bird's attorney indicated the court could consider support that the camera system was installed due to prior harassing behavior, that he yard is enclosed and the signs were observed and discussed when shown in the video recording as well as through pictures taken by Mr. Harris.

1.14 This finding mixes fact and conclusion again. Read in totality it matches the facts and it comports with the law discussed above wherein the trial court is required to evaluate the facts in totality to determine if the area access was in fact public. The court found this area was not open to the "public" when that "public" was defined as those whose goal and purpose was to ring the doorbell and run while yelling racial slurs loud enough for the occupants of the home to hear the slurs.

This comports with the “reasonably respectable” standard addressed above.

In addition, even where a trial court's written findings are incomplete or inadequate, we can look to the trial court's oral findings to aid our review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997), *review denied*, 135 Wash.2d 1004, 959 P.2d 127 (1998).

Finally, given the written findings of facts that the trial court did enter, there is no probability that the outcome of the bench trial would have differed had the trial court entered additional express findings of fact. See, State v. Banks, 149 Wash.2d 38, 45-6, 65 P.3d 1198 (2003) wherein the court ruled that the court's failure to enter finding on essential element following bench trial was harmless error.

The “error” that is found within the findings are such that if corrected they would have no effect on the outcome of the trial court’s decision.

RESPONSE TO ALLEGATION THREE – RECUSAL

The rulings by the trial court that address this allegation both oral and written where some of the most extensive, in depth and complete that the State has had occasion to read and review. The State shall not regurgitate those rulings and findings at great length. The State adopts and has attached in Appendix C those rulings.

Clearly the allegation of some type of misconduct on the part of the trial judge, Judge Federspiel, where distressing to the judge. There is no method for the State to recreate those rulings or the passion and emphatic discourse set forth in those rulings therefore the State shall not try. The cases and canons cited by Judge Federspiel as well as the recitation of the statements that are a basis of this allegation have been read and reviewed by the State and once again as indicated above the State adopts those rulings both oral and written.

Judge Federspiel's ruling after hearing regarding the initial motion for recusal in the trial court covers twenty-nine pages of the verbatim report of proceedings. RP 61-90. Thereafter the trial entered an eighteen page set of very detailed and explicit findings and conclusions denying the motion for recusal. These are both attached in Appendix C.

The ruling to remain the finder of fact in this case was a discretionary ruling, as was stated in one of the most cited cases in the state, State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. *State ex rel. Clark v. Hogan*, 49 Wash.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of

discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *MacKay v. MacKay*, 55 Wash.2d 344, 347 P.2d 1062 (1959); *State ex rel. Nielsen v. Superior Court*, 7 Wash.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

A party alleging judicial bias **must** present evidence of actual or potential bias. *In re. Guardianship of Wells*, 150 Wn.App. 491, 503, 208 P.3d 1126 (2009). Without evidence of actual or potential bias, a claim of judicial bias is without merit. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992). There has been no showing of ANY bias on the part of the trial court.

The following is the portion of the record that Bird claims demonstrates that the trial court was not capable of making an unbiased decision in this case;

THE COURT: Well, this process was butchered the whole way through. I am denying the motion to demand that it be deferred. 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 discretion, granted by our state's legislature. Do I like it? No. But I am bound to follow the law of the legislature. And, you know, when I

see representations that a diversion agreement was offered, I sort of get my dander up, because I don't think it was. I think it was discussed. And I don't think the state followed the process that it should have followed.

This is an emotional case. But just because cases are emotional it does not allow you to bypass the law. No matter how much somebody might want to, the law is here to protect from emotion running rampant over the law.

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...

Was anybody else here on this case interested in this case?

MR. SOUKUP: Mr. Harris is, Your Honor.

THE COURT: Mr. Harris. Good morning, sir.

MR. HARRIS: Good morning, Your Honor.

THE COURT: I wanted -- I want to let you know that I don't have in my opinion the legal authority to make a decision on this case as to whether or not it gets diverted. If it does get diverted, within the authority and discretion of the diversionary unit that the state legislature set up, there will be a process whereby the actions of this young man would be scrutinized for a period of time. If he did not comply, the diversion would be denied and revoked. And it would go -- it would go to trial or some other -- or some other mechanism within the discretion of the state.

I understand that -- I can understand that you might not be happy with the decision that I have
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made today. But I want you to know that I'm bound as a judicial officer to follow the law that the legislature's passed and that the governor signed. I don't have the ability to bypass the governor or the legislature in terms of this law no matter what my personal feelings are, or what I think the equities are, sir.

Without talking about the facts of the case, I want to offer you the opportunity, do you have any questions about the process that we have discussed

today? I'll take any time that I can to answer any questions about the process and the decision that I have made today. I want to give you that opportunity.
RP 54

As stated by the trial court a recent case, decided by this court, Tatham v. Rogers, 170 Wn.App. 76, 79, 283 P.3d 583 (Wash.App. Div. 3 2012) addressed this issue “Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial. State v. Finch, 137 Wash.2d 792, 808, 975 P.2d 967 (1999).”

Tatham goes on to state:

Recusal decisions lie within the sound discretion of the trial court. *State v. Bilal*, 77 Wash.App. 720, 722, 893 P.2d 674 (1995). We review a trial court's recusal decision for an abuse of discretion. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wash.App. 836, 840, 14 P.3d 877 (2000). The court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

It is unusual to require a judge to recuse himself or herself from ruling on a motion for a new trial even where the motion is based on grounds that are critical of the trial judge. The trial judge is fully informed and is presumed to perform his or her functions regularly and properly without bias or prejudice. *See, e.g., Wolfkill*, 103 Wash.App. at 841, 14 P.3d 877. A different rule could reward groundless tactical attacks. Ordinarily,

[t]he nonmoving party has the right to have the trial judge make the decision [on the new trial motion] and the moving party should not be able to force the judge to recuse himself in ruling on such a motion

by including allegations directed at the trial judge himself.

Jones v. Halvorson-Berg, 69 Wash.App. 117, 129, 847 P.2d 945 (1993).

As was further set forth in Tatham v. Rogers, 170 Wn.App. 76, 283 P.3d 583 (Wash.App. Div. 3 2012) a case cited by the trial court;

Beginning with State v. Post, 118 Wash.2d 596, 826 P.2d 172, 837 P.2d 599 (1992), the Supreme Court has characterized a judge's failure to recuse himself or herself when required to do so by the judicial canons as a violation of the appearance of fairness doctrine.^[4] The court also narrowed the scope of the appearance of fairness doctrine from one under which a party could challenge whether decision-making *procedures* created an appearance of unfairness to a reformulated threshold: whether there is "evidence of a judge's or decision maker's actual or potential bias." 118 Wash.2d at 619 n. 9, 826 P.2d 172, 837 P.2d 599."

Bird has not met the standard set out above. The statements of the trial court as read in context and as explained by the court in its oral ruling and in the written ruling denying recusal are not sufficient to case the recusal of this judge.

The State will not belabor this issue with more repetition of the rulings of the trial court. It is without doubt that the nearly fifty pages of oral and written ruling on this issue more than adequately address the issue.

There was no basis for Judge Federspiel to recuse himself, nor is there a basis for this court to overturn that decision.

IV. CONCLUSION

For the reasons set forth above this court should deny allegations raised by Mr. Bird. The decisions of the trial court should not be disturbed. This appeal should be dismissed. Respectfully submitted
this 8th day of January 2016,

By: s/ David B. Trefry
DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
Yakima County
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
Fax: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us

APPENDIX A

THE COURT: On the motion at the close of the state's case my understanding of the burden is that the court's role is to take the evidence in the light most favorable to the state and determine whether or not it exists to an extent in the record, that would allow the reasonable trier of fact to find all of the elements of the offense beyond reasonable doubt. I'm going to deny the motion for dismissal at this point. And I'll try and touch on each of the arguments to the extent that this repeats the legal arguments in the Knapstad motion, I would rely heavily on my prior ruling in that regard.

In this case we have evidence on the record that there was a discussion, which was the suggestion of Corbin Bird to have two or more individuals run up to a home and go up on the porch, ring a doorbell and yell at a minimum the N word or some statement including that. The Wilson case would indicate on the accomplice part of it that in RP 251

the reference to 9A.08.020. You can just as Mr. Maxwell is correct in saying, presence in and of itself isn't sufficient for an accomplice liability. But the steps to assist in that regard to solicit, command, encourage or request the commission of a crime.

In this case there's evidence on the record including but not limited to the use of the N word suggested by Corbin. And importantly to the court in its decision on this half time motion, the walking from the creek area halfway towards Mr. Harris's home and having Corbin point it out to the two other young men is sufficient perhaps in and of itself.

