NO. 44268-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROY EUGENE MILLER,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

F. APPENDIX

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutional Provisions

Statutes and Court Rules

Other Authorities

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it granted a state's motion to exclude evidence relevant to the defendant's claim of self-defense, and when it refused to allow the defense to elicit the fact that the complaining witness had not told the police that the defendant had threatened her with a gun.

2. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when he intentionally elicited evidence from a police officer that he believed the defendant was guilty.

3. Trial counsel's failure to object when the complaining witness repeatedly interjected irrelevant, prejudicial evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. In a case in which the state has charged a the defendant with second degree assault with a firearm, does a trial court deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it refuses to allow the defense to elicit the fact that (1) the defendant feared the complaining witness because she was an active drug dealer, and (2) that the complaining witness had not told the investigating officer that the defendant had threatened her with a gun?

2. In a case in which the court finds sufficient evidence to instruct the jury on the claim of self-defense, does a prosecutor commit misconduct and thereby deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if he or she intentionally elicits evidence that a police officer believed the defendant was the primary aggressor?

3. Does a trial counsel's failure to object when the complaining witness repeatedly interjects irrelevant, prejudicial evidence deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

The defendant, Roy Eugene Miller has lived for many years in a house at 361 South 8th in Kalama, Washington, along with his five-year-old son Matthew, his older son Christopher and Christopher's girlfriend Nicole Reynolds. RP 41-43, 48-50, 231-239. Rachel Robinson, the defendant's ex-wife and the mother of Matthew, had also lived in the house until the summer of 2011 when she and the defendant separated. *Id.* She then moved out, leaving Matthew in the defendant's custody. *Id.* However, while she had moved out she returned most days to see Matthew and help tend to Matthew although she would occasionally refrain from visiting if she and the defendant had been in an argument. RP 51-52.

Sometime around July 13, 2012, the defendant became aware that Matthew's mother Rachel was using drugs and dealing drugs with her friend Scott Tuitt. RP 16-21, 21-25, 28-29. Once the defendant found out this information he called and texted Rachel telling her what he had found out. *Id.* He also told her that she could not come over to his house and could not see Matthew until she got her drug issue resolved. RP 16-21, 21-25, 28-29, 239-244. The next day, the defendant got a call from Scott Tuitt telling the defendant that he was coming over to speak with him. RP16-21, 21-25, 28-29. This caused the defendant a great deal of concern given his belief that

Rachel and Scott Tuitt were dealing drugs together. *Id.* The defendant has a number of physical limitations including five herniated disks in his back that make it difficult for him to physically defend himself. RP 231-239.

According to the defendant, at some point during the afternoon of July 14th Scott Tuitt did come over to his house to talk with him. RP 253-255. The defendant was concerned enough about the situation that he armed himself with a hand gun, putting it in his belt in the small of his back. *Id.* During this conversation, which occurred in the house, the defendant looked at his surveillance video and saw Rachel Robinson enter his back yard in spite of his repeated orders that she stay away from his house and in spite of his no trespassing signs. RP 239-244. In fact, Rachel had come to the property armed with a knife to use against the defendant if necessary. RP 77-84. Upon seeing Rachel the defendant left the house and walked out to the end of the back yard in the garden area where Rachel stood picking berries. RP 239-244. She had a knife in her hand. *Id.* The defendant then confronted Rachel. RP 57-60, 239-244.

According to Rachel, when the defendant came out of the house he was carrying a pipe. RP 57-60. According to the defendant he came out of the house carrying one pipe, set it down, and then picked up another pipe when he saw that Rachel was armed with a knife. RP 239-244. Regardless of the origin of the pipe, both parties agreed that when the defendant

confronted Rachel he had a pipe in his hands. RP 57-60, 239-244. As the defendant walked up to Rachel he reminded her that he had forbid her from coming onto his property and ordered her to leave. RP 239-244. She refused. RP 57-60. She then opened the blade on the knife and slashed at the defendant. *Id.* She claimed she took this action because she believed the defendant was going to hit her with the pipe, although she did not claim that he had tried to do so up to that point. *Id.*

