

THE
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 41986-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MATTHEW LAVALSIT,

Appellant.

APPELLANT'S BRIEF

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A. Assignments of Error

Assignments of Error

1. The trial court erred when it denied the defendant's motion in limine No. 2.
2. The trial court erred when it denied the defendant's motion in limine No. 5.
3. The defendant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.
4. The defendant was denied a fair trial in violation of the Fourteenth Amendment based on bias shown by the court during the trial.

Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion when it denied the defendant's motion in limine No. 2 to prohibit the state from presenting evidence of Mr. Lavalsit's alleged resistance to being arrested and taken into custody near the scene of an alleged assault in the third degree where he was not charged with resisting arrest? (Assignment of Error 1.)
- 2.. Whether the trial court abused its discretion when it denied the defendant's motion in limine No. 5 to prohibit the state from presenting evidence that Mr. Lavalsit hit the victim's car or tried to open her door and tried to pull her out of the car when the parties were outside? (Assignment

of Error 2.)

3. Whether Mr. Lavalait was denied effective assistance of counsel where his court appointed attorney did not cross-examine any witnesses with regard to the location of the social worker's vehicle? This was significant because the social worker testified that she observed the altercation between the alleged victim and Mr. Lavalait from her vehicle. It is anticipated that Mr. Lavalait will maintain that this examination was necessary in order to show that the second nurse could not have seen any altercation from the position of her parked vehicle. (Assignment of Error 3.)

4. Whether the defendant was denied a fair trial in violation of the due process clause based on bias shown by the trial court during questioning of witnesses in the presence of the jury? (Assignment of Error 4.)

B. Statement of the Case

Trial Procedure

Matthew Lavalait, age 49, was charged with Assault in the Third Degree. CP 1. He was accused of assaulting nurse R.M. Dusty Vonberg who was performing her nursing duties at the time of the assault on July 26, 2010 in Kitsap County. RCW 9A.36.032(1)(b). The trial court conducted a CrR 3.5 hearing and found Mr. Lavalait's statements to law

enforcement to be made “freely, knowingly and voluntarily” and were admissible at trial. RP 29; CP 83. A jury found Mr. Lavalsit guilty as charged. CP 57. He was sentenced by the Honorable Judge Sally F. Olsen to the high end of his standard range of 3 months in jail. On April 11, 2011 he filed a notice of appeal and an amended notice of appeal. CP 70, 71-82.

Trial Testimony

Brandon J. Robichaux testified that he was a firefighter, EMT employed by North Kitsap Fire and Rescue. RP 31. On July 26, 2010 at about 5:30 p.m. he was dispatched to an “...an unknown medical problem with nurses on scene, and the nurses were who called 911.” RP 32.

He went inside the residence where there were three females. RP 33. He spoke to two hospice nurses and his partner attended to the patient who was sitting on a couch. RP 34. Two other people- who had arrived when he did- were also present. id. “The male wasn’t saying a whole heck of a lot.” id. The female was asking: “Why are you guys here?” id.

Mr. Robichaux advised the female that a nurse had summonsed them. She then screamed: “Why are you here? You can’t be here, and get out of my house. We didn’t call you here. You broke into my house.” RP 35. Mr Robichaux indicated that the comments were directed to the hospice nurse. He testified: “The male and female were pretty nice to me throughout the whole call.” id.

Because of the situation, Mr. Robichaux asked the male and female to step out of the house. “The male, he was willing to step out of the house. So I got him outside, and I was just talking to him, but I couldn’t get the female out of the house.” RP 36.

Mr. Robichaux testified that he stayed with the defendant the entire time outside of the house. RP 37-38. Because of the escalating situation inside the house Mr. Robichaux called for law enforcement. RP 38. He testified: “I needed law enforcement out there because...I decided that I wasn’t going to be able to calm down the lady.” RP 38-39. “Like I said, the defendant, he was pretty—he was pretty level headed the entire time with me. I didn’t really have a problem with him out in the yard.” RP 39.

Robichaux explained that the nurses emerged from the residence. Because of the interference by the female he ordered them to “Get in your vehicles, lock yourself in your car and please don’t leave because I need to talk to you once law enforcement gets here.” RP 40. He testified further “...one of the hospice nurse’s cars was in the driveway, and the other was on Brendt Street...” RP 40.

One nurse walked to her vehicle on Brandt Street. The other nurse was walking to her truck. Apparently, Mr. Lavalsit was described as being in front of the nurse and backpedaling. Robichaux testified:

“He was backpedaling, and he decided to stop, and that is

when contact – he made contact with his right shoulder to her right shoulder, and that is when she screamed that, “He touched me.” RP 41.

The nurse then looked at Mr. Lavalsit and said: “Don’t touch me.” RP 42.

However, Mr. Lavalsit “..took her forearm and pushed it into her.” Then, he “...hit her with the second forearm, it knocked her off kilter. I mean, she didn’t look like she was going to fall to the ground. She definitely diverted her path.” RP 42.

The nurse appeared to be “scared.” RP 43. She then got into her truck while Mr. Lavalsit was standing in the area. She locked her doors. She then started her truck, put it in reverse and began backing out of the driveway. RP 44.

Of the two hospice personnel that testified, Rosemary (Dusty) Vonberg testified that she had been employed by Group Health for the past 10 years. RP 86. She was licensed by the Washington State Department of Health. RP 87. On July 25, 2010 she received a hospice assignment in Hansville. On Sunday morning she called the location and spoke to the daughter of the patient, Debra Upsahl . Vonberg advised the daughter that she was running late. RP 91. She knocked on the door and no one answered so she left. RP 92.

