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COURT OF APPEALS

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NO. 33933-1-II

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

STATE OF WASHINGTON,

Respondent,

vs.

BRENT WARD LUYSTER,

Appellant.

BRIEF OF APPELLANT

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

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

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered judgment of conviction for malicious harassment because the state failed to present substantial evidence on this charge.

2. The trial court denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it allowed the state to elicit evidence that was highly prejudicial but only marginally probative.

3. The trial denied the defendant his right to a jury trial under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment on all of the elements of the offense charged when it allowed a defense expert to render an opinion on the defendant's state of mind.

4. Trial counsel's failure to move to exclude the incriminating statements of a non-testifying co-defendant violated the defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it enters judgment of conviction for malicious harassment when the state fails to present substantial evidence on this charge?

2. Does a trial court deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it allows the state to elicit evidence that is highly prejudicial but only marginally probative?

3. Does a trial deny a defendant the right to a jury trial under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment on all of the elements of the offense charged if it allows a defense expert to render an opinion on the defendant's state of mind?

4. Does a trial counsel's failure to move to exclude the incriminating statements of a non-testifying co-defendant violate a defendant's right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

On June 19, 2005, Eric Ross was at the James Fessel residence in Clark County, Washington. RP 134-136, 204, 253-254.¹ Mr. Ross is African-American. *Id.* At the time, James Fessel and his son Jesse were working on Ross's car. RP 134. While watching the Fessels working on his vehicle, Ross noticed a car pass by with either two or three men in it. RP 138-39. Ross recognized one of the men as Michael "Bobo" Rund. RP 137-38. A few minutes later, Mr. Rund and Defendant Brent Luyster along with three other men walked down the street toward Ross. RP 138-39. Ross knew Rund and Luyster from previous peaceful contacts. RP 136, 161-62, 179, 181-183.

The group of met stopped near Jesse Fessel. RP 140. Rund then said to Jesse, "Can we jump the nigger?" RP 140. Jesse responded to Rund, "No, that's little Eric." RP 140. Rund replied to Jesse, "I didn't know you names your niggers." RP 142. Rund then reached out as if to shake Ross's hand. RP 145. Instead, Rund hit Ross on the side of the head with a closed fist. RP 145. Ross responded by hitting Rund with a closed fist. RP 146. At this point Rund told Ross that he did not want to fight anymore. RP 146.

¹"RP" refers to the five consecutively-numbered volumes of verbatim that covering the trial and sentencing in this case.

However, Ross continued to hit Rund in the face while stating that they should “finish the fight.” RP 146. At this point defendant Luyster jumped into the fray and tried to kick Ross. RP 146. However, he missed and in response Ross grabbed the defendant’s leg and hit the defendant with a closed fist. RP 147.

Ross then looked up and saw a member of the group – later identified as Prueitt – pointing a gun at his chest and stomach. RP 147. The gun clicked but did not fire and Ross ran. RP 148. As he ran away, Prueitt shot Ross in the leg. RP 148. Although shot, Ross hopped into the Fessel home where James Fessel called 911. RP 150, 197-98. There was no evidence that Rund or Luyster encouraged Prueitt to shoot Ross, or even knew that Prueitt had a gun.. *Id.*

Although Rund had a large swastika tattooed on his head, at the time of the incident Mr. Ross could not see it because Rund’s hair was long enough to cover it. RP 150-51. Mr. Ross stated that he did not feel threatened by the “nigger” comment; rather, he felt “disrespected”. RP 172. Mr. Ross did feel threatened when Rund hit him. RP 172.

During the encounter, the defendant never said anything that could be interpreted as a racially-motivated statement. RP 153. Prior to the encounter, the defendant had approximately ten prior contacts with Mr. Ross and they had all been peaceful. RP 181. The defendant does have a three-inch

swastika tattooed on his right bicep. RP 187.

Procedural History

By information filed July 8, 2005, the Clark County prosecutor charged Jeremiah Prueitt, Brent Luyster, and Defendant Michael Rund with attempted murder in the first degree (count I) and malicious harassment (count II). CP 1-2. On the first day of trial, the court severed Defendant Prueitt's case from the trial of the defendant and Mr. Rund. RP 13-14. The severance was based upon an attorney conflict that necessitated the assignment of new counsel in Mr. Prueitt's case. RP 13-14. Although the record is silent on the matter, the state apparently moved to dismiss the attempted murder charge against the defendant and Mr. Rund because they were tried only on the malicious harassment charge, which was thereafter referred to as Count I. CP 71-85.