Regardless of Rachel's motivation, once she slashed the defendant's arm with the knife the defendant did hit her a number of times with the pipe. RP 59-61. The first blow was to her hand. *Id.* The second was to her shoulder, and the third was to her thigh. *Id.* According to the defendant, he administered each blow in a controlled manner in an attempt to get her to drop the knife. RP 245-250. According to Rachel, the last blow with the pipe knocked her to the ground, after which the defendant stomped on her chest. RP 61-62. The defendant denied this conduct. RP 269. Rather, according to the defendant, she turned and fell over her own feet. *Id.* According to Rachel the defendant then took out his pistol and threatened to kill her with it. RP 61-62. According to the defendant the pistol fell from behind his back and he merely picked it up and put it back in his belt and in no way threatened Rachel with it. RP 251-255.

At about this time a Kalama Police Officer arrived on the scene,

having been summoned by a neighbor who had heard the dispute along with a male voice saying "Die Bitch." RP 43-47. This officer approached the defendant and asked if the defendant had any weapons on him. RP 133-138. The defendant stated that he had a gun and a knife. *Id.* The officer then placed the defendant in handcuffs for officer safety and took the defendant's pistol, as well as a switchblade knife and a "leather man" tool the defendant had on his person. *Id.* The defendant later stated that he did not know that it was illegal to possess the switchblade. RP 273. A second officer arrived a short time later and the two officers then took statements from the defendant and Rachel. RP 145-149, 178-184. Afterward they arrested the defendant and had Matthew leave with Rachel with the defendant's permission. RP 260.

Procedural History

By information filed on July 16, 2012, and amended on November 13, 2012, the Cowlitz County Prosecutor charged the defendant with one count of second degree assault with a deadly weapon against Rachael Robinson, and one count of possession of a dangerous weapon. CP 3-4, 8-9. The first count alleged that the deadly weapon was "a pipe and/or pistol" and that during the commission of the offense the defendant was armed with "a deadly weapon, to wit: a pipe" and that during the commission of the offense the defendant was also armed with "a firearm, to wit: a pistol." *Id.* The case

later came on for trial before a jury with the state calling three witnesses: Rachel Robinson and the two police officers who had responded to the defendants house. RP 41, 48, 124, 177. The defense then called three witnesses: the defendant's adult son Christopher, Christopher's girlfriend Nicole Reynolds and the defendant. RP 199, 212, 230. The state then recalled one of the officers for brief rebuttal. RP 275.

Just prior to picking the jury in this case the state moved *in limine* to exclude the defendant from eliciting any evidence, either through its own witnesses or through cross-examination of the state's witnesses, that either Rachel Robinson or Scott Tuitt had either been using drugs or selling drugs, or that these facts caused the defendant any concern for his safety. RP 16-30. Based upon the court's ruling, the defense did not present any of this evidence, nor argue from it before the jury during closing. RP 16-30, 327-339.

On four occasions during cross-examination Rachel Robinson claimed that the defendant had habitually physically assaulted her and threatened to kill her with firearms, and that his actions on the day in question were consistent with his prior assaultive behavior. RP 86-87, 88, 93-94, 95. Her first statement was as follows:

> I know how he is. I've put up with him hitting me upside the head and my ear bleeding. I mean, he's pulled his gun on me in front of our son. This is just him, I mean, he's – and yeah, I've fought back

previous times, too.

RP 86.

Rachel Robinson's second statement concerning the defendant's propensity for assaulting her was as follows:

> Oh, I got it pulled on me so many times, it's not that I don't pay attention to it. I kind of got used to him pulling a gun on me.

RP 88.

Rachel Robinson's third claim concerning the defendant's history and propensity for violence was the following:

> Q. Are you aware that he has some physical limitations?
>
> A. What do you mean by that? Physical limitations?
>
> Q. Bad back, a bad left arm?
>
> A. Yeah, that's never stopped him before from beating me.
>
> Q. Okay, that wasn't really my question. My question was you're aware that he has the bad back?
>
> A. Yeah, his back. So he says, yeah.

RP 93.

