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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 refused to allow him to present relevant, exculpatory evidence.

2. Trial counsel's failure to object when the state introduced irrelevant, unfairly prejudicial evidence denied the defendant his 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, when it refuses to allow the defense to present relevant, exculpatory evidence?

2. Does a trial counsel's failure to object when the state introduces irrelevant, unfairly prejudicial evidence deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, when that failure fell below the standard of a reasonably prudent attorney and but for that error the jury would have acquitted the defendant?

STATEMENT OF THE CASE

Factual History

In August of 1998, George and Berit Riddle were living in their family home in a rural area outside the City of Battleground in Clark County. RP 260-261.¹ During the middle of the month, their nine-year-old granddaughter Lorin Riddle traveled from her home in Lakewood to stay a few weeks with them. RP 238-239. She did this every year. *Id.* When Lorin visited, she slept in a guest bedroom. *Id.* Since Lorin was afraid of the dark, her grandparents put a night light on the wall at the foot of the bed, as well as two electric "touch" lights on the night stands at either side of the head of the bed. RP 244-245. While at her grandparents, Lorin spent a lot of time with the nine-year-old daughter of her grandparent's neighbor. RP 262-263.

About a week after Lorin arrived, George and Berit received a call from the defendant Samuel Robert English. RP 240-243. At the time, the defendant was a 37-year-old Canadian citizen who worked driving a truck route along Interstate 5 between British Columbia and California. RP 460. He had grown up in Bellevue, Washington, prior to moving to Canada, and his family had been best friends with the Riddles, who had lived next door in Bellevue. RP 240-245, 316-318. By 1998, George and Berit had not seen the

¹The record in this case includes five volumes of continuously numbered verbatim reports referred to herein as "RP."

defendant for five or six years. RP 263-264. When the defendant called, he told the Riddles that he was parked out on the highway and had a delivery in Vancouver the next day. *Id.* Berit Riddle suggested that she have her husband go out and pick him up so he could have dinner with them and stay the night. *Id.* The defendant agreed and as a result, at about 4:00 pm on August 17th, George went out to the truck stop where the defendant was parked and picked him up. 267-268, 316-318.

On the way home from the truck stop, George and the defendant stopped at a convenience store and bought a six-pack of beer. R 267-268, 318-319. Once at the Riddle home, the defendant began continuously drinking beer from the time he arrived to the time he went to bed around 10:00 in the evening. RP 173-174. According to the Riddles, the defendant drank a total of 10 or 11 beers that evening and ate little of his dinner. *Id.* He also "chain smoked" cigarettes the entire time. RP 318-319. Although neither of the Riddles use tobacco, they did allow the defendant to smoke outside the house on their back patio where they had dinner. *Id.*

Sometime around 9:00 pm that evening, Berit called Lorin home from the neighbor's house and gave her a bath. RP 269-273. She then put Lorin to bed. *Id.* Lorin was wearing an old T-shirt of her grandfather's and a pair of panties. RP 247-249. As Berit left the room, the night light and the two "touch lights" on the night stands were on, but the overhead light was not.

RP 244-245. A little later, Berit Riddle went into the kitchen and had a conversation with the defendant. RP 173-174. She then went to bed, and the defendant went out on the patio to finish a last cigarette and his last beer. RP 275, 287. George Riddle had already gone to bed. *Id.*

At 2:30 in the morning, Berit Riddle woke up to find Lorin standing by her bed, saying something about the defendant being in her room. RP 276-277. Berit then went with Lorin into Lorin's bedroom. RP 277-278. When Berit entered, she noticed that the night light and the "touch lights" were not on and the room was dark. *Id.* In fact, the lights had been unplugged from the wall. *Id.* Berit also noticed an odor of cigarettes in the room. *Id.* At this point, Lorin told her grandmother that she had been sleeping on her stomach and had awoken to find someone sitting on her bed rubbing her back underneath her shirt. *Id.* According to Lorin, she first thought that her grandmother had come to awake her. RP 247-249. However, when she smelled an odor of cigarettes, she realized it was the defendant, although she could not see him in the dark. *Id.* She told him to leave or she would call for her grandparents. *Id.* After she said this, she heard the defendant leave the room and walk down the hallway. *Id.*