During trial, the State sought to admit Mr. Rund's post-incident statements into evidence. RP 78. Accordingly, a CrR 3.5 hearing was held before the taking of trial testimony. RP 81-91. During this hearing, Detective Henderson testified that Rund made certain statements to him when Rund was not in custody and after he had been Mirandized. RP 83-88. Rund did not dispute Henderson's testimony. RP 91. The court ruled that Rund's statements were admissible. RP 91. In a motion in limine, the State raised

the issue of the admissibility of evidence that Luyster, Rund, and Pruiett all had swastika tattoos. RP 28-29. The State argued its admissibility for identification purposes and for proof of motive to commit a racial act. RP 28-29. The defense objected on relevancy grounds. RP 34. The court agreed with the State and found the swastika evidence admissible for both identification purposes and proof of motive. RP 37, 42-43. Although the court found the evidence highly prejudicial, it ruled that its probative value outweighed the prejudicial effect. RP 43.

Prior to trial, the defendants also argued against the admission of a “911” call.² RP 45-49. The State argued that the call was an excited utterance. RP 49. The defense challenged the tape as cumulative of the anticipated testimony and irrelevant as it focused on an act by the severed co-defendant Pruiett. RP 55. Ultimately the court concluded that the evidence would be admitted as an excited utterance if the caller – James Fessel – testified. RP 55-57. Mr. Fessel did testify and the court admitted the tape into evidence and played it to the jury. RP 198-204.

Trial lasted from September 12th to the 14th. RP 3-428. During trial Mr. Ross identified the defendant and co-defendant in court as he had known him from many prior contacts. RP 135-37, 151, 161-162, 179, 181-183.

²The 911 call is transcribed and included in the record at RP 198-205.

Neither Mr. Ross nor any other witnesses used the tattoos as part of their evidence of identification. *Id.* They also testified to the facts contained in the preceding *Factual History*. RP 3-428.

During trial and without objection from defendant's attorney, Detective Henderson testified that Mr. Rund admitted to physical contact with Ross but described it as chest bumping and then pushing Ross away. RP 185-86. He also testified that Mr. Rund denied knowing that Pruiett had a gun or that anybody was going to be shot. RP 185-86. However, according to Detective Henderson, Mr. Rund acknowledged having a swastika tattoo on his head and to being a white supremacist. RP 185-87.

Over continued objection the state played James Fessel's 911 call. RP 198-205. During the call, "Moe" is identified as the person who shot Ross, "Moe" was with a group of six or seven Skinheads, and James Fessel knew the people involved. RP 198-205. A picture of Jeremiah "Moe" Prueitt, later found in a search of a Woodland motel room around July 15 was admitted into evidence over strenuous objection from the defense. RP 272-75. The picture is of Pruiett's back and shows a tattoo with "Moe Prueitt" flanked on both sides by a swastika. RP 272-75. The court expressed a concern that because no one saw the tattoo at the time of the incident, it wasn't relevant for identification purposes. RP 274-75. In admitting the photo, the court relied on the commonality of the three defendants having swastika tattoos as

an indication of a common racist mindset. RP 274-75. Although Detective Henderson looked at Pruiett's back while the trial was in progress and confirmed the presence of the tattoo, no one testified that Pruiett had the tattoo at the time of the incident. RP 3-328.

Over defense objection, the State called a gang expert, Vancouver police detective Zapata, as its last witness. RP 293, 296. Zapata provided limited information about the white supremacists movement, swastikas, and African Americans. RP 295-97.

PROSECUTOR: Okay. Do you have experience with the meaning of swastika tattoos with respect to White Supremacists?

ZAPATA: Yes.

(The defense objects on relevancy grounds and the court overrules the objection.)

PROSECUTOR: And what is the meaning of a swastika tattoo and how does it – well, actually, let me back up for a second. Does a swastika tattoo with respect to White Supremacists have a meaning towards African-Americans people.

ZAPATA: Yes. There came a time where – where it did have a meaning. It's recognized as a symbol of hate by various civil rights groups.

PROSECUTOR: Okay. Is that a well-known symbol?

ZAPATA: Yes.

PROSECUTOR: All right.

RP 295-97.

