

No. 36172-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

FAWN R. BERGH,

Appellant.

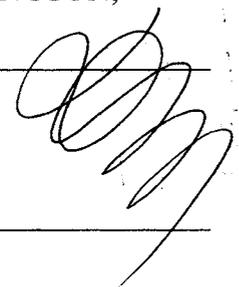
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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

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The Honorable John Hickman, Judge

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*APPELLANT'S OPENING BRIEF*

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and abused its discretion in admitting irrelevant, prejudicial evidence of racist comments and the result was deprivation of appellant's Sixth Amendment and Article 1, § 22, rights to a fair trial.

2. Appellant's Sixth Amendment and Article 1, § 22, rights to effective assistance of counsel were violated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant and her father were accused of crimes relating to the claim of a police officer that he had been assaulted by them when he had tried to get them to leave a park. Over defense objection, the court allowed the prosecutor to elicit testimony from the officer about racist statements the officer claimed appellant's father had made prior to the incident. Later, in closing argument, the prosecutor belittled appellant's efforts to distance herself from her father.

There was no evidence that the officer was of the race against whom the remarks were made, nor that the alleged assault of the officer had anything to do with race.

Did the trial court err and abuse its discretion in admitting the highly prejudicial, irrelevant evidence of racism? Further, is evidence of racism so prejudicial and likely to invoke strong emotions in jurors' minds that its improper admission violates the state and federal due process rights to a fair trial?

2. Further, was counsel ineffective in only arguing the issue on her client's behalf after the court had already ruled, and in failing to move to sever Fawn's case from that of her father once the court ruled that

his allegedly racist statements would be admitted?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Fawn Bergh was charged by second amended information with third-degree assault of a law enforcement officer. CP 4; RCW 9A.36.031(1)(g).

Trial was held before the Honorable John R. Hickman on February 13-15, 20-22, 2007, after which the jury found Ms. Bergh guilty as charged. CP ; RP 1, 78, 132, 457, 325, 512.<sup>1</sup> On March 23, 2007, Judge Hickman imposed a “first time offender” sentence. CP 47-59. Ms. Bergh appealed and this pleading follows. See CP 64.

3. Overview of relevant facts<sup>2</sup>

On July 16, 2006, Pierce County Sheriff’s Department (PCSD) officer Robert Carpenter went to patrol Lake Tapps park to make sure people left at the “appropriate hour,” before the park closed. RP 196. Once at the park, he starting approaching people and telling them they needed to leave the park before 8 p.m., when park gates would be closed. RP 196.

At some point, Carpenter saw a man “sitting in a chair kind of kicked back relaxing” near a concession stand, by the boat ramp. RP 198. Carpenter approached the man, told him the park was now closed and he

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<sup>1</sup>The verbatim report of proceedings consists of 7 volumes, which will be referred to as follow:  
the six chronologically paginated volumes of pretrial and trial proceedings from February 13-15, 20-22, 2007, as “RP;”  
the sentencing proceedings of March 23, 2007, as “SRP.”

<sup>2</sup>More detailed discussion of the facts relating to the issues on appeal is contained in the argument section, *infra*.

needed to leave. RP 198. The man chuckled and said something like Carpenter must be the “new guy” for not knowing who he was. RP 198. Carpenter took issue with that, correcting the man and saying he had worked in the park for at least eight years and had never seen the man before. RP 199.

At that point, the man stood up and introduced himself as Robert Bergh<sup>3</sup>, shaking Carpenter’s hand and explaining that he had the contract to rent “Seadoos” to people in the park. RP 199, 232. Carpenter told Robert it did not matter if he had a contract, he still had to be out of the park by 8 like everyone else. RP 199. According to Carpenter, Robert was “trying to be jovial” and “make friends” but seemed “sarcastic.” RP 200, 232.

Carpenter admitted he did not think Robert could have a contract giving him the option of staying past closing time to get his equipment out of the park. RP 237, 243. Carpenter also thought that Robert should have “known better” than to have been in the park after hours. RP 237, 243.

Robert had been a civil engineer with the state Department of Transportation and had 20 years of experience working with police officer in several capacities without incident. RP 195-96. His contract to rent out jet skis or “seadoos” at the park was supposed to be exclusive, so that no one else was supposed to rent out of the park. RP 202, 296, 358.

As part of his contract, Robert had permission to come in before park hours or stay later to “close up shop.” RP 297. The park supervisor

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<sup>3</sup>Because Robert Bergh shares the same last name with his daughter, Fawn, the appellant in this case, they will be referred to by their first names for clarity. No disrespect is intended.

had given him keys and shown him how to get in and out of the park after hours to make sure he could do so on those occasions when he had to be late or early. RP 298-99. He had not had to stay after 8 p.m. very often but upon occasion it happened, when someone returned a rental late. RP 297-98. He tried to minimize that by having a fine for late returns. RP 299. With a late return, he had to stay later, checking the equipment for damage, fueling it up in order to know what to charge for fuel and oil, and to arrange to get the equipment out of the park at night. RP 300.

When Carpenter told him he needed to leave the park, Robert pointed to some people who were at the boat launch loading up some jet skis to a trailer attached to a "Denali" automobile. RP 200, 235. According to Robert, he told the deputy that he needed to gas up two more jet skis and get his turn at the boat launch after the people in the Denali. RP 301-302. According to Carpenter, Robert made some disparaging comments about the people in the Denali, then said he would get his boats out of the water when they were through. RP 200, 235.

Robert was unhappy with the people with the Denali because he felt they were taking business away from him by improperly renting jet skis out of the park despite his exclusive contract. RP 302-303, 358. He wanted the deputy to tell them they needed to remove their advertising from the park, but Carpenter refused. RP 202, 349. Carpenter said he did not think Robert had any more right to be in the park than the people in the Denali, even if they had no contract. RP 244.