After Lorin related this story, Berit took her back into the master bedroom, woke George up, and told him what had happened. RP 277-278. Upon hearing this, George got dressed and went into the bedroom in which

the defendant had been sleeping. RP 325-327. However, the defendant was not there. *Id.* George then walked back through the kitchen and noticed that the sliding glass door to the patio was open and there was a lit cigarette in the ashtray. *Id.* About this time, the defendant walked up from outside and said that he had been pursuing someone whom he had seen running away from the house. RP 327. George then decided to take the defendant back to his truck on the highway, and returned to the master bedroom to tell Berit and Lorin what he was going to do. *id.* At this time, Berit and Lorin told him that when he left the bedroom, they had heard someone outside tapping on the bedroom window or the window in the next room. RP 277-278.

While driving the defendant back to his truck, George saw a police officer and a sheriff's deputy who were finishing a traffic stop in Battleground. RP 328. Upon seeing this, he stopped his vehicle and told the deputy what had happened that evening. *Id.* The deputy, Brent Waddle, spoke with the defendant, who told him that he had not molested Lorin and that he had seen a stranger fleeing from the Riddle's home. RP 347-349. Noting that Mr. Riddle was very upset and that the defendant was intoxicated, Deputy Waddle decided to take the defendant the rest of the way out to the truck stop. *Id.* He did this, and once at the truck, he warned the defendant to not operate his rig until he was sober. *Id.*

The next day, a second deputy sheriff came to the Riddle home to take

statements from them and Lorin. RP 279. A few days later, the defendant agreed to come in and give a statement. RP 363-365, 471-473. As a result, on September 1, 1998, the defendant came into the Vancouver Police Department and submitted to an interview with Steve Norton, a Vancouver Police Officer assigned to the Clark County "Child Abuse Intervention Center." RP 364-367. Prior to the interview, Officer Norton read the defendant his *Miranda* rights, which the defendant indicated he understood and would waive. RP 368-369. During this interview, the defendant stated that he was an alcoholic who suffered from blackouts, that during the evening in question he had been drinking heavily, and that he had very little memory of what had happened. RP 367. However, while he denied molesting Lorin or having any such tendencies, he did admit that he had lied to Mr. Riddle and the sheriff's deputy about seeing a stranger flee the Riddle home. RP 372-373.

Procedural History

By information filed September 10, 1998, the Clark County Prosecutor charged the defendant Samuel Robert English with one count of attempted child molestation in the first degree. CP 1-2. The defendant was released on \$10,000.00 bail and later appeared with counsel. CP 16. On December 9, 1998, the parties again appeared, this time for omnibus. CP 4-7. At this omnibus hearing, the defendant gave notice that he intended to rely

upon a claim of diminished capacity. CP 8. On its side, the state gave notice that it intended to seek admission of child hearsay under RCW 9A.44.120. CP 11. As a result of this latter claim, the court ordered the parties to appear on January 7, 1999, for a *Ryan* hearing. CP 11, 12, 16.

On January 7, 1999, defense counsel appeared for the *Ryan* hearing and informed the court that the defendant had called him and stated that he was on his truck route in California, that he had been unavoidably delayed, that he would be able to appear the next day, and that he wanted his attorney to proceed with the *Ryan* hearing in his absence. RP 3-7. Given the defendant's statement over the telephone and defense counsel's belief that he did not need the defendant present to effectively represent him at the *Ryan* hearing, defense counsel moved the court to (1) proceed with the *Ryan* hearing in the defendant's absence, and (2) delay issuing a warrant until the defendant had an opportunity to appear the next day. *Id.* The state concurred with the first request but opposed the second. *Id.* Based upon counsel's representations, the court granted both defense requests, proceeded with the *Ryan* hearing, and did not issue a warrant. *Id.*

At the *Ryan* hearing, the state called Lorin, Berit, and George Riddle as witnesses. RP 8, 21, 29. They testified to the facts set out in the preceding Factual Statement. Following argument by counsel, the court ruled that all of Lorin's statements to Berit and George during the morning of the incident

were admissible under both RCW 9A.44.120, as well as admissible under the excited utterance exception to the hearsay rule. RP 32-38. The court later entered findings and conclusions in support of this ruling. CP 13-14.