And then, but if that weren't sufficient in addition pressuring these two young men calling them pussies if they didn't, overcomes the attack on half time under Wilson and the accomplice liability portion of it. I continue to be of the opinion that it is not constitutionally protected speech. There was some reference to whether or not it would be fighting words in that constitutionally protected fighting speech context, due to the proximity issue. In other words, was there an opportunity for the immediate elicit of violence or threat of violence with the two examples being one face to face and

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another a phone call .

I go back to the City of Billings vs. Nelson case that I relied in part on in my Knapstad motion and where the two people in a car driving by on a road hollered racial slurs at a youth on a public sidewalk. And that same issue came up here in that case. The defense argued that it didn't constitute fighting words because they weren't close enough. And the court rejected that, it said the fact that Nelson and Oltrogge, I ' m not sure I ' m pronouncing that right, were in a car does not mean that their speech could not have incited an immediate violent response from a listener on the street here .

The two young men that did this act knew or at least by their actions evidenced their concern that it was going to incite an immediate violent response by their actions and their admissions . The young men that testified were worried about what Mr. Harris was going to do. And they evidenced by an immediate flight from the residence . So to the - - to the extent that proximity was an issue in the context of fighting words, I find that the evidence would indicate that there was sufficient evidence that immediate violent response could have resulted from a listener in addition to
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the testimony of Mr. Harris indicating that initially he was shocked and then he was pissed. Which in combination with his actions and the flight of the two young men again would satisfy that prong of it.

Here we also - - flight as an indicia or circumstantial evidence of guilt. In addition with the almost contemporaneous lies from the two young men to conjure up a story about selling fund raising football coupons would be also circumstantial evidence in and of themselves not sufficient , but adding to the record as a whole .

The other issue I did want to touch upon is I think it's important for the court to reiterate my position that this - -

this is not a crime about the statement, this crime is not the statement. This crime is based on criminal trespass in the second degree, which is exceeding the scope of the license or permission of this easement. The - - this isn't the sidewalk that's adjacent to and incorporating a public sidewalk that ' s part of a roadway system , this is a side walk from that public sidewalk up to this gentleman ' s and his family ' s porch inside a gated yard . And those are I would think less license for conduct than might be on a side walk

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adjacent to or part of a public roadway. So to refocus my point, the - - to say that this should have been charged under RCW 9A.36.080 I think conflates two different ideas. This isn't - - the statement is being charged as a crime,

it's exceeding the scope of the license or permission under the criminal trespass in the second degree that constitutes the elements of the crime .

So I see them as two separate and extinct - -distinct issues.

And so I did want to address that as part of my ruling.

APPENDIX B

FILED
JAN 14 2015

YAKIMA COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR YAKIMA COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

NO. 14-8-00363-4

vs.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

CORBIN BIRD,
DOB 7/25/1998

Respondent.

This matter having come on for an adjudicatory hearing on December 15, 2014 in Yakima County Juvenile Court, and the court having considered the testimony of Melvin Harris, Trina Harris, Payton Connor, Jeff Britz, Elijah Jackson, Yakima Police Department Detective Ileanna Salinas, and Jordan Wright; together with the exhibits admitted, and having considered the argument and legal memoranda submitted by counsel, the court now enters the following:

33110 5-000000030

I. FINDINGS OF FACT

Found Beyond a Reasonable Doubt

- 1.1 During the late afternoon of June 1, 2013, Corbin Bird was gathered with several acquaintances near a park. There was a group of five or six young men and women, all juveniles. They were in an area of West Valley adjacent to a park known as "the creek" because there is a creek running alongside the sports fields. They were hanging out and by their own admission were bored, looking for something to do. Corbin Bird suggested to his young male friends that they "dingdong ditch" a residence. The term "dingdong ditch" is slang for the practice of running up to someone's front door, ringing the doorbell, and running away before the occupant(s) can come to the door.
- 1.2 In carefully observing the witnesses, the Court made assessments of their credibility, and thus the corresponding weight to be given to their testimony. Payton Connor testified and was a credible witness. During his testimony, he made eye contact when answering questions, he did not appear nervous and he answered questions directly. The Court finds his testimony reliable and gave it great weight.
- 1.3 Based on the evidence accepted by the Court, including but not limited to the testimony of Payton Connor, the court finds that Corbin Bird went beyond suggesting the activity in question. Corbin Bird dared Payton Connor and Jordan Wright to "ding dong ditch" the Harris residence in front of a group of their peers, including young women. Corbin Bird pressured the boys, telling them that they would be "pussies" if they did not accept the dare. Influenced by Corbin Bird's taunting and peer pressure, Connor and Wright agreed to take the dare and

33110 5-000000031

accompanied by Corbin Bird, walked from "the creek" half way across the sports fields towards the Harris residence. 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 "dingdong ditch" Mr. Harris' home.

1.4 Payton Connor, prompted by Corbin Bird, agreed to "ding dong ditch" Mr. Harris' home to avoid being perceived as a "pussy" by the other young people in the group. While they were walking towards the Harris residence, the Corbin Bird upped the ante and urged the two boys to yell "nigger" when they rang the doorbell.

1.5 The Court finds Melvin Harris and his wife Trina Harris to be credible witnesses. Based on their testimony the Court finds that at approximately 6:14 pm Melvin and Trina Harris were in the living room of their residence watching television after an afternoon of shopping. One of the windows adjacent to the front door was open because it was a warm summer day and opening the window helped the air circulation in their house. Melvin and Trina Harris heard the doorbell ring, and then heard someone shout very loudly "You fucking nigger, go back to Africa!" This made Melvin and Trina Harris initially shocked and afraid, and then immediately angry and very upset. Melvin Harris is African American, Trina Harris is Caucasian.

1.6 Mr. and Ms. Harris didn't know it at the time, but the person who yelled "You fucking nigger, go back to Africa!" was Jordan Wright, accompanied by Payton Connor. 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. He saw one boy climb over the chain link fence across the street and run back across the sports field toward the

33110 5-000000032

creek. Mr. Harris saw another boy run down the street parallel to the fence accompanied by another boy running parallel to him on the other side of the fence headed away from Mr. Harris back toward the area of the creek. Mr. Harris had a direct line of site on all three boys to identify their clothing, approximate height, and hair color. Mr. Harris went back inside his home, retrieved the keys to his truck, and drive down the block and around a corner to an area where he surmised the young men would be found exiting the creek near the park in a residential area. There was only one viable route out of the creek area which Mr. Harris accurately surmised that he could intercept their attempted escape from the creek area into a residential neighborhood.

- 1.7 There was a video surveillance system installed by Mr. Harris at his residence. Mr. Harris later viewed the surveillance video and video recorded the video from the surveillance system with his cell phone. He provided the video from his phone to the police department. The video recording prepared by Mr. Harris was admitted into evidence and viewed by the Court. It showed Payton Connor and Jordan Wright slowly approaching the Harris residence, walking part way down the driveway, and then slowly walking away to an area across the street from the residence and to the left of the residence.
- 1.8 In the video one can then see Connor and Wright turning towards each other is if they are talking to each other. Mr. Harris testified that when he viewed the video from the surveillance system on June 1, 2013 that he could see it more clearly than what the court was able to see as a result of his videoing the video with his cell

phone. Mr. Harris testified that he could see Peyton Connor and Jordan Wright facing each other.

1.9 The surveillance video then shows Jordan Wright and Payton Connor running towards the residence. Mr. Harris's front yard is completely fenced. Mr. Harris' mailbox is located across the street and not within their front yard. There is a driveway from the street to their garage. There is an entrance gate adjacent to the home, and inside the gate there is private a sidewalk (within the fenced yard) leading from there to the front porch and their front door. The boys proceeded to run off of the street, across the public sidewalk adjacent to the street, up the Harris' private driveway, though the gate into their fenced front yard, run down the Harris' private sidewalk and up onto the porch of their home. This was when the boys rang the doorbell and according to both Payton Connor and Jordan Wright, Jordan Wright loudly shouted the offensive racial slur; i.e. while standing on Mr. Harris' porch he shouted very loudly "You fucking nigger, go back to Africa!"

1.10 Connor and Wright can then be seen on the video running away from the residence. Payton Connor vaulted a chain link fence directly across the street from the Harris residence. Mr. Harris having driven to the location where he expected to intercept the fleeing youth contacted Mr. Connor shortly after the incident and noted that he was wearing the same red hat and white shirt as the person he had seen jumping the fence in the video. Jordan Wright appeared shortly thereafter along with Corbin Bird who was on the phone with his attorney. Mr. Harris asked the boys if he could speak with their parents, and also asked what they were doing at his home. The testimony established that they admittedly lied concocting a story about selling

fundraising tickets for the sports team. At some point shortly thereafter, Corbin Byrd's mother appeared on the scene. The uncontroverted evidence was that she confronted Mr. Harris asking him "What is your black ass doing in my neighborhood?" The Court concludes that Corbin Bird is raised in a home that harbors racist attitudes towards African Americans and is circumstantial evidence supporting the factual finding that Corbin Bird did in fact promote the idea of yelling offense racial slurs on the doorstep of Mr. Harris' home.