The next day- on Monday- Ms. Vonberg went to the residence. She went through a sliding glass door where she met the social worker, Jan

Kerman, and an elderly patient who was sitting on a couch and who “Looked frail and elderly” and who had been diagnosed with cancer. RP 93. Not knowing what to do in the situation where the patient appeared to need 24-hour care and no one was home, she decided to call 911. RP 96.

911 arrived. Shortly thereafter Debra and the defendant arrived. RP 97. Vonberg was behind the couch where the patient was seated. The social worker was sitting on another couch opposite the patient. Id. Vonberg was advised by Upsahl that she was fired and so she began to leave. RP 98. Upsahl started yelling: “Leave, Leave.” id. She testified that the defendant came at her swearing: “Leave, you fucking bitch.” RP 99. She said, “I am leaving.” id.

Ms. Vonberg testified that as she attempted to leave the residence by way of the sliding glass door the defendant “...hit me and knocked me back off balance, and I said to him – when I saw that he was going to hit me I said, “Don’t touch me, and he still hit me.” RP 100. “And then after I went through the door to get out, and he was still in my way, and I said, “I will leave if you move,” and he hit me again.” id. The witness indicated that she was struck on the arm and shoulder. RP 101.

Matthew Lavalsit’s Testimony

The defendant testified that he had known his friend Debra Upsahl for the past ten years. RP 162. He testified that he had a prosthesis hip,

two bad knees and that he was arthritic. RP 163. After moving some items for a customer of Mr. Lavalsit they returned to Ms. Upsahl's home. Id. Upon arriving he said, "Oh no . There is an ambulance there, Debbie." RP 164. He parked behind an ambulance.

Mr. Lavalsit peeked inside and saw the patient- Shirely- who he referred to as "mom." id. He then gave her "a hug and a kiss on the cheek." RP 165. He testified that he never approached Ms. Vonberg; that he never raised a fist at her direction; that he never made any threats toward her and that he never hit her. RP 166.

Mr. Lavalist testified that he moved out of everybody's way "...because it was just too much excitement for me to deal with, and, plus, it wasn't my place." RP 167. Mr. Lavalsit testified that he did not approach Ms. Vonberg when she was walking outside; or that he ever pushed her while she was walking outside; or that he tried to open her car door. He did admit that he touched the back window of her vehicle. Id.

Eventually he moved his truck and trailer that he used in his landscaping business. He parked in the neighbor's driveway. RP 170. He met the social worker and apologized to her by saying: "Debbie is a little bit upset, so thanks for coming outside." RP 171. The defendant finished his testimony with a description of his encounter with the police officers when he was about one block away from the Upsahl residence. RP 172-5.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION IN LIMINE NO. 2.

Prior to trial the defense filed its motions in limine. CP 32-3. The defense requested that the trial court enter an Order in Limine preventing the state from introducing any evidence or testimony regarding the circumstances of Mr. Lavalsit being taken into custody near the scene of the alleged crime of Assault in the Third Degree.¹ The officers testified that Mr. Lavalsit resisted being taken into custody. However, he was not charged with Resisting Arrest.

The defense argued in part "...the risk of unfair prejudice does outweigh any relevance that this has to the charge of assault, which is what Mr. Lavalsit is being charged with, not with resisting. So when you look at the balancing, I think that that is clearly outweighed." RP 10.

The trial court denied the defendant's motion.²

¹ Defendant's motion in limine states: "2. The court should exclude testimony by both deputies [Deputies Menge and Wheeler] regarding any resisting by Mr. Lavalsit. Mr. Lavalsit is not charged with resisting arrest so this information is not relevant and is a risk of prejudice. ER 402,403."

² 'THE COURT: But I think in context, especially it relates to credibility of all the surrounding circumstances, I think that it;'s probative value and outweighs the potential prejudice. I think the prejudice can be minimized if it is understood that the officers may not indicate that he was charged with resisting arrest. They are certainly going to be describing his

Given the trial court's ruling two police officers-who were not present during the alleged assault-became instrumental witnesses for the state when they testified to the specific details of Mr. Lavalsit's arrest.

Police Officer's Prejudicial Testimony

Deputy Wheeler testified that he responded to a 911 call. RP 77. When he arrived he was being motioned by one of the aid crew to a vehicle down the road. Id. He and Deputy Menge followed a truck and pulled it over. RP 78. The deputy described Mr. Lavalsit emerging from his vehicle: "His fists were clenched and kind of stiff-armed walking back toward us." Mr. Lavalist did not respond to Deputy Menge's commands to go to the back of his vehicle.

Deputy Wheeler continued his testimony:

"Deputy Menger stepped forward and took control of his left hand. As soon as he did that, as I was holstering, Mr. Lavalsit started to pull away, and deputy Menger was giving him commands to stop resisting, and I took ahold of his right hand, and he was trying to pull away from me. We were struggling standing up and ended up breaking the pen that was in his hand, and then we ended up having to place him on the ground.

As we were putting him in handcuffs he was threatening to sue us and calling us names and yelling at us...

RP 79-80.

Q. Did he appear agitated? What was his demeanor like?

conduct." RP 11.

A. He was upset. Other than threatening to sue us, he wasn't threatening any harm to us. He was just yelling. He kept repeating: "I didn't do anything, and I don't know what is going on." Then he started saying, "I am trying to help the situation. I don't know what is going on."

