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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's admission of evidence that was both irrelevant and unfairly prejudicial denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. RP 24-35, 146-148, 172-174.

2. Trial counsel's failure to object when the state elicited irrelevant, prejudicial evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. RP 138-140, 145-148, 153-154, 167-168, 172-174, 177-178, 186-187, 194, 359-360

3. The trial court erred when it calculated the defendant's offender score because the state failed to prove that the defendant's Oregon conviction for unlawful use of a weapon was comparable to a Washington felony. RP 464; CP 57, 58-70.

Issues Pertaining to Assignment of Error

1. Does a trial court's admission of evidence that is both irrelevant and unfairly prejudicial deny a defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

2. Does a trial counsel's failure to object when the state elicits irrelevant, prejudicial evidence deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the exclusion of that evidence following timely objections would have resulted in a verdict of acquittal instead of a verdict of guilt?

3. Does a trial court err if it includes a foreign conviction in a defendant's offender score when the state fails to prove that the foreign conviction was comparable to a Washington felony?

STATEMENT OF THE CASE

Factual History

Sometime in September or October of 2007, the defendant became acquainted with a woman by the name of Jessica White. RP 37-39, 375-379¹. At the time, the defendant lived in Portland and Jessica White, unbeknownst to the defendant, lived with her boyfriend in Vancouver. *Id.* The defendant's mother and step-father lived in Kelso, Washington, at a house at 2411 Burcham Street. RP 285-286 About a month after meeting each other, the defendant and Jessica began an intimate relationship, which the defendant thought was exclusive and which the defendant claimed involved consensual bondage in which he would tie Jessica up during sex. RP 40-43, 72-74, 375-379, 386-387. Since the defendant's living arrangement made it difficult for him to have Jessica over for the weekends, they would usually get together after work on Friday and drive to Kelso, where they would spend the weekend at the defendant's mother's house. RP 375-379. By the end of November they had done this on four or five occasions. RP 40-43, 72-78.

According to the defendant, on Friday, November 20, 2007, they followed their normal pattern with Jessica picking him up and driving the two of them to the defendant's mother's house. RP 75-76, 375-379. Once at this

¹The record in the case at bar includes three volumes of continuously numbered verbatim reports, referred to herein as "RP."

location, they spent the night together and engaged in consensual sex, including consensual bondage with him tying her up with phone cord. RP 75-76, 375-379, 386-387. That next morning, Jessica got a call to work overtime, so she drove back to Vancouver, with plans to return after her shift. RP 375-379. However, after her shift, she sent a text message to the defendant, indicating that she could not return. RP 72-74, 375-379. The defendant then called her, and the two of them got into an argument in which Jessica claimed that the defendant said he was going to walk back to Portland. *Id.* According to the defendant, he told Jessica that he would arrange a ride back home. *Id.*

Regardless of whose version of events was correct, if either, both parties agree that late that night the defendant ended up walking south on Interstate 5 where it runs through Kelso, and Jessica took her Vancouver boyfriend's truck and drove to Kelso. RP 40-43, 75-76, 375-379. Once the defendant got out on the highway, a state trooper picked him up and told him that he could not walk down an interstate. RP 120-124. As the trooper drove the defendant to the nearest exit, Jessica drove by in the truck. *Id.* At the defendant's request, the officer turned on his lights behind Jessica, and when she stopped, he allowed the defendant to get out of his patrol car and into the truck. *Id.*

Once the defendant got into Jessica's truck, the two of them got into

an argument. RP 40-43, 75-76, 379-381. At one point, the defendant grabbed financial papers in the truck and threw them out the window. *Id.* He also opened a bottle of soda and poured it on her and the inside of the truck. *Id.* According to Jessica, he then ordered her to drive to his mother's house, which she did. *Id.* Once at the house, he ordered her upstairs to the bedroom in which they usually stayed. RP 44-48. He then tied her hands, ankles, and torso with phone cord, all the time stating that he was going to kill her. RP 49-50. Jessica later stated that he tied her hands so tightly together that they turned blue and she begged him to untie her. Rp 49-50, 57.

Jessica also claimed that two other significant events occurred while the defendant held her in the bedroom. RP 55-57. The first was that he pulled out his folding knife and held it to her arm and then her throat, all the time saying that he was going to kill her. RP 44-48. The second was that the defendant twice injected himself with drugs, passing out each time shortly after he did. RP 55-60. According to Jessica, on the first occasion, he squirted blood out of the syringe onto the wall next to her. RP 55-57. Before the second occasion, the defendant untied Jessica, who walked downstairs into the garage, and smoked a cigarette with the defendant's mother, who was also in the garage. RP 57-60. She then went back upstairs to try to retrieve her keys from the defendant, who had taken them. RP 60-61. However, he refused to give them to her. *id.* When she was unable to get the keys, she

went back downstairs, and fled out a door in the garage. RP 65-68. According to Jessica, she ran through the backyard, jumped over the fence, and ran to a neighbor's house where two men were working outside. *Id.* Just why she jumped the back fence is uncertain, as the defendant's step-father and the defendant explained that half the back cyclone fence had been taken down and rolled up. RP 304-305, 401.