1.11 Jordan Wright ran to the left as viewed in the surveillance video along the fence line. Mr. Harris testified that he could see another person run along with him and was able to see his attire, approximate height and hair color which matched that Corbin Byrd was wearing when confronted by Mr. Harris shortly thereafter. The court finds that this third person was Corbin Byrd. Mr. Harris noted that when he contacted Mr. Wright shortly after the incident he had dark hair, no hat, and a gray shirt, consistent with his observations of person who ran to the left on the surveillance video.

1.12 The fact that Corbin Byrd, Wright and Connor all ran away from the Harris residence after the doorbell had been rung and the racial slur shouted on Mr. Harris' porch shows a consciousness of guilt as to all three regarding their joint endeavor.

1.13 The Harris residence is a private residence. The front doorway which Connor and Wright approached was on the Harris family's private property and inside a fence which enclosed the front yard. Because of problems with "ding dong ditching" in the past Mr. Harris had installed the video surveillance cameras and there were signs warning persons who approached the residence of the surveillance system. Photos of these signs were admitted into evidence.

- 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.
- 1.15 The Harris residence is located within the State of Washington.
- 1.16 The Court finds that Jordan Wright’s testimony was not credible. This is based in part upon the Court’s observation of his demeanor when he testified. He tended to look down and not to look at the person who asked him questions. His memory of the events did not seem very clear. He appeared to the Court to be someone who was testifying in such a manner as to protect a friend.
- 1.17 Elijah Jackson was not a credible witness. His memory of the surrounding events seemed to be very bad. The Court observed that he appeared to be testifying in such a manner as to protect a friend.
- 1.18 Detective Ileanna Salinas’ testimony was not very helpful one way or the other. She did not seem to have a particularly good memory of the matters which she was questioned about.
- 1.19 The court finds that a lack of memory as to some of the events explains many of the discrepancies in the testimony of the witnesses, rather than intentionally not telling the truth.
- 1.20 The court made further factual findings on the record which are not set forth herein, and those findings are hereby incorporated by reference. Based upon the above findings of fact, the court now reaches the following:

1.21

II. CONCLUSIONS OF LAW

- 2.1 With knowledge that he would promote or facilitate the commission of the crime of criminal trespass in the second degree, the respondent solicited, encouraged, or requested Payton Connor and Jordan Wright to enter or remain unlawfully in or upon private premises to which they were not then licensed, invited or otherwise privileged to enter or so remain; to wit: the private property immediately surrounding the Harris residence. His actions establish accomplice liability.
- 2.2 This Court has criminal jurisdiction as these events happened within the State of Washington
- 2.3 It is not Connor and Wright's mere presence alone on the servient easement which makes this a trespass, but rather shouting an offensive racial slur while on their front porch exceeded the scope of their invitation or license.
- 2.4 The Harris residence walkway and porch area adjacent to the front door were not open to the public for the purpose of ringing the doorbell, yelling the offensive words quoted above so loudly that they could be heard within the residence, and running away. This conduct was beyond the scope of any implicit license, invitation or other privilege to enter or remain upon said private property.
- 2.5 The Washington Courts have held that on a case by case basis, an implied limitation upon the scope of an invitation or license to enter private property may be inferred from the circumstances, including the purpose for the consent and the parties' expectations. See State v. Collins, 110 Wn.2d 253, 751 P.2d 837, 838 (1988). The court concludes that such an implied limitation applies here. The purpose of any

license, invitation or other privilege to enter or remain upon the private property surrounding the Harris residence was for normal reasonably respectful social contact, not for this type of behavior that exceeded the dissemination of offensive ideas and crossed the line into the realm of unprotected racial slurs constituting fighting words.

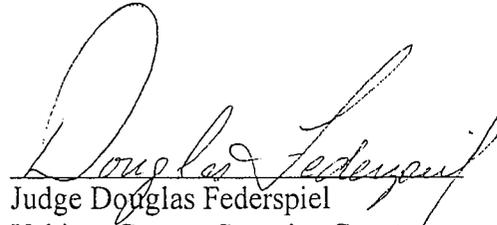
2.6 It was not necessary that the Harris property be posted with signage explicitly prohibiting such conduct. No reasonable person would entertain the 'believe that offensive racial slurs yelled into a person's home on their own doorstep would be permissible in a civilized society. Consequently, the Court rejects the defense's proposition and rules as a matter of law that no homeowner is required to post a sign on their front porch placing the public on notice that they are prohibited from standing on their front porch and yelling "You fucking nigger, go back to Africa."

2.7 The respondent has argued that convicting him of the charge would run afoul of First Amendment free speech protections. Under the facts of this case, this offensive racial slur yelled on Mr. Harris' front port is not constitutionally protected speech. These are the same arguments which were heard and rejected by the Court in denying the respondent's motion to dismiss on September 4, 2014. The Court declines to reconsider that ruling.

2.8 Moreover, the respondent's First Amendment arguments are not well-taken because the speech here is not protected speech. Also, the offensive racial slur took place on private property and exceeded the license or permission by any reasonable interpretation of the law or societal norms. The Court's oral ruling of September 4, 2014 is incorporated herein by reference.

2.9 The Court therefore finds respondent Corbin Bird GUILTY of the crime of second degree criminal trespass under RCW 9A.52.080 as charged.

DATED: 1/14/15


Judge Douglas Federspiel
Yakima County Superior Court
Juvenile Division

APPENDIX C

18

FILED
COUNTY CLERK

'14 OCT 27 P3:36

SUPERIOR COURT
YAKIMA CO. WA

SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF YAKIMA
JUVENILE COURT

State of Washington
Plaintiff
vs.

CORBIN BIRD

DOB: 07/25/1998 SEX: MALE

Respondent.

No. 14-8-00363-4

ORDER DENYING RESPONDENT'S MOTION
FOR RECUSAL / DISQUALIFICATION

The Respondent filed a Motion asking for my recusal arising out of statements made during a hearing held in this courtroom on October 13th, 2014. For the reasons set forth below, I am DENYING the Motion.

As a preliminary matter of law, the filing of a Motion for Recusal in the form presented by the Respondent's Motion does not, in and of itself, require that I disqualify myself from deciding the Motion. "The decision to recuse oneself is an intrinsic part of the independence of a judge." Consiglio v. Consiglio, 711 A.2d 765, 769 (Conn.App. 1998). I note that the moving party asked that the matter be set before Judge Elofson as the presiding judge. Unless requested *sua sponte* by the trial court judge, the matter of a trial court judge's recusal is in the reasonable discretion of that judge, not the presiding judge. Tatham v. Rogers, 170 Wn.App. 76 (2012).

I decline to recuse myself from hearing and ruling on this mo 33110 5-000000075

There is a famous quote from a British court case, Ex Parte McCarthy decided at the turn of the century in which Lord Chief Justice Hewart stated:

“Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

In Washington State, there are two primary methods for promoting this fundamental tenant. The most common vehicle is a timely Affidavit of Prejudice filed pursuant to RCW 4.12.040 and .050. That is not at issue in this hearing as we are not dealing with a timely filed Affidavit of Prejudice.

The alternate avenue for the disqualification of a judge is through the application of Canon 2 of the Code of Judicial Conduct.

Terminology is important in this case, and especially in this hearing, and I want to point out that what has historically been referred to as “recusal” is not the current language of the Code of Judicial Conduct in Washington State. The correct, current terminology is disqualification.

Referencing the prior Canons of Judicial Conduct in effect in 2006, it has been stated:

“Due process, appearance of fairness and Canon 3(D)(1) of the Code of Judicial Conduct require a judge to recuse himself where there is bias against a party or where impartiality can be questioned. The test for whether a judge should disqualify himself where his impartiality might reasonably be questioned is an objective one.” State v. Leon, 133 Wn.App. 810, 812, 138 P.3d

33110 5-000000076

159 (2006)(citing Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)) This is similar to the quote from Wolfkill cited in the Respondent's brief.

It is appropriate to look at all three concepts referenced by that quotation:

(1) Due Process; (2) Appearance of Fairness; and (3) the Code of Judicial Conduct.

They are grouped together as though they are one and the same. They are not. While they share related concepts and attributes, they are not identical legal issues.

The "appearance of fairness" doctrine is applied to quasi-judicial actions, typically associated with decisions made under the Administrative Procedures Act. The appearance of fairness doctrine is not a concept applicable to executive actions, such as the decision whether or not to charge an individual with a crime.