Q. Okay. So you took him to the ground. What happened at that point?

A. As soon as we got him into handcuffs he was, again, threatening to sue us. We stood him up and started walking him back to the car, and he started apologizing for not listening to us, and he should have been listening to us, and was sorry."

RP 80-1.

Deputy Menge then testified as the next witness. He relayed to the jury that as he approached the scene two people were pointing directions.

RP 58. The deputy circled and pulled in behind the defendant's truck and stopped it with lights. He told the jury: "...the defendant immediately got out of his truck, which caused me some concern. Most people don't immediately jump out of their cars when they are pulled over." RP 59. Mr. Lavalsit was given three commands "...to move to the back and turn around." id.

Menge next volunteered his opinion: "He seemed kind of hostile and angry, and you know, he wasn't calm at all. I would say belligerent would be the most accurate word." id. The deputy then described the takedown in detail:

“Q. Okay. And what did that entail control – taking control?”

A. I grabbed one arm, and I believe that it was his right arm. Deputy wheeler put his Taser away and grabbed the other arm, so we had control of both hands, which is the most important thing for us. He was still tense, resisting and trying to twist and pull away at that point.

Q. What did you do? How did you finally get him, you know, detained?

A. “I was able to straighten out hit (sic) arm; overcoming his resistance for me to straighten out his arm. We call that an armbar, and then I pushed him to the ground, as Deputy Wheeler also pushed him to the ground. So he went down on his stomach and was able to secure both arms and place him in handcuffs.

Q. And what action did you take after you had gotten the defendant in handcuffs?

A. I stood him back up and then walked him to my patrol car or Deputy Wheeler’s patrol car. I am not sure which one.” RP 60.

Standard of Review

Review of motions in limine and evidentiary rulings are reviewed for an abuse of discretion. Karl B. Tegland, *5 Washington Practice* 37-8, 99-100, (5th ed. 2007); *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976). An abuse of discretion is discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex Rel. Carroll v. Junker*, 79 Wn.2d 12,26, 482 P.2d 775 (1971).

Arrests-arising out of the same incident- are usually excluded in any subsequent trial. According to Karl B. Tegland:

“Even if a person’s prior misconduct is admissible under Rule 404(b)³, the person’s arrest for such misconduct is normally inadmissible to prove that the misconduct occurred. Evidence of arrest has little probative value and creates unfair prejudice. Mueller & Kirkpatrick, Federal Evidence sec. 109 (2nd ed.). citing federal cases.”

5 Washington Practice 452, n. 2 (5th ed. 2007). ER 404(b) prohibits evidence of past misdeeds solely to prove a defendant’s criminal propensity. *State v. Cook*, 131 Wn.App. 845, 129 P.3d 834 (2006).

State v. Jordan, 39 Wn. App. 530, 694 P.2d 47 (Div. I 1985) was a prosecution for robbery and was cited to the trial court by defense counsel at the time of hearing on its motions in limine. RP 10. In *Jordan* the trial court excluded evidence that witnesses had connected the defendant with two other robberies whose charges were dismissed. The trial court “...ruled that evidence either was not relevant or, even if it were, its admission would disrupt the trial because two additional counts of

³ ER 404(b) states in pertinent part:

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

robbery would in effect have to be tried.” *id.* at 539. This decision was affirmed on appeal.

A similar situation exists in the case at bench. Except the trial court erred when it admitted evidence and testimony of the circumstances surrounding Mr. Lavalisit’s apprehension by two police officers. Both of whom testified in detail to Mr. Lavalisit’s take down and arrest, including repeated testimony of threats of being sued by Mr. Lavalisit.

ER 403 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.”

Neither deputy contributed any testimony on direct examination about the circumstances of the alleged assault or explained any details of the investigation. They were called as witnesses by the prosecution to testify in tandem for the sole purpose of revealing to the jury the conduct of Mr. Lavalisit when they stopped him some distance from the scene on Brandt Street.

According to Tegland:

“Aside from controlling excursions into side issues, perhaps the most common application of this portion of Rule 403 has been to control the admissibility of evidence that is likely to be *overvalued* by the jury. It is essentially on this basis that

arrests, traffic citations...are often excluded in subsequent proceedings arising out of the same incident.”

5 *Washington Practice* 451-4 (Teglend’s italics, footnotes omitted.)

See generally, *State v. Thrift*, 4 Wn.App. 192, 480 P.2d 222 (Div. I 1971). The appellate court held it was error to permit the state’s witness to testify that he had arrested the defendant on the basis of a bench warrant for another alleged crime. The court held: “...it was clearly improper and unnecessary to the prosecution to inform the jury that Thrift was arrested for unrelated offense.” *id.* at 194.

See also, *State v. Morgan*, 146 Wash. 109, 261 P. 777 (1927) (reversible error to admit testimony about prior act of carnal knowledge with 13 year old step-daughter in prosecution in this state for rape of same step-daughter at age 16.

The details of Mr. Lavalsit’s arrest were not relevant to whether he shoved Nurse Vonburg. The circumstance of this take-down and arrest were too remote from the scene of the alleged assault in terms of time and distance and were much more prejudicial than probative of any element that the state had to prove for an assault conviction.

II. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION IN LIMINE NO. 5.

As part of the defendant’s motions in limine, the defense also moved the court pre-trial to exclude any testimony or evidence of Mr.

Lavalsit allegedly trying to open Ms. Vonberg's vehicle's door or striking the victim's vehicle with his hand.⁴

The defense argued in part: "I do think that the risk of unfair prejudice does substantially outweigh any probative value this has as to the assault. Mr. Lavalsit is not charged with malicious mischief or hitting the car or anything like that." RP 12-13.