According to one of the two construction workers, when Jessica White ran up she was in a panic, was very upset, and asked for their help. RP 108-111. However, she asked them to not call the police. RP 116. One of the workers allowed her to get in his car to get warm, and he then called 911 anyway, telling the operator that a woman had just run up and claimed that her boyfriend had a gun and had held her against her will. RP 112-115. Within a few minutes, a number of Kelso officers arrived, spoke with Jessica, and had her show them the house where the defendant's mother lived, even though she appeared extremely reluctant to do so. RP 137-138. Once they identified the house, two officers walked up to the door and knocked on it a number of times. RP 138-140, 167-168. When no one answered, they tried to call the defendant's mother, who they identified as the registered owner of one of the vehicles in the driveway. *Id.*

At about the time the officers were trying to make the telephone call, the defendant's mother and step-father drove up in their vehicle. RP 138-

140, 167-168. They had just returned from grocery shopping. *Id.* At the officers' request, the group went into the house, and the defendant's mother called the defendant downstairs from the bedroom. *Id.* The officers questioned the defendant, who denied that he had held Jessica against her will or threatened her. RP 144-145, 170-171. They then arrested the defendant, handcuffed him, read him his *Miranda* rights, and took him to jail. RP 144-145, 153-154, 172-174. According to the officers, they thought the defendant was under the influence of methamphetamine at the time. RP 146-148, 172-174.

While still at the house, the officers asked the defendant's mother and step-father for permission to search in the bedroom where the defendant and Jessica had stayed. RP 194, 359-360. They both refused. *Id.* As a result, later that day, the officers obtained a search warrant, searched the upstairs bedroom, and found the following: (1) a used syringe in a trash can, which the officers did not get tested, (2) cut telephone cord with knots in it under the blankets on a mattress, and (3) what appeared to be a small amount of blood spatter on the wall, although the officers did not collect a sample and have it tested. RP 235-242. The officers also found other cord in the house. *Id.* However, neither that day nor the next did they ever see any marks or abrasions on Jessica White's body to indicate that she had ever been tied, even though they specifically looked for such marks. RP 161-162, 254-255.

Procedural History

By information filed December 4, 2007, and later amended, the Cowlitz County Prosecutor charged the defendant with first degree kidnapping, second degree assault, and felony harassment. CP 1-3, 10-12. In each count, the state also alleged that the defendant was armed with a deadly weapon when he committed the alleged crimes. *Id.* The case later came on for trial before a jury with the state calling eight witnesses. RP i-iii. These witnesses testified to the facts contained in the preceding *Factual History*.

In addition, during the trial, the state elicited the following facts, all without objection by the defense: (1) that the officers had repeatedly knocked on the door at 2411 Burcham and the defendant had refused to answer it, (2) that after talking to the defendant, the officers arrested the defendant handcuffed him, read him his *Miranda* rights, and took him to jail, and (3) that the defendant's mother and step-father had refused to consent to a search of the upstairs, that they refused to give written statements, and that they stated that they wanted to consult with an attorney. RP 138-140, 144-145, 153-154, 167-168, 172-174, 194, 359-360.

In addition, the state also elicited the following during its direct examination of Officer Blaine.

Q. And what was the goal at that point? Why did you – why

were you coming back to Kelso to talk to Sergeant Lane and Officer Voelker about this case?

A. Uh, to complete the search warrant so we could – I had a residence for the – I had 2411 Burcham, *where the crime occurred*, and recovered some evidence.

Q. And did you write a search warrant?

A. Yes

Q. And did you make an application to a judge for that warrant?

A. Yes

Q. And was that granted?

A. Yes.

RP 177-178 (emphasis added).

The defense made no objection that this evidence was irrelevant, or that it constituted an improper opinion by Officer Blaine and a judge that a crime had actually occurred and that the defendant was guilty of that crime.

RP 177-178.

In addition, later in Officer Blaine's direct, the following exchange took place.

Q. Detective Blaine, why was it you were looking for these three – for these specific kinds of items?

A. Because those are the items *the victim* specifically said she was restrained in.

RP 186-187 (emphasis added).

Once again, the defense made no objection that the issue in this case was whether or not a crime had ever been committed. Thus, whether or not Jessica White was a “victim” of a crime was for the jury to determine, not Officer Blaine. *Id.* By contrast, the defense did object every time the state elicited evidence to indicate that the defendant had allegedly used methamphetamine on the day in question. RP 22-35, 146-148, 172-174. However, the court overruled these objections and allowed the state to present this evidence. *Id.*

Following the presentation of the state’s evidence, the defense called four witnesses, including the defendant. CP 421, RP i-iii. The first witness was Gare Wyatt, an employee for Lower Columbia Mental Health. RP 277-278. He testified that on the Monday after the defendant was arrested (the next day), he administered a urinalysis test at the request of one of the Superior Court judges. *Id.* This test was negative for opiates, amphetamine, methamphetamine, or marijuana. RP *Id.*

The defense then called the defendant’s step-father and his mother. RP 283, 316. After their testimony, the defendant then took the stand on his own behalf, and denied that he had restrained or threatened Jessica White in any way. RP 274-401. At this point, the defense rested, and the state did not call any rebuttal witnesses. RP 421. The court then instructed the jury, with neither side making any objections or taking any exceptions, and the parties

proceeded with closing arguments. RP 424, 425-457.

Following closing arguments, the jury retired for deliberations. RP 457-458. The took a number of exhibits with them, including Exhibits 22 and 22A (folding knife and bag containing folding knife), Exhibits 23 and 23A (Yellow Cat. 6 cable and bag containing Yellow Cat. 6 cable), Exhibits 24 and 24A (plastic bottle containing syringe and bag containing plastic bottle containing syringe), and Exhibits 25 and 25A, (telephone line and bag containing telephone line). RP 152, 185, 188, and 192. The court admitted all of these exhibits into evidence, including the bags. *Id.*

The jury eventually returned verdicts of “not guilty” to first degree kidnapping (count I), “guilty” to the lesser included offense of unlawful imprisonment, “not guilty” to second degree assault (count II), and “guilty” to felony harassment (Count III). CP 48-56. The jury also returned special verdicts that the defendant had been armed with a deadly weapon when he committed the crimes of unlawful imprisonment and felony harassment. *Id.*

The court later sentenced the defendant to the top end of the range on the two convictions plus the deadly weapons enhancements, under an offender score calculation that assigned one point for an Oregon conviction for unlawful use of a weapon. CP 59, RP 464. The defense admitted the fact of the conviction, but did not stipulate to its comparability to a Washington felony. *Id.* Following sentencing, the defendant appealed. CP 75.

