

NO. 46026-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL REUBEN HORST,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

Trial counsel's failure to seek a mistrial after a state's witness told the jury that the defendant was guilty of the crime charged and that the complaining witness was telling the truth 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

Does a trial counsel's failure to seek a mistrial after a state's witness tells a jury that in her opinion the defendant is guilty of the crime charged and that the complaining witness is telling the truth deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when (1) no reasonable attorney would have failed to move for a mistrial, and (2) no instruction by the court was sufficient to ensure the defendant a fair trial free from the taint of the improper opinion evidence?

STATEMENT OF THE CASE

Factual History

Michael Horst and Kayla Horst originally met in high school, began dating, and were later married. RP 102-102. In September of 2012 they had a baby girl. *Id.* During the beginning of 2013 they began having marital problems and by April or May of that same year they separated. RP 104-105. According to Kayla they did not engage in any sexual contact after permanently separating. RP 106-107. However, Kayla continued to have contact with the defendant and frequently called upon him to provide her rides as she did not have a car. *Id.*

On the evening of July 26, 2013, Kayla had plans to spend the evening with her friend Marissa so she called the defendant and asked if he would give her a ride to Marissa's house. RP 107-109. However, by the time the defendant and Kayla got to Marissa's house Marissa canceled their plans. *Id.* As a result Kayla decided to spend the evening at the defendant's mother's house with the defendant and his family members. *Id.* Once at the defendant's mother's house they spent the evening eating, watching television and socializing with the defendant's mother, the defendant's brother, and the defendant's two nieces who were present in the home. RP 109-111. By 10 or 11 pm the defendant's mother went to bed, after which Kayla changed into her pajamas. *Id.*

A while later the defendant's brother went to bed leaving Kayla and the defendant alone in the living room on the couch with the defendant sitting at one end while Kayla reclined so the defendant could rub her feet. RP 113. According to Kayla, the defendant asked her more than once if she would have sex with him and she responded each time that she would not. *Id.* She then claimed that she fell asleep and awoke a short time later to the defendant tickling her thigh. RP 115-117. She then fell asleep and awoke a second time to the defendant digitally penetrating her vagina. *Id.* Kayla went on to claim that once he stopped she fell back asleep again. *Id.* She then awoke a third time to find the defendant on top of her after having penetrated her vagina with his penis. *Id.* Kayla stated that she did not say anything or try to push him off of her. *Id.* Rather she waited until he had ejaculated, got off of her and cleaned himself off with a blanket. *Id.* Once he did this she went to use the bathroom and then came back out into the living room and asked him to go get her some food from a nearby McDonalds. RP 117-118, 147.

According to Kayla, once the defendant left she woke up his brother and told him that the defendant had either "raped her" (testimony at trial) or "touched her" (recorded statement prior to trial). RP 118-119, 139-140. However, the defendant's brother apparently did nothing. *Id.* As a result, once the defendant returned she told him that she was going to walk home. RP 119-120. However the defendant offered to drive her home and she

agreed. *Id.* Once they got to about a block from Kayla's home Kayla told the defendant to let her out of his car by a small strip mall and gas station and leave or she would call 911. RP 119-120. The defendant complied with her request and left after dropping her off. *Id.*

Once the defendant left, Kayla attempted to call a number of friends to get a ride and eventually contacted her friend Bailey Karpa. RP 130-132. According to Ms Karpa, Kayla was distraught when she called. RP 89-93. Ms Karpa responded by immediately driving to Kayla's location. RP 89-93. Once at that location Kayla told her that the defendant had raped her but she didn't want to go to the police. *Id.* However, Ms Karpa talked her into reporting what had happened to the police and then drove Kayla to the police station where both women gave statements to a police officer. RP 91-93. During the period of time between dropping Kayla off and Kayla going to the police station the defendant attempted to call her 14 times, and then sent her five text messages with the fifth one asking "what do u want me to say." Exhibits 2-5. Kayla then responded with "The truth!!!!!!! Tell me the fucking truth!!!!!!!!!!!!!!". Exhibit 6. The defendant then responded with 14 text messages over nine minutes, which stated as follows:

Fine I don't know y I did it I just didn't have for a long time so my body wanted it. I'm soo sorry I didn't want to have sex with u. Cuz when u said no I got it. What u going to do to me u going to call the cops on me?