The trial court denied the defendant's motion in limine No. 5.⁵ Mr. Robichaux testified to the events when nurse Vonberg was driving her truck out of the driveway: "And at that time I watched the defendant go behind her truck and with a closed fist swing at her back canopy window of her truck hitting it." RP 44.

Vonberg testified she got into her vehicle and shut her door. The defendant opened her door and was call her the "F-ing "B" word and he put his hands on the top of my car door and went to keep it open." id. She braced herself and closed and locked the door. RP 102 She testified that when she started her vehicle and attempted to leave the residence: "He

⁴ Defendant's motion in limine No. 5 stated: "The court should exclude any testimony regarding Mr. Lavalsit hitting Ms. Vonberg's car, or opening her door and trying to pull her out of the car. ER 402,403. CP 33.

⁵ "THE COURT: ...I am going to deny No. 5 similar to No. 3. I think that it is part of the incident describing his conduct, and I believe its's probative. So No. 5 is denied." RP 13.

took his hand, and he hit the back of my truck—my car/truck or whatever.”

RP 102-3.

Social Worker Kerman testified that Mr. Lavalsit hit the back window of nurse Vonberg’s vehicle described as “a truck with a back window.” RP 130.

Mr. Lavalist testified in part:

“And she proceeded to back up. She was probably right at the edge of the driveway right here, and I walked past her truck real quick, and she started to back up, and I just smacked the back of her window with my hand like this and yelled: “Stop. I am moving my truck.” You know, I was getting excited because she was backing over me.” RP 170.

Standard of Review

Review of motions in limine and evidentiary rulings are reviewed for an abuse of discretion. Karl B. Tegland, 5 *Washington Practice* 37-8, 99-100, (5th ed. 2007); *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976). An abuse of discretion is discretion manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex Rel. Carroll v. Junker*, 79 Wn.2d 12,26, 482 P.2d 775 (1971).

According to *State v. Nelson*, 131 Wn.App. 108, 115, 125 P.3d 1008 (Div. III 2006):

“The trial court must find that the evidence is logically

relevant to an issue that is before the jury and necessary to prove an essential element of the crime charged before admitting prior bad acts evidence in a criminal prosecution. *State v. Barragan*, 102 Wn.App. 754,758, 9 P.3d 942 (2000); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The court then balances the probative value of the evidence against its potential for prejudice. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 847, 889 P.2d 487 (1995).”

ER 402 states:

“All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

Although relevant, evidence may be excluded pursuant to ER 403.

The trial court did little or no balancing of probative value against prejudicial effect on the record with regard to this proposed testimony.

See generally, *United States v. Long*, 574 F.2d 761 (3rd Cir. 1978) (When an objection does invoke Rule 403, the trial judge should record his balancing analysis on the record. This will allow the exercise of discretion to be fairly reviewed on appeal.)

The trial court erred because it did not consider unfair prejudice to Mr. Lavalsit but only considered the evidence’s probative value. RP 13.

III. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL REGARDING EXAMINATION OF WITNESSES.

Mr. Lavalsit was denied effective assistance of counsel when his

court appointed attorney did not cross-examine any witnesses with regard to the location of the social worker Jan Kerman or her vehicle at the time of the alleged assault. This was very important because Kerman testified that she observed the altercation between the alleged victim and Mr. Lavalsit from near her vehicle. ⁶

Robichaux testified to the location of Kerman's vehicle when he went to talk to her. "I actually, at one point, ran down to the other hospice nurse's car and just made sure she was okay and making sure she wasn't leaving." RP 46. "I was down checking on the nurse that was locked in this car, and he tried to come down – followed me down to talk to the nurses. I didn't want him to, so I said, "Hey, back up and go back to the front yard." RP 46-7.

Nurse Vonberg indicated on an illustration where she parked after she drove out of the residence and where social worker Jan Kerman was parked. RP 103. Yet, no questions were asked of her as to the location of Kerman or her vehicle.

Jan Kerman, who was a medical social worker for Group Health

⁶ Jan Kerman testified in part: "When she – and I was walking on the grass here, so I was about here, I think, when I saw him open Dusty's car door and lunge into the car. I couldn't even see if she was hurt or what he was doing, but I do know that I saw her push over like this." RP 128.

with a master's degree in social work . She testified and diagramed the location of her vehicle, nurse Vonberg's vehicle as well as the location of the medic's vehicle and Mr. Lavalsit's truck and trailer.⁷ RP 112-13, 126.

Standard of Review

According to *In re Riley*, 122 Wn.2d 772, 863 P.2d 554 (1993):

"The sixth amendment to the United States Constitution guarantees a criminal defendant the right "to have assistance of counsel for his defense." U.S. Const. amend. 6. The right to counsel means the right to the effective assistance of counsel."

id. at 779-80, (citing *Strickland v. Washington*, 466 U.S. 668,686, 80

L.Ed.2d 674, 104 S.Ct. 2052 (1984)(citing *McMann v. Richardson*, 397

U.S. 759, 771 n. 14, 25 L.Ed. 763, 90 S.Ct. 1441 (1970).

The *Strickland* test is set forth in *State v. Thomas*, 109 Wn.2d 222,225-26, 743 P.2d 816 (1987):

"First, the defendant must show that counsel's performance was deficient. That requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense...See also, *State v. Jeffries*, 105 Wn.2d 398,418, 717 P.2d 722, *cert. denied*, 93 L.Ed.2d 301 (1986); *State v. Sardinia*, 42 Wn.App. 533, 713 P.2d 122 (1986)."