ARGUMENT

I. THE TRIAL COURT'S ADMISSION OF EVIDENCE THAT WAS BOTH IRRELEVANT AND UNFAIRLY PREJUDICIAL DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

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

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is

intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

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

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

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

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial,

the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

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

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

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

In the case at bar, the state repeatedly introduced evidence that during the event in question, the defendant had injected drugs, which the state's

witnesses speculated were methamphetamine. The defendant argued that under the recent decision in *State v. Powell*, 139 Wn.App. 808, 162 P.3d 1180 (2007), this evidence was both irrelevant and inadmissible. The following examines this case.

In *State v. Powell, supra*, the state charged the defendant with attempted first degree burglary after he went over to his girlfriend's parent's house one morning, walked up the steps, and turned the doorknob. At the time, he was carrying a firearm. The defendant's girlfriend was living with her parents, the young child she had with the defendant, and her other older child. In a telephone conversation the previous evening, the defendant had stated that he wanted to come see their child the next morning but his girlfriend had refused. At trial, she testified that the defendant had previously threatened to kill her if she kept him from their child. In addition, at trial the state had presented evidence that the defendant had used methamphetamine a few hours before the incident out of which he was charged.

Following conviction, the defendant appealed, arguing in part that the trial court had denied him a fair trial when it admitted evidence of his alleged methamphetamine use because this evidence was irrelevant and prejudicial. This court agreed in part, holding that the defendant's drug use might have been relevant had the state presented an expert who had rendered an opinion on how methamphetamine use could affect a person's state of mind.

However, since the state had failed to present such evidence, the court reversed the conviction, and remanded for a new trial. The court held:

Contrary to Powell's claim, his drug use was relevant to his state of mind. The principal question the jury needed to answer was what had Powell intended to do if he had entered Williams's home. This evidence potentially completed the picture of someone who was upset with Williams about keeping his son from him, had threatened to kill her for doing so, and was dressed in camouflage clothing and carrying a loaded fully-functional firearm. The drug use evidence could have been logically relevant to explain Powell's seeming determination to enter Williams's home. The problem is that the State did not offer any expert testimony to explain the actual or even potential effects methamphetamine could have had on Powell. Thus the jurors were left to speculate on this question from their own knowledge, knowing only that Powell was a law breaking drug user. As the evidence in this case was far from overwhelming, we cannot say that the error in admitting testimony about Powell's drug use was harmless. We must reverse.

State v. Powell, 139 Wn.App. at 818².

In the case at bar, unlike *Powell*, the state never did even definitively identify the drug that Jessica White claimed the defendant injected. While two police officers gave their opinion that the defendant appeared to be on methamphetamine at the time they arrested him, Jessica White's claim that the defendant passed out after using drugs does not appear consistent with methamphetamine use, since methamphetamine is a central nervous system stimulant, not a depressant. However, this case is exactly like *Powell* in one

²The state subsequently obtained review of this decision. The case has now been argued before the Washington Supreme Court, and the parties are awaiting a decision.

salient point: in neither case did the state call an expert to give an opinion on how the drugs the defendant allegedly used affected his mental or physical processes. Thus, in the same manner that the trial court erred in *Powell* when it admitted the evidence of methamphetamine use, so the trial court erred in the case at bar when it admitted the evidence of the methamphetamine use.

The case at bar also resembles *Powell* in another important point: both cases did not involve overwhelming evidence of guilt. In the case at bar, the jury did not even convict the defendant of the original charges of first degree kidnapping and second degree assault. Rather, the jury convicted the defendant of one lesser included offense along with Count III. Thus, in the same manner that the court in *Powell* could not say that the error was harmless, so the court in this case cannot say that the error was harmless. As a result, in the same manner that the defendant in *Powell* was entitled to a new trial, so the defendant in the case at bar is entitled to a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE ELICITED IRRELEVANT, UNFAIRLY PREJUDICIAL EVIDENCE AT TRIAL DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for

judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

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

In the case at bar, the defendant claims ineffective assistance based

upon trial counsels failures to object when the state repeatedly elicited irrelevant, prejudicial evidence. The following presents these arguments.

(1) Trial Counsel's Failure to Object When the State Elicited Evidence That the Defendant Failed to Come to the Door When Officers Knocked Fell below the Standard of a Reasonably Prudent Attorney.

In the case at bar, the state repeatedly elicited the fact that after the officers spoke with Jessica White, they had her point out the defendant's parent's house, they repeatedly knocked on the door, and the defendant refused to answer the door. Defense counsel did not object to this evidence. The error in failing to object to this evidence is that it constituted a direct comment on the defendant's failure to cooperate with and talk to the police under circumstances in which he not only had no duty to cooperate and speak, but in which he had a right to remain silent. In making this argument, it should be noted that the officers had not obtained a warrant for the defendant's arrest, they were not in hot pursuit, and there were no exigent circumstances that excused their failure to get a warrant of arrest. Thus, when they went to the front door of the defendant's mother's house, they had no legal justification for requiring him to answer the door.

Given this conclusion, the question arises as to the "relevance" of the testimony concerning the fact that the defendant failed to answer the door. Under ER 401, "relevance" is defined as "evidence having any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In other words, for evidence to be relevant, there must be a “logical nexus” between the evidence and the fact to be established. *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a “tendency” to prove, qualify, or disprove an issue for it to be relevant. *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980).