In 1999 our State Supreme Court held that the prosecutor's determination to file charges, to seek the death penalty or to plea bargain are executive, not adjudicatory in nature and therefore the doctrine of "appearance of fairness" does not apply. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999)

The "appearance of fairness doctrine" applicable to quasi-judicial action does not apply, in a disciplined legal analysis, to judicial actions. This was pointed out by the University of Washington Law Review article "*The Appearance of Fairness Doctrine: A Conflict in Values*" 61 Wash. L. Rev. 533 on page 534 and again in footnote 10 – and I quote: "Judicial procedures

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are reviewed under the Washington State Code of Judicial Conduct, therefore, the appearance of fairness doctrine does not apply.”

Due Process is a completely separate legal concept in the context of analyzing whether a judicial officer has acted with bias or impartiality sufficient to warrant disqualification. I should point out that there is a relatively recent United States Supreme Court case on point. Caperton v. A.T. Massey Coal Co., Inc. 556 U.S. 868 (2009).

This is an important case in the context of the argument advanced by Corbin Bird that my actions and statements, as framed by Mr. Ritchie, violate the Due Process Clause of the Constitution. They do not, not only factually but as a matter of law. In short, both the majority and the dissent in Caperton make it clear that a complaint alleging an appearance of impartiality is not sufficient to trigger a violation of the Due Process Clause under the Constitution. Where only the appearance of impartiality is at issue, the Due Process Clause of the Constitution does not provide a legal remedy. The U.S. Supreme Court ruled, as a matter of law, that disqualification based upon an appearance of impartiality is a matter left to the States’ legislatures, and here, the Code of Judicial Conduct. This Supreme Court Opinion appears to be binding precedent, and disposes of that legal issue.

This Supreme Court Case was discussed in Tatham v. Rogers, *supra*, and adopted the analysis for application in Washington State, precluding that argument under the State Constitution.

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Thus, we are left here with whether disqualification is proper under the Code of Judicial Conduct.

While the Canons of Judicial Conduct have changed since the quotations from State v. Leon and Wolfkill, the test for disqualification has not; i.e., given the state of the record on the whole, would an objective observer reasonably question whether the trial court judge can act impartially.

There are three primary rules that apply to the issue at hand. Rule 2.2, Rule 2.3 and Rule 2.11. Within the framework of Canon 2 are the independent concepts of extra-judicial prejudice or bias, and intra-judicial prejudice, also called judicial prejudice.

Let me go through the CJC rules individually.

Rule 2.2 of the Code of Judicial Conduct, is relevant. It states: **“A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”**

Comment 2 is instructive in this situation. *“Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”*

Mr. Ritchie’s Motion of October 20th, 2014 seeks an Order disqualifying me as the trial court judge “on the ground that he has made comments that indicate a lack of appearance of fairness and impartiality.” (Respondent’s Motion, page 1 lines 23-24.)

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First, on page 5 of the Motion, Lines 8-11 the Motion States: “He [Judge Federspiel] stated this case is an “emotional” case, and seemed to state his displeasure that a diversion might be entered: “Do I like it? No.”

Let me address the latter comment first.

The legal issue presented to me on October 13, 2014 was whether I had the legal authority to override the discretionary decision of the diversion unit diverted pursuant to RCW 13.40.080 under the process set forth in RCW 13.40.070(6). In layman terms, certain types of offenses are required to be referred to the diversion unit and the diversion unit has the discretion whether to offer a diversion, or reject a diversion. The diversion unit’s decision, once made, is not a decision that can be reviewed by the trial court judge.

In essence, the parties’ initial cross-motions to this court asked me to make a decision whether to charge Corbin Bird or not charge Corbin Bird and divert his charges under RCW 13.40.070.

You both asked this Court to rule in a fashion that no law provides. While I have the obligation to determine whether there is probable cause from a police report, I do not – using that same police report or any other information - have the authority to make a determination whether to divert a case or charge Corbin Bird. That was the sum and substance of the legal issue before me and my ruling.

It is in the context of discussing the legal process, and the fact that the juvenile court judge has

33110 5-000000080

no legal authority to review the decision of the diversion unit, that I made the following statement during a portion of my decision:

“Well, this process was butchered the whole way through. I am denying the motion to demand that it be deferred. 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 discretion granted by our state’s legislature. Do I like it? No. But I am bound to follow the law of the legislature.”

I expressed an opinion that I did not like a legal process that didn’t allow for a trial court to review the decision of a diversion unit. As you will note, I concluded by saying, quote: “But I am bound to follow the law of the legislature.” That is exactly, almost word for word, consistent with Comment 2 to Rule 2.2 of the Code of Judicial Conduct referenced above, which warrants repeating:

“Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”

Remember, there was no decision by the diversion unit as of the date of that hearing for me to like, or dislike. The suggestion or inference by the Respondent that my comment evidenced a lack of impartiality is simply wrong, and taken completely out of context.

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At page 5 of Respondent's brief, Mr. Ritchie argues "*the fact that he openly stated 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.*"

Let me make this perfectly clear. Nowhere in the record did I state, nor would I state, that I did not like the fact that the case might be diverted. Respondent's suggestion that my comment was somehow intended to disapprove of diverting, or not diverting the case is taken completely out of context.

To drive this point home, let me repeat: Mr. Ritchie's accusation could not have been so because no decision had been made for me to like, or to dislike. As of the date of the hearing, the facts on this record indicate that the case against this young man had yet to be referred to the diversion unit and ipso facto, the diversion unit had yet to make a decision on whether or not to divert the case. In addition to this young man, the information on file in this case implicates two other young men who were charged by information with the same crime arising out of the same facts. One young man was offered a diversion under cause number 13-8-00488-8 and one young man's diversion was rejected and he eventually pled guilty in 13-8-00489-6 to the same charge pending in this case, 2nd Degree Criminal Trespass arising out of the same facts.

Follow me here – the diversion unit had already offered a diversion to one young man, and rejected a diversion to another young man arising out of these same facts. As of the October 13th hearing, there was no decision yet regarding diversion made by the diversion unit

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concerning Corbin Bird; and in fact, there is no evidence on the record that it had even been referred to the diversion unit. How in the world could anyone advance an argument that I liked or disliked a future unknown decision by the diversion unit which had already gone two different ways on the same facts and consequently, based on the record could go two different ways in Corbin Bird's case. The argument advanced by Mr. Ritchie is, in my opinion, inherently illogical. An objective observer would agree.

The Respondent's September 29th Motion sought a judicial edict that I enter an order mandating that the case be diverted essentially bypassing the legal process and the law's grant of unfettered discretion of the diversion unit. Despite Mr. Ritchie's written representation in his brief that the Respondent had in fact been offered a diversion, no such diversion had actually been offered. And when pressed by me to provide proof of the claimed diversion at the October 13th hearing, Mr. Ritchie admitted on the record: "There wasn't an offer." (see transcript, page 2 line 16).

In response, the prosecutor's office filed a motion on October 9th opposing the requested diversion and further, seeking a judicial edict that I enter an order summarily denying a diversion prior to any submission to - and decision by - the diversion unit.

As I pointed out above, neither party followed the law. I made it abundantly clear in my October 13th oral ruling that I was displeased with both sides:

"And, you know, when I see representations that a diversion agreement was offered, I sort of get my dander up, because I don't think it was."

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followed the process that it should have followed.”

That is precisely what I meant when I stated that the process had been “butchered.”

In addition to voicing my displeasure with both counsel, I also voiced my displeasure with the legislature’s grant of unreviewable discretion to the diversion unit to make this decision. That is what I meant when I said “*Do I like it? No.*” But in the very next breath, I made it abundantly clear – consistent with Comment 2 to Canon 2.2 – “*But I am bound to follow the law of the legislature.*”

There is a presumption that a trial court judge discharges his or her official duties without bias or prejudice. In re Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004) That was the precise point I was trying to make in making that statement. I will decide the matters in this case without bias or prejudice consistent with my judicial duties.

Now, let me address the Respondent’s alternative argument that by referring to the case as an “emotional case” I somehow evidenced impartiality in violation of my obligations under the code of judicial conduct.

Respondent’s assertion that my comment evidenced my impartiality was completely out of context. The statement I actually made on the record was this:

“This is an emotional case. But just because cases are emotional does not allow you to bypass the law, no matter how much somebody might want to. The l

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running rampant over the law.”

This is covered by Rule 2.3 which, in substance, states that a judge shall not, by words or conduct, manifest bias or prejudice. However, this restriction does not preclude judges from making reference to factors that are relevant to an issue in a proceeding.

I have listened to the recorded transcript. I listened carefully for the tone of voice I used throughout, especially in the areas that Mr. Ritchie lodges objections. Neither the volume of my voice nor the tone of my voice varied in any meaningful way throughout the hearing in any fashion that would indicate or communicate a manifest bias or prejudice.

