

**NO. 43645-7-II**

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

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CHAD ERNEST CHRISTENSEN,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

Trial counsel's failure to object when the State repeatedly called upon the complaining witness to comment on her own veracity and when the state elicited evidence of the defendant's arrest and incarceration denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

### ***Issues Pertaining to Assignment of Error***

In a case charging a single case of first degree rape of a child in which there is no supporting physical evidence, no eye witnesses testimony and no confession, and in which the only incriminating evidence comes from the claims of the alleged victim, does a trial counsel's failure to object when the state repeatedly calls upon the complaining witness to comment on her own veracity and when the state elicits irrelevant evidence of the defendant's arrest and incarceration deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the jury more likely than not have returned a verdict of acquittal had counsel objected to this irrelevant, prejudicial evidence?

## STATEMENT OF THE CASE

### *Factual History*

The defendant Chad Ernest Christensen and Elan Christensen have known each other for the majority of their lives. RP 289-292.<sup>1</sup> Both have children from prior marriages: the defendant has one young daughter and Elan has four children, including daughters IB (born 9/12/02) and AB, who is two years older than IB. RP 173-175, 265-270, 289-292. During the late summer and fall of 2010, the defendant and Elan began a romantic relationship. RP 293-296. At the time the defendant was living in a small two bedroom apartment in Chehalis and Elan was living with her children in Vancouver. *Id.* By mid-November of 2010, Elen and her children moved in with the defendant and on November 11, 2010, they got married. *Id.* After getting married they moved into a trailer in Onalaska in rural Lewis County. RP 291, 358.

On one occasion in September of 2010 or October of 2010, Elan and her children stayed with the defendant over the weekend. RP 300. She had her two daughters IB and AB with her, and the defendant had his young daughter also. *Id.* According to IB, at one point late on one of the evenings she was sitting on the couch while her mother and older sister were in bed in

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<sup>1</sup>The record on appeal includes five volumes of continuously numbered verbatim reports, referred to herein as “RP [page #].”

a bedroom. RP 180-181. The defendant came out, sat near her on the couch, took her hand by the wrist, and placed it in his pants so her hand touched his penis. *Id.* She then took her hand out and eventually went to sleep. *Id.* IB later stated that the defendant took all of these actions without saying anything. *Id.*

IB went on to state that the next morning she went into the bathroom to wash her hands because she could still feel “it.” RP 181. As she did so, her sister AB asked what she was doing. RP 265-270. According to both of the sisters, IB then told AB what had happened. RP 180-181, 265-290. AB then took IB into their mother and IB told her mother that the defendant had taken her hand and placed it in his pants and on his penis. *Id.* By this time, the defendant had left the apartment. RP 302. Elan later confronted the defendant with IB’s claims either that day or a few days later. RP 302-303. According to Elan, the defendant denied the allegations and she believed his denial. *Id.*

A number of months after getting married and moving to Onalaska, the defendant and Elan got into a big argument in front of the children on an unrelated matter. RP 311-314. The defendant ended the argument by taking off his wedding ring, throwing it to the floor, and leaving the home. *Id.* He returned a number of hours later and spoke with the two girls alone after speaking with Elan. *Id.* According to IB, he blamed her for the breakup. RP

181-184. The defendant and Elan then separated and eventually filed for divorce. RP 297-298, 312-214. Once they separated, Elan contacted the police to report IB's claim of sexual abuse. RP 315.

After Elan made the report, two investigators from CPS interviewed IB. RP 220-223, 253-255. The first interview was short and took place at IB's school. RP RP 255. The second interview was longer and was audiotaped while a police officer watched through a one-way mirror. RP 253-228. IB repeated her claims to the second investigator as well as to a mental health counsel she consulted. RP 223-228, 231-241. This police officer later interviewed the defendant and eventually arrested him. RP 350-355.