Robert thought the conversation was a "friendly exchange," with him telling Carpenter about his complaints regarding the other people being there but letting it "go" when Carpenter said he would not do

anything. RP 303. The two men talked a little and Robert said they shook hands during the exchange. RP 302-303. Carpenter said he wanted to “discontinue” the conversation, so he told Robert to get his boats out as soon possible and then immediately leave the park. RP 202.

When the officer started walking away, a woman ran up to Robert, looking upset. RP 203. The woman, later identified as Robert’s daughter, Fawn, said she had rented an expensive rope and an inner tube to a kid earlier and had seen that rope, damaged and hanging off the back of the trailer attached to the Denali. RP 203. She had recognized the rope as belonging to her father’s business. RP 204.

Fawn was home from college and helping her dad run his jet ski business that summer. RP 377-78. As part of the business, they also rented things like ropes, inner tubes, wake boards and water skis for use on the lake. RP 299. Fawn had rented an inner tube and a rope to a boy, about 14 years old, “Billy,” earlier in the day. RP 299. That boy was someone Fawn had seen around the park nearly every sunny day, and she knew he was somehow associated with the people in the Denali. RP 394.

At some point during the day, Billy he had come back and asked to borrow a knife. RP 307. He had returned with the knife and the inner tube a few minutes later, but not the rope. RP 204, 307-308. Fawn had told the boy he would need to pay for the items if they were damaged or not returned and the boy had said, “yeah, yeah, yeah, I know,” then left, saying he would come back with the money to pay for the damages. RP 307-308. The boy left behind a “deposit” of \$20.00 but the rope was long, 75-100 feet, and worth \$49.95. RP 306-308.

The boy never came back, however, and Fawn had gone looking

for him or someone else to “take care of it” and reimburse the Berghs for the damages. RP 301, 309. Fawn had no luck finding Billy and was returning, upset, when she had seen their rope hanging off the back of a jet ski on the Denali’s trailer. RP 301. Fawn then went over to the people in the Denali and asked them about Billy but they had denied knowing where he was or where to find him. RP 204.

Once Fawn returned and reported what she had seen, Robert also looked and saw the remains of his rope hanging out of the bottom of a jet ski, destroyed. RP 310. It appeared the rope had gotten sucked into the jet ski, something which can easily happen because jet skis suck water and shoot it into the air and dragging something behind a jet ski is thus not a great idea. RP 306-307. Robert tries to discourage people from using jet skis that way but if they are “insistent” then they are told the “break it you buy it rule.” RP 307.

Robert thought the people in the Denali were going to leave without paying him for the damages to his property, and he wanted Carpenter to help. RP 310. According to Carpenter, Robert was “furious.” RP 204, 273, 306. Carpenter told Robert he needed to see “paperwork” on the rental or documentation that it had occurred, as well as the full name of the renter. RP 204, 273. When the Berghs told him they did not have “paperwork” and they only knew the boy as Billy, Carpenter decided the issue was just a “civil dispute” and he was not going to get involved. RP 205-206. He said he did not think there was anything he could do and he did not want to do anything because of Robert’s “demeanor” and the derogatory comments Robert had made about the people in the Denali. RP 205-206.

Carpenter refused to admit, however, that Robert had irritated him. RP 247, 275. Instead, Carpenter said, he did not want to be a “party to” Robert’s complaints and was not going to go arrest someone to get them to tell him where a 14-year old boy was, something he thought Robert wanted him to do. RP 247-48, 275.

Carpenter told Robert that Robert needed to take care of it himself, because it was a “civil” matter in which Carpenter was not going to get involved. RP 311, 380. At that point, Robert called Carpenter a “useless fucker” and “useless as a cop.” RP 206. According to Carpenter, Robert also said something about making more money than Carpenter. RP 206.

Robert admitted he was angry because it seemed to him that Carpenter was not willing to do his job. RP 309-310. He said some “not so nice words” about Carpenter’s failure to act on the apparent destruction of his valuable property, which Robert thought was theft. RP 206, 309-310, 352. Robert said he made comments on Carpenter and “his abilities,” which were that Carpenter was a poor excuse for a police officer and a disgrace to the badge for refusing to do his job. RP 352, 359.

Carpenter admitted that Robert made “personal remarks” which the officer “absolutely” took personally. RP 275-76.

Robert then asked Carpenter to call another deputy to come to the park to handle the issue if Carpenter would not. RP 206, 310. RP 206. Instead, Carpenter said, he gave Robert his name and said Robert could call his supervisor but Robert needed to get out of the park. RP 206-207. Robert said he actually asked Carpenter to call his supervisor and Carpenter refused, then would not say his own name when asked. RP 310, 352. Carpenter simply stuck out his chest, which Fawn said was covered in

badges and medals the officer was sporting. RP 310, 381. Robert said he had to read off Carpenter's name and badge number to get the information. RP 310.

At that point, Robert went over to the concession stand and Carpenter assumed Robert was going to call his supervisor. RP 207. Carpenter started towards his car, figuring the supervisor would tell Robert the same thing Carpenter was saying about the matter. RP 210.

A moment later, however, Carpenter saw Robert go over to the Denali, now at a tie down area. RP 210.

Robert said he went to the concessions office to write down the officer's information, then went over to the Denali because Carpenter had told him to handle it himself. RP 310. Carpenter first implied that he was surprised by Robert's going over to the Denali and that Robert seemed "angry" when he went over. RP 210-11. On cross-examination, however, Carpenter admitted that he had, in fact, suggested that Robert go over and talk to the people in the Denali himself. RP 210-11. Carpenter agreed it was not a "real good idea" for him to make that suggestion, given the way he said Robert was acting. RP 248.