According to the defendant, he met with his attorney after the *Ryan* hearing. CP 155. During this meeting, his attorney advised him that he was “facing nine years in prison” and he should simply return to Canada as he would not be extradited in this case. *Id.* After this meeting, this is precisely what the defendant did. RP 155-160. Once he failed to appear, the court issued a warrant for the defendant’s arrest, and later forfeited his bail. CP 15-18. Eventually, in September of 2000, the defendant was arrested in Canada, and there admitted to supervised release, the terms of which required him to report to a probation officer weekly. CP 150-155. The defendant resisted extradition, and the case took over 7 years before the defendant was ordered to return to the United States. CP 150-154, 155-160.

The defendant finally reappeared in Clark County Superior Court on April 30, 2007, with new counsel. RP 19-23, 381-382. Following a CrR 3.5 hearing, the case was eventually called for trial before a jury on September 19, 2007. RP 193. At trial the state called six witnesses: Lorin Riddle, Berit Riddle, George Riddle, Deputy Brent Waddell, Officer Steven Norton, and Nancy Jo Campbell. RP 237, 259, 316, 345, 363, 375. The first six witnesses testified to the facts contained in the preceding factual history. *See*

Factual History. The last witness was a Deputy Superior Court Clerk for Clark County and she testified to the fact that the defendant had been admitted to bail in Clark County in this case, that he had failed to appear when required, that a warrant had been issued for his arrest, that the bail had been forfeited, and that the defendant had eventually reappeared before the court in April of 2007. RP 375-382.

During the state's direct examination of George Riddle, the prosecutor inquired as to what Mr. Riddle thought and did as he was taking the defendant back to his truck. RP 327. This question, and Mr. Riddle's response were as follows:

Q. As you were going back to his truck on Exit 14, well, did you do anything before you got to his truck?

A. Yes. *As I was driving, I realized that I had to do something, a crime had been committed.* so I said, "Well, I could go to the police." And he said, "Do that, so they could take some fingerprints or whatever" to show that he was innocent.

RP 327-328 (emphasis added).

The defense failed to object to this testimony as an improper opinion of guilt and failed to move for a mistrial after hearing it. *Id.*

In addition, during Officer Norton's testimony, the state specifically elicited the fact that Officer Norton was given this case because he was a Vancouver Police Department investigator assigned to work with the "Child Abuse Intervention Center." RP 363. The state did not present any argument

as to why it was relevant that this officer was assigned to the "Child Abuse Intervention Center," and the defense attorney did not object to this evidence.

Id.

In addition, later in his testimony, Officer Norton testified that when the defendant came to the police station to submit to an interview, Officer Norton began by reading the defendant his rights under *Miranda*. RP 368-369. In fact, the state had Officer Norton repeat those rights to the jury during his testimony. *Id.* At no point did the state present any argument to the court as to what the relevance of this testimony was and the defense again did not object. *Id.* In fact, the defendant testified at the CrR 3.5 hearing, and he had not claimed that his statement was not knowing or voluntary. RP 101-108. Neither did he make such a claim at trial during his testimony. RP 458-496.

After the state closed its case, the defense proposed to call a psychiatrist by the name of Dr. Jerry Larsen as its first witness. RP 395-406. The state objected and the defense then made an offer of proof concerning Dr. Larsen's qualifications to testify to the following three points: (1) that Dr. Larsen had examined the defendant and that in his opinion the defendant was an episodic alcoholic who suffered blackouts during his drinking binges, (2) that he had performed a psycho-sexual evaluation on the defendant and the defendant did not appear to suffer from any form of pedophilia, and (3) that

significant alcohol ingestion by an alcoholic during an episode of binge drinking can prevent that person from being able to form the requisite intent to commit a crime. RP 401-406.