⁷ "Q. Okay. Can you just put an "J" where your car was and a "D" where Dusty's car was? A. (witness complies). Q. Okay. And then the bigger one – A. The medic was here, and the defendant was here." RP 126. No exhibits were admitted during the trial. RP 214.

(citing *Strickland v. Washington*, 466 U.S. at 687).

According to *State v. Benn*, 120 Wn.2d 631,663, 845 P.2d 289

(1993):

"A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct. *Strickland v. Washington*, 466 U.S. 668,687-88, 694, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)."

(citing *Strickland v. Washington*, 466 U.S. at 687).

Both prongs of the *Strickland* test have been described as:

"Under one prong-the performance prong-the defendant must show that counsel's performance was deficient. Under the other prong-the prejudice prong-the defendant must show that the deficient performance prejudiced the defense."

In re Riley, 122 Wn.2d at 780, citing *Strickland*, 466 S.Ct. at 687. The Supreme court adopted this test in *State v. Jeffries*, 105 Wn.2d at 418.

According to *Thomas*,

"To meet the requirement of the second prong defendant has the burden to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*

109 Wn.2d at 226 (citing *Strickland*, at 694) ((court's italics.) However,

"If defense counsel's trial conduct can be characterized

as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Adams*, 91 Wn.2d 86,90, 586 P.2d 1168 (1978)."

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 113 S.Ct. 164 (1992).

Mr. Lavalsist's attorney did not cross examine the main witness for the state as to the alleged assault- Mr. Robichaux- about the location of the two nurses once they were outside the residence and in their respective vehicles.⁸ This was significant because Mr. Lavalsit testified that Ms. Kerman's vehicle was never in the driveway. He indicated on an illustrative diagram where it was located.⁹ RP 169.

There was no evidence of physical assault in this case. No marks or bruises were located on the alleged victim. RP 64, 85. Consequently, the outcome of the case depends on the witnesses' testimony regarding any alleged assault. Therefore, examination of the location of Jan Kerman, as one of the witnesses' to the alleged assault, was important to the outcome of the case. Otherwise, there is a reasonable probability that the outcome

⁸ Mr. Robichaux was only asked on cross-examination: "Q...you stated that you saw both hospice nurses get into their cars; is that right? A. Yes." RP 54.

⁹ "The red car [Upsahl] was here, and the green van was here, and the Vonberg truck was here, and the other nurse's vehicle, like I said was always over here. It was never in the driveway." RP 169.

of the case could have been different but for counsel's error.

IV. THE DEFENDANT WAS DENIED A FAIR TRIAL BASED ON BIAS SHOWN BY THE TRIAL COURT IN THE PRESENCE OF THE JURY.

According to RAP 2.5(a) entitled "Error Raised for First Time on Review" states in part:

"The appellate court may refuse to review any claim or error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ...(3) manifest error affecting a constitutional right." (See appendix.)

The court stated in *State v. Curtis*, 110 Wn.App. 6, 11, 37 P.3d 1274 (2002):

"This is a claim of manifest constitutional error, which can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1215 (1995); *State v. Neidigh*, 78 Wn.App. 71,78, 895 P.2d 423 (1995). Review is de novo. *State v. Byers*, 88 Wn.2d 1, 11, 559 P.2d 1334 (1977), *overruled on other grounds by State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984)."

It was apparent from reading the transcripts that the trial court conveyed its annoyance and bias toward the defense in the presence of the jury. Notable was the trial court's admonishment of the defense witness Debra Ann Upsahl- a friend of Mr. Kavalsit and the daughter of the patient in the house- not to volunteer any additional information other than what was being asked by the examiner.

Before there had been any objections by the State, the court acted

sua sponte and interrupted her testimony with the following admonition during direct examination of defense witness Upsahl:

“Q. Okay. Your mother was sitting on the couch?

A. Yes, and –

Q. Was – where was she?

THE COURT: Ma’am, you can’t volunteer information. You just have to wait for the question then answer it.”

THE WITNESS: Okay. Thank you.” RP 143.

Then, during cross-examination of Ms. Upsahl by the prosecutor the following occurred as the witness began to answer a supposed question:

“Q. Okay. Didn’t you tell her that she was fired?

A. No, I did not.

Q. Okay. But you were screaming --

A. I was --

Q. --“Get out of my house”?

THE COURT: Ma’am. There are rules in here. Okay? This woman in front of me is typing down, so please don’t interrupt her question and wait until she is done and then answer.

THE WITNESS: Okay. All right. Sorry.

THE COURT: Go ahead.”

Q. And then you were screaming, “Get out of my house,” right?” RP 152.

Repeatedly the trial court admonished this defense witness in the presence of the jury even though the prosecutor was asking multiple questions:

“Q. How did you know that that is what happened? How did you

A. Because –

Q. --know that they’d let –

THE COURT: Ma’am, I have to remind you again. Wait

until she is done with her question.¹⁰

THE WITNESS: All right. Sorry.”

Q. How did you know that they were even the first to arrive?”
RP 153.

Then during cross-examination of Mr. Lavalsit the following occurred when he was questioned by the prosecutor:

“Q. After you didn’t listen to their commands?

A. He had --

THE COURT: Wait.

THE DEFENDANT: I’m sorry. You are right.¹¹ I know better.

Q. After you didn’t listen to their commands, correct?” RP 180.

At this point the trial court is clearly interjecting itself into the trial. Not only did the prosecutor ask a complete question that Mr. Lavalsit was attempting to answer, but the question that was repeated after the court’s interruption was the same question that was asked initially before the court’s interruption and abrupt command to “Wait.”