### ***Procedural History***

By information filed on December 8, 2011, the Lewis County Prosecutor charged the defendant Chad Ernest Christensen with once count of first degree child molestation. CP 1-3, 34-35. The state later amended information to add an allegation that the defendant had committed the offense from a position of trust and authority. CP 34-35. Prior to trial, the court called the case for a hearing under RCW 9A.44.120 and CrR 3.5 during which the state called 10 witnesses, including IB, her sister AB, her mother Elan Bradley, a licensed mental health counsel by the name of Sandra Ames, and Keith Sand and Roni Jensen. RP 4-133. The last two witnesses named

were the CPS investigators who interviewed IB. RP 40, 45. Following this hearing and argument by counsel, the court found that all of the defendant's statements to the police were admissible, that IB was competent and that her statements to her sister, mother, two CPS investigators and a mental health counselor were all substantively admissible into evidence provided she testify at the trial. RP 142-147. The court later entered the following findings of fact and conclusions of law on these issues:

### **I. FINDINGS OF FACT**

- 1.1 I.B, a female, has a date of birth of 9/12/2002. AB, a female, has a date of birth of 8/24/2000. Elan Bradley is the mother of IB and AB
- 1.2 IB is competent to testify as a witness at trial.
- 1.3 Elan Bradley and the Defendant began a dating relationship sometime in the middle of 2010. In the fall of 2010, Elan Bradley and her children moved into the Defendant's apartment located at 484 NE Washington Ave., Apartment B2, Chehalis, WA.
- 1.4 On December 11, 2010, Elan Bradley and the Defendant got married.
- 1.5 The collective testimony from IB, and AB, and Elan Bradley at the Child Hearsay hearing established that on an evening between the time Elan Bradley and her children moved into the apartment in Chehalis with the Defendant and approximately two weeks before the date of the marriage, IB and the Defendant were lying on the couch in the living room watching television. IB was pretending to sleep. The Defendant took IB's hand and placed it on his bare penis. Both IB and the Defendant fell asleep afterwards. In the morning, the Defendant awoke before IB and left the apartment. IB woke up and washed her hands.

AB observed IB washing her hands. IB told AB that she was washing her hands because the Defendant made IB touch his penis. AB and IB went to Elan Bradley and told her about the incident that occurred the previous night. When the Defendant returned to the apartment that morning, Elan told the Defendant about the disclosure from IB

- 1.6 Around the time of the marriage, Elan Bradley, her children, and the Defendant moved into a residence in Onalaska, WA.
- 1.7 Around September 2011, Elan Bradley and the Defendant ended their relationship and the Defendant began staying at a different residence. Within several days, the Defendant came to the previously-shared residence in Onalaska for a brief time.
- 1.8 At the Child Hearsay hearing, IB testified that during this visit, the Defendant told IB that it was her fault that the Defendant could not live at home anymore. Right after this conversation, IB told Elan Bradley about what the Defendant said. At the Child Hearsay hearing, Elan Bradley testified that during this same visit, IB came up to Elan Bradley and said that Chad had just blamed IB for the fact he could not live at home.
- 1.9 Approximately two weeks later, Elan Bradley reported IB's initial disclosure to CPS.
- 1.10 On or about October 12, 2011, CPS social worker Keith Sand contacted IB at her elementary school in order to conduct an interview as part of a CPS investigation. During the interview, Mr. Sand asked IB if she felt safe at home. IB responded that she feels safe now but did not feel safe around Chad. Mr. Sand asked why and IB said because she does not feel safe around tall people. Mr. Sand asked if something happened between IB and Chad. IB said something did happen, but she did not want to talk about it with Mr. Sand. When asked if she would feel more comfortable talking to a female about it, IB said she would. When asked if she had told anyone else about what happened, IB said she told her sister, AB, and her mother.
- 1.11 On October 18, 2011, CPS social worker Roni Jensen interviewed IB at the CPS office in Centralia, WA. During a