In the case at bar, the “logical nexus” between the defendant’s failure to respond to the officers’ repeated knocks on the door and the facts at issue in this trial was that his failure to respond and speak to the police was a tacit admission of guilt that contradicted his later protestations of innocence. In other words, his initial failure to respond and speak when confronted by the police is relevant because one can logically infer guilt from it, and this is precisely why the state elicited this evidence. The evidence has no other “relevance.” The problem with this evidence is that while highly relevant, it was also highly prejudicial because it draws an inference of guilt from the defendant’s exercise of his right to silence under Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment. The following examines this issue.

The Fifth Amendment to the United States Constitution states that no person “shall ... be compelled in any criminal case to be a witness against

himself.” Washington Constitution, Article 1, § 9, contains an equivalent right. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It also precludes the state from eliciting comments from witnesses or making closing arguments relating to a defendant’s silence to infer guilt from such silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979).

In *State v. Easter, infra*, the court states this proposition as follows: At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); *Miranda*, 384 U.S. at 461, 86 S.Ct. at 1620-21. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant’s silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, “[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation.” *Miranda*, 384 U.S. at 468 n. 37, 86 S.Ct. at 1624 n. 37. The purpose of this rule is plain. An accused’s Fifth Amendment right to silence can be circumvented by the State “just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.” *State v. Fricks*, 91 Wash.2d 391, 396, 588 P.2d 1328 (1979).

State v. Easter, infra at 236.

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the defendant was prosecuted for multiple counts of vehicular homicide. At trial, the state, in its case in chief, elicited testimony from its

investigating officer that shortly after the accident, he found the defendant in the bathroom of a gas station at the intersection, and that the defendant “totally ignored” him when he asked what happened. The police officer also testified that when he continued to ask questions, the defendant looked down, “once again ignoring me, ignoring my questions.” Following conviction, the defendant appealed, arguing that this testimony violated his right to remain silent. The Washington Supreme Court agreed and reversed, stating as follows:

Accordingly, Easter’s right to silence was violated by testimony he did not answer and looked away without speaking when Officer Fitzgerald first questioned him. It was also violated by testimony and argument he was evasive, or was communicative only when asking about papers or his friend. Moreover, since the officer defined the term “smart drunk” as meaning evasive behavior and silence when interrogated, the testimony Easter was a smart drunk also violated Easter’s right to silence.

State v. Easter, 130 Wn.2d at 241.

The evidence in the case at bar is analogous. In *Easter*, the defendant repeatedly refused to answer the officer’s questions, while in the case at bar, the defendant repeatedly refused to respond to the officer’s knocks on his mother’s door. By eliciting this evidence, the state invited the jury to infer guilt from the defendant’s refusal to cooperate with the officers. No reasonable defense counsel would fail to object to the state’s actions in eliciting evidence concerning the defendant’s exercise of such a fundamental

constitutional right. Thus, trial counsel's failure to object fell below the standard of a reasonably prudent attorney.

(2) Trial Counsel's Failure to Object When the State Elicited Evidence That Police Officers Arrested and Handcuffed the Defendant Fell below the Standard of a Reasonably Prudent Attorney.

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 both defense counsel and the prosecutor, as well as the witnesses, must refrain from any statements or conduct that express their personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a "substantial likelihood" that any such conduct, comment, or questioning has affected the jury's verdict, then the defendant's right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted

to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the jury he refused to testify concerning his conversation with Walker as he didn't want to be labeled a "snitch." Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the following.

Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. *See State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

State v. Denton, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant knifed another person during a fight outside a bar. During the trial the defendant testified and claimed self defense. During cross examination the prosecutor repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor that was never made part of the record. In setting out the law on this issue, the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate him Ed Frazier, deputy county attorney, a lawyer of high standing for integrity and ability. These questions were not put, as the court assumed as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he may possess under the guise of cross-examination, as in this case.

* * *

To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

State v. Yoakum, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at 311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

State v. Yoakum, 37 Wn.2d at 144.

Similarly, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

In *State v. Carlin*, the court put the principle as follows:

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

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

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

For example, in *State v. Carlin*, *supra*, the defendant was charged

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

Under this rule the fact that officers performed a "high risk" traffic stop, arrested the defendant, placed him in handcuffs, and took him to the police station or the jail is not evidence because it constitutes the arresting officer's opinions that the defendant is guilty. For example, in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant's vehicle hit the plaintiff's vehicle. Following a defense verdict the plaintiff appealed arguing that defendant's argument in closing that the attending officers' failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

While an arrest or citation might be said to evidence the

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

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

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

As with the evidence of the defendant failing to answer the door, one is left in this case to ask the question: what was the relevance of the fact that the officers arrested the defendant and read him his *Miranda* rights? What fact at issue at trial does the fact of the arrest make more or less likely? The answer is that the only relevance in this evidence lies in the inference that the officers believed the defendant guilty. The progression of the prosecutor's questions leading up to this evidence also illustrates this point. This progression was as follows: (1) police get call to possible assault, (2) police interview hysterical woman who claims boyfriend held her captive and assaulted her, (3) police have woman show her the house where they can find

the defendant, (4) police knock on the door and get no answer, (5) police get in when defendant's mother comes home, (6) defendant comes down and talks to them, and finally (6) based upon what the woman and the defendant have said, the officers arrest the defendant. Why do they arrest the defendant? They arrest the defendant because they believe he committed a crime or crimes. This evidence has no other relevance.

No possible tactical advantage exists for the defense to fail to object to this evidence which is both irrelevant and prejudicial to the defense. Consequently, the failure to object fell below the standard of a reasonably prudent attorney.

(3) Trial Counsel's Failure to Object When the State Elicited Evidence from a Police Officer That the Defendant's Mother's House Was "Where the Crime Occurred" Fell below the Standard of a Reasonably Prudent Attorney.