According to the reasoning in *State v. Ryna Ra*, 144 Wn. App. 688, 795, 175 P.3d 609, *review denied*, 164 Wn.2d 1016 (2008) this was

¹⁰ Review of the transcription of the prosecutor’s questioning shows that the witness was asked a question. This was followed -by an objectionable- second question before the witness had time to answer the first question.

¹¹ Arguably, the court was not right. The court was wrong because the prosecutor did not change the initial question that was first asked Mr. Lavalsit from the question that was repeated after the trial court’s interjection all in the presence of the jury.

inappropriate. “A trial court should not enter into the “fray of combat” or assume the role of counsel. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 141, 606 P.2d 1214 (1980).” According to *Egede-Nissen*: “...the cumulative effect of repeated interjections by the court may constitute reversible error.” *id.* at 141.

At one point Mr. Lavalsit was testifying on direct examination as to what occurred after he moved his truck to the neighbor’s driveway and when he approached the social worker to thank her, when the following occurred. The court again acted *sua sponte* without any objection by the prosecutor and bluntly scolded Mr. Lavalsit in the presence of the jury:

A....And I walked past – she was standing outside of her car door and then I just reached out my hand and she reached out her hand just to thank her for coming outside. And all that I said was, “Debbie apparently is a little bit upset, so thanks for coming outside.”

And then she --

THE COURT. Stop. Sir, why don’t you have a seat. This is getting too narrative.

THE DEFENDANT: I’m sorry.”

RP 171 (see appendix for copy of transcript of this portion of the testimony and preceding questions and answers). These multiple interruptions by the trial court- by entering into the “fray of combat”- resulted in Mr. Lavalsit repeatedly apologizing in the presence of the jury for his testimony.

According to *Ryna Ra*:

“Due process, the appearance of fairness, and canon 3(D)(1) of the Code of Judicial Conduct¹² require disqualification of a judge who is biased against a party or whose impartiality may be reasonably questioned. *State v. Perala*, 132 Wn. App. 98, 110-11, 130 P.3d 852, *review denied*, 158 Wn.2d 1018 (2006). A judicial proceeding is valid only if it has the appearance of impartiality, such that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn.App. 720,722, 893 P.2d 674 (1995) (quoting *State v. Ladenburg*, 67 Wn.App. 749,754-55, 840 P.2d 228 (1992).”

Due Process Of Law

Due process is denied when the tribunal is not impartial. It was stated in *In re Murchison*, 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623 (1955):

“ A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness... But to perform its high function in the best way ‘justice must satisfy the appearance of justice.’¹³ *Offutt v. United*

¹² According to *State v. Gamble*, 168 Wn.2d 161, 188, 225 P.3d 973 (2010) “Under the Code of Judicial Conduct, designed to provide guidance for judges, “[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.” CJC Canon 3(D)(1), *quoted in Chamberlin*, 161 Wn.2d at 37; *see also State v. Dominguez* 81 Wn.App. 325, 328, 914 P.2d 141 (1996).” (citing *State v. Chamberlin*, 161 Wn.2d 30, 162 P.3d 389 (2007)).

¹³The full statement was: “Therefore, justice must satisfy the appearance of justice.”

States, 348 U.S. 11, 14.”“

(citing *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11,13 (1954).

See also, *State ex rel. Barnard v. Board of Education of Seattle*, 19 Wash. 8, 19, 52 Pac. 317 (1898) (the principle is “...that the citizen is entitled to a judge who is absolutely impartial.”)

“...The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based on this principle... for as was well said by Judge Bronson in *People v. Suffolk Common Pleas*, 18 Wen. 550:

“Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge.”¹⁴

This principle has developed over the course of more than a century into the modern rule that states:

The Supreme Court held that the same judge who presided as the Michigan “judge-grand jury” where the witness testified and then presided at a contempt hearing where the same witness could be adjudged in contempt for conduct before the “one-man grand jury” violated due process of law.

¹⁴ The state Supreme Court also stated with regard to precedent:

“A review of the cases cited by appellant is made by the respondents for the purpose of showing that the facts decided in them are not similar to the facts in the case at bar, and, while it is true that in some of the cases financial interest was claimed, yet, as a rule, the decisions are not based upon that ground, but upon the broad ground that a citizen is entitled to a judge who is absolutely impartial.” *id.* at 19.

“The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice.” *State v. Madry*, 8 Wn.App. 61, 70, 504 P.2d 1156 (1972); *Brister v. Tacoma City Council*, 27, Wn.App. 474, 486, 619 P.2d 982 (1980). “The critical concern in determining whether a proceeding appears to be fair is how it would appear to a reasonably prudent and disinterested person.” *Brister*, 27 Wn.App. At 486-87 (citing *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Human Rights Comm’n*, 87 Wn.2d 802, 557 P.2d 307 (1976). To prevail under the appearance of fairness doctrine, the claimant must provide some evidence of the judge’s or decision-maker’s actual or potential bias. *State v. Post*, 118 Wn.2d 596, 619 n.9, 826 P.2d 172, 837 P.2d 599 (1992).”

State v. Dugan, 96 Wn.App. 346, 354, 979 P.2d 885 (Div. II 1999).

According to *Madry*, 8 Wn.App. At 70: “The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.”