taped interview, IB said that she was not comfortable around the Defendant. IB wrote down on a piece of paper that “we went to his apartment and it was night time and [AB] was in bed with mom and he went in bed with me and I was pretending to fall asleep and he grabbed my hand and took out his wiener, and made my hand touch it and put it down his pants.” IB went on to explain verbally that this touching occurred on the living room couch when IB was eight years old. IB said this occurred at the Defendant’s apartment, which was 2B, in Chehalis. IB demonstrated for Roni Jensen the way that the Defendant grabbed IB wrist. IB said she fell asleep on the couch afterwards. IB said that, in the morning, IB got up and washed her hands with soap and also told AB about what had happened. AB went to Elan Bradley with IB and told Elan what occurred. IB then confirmed this information to Elan Bradley. IB mentioned that all of these events occurred prior to the marriage of Elan Bradley and the Defendant.

- 1.12 Sometime during the week prior to November 21, 2012, Detective Silva called the Defendant on the telephone and made arrangements for the Defendant to come to the Chehalis Police Department for an interview on November 21, 2012. On November 21, 2012, the Defendant met Detective Silva at the Chehalis Police Department for a video-recorded interview. Prior to starting the interview, Detective Silva informed the Defendant that he was not under arrest. Also, Detective Silva told the Defendant two times that he is free to leave at any time. During the interview, Detective Silva questioned the Defendant about the allegations.
- 1.13 During the interview with Detective Silva, the Defendant said that he used to live in an apartment, number B2, in Chehalis. Elan Bradley and her children moved from Vancouver, WA, into the Defendant’s apartment. One night, the Defendant slept on the couch in the living room. IB was on the couch with her head laying on a pillow next to the Defendant with her feet up on the footrest. Both of them slept on the couch that night. The Defendant awoke in the morning and he left the apartment to go to the store. IB was still on the couch at that time. When he returned later, Elan Bradley told the Defendant about the allegations made by IB

- 1.14 IB attended counseling sessions with Sandra Ames, a licensed mental health counselor, on the following dates: November 14, 2011, December 1, 2011, December 15, 2011, January 12, 2012, January 26, 2012, February 23, 2012, March 8, 2012, March 22, 2012, and April 19, 2012. The purpose of these sessions was to receive counseling in relation to the allegation of sexual abuse by the Defendant.
- 1.15 During the counseling session on November 14, 2011, IB told Ames that she was on the couch and Chad was lying beside her. IB said she was pretending to be asleep. Chad picked up IB's hand and made IB touch his penis. Chad thought IB was asleep. Chad quit but stayed on the couch. IB then fell asleep. IB said that, in the morning, she told her sister, AB, and her mom that Chad is a pervert. IB then told her mother what occurred with Chad.

## **II. CONCLUSIONS OF LAW**

- 2.1 The court has jurisdiction over the Defendant and the subject matter of this action.
- 2.2 In weighing and considering the nine factors set forth in *State v. Ryan*, 103 Wn.2d 165, 175-6, 691 P.2d 197, 205 (1984), the time, content, and circumstances of IB's statements made in the presence of Roni Jensen, Sandra Ames, Keith Sand, AB and Elan Bradley provide sufficient indicia of reliability to be admissible at trial under RCW 9A.44.120(1). If IB testifies at trial, all such statements are admissible.
- 2.3 Because IB is anticipated to testify at trial, the Court did not reach the issue of whether, under RCW 9A.44.120(2)(b), corroborative evidence exists of the sexual contact described in IB's statements.
- 2.4 IB's statements to Roni Jensen, Keith Sands, and Sandra Ames are testimonial under *Crawford v. Washington*, 541U.S. 36, 124 S. Ct. 1254 (2004).
- 2.5 On November 21, 2012, the Defendant was not in custody during the interview with Detective Silva at the Chehalis Police

Department. During this interview, the Defendant voluntarily spoke to Detective Silva. All of the Defendant's statements to Detective Silva are admissible at trial under CrR 3.5

CP 63-67.