Neither the defendant nor Mr. Rund testified during the trial. RP 3-328. Following instruction, argument, and deliberation, the jury returned verdicts of guilty against both the defendant and Mr. Rund. RP 439-40, CP 68. The court later sentenced the defendant to 40 months on a 33-43 month range. RP 448-457; CP 50-67. The court sentenced Mr. Rund to 60 months on a range of 60 months. RP 448-457. Both the defendant and Mr. Rund later filed timely notice of appeal and this court had consolidated their cases on appeal. CP 86; *see also* Order of Consolidation.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED JUDGMENT OF CONVICTION FOR MALICIOUS HARASSMENT BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE ON THIS CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact

to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974).

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

For example, in *State v. Q.D.*, 102 Wn.2d 19, 685 P.2d 557 (1984), Defendant was convicted of criminal trespass and appealed on the basis that the state did not present substantial evidence of the crime charged. The evidence presented to the court consisted of the testimony of the principal and a custodial engineer of the school in which Defendant was alleged to have trespassed. The engineer testified that he saw Defendant, who was 11½ years old, sitting on the school grounds about 2 p.m. playing with a set of keys that looked like those belonging to the night custodian. The engineer then checked the custodian’s desk and found that the keys were missing, along with a burglar alarm key. The desk was located in an unlocked office. He

and the principal then took Defendant into the principal's office to speak with him. When Defendant arose from the chair in which he was sitting in the office, the burglar alarm key was discovered on a radiator behind the chair.

On appeal, the Washington Supreme Court reversed, stating as follows:

Recently, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), we reiterated the long-standing law in Washington that proof of possession of recently stolen property is not prima facie evidence of burglary unless accompanied by other evidence of guilt. See *State v. Garske*, 74 Wn.2d 901, 447 P.2d 167 (1968); *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946). Other evidence of guilt may include a false or improbable explanation of possession, flight, use of a fictitious name, or the presence of the accused near the scene of the crime. *State v. Mace, supra*. While Q.D. was on the school grounds with the keys, the keys were not known to be missing until he was seen with them, and they had last been seen several hours before in a desk in an unlocked office. Thus, both the absence of evidence that he was near the scene at a time proximate to the disappearance of the keys, and the absence of other evidence corroborative of guilt require us to conclude that there was insufficient evidence of trespass in the first degree. We therefore reverse [Defendant's] conviction.

State v. Q.D., 102 Wn.2d at 28.

In the case at bar, the defendant was charged with malicious harassment under RCW 9A.36.080(1), which states as follows.

(1) A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victims race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap:

(a) Causes physical injury to the victim or another person;

(b) Causes physical damage to or destruction of the property of the victim or another person; or

(c) Threatens a specific person or group of persons and places that person, or members of the specific group of persons, in reasonable fear of harm to person or property. The fear must be a fear that a reasonable person would have under all the circumstances. For purposes of this section, a "reasonable person" is a reasonable person who is a member of the victim's race, color, religion, ancestry, national origin, gender, or sexual orientation, or who has the same mental, physical, or sensory handicap as the victim. Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.

RCW 9A.36.080(1).

The gravamen of this offense under the first alternative method is to (1) cause "physical injury to the victim or another person," and (2) to do so based upon the defendant's "perception of the victims race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap." Thus, to sustain a conviction in the case at bar, substantial evidence must support two findings: (1) that the defendant assaulted Eric Ross, and (2) that the defendant acted out of a racial motivation. Seen in the light most favorable to the state, the evidence proves only the first element of the offense.

By contrast, the record is absolutely devoid of any evidence that the defendant acted out of racial motivation. The defendant was apparently

acquainted with Mr. Ross and had seen him on as many as ten prior occasions without any problems. It is true that on this occasion the co-defendant did make racially offensive statements at the beginning of his physical confrontation with Eric Ross. However, the defendant did not make any racially motivated statements and he did nothing to endorse the statements of the co-defendant. In fact he only entered the physical confrontation when Mr. Ross continued to beat the co-defendant after the co-defendant attempted to withdraw from the physical confrontation. Even seen in the light most favorable to the state, this evidence fails to prove that the defendant acted with any racial animus. In addition, it fails to prove beyond a reasonable doubt that the defendant endorsed, promoted, or encouraged the co-defendant's racial animus. Thus, substantial evidence does not exist to support the second element of the crime charged. As a result, this court should reverse the defendant's conviction and remand with instructions to dismiss the charges.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ALLOWED THE STATE TO ELICIT EVIDENCE THAT WAS HIGHLY PREJUDICIAL BUT ONLY marginally PROBATIVE.

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 a 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).