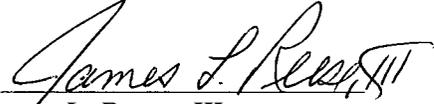
As shown by the conduct of the trial court with regard to the defense witnesses this proceeding would not appear to be fair to a reasonably prudent and disinterested person. *State v. Perala*, 132 Wn.App. at 113 (citing and quoting *State v. Dugan*, 96 Wn.App. at 354.)

D. Conclusion

This court should reverse Mr. Lavalsit’s conviction of assault in the third degree or reverse his conviction and remand to the Superior Court for a new trial.

Dated this 13th day of November 2011.

Respectfully Submitted,

A handwritten signature in cursive script that reads "James L. Reese, III". The signature is written in black ink and is positioned above a horizontal line.

James L. Reese, III

WSBA #7806

Court Appointed Attorney

For Appellant

1 probably early 90's; something -- late 80's, early 90's.
2 It had -- I can't remember the color of the canopy shell,
3 but it had a full canopy shell on the back, which is
4 incased. On the back of the canopy shells you have the
5 closed glass window, and it opens up like a hatch. That is
6 just the description of the vehicle. Yes, ma'am.

7 Q. Okay. Did you ever touch any part of her vehicle?

8 A. Yes, ma'am.

9 Q. Okay. And what part of her vehicle?

10 A. The back window --

11 Q. Okay.

12 A. -- of the canopy.

13 Q. why did you do that?

14 A. I was still up on the deck, and the two nurses had
15 left the deck and the premises -- the house, and was -- can
16 I show you up here?

17 Q. Sure.

18 THE DEFENDANT: Do you want to see, too, Your
19 Honor?

20 THE COURT: I am fine. Go ahead. The jury
21 needs to see. Sir, why don't you stand the other way.

22 THE DEFENDANT: Stand this way. I'm sorry.

23 THE COURT: That is all right.

24 A. The Vonberg car was in the driveway. The other
25 nurse's car, like they had mentioned before, was always

1 parked here. It was never in the driveway, and Debbie's
2 red car -- in fact, it was my old car. It was -- my
3 girlfriend sold it to Debbie, and I think the three of them
4 -- she got a steal on it, and the green van.

5 The red car was here, and the green van was here,
6 and the vonberg truck was here, and the other nurse's
7 vehicle, like I said, was always over here. It was never
8 in the driveway.

9 So I was behind the truck. Actually I was at the
10 glass door, and I didn't realize they were actually
11 leaving. I didn't even know they had gotten that far.
12 vonberg was already in her truck. It appeared to be her
13 window. I didn't look. I just noticed that she is
14 starting up her truck, and I can hear it starting up from
15 up here.

16 So I said, "Shoot. She is backing up." So I came
17 down here because my truck was right here. This is my
18 truck, and I had a trailer. It's a long bed work truck,
19 extra cab, the whole bit with the long trailer on it, and
20 that is what I do is landscaping.

21 And she proceeded to back up. She was probably
22 right at the edge of the driveway right here, and I walked
23 past her truck real quick, and she started to back up, and
24 I just smacked the back of her window with my hand like
25 this and yelled: "Stop. I am moving my truck." You know,

1 I was getting excited because she was backing over me.

2 So I went ahead -- and after she did stop, I went
3 ahead and got into my truck and then pulled around. It's
4 not on here. The neighbor's house -- because I am friends
5 with them also, and I pulled around and parked in their
6 driveway.

7 Q. Okay. Thank you. You can have a seat.

8 A. That is all that happened.

9 Q. So after you parked in the neighbor's driveway, then
10 what did you do?

11 A. I just put it in park calmly and looked up to see if
12 the neighbors are looking out their window, and at that
13 time they weren't -- because it was right there, the big
14 bay windows and everything -- and got out of my truck. I
15 was going to just walk back because it was time for me to
16 go. It was too much excitement for me in all of this, and
17 it looked like it was under control. So I walked by --
18 because she was parked -- this is not here. So the
19 neighbor's house is directly -- they are only like 10, 12
20 feet apart from each other -- that close to each other --
21 and the house and the driveway.

22 And the other nurse that was here today, she was
23 parked right here just like I showed on the other. So I
24 came around and came around the EMT and parked in the
25 neighbor's driveway --

1 Q. Okay.

2 A. -- like so.

3 Q. And then you stated --

4 A. Then I got out of my truck, and there was -- this is
5 just a gravel parking area, like eight feet wide, and it is
6 all in front of their house where people -- if she has a
7 guest they can park or park in front of their house, and so
8 forth, because this is all lawn in here. There is no lawn
9 here. It is a small gravel lot. There is no boulders or
10 anything here.

11 And I walked past -- she was standing outside of her
12 car door, and then I just reached out my hand and she
13 reached out her hand just to thank her for coming outside.
14 And all that I said was, "Debbie apparently is a little bit
15 upset, so thanks for coming outside."

16 And then she --

17 THE COURT: Stop. Sir, why don't you have a
18 seat. This is getting too narrative.

19 THE DEFENDANT: I'm sorry.

20 Q. Why don't you have a seat. Thank you.

21 So do you remember the police eventually pulling you
22 over?

23 A. Yes. Oh, yeah.

24 Q. Okay. And what did you do when you first saw that
25 the police were behind you?

TITLE IV. RELEVANCY AND ITS LIMITS

RULE 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.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

RULE 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.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

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

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

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

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

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

[Amended effective September 1, 1992.]

RULE 405. METHODS OF PROVING CHARACTER

(a) **Reputation.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(b) **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

[Amended effective September 1, 1992.]