As was stated in the preceding section, under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, both defense counsel and the prosecutor, as well as the witnesses, must refrain from any statements or conduct that express their personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case, supra*. In this case the state violated this when it elicited the fact that the officer arrested the defendant, because the jury was left to infer, as it no doubt did, that in the opinion of the officers, the

defendant was guilty. However, in this case, the state also elicited a direct statement from a police officer that in his opinion the defendant was guilty. The jury was not required to infer the fact at all. This occurred when Officer Blaine answered a question from the state on direct concerning his actions in obtaining a search warrant at the defendant's mother's house. The testimony went as follows:

Q. And what was the goal at that point? Why did you – why were you coming back to Kelso to talk to Sergeant Land and Officer Voelker about this case?

A. Uh, to complete the search warrant so we could – I had a residence for the – *I had 2411 Burcham, where the crime occurred*, and recovered some evidence.

Q. And did you write a search warrant?

A. Yes

Q. And did you make an application to a judge for that warrant?

A. Yes

Q. And was that granted?

A. Yes.

RP 177-178 (emphasis added).

Defendant submits that the standard this court should apply when judging the purpose and effect of any evidence presented in a trial is the standard of relevance. In the context of the above-quoted testimony, the

question would then be: What is the relevance of the fact that the officer obtained a search warrant at the place “where the crime occurred”? The state might argue that it showed how the officers obtained entry into the second floor of the house to search the bedroom, which search yielded evidence the state was using at trial. The error in any such argument is that the question of how the police got into the upstairs bedroom at 2411 Burcham did not make any fact at issue at trial any more or less likely. Thus, it was irrelevant. That the officers searched and found items in the upstairs bedroom was, of course, highly relevant. However, how they got into the bedroom was not relevant at all.

While the evidence of how the police got into the bedroom was not relevant, the state did have a purpose for eliciting it. This purpose was to impress upon the jury that a judge had reviewed the officer’s belief that 2411 Burcham was the place “where the crime occurred,” and that the judge had placed his imprimatur on that opinion. Thus, not only did the state elicit the direct opinion of a police officer that the defendant was guilty (else how could the house be the place “where the crime occurred”), but the state also elicited the implied opinion of a judge that the police officer’s opinion was correct (else why would the judge have issued the search warrant). This evidence violated the defendant’s right to a fair trial. No tactical reason existed for failing to object to it. Thus, trial counsel’s failure to object fell

below the standard of a reasonable prudent attorney.

(4) Trial Counsel's Failure to Object When the State Elicited Evidence from a Police Officer That the Defendant's Girlfriend Was the "Victim" of the Defendant's Crimes Fell below the Standard of a Reasonably Prudent Attorney.

In the case at bar, Jessica White testified that the defendant bound her with telephone cord to the point where her hands turned blue, held her against her will for many hours, repeatedly threatened to kill her over many hours, and menaced her with a knife. The defendant flatly denied her allegations. Interestingly enough, she bore no physical marks from this alleged traumatic event. In such a case, if the former claim was correct, then Jessica White was undoubtedly the "victim" of a crime. However, if the latter claim was correct, then Jessica White was a liar and definitely not the "victim" of either a crime or any type of traumatic event.

This type of case can be contrasted with those in which the defense does not contest the fact of the crime, but does contest the defendant's involvement. For example, in the case of a drive-by shooting, a defendant would undoubtedly agree that the person shot was the "victim" of a crime, particularly if the defense was that some other person did the shooting. The point of comparing this hypothetical with the facts of the case at bar is to illustrate that there are cases in which the state's use of the term "victim," or the use of this term by a witness, convey's the opinion of the state or the

witness that the defendant is guilty. The case at bar is a good example.

In other words, the ultimate issue for the jury to determine in the case at bar was whether or not Jessica White was a “victim” of a crime. The case was not about who perpetrated that crime if one indeed occurred. Thus, in the case at bar, any use of the term “victim” to refer to Jessica White necessarily implied the opinion of the person using the term that she was telling the truth, that the defendant was lying, and that the defendant was guilty. In this case, this occurred during the following portion of Officer Blaine’s direct testimony.

Q. Detective Blaine, why was it you were looking for these three – for these specific kinds of items?

A. Because those are the items *the victim* specifically said she was restrained in.

RP 186-187.

Under the facts of this case, Officer Blaine’s characterization of Jessica White as “the victim” unequivocally expressed his opinion to the jury that Jessica White had told the truth, that the defendant had lied, and that the defendant was guilty. No possible tactical reason exists for defense counsel’s failure to object to such evidence. As a result, counsel’s failure to object fell below the standard of a reasonable prudent attorney.

(5) Trial Counsel's Failure to Object When the State Elicited Evidence That the Defendant's Mother and Step-Father Refused to Consent to a Search of Their Home, Refused to Give Written Statements, and Stated That They Wanted to Talk to an Attorney Fell below the Standard of a Reasonably Prudent Attorney.

In the case at bar, the state elicited three curious facts during its direct examination of the officers who interviewed the defendant's mother and step-father. These facts were: (1) that the defendant's mother and step-father refused to consent when the police asked permission to search their home, (2) that the defendant's mother and step-father refused to give written statements to the police, and (3) that the defendant's mother and step-father told the police that they wanted to speak with an attorney before considering giving any more statements. The state reiterated these facts during its cross-examination of the defendant's mother and step-father when they testified for the defense.

Once again, one is left to ask the question as to the relevance of this evidence. What fact at issue at this trial did this evidence make more or less likely? Seen in the light of an enquiry concerning relevance, the purpose of this evidence becomes immediately apparent. The state's purpose was to imply to the jury that the defendant's mother and step-father either knew the defendant was guilty, or at least believed he was. This opinion, inferred from the actions of two witnesses who obviously wanted to help and protect the defendant, had a powerful effect on the jury. Thus, it was improper opinion

evidence to which the defendant's attorney should have immediately objected. This failure fell below the standard of a reasonably prudent attorney.