Similarly, Tegland goes on to note that “the courts are reluctant to allow the State to prove the commission of a crime by evidence that the defendant was associated with persons or organizations known for illegal activities.” 5 Karl B. Tegland, at 124.

For example, in *State v. Pogue*, 104 Wn.App. 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 the conviction and remanded the case for a new trial.

In addition, even if the state can prove some relevance in evidence that has the tendency to convince the jury that the defendant was guilty because of his propensity to commit crimes such as the one charged, the trial court must still weight the prejudicial effect of that evidence under ER 403.

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).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), Acosta 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 of the expert, 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).

In the case at bar, the court allowed the state to elicit the following evidence over defense objection: (1) the defendant and co-defendant had swastikas tattooed on their bodies, (2) that the swastika tattoos associated the defendant and co-defendants with "skinhead" gangs, and (3) that "skinhead" gangs and people with swastika tattoos who are skinheads generally carry racial animus towards black people among others. In fact over defense objection the court allowed the state to call a "gang" expert to testify to these associations. These admission of this evidence had one purpose only at trial: to convince the jury that the defendant and co-defendant were racist, skinhead, white supremacists whose overriding motivation in life is their hatred for black people. Although there was no evidence whatsoever that the defendant in this case ever uttered a racist remark or endorsed the racial remarks of the co-defendant, the defendant's tattoo and the co-defendant's tattoo stood as stark proof in the eyes of the jury that the defendant must have acted out of what the stated argued was his propensity for racial hatred. Thus,

the evidence was highly prejudicial while only marginally probative at best. Indeed, it had the effect of convincing the jury to convict the defendant based upon their perception of his beliefs, not based upon his actions.

In this case, as in *Pogue*, there is a “reasonable probability” that absent the grossly prejudicial propensity evidence the jury would have acquitted the defendant. This conclusion follows from the facts that (1) the defendant had many prior encounters with Mr. Ross without uttering a racial remark and apparently without any problem, (2) the defendant never uttered a racial epithet during the entire incident in this case, (3) the defendant did not join in the co-defendant’s initial confrontation with Mr. Ross nor encourage or endorse it, and (4) the defendant only joined in the affray when the co-defendant attempted to withdraw and Mr. Ross continued beating the co-defendant. This evidence fails to show any racial animus on the defendant’s part. Thus, absent the state’s use of the swastika tattoos and expert testimony to paint the defendant as a racist, it is quite likely that the jury would have acquitted the defendant. As a result, the defendant is entitled to a new trial.

III. THE TRIAL DENIED THE DEFENDANT HIS RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT ON ALL OF THE ELEMENTS OF THE OFFENSE CHARGED WHEN IT ALLOWED A DEFENSE EXPERT TO RENDER AN OPINION ON THE DEFENDANT'S STATE OF MIND.

Opinion testimony as to the guilt, whether given by lay or expert witness invades the exclusive province of the jury and may be reversible error because it violates the defendant's right to a trial by jury under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment. *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001). In *State v. Carlin*, 40 Wn.App. 698, 700 P.2d 323 (1985), 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).

To 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. at 701.

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. *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).

In the case at bar, over repeated defense objection, the trial court allowed the state to elicit an opinion from the state’s expert that people who had swastika tattoos were white supremacists who harbored racial animus toward black people. By so testifying, the expert clearly stated to the jury that in his opinion the defendant acted out of racial animus in his confrontation

with Mr. Ross because (1) the defendant had a swastika tattoo, (2) that *ergo* the defendant was a white supremacist, and (3) that *ergo* the defendant acted out of racial animus. This expert evidence took the question of the defendant's intent out of the purview of the jury and place it squarely with the witness, thereby violating the defendant's right to have the jury decide the question intent based upon the evidence and not upon the opinion of the expert. Consequently, the admission of this evidence violated the defendant's right under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment to have the jury decide his case.

IV. TRIAL COUNSEL'S FAILURE TO MOVE TO EXCLUDE THE INCRIMINATING STATEMENTS OF A NON-TESTIFYING CO-DEFENDANT VIOLATED THE DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT .

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

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

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's 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 to the admission of the non-testifying co-defendant's post-arrest statements that implied that the defendant acted out of racial motivation. The following sets out this argument.