A little later in his testimony, Carpenter backtracked, saying he had "not necessarily" advised Robert to go over and talk to the people in the Denali. RP 276-77. Carpenter claimed he did not "remember saying that exactly" and did not recall telling Robert to go over and handle it himself. RP 276-77. When confronted about having admitted earlier at trial that he had told Robert to resolve it himself, Carpenter did not answer that question. RP 277. Instead, he just said that all he now recalled was saying he could not go and arrest them for the inner tube or whatever and that the

issue “had to be sorted out between him and that other individual.” RP 277.

Carpenter saw Robert go over to the passenger side of the Denali. RP 211. He heard words exchanged and Robert shouting, then saw Robert open the passenger side door, reach in and come out with the ignition keys to the Denali. RP 211.

Robert said he went over, told the man that his rope was on the jet ski on his trailer and he needed to get paid for it, and the man said he “didn’t do it” so he was “not going to deal with it.” RP 311. The man then got out of his car and Robert reached inside, grabbing the man’s keys so he could not drive away with the evidence of the damaged rope. RP 312. Robert was sure that, if the man drove away, the rope would get taken off and destroyed and Robert would never get fully paid. RP 312.

Robert said he thought he had the right to take the keys to prevent the people in the Denali from leaving with the evidence of the crime. RP 312. He wanted to preserve it for the officer he thought would be coming to the park soon. RP 312.

Carpenter said that, after Robert took the keys, the man inside the Denali got out, upset, and said, “[o]fficer, that guy has my keys.” RP 211. Robert was walking towards the concession stand and Carpenter confronted him, ordering him to stop. RP 212. Carpenter said that he stepped in at that point because he thought Robert had just committed a “[v]ehicle prowl.” RP 212. Robert did not stop, instead ignoring Carpenter and marching past him towards the concession stand. RP 212.

Robert admitted walking right by Carpenter, who was “obviously very agitated.” RP 313. Robert explained that he knew Carpenter was not

going to help, so he was going to go call for another officer to come and view the evidence. Robert said that he stopped and turned around when Carpenter asked him to do so. RP 313. Carpenter said he had to threaten to arrest Robert to get him to stop. RP 212.

Carpenter said Robert was being “hostile and aggressive” and took some kind of a fighting stance, saying, “[w]hat? What are you going to do?” RP 213-14. Robert said he asked why Carpenter wanted him to stop and Carpenter ordered him to give the keys back. RP 313.

Robert refused. RP 213, 313. According to Carpenter, Carpenter then threatened to arrest Robert, and Robert was disbelieving. RP 214. They went back and forth, arguing, with Carpenter estimating that he warned Robert he was facing arrest at least 15-20 times. RP 214. Carpenter said he kept telling Robert what he was doing was criminal and ultimately told Robert to turn around and put his hands behind his back because he was under arrest. RP 215.

In contrast, Robert was clear that Carpenter did not threaten to arrest him or tell him to turn around and put his hands behind his head at that point. RP 315, 355. Fawn also never heard Carpenter say he was going to arrest Robert. RP 397.

Robert testified that, when Carpenter told him to give the keys back, he agreed to do so when he got reimbursed by the person he thought was Billy’s dad, the Denali driver, for the rope, or got contact information for Billy. RP 313, 353. Carpenter did not want to hear why Robert had taken the keys and things got “a little more heated.” RP 313-14. It seemed to Robert that Carpenter needed to be “right,” no matter what, and “didn’t want to hear anything anybody else had to say.” RP 314. Indeed,

Robert said, he was careful to stand with his hands open and at his waist, and did not gesture because he did not want to give Carpenter any reason to attack him. RP 314.

Robert was planning to wait until other officers arrived, which he thought would be soon, because other officers often showed up there at that time on weekends. RP 360. He thought other officers would be “cooler heads” than Carpenter and would be willing to help Robert with the theft as he thought it was their job. RP 338.

Fawn described her father as being shirtless, shoeless, and with Bahama shorts “halfway falling off.” RP 384. She heard him keep saying to the officer, “[l]et’s figure this out. I want to figure this out.” RP 384. She heard him say he wanted Carpenter to help resolve the issue and it would not take very long, because all that was needed was either some information on how to find the boy or some money. RP 384-85.

The officer, however, refused to listen and kept demanding that Robert return the keys. RP 385.

According to Carpenter, at this point, he now had “officer safety concerns” because Robert was giving “pre-attack indicators” which gave Carpenter the belief he would be attacked if he put hands on Robert to arrest him. RP 215-16. Carpenter said he pulled out his pepper spray and threatened to spray Robert with it if he did not comply with being arrested. RP 216. Carpenter said Robert did not believe he was going to be arrested. RP 216. Carpenter said he then tried to “deescalate,” saying, “give the keys back. I’m going to spray you.” RP 216.

After a moment, Carpenter decided to spray Robert, so he first faked like he was going to spray him and then, when the spray did not

come and Robert looked back, sprayed directly at Robert's eyes. RP 217, 255.

In contrast, Robert said what happened was he heard a shaking sound, a "rattle" like a spray paint can being readied, then saw a can of what looked like mace partially hidden in Carpenter's hand. RP 315. He asked Carpenter, "[w]hat are you gonna do, mace me?" RP 315. The officer said, "yes," pointed the mace at him, faked Robert out and then sprayed. RP 315.

A woman in the park that day, Cody Romero, saw what was happening from afar and speculated from "body language" that the officer was telling Robert to calm down. RP 168-72. She said she saw Robert "lunge" a couple of times towards the officer when the officer had his pepper spray out and thought the officer was saying, "I'll mace you." RP 172. Romero opined that the officer was being "very calm" and "stern" and said Robert was "maced" when he lunged towards the officer. RP 172.

Carpenter described pepper spray as a "pain compliance technique." RP 272. On a normal person, pepper spray causes "an intense burning sensation to mucous membranes" and can cause "blepharospasm, which is an involuntary contracting of the eyes" making the eyes often involuntarily clamp shut. RP 229-30. Carpenter was using a pepper spray foam, which is more likely to stick to the person sprayed. RP 231.