(6) Trial Counsel's Failure to Object When the State Submitted Evidence to the Jury in Bags That Had Prejudicial Statements the Police Had Written on Them Fell below the Standard of a Reasonably Prudent Attorney.

As has been repeated in the previous sections of this argument, in order to assure a defendant a fair trial under both Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, 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, supra.*

In this case at bar, without objection by the defense, the trial court allowed the exhibits admitted into evidence to go to the jury in four separate bags upon which the police had placed their "evidence stamps." On these evidence stamps, the police wrote numerous comments that spoke testimonially to the jury, including a statement of opinion by the officers as to what "crime" they believed the defendant had committed. In this case, the crime designated was "Assault 1 - Unlawful Imprisonment." These stamps also included statements by the police as to the "description of Property or

Evidence” the officer seized, as well as their claims as to where the evidence was allegedly seized. The following is a portion of one of these stamps that the jury took to the jury room. Photocopies of all four stamps are included in Clerk’s Papers and are reproduced in the appendix to this brief.

EVIDENCE/PROPERTY
Agency Kent PD Case No. 27-0497
Item No. _____ Offense Aggravated Assault
Suspect CLAYTON ALLEN R.
Victim WHITE, JESSICA L.
Date and Time of Recovery 12-2-07 / 12:40
Recovered By SGT. LANE
Description and/or Location LEATHERMAN FOLDING KNIFE.

DO NOT CUT HERE TO OPEN (vertical text on left and right edges)

Exhibit 22 (in part).

While the information concerning case number, date, and item number included with the evidence stamp is not objectionable other than being repetitive and in written form, the other items on each stamp are highly improper. Whereas no officer would be allowed to stand before the jury and testify that he or she “believed” that the defendant had committed a specific offense, these evidence stamps and the information contained in them had the same effect as such improper opinions of guilt. The stamp on Exhibit 22

specifically includes the officer's identification of Jessica White as the "victim" in a case in which the real issue for the jury was whether or not there really had been a crime. As with the other failures to object in this case, the failure to object to this opinion evidence of guilt served no conceivable defense tactic. Thus, defense counsel's failure to object fell below the standard of a reasonable prudent attorney.

(7) Trial Counsel's Failures to Object to this Inadmissible, Irrelevant Evidence Caused Prejudice.

In the case at bar, the jury was faced with a question of credibility between two diametrically opposed witnesses. On the one hand, Jessica White claimed the defendant held her against her will, tied her up, and repeatedly threatened her. On the other hand, the defendant denied these claims. In deciding which version of events to believe, the jury had relatively little other evidence to aid in its decision. The strongest evidence on the state's side might well have been the cut up telephone cord found in the bedroom, although the defendant did have an explanation for this piece of evidence. Indeed, the state did not attempt to rebut this explanation by recalling Jessica White to the stand to deny it.

The strongest evidence on the defendant's side might well have been the lack of any marks on Jessica White's wrists under circumstances in which one would have expected to see them. In addition, the testimony of the

defendant's mother and step-father, if believed, certainly would make Jessica White's claims at least improbable. The jury obviously had a difficult time in making its decision given this evidence as their verdicts of not guilty to the kidnapping and assault charges indicate. Under such circumstances, the admission of inadmissible evidence is more than sufficient to change a verdict of outright acquittal to one of guilty on a lesser included offense. The defendant argues that this is precisely what happened in this case. The inappropriate and repeated admission of opinion evidence that the defendant was guilty, as is outlined above, was what more than likely convinced the jury to find the defendant guilty on the lesser included offenses. Thus, had defense counsel made timely objections to this evidence, the jury would more likely than not have acquitted. As a result, trial counsel's deficient failure to object caused prejudice, thereby denying the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. As a result, the defendant is entitled to a new trial.

III. THE TRIAL COURT ERRED WHEN IT CALCULATED THE DEFENDANT'S OFFENDER SCORE BECAUSE THE STATE FAILED TO PROVE THAT THE DEFENDANT'S OREGON CONVICTION FOR UNLAWFUL USE OF A WEAPON WAS COMPARABLE TO A WASHINGTON FELONY.

In RCW 9.94A.525(3), the Washington Legislature set out the criteria for determining whether a foreign conviction counts within a defendant's

offender score as a prior offense. This statute states:

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3).

The process to determine whether or not the state has proven that a foreign conviction is “comparable” to a Washington felony is called “comparability analysis.” In it, the court must determine whether or not a foreign conviction counts either as a prior conviction for the purpose of calculating a defendant’s offender score under RCW 9.94A.525(3), as well as determining whether or not a prior conviction qualifies as a sex offense under RCW 9A.44.130 for those charged of failure to register following a foreign conviction. Comparability is always first a legal question, and then possibly a factual question. *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998). If the supposed equivalent Washington statute defines the offense with elements that are identical to or more inclusive than the foreign statute, then the foreign conviction is necessarily comparable to the Washington offense. *Id.* In other words, if every violation of the foreign statute would necessarily be a violation of the supposed equivalent Washington statute,

then the foreign statute is comparable. In this situation, no factual analysis is necessary.

By contrast, if the Washington statute defines the offense more narrowly than the foreign statute, then the court must determine whether or not the defendant's specific conduct, as evidenced in the records of the foreign conviction, would have violated the Washington statute in question. *Morley*, 134 Wn.2d at 606. Thus, under the factual analysis, the specific facts underlying the foreign conviction must have been admitted or proved to the finder of fact in the foreign jurisdiction beyond a reasonable doubt. *State v. Farnsworth*, 133 Wn.App. 1, 130 P.3d 389 (2006).

The State normally bears the burden of proving the foreign conviction comparable by a preponderance of evidence. *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004). Absent such proof, the court is barred from using the foreign conviction as a prior conviction for the purpose of calculating offender score. *Id.* As the following explains, in the case at bar, the state failed to prove by a preponderance of the evidence that the defendant's Oregon Conviction for unlawful use of a weapon was comparable to a Washington felony offense, either legally or factually.