Under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment the court violates a defendant's right to

confrontation if (1) it admits evidence of the post-arrest statements of a non-testifying co-defendant, and (2) those statements include claims that the defendant participated in the commission of the crime. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). The case in *Bruton* involved a trial of co-defendants in which the state elicited the non-redacted confession of the first defendant, who did not testify at trial. Since that statement incriminated the second defendant, the court gave an instruction that the jury could only use it against the first defendant. Following conviction, the second defendant appealed, arguing that the admission of the first defendant's statements violated the second defendant's right under the Sixth Amendment to confront witnesses. The United States Supreme Court agreed, holding as follows:

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Bruton, 391 U.S. at 135-36.

Just what constitutes a redaction sufficient to prevent a confrontation violation under *Bruton* has been the subject of substantial litigation. For example, in *State v. Vannoy*, 25 Wn.App. 464, 610 P.2d 380 (1980), the court held that redacting the non-testifying co-defendant's statements to "we"

did not meet the requirements of *Bruton* when it was obvious from the evidence that the defendant was part of “we.” Similarly, in *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), the court held that blanking out the defendant’s name in the non-testifying co-defendant’s written statement, or marking “deleted” over the defendant’s name also did not meet the requirements of *Bruton* because it would be obvious to the jury that the co-defendant’s confession directly implicated the defendant. By contrast, in *State v. Medina*, 112 Wn.App. 40, 48 P.3d 1005 (2002), the court held that substituting the words “other guys” or “other guy” did not run afoul of the requirements in *Bruton* because under the facts of the case, it would not have been obvious to the jury that the non-testifying co-defendant was referring to the defendant.

In *State v. Vincent*, 131 Wn.App. 147, 120 P.3d 120 (2005), the defendant and his brother were charged with a drive by shooting. At a joint trial, the state elicited evidence from its witnesses that the defendant’s brother had confessed to committing the crime with the “other guy.” Under the facts of the case, the defendant was the only possible “other guy.” Following conviction the defendant appealed arguing that the admission of his brother’s statements violated his right to confrontation. The Court of Appeals agreed, holding as follows:

Here, there were only two participants in the crimes and only two

defendants. On direct examination, Speek testified repeatedly that there was only one “other guy” with Vinson before, during, and after the shooting of Thomas. As in *Vannoy*, the only reasonable inference the jury could have drawn from Speek’s references to the “other guy” was that the other guy was Vidal. The redaction thus failed in its purpose, and admission of Speek’s testimony in the joint trial violated Vidal’s rights under *Bruton*.

State v. Vincent, 120 P.3d at 124.

Vannoy, *Gray v. Maryland*, *Medina*, and *Vincent* all appear to follow a similar theme: the more the redaction directly implicates the defendant the more likely it violates the requirements of *Bruton*, and the less the redaction directly implicates the defendant the less likely it violates the requirements of *Bruton*. Each of these cases explains that there is no magic language for redaction because each case turns upon its own facts and how much the non-testifying co-defendant’s statement will directly implicate the defendant.

Applying these principles to the case at bar, a number of preliminary facts should be noted. First, the state charged both the defendant and the non-testifying co-defendant as accomplices to each other’s actions. The jury instructions reflected this charging decision and included an accomplice instruction that told the jury that each defendant could be found guilty as the accomplice to the other defendant’s actions. Thus, the admission of any post-arrest statement by the non-testifying co-defendant had the direct affect of incriminating the defendant. Second, in this case the state spent significant time eliciting evidence that both the defendant and co-defendant were racist

“swastika tattooed skinheads.” Through this evidence, the state was able to reinforce its argument to the jury that the defendant was criminally liable as an accomplice for the actions of the non-testifying co-defendant. Thus, the state quite effectively argued that if one defendant was guilty then they both had to be guilty. Third, in this case as in *Vincent*, there were only two defendants at trial. Thus, any argument from the state that the non-testifying co-defendant was guilty because of his post-arrest statements had the immediate effect of arguing that the defendant was also guilty.

In light of these preliminary facts, the state presented evidence that the co-defendant (1) uttered a racial slur at the time he attacked Mr. Ross, (2) that both the defendant and the co-defendant has swastika tattoos, (3) that people with swastika tattoos were associated with members of white supremacist groups who held racial animus toward black people. As a result, the evidence that the non-testifying co-defendant admitted to the police that he was a “white supremacist” constituted *ipso facto* a statement that the defendant was also “a white supremacist.” Although not stated in so many words, this conclusion was unavoidable in the minds of the jury. As a result in the case at bar as in *Vincent* and the other cases mentioned, it was error to admit the non-testifying co-defendant’s post-arrest statements into evidence because these statements directly incriminated the defendant while denying the defendant his right under Washington Constitution, Article 1, § 22 and

United States Constitution, Sixth Amendment to cross-examine the makes of the statement.