After having pepper spray shot into his face by the officer, Robert immediately threw the keys, either down (according to Carpenter) or as far away as possible (according to Robert). RP 217, 315. Carpenter said that, after spraying Robert, the officer started "backing away," waiting for the

spray to take effect. RP 217, 258, 288. According to the officer, Robert then took “a swing” at Carpenter but missed. RP 217, 258, 288.

Robert said he made no such movements. RP 315-17. Instead, he said, he watched through his right eye as Carpenter immediately turned and shot the pepper spray at Fawn, who was about 10 feet away. RP 315. Robert then ran to the water to try to wash out his eyes. RP 315-16. His eyesight was very blurry but he could see the shape of his daughter on the ground. RP 316-17. He could also hear her crying and calling for him. RP 317.

Fawn said that, once she got sprayed, her eyes were burning, her nose seemed to be starting to close and she started having a “very difficult time breathing.” RP 386.

Carpenter claimed that he never hit Fawn with the pepper spray. RP 218. He said that, just after he had sprayed Robert, he was hit on the right side of his jaw unexpectedly, by Fawn, so he turned and tried to spray her but she was not close enough for the spray to reach. RP 217-18, 262. Although he said he was hit “immediately” after spraying Robert, the officer later admitted he had time to watch Robert run to the water before having his attention “diverted” to Fawn. RP 263-64.

Carpenter said he did not “recall” hearing Fawn screaming in pain that her eyes and face were burning. RP 262-63.

Romero testified that Fawn ran up and hit the officer, after which the officer shot the pepper spray into Fawn’s face. RP 173-75, 187-88. Romero was very sure Fawn was hit with the spray. RP 173-75, 187-88. Although Romero was so far away she did not think she could have heard the officer if he had yelled during the incident, Fawn was yelling so loud

that Romero could actually hear her saying how much her eyes and face hurt. RP 175, 179, 184-85, 187.

Carpenter claimed that, after failing to hit Fawn in the eyes with the pepper spray, he grabbed her and performed “a straight arm bar take down” of her to the pavement, then slapped on handcuffs. RP 219, 264. Robert was in the lake trying to wash out his eyes. RP 219. The only yelling Carpenter remembered was Fawn yelling for her father. RP 219.

Fawn said her eyes were burning and she was yelling and tried to head for the water but Carpenter grabbed her arm and threw her down after she took a step and a half towards the lake. RP 386. Carpenter handcuffed her with her arms so far up her back that she could feel her shoulder blades with her fingers. RP 387.

At that point, Robert came out of the lake. RP 180-81, 337. Romero first said it appeared Robert was “directly running” at the officer. RP 180. A moment later, however, Romero admitted that the officer was with Fawn at the time, so it could have been that Robert was running to his daughter, not at the officer. RP 181.

Carpenter also first claimed that Robert came out of the lake “at” him. RP 219. Ultimately, however, Carpenter admitted that he had stepped away from Fawn at the time and, in fact, Robert did not run towards where Carpenter was but instead went directly to his daughter, who was lying on the ground in handcuffs. RP 180-81, 219-20, 261, 266-67.

Robert said he went over to his daughter on the ground and was trying to comfort her. RP 318-19. She was crying, “[m]y eyes. They hurt. They burn” and “[i]t hurts.” RP 337. Robert’s eyes were still blurry but

he could see a crowd of people around. RP 318. He got down on all fours and tried to comfort his daughter, telling her “[r]elax, relax, relax. It will be all right.” RP 318-19.

Carpenter said he had stepped away from the handcuffed Fawn to pick up his “telescopic baton.” RP 219-20. Carpenter had pulled out the baton when Robert came out of the lake, assuming Robert was coming to assault him. RP 219-20.

As the officer extended the baton, however, he accidentally threw it. RP 220 260, 266. He said it fell about 20 feet away, in the gathering crowd, and he wanted to make sure both that he got it back and also that “no one else grabbed it to use it” against him. RP 220, 260, 266.

Carpenter did not say why he thought people in the crowd would want to use a baton against him. RP 220.

In contrast to Carpenter, Romero testified that the officer took Robert “down” immediately after Robert came out of the water and over to his handcuffed daughter. RP 181. Romero said Robert was already on the ground but still “struggling” when the officer pulled out the baton. RP 181. Romero did not see the officer accidentally throw the baton 20 feet but instead saw it fall right in front of the officer. RP 181.

Carpenter testified that he grabbed his baton and ran back to Fawn and Robert. RP 221. He said he thought Robert was starting to stand up, assumed Robert would be “combative,” and so decided to start repeatedly hitting Robert with the baton. RP 221, 261. Carpenter struck blows on Robert’s back, shoulder, and “biceps/triceps area.” RP 221, 261, 289-90.

According to Carpenter, before hitting Robert, he yelled for Robert to get down on the ground. RP 221. Carpenter admitted that Robert was

already on the ground but said he thought Robert was starting to stand up. RP 221, 261. Carpenter also said that he had repeatedly hit Robert because he wanted to get Robert into “a prone handcuffing position which offered the best control for a combative subject.” RP 221, 261. Once Carpenter started hitting him, Robert said, “[o]kay. Okay” and went down to the ground. RP 222, 261.

Romero never saw the officer hit Robert with the baton. RP 181, 190.

Robert said that, when he was comforting his daughter, he felt someone grab his right arm and hit him at the same time that a voice said, “[g]et down. Get down. Get down.” RP 320. Robert said “[a]ll right. All right. All right,” right away, trying to get his knees out from underneath him while he was being hit and pushed and pulled with his knees on rocks and asphalt. RP 320.

Robert testified that he never took a “swing” at Carpenter. RP 317. He said he never intentionally tried to hit the officer and never tried to stand up or fight back or anything at the time he was comforting Fawn. RP 317, 320.