Turning to the words themselves, keep in mind that the documents on file in this case contain allegations that the alleged victims' daughter questioned the respondent's actions in calling another student a "faggot"; that in response the respondent commented on Facebook that she was "A once a month bleeding bitch;" that there was a period of exchanges over time with less than civilized accusations back and forth, culminating in the alleged statement yelled on Mr. Harris' porch: "You fucking Nigger, Go back to Africa!"

It would be disingenuous of me, or any judge for that matter, to convey that this case does not have the potential to stir the emotions of many segments of our society. My reference to this by referring to the case as an "emotional case" was not to convey a "manifest bias of prejudice" held by me personally, but instead to make reference to these factors which are relevant to the case consistent with Rule 2.3.

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Turning to Rule 2.7 of Canon 2, it states: “A judge shall hear and decide matters assigned to the judge, except when disqualification or recusal is required by Rule 2.11 or law.” Comment 1 reads in part: “Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge’s respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues require that a judge not use disqualification or recusal to avoid cases that present difficult, controversial, or unpopular issues.”

The law provides that there is a presumption that a trial court judge discharges his or her official duties without bias or prejudice.

This directive and balance must be, and has been factored into my decision.

This leaves Rule 2.11.

The final factual attack on my impartiality is the assertion by Mr. Ritchie that I admitted on the record that I have feelings about the case.

Mr. Ritchie’s brief argues that, quote: “*a judge presiding over a criminal matter has no business having any personal feelings or thoughts about a case.*” (Respondent’s brief, page 5, ll. 13-14) Respondent asks me to recuse myself based on that admission. That is unrealistic, and

33110 5-000000086

not the legal standard for disqualification of a judge.

My comments need to be placed in context. In pressing the prosecutor on the legal foundation for his argument that I had the ability to override the decision of a diversion unit, I posed the following challenge: “Regardless of how I feel about the case, do I have the discretion to override the decision of the diversionary unit?” The State initially argued that I did in fact have that authority; however, I ruled, as a matter of law, as follows:

“Well, I – I may have my personal thoughts about this case, but I don’t have the authority to override a discretionary decision that the legislature gave to a diversionary unit. Now we can have, you know, evidentiary hearings about whether or not the process was followed, which clearly it wasn’t pursuant to law. But there is no way I have got the authority to come in and override a discretionary decision of a diversionary unit. If I don’t like them - - If I don’t like it, I can fire them and replace them, but I can’t come back in and second guess or override it. . . . I do not have the authority to second guess a discretionary decision that they have made.”

My comments regarding having personal thoughts about the case were entirely responsive to the State of Washington’s suggestion that I could substitute my personal opinion for that of the discretionary decision of the diversion unit. Again, to suggest that these comments reflect a lack of impartiality and evidenced an appearance of impartiality against the state or alternatively against Corbin Bird, is to take my comments completely out of context.

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As I explained to Mr. Harris after my ruling: “I understand that – I can understand that you might not be happy with the decision that I’ve made today, but I want you to know that I’m bound as a judicial officer to follow the law that the legislature passed and that the governor signed. I don’t have the ability to bypass the governor or the legislature in terms of this law no matter what my personal feelings are or what I think the equities are sir.”

The United States Supreme Court has looked at this issue in *Liteky vs. U.S.*, 510 U.S. 540 (1994). There, the Supreme Court noted that judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to a lawyer, a party or their case are not ordinarily sufficient to warrant disqualification. Expressions of impatience, dissatisfaction, annoyance and even anger are not a viable basis. In the opinion, the Supreme Court provided an example of the type of statement that would tip the scales. A judge, presiding over an espionage case against a German-American stated on the record that German-Americans “hearts are reeking with disloyalty.” That was the type of statement that the U.S. Supreme Court viewed as evidence of impartiality.

None of the cases cited by Mr. Ritchie’s brief involve situations where comments made during court proceedings were the premise of the challenge to partiality.

There is one case in Washington State where statements made on the record by the trial court judge did form the basis of a challenge to the judge’s partiality. In *State v. Worl*, 91 Wn.App. 88 (1998), Mr. Worl was tried for malicious harassment and attempted murder in a racially

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motivated “skin-head” attack on an African-American victim. The jury found Mr. Worl guilty. During the sentencing hearing, prior to issuing a decision, the trial judge stated the following: “My wife is white, we have two adopted Korean children. They have been harassed and intimidated by skinheads for race. Even to the point of asking my wife, why would you want to do that? It’s not a one time thing. When you do a crime, like harassment, based on race, based on hate, they will never forget it.” The defendant challenged this on appeal alleging that the judge was not impartial and should have recused himself. On appeal, the court ruled that it did not require disqualification.

Rule 2.11(A)(1) is instructive: **“A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, . . .”**

Comment 1 to this Rule states: *“Under this Rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply.”*

The standard for deciding whether to disqualify myself under the “impartiality rule” governed by Rule 2.11(A)(1) is whether an objective person, viewing the record as a whole, could question my impartiality. The Respondent filed only a portion of the transcript. I asked the Court’s official reporter to transcribe and file the transcripts of the two full hearings held on September 5th, 2014 and October 13th, 2014.

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In looking at the transcript as a whole, an objective person would conclude that in the context of the October 13th Motion, where one side was demanding that I mandate a diversion and the other side was demanding that I deny a diversion and preemptively override any decision to the contrary by the diversion unit, I was explaining the basis for my ruling - not projecting a bias one way or another. This position is supported by the court's analysis in State v. Chamberlin, a unanimous Washington State Supreme Court decision at 161 Wn.2d 30 (2007).

Again, the test is an objective test taking the record as a whole. The record, taken as a whole, indicates an effort on my part to be disciplined in my legal analysis and respectful of all participants in this legal proceeding.

Recall that Rule 2.11(A)(1) focuses on whether the judge has a personal prejudice regarding a party, or a party's lawyer. Here, there is no suggestion that I have any prejudice against Mr. Ritchie or his firm, Mr. Soukoup or the prosecutor's office, or Corbin Bird. There is no suggestion that this motion is based upon extra-judicial prejudice against a lawyer, a law firm, or a party. In addition, there was no judicial prejudice as that term is used under the law. I do not know Corbin Bird. This is the first matter I have had with him in any respect, legally or socially. I never sat on, or made any decisions whatsoever in the cases of the other two young men involved in this alleged incident, nor to the best of my knowledge have I presided over any cases involving either of them in any other respects. Thus, unlike cases involving a retrial, or cases of a failed or withdrawn plea, there is no possibility of judicial prejudice as that term is used by the courts in the context of this analysis.

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The only suggestion advanced by the Respondent is that my comments, referenced above, made in court during an oral ruling evidenced sufficient impartiality towards one side or another to bring into question my ability to sit fairly and impartially in this case warranting my disqualification.

Mr. Ritchie's brief concludes with the following statement: "Any ruling Judge Federspiel would make in this case would be tainted by the suspicion of impartiality."

That is not the test. As stated by the court in *State v. Corbin*, 827 F.Supp. 26 at page 33: "Mere suspicion of impartiality is not enough to secure a judge's disqualification."

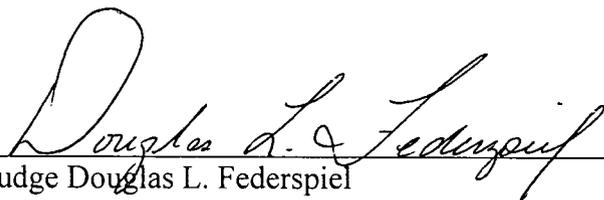
There is no evidence, or even a suggestion, of extra-judicial bias or prejudice. My statements made in the course of my October 13th ruling on the parties' cross-motions that, regardless of my personal feelings, I don't have the authority to grant either side the relief they requested in this admittedly emotional case, are not the types of statements that would lead any reasonable, objective observer to reasonably conclude that I could not proceed in a fair and impartial manner.

Just the opposite, they were designed to promote fairness and justice addressing head-on that the rule of law will prevail over emotion in my courtroom consistent with the standard set by Justice Hewart a century ago and currently required by our Code of Judicial Conduct.

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The Respondent's Motion for Recusal / Disqualification is DENIED.

Dated this 27 day of October, 2014



Judge Douglas L. Federspiel
Yakima County Superior Court, Juvenile Division

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THE COURT: I did spend some time reading the briefing. And the cases cited in the briefing. And I have put together notes for my ruling, which I'll read today with the intention then of attaching to an order. I wasn't efficient enough with my time over the weekend to put this into a pleading format because I think it warrants as opposed to simply getting a new transcript, I'll read my decision and I might - - I might have some editing as I read through it . My intent then will be to print this, attach it to an order and have it filed. But I was

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not efficient enough to get it out in advance to handout, so sorry about that. The respondent has filed a motion asking for my recusal arising out of statements that I made during a hearing in this courtroom on October the 13th, 2014. As a preliminary matter, the filing of the motion for a recusal in the form presented by the respondent ' s motion does not in and of itself require that I disqualify myself from deciding the motion. The decision to recuse oneself is an intrinsic part of the independence of a judge. And that's a quote from Consi - - it's a tough one to pronounce, Consiglio v . Consiglio.