Following this offer of proof and argument, the court ruled that Dr. Larsen would not be permitted to present any evidence on the defendant's sexual normalcy. RP 401-406. However, the court did permit the defense to call Dr. Larson to testify outside the presence of the jury by way of further offer of proof on the other two issues. RP 406-408. During his time on the stand, Dr. Larsen explained his qualifications as a psychiatrist with special training and experience in the affects of alcohol upon the mind. RP 408-410. He also testified to the scientifically recognized phenomena of alcoholic blackouts. *Id.* Although he did testify that one who experiences an alcoholic blackout does not necessarily loose the mental ability to form a specific criminal intent, he did explain that one of the effects of excessive alcohol abuse can be the temporary loss of the mental ability to form a requisite criminal intent during a state of inebriation. RP 412-415, 419-421.

After this testimony and further argument from counsel, the court ruled that Dr. Larson would be allowed to testify concerning alcoholic blackouts, but would be precluded from testifying concerning the effect of alcohol use and abuse on the ability to form the requisite intent to commit a crime. RP 428-435. Twice during Dr. Larsen's direct examination, and once

during redirect examination, the defendant asked Dr. Larsen whether episodic alcohol abuse can interfere with a person's ability to form an objective intent. RP 449-451, 455-456. The court sustained the state's objection to each of these questions and prohibited Dr. Larsen from answering them. *Id.*

After Dr. Larsen's testimony, the defendant took the stand on his own behalf. RP 458. During his testimony, he told the jury that he was an alcoholic, that he had little memory of what happened while he was at the Riddle home, and that he had no sexual attraction to little girls. RP 458-496. After his testimony, the defense rested and the state did not call any witnesses in rebuttal. RP 496. The court then instructed the jury without objection or exception from the defense. RP 512. These included instructions on fourth degree assault as a lesser charge included to the charge of attempted child molestation. CP 115-118.

During closing argument, the state made the following statements, among others:

Drinking does not make you touch children. Drinking dis-inhibits something that's already there. Not everybody who gets drunk touches children.

RP 514-515.

The defense did not object that this argument was improper given the fact that the state had successfully moved *in limine* to preclude the defendant from presenting scientific evidence to rebut this claim. *Id.*

Following the remainder of argument by counsel, the jury retired for deliberation and later returned a verdict of "guilty" as charged. 120. The court later sentenced the defendant within the standard range, and the defendant thereafter filed timely notice of appeal. CP 197-213, 216.

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 REFUSED TO ALLOW HIM TO PRESENT RELEVANT, EXCULPATORY EVIDENCE.

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

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

On review, the state argued that the trial court had not erred because

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

In the case at bar, appellant argues that the trial court committed the same error as the trial court did in *Ellis* when (1) it precluded the defendant's expert from testifying concerning the defendant's claim that his voluntary intoxication had prevented him from forming the requisite intent to commit a crime, and (2) when it precluded the defendant's expert from testifying concerning defendant's sexual normalcy. The following explains these arguments.

(1) The Trial Court's Ruling Prohibiting the Defense from Presenting Evidence to Support a Voluntary Intoxication Defense Denied the Defendant Due Process.

Diminished capacity and voluntary intoxication are two related defenses. *State v. Eakins*, 127 Wn.2d 490, 902 P.2d 1236 (1995). In fact, voluntary intoxication is sometimes referred to as "a subset of the general defense of diminished capacity." *State v. O'Connell*, 137 Wn.App. 81, 94, 152 P.3d 349 (2007). In the former, the defendant argues to the jury that he or she has an underlying mental disorder that precluded or interfered with the formation of the specific intent to commit the crime charged. *State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997). In the latter, the defendant argues that his or her voluntary intoxication prevented the formation of the specific intent to commit the crime charged. *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987).