Rachel Robinson's fourth statement concerning her claims of prior abuse and the defendant's propensity for violence against her was:

> Q. You weren't trying to set Mr. Miller up were you?
>
> A. No, I wasn't. I've never done that. If that was the case, I would have done it a long time ago. All the twenty, thirty other times he's beat on me. That was not my intention – I did not. The neighbors

> called that I don't talk to, I don't talk to his neighbors. I wanted to get arrested because I was afraid of Mr. Miller, the way he would react, I mean, and I asked Officer Skeie, who – you know, who called the cops? And he said the neighbor.

RP 95.

At no point during any of these statements did the defendant's attorney object or move that the court instruct the jury to disregard. RP 86-87, 88, 93-94, 95. In addition, during the state's redirect examination of one of the officers, the state asked why he did not arrest Rachel Robinson. RP 193. The question and the officer's answers were as follows:

> Q. Um, why didn't you arrest Rachel Robinson?
>
> A. Well, as far as the assault, we didn't believe that she was the primary physical aggressor.

RP 193.

Once again, the defense did not make any objection to this evidence or move that the court instruct the jury to disregard both the question and the answer. RP 193. Finally, during the defendant's cross examination of one of the officers, the defense attempted to elicit the fact that while Rachel Robinson was now claiming to the jury that the defendant had pulled a gun and threatened to kill her with it, she did not make any similar claim to the police officers who arrived on the scene during the confrontation and arrested the defendant. RP 175. The state objected that the defendant's question called for inadmissible hearsay and the court sustained the objection. *Id.*

This exchange went was follows:

> Q. Okay. Did – on July 14th, when you talked with Ms. Robinson, did she ever make a statement that my client had pointed the gun at her?
>
> MR. BENTSON: Objection, hearsay.
>
> JUDGE HAAN: Sustained.
>
> MR. SURYAN: I'm not a –
>
> JUDGE HAAN: Counsel approach.
>
> (Sidebar; not recorded.)
>
> JUDGE HAAN: Counsel, you're withdrawing the question, is that correct?
>
> MR. SURYAN: Yes.
>
> JUDGE HAAN: All right.
>
> MR. SURYAN: Can we approach, Your Honor?
>
> (Sidebar; not recorded.)

RP 175.

Following the close of evidence in this case the court instructed the jury with neither party making any objections or taking exception to any of the instructions. RP 219-225, 226-227, 285-304; CP 53-82. The parties then presented closing argument with neither party making any objections to the other party's statements to the jury. RP 304-327, 329-339, 339-350. At this point the court released the jury for the day and instructed them to return at

8:30 the next morning to begin deliberations. RP 356. Just a little after noon the next day the jury finished its deliberations and returned verdicts of guilty on both counts. RP 358-361; CP 83-84. The jury also returned special verdicts that the defendant was armed with both a deadly weapon (the pipe) and a firearm during the commission of Count I, and a special verdict that the defendant committed Count I against a family member. CP 85-87.

The court later sentenced the defendant to 54 months in prison on Count I. CP 94. This sentence reflected imposition of 6 months on a range of 3 to 9 months, plus 36 months for the firearm enhancement and 12 months for the deadly weapon enhancement. CP 88, 89-102. The defendant filed timely notice of appeal following imposition of sentence. CP 106.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL WHEN IT GRANTED A STATE'S MOTION TO EXCLUDE EVIDENCE RELEVANT TO THE DEFENDANT'S CLAIM OF SELF-DEFENSE AND WHEN IT REFUSED TO ALLOW THE DEFENSE TO ELICIT THE FACT THAT THE COMPLAINING WITNESS HAD NOT TOLD THE POLICE THAT THE DEFENDANT HAD THREATENED HER WITH A GUN.