Fawn testified that she had been very respectful to the officer during the incident, never calling him any names or anything like that. RP 391-92. She said she did not try to attack the officer when her father was pepper sprayed. RP 392. When the officer sprayed her, she was not lunging at him or anything like that, but was just “very upset and crying.” RP 392.

Fawn never saw her father strike the officer. RP 392, 396-97. She did not recall striking the officer herself and did not do so intentionally but

might have connected when she was flailing around after being pepper sprayed. RP 386.

Robert and Fawn had photographs taken just after the incident, showing the bruises Carpenter had inflicted on them. RP 335-36, 387-89. Robert suffered continuing soft tissue damage to his shoulder. RP 338. Fawn had scrapes on her knees from hitting the asphalt when Carpenter “took her down.” RP 389. She had bleeding and bruises on her arms. RP 389.

D. ARGUMENT

ADMISSION OF IRRELEVANT, PREJUDICIAL EVIDENCE  
OF RACIST COMMENTS DEPRIVED APPELLANT OF HER  
CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR  
TRIAL AND COUNSEL WAS PREJUDICIALLY INEFFECTIVE

a. Relevant facts

Before trial, at the suppression hearing, Carpenter testified that Robert had referred to the people in the Denali as “those fucking Indians.” RP 14. Carpenter said that he had not wanted to “get involved” in any dispute because of those “comments regarding, you know, the Indians and what [Robert]. . . felt about that.” RP 17. When counsel for Robert asked about that comment, the officer said he did not know why a dispute about the business of jet ski rentals “would bring up someone’s race.” RP 28.

After the evidence was presented at the suppression hearing, the prosecutor argued that the statements should be admissible as “volunteered statements” not made in custody. RP 41. Robert’s counsel then argued that it would be impermissible to introduce racial slurs in front of the jury, because it was improper “character” evidence, the probative value of which was minimal. RP 41. He said that the prejudicial effect would be

great, because it was evidence offered to show that Robert was racist, and that the prejudice was outweighed by any probative value. RP 41.

Fawn's attorney made no initial argument on this issue. RP 41-43.

The prosecution then argued that all evidence admitted against a defendant is "going to be prejudicial" but that the evidence was admissible as "res gestae" and relevant to Robert's "attitude" and "state of mind," such as his "anger and so forth." RP 43. The prosecutor speculated that the jury could give the evidence "no weight" if it chose and the introduction of such evidence could backfire on the state if the jury thought that evidence should not have been admitted. RP 44. The prosecutor argued that the evidence was no otherwise "unduly prejudicial." RP 44.

The court found the statements were made "pre arrest," then said:

I understand where defense counsel would like to have the fucking Indian statement out, but again, I would have to concur with the State that I think it is res gestae and it does set the stage for what was to occur later on. So I think it does have probative value.

Obviously [the] defense can put whatever light on it it wants with the jury, but again, I think it was - - it was said within minutes of what was occurring and I think it's important that it come in as state of mind evidence.

RP 44-45.

At that point, counsel for Fawn finally spoke up, objecting on Fawn's behalf. RP 45-46. Counsel said Fawn was "a party who can be affected by the court allowing that in" and that the evidence would affect how the jury perceived Fawn, as well. RP 46. She noted that there was no evidence that the officer was Native American or that race was otherwise relevant, and pointed out that the prosecution could prove its case without

bringing in the racist statements. RP 46.

The court noted that these arguments were being made “post decision,” but allowed them to “stand for the record.” RP 47. The court pointed out that counsel had made no motion for severance of the trials, and said it thought the jury could “adequately distinguish the case between these two defendants.” RP 46-47.

Counsel made no subsequent motion to sever.

At trial, within moments of beginning opening argument, the prosecutor referred to the racist comments, telling the jury Robert had made some “inflammatory comments, some inappropriate, flagrant comments towards” the people in the Denali. RP 151-52. The prosecutor told the jury “these comments were essentially profane” and that “[s]ome of them were racist comments towards this other party.” RP 151-52.

In his opening, counsel for Robert tried to minimize the evidence, stating that he would present evidence that Robert “is not a racist” and “has Indian friends.” RP 160.

In direct examination, Carpenter was asked about the incident and testified that Robert made some “racially disparaging comments” about the individuals with the Denali. RP 200. The prosecutor went on to question Carpenter not only about the comments but also Carpenter’s reaction to them:

Q: Now, Deputy, you had started to say that Mr. Bergh essentially made a disparaging remark - -

A: Yes.

Q: - - about the other party.  
Can you please explain to the jury what exactly he said?

A: The other company was owned by some Native Americans,

and his comment, to be exact, was, "I'll get my boats out of the water just as soon as those fucking Indians get their boats out."

Q: Did you appreciate him using that kind of language?

A: No, I didn't.

RP 201.

Carpenter went on to later state that, during the discussion about the people in the Denali taking away his business, Robert "continued making disparaging comments regarding their race, et cetera." RP 202.

In cross-examination, Robert's counsel tried to defuse the impact of the evidence, asking about the "racial comment" and why it was disparaging to call someone an "Indian." RP 233. Carpenter responded, "[w]hy wouldn't he just say people?" RP 233. He also related that Robert had made other disparaging statements about "them being Indians." RP 234.

Fawn's counsel similarly tried to minimize the racism evidence, asking about Robert being "a little upset with the situation in regards to the tube and the rope." RP 273-74. Carpenter then declared, "[i]t wasn't - - his - - *his biggest beef seemed to be with the individuals that owned the other boats and their race.*" RP 273-74 (emphasis added). A few moments later, when asked about whether Robert and Fawn had explained their concern about the inner tube and the rope, Carpenter declared:

The problems that he had were - - the problems that he had were that there was these other individuals that were renting Seadoos at the place. *The problem he apparently had was that they were Indian.*

The problem that he had is that he had rented an inner tube under the table and hadn't - - and now it was gone, and that individual that he had rented this inner tube to had already gone from the park, and there was nothing I could do about any of those

things that he was talking to me about.