In order to be entitled to argue diminished capacity, a defendant must meet two prerequisites: (1) the presentation of expert medical testimony that the defendant suffers from an underlying mental disorder short of insanity, and (2) the presentation of expert medical testimony that the underlying mental disorder prevented the defendant from forming the specific intent required under the crime charged. *State v. Turner*, 143 Wn.2d 715, 23 P.3d 499 (2001). In order to be entitled to argue voluntary intoxication, the defendant has a burden of production of evidence of intoxication sufficient

to affect the ability to form a specific intent unless the state's own evidence is sufficient to meet this burden. *State v. Carter*, 31 Wn.App. 572, 643 P.2d 916 (1982); *see also* W. LaFave & A. Scott, *Criminal Law* §§ 8, 45 (1972) (To argue voluntary intoxication the defendant has the burden of producing sufficient evidence of intoxication to put the defense in issue, unless the State's own evidence is sufficient).

In the case at bar, the state's own evidence was more than sufficient to put the issue of voluntary intoxication before the jury. Both of the Riddles testified concerning the defendant's excessive alcohol consumption on the night in question, and Deputy Waddell testified that shortly after the incident the defendant was sufficiently intoxicated that he told him to refrain from driving. This testimony was supplemented by the defendant's own testimony that he was an alcoholic and that he had drunk so much alcohol on the night in question that he suffered from an alcoholic blackout. This testimony was confirmed by Dr. Larsen's examination of the defendant. Thus, there was sufficient evidence to put voluntary intoxication at issue. In this case the trial court agreed and did instruct the jury with the following instruction on voluntary intoxication.

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

CP 113.

In fact, this instruction derives from RCW 9A.16.090, which states the following:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090.

This jury instruction used in this case begs the questions (1) whether or not intoxication, including alcohol intoxication, can interfere with a defendant's mental capacity to form a specific intent, and (2) how it is that alcohol intoxication interferes with the formation of a mental intent. When seen in the light of the first sentence of the instruction that "no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition," it was critical for the defense to present expert testimony that alcohol intoxication can affect a person's capacity to form a specific intent. Such evidence is generally contemplated under ER 702, which states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

In addition, the fact that this evidence may “embrace” an ultimate issue before the jury does not make evidence admissible under ER 702 inadmissible. As ER 704 states:

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ER 704.

In the case at bar, Dr. Larsen was both qualified and able to explain to the jury how alcohol intoxication, particularly alcohol intoxication sufficient to cause blackouts, can affect the brain and the capacity to form intent. In fact, the defense specifically asked whether or not alcohol intoxication could affect the formation of intent on three separate occasions. However, on each occasion, the state objected and the court sustained the objection. Given the facts that (1) voluntary alcohol intoxication was at issue before the jury as a possible defense, and (2) Dr. Larsen’s testimony was necessary to explain to the jury that alcohol intoxication can affect the formation of intent (as well as how it does this), the court’s action in refusing to allow the defense to elicit this evidence prevented the defense from effectively presenting its case. As such the court’s ruling was illogical and untenable. Thus, the trial court abused its discretion on these rulings. *See State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001) (The trial court abused

its discretion when it rules in a manifestly unreasonable manner or based upon untenable grounds or reasons.)

(2) The Trial Court's Ruling Prohibiting the Defense from Presenting Evidence on Sexual Normalcy Denied the Defendant Due Process

As was already stated earlier, the due process right to a fair trial includes the right to present relevant, exculpatory evidence. *Hudlow, supra; Chambers v. Mississippi, supra*. This includes the right to present expert testimony if (1) such testimony is relevant, (2) if the evidence will assist the trier of fact to understand the evidence or to determine a fact in issue, (3) if the testimony is based upon scientifically accepted principles, and (4) if the expert is qualified in the area in which he or she testifies. *State v. Willis*, 151 Wn.2d 255, 87 P.3d 1164 (2004). If the defendant meets all of these requirements, then the trial court abuses its discretion if it excludes the proposed expert testimony. *State v. Ellis, supra*. As the following explains, Dr. Larsen's proposed testimony concerning the defendant's sexual normalcy met these criteria and the trial court abused its discretion when it precluded this evidence.