About a month after the hearing the court called the case for trial before a jury. CP 173. During trial the state called eight witnesses, including IB, AB, IB's mother, the mental health counselor who interview IB, the two CPS workers who interviewed IB, and the police officer who interviewed the defendant. CP 173-355. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History. The defendant then called five witnesses including himself, and the state responded with one rebuttal witness. CP 356-446, 446-449.

The state called IB as its first witness before the jury. CP 173-213. During her time on the witness stand she repeated the claims she had made to her sister, mother, the mental health counselor and the two CPS investigators. *Id.* Three times during direct, and twice on redirect, the state called upon IB to comment on her own credibility. RP 180-181, 187, 211, 213. The following quotes the three exchanges during direct:

Q. When you talked to your sister and mom that morning, did you tell them the truth about what happened?

A. Yes

RP 180-181.

Q. The things you told your counselor Sandra, were those things you told the truth?

A. Yes.

Q. Were these things you told Roni [the second CPS investigator] the truth?

A. Yes.

RP 187.

The following quotes the two exchanges on redirect during which the state again called upon IB to comment on her own credibility:

Q. Has anyone ever told you what to say about Chad?

A. No. They just say tell the truth.

Q. Who told you that?

A. My grandma, my mom and so –

RP 211.

Q. So you understand when the judge had you raise your right hand, you were promising to tell the truth?

A. Yes.

Q. You understand that?

A. Yes.

Q. Is everything you told us here today the truth?

A. Yes.

RP 213.

The state elicited the third comment at the end of direct and the fifth comment at the end of redirect. RP 187, 213. There was no recross-examination. RP 213. Thus, the last statement the jury heard from IB at the end of direct and at the end of her time on the stand her statements that she had and was telling the truth about the claimed abuse. *Id.* The defense did not object to any of this evidence. RP 180-181, 187, 211, 213.

During Rick Silva's testimony, the state elicited the fact that he was a Chehalis Police Detective assigned to the case, that had attended the second lengthy CPS interview with IB, that he had interviewed IB's mother and sister, that he had interviewed the defendant at the police station, and that after finishing his investigation he had arrested the defendant, taken him into custody, and booked him into the Lewis County Jail. CP 350-355. The state elicited the last portion of this evidence at the end of direct and it went as follows.

Q. Direct your attention to December 7, 2011: Did you make an arrest of the defendant on that day?

A. Yes, I did. He was taken into custody and booked into the Lewis County jail.

RP 353-354.

The defense did not object to this evidence as irrelevant, an inadmissible expression of opinion, or as unfairly prejudicial. *Id.*

Following the close of the state's case, the defense called five

witnesses. RP 356-446. The first witness was the defendant's sister Chelsea Christensen. RP 356-373. She testified that after Elan and the defendant separated Elan told her that she was going to interfere with the defendant's attempts to get custody of his daughter, that the defendant should never have left her and her children, and that she was going to make him pay for leaving them. RP 362-363. Elan Christensen had denied making any such statements. RP 336.

The defendant's second witness was Janice Braden, Elan Christensen's older sister. RP 374. According to Ms Braden, following her sister's separation from the defendant, she had separate conversations with both IB and AB RP 378-383. According to Ms Braden, during the first conversation, IB told her that the defendant had not really molested her and that she had made up the false claim because she did not like him. RP 378-380. During the second conversation, AB told her that IB had admitted to her that she had lied about her claims that the defendant had molested her. RP 380-383. Both IB and AB had testified on direct examination that they had made no such statements to their Aunt Janice. RP 208-209, 288-289.

The defendant also testified in this case and denied that he had ever touched IB in a sexual manner, although he did admit that there was an occasion prior to his marriage to IB's mother in which both he and IB were sitting on the couch at his Chehalis apartment watching television while IB's

mother and sister were in bed. RP 418-446. Following the defendant's testimony the defense rested and the state called a witness for brief rebuttal. RP 446-449.