I want us friends and I don't want anyone to know about this please
cuz if u tell people I just like about it

I want us friends and I don't want anyone to know about this please
cuz if u tell people I will just lie about it

So please could we still be friends

This will never happen again I promise. Please answer me

Call me so I could say one more this. Tell I leave forever

Answer please

Answer please

U there

What do u want

New

I want to know one thing

Please just answer when I call

Please

Exhibit 7-8.

After Kayla finished giving her statement to the police, a number of officers drove to the defendant's mother's house in the early morning and knocked on the door. RP 69-71. The defendant responded and came out onto the porch at the officers' request. *Id.* At this point the officers asked him if he knew what they were there and the defendant responded that it must have something to do with Kayla. *Id.* The officers then arrested the

defendant and read him his *Miranda* rights. RP 15. The defendant responded by stating that he had done something stupid and he would rather not talk about it. RP 15. However, once at the police station the police again asked him what had happened and the defendant responded by giving them a lengthy recorded statement. RP 5-7.

Procedural History

By information filed July 30, 2014, the Clark County Prosecutor charged the defendant Michael Reuben Horst with one count of second degree rape under RCW 9A.44.050(a)(b), alleging that the defendant engaged in sexual intercourse with Kayla Horst when she “was incapable of consent by reason of being physically helpless or mentally incapacitated.” CP 1-2. The case later came on for trial with the state calling three witnesses: the arresting officer, Bailey Karpa and Kayla Horst. RP 67-143. They testified to the facts contained in the preceding factual history. *See* Factual History. The state did not present any evidence that the investigating officer had taken Kayla to a hospital for a physical examination, that a health care worker had performed a “rape kit” on her, that a police officer had ever interviewed the defendant’s mother, brother or nieces, or that the police had obtained a search warrant to gather evidence at the defendant’s mother’s house, much less submitted any evidence at all for scientific analysis. RP 2-143.

During her testimony, the following exchange occurred between the

prosecutor and Bailey Karpa:

Q. Can I ask why you encouraged her to call the police?

A. Because I – I feel like, you know, that’s – that’s – that’s a pretty – it’s a pretty big claim to make against somebody and you know, I – if it really happened – if it did – if it didn’t actually happen, I don’t think she would have gone to the police, you know? Like it – it really seemed like she really, really meant everything that she had said.

Q. Okay.

A. There was never a point in the time that I had been with her

JUDGE JOHNSON: I – I’m going to direct the jury to disregard any interpretation of the witness as to believability or what another person may have –

MR. RUCKER: Thank you, Your Honor.

JUDGE JOHNSON: – meant, or the believability of another witness who is scheduled to testify here, so the jury will disregard that.

MR. VITASOVIC: Alright.

JUDGE JOHNSON: Just answer the question. Listen to it real carefully and answer the question. Alright. Please restate a question.

RP 93-94.

The defendant’s attorney did not even object to this exchange, much less move for a mistrial. *Id.* Neither did he argue that the statement was also inadmissible and prejudicial as an opinion of guilt. *Id.*

Following the close of the state’s case the defense closed without calling any witnesses. RP 159. The court then instructed the jury without

objection, after which the parties presented their closing arguments. RP 160-172; CP 75-90. Following deliberation the jury returned a verdict of “guilty” as charged. CP 38. The court later sentenced the defendant to life in prison with a minimum time to serve before he could first be considered for release of 78 months on a range of 78 to 102 months. CP 75-90. The defendant thereafter filed timely notice of appeal. CP 91-92.

ARGUMENT

TRIAL COUNSEL'S FAILURE TO SEEK A MISTRIAL AFTER A STATE'S WITNESS TOLD THE JURY THAT THE DEFENDANT WAS GUILTY OF THE CRIME CHARGED AND THAT SHE BELIEVED THE COMPLAINING WITNESS DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a

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

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to move for a mistrial when the state elicited evidence from Bailey Karpa that she believed that the defendant was guilty and that Kayla Horst was telling the truth when she claimed that the defendant had raped her. The following addresses this argument.

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). 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.