RP 274 (emphasis added).

A few moments later, when asked if he was “irritated” with Robert, Carpenter said he was “taken” by the “attitude” Robert took “regarding these other folks,” that Carpenter “didn’t want to be a part of his [Robert’s] race bashing or anything.” RP 275. Counsel asked if Carpenter thought referring to “Indians as Indians” made Robert racist, and Carpenter said there were “a number of other things,” that the comments were “not just Indians but fucking Indians and a number of other disparaging comments.” RP 275.

The efforts to minimize the racism evidence continued when Robert testified, with Robert’s counsel asking Robert point blank if he was a racist. RP 339. Robert said he was not. RP 339. He also denied using the term “fucking Indians” during the incident, saying he had said something “colorful” like, “[t]hose assholes” but had never identified the people in the Denali as “Indians” or by their race at all. RP 339-40. He said he had a number of Native American friends. RP 340-41. He said he had not made any comments that were “racially insensitive or disparaging towards Indians” during the entire incident. RP 340.

In closing argument, the prosecution’s theory was that Carpenter was acting properly and consistent with his duties as an officer whereas Fawn and Robert were out of control and had assaulted the officer. RP 461-77. Counsel for Fawn tried to distance her from her father’s actions, describing her as “a calf caught between two bulls,” “caught in the crossfire” between Carpenter and her dad, who were being stubborn and clashing. RP 490, 498.

In rebuttal closing argument, the prosecutor argued that the deputy “showed incredible restraint” during the incident and only used pepper spray because he had “no recourse” when faced with the improper actions of the Berghs. RP 504. While stopping just short of reminding the jury the specific racist remarks that were made, the prosecutor used those remarks to attack Robert’s credibility, saying that Robert was trying to “down play” his comments by only admitting that he “might have said some things” he should not have. RP 500. Instead, the prosecutor said, the comments went beyond that and Robert had “used entirely inappropriate language in escalating the situation.” RP 500.

The prosecutor also belittled counsel’s attempts to distance Fawn from her father by calling counsel’s arguments on that point “some pretty fancy lawyering” and “pretty catchy.” RP 503. The prosecutor argued that Fawn was not caught in a “cross fire” but instead had injected herself into the situation, “engulfed” by her emotions, attacking the officer “unprovoked.” RP 504. Just because Fawn seemed like a “nice young lady” in court and had cried in front of the jury, the prosecutor argued, did not mean the incident had happened the way she said. RP 505. The prosecutor suggested that Fawn was actually crying because she was upset at where she was now and what she had done, not how terribly the officer had treated them. RP 505.

- b. The admission of the extremely inflammatory evidence was an abuse of discretion and the evidence so pervaded the trial that appellant’s due process rights to a fair trial were violated

This Court should reverse, because the trial court abused its discretion in admitting the improper, irrelevant, and highly inflammatory

evidence of Robert's racist comments and the admission of that evidence was so prejudicial that Fawn was deprived of her constitutional right to a fair trial. Further, counsel was ineffective in her handling - or rather *failing* to properly handle - the issue.

Only relevant evidence is admissible, and evidence is only relevant if it has a tendency to prove or disprove facts at issue in a case. See ER 401; ER 402. Further, under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a person's "character" and that they acted "in conformity therewith" on a particular occasion. See State v. Dennison, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990). The reason for exclusion of such evidence is that it has a great capacity to arouse prejudice and that it invites jurors to convict based not upon the evidence but on their emotions regarding "character." See State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984).

While in general the decision to admit evidence is reviewed for "abuse of discretion," when a court admits evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair," the due process right to a fair trial is violated and a new trial must be ordered. See Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

That is exactly what happened here with the repeated admission of Carpenter's claims that Robert had made the racist comments. First, there can be no question the comments were incredibly, inherently prejudicial. "Propensity" evidence is already so prejudicial that it is virtually guaranteed to "impress itself upon the minds of the jurors." State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968). Further, it is well-settled that damaging evidence has particular power and authority when it comes from

an officer of the law, someone the jury was already likely to see as reliable and whose testimony they would already normally be inclined to give great weight. See, e.g. State v. Jungers, 125 Wn. App. 895, 106 P.3d 827 (2005).

But this evidence was not just “propensity” or “character” evidence coming from an officer. It was also evidence which, by its nature, ignited strong passions about one of the most difficult and troubling social issues facing our country today. As one court has noted:

It does not take much imagination to understand how . . . grossly biased comments would be viewed by the jury. We need not know the racial composition of the jury, for nearly all citizens find themselves repelled by such blatantly racist remarks and resentful of the person claimed to have uttered them.

U.S. v. Ebens, 800 F.2d 1422, 1434 (6<sup>th</sup> Cir. 1986). Evidence of racial bigotry is so highly prejudicial that it is recognized to “have a damaging effect on the fairness of a legal proceedings” and a “particularly corrosive influence” on “the administration of justice.” Green v. New Jersey Mfg. Ins. Co., 160 N.J. 480, 496, 734 A.2d 1147 (1999).

Indeed, evidence of racism is so completely, irrevocably prejudicial that at least one court has recognized that trying to remedy it may be futile. See Green, 160 N.J. at 499.. Even a curative instruction may have little effect in erasing the indelible prejudice that evidence of racism can cause. Id. And even if jurors want to try to be fair despite evidence of racism, it is extremely difficult for that to occur, given the strong emotions of revulsion and disgust evidence of racism will raise. See, e.g., Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 Mich. L. Rev. 2320, 2338 (1989) (discussing the public and private impact of racist speech).