After rebuttal, the court instructed the jury on the charge and the aggravating factor without objection from the defense. RP 455, 455-466. The parties then presented closing arguments, after which the jury retired for deliberation. RP 465-494. The jury eventually returned a verdict of "guilty" to the charge of child molestation in the first degree, as well as a finding of "yes" to the special verdict asking if the defendant used a position of trust or confidence to facilitate the commission of the offense. CP 115-116.

The court later sentenced the defendant to life in prison with a minimum mandatory time of 132 months to serve before he could first be considered for release on parole. CP 148-159. Following imposition of sentence, the defendant filed timely notice of appeal. CP 163-175.

## ARGUMENT

### **TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE ELICITED INADMISSIBLE, PREJUDICIAL EVIDENCE 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 professional errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when (1) the state called upon the complaining witness to comment on her own credibility, and (2) when the state elicited irrelevant, prejudicial evidence that the defendant had been arrested and placed in custody. The following addresses both of these arguments and explains why these failures caused prejudice.

***(1) Trial Counsel’s Failure to Object When the State Repeatedly Called upon the Complaining Witness to Comment on Her Own Veracity Fell below the Standard of a Reasonably Prudent Attorney.***

Under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment a prosecutor should never assert his or her personal opinion as to the “credibility of a witness” or the “guilt or innocence of an accused.” *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). Any such expression on the credibility of a witness or expressing a “personal belief in the defendant’s guilt” is “not only unethical but

extremely prejudicial.” *State v. Case*, 49 Wn.2d 66, 68, 298 P.2d 500 (1956). Thus, a prosecutor should never introduce “evidence of any matter immaterial or irrelevant to the single issue to be determined.” *State v. Devlin*, 145 Wn. 44, 49, 258 P. 826 (1927). The courts “will not allow such testimony, in the guise of argument, whether or not defense counsel objected or sought a curative instruction.” *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Similarly, under both Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, a defendant is entitled to have his or her case decided upon the evidence adduced at trial, not upon the opinions of attorneys, the courts or the witnesses concerning the credibility of witnesses, the evidence, or the guilt of the defendant. *State v. Casteneda-Perez*, 61 Wn.App. 354, 360, 810 P.2d 74 (1991). Thus, it is improper for the prosecutor to elicit evidence of any person’s personal opinion about the credibility of himself, herself, or another witness. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). As part of this right, it is also improper for the state to attempt to get the defendant to comment on the credibility of the state’s witnesses. *State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994).

For example, in *State v. Jerrels*, 83 Wn.App. 503, 925 P.2d 209 (1996), the defendant was convicted of Rape of a Child and Child

Molestation after a trial in which the trial court permitted the state to ask the defendant's wife whether or not she believed that her children were telling the truth. The defendant appealed his convictions arguing that this line of questioning denied him his right to a fair trial. In addressing this argument, the Court of Appeals first noted that it was error for the court to allow a witness to comment on the credibility of another witness. The court stated:

A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. Such questioning invades the jury's province and is unfair and misleading. The questions asked of Mrs. Jerrels were clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred. In another sexual abuse case, we held recently that reversible error occurred when a pediatrician was allowed to testify that, based on the child's statements, she believed the child had been abused.

*State v. Jerrels*, 83 Wn.App. at 507-508 (citations omitted).

As the court states: "A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth." Thus, it was error in *Jerrels* for the prosecutor to ask the defendant's wife whether or not she believed her children.

In the case at bar, the state directly violated this prohibition on five separate occasions when it called upon the complaining witness to render an opinion on her own truthfulness. The first three occasions occurred during

direct, and were as follows:

Q. When you talked to your sister and mom that morning, did you tell them the truth about what happened?

A. Yes

RP 180-181.

Q. The things you told your counselor Sandra, were those things you told the truth?

A. Yes.

Q. Were these things you told Roni [the second CPS investigator] the truth?

A. Yes.

RP 187.