At sentencing in the case at bar, the state claimed that the defendant had a prior Oregon conviction for "unauthorized use of a weapon." CP 59. The defendant did not deny it. RP 464. However, the admission of the fact

of a foreign conviction is not an admission that it is comparable to a Washington felony. Indeed, as the following explains, the Oregon offense of unauthorized use of a weapon is not the legal equivalent to a Washington felony.

Under ORS 166.220, the unauthorized use of a weapon is a felony in Oregon. This statute states:

ORS 166.220
Unlawful Use of Weapon

(1) A person commits the crime of unlawful use of a weapon if the person:

(a) Attempts to use unlawfully against another, or carries or possesses with intent to use unlawfully against another, any dangerous or deadly weapon as defined in ORS 161.015; or

(b) Intentionally discharges a firearm, blowgun, bow and arrow, crossbow or explosive device within the city limits of any city or within residential areas within urban growth boundaries at or in the direction of any person, building, structure or vehicle within the range of the weapon without having legal authority for such discharge.

(2) This section does not apply to:

(a) Police officers or military personnel in the lawful performance of their official duties;

(b) Persons lawfully defending life or property as provided in ORS 161.219;

(c) Persons discharging firearms, blowguns, bows and arrows, crossbows or explosive devices upon public or private shooting ranges, shooting galleries or other areas designated and built for the purpose of target shooting; or

(d) Persons lawfully engaged in hunting in compliance with rules and regulations adopted by the State Department of Fish and Wildlife.

(3) Unlawful use of a weapon is a Class C felony.

ORS 166.220.

This statute criminalizes a wide range of conduct, including the discharge of a firearm in a residential area. Under RCW 9.41.230, this conduct is a misdemeanor. This statute states:

RCW 9.41.230
Aiming or Discharging Firearms, Dangerous Weapons

(1) For conduct not amounting to a violation of chapter 9A.36 RCW, any person who:

(a) Aims any firearm, whether loaded or not, at or towards any human being;

(b) Willfully discharges any firearm, air gun, or other weapon, or throws any deadly missile in a public place, or in any place where any person might be endangered thereby. A public place shall not include any location at which firearms are authorized to be lawfully discharged; or

(c) Except as provided in RCW 9.41.185, sets a so-called trap, spring pistol, rifle, or other dangerous weapon, although no injury results, is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

(2) If an injury results from a violation of subsection (1) of this section, the person violating subsection (1) of this section shall be subject to the applicable provisions of chapters 9A.32 and 9A.36 RCW.

RCW 9.41.230.

As reference to these two statutes reveals, the Oregon offense

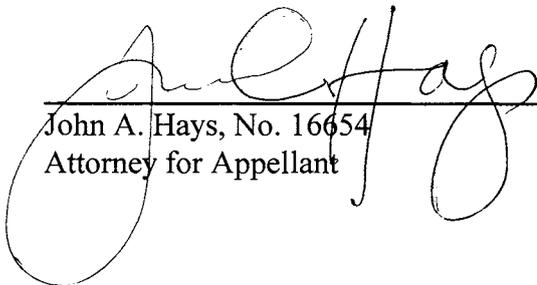
encompasses conduct that is not a felony in Washington. As a result, it is not the legal equivalent to a Washington felony. Under comparability analysis, the defendant's Oregon offense could still be counted as a Washington felony if the state had met its burden of proving that the actual conduct underlying the defendant's Oregon conviction would have been a felony in Washington. However, in the case at bar, the state did not produce any evidence at all concerning the facts underlying the defendant's Oregon conviction. As a result, the trial court erred when it included the defendant's Oregon conviction for unauthorized use of a weapon in the defendant's offender score. Thus, instead of the defendant's range on Counts I and II being 9 to 12 months on an offender score of 3 points, it was actually 4 to 12 months on an offender score of 2 points. Consequently, the defendant is entitled to be resentenced upon the correct range.

CONCLUSION

The trial court's ruling admitting evidence of the defendant's alleged methamphetamine use denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. In addition, trial counsel's failure to object when the state repeatedly elicited irrelevant, prejudicial evidence denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, the defendant is entitled to a new trial. In the alternative, the defendant is entitled to be resentenced because the trial court included a foreign conviction in the defendant's offender score that the state did not prove was comparable to a Washington felony.

DATED this 18th day of August, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

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

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

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

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

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

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

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

RCW 9.94A.525(3)

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

**ER 401
DEFINITION OF "RELEVANT EVIDENCE"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**ER 403
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF
PREJUDICE, CONFUSION, OR WASTE OF TIME**

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

ORS 166.220
Unlawful Use of Weapon

(1) A person commits the crime of unlawful use of a weapon if the person:

(a) Attempts to use unlawfully against another, or carries or possesses with intent to use unlawfully against another, any dangerous or deadly weapon as defined in ORS 161.015; or

(b) Intentionally discharges a firearm, blowgun, bow and arrow, crossbow or explosive device within the city limits of any city or within residential areas within urban growth boundaries at or in the direction of any person, building, structure or vehicle within the range of the weapon without having legal authority for such discharge.

(2) This section does not apply to:

(a) Police officers or military personnel in the lawful performance of their official duties;

(b) Persons lawfully defending life or property as provided in ORS 161.219;

(c) Persons discharging firearms, blowguns, bows and arrows, crossbows or explosive devices upon public or private shooting ranges, shooting galleries or other areas designated and built for the purpose of target shooting; or

(d) Persons lawfully engaged in hunting in compliance with rules and regulations adopted by the State Department of Fish and Wildlife.

(3) Unlawful use of a weapon is a Class C felony.