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.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wash.2d 312, at page 315, 427 P.2d 1012, at page 1014 (1967), said:

Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. The proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. To the question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).

So the testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

State v. Haga, 8 Wn.App. At 491-492.

In the case at bar the jury heard the following exchange between the state and Bailey Karpa in which Ms Karpa told the jury that she believed that

the defendant was guilty of rape and that she believed Kayla Horst was telling the truth:

Q. Can I ask why you encouraged her to call the police?

A. Because I – I feel like, you know, that's – that's – that's a pretty – it's a pretty big claim to make against somebody and you know, I – if it really happened – if it did – if it didn't actually happen, I don't think she would have gone to the police, you know? Like it – it really seemed like she really, really meant everything that she had said.

Q. Okay.

A. There was never a point in the time that I had been with her

JUDGE JOHNSON: I – I'm going to direct the jury to disregard any interpretation of the witness as to believability or what another person may have –

MR. RUCKER: Thank you, Your Honor.

JUDGE JOHNSON: – meant, or the believability of another witness who is scheduled to testify here, so the jury will disregard that.

MR. VITASOVIC: Alright.

JUDGE JOHNSON: Just answer the question. Listen to it real carefully and answer the question. Alright. Please restate a question.

RP 93-94.

This testimony by Ms Karpa was a clear expression of her belief that Kayla Horst was telling the truth when she claimed she was raped. It also stood as Mrs. Karpa's personal opinion that the defendant must be guilty. In fact it even functioned as a persuasive argument as to why the jury should

believe Ms Horst's claims. It is evident that the trial court immediately recognized the error in allowing the jury to hear such evidence because the court itself immediately instructed the jury to disregard the statement and then admonished the witness to answer only the questions asked. The problem with the court's instruction was that under the facts of this case Ms Karpa's statement was so prejudicial and improper that no admonition by the court could erase the unfair prejudice in the minds of the jury. The following addresses this argument.

It is true that our case law recognizes that juries are presumed to follow the instructions of the court, including curative instructions to disregard statements made by a witness during trial. *State v. Grisby*, 97 Wn.2d 493, 647 P.2d 6 (1982). However, our case law also recognizes that some statements are so prejudicial that once made before the jury no instruction can ameliorate the prejudice and the only possible remedy is a mistrial. *State v. Gamble*, 168 Wn.2d 161, 225 P.3d 973 (2010). Ultimately the question for the court to determine on review is whether or not, when "viewed against the background of all the evidence," the improper testimony was so prejudicial that the defendant did not get a fair trial. *State v. Thompson*, 90 Wn.App. 41, 950 P.2d 977 (1998). If it was, then a mistrial is required. *Id.* In determining whether a witness' opinion on the guilt of the defendant affected the jury's verdict, the appellate court examines (1) the

seriousness of the irregularity, (2) whether the irregularity involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard the irregularity. *Thompson*, 90 Wn.App. at 46 (citing *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)).

For example in *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987), a defendant convicted of third degree rape appealed his conviction, arguing that the trial court had erred when it allowed a state's expert to testify to the existence of "rape trauma syndrome," testify concerning the symptoms of that syndrome, and then testify that the complaining witness exhibited those symptoms. Specifically, the defendant argued that his right to a fair and impartial jury had been denied because the testimony of the state's expert that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" inferentially constituted an improper statement of opinion as to the defendant's guilt or innocence. The Washington Supreme Court agreed, holding as follows:

No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference. Here, rape counselor Bermensolo testified that, in her opinion, [the complaining witness] suffered from rape trauma syndrome, and that "[t]here is a specific profile for rape victims and [the complaining witness] fits in." In [*State v.*] *Saldana*, [324 N.W.2d 227, 230 (Minn.1982)]; the Minnesota Supreme Court aptly observed that:

[p]ermitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly

prejudices the [defendant] by creating an aura of special reliability and trustworthiness.

The danger of prejudice is especially acute where, as here, the expert expressly uses the term “rape trauma syndrome.” As one court cogently notes, “[t]he term itself connotes rape.” It carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped. It constitutes, in essence, a statement that the defendant is guilty of the crime of rape.

State v. Black, 109 Wn.2d at 348-49 (some citations omitted).