RULE 406. HABIT; ROUTINE PRACTICE

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

RULE 407. SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Amended effective September 1, 2008.

a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

(c) **Effect of Denial of Discretionary Review.** Except with regard to a decision of a superior court entered in a proceeding to review a decision of a court of limited jurisdiction, the denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision.

(d) **Considerations Governing Acceptance of Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction.** Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

(e) **Acceptance of Review.** Upon accepting discretionary review, the appellate court may specify the issue or issues as to which review is granted.

[Amended effective January 1, 1981; September 1, 1985; September 1, 1998; December 24, 2002.]

RULE 2.4. SCOPE OF REVIEW OF A TRIAL COURT DECISION

(a) **Generally.** The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

(b) **Order or Ruling Not Designated in Notice.** The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate

court accepts review. A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

(c) **Final Judgment Not Designated in Notice.** Except as provided in rule 2.4(b), the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely posttrial motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

(d) **Order Deciding Alternative Post-trial Motions in Civil Case.** An appeal from the judgment granted on a motion for judgment notwithstanding the verdict brings up for review the ruling of the trial court on a motion for new trial. If the appellate court reverses the judgment notwithstanding the verdict, the appellate court will review the ruling on the motion for a new trial.

(e) **Order Deciding Alternative Post-trial Motions in Criminal Case.** An appeal from an order granting a motion in arrest of judgment brings up for review the ruling of the trial court on a motion for new trial. If the appellate court reverses the order granting the motion in arrest of judgment, the appellate court will review the ruling on a motion for new trial.

(f) **Decisions on Certain Motions Not Designated in Notice.** An appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

(g) **Award of Attorney Fees.** An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits.

[Amended effective September 1, 1994; September 1, 1998; December 24, 2002; September 1, 2010.]

References

Rule 5.2, Time Allowed To File Notice, (f) Subsequent notice by other parties.

RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) **Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at

any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) *Generally.* A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) *Security.* If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A

party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) *Conflict With Statutes.* In the event of any conflict between this section and a statute, the statute governs.

(c) *Law of the Case Doctrine Restricted.* The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

[Amended effective September 1, 1985; September 1, 1994.]

TITLE 3. PARTIES

RULE 3.1 WHO MAY SEEK REVIEW

Only an aggrieved party may seek review by the appellate court.

RULE 3.2 SUBSTITUTION OF PARTIES

(a) *Substitution Generally.* The appellate court will substitute parties to a review when it appears that a party is deceased or legally incompetent or that the interest of a party in the subject matter of the review has been transferred.

(b) *Duty to Move for Substitution.* A party with knowledge of the death or declared legal disability of a party to review, or knowledge of the transfer of a party's interest in the subject matter of the review, shall promptly move for substitution of parties. The motion and all other documents must be served on all parties and on the personal representative or successor in interest of a party, within the time and in the manner provided for service on a party. If a party fails to promptly move for substitution, the personal representative of a deceased or legally disabled party, or the successor in interest of a party, should promptly move for substitution of parties.

(c) *Where to Make Motion.* The motion to substitute parties must be made in the appellate court if the motion is made after the notice of appeal was filed or discretionary review was granted. In other cases, the motion should be made in the trial court.

(d) *Procedure Pending Substitution.* A party, a successor in interest of a party, a personal representative of a deceased or legally disabled party, or an attorney of record for a deceased or legally disabled party who has no personal representative, may without waiting for substitution file (1) a notice of appeal, (2) a notice for discretionary review, (3) a motion for reconsideration, (4) a petition for review, and (5) a motion for discretionary review of a decision of a trial court or the Court of Appeals.

(e) *Time Limits.* The time reasonably necessary to accomplish substitution of parties is excluded from computations of time made to determine whether the following have been timely filed: (1) a notice of appeal, (2) a notice for discretionary review, (3) a motion for reconsideration, (4) a petition for review, and (5) a motion for discretionary review of a decision of a trial court or the Court of Appeals.

(f) *Public Officer.* If a public officer is a party to a proceeding in the appellate court and during its pendency dies, resigns, or otherwise ceases to hold office, a party or the new public officer may move for substitution of the successor as provided in this rule.

[Amended effective September 1, 1998.]

RULE 3.3 CONSOLIDATION OF CASES

(a) *Cases Tried Together.* If two or more cases have been tried together or consolidated for trial, the cases

AMENDMENT (XIV)

Ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States 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 laws.

COURT OF APPEALS
DIVISION II

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PROOF OF SERVICE

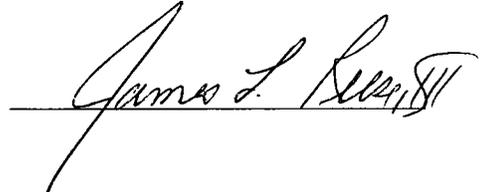
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STATE OF WASHINGTON)
COUNTY OF KITSAP)

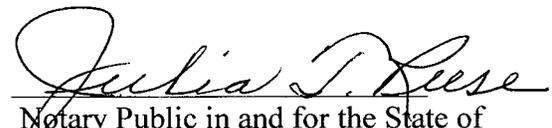
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 14th day of November, 2011, he deposited in the mails of the United States of America, postage prepaid, the original and one (1) copy of Appellant's Brief in State of Washington v. Matthew Lavalsit, Court of Appeals No. 41986-6-II for filing to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant at his last known address; Matthew Lavalsit, 35060 Little Boston Rd. NE, Kingston, WA 98346.



Signed and Attested to before me this 14th day of November, 2011 by James L. Reese, III.


Notary Public in and for the State of Washington residing at Port Orchard.
My Appointment Expires: 04/04/13