There is also a troubling constitutional dimension to admission of evidence of racist statements in a criminal case. Racist comments, while morally reprehensible to the vast majority of Americans, are nevertheless protected speech under the First Amendment. See Dawson v. Delaware, 503 U.S. 15, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992); see also Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1978); Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (“The government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”). Where a person’s beliefs “have no bearing on the issue being tried,” the First Amendment prohibits admission of evidence of those beliefs in a criminal case. Dawson, 503 U.S. at 166-67. This is true even if the evidence was admissible under some rule of evidence. Id.

Thus, while the First Amendment does not “erect a *per se* barrier to the admission of evidence concerning one’s beliefs and associations” courts must ensure that such evidence is admitted only when racist beliefs are necessary and relevant to some fact at issue to the jury. Dawson, 503 U.S. at 166.

Here, the evidence was not so relevant. In finding otherwise, the trial court relied on the statements being “res gestae” and thus having “probative value.” RP 44-45. The court also said the evidence was relevant to Robert’s “state of mind.” RP 44-45.

The court’s rulings were simply wrong, for several reasons. First, it is highly questionable whether the fact that Robert made racist remarks was relevant to anything other than the prosecution’s desire to have the jury dislike him and his daughter and thus give less credence to their

testimony. There was no allegation that Carpenter was Native American. There was no claim that the alleged assault on the officer was committed because Robert was racist. There was not even evidence that Robert *thought* Carpenter was Native American, or that any racist statements were made during the assault which might have explained what Carpenter said occurred. Robert was not alleged to have attacked Carpenter because Carpenter refused to buy into his racism. Instead, the racism evidence was simply being used by the state to denigrate Robert and bolster the prosecution's main witness as a "good guy" who did not "buy into" Robert's racism and thus was more credible in his version of events.

In arguing admissibility for "state of mind," the prosecutor said the evidence showed Robert's "attitude" and his "emotion, his anger and so forth." RP 43. But the prosecutor did not explain how Robert's racist statements showed his "state of mind" in relation to the alleged assault on *Carpenter* - a victim not even alleged to be of the race about which the racist comments were made. The only way racist statements about Native Americans can be seen as proof of Robert's "attitude," "emotion" or "anger" is to make the assumption that, because Robert was racist, he was therefore a hothead or irrational and likely to assault an officer or at least be unreasonable or less credible. The point is that the "attitude" Robert had was about people *other* than the person he was alleged to have assaulted, not about the victim. The evidence was not relevant for that purpose.

Nor was the evidence admissible as "res gestae." The "res gestae" exception to the prohibition against evidence of other crimes, wrongs or acts is intended to prevent the prosecution from having to "present a

truncated or fragmentary version” of what happened to the jury. State v. Bockman, 37 Wn. App. 474, 491, 692 P.2d 925, review denied, 102 Wn.2d 1002 (1984). It is a limited exception, allowing only introduction of evidence of acts which are an “inseparable part” of the story and necessary “to complete the story of the crime on trial.” State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

But here the racist comments were not an “inseparable part” of this incident. The prosecution could easily have established the same “attitude” by referring to Robert’s angry comments to the officer, without evidence of the racist comments at all.

This was not a case in which the defendant’s racism was relevant to whether he committed the charged crime, such as a case in which a defendant murdered a white hitchhiker and was a member of a racist gang with the avowed goal of starting a “racial war.” Dawson, 503 U.S. at 166. Nor was it a case involving malicious harassment, where evidence of racial animus is admissible if it specifically relates to the charged crime, as in a “hate crime” situation. See, e.g., RCW 9A.36.080(4). And it is not criminal to utter biased or racist remarks while committing an unrelated crime. State v. Pollard, 80 Wn. App. 60, 65, 906 P.2d 976 (1995).

In addition, the trial court’s decision was flawed and is subject to reversal because the court failed to conduct the required balancing on the record. In deciding the issue, the court focused solely on whether the evidence was relevant or “probative.” RP 45-46. But that was not the only question. The court was also presented with argument about whether the probative value of the evidence was outweighed by its prejudice and whether the evidence was inadmissible as improper “character” evidence.

RP 41. To answer *those* questions, the court must ask not only whether the evidence was “relevant” but whether it was relevant *and necessary* to prove an essential element of the crime. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Further, the court must conduct a “balancing” of the probative value of the evidence against its likely prejudicial effect, on the record. See State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981); State v. Carleton, 82 Wn. App. 680, 685-86, 919 P.2d 129 (1996).

The court does not appear to have conducted such a balancing here.

RP 45. While recognizing that there was a good reason for the defense to want to exclude the evidence the court focused solely on whether it had “probative value” and was admissible as “state of mind” evidence or under the “res gestae” theory to “set the stage for what was to occur later on.”

RP 45.

But “bad acts” evidence is not admissible simply because it is relevant. Instead, it is presumptively inadmissible unless “necessary to prove a material issue” *and* the probative value to the prosecution outweighs the prejudice introduction of the evidence will cause the defense. See State v. Powell, 126 Wn.2d 244, 262-63, 893 P.2d 615 (1995). It is error for a court to fail to conduct the balancing of unfair prejudice and probative value on the record, because such balancing is necessary to ensure the court “thoughtfully evaluated” the prejudicial impact of the evidence as required. Carleton, 82 Wn. App. at 685-86. The record in this case does not show such thoughtful evaluation or even recognition of how extremely prejudicial evidence of racism would be.

Further, there are limits on use of ER 404(b) evidence as proof of

mental states such as “state of mind” or “intent,” because otherwise those exceptions would swallow the rule. See Powell, 126 Wn.2d at 262, citing, Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St. L. J. 575, 579-80 (1990). Thus, for example, in Powell, the Supreme Court held that other bad acts or misconduct evidence “is only necessary to prove intent when intent is at issue or when proof of doing the charged act does not itself conclusively establish intent.” 126 Wn.2d at 262. A similar concept is embodied in the rule that, even if relevant to prove a material issue, evidence of other crimes, wrongs or acts must be limited to that quantum of evidence *required* and *necessary* to prove the relevant part of the prosecution’s case. See State v. White, 43 Wn. App. 580, 587, 718 P.2d 841 (1986). Such evidence must be excluded if there is other evidence which can sufficiently establish the point for which the prosecution seeks to admit the other bad acts evidence. Id.