In the case at bar, the state charged the defendant with attempted first degree child molestation under RCW 9A.44.083 and RCW 9A.28.020. The former statute states:

- (1) A person is guilty of child molestation in the first degree

when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

RCW 9A.44.083.

Under this statute, the gravamen of this offense is for one person to have "sexual contact" with another to whom he or she is not married, given the defined age limitations. The term "sexual contact" is defined in RCW 9A.44.010(2), which states:

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2).

As this definition explains, the term "sexual contact" means a touching done "for the purpose of gratifying sexual desire." Thus, in the case at bar, one issue before the jury to determine was whether or not the defendant touched Lorin Riddle, a nine-year-old girl, "for the purpose of gratifying sexual desire." In fact, given the evidence the state presented, as well as the defendant's admission to the police and on the witness stand, this was really the only issue before the jury.

Given Lorin Riddle's age, if the defendant did, in fact, touch her "for the purpose of gratifying sexual desire," then he would meet any accepted

definition as a pedophile. As Dr. Larsen was prepared to testify, pedophilia is a recognized sexual deviancy under the DSM-IV, and there are scientifically accepted methods for testing whether a person has such tendencies. In this case, he had performed these tests and determined that the defendant did not meet the definition for a pedophile. This evidence did not necessarily mean that the defendant could not have acted with sexual intent when he touched Lorin. However, it certainly made it less likely that he did. Thus, Dr. Larsen's evidence on this issue was relevant and it would have helped the jury determine a fact at issue. Finally, the state did not argue and the court did not hold that Dr. Larsen was not qualified to present such evidence or that his opinion was not based upon scientifically accepted principles. Thus, the trial court abused its discretion when it refused to allow the defense to present Dr. Larsen's evidence on the defendant's sexual normalcy.

In this case, the evidence of sexual intent was equivocal based upon the fact that (1) the defendant was highly intoxicated at the time of the event and may well not have had the capacity to form any type of intent, and (2) the defendant did not touch Lorin Riddle in a sexual manner. Given the equivocal nature of this evidence, it is more likely than not that but for the trial court's error in refusing to allow Dr. Larsen to testify concerning voluntary intoxication as it relates to the capacity to form intent, and but for

the trial court's error in refusing to allow Dr. Larsen to testify concerning sexual normalcy, the jury would have entered a verdict of acquittal. Thus, the trial court's errors caused prejudice and the defendant is entitled to a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE INTRODUCED IRRELEVANT, UNFAIRLY PREJUDICIAL EVIDENCE DENIED THE DEFENDANT HIS 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 professional 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 irrelevant, prejudicial evidence. This evidence came in three forms: (1) George Riddle’s testimony that the defendant had committed a crime, (2) Officer Norton’s testimony that he was assigned to this case because he worked as part of the “Child Abuse Intervention Center.” and (3) Officer Norton’s testimony that he gave the defendant a *Miranda* warning along with testimony of what those *Miranda* warnings were. The following presents this argument.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v.*

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

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

The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

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

defendant's guilt or innocence).

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.

In the case at bar, George Riddle testified that the defendant was guilty of the offense charged. This occurred in the following question and answer:

Q. As you were going back to his truck on Exit 14, well, did you do anything before you got to his truck?

A. Yes. *As I was driving, I realized that I had to do something, a crime had been committed.* so I said, "Well, I could go to the police." And he said, "Do that, so they could take some fingerprints or whatever" to show that he was innocent.

RP 327-328 (emphasis added).