The last two exchanges occurred during redirect and went as follows:

Q. Has anyone ever told you what to say about Chad?

A. No. They just say tell the truth.

Q. Who told you that?

A. My grandma, my mom and so –

RP 211.

Q. So you understand when the judge had you raise your right hand, you were promising to tell the truth?

A. Yes.

Q. You understand that?

A. Yes.

Q. Is everything you told us here today the truth?

A. Yes.

RP 213.

In the case at bar there was no physical evidence to support the claim of abuse, no eyewitness, and no confession. Literally, the only evidence supporting the conviction was IB's claim before the jury along with the testimony of five other people who stated that IB had also claimed to them that the abuse had happened. Similarly, the only evidence the defense presented was the defendant's denial, along with evidence that IB had recanted the claim. In such a case, there is one paramount question for the jury: credibility. In spite of the critical nature of this issue, the defendant's attorney sat mute while the state on five occasions called upon IB to present inadmissible, prejudicial opinion evidence to bolster her credibility before the jury. Appellant submits that there is no tactical advantage in failing to object to such evidence which is inadmissible, prejudicial and constitutes misconduct for the state to even solicit. This conclusion is particularly supported in a case such as this in which the question of credibility was critical to the jury's decision. 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 of the Defendant’s Arrest and Incarceration 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). As a result 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 of an arrest is not evidence because it constitutes the arresting officer's opinion 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.

In the case at bar, the state specifically elicited testimony from Detective Silva that he had arrested the defendant and booked him into the Lewis County Jail. This evidence came before the jury as follows:

Q. Direct your attention to December 7, 2011: Did you make an arrest of the defendant on that day?

A. Yes, I did. He was taken into custody and booked into the Lewis County jail.

RP 353-354.

The form of the question reveals that it was the state's specific intent to present this inadmissible, prejudicial facts to the jury. In addition, a careful review of the method the state used in presenting this evidence, including its placement at the end of Detective Silva's direct examination, reveals that the state's intent was to get the jury to understand that by arresting the defendant and taking him to jail, Detective Silva was rendering his expert opinion as a police officer that IB told the truth, that the defendant had lied, and that the defendant was guilty. The progression of this evidence want as follows: (1) the state elicited Detective Silva's training and experience, (2) the state pointed out the fact that Detective Silva had watched IB's taped interview with the second CPS investigator, (3) the state then elicited the irrelevant evidence that Detective Silva had himself interviewed both IB's sister and IB's mother, and (4) the state elicited the fact that Detective Silva had interviewed the defendant.

After eliciting this evidence in this order, the state then asked the culminating question: On December 7, 2011 [after you completed each phase of your investigation], what did you do? The answer was: I arrested the defendant and took him to jail. The "why" of the matter was immediately apparent to the jury. The officer arrested the defendant and took him to jail because, in his opinion, IB told the truth, the defendant lied, and the

defendant was guilty. Indeed, this is the only relevance in eliciting the fact of the arrest in this case. This evidence was inadmissible and highly prejudicial. As such, there was absolutely no tactical reason for the defendant's attorney to fail to object to this evidence. Consequently, defense counsel's failure to object to this evidence fell below the standard of a reasonably prudent attorney.

A careful examination of this evidence under the definition of the term "relevance" supports this conclusion. 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).

Under ER 402, irrelevant evidence is not admissible. This court rule 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.

ER 402.

In the case at bar, there was no “logical nexus” between the fact at issue (whether or not the defendant touched IB with sexual intent) and the facts the state specifically elicited through Officer Silva (that he arrested the defendant). Rather, the inference that the state was attempting to have the jury draw was that the defendant was guilty because Officer Silva believed IB’s claims and disbelieved the defendant protestations of innocence. How better to present such improper and prejudicial evidence than by specifically eliciting the fact that Officer Silva arrested the defendant but only after thoroughly investigating the case by studying the interviews of IB, himself interviewing the other witnesses, and then interviewing the defendant. This specific analysis of the relevance of this evidence also supports the conclusion that trial counsel’s failure to object fell below the standard of a reasonably prudent attorney.