While the witness in the case at bar was not an expert rendering an opinion on rape-trauma syndrome, she did offer an equally improper and damaging opinion on why the defendant was guilty of rape and why the jury should believe the complaining witness. As such, it was as harmful as the improper testimony in *Black*. Thus, the first criteria under *Thompson* is met in this case. In addition, under the second *Thompson* criteria the irregularity in this case was far from merely cumulative. Rather, it involved a new argument by Ms Karpa that was itself improper. Thus, not only did she express an opinion on the guilt of the defendant, but she based it upon her own theory and argument that Kayla should be believed because her willingness to go to the police and make a report was evidence that she was telling the truth. Finally, in this case the court did properly instruct the jury to disregard the irregularity that was created through Ms Karpa’s testimony. However, when the evidence from the case is viewed as a whole, it supports the conclusion that the court’s curative instruction was insufficient. The

following reviews that evidence.

The evidence in the case at bar centered on one primary issue: the credibility of Kayla's Horst's claims. The reason this case devolved to this single issue was that the police failed to gather or analyze any physical evidence at all, particularly evidence that one would expect to have analyzed in a case involving a claim of rape. This missing evidence included: (1) no medical evaluation following the claim of rape, (2) no rape trauma kit having been performed or evaluated, (3) no seizure of evidence or examination for body fluids from the scene of the alleged crime, (4) no apparent interview of the defendant's mother, brother and nieces even though they were all with the defendant and Kayla for the hours immediately preceding and after the alleged rape. In fact, they were literally in the adjoining rooms.

The missing evidence was not the only thing that was weak in this case. A careful review of Kayla Horst's contradictory and unusual claims also calls her story into serious questions. Just for example, at one point she claims she told the defendant's brother that the defendant had "touched" her, whereas at trial she claims that she told the defendant's brother that the defendant had "raped" her. In addition, Ms Horst did not claim that the defendant in any way threatened or coerced her into sexual contact. Neither did she claim any prior instances of abuse or threats. Thus, it is hard to explain why she would not have called out to both the defendant's mother

and brother as well as his nieces had she really been sexually assaulted given the fact that they were in the next room of a small residence. Similarly it is difficult to believe that the defendant violently assaulted her via digital penetration but somehow she immediately fell back asleep as if nothing untoward had happened. Finally, absent a claim of some sort of alcohol or drug use it is also difficult to believe her claim that she did not wake until the defendant had somehow penetrated her vagina with his penis. Certainly this latter claim would be understandable had there been any evidence of any type of intoxication. However, no such claim was made.

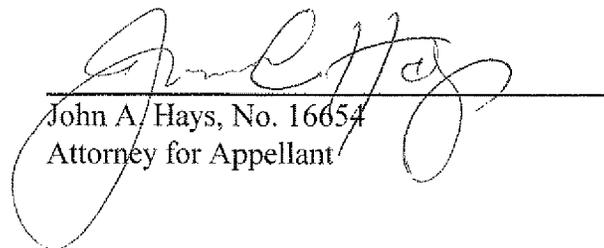
In this case it was certainly within the rights of the jury to believe the story of the complaining witness even given its unusual nature and improbabilities. However, in such an instance, the most likely evidence that tipped the jury in favor of a conviction would be Ms Karpa's improper opinion evidence and argument that Ms Horst was telling the truth. As such, it makes it highly unlikely that the court's curative instruction to the jury had any effect at all. Thus, the presentation of this improper evidence in this case denied the defendant a fair trial in spite of the trial court's attempt to prevent Ms. Karpra's improper evidence from fatally tainting the jury. Given this conclusion no reasonable defense attorney would have failed to object and move for a mistrial. Further, this failure obviously caused prejudice because the failure to bring the motion left the defendant with a tainted jury.

CONCLUSION

Improper opinion evidence of guilt denied the defendant a fair trial and trial counsel's failure to move for a mistrial following the admission of that evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result this court should grant a new trial.

DATED this 3rd day of September, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 22

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

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

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

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 46026-2-II

vs.

**AFFIRMATION OF
OF SERVICE**

MICHAEL REUBEN HORST,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 3rd day of September, 2014, at Longview, Washington.



Donna Baker

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