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial, a defendant charged with a crime has the right to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis,* 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his due process right under Washington Constitution, Article 1, § 3, and United States Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

In the case at bar, the defense argues an equivalent denial of due process when the court granted the state's request to prevent the defense from presenting any evidence that the defendant had just become aware that Rachel Robinson and Scott Tuitt were using drugs together, were dealing drugs together, that this was the reason that he had excluded Rachel Robinson from his property, that he felt threatened by Scott Tuitt and Rachel

Robinson, and that this was why he had armed himself with a firearm. This evidence was critical in order to support the defendant's claims that he did not leave his home in order to confront Rachel Robinson with a firearm and was relevant to rebut Rachel Robinson's claims that the defendant pulled that firearm and threatened her with it. This evidence was also relevant and important to the defense in order to show the jury that the defendant had not arbitrarily excluded Rachel from access to their son.

However, this evidence was relevant and admissible for a more fundamental reason. This reason was that in the case at bar the defendant endorsed a claim of self-defense. In order to properly raise the issue of self-defense or justified use of force in the State of Washington, the defendant needed to produce evidence supporting the claim that the defendant's conduct was done in self-defense. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982). Although this evidence did not need to raise to the level of sufficient evidence "necessary to create a reasonable doubt in the jurors' minds as to the existence of self-defense," there still needed to be relevant evidence on this issue. *State v. Adams*, 31 Wn.App. at 395 (citing *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977)). In fact, the court may only refuse an instruction on self-defense where no plausible evidence exists in support of the claim. *Id.* A defendant's claim alone of self-defense is sufficient to require instruction on the issue. *State v. Bius*, 23 Wn.App.

807, 808, 599 P.2d 16 (1979).

In determining whether or not "any" evidence exists to justify instructing on self-defense, the court must apply a "subjective" standard. *State v. Adams*, 31 Wn.App. at 396. In other words, "the court must consider the evidence from the point of view of the defendant as conditions appeared to him at the time of the act, with his background and knowledge, and 'not by the condition as it might appear to the jury in the light of testimony before it.'" *State v. Adams*, 31 Wn.App. at 396 (quoting *State v. Tyree*, 143 Wash. 313, 317, 255 P. 382 (1927)). In *Tyree*, the Supreme Court states the proposition as follows:

> The appellants need not have been in actual danger of great bodily harm, but they were entitled to act on appearances; and if they believed in good faith and on reasonable grounds that they were in actual danger of great bodily harm, it afterwards might develop that they were mistaken as to the extent of the danger, if they acted as reasonably and ordinarily cautious and prudent men would have done under the circumstances as they appeared to them, they were justified in defending themselves.

State v. Tyree, 143 Wash. at 317.

The court also stated:

> [T]he amount of force which (appellant) had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant.

State v. Tyree, 143 Wash. at 316.

As this review of the law on self-defense explains, evidence

addressing the defendant's subjective belief of danger and evidence addressing the objective reasonableness of that belief is relevant and admissible in order to aid the jury in evaluating these two questions. In fact, the existence of such evidence and effective argument from it is necessary in order to effectively make the claim of self defense. This is precisely why the trial court's ruling on the state's motions *in limine* in this case denied the defendant his right to a fair trial. By excluding the evidence of Scott Tuitt and Rachel Robinson's drug use and dealing, of the defendant's knowledge of it and the fear that this fact created, the court prevented the defendant from effectively arguing his defense in the same way as the court in *Ellis* prevented the defendant from presenting his claim of lack of intent by excluding the defendant's expert witnesses. Thus, in the same manner that the defendant was entitled to a new trial in *Ellis*, so the defendant in this case is entitled to a new trial.

II. THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE INTENTIONALLY ELICITED EVIDENCE FROM A POLICE OFFICER THAT HE BELIEVED THE DEFENDANT WAS GUILTY.

As was mentioned in the previous argument, while due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *Bruton v. United States, supra; State v. Swenson, supra.* The due process right to a fair trial is violated when the

prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order *in limine* precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and (2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this claim by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the death sentence. The court held:

> Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion *in limine* was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the

> prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

State v. Gregory, 158 Wn.2d at 866-867.