I note that the moving party asked that the matter be noted before Judge Eloffson as the presiding judge. Unless requested sua sponte by the trial court judge, the matter of the trial court judge 's recusal is in the reasonable discretion of that judge , not the presiding judge . And there's a Washington case that addresses that, Tatham v. Rogers at 170 Wn. App. 76, it's a 2012 case. I decline to recuse myself from hearing the motion and from ruling on the motion.

To begin with there was a famous quote from a British court case that most lawyers are familiar

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with, ex parte McCarthy decided at the turn of the century in which Lord Chief Justice Hewart stated justice should not only be done but should manifestly and undoubtedly be seen to be done. It's a fairly famous quote.

In Washington State there are two primary methods for promoting this fundamental tenet. The most common vehicle is a timely affidavit of prejudice filed pursuant to RCW 4.12.040 and 050. That is not at issue in this hearing as we're not dealing with a timely filed affidavit of prejudice. The alternate affidavit for the disqualification of a judge is through the application of Canon 2 of the Code of Judicial Conduct. Terminology is important in this case and especially in this hearing. And I want to point

out that what has historically been offered to as recusal is not the current language of the Code of Judicial Conduct in Washington State.

The correct current terminology is disqualification. Referencing the prior canons of judicial conduct in effect in 2006 it has been stated, quote, " Due process , appearance of fairness and Canon 3(d) (1) of the Code of Judicial Conduct require a judge to recuse himself where there is bias against a party, or where impartiality can be questioned. "

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The test for whether a judge should disqualify himself is where impartiality might reasonably be questioned in an objective - - is an objective one. That was a quote from the State v. Leon, this is similar to the quote from Wolfkill cited in the respondent's brief.

It's appropriate to look at all three concepts referenced by that quotation. Due process, appearance of fairness and the Code of Judicial Conduct. They are grouped together as though they were one and the same. But they're not. While they share related concepts and attributes, they are not identical legal issues.

The appearance of fairness doctrine is applied to quasi - judicial actions, typically associated with decisions made under the Administrative Procedure Act . The appearance of fairness doctrine is not a concept applicable to executive actions such as the decision whether or not to

charge an individual with a crime. In 1999 our state Supreme Court held that the prosecutor's determination to file charges, to seek the death penalty or to plea bargain or executive not adjudicatory in nature and therefore the doctrine of appearance of fairness does not apply.

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That can be found in the case of *State v. Finch* at 137 Wn.2d 792. The appearance of fairness doctrine applicable to quasi - judicial action does not apply in the disciplined legal analysis to judicial actions. This was pointed out by the University of Washington Law Review article. The appearance of fairness doctrine a conflict in values at 61 Washington Law Review 533, on page 534 and again in footnote 10. And I quote from that footnote, "Judicial procedures are reviewed under the Washington State Code of Judicial Conduct. Therefore, the appearance of fairness doctrine does not apply," end quote.

Due process is a completely separate legal concept in the context of analyzing whether a judicial officer has acted with bias or impartiality sufficient to warrant disqualification. I should point out that there is a relatively recent United States Supreme Court case on point. *Caperton v. A T Massey Coal Company*, 5 56 U.S. 86 8 from 2009.

Forgive my allergies, I ' m having to drink some water to keep my voice. This is an important case in the context of the argument advanced

by Corbin B urn - - Bird. That my actions and statements as framed by Mr. Ritchie

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violate the due process clause of the constitution . They do not. Not only factually, but as a matter of law. In short, both the majority and the dissent in Caperton make it clear that a complaint alleging appearance of impartiality is not sufficient to trigger a violation of the due process clause under the Constitution.

Where only the appearance of impartiality is at issue the due process clause of the Constitution does not provide a legal remedy. The U. S. Supreme Court ruled as a matter of law that disqualification based upon an appearance of impartiality is a matter left to the state ' s legislatures . And here the Code of Judicial Conduct.

This United States Supreme Court opinion is binding precedent and disposes of that legal issue. This Supreme Court case was discussed at some length in Tatham v. Rogers. And they adopted the Supreme Court's analysis precluding the argument advanced by Corbin Bird in this case under the law of the state of Washington.

Thus, we're left here today with whether or not disqualification is proper under the Code of Judicial Conduct. While the canons of judicial conduct have changed since the quotations from State

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v. Leon and Wolfkill, the test for disqualification has not. That is given the state of the record on the whole, would an objective observer reasonably question whether the trial judge can act impartially. There are three primary rules that apply to the issue at hand. All from Canon 2 of the Code of Judicial Conduct, Rule 2.2, Rule 2.3 and Rule 2.11. Within the framework of Canon 2 are the independent concepts of extra judicial prejudice or bias and intra judicial prejudice, or sometimes referred to as straight judicial prejudice.

Let me go through those three rules individually. Rule 2.2 of the Code of Judicial Conduct is relevant. It states, quote, "A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially,"end quote. Comment 2 to Rule 2.2 is instructive in this situation. Quote, "Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."

Mr. Ritchie's motion of October 20th, 2014 seeks an order disqualifying me as the trial court judge. Quote, "On the ground that he has made

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comments that indicate a lack of appearance of fairness and impartiality , " end quote . It's from the respondent ' s motion , page 1 , lines 23 through 24, first on page 5 of Mr. Ritchie's motions, lines 8 through 11 , he states , quote, " He, " Judge Federspiel, "stated this is an emotional case. And seemed to state his dis pleasure that a diversion might be entered: Do I like it question? No, "end quote.

Let me address the latter comment first. The legal issue presented to me on October 13th, 2014 was whether I had the legal authority to override the discretionary decision of the diversion unit diverted pursuant to RCW 13.40.080 under the process set forth in RCW 13.40.070(6). In layman terms certain types of offenses are required to be referred to the diversion unit and the diversion unit has the discretion whether to offer a diversion or to reject a diversion. The diversion unit's decision once made is not a decision that can be reviewed by the trial court judge. In essence, the parties ' initial cross motions to this court ask me to make a decision whether to charge Corbin Bird or not charge

Corbin Bird and divert his charges under RCW

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13.40.070. You both asked me to rule in a fashion that no law provides.

While I have an obligation to determine whether there ' s probable cause from a police report, I do not using that same police report or any other information, have the authority to make a determination whether to divert a case or to charge Corbin Bird. That was the sum and substance of the legal issue before me and my ruling. It is in the context of discussing the legal process and the fact that a juvenile court judge has no legal authority to review the decision of the diversion unit, that I made the following statement during a portion of my decision. Quote, “Well, this process was butchered the whole way through. I am denying the motion to demand that it be deferred. 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 discretion granted by our state’s legislature. Do I like it? No. But I ' m bound to follow the law of the legislature, “end quote.

I expressed an opinion that I did not like the legal process that didn’ t allow for a trial court to review the decision of a diversion unit.

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As you will note, I concluded by saying, quote, " But I am bound to follow the law of the legislature,” end quote. That is exactly, almost word for word, consistent with Comment 2 to Rule 2. 2 of the Code of Judicial Conduct referenced above which warrants repeating. Quote,

"Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question," end quote.

Remember, there was no decision by the diversion unit as of the date of that hearing for me to like or to dislike. The suggestion or inference by the respondent that my comment evidenced a lack of impartiality is simply wrong and taken completely out of context.

At page 5 of the respondent brief Mr. Ritchie argues, quote, "The fact that he openly stated that he did not like the fact that the case might be diverted indicates a personal bias . Lack of an appearance of fairness and lack of Impartiality, "end quote.

Let me make this perfectly clear. No where in the record did I state, nor would I state , that I did not like the fact that the case might be

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diverted. The respondent's suggestion that my comment was somehow intended to dis approve of diverting or not diverting the case is taken completely out of context. To drive this point home let me repeat, Mr. Ritchie ' s accusations could not have been so, because no decision had been made for me to like or to dislike. As of the date of that hearing the facts on this record indicate that the case against this young man had yet to

be referred to the diversion unit and ipso facto the diversion unit had yet to make a decision on whether or not to divert the case.

In addition to this young man, the information on file in this case is a matter of public record implicates two other young men who were charged by information with the same crime arising out of the same facts. One young man was offered a diversion under Cause No . 13-8-00488-8.