This evidence went beyond even an opinion that the defendant was

guilty. Rather, it was an affirmative statement that the defendant had committed the offense. As such is was highly objectionable and improper. However, while not quite as direct, Officer Norton also gave opinion evidence of guilty when he informed the jury that the case had been assigned to him because he worked with the "Child Abuse Intervention Center." In other words, were the defendant not guilty of child sexual abuse, had he merely committed the crime of fourth degree assault, he would not have been assigned to the case. In addition, had the defendant not been guilty of the crime, there would have been no need for Officer Norton to inform the defendant of his rights to silence, and to recite to the jury the *Miranda* rights as he gave them to the defendant.

This latter decision of the state to have Officer Norton read the *Miranda* warnings into the record is curious indeed because the defendant had never disputed the voluntariness of his statements to the police. As a matter of fact, in his testimony, the defendant confirmed that he had spoken freely without coercion to Officer Norton. As a result, the voluntariness of the defendant's statements to Officer Norton were never at issue. Thus, one is left to speculate as to the relevance of telling the jury that Officer Norton *Mirandized* the defendant. What fact at issue before the jury was made ever so slightly more or less probable based upon this evidence? The answer is that this evidence was not relevant at all. However, there was a purpose in

the state's actions. This purpose was to convey to the jury that in Officer Norton's opinion, the defendant was guilty of the crime for which Officer Norton was interrogating him.

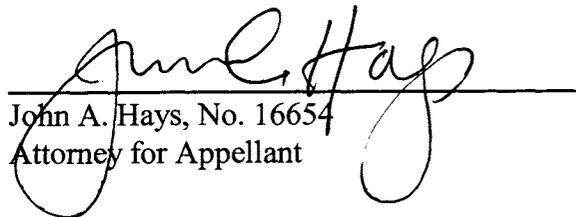
In the case at bar, there was no tactical reason for the defendant's attorney to fail to object to the improper opinion evidence of guilt in this case. Thus, this failure to object fell below the standard of a reasonably prudent attorney. In addition, as was already mentioned, the evidence that the defendant acted with sexual intent in the case was equivocal at best. Thus, it is more likely than not that had counsel objected to this improper, prejudicial evidence, the court would have sustained the objections and the jury would have entered a verdict of acquittal. Thus, trial counsel's failure also caused prejudice and the defendant is entitled to a new trial because he was denied effective assistance of counsel.

CONCLUSION

The trial court's decision refusing to allow him to call a witness to present relevant, exculpatory evidence denied the defendant a fair trial. In addition, trial counsel's failure to object to the introduction of irrelevant, prejudicial evidence denied the defendant his right to effective assistance of counsel. As a result, this court should reverse the defendant conviction and remand this case for a new trial.

DATED this 30th day of June, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

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

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the 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.

ER 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 704

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

RCW 9A.16.090

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

RCW 9A.28.020

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step

toward the commission of that crime.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;

(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;

(c) Class C felony when the crime attempted is a class B felony;

(d) Gross misdemeanor when the crime attempted is a class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

RCW 9A.44.010(2)

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.083

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

Instruction No. 11

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant act with intent.

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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON,
Respondent,

CLARK CO. NO: 98-1-01646-9
APPEAL NO: 37047-6-II

vs.

AFFIDAVIT OF MAILING

ENGLISH, Samuel Robert
Appellant

STATE OF WASHINGTON)
) vs.
COUNTY OF CLARK)

CATHY RUSSELL, being duly sworn on oath, states that on the 30TH day of JUNE, 2008, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS
PROSECUTING ATTORNEY
1200 FRANKLIN ST.
VANCOUVER, WA 98668

SAMUEL R. ENGLISH #937208
WASHINGTON STATE CORRECTIONS CTR
P.O. BOX 900
SHELTON, WA 98584

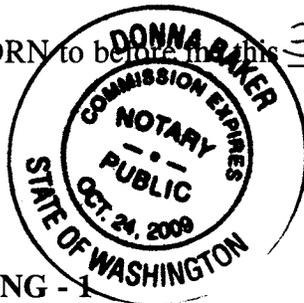
and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 30TH day of JUNE, 2008.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 30th day of JUNE, 2008.



John A. Hays
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09