In the case at bar, the prosecutor committed misconduct when he specifically elicited irrelevant, prejudicial evidence that the police officers believed that the defendant was the primary aggressor in this case and that this was why they arrested the defendant and did not arrest Rachel Robinson. This misconduct occurred during the state's redirect examination of one of the officers when the prosecutor asked why the officers did not arrest Rachel Robinson. RP 193. The question and the officer's answer were as follows:

> Q. Um, why didn't you arrest Rachel Robinson?
>
> A. Well, as far as the assault, we didn't believe that she was the primary physical aggressor.

RP 193.

As the following explains, this evidence was both irrelevant and prejudicial. Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has

the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

> "[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); *see Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).
>
> The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

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

defendant's guilt or innocence).

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

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

While an arrest or citation might be said to evidence the

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

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

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

In the case at bar the prosecution's intentional injection of the fact of arrest to the jury went well beyond the general opinion evidence that any fact of arrest conveys. Rather, as the previously quoted question and answer reveal, the prosecutor asked the police officer to render an opinion directly on the guilt or innocence of the defendant by eliciting the fact that the officers believed the defendant was the "primary aggressor" in this case. The reason is that under Jury Instruction No. 14, sometimes called the "primary aggressor" instruction, an opinion that a person is a primary aggressor is necessarily an opinion that the defendant was not acting in self defense. This instruction stated:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 69.

In this case the defendant did not deny that he had repeatedly hit Rachel Robinson with a pipe. Rather he took the stand and admitted the conduct, arguing that he was acting in self-defense. The state responded to this argument by proposing the preceding "first aggressor" instruction and then arguing to the jury that the claim of self-defense must fail because, consistent with the instruction, the defendant was the primary aggressor. Under these facts, the state's elicitation of evidence from a police officer that in his and his fellow officer's opinions the defendant was the primary aggressor violated the defendant's right to a fair trial and constituted prosecutorial misconduct.

A careful review of the evidence presented at trial also leads to the conclusion that in this case this improper question by the prosecutor caused prejudice to the defendant. This evidence includes the following facts: (1) that the incident occurred on the defendant's property, (2) that Rachel Robinson had no right to enter upon this property without the defendant's consent, (3) that the defendant had unequivocally communicated to Rachel

Robinson that she was excluded from his property, (4) that Rachel Robinson intentionally trespassed upon the defendant's property, (5) that Rachel Robinson armed herself with a knife prior to trespassing on the defendant's property, (6) that Rachel Robinson stuck the first blow in the fight by slashing the defendant's arm with the knife, and (7) that while Rachel Robinson claimed that the defendant viciously assaulted her with a pipe and his feet, she refused any medical aide. Under these facts there is a significant likelihood that but for the state's misconduct in eliciting the officers' opinions the jury would have returned a verdict of acquittal. As a result, the defendant is entitled to a new trial.

III. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE COMPLAINING WITNESS REPEATEDLY INTERJECTED IRRELEVANT, PREJUDICIAL EVIDENCE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

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

assistance has met this standard, the Supreme Court has set a two part test.

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

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when Rachel Robinson repeatedly interjected inadmissible, highly prejudicial propensity evidence before the jury. This evidence violated the defendant's right to a fair trial under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and caused prejudice. The following addresses this

argument.

As was mentioned in Argument I, while due process does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

> the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal justice that "propensity" evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. *See* 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Tegland puts this principle as follows:

> Rule 404(b) expresses the traditional rule that prior misconduct

> is inadmissible to show that the defendant is a "criminal type," and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.
>
> Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.
>
> . . .
>
> The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the

past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

> The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In addition, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

> Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995). As the court stated in *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982), "[a] careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest."

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190 (1987), also explains why evidence of similar crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, the Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted

him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

> In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

State v. Escalona, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which almost constituted the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of

other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

> There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." *See State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." *See State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. *See Saltarelli*, 98 Wn.2d at 362.
>
> While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," *[State v.] Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972) (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584 (1917)), the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

State v. Escalona, 49 Wn.App. at 255-56.

The decisions in *Pogue, Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed a crime, particularly

one similar to the crime charged. The admission of this evidence is such a strong inducement to the jury to simply find the defendant guilty based upon his propensity to criminal conduct that its admission denies the defendant a fair trial.