Here, had the court conducted the proper analysis, it would have found that the evidence of racial bias was neither relevant nor necessary to prove any essential part of the prosecution’s case, and that its minimal probative value was far outweighed by the prejudice it would cause. The prosecution already had evidence of Robert’s anger and unhappiness with Carpenter, the actual victim in the case, who was not Native American. In addition, the prosecution already had ample evidence of “attitude” - such as Robert’s alleged “following” or “watching” of the people in the Denali, his apparent anger with Carpenter and other acts that day - to prove Robert’s “state of mind” was not “calm.” See RP 500, 504 (prosecutor

relying on that evidence in closing to argue this point). It was not necessary for the prosecution to also elicit testimony of the largely irrelevant racist comments in order to establish anything of relevance to the case.

It is telling that this evidence was elicited over and over. Some of that was due not to the prosecutor but to the officer himself, who injected the issue of racist comments into the case again and again even when no questions about the comments were asked. RP 272-75. And it is further significant that the prosecutor made sure to elicit not only that Robert had made racist comments but also the officer's emotional response and that he was offended by the remarks. RP 201. Thus, the prosecutor neatly bolstered his own crucial witness while at the same time demeaning the defense.

As in Dawson, it appears that the evidence admitted here was not for any proper purpose but rather "simply because the jury would find these beliefs morally reprehensible." 503 U.S. at 167. The admission of the evidence was in error. And the evidence was so extremely prejudicial that it was impossible for Fawn to receive a fair trial. There was bound to be at least one juror who would hold against the child the prejudices of its father, however wrong that may be. Given the important constitutional rights involved, this Court should give very close scrutiny to the wrongful injection of evidence of racial bias into a criminal proceeding and ensure that such evidence is only admitted when necessary and relevant to prove an essential part of the prosecution's case. The evidence did not meet that standard here and the result was deprivation of Fawn's constitutional right to a fair trial. This Court should so hold and should reverse.

c. Counsel was ineffective

Reversal is also required based upon counsel's ineffectiveness on this issue. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

In this case, that standard is met, because counsel was prejudicially ineffective in several crucial ways in relation to this issue. First, counsel was ineffective in failing to join in Robert's counsel's motion to exclude the evidence in the first place. It appears that counsel only thought about the clear prejudice admission of the evidence would cause her client *after* the court had already ruled. See RP 45-46. But reasonable counsel would have known that having her client's father painted as a racist when he was sharing her defense and was the main witness supporting her client's version of events could not help but prejudice the jury's ability to fairly and impartially decide the case. At the least it would make any thinking jury so biased against Robert that they would be likely to discount all he said. At the worst it would make the jury feel disgust and revulsion for Robert and a desire to punish him for all of the ills racism has wrought on

our society - and his daughter by extension.

Further, counsel's initial failure was not remedied by counsel's later arguments. Those arguments were made only *after* the court had already ruled. A person arguing for reconsideration of a decision already made is in an inherently weaker position than someone arguing before the court's initial ruling. See, e.g., State v. Crider, 78 Wn. App. 849, 861, 899 P.2d 24 (1995).

Even if those failures could somehow be deemed acceptable, counsel's subsequent failure to move to sever cannot. CrR 4.4(c)(2) requires severance of defendants either "before trial . . . to promote a fair determination of the guilt or innocence of a defendant," or even during trial, if there is "consent of the severed defendant" and severance is "deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." CrR 4.4(a)(1). Although separate trials are not usually favored for reasons of judicial economy, severance is proper if the defendant can prove that a joint trial would be so "manifestly prejudicial" that the general concerns of judicial economy are outweighed. See In re Personal Restraint of Davis 152 Wn.2d 647 101 P.3d 1 (2004); see also State v. Dent 123 Wn.2d 467, 484 869 P.2d 392 (1994). If a defendant can point to specific prejudice such as the likelihood the evidence against one defendant would be such that it would be almost impossible for the jury to separate its decision regarding each defendant, severance is proper. See Dent 123 Wn.2d at 484.

Here, had counsel made a motion to sever once the court decided to admit Robert's racist statements, it would have been an abuse of discretion for the court to deny the motion. Given how extremely,

extraordinarily prejudicial evidence of racism is and the very real likelihood that the evidence would incite the jury emotionally not only against Robert but also against his version of events and his daughter, it seems impossible that it could be a “tactical” decision for counsel to fail to move to sever once she knew the court would be admitting the racist statements at trial.

Further, because a motion to sever is addressed to the sound discretion of the trial court, even if counsel believed the court would deny the motion, that did not justify the failure to make it. See State v. Dawkins, 71 Wn. App. 902, 908, 863 P.2d 124 (1993).

Counsel’s failures prejudiced her client. The real issue in this case was credibility. Even the state’s other witness did not support the version of events Carpenter had given in material ways. Given that this case was largely a “swearing match,” counsel’s failures to 1) properly address the potential admission of the highly prejudicial evidence in the first place and 2) take the reasonable step of moving to sever her client’s case once the evidence of racism was ruled admissible were ineffective assistance. The result was an unfair trial for Fawn, and this Court should so hold and should reverse and remand for a new trial at which Fawn should be given effective assistance of counsel.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 15th day of December, 2007.

Respectfully submitted,

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,  
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;  
to Ms Fawn Bergh, 5101 W. Tapps Rd., Bonney Lake, WA.  
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DATED this 15<sup>th</sup> day of December, 2007.

  
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