RCW 9.41.230
Aiming or Discharging Firearms, Dangerous Weapons

(1) For conduct not amounting to a violation of chapter 9A.36 RCW, any person who:

(a) Aims any firearm, whether loaded or not, at or towards any human being;

(b) Willfully discharges any firearm, air gun, or other weapon, or throws any deadly missile in a public place, or in any place where any person might be endangered thereby. A public place shall not include any location at which firearms are authorized to be lawfully discharged; or

(c) Except as provided in RCW 9.41.185, sets a so-called trap, spring pistol, rifle, or other dangerous weapon, although no injury results, is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

(2) If an injury results from a violation of subsection (1) of this section, the person violating subsection (1) of this section shall be subject to the applicable provisions of chapters 9A.32 and 9A.36 RCW.

EVIDENCE/PROPERTY

Agency Kelso P.D. Case No. 07-13497
Item No. _____ Offense UNLAWFUL EMP.
Suspect CAYENNE WICKEN R.
Victim WIFE, JESSICA L.
Date and Time of Recovery 12-2-07 / 12:40
Recovered By SGT. LANE
Description and/or Location LEATHERMAN
FOLDABLE KNIFE.

DO NOT CUT HERE TO OPEN - DO NOT CUT HERE TO OPEN

DO NOT CUT HERE TO OPEN - DO NOT CUT HERE TO OPEN

KELSO POLICE DEPARTMENT
Inc# 07-13497 Loc B 29B16



33445

FROM 2 Knife, LEATHERMAN

FROM	TO	QUANTITY	DESCRIPTION

07-1-01525-3
12-22-07
EXHIBIT
S.P.L.A.N.T.F.F.'S

TYPE PRINTED / (V) EVIDENCE TAG#
CRIME ASSAULT 1ST DATE 12-2-07 CASE# 07-13497
DESCRIPTION (MAKE MODEL AND SERIAL #)
YELLOW CAT. 6 CABLE
LOCATION OF RECOVERY 2411 BURCHAM ST. KELSO
OWNER MARY COUCH PHONE _____
ADDRESS 2411 BURCHAM ST. KELSO
INVENTORYING OFFICER DET. BLAIN 12-5-07 1137 HRS.
NAME DATE TIME

KELSO POLICE DEPARTMENT
Inc# 07-13497 Loc B 29816



33511
2 Cable TELEPHONE

#23

PLAINTIFF'S
EXHIBIT
#23 Ex #23
07-1-01525-3 01-30-08

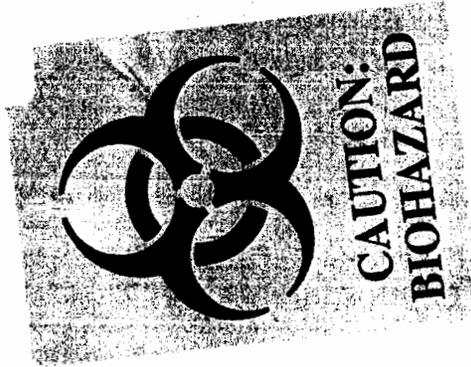
TYPE PP / FD / EV EVIDENCE TAG# _____
CRIME Assault 1° DATE 12-2-07 CASE# 07-13497
DESCRIPTION (MAKE, MODEL AND SERIAL #)
1 PLASTIC BOTTLE CONTAINS USED SYRINGE

LOCATION OF RECOVERY 2411 BUCHANAN ST. (GARAGE CAN) ^{UPSTAIRS}
OWNER ALLEN CLAYTON PHONE _____
ADDRESS 2411 BUCHANAN ST. KELSO
INVENTORYING OFFICER DET. ALAN 12-06-07 1115 HRS.
NAME DATE TIME

KELSO POLICE DEPARTMENT
Inc# 87-13497 Loc B 32B15



33535
2 Parathionella SYRINGE



PLAINTIFF'S
EXHIBIT
10# 24 Ev# 24
07-1-015 25-3
01-30-08

24

TYPE PF / FD (EV) EVIDENCE TAG#
 CRIME ASSAULT 1ST DATE 12-2-07 CASE# 07-13497
 DESCRIPTION (MAKE MODEL AND SERIAL #)
TAN (GRAY) TELEPHONE LINE
 LOCATION OF RECOVERY 2411 BURNHAM ST. KELSO
 OWNER MARY COUCH PHONE _____
 ADDRESS 2411 BURNHAM ST KELSO
 INVENTORYING OFFICER DET. BLAFA 12-5-07 1137 HRS.
NAME DATE TIME

KELSO POLICE DEPARTMENT
 Inc# 07-13497 Loc. B 29B16



33512
 Z Wire, TELEPHONE LINE

25

PLAINTIFF'S
 EXHIBIT
 ID# 256 #25
 07-1-01525-3

FILED
COURT OF APPEALS
DIVISION II
08 AUG 20 AM 10:58
STATE OF WASHINGTON
BY Al
DEPUTY

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

STATE OF WASHINGTON,
Respondent

NO. 07-1-01525-3
COURT OF APPEALS NO:
37345-9-II

vs.

CLAYTON, Allen Ray
Appellant

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
COUNTY OF COWLITZ) ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 18th day of AUGUST, 2008, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR
COWLITZ COUNTY PROSECUTING ATTY
312 S.W. 1ST STREET
KELSO, WA 98626

ALLEN R. CLAYTON DOC #315185
AIRWAY HEIGHTS CORR CTR.
P.O. BOX 2079
AIRWAY HEIGHTS, WA 99001

and that said envelope contained the following:

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

DATED this 18TH day of AUGUST, 2008.

Donna Baker
DONNA BAKER

SUBSCRIBED AND SWORN to before me this 18th day of AUGUST, 2008.



Heather Chittock
NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 11-04-2008

AFFIDAVIT OF MAILING - 1

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
(360) 423-3084