In the case at bar Rachel Robinson injected inadmissible, highly prejudicial propensity evidence on four occasions in quick succession without objection from the defense. Her first statement was as follows:

> I know how he is. I've put up with him hitting me upside the head and my ear bleeding. I mean, he's pulled his gun on me in front of our son. This is just him, I mean, he's – and yeah, I've fought back previous times, too.

RP 86.

Rachel Robinson's second statement concerning the defendant propensity for assaulting her was as follows:

> Oh, I got it pulled on me so many times, it's not that I don't pay attention to it. I kind of got used to him pulling a gun on me.

RP 88.

Rachel Robinson's third claim concerning the defendant's history and propensity for violence was the following:

> Q. Are you aware that he has some physical limitations?
>
> A. What do you mean by that? Physical limitations?
>
> Q. Bad back, a bad left arm?
>
> A. Yeah, that's never stopped him before from beating me.

Q. Okay, that wasn't really my question. My question was you're aware that he has the bad back?

A. Yeah, his back. So he says, yeah.

RP 93.

Rachel Robinson's fourth statement concerning her claims of prior abuse and the defendant propensity for violence against her was:

Q. You weren't trying to set Mr. Miller up were you?

A. No, I wasn't. I've never done that. If that was the case, I would have done it a long time ago. All the twenty, thirty other times he's beat on me. That was not my intention – I did not. The neighbors called that I don't talk to, I don't talk to his neighbors. I wanted to get arrested because I was afraid of Mr. Miller, the way he would react, I mean, and I asked Officer Skeie, who – you know, who called the cops? And he said the neighbor.

RP 95.

These four gratuitous statements concerning the defendant's alleged repeated and vicious prior assaultive behavior towards Rachel Robinson well exceeded the inadmissible propensity evidence in both *Pogue* and *Acosta*. In the former case there was only one reference to the defendant's prior possession of the type of drug with which he was currently charged with possessing. The court found this sufficient to deny him a fair trial. In the latter case there was only one reference to the defendant's prior assaultive behavior with a knife in a case in which he was charged with a similar assault. The court found this sufficient to deny him a fair trial. By contrast,

in the case at bar Rachel Robinson four times made claims to the jury that the defendant had physically beat her and threatened her with firearms on twenty or thirty occasions causing her significant injury. Under the facts of this case, this evidence also denied the defendant his right to a fair trial.

In addition, there was no possible tactical basis for the defendant's attorney to fail to object and move for a mistrial. Put another way, one might ask the following questions: What possible tactical advantage could be gained by failing to object to the repeated admission of evidence that by its very nature denies the defendant a fair trial and assures his conviction? Since there is no possible tactical advantage, trial counsel's failure to object to this evidence fell below the standard of a reasonably prudent attorney. In addition, this failure also caused prejudice. As was mentioned in the previous argument, there was significant evidence presented at trial that supported the defendant's claim that Rachel Robinson was the primary aggressor and that he was acting in self-defense in everything that he did. The evidence included the fact that Rachel Robinson armed herself with a knife with the intent of trespassing on the defendant's property and that she struck the first blow. Thus, there is a high likelihood that the defendant would have been acquitted had trial counsel simply objected to Rachel Robinson's repeated improper statements. As a result, trial counsel's repeated failures to object denied the defendant his right to effective

assistance of counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. Consequently, the defendant is entitled to a new trial.

CONCLUSION

This court should vacate the defendant's conviction for second degree assault and remand for a new trial based upon the trial court's improper exclusion of relevant, exculpatory evidence, based upon the state's introduction of inadmissible opinion evidence, and based upon the denial of the defendant's right to effective assistance of counsel.

DATED this _____ day of May, 2013.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

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

WASHINGTON CONSTITUTION
ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. ROY E. MILLER, Appellant.	NO. 44268-0-II AFFIRMATION OF OF SERVICE

Cathy Russell states the following under penalty of perjury under the laws of Washington State. On May 20th, 2013, I personally placed in the United States Mail and/or E-filed the following document with postage paid to the indicated parties:

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Dated this 20TH day of May, 2013, at Longview, Washington.

/s/

Cathy Russell, Legal Assistant

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