And one young man's diversion was rejected and he eventually pled guilty in 13 - 8 - 004 89- 6 to the same charge pending in this case. Second degree criminal trespass arising out of the same facts.

Follow me here. The diversion unit had already offered a diversion to one young man and rejected a diversion to another young man arising

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out of the same facts. As of the October 13th hearing there was no decision yet regarding the diversion, regarding diversion made by the diversion unit concerning Corbin Bird. And in fact, there is no evidence on the record that it had even been referred to the diversion unit. How in the world could anybody advance an argument that I liked or that I disliked a future unknown decision by the diversion unit? Which had already gone two different ways on the same facts? And consequently based on the record could go two different ways in Corbin Bird's case.

The argument advanced by Mr. Ritchie is in my opinion inherently illogical. An objective observer would agree, the respondent's September 29th motion sought a judicial edict that I enter an order mandating that the case be diverted . Essentially bypassing the legal process and the law's grant of unfettered discretion of the diversion unit. Despite Mr. Ritchie's written representation in his brief that the respondent had in fact been offered a diversion, no such diversion had actually been offered . And when pressed by me to provide proof of the claimed diversion at the October 13th hearing, Mr. Ritchie admitted on the

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record, quote , "There wasn't an offer," end quote . See the transcript that's been filed, page 2, line 16. In response the prosecutor's office filed a motion on October 9th opposing the requested diversion and further seeking a judicial edict that I enter an order summarily denying a diversion prior to any submission to and decision by the diversion unit. As I pointed out above, neither party followed the law. I made it abundantly clear in my October 13th oral ruling that I was displeased with both sides. Quote, from me, " And, you know, when I see representations that a diversion agreement was offered, I sort of get my dander up, because I don ' t think it was. And I don't think the state followed the process it should have followed, " end quote .

That is precisely what I meant when I stated that the process had been butchered. In addition to voicing my dis pleasure with both counsel, I also voiced my dis pleasure with the legislature's grant of un reviewable discretion to the diversion unit to make this decision. That is what I meant when I said, "Do I like it ? No. "But in the very next breath I make it abundantly clear, consistent with Comment 2 to Canon 2.2, quote, "But I am bound to

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follow the law of the legislature, " end quote. In Washington State there is a presumption that a trial court judge discharges his or her official duties without bias or prejudice. That statement comes from our state Supreme Court in the case of In Re Davis, 152 Wn.2d 647, found at page 692, a 2004 opinion. That was the precise point I was trying to make in making that statement. I will decide the matters in this case without bias or prejudice consistent with my judicial duties.

Now let me address the respondent's alternative argument that by referring to the case as an emotional case I somehow evidenced impartiality in violation of my obligations under the Code of Judicial Conduct. Respondent's assertion that my comment evidenced my impartiality was completely out of context. The statement I actually made on the record was this: Quote, "This is an emotional case , but just because

cases are emotional does not allow you to bypass the law , no matter how much somebody might want to . The law is here to protect emotion running rampant over the law," end quote. This is covered by Rule 2.3, which in substance states that a judge shall not by words or

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conduct manifest a bias or prejudice. This restriction does not preclude judges from making reference to factors that are relevant to an issue in a proceeding. I have gone back and listened to the recorded transcript in both hearings. And what I mean by that, I ' m talking about the original Knapstad hearing and the - - I can't remember the date of that, September 5th, 2014. And the motion, cross motions for diversion on October 13th. I listened carefully for the tone of voice I used throughout, especially in the areas that Mr. Ritchie lodges objections. Neither the volume of my voice nor the tone of my voice varied in any meaningful way throughout the hearing in any fashion that would indicate or communicate a manifest bias or prejudice. I did this because oftentimes a transcript doesn't communicate emotion, connotations of verbiage or volume or tone.

Turning to the words themselves. Keep in mind that the documents on file in this case contained allegations that the alleged victims ' daughter questioned the respondent's actions in calling another student a "faggot."

That in response, the respondent commented on Facebook that she was
“Once a month bleeding bitch,” end quote.

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That there was a period of exchanges over time with less than
civilized accusations back and forth, culminating in the alleged statement
yelled on Mr. Harris's porch, quote, “You fucking nigger, go back to
Africa,” end quote . It would be disingenuous of me or any judge for that
matter to convey that this case does not have the potential to stir the
emotions of many segments of our society.

My reference to this by referring to the case as an emotional case
was not to convey a manifest bias of prejudice held by me personally but
instead to make reference to these factors which are relevant to the case
consistent with Rule 2. 3 of the Code of Judicial Conduct.

Turning to Rule 2.7 of the canons it states, quote, “A judge shall
hear and decide matters assigned to the judge except when disqualification
or recusal is required by 2 . 11 or the law. “Comment 1 reads in part,
“Unwarranted disqualification may bring public dis favor to the court and
to the judge personally. The dignity of the court, the judge’s rest to reflect
for fulfillment of judicial duties and a proper concern for the burdens that
may be imposed upon the judge ' s colleagues require that a judge not use
disqualification or recusal to avoid

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cases that present difficult , controversial or un popular issues , " end quote .

The law provides in the state of Washington that there is a presumption that the trial court judge discharges his or her official duties without bias or prejudice. This directive and balance must be and has been factored into my decision. This leaves Rule 2.11 of the Code of Judicial Conduct.

The final attack on my impartiality is the assertion by Mr. Ritchie that I admitted on the record that I have feelings about the case. Mr. Ritchie's brief argues that, quote, " A judge presiding over a criminal matter has no business having any personal feelings or thoughts about a case, " end quote. Respondent asks me to recuse myself based on that admission. That is unrealistic. And not a legal standard for disqualification of a judge. My comments need to be placed in context. In pressing the prosecutor for the legal foundation for his argument that I had the ability to override the decision of a diversion unit I posed the following challenge, quote , " Regardless of how I feel about the case , I do not have the discretion to override the decision of the diversionary unit, "end quote.

The state initially argued that I did in fact have

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that authority . However, I ruled as a matter of law as follows: Quote, " Well, I may have my personal thoughts about the case , but I don ' t have the authority to override a discretionary decision that the legislature gave to a diversionary unit. "Now, we can have, you know, evidentiary hearings about whether or not the process was followed, which clearly it wasn't , pursuant to law. But there is no way I have got the authority to come in and override a discretionary decision of a diversionary unit. If I don't like them, if I don't like it , I can fire them and replace them , but I can' t come back in and then second guess or override it. I do not have the authority to second guess a discretionary decision that they have made, "end quote.

My comments regarding having personal thoughts about a case were entirely responsive to the state of Washington's suggestion that I could substitute my personal opinion for that of the discretionary decision of the diversion unit. Again, to suggest that these comments reflect a lack of impartiality and evidenced an appearance of impartiality against the state or alternatively against Corbin Bird is to take my comments

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completely out of context . As I explained to Mr. Harris after my ruling, quote, "I understand that, I can understand that you might not be happy

with the decision that I've made today . But I want you to know that I am bound as a judicial officer to follow the law that the legislature passed and the governor signed. I don't have the ability to bypass the governor or the legislature in terms of this law, no matter what my personal feelings are or what I think the equities are, sir, “end quote. The United States Supreme Court has looked at this issue in *Liteky v. United States*, 5 10 U. S. 5 40, a 199 4 United States Supreme Court case.

There, the Supreme Court noted that a - - that judicial remarks during the course of a trial that are critical, or dis approving of , or even hostile to a lawyer , to a party , or to their case are not ordinarily sufficient to warrant disqualification. Impressions of impatient, dissatisfaction, annoyance and even anger are not a viable basis. In the opinion of the Supreme Court - - pardon me, I read - -in the opinion, the Supreme Court provided an example of the type of a statement that would tip the scales. A judge presiding over an espionage case against a German American stated on the record

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that, quote, " German Americans' hearts are reeking with disloyalty, " end quote. That was the type of statement that the U.S. Court viewed as evidence of the impartiality.

None of the cases cited by Mr. Ritchie ' s brief involves situations where comments made during court proceedings were the premises of the challenge to impartiality. In Dimmock v. Campbell, the trial court judge was sitting on a case between two litigants involved in a real property dispute. Campbell was suing Dimmock, claiming that Campbell had acquired property formerly owned by Dimmock due to a change in the course of a river. The crux of the dispute was the characterization of the movement of the river either as a gradual shift called an accretion or a sudden shift called an evulsion.