**(3) Trial Counsel’s Failures to Object Caused Prejudice.**

As was previously stated, in order to prevail on a claim of ineffective assistance of counsel under either Washington Constitution, Article 1, § 22, or United States Constitution, Sixth Amendment, the defendant must first prove that trial counsel’s conduct fell below the standard of a reasonably prudent attorney. The defense has done this in the previous two arguments.

In addition, the defense must also prove that trial counsel's deficient conduct caused "prejudice." *See State v. Johnson, supra*. In this context, the term "prejudice" means that the defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) (citing *Strickland*, 466 U.S. at 687).

In the case at bar, a careful review of the evidence supports the conclusion that the defendant has met the burden of proving prejudice in trial counsel's deficient performance in failing to object to improper, prejudicial evidence. As was mentioned previously, in this case there was no physical evidence to support the claim of abuse, no eyewitness testimony, and no confession. The state will undoubtedly point out, quite properly, that this was not the type of case in which there would not be physical evidence or an eyewitness. While this is quite correct, such an argument itself bolsters the point that this type of case turns on one issue only: credibility. In deed, in this case the only evidence supporting the conviction was IB's claim before the jury along with the hearsay testimony of five other people who stated that IB had told them that the abuse had happened.

While the defendant certainly had no duty to present any evidence rebutting these claims, he did present evidence from both his sister as well as IB's aunt that IB had recanted the claims and admitted her motivation in

lying. In addition, the defendant also took the stand on his own behalf and denied any sexual contact with IB. Finally, as the jury was instructed, a reasonable doubt may arise from both the evidence as well as the lack of evidence. In this case such a lack of evidence existed in the absence of any claim by IB or her sister that the defendant had ever attempted such conduct prior or subsequent to the one incident alleged in spite of unfettered access to both girls over a period of time that extended many months. Although the claim of a single discrete incident of abuse is sufficient to support a conviction if believed by a jury, in spite of constant access over an extended period of time, a review of most child sex cases brought before this court reveals that such claims of single discrete incidents in the face of unfettered access over extended periods of time is quite unusual.

Appellant argues to this court that a careful review of the evidence in this case and the lack of evidence reveals that the state's case tread upon a razor's edge in which each and every piece of evidence was necessary to sway the jury to a verdict of conviction. If you extract IB's repeated protestations of truthfulness as well as Detective Silva's improper testimony of arrest and incarceration, then it is highly likely that the jury would have returned a verdict of acquittal. Thus, in this case, the defense has proven prejudice from trial counsel's deficient performance.

## CONCLUSION

Trial counsel's failure to object to irrelevant, prejudicial evidence fell below the standard of a reasonably prudent attorney and caused prejudice, thereby denying the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should reverse the defendant's conviction and remand for a new trial.

DATED this 28<sup>th</sup> day of January, 2013.

Respectfully submitted,

  
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John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

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

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 21**

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

**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.

**EVIDENCE 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.

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

STATE OF WASHINGTON,  
Respondent,

NO. 43699-0-II

vs.

AFFIRMATION OF  
OF SERVICE

CHAD E. CHRISTENSEN,  
Appellant.

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Cathy Russell states the following under penalty of perjury under the laws of Washington State. On January 28<sup>TH</sup>, 2013, I personally placed in the United States Mail the following document with postage paid to the indicated parties:

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

JONATHAN MEYER  
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ABERDEEN, WA 98520

Dated this 28<sup>TH</sup> day of January, 2013, at Longview, Washington.

/s/

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Cathy Russell, Legal Assistant

# HAYS LAW OFFICE

**January 29, 2013 - 9:47 AM**

## Transmittal Letter

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### Comments:

Corrected Brief

Sender Name: Cathy E Russell - Email: jahayslaw@comcast.net

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