In the case at bar there was not tactical reason for defendant's counsel to fail to make a proper *Bruton* objection to the admission of the co-defendant's statement. Given that the state had the burden of proving the element of racial animus the co-defendant's statement that he was a white supremacist caused immeasurable harm to the defendant's case while providing no benefit whatsoever. Thus, counsel's failure to make an appropriate objection fell below the standard of a reasonable prudent attorney.

In addition, as was previously argued in this brief, the evidence against the defendant of racial animus was non-existent. The defendant uttered no racial slur, he did not act derisively toward Mr. Ross. He had prior contacts with Mr. Ross all apparently without problem. The defendant only joined the affray when Mr. Ross would not allow the co-defendant to withdraw. Under these facts, the only evidence of racial animus the state had against the defendant was the co-defendant's post-incident admission to the police that he was a white supremacist, an admission that also identified the defendant as a white supremacist. Thus, had counsel lodged an appropriate *Bruton* objection and the evidence been excluded, the result of the trial would have been an acquittal instead of a conviction. As a result, counsel's failure

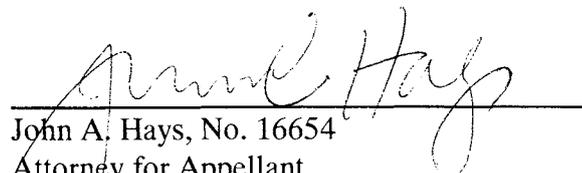
caused prejudice and denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. The defendant is entitled to a new trial with effective counsel.

CONCLUSION

The state failed to present substantial evidence that the defendant committed the crime charged. As a result, this court should vacate the conviction and remand with instructions to dismiss. In the alternative, the defendant's conviction should be vacated and the case remanded for a new trial based upon ineffective assistance of counsel and the denial of the defendant's right to a fair trial

DATED this 22nd day of May, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 3

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

WASHINGTON CONSTITUTION ARTICLE 1, § 21

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

WASHINGTON CONSTITUTION ARTICLE 1, § 22

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

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

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

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

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

. . .

RCW 9A.36.080

(1) A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap:

(a) Causes physical injury to the victim or another person;

(b) Causes physical damage to or destruction of the property of the victim or another person; or

(c) Threatens a specific person or group of persons and places that person, or members of the specific group of persons, in reasonable fear of harm to person or property. The fear must be a fear that a reasonable person would have under all the circumstances. For purposes of this section, a "reasonable person" is a reasonable person who is a member of the victim's race, color, religion, ancestry, national origin, gender, or sexual orientation, or who has the same mental, physical, or sensory handicap as the victim. Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat. Threatening words do not constitute malicious harassment if it is apparent to the victim that the person does not have the ability to carry out the threat.

(2) In any prosecution for malicious harassment, unless evidence exists which explains to the trier of fact's satisfaction that the person did not intend to threaten the victim or victims, the trier of fact may infer that the person intended to threaten a specific victim or group of victims because of the person's perception of the victim's or victims' race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap if the person commits one of the following acts:

(a) Burns a cross on property of a victim who is or whom the actor perceives to be of African American heritage; or

(b) Defaces property of a victim who is or whom the actor perceives to be of Jewish heritage by defacing the property with a swastika.

This subsection only applies to the creation of a reasonable inference for evidentiary purposes. This subsection does not restrict the state's ability to prosecute a person under subsection (1) of this section when the facts of

a particular case do not fall within (a) or (b) of this subsection.

(3) It is not a defense that the accused was mistaken that the victim was a member of a certain race, color, religion, ancestry, national origin, gender, or sexual orientation, or had a mental, physical, or sensory handicap.

(4) Evidence of expressions or associations of the accused may not be introduced as substantive evidence at trial unless the evidence specifically relates to the crime charged. Nothing in this chapter shall affect the rules of evidence governing impeachment of a witness.

(5) Every person who commits another crime during the commission of a crime under this section may be punished and prosecuted for the other crime separately.

(6) "Sexual orientation" for the purposes of this section means heterosexuality, homosexuality, or bisexuality.

(7) Malicious harassment is a class C felony.

(8) The penalties provided in this section for malicious harassment do not preclude the victims from seeking any other remedies otherwise available under law.

(9) Nothing in this section confers or expands any civil rights or protections to any group or class identified under this section, beyond those rights or protections that exist under the federal or state Constitution or the civil laws of the state of Washington.

ER 404(b)

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