The finder of fact had to characterize the nature of the shift as a finding of fact which determined whether the boundary line was changed or was not changed as a matter of law. An accretion modified the property boundary whereas an evulsion did not. As it turned out the judge had worked at a law firm which several years ago had represented

Mr. Dimmock. An associate had written a letter to Mr. Dimmock providing a legal opinion that the river

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had changed course slowly and legally Mr. Dimmock had lost ownership of the property . At trial, the jury granted the judgment in favor of Campbell. Post-trial the judge granted a judgment notwithstanding the verdict in favor of Mr. Dimmock based on similar legal analysis from his

prior firm's opinion letter. While the trial judge did not recall having worked on Mr. Dimmock's case, the court granted a new trial on the basis that he acknowledged that Mr. Campbell might view his setting aside the jury's verdict as justifiably feeling that he had been denied a fair trial given the judge's presence at the law firm, when an opinion letter was written by an associate. There was though evidence that the judge used that opinion letter as a basis for his decision to set aside the jury's verdict, but the judge recused himself under those circumstances .

In state ex rel, *McFerran v. Justice Court of Evangeline Starr*, a case cited by Mr. Ritchie's brief . In that case law enforcement brought a gentleman before a justice of the peace in 1949. At that time at the first appearance the justice of the peace was presiding over a court that was not a court of record. When the gentleman appeared before

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the justice of the peace in his preliminary appearance the justice of the peace announced on the record that he could not give the defendant a fair and impartial trial . He signed an order transferring Mr. *McFerran's* case to another justice of the peace. The matter was taken to Superior Court seeking a writ mandating that Judge Starr lacked the authority to transfer venue that was the legal issue. Judge Starr had stated in open court that he

could not provide the defendant with a fair and impartial trial and on that basis they allowed the transfer to the alternate venue to proceed.

That was the legal issue in that case, In Wolfkill Feed and Fertilizer v. Martin, the trial court judge was presented with a brief by the plaintiff Wolfkill in which Wolfkill disclosed that Mr. Martin, the arbitrator under the mandatory arbitration had awarded judgment in favor of Wolfkill in violation of the mandatory rule – Arbitration Rule 7.2 (b). Martin asked the trial court judge to recuse himself. The judge declined, stating, quote, “The reference in the trial brief, and I really didn't pay attention to it, and I certainly will disregard anything that may have occurred. I don't know what occurred other than the

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recitation in the trial brief and I think it was inappropriate for the court to recuse itself in this matter. I can certainly disregard anything that's inappropriate in the trial brief and I think it is inappropriate. I ' m not going to pay attention to it. I'll base my decision on the facts presented here regardless of what M. Morgan might have thought , the court doesn't feel at all bound - - the court doesn't feel" - - I skipped a line - - " at all that the fact that Mr. Morgan might have done something in a mandatory arbitration is that I feel honor bound in any manner to uphold . And I don't

know what his reasons were. All I know is what was indicated to be the fact in Wolfkill's trial brief. And I'm going to disregard it.

On appeal the Court of Appeals affirmed the trial court's decision not to recuse stating, quote, "Here the court gave assurances it would ignore any reference to the arbitration proceedings and that it would act impartially. Martin's claim of possible bias is purely speculative. Moreover, unlike a jury trial, the court in a bench trial is presumed to base its decision solely on admissible evidence."

The final case cited by Mr. Ritchie's brief worth commenting on is Sherman v. State. In Sherman

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v. State the University of Washington School of Medicine terminated Dr. Sherman from his residency program. Dr. Sherman abused Fentanyl, it's an anesthetic and may have been under the influence when treating a patient during an operation. Dr. Sherman was terminated and he challenged the termination alleging noncompliance with the Administrative Procedure Act. Dr. Sherman was receiving treatment through the Washington monitored treatment program, WMTP. The case involved very complex legal issues, including but not limited to compliance with the AP A in the context of monitoring under the WMTP.

The trial court judge sent his intern to the Washington monitored treatment program for an interview to get information regarding the process used by the WMTP to monitor recovering physicians in order to resolve a discovery dispute sitting on the desk of the trial judge . This came to light and the trial judge refused to recuse himself. The question on appeal was whether the ex parte contact required recusal.

The court set forth the following test, quote, "The test for determining whether the judge's impartiality might reasonably be questioned is an

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objective test that assumes a reasonable person knows and understands all of the relevant facts. The central issue in Dr. Sherman's case was an allegation that he was not provided with a reasonable accommodation by the WMTP, the ex parte communication, quote , ' M ay have inadvertently obtained information critical to a central issue on remand. "Given that fact a reasonable person might question him impartially.

None of these cases involved situations where comments were made during court proceedings where the premises which was the premise of the challenge to impartiality. But there is one Washington State court where statements were made on the record by the trial court judge, which was the basis of a challenge to the court's impartiality.

That's the 1998 case of State v. Worl, 91 Wn. App. 88. Mr. Worl was tried for a malicious harassment and attempted murder in a racially motivated skin head attack on an African-American victim. The jury found Mr. Worl guilty.

During the sentencing hearing, but prior to issuing a decision on sentencing, the trial judge stated the following, "My wife is white, we have two adopted Korean children. They have been harassed

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and intimidated by skin heads for their race. Even to the point of asking my wife why would you want to do that? It's not a one-time thing. When you do a crime like harassment based on race, based on hate, they will never forget it."

The defendant challenged this alleging that the judge evidenced impartiality and should have recused himself. On appeal the trial court ruled that it was not. Rule 211, 211(a)(1) is instructive in this case. Quote, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.

Including but not limited to the following circumstances; the judge has a personal bias or prejudice concerning a party or a party's lawyer.

Comment 1 to this rule states under this rule a judge is disqualified whenever the judge's impartiality might reasonably be questioned

regardless of whether any of the specific provisions of paragraphs (a)(1) through (a) (5) apply."

The standard for deciding whether to disqualify myself under the impartiality rule governed by Rule 2.11A (1) is whether an objective person viewing the record as a whole could question my impartiality. The respondent filed only a

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portion of the transcript . I had the court - - court' s official reporter transcribe and file the transcripts of the two full hearings held on September 5, 2014 and October 13th, 2014 as the basis is to take a look at the transcript as a whole.

In looking at the transcript as a whole, an objective person would conclude that in the context of the October 13th motion where one side was demanding that I mandate a diversion and the other side was demanding that I deny a diversion and preemptively override any decision to the contrary by the diversion unit. I was explaining the basis for my ruling. Not projecting bias one way or the other.

This position is supported by the Washington State Supreme Court in *State v. Chamberlin*. A unanimous 2007 opinion found at 161 Wn.2d 30. Again, the test is an objective test taking the record as a whole. The record taken as a whole indicates an effort on my part to be disciplined in

my legal analysis and respectful of all participants in this legal proceeding. Recall that Rule 2.11A (1) focuses on whether the judge has a personal prejudice regarding a party or a party's lawyer.

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Here there is no suggestion that I have any prejudice against Mr. Ritchie or his firm, Mr. Soukup or the prosecutor's office or Corbin Bird.

There is no suggestion that this motion is based upon extra judicial prejudice against a lawyer, a law firm or a party. In addition, there was no intrajudicial prejudice as that term is used under the law, alternately judicial prejudice. I do not know Corbin Bird. This is the first matter I have had with him in any respect legally or socially. I never sat on or made any decision whatsoever in the cases of the two other young men involved in this alleged incident. Nor to the best of my knowledge have I presided over any cases involving either of those two other young men in any respects.

Thus unlike cases involving a retrial or cases of a failed or withdrawn plea, or Alford plea, there is no possibility of judicial prejudice as that term is used by the courts in the context of this analysis. The only suggestion advanced by the respondent is that my comments referenced above made in court during an oral ruling evidenced sufficient impartiality towards one side or another to bring

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into question my ability to sit fairly and impartially in this case.

Warranting my disqualification.

Mr. Ritchie's brief concludes with the following statement, quote, "Any ruling Judge Federspiel would make in this case would be tainted by the suspicion of impartiality, "end quote.

That is not the test. As stated by the court in State v. Corbin, 8 27 F.Supp. 26 at page 3 3, quote, "Mere suspicion of impartiality is not enough to secure a judge's disqualification, " end quote. There is no evidence or even a suggestion of extra judicial bias or prejudice. My statements made in the course of my October 13th ruling on the party's cross motions, " That regardless of my personal feelings, I don' t have the authority to grant either side the relief they requested in this admittedly emotional case , " are not the types of statements that would lead any reasonable objective observer to reasonably conclude that I could not proceed in a fair and impartial manner . Just the opposite, they were designed to promote fairness and justice, addressing head on that the rule of law will prevail over emotion in my courtroom , consistent with the standards set by Justice Hewart a century ago and

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currently required by our Code of Judicial Conduct.

Consequently I am denying the respondent's motion for disqualification.

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DECLARATION OF SERVICE

I, David B. Trefry, state that on January 8, 2016, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Mr. Peter Ritchie at ritchie@mftlaw.com and Deanna Boss at Boss@mftlaw.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of January, 2016 at Spokane, Washington.

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
Fax: (509) 534-3505
David.Trefry@co.wa.yakima.us