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Court of Appeals
Division III
State of Washington

NO. 33169-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

28
RAMON MORFIN, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Alexander C. Ekstrom, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. INTRODUCTION

Appellant Ramon Morfin was convicted of two counts of first degree assault for a shooting that took place in the parking lot of a Motel 6 in Pasco. CP 51-52, 17-30. The only issue in the case was the identity of the shooter. RP 160, 163. The state presented no eye witnesses identifying Morfin as the shooter. RP 63, 80. The police did not recover the gun and therefore had no ballistics evidence to present. RP 53, 112.

Instead, the state presented a blurry surveillance video from the motel that, at the time of the shooting, depicted an indiscernible group of 4-6 people gathered near a Mercedes Benz in the parking lot. RP 41-42, 133. The video next depicted one of these individuals – with indiscernible facial features – leaning over the car, followed by a muzzle flash emanating from what appeared to be the end of the person's extended arm. RP 18, 44.

With no objection from defense counsel or previous motion to exclude such evidence, the prosecutor elicited testimony from two detectives that they were able to identify Morfin as the shooter in the video, based on his "build" and clothing worn during a police interview. RP 18, 36, 49, 128-29. Again, with no objection from defense counsel or previous motion to exclude such evidence, the

prosecutor also elicited from one of these detectives that he subsequently interviewed an eye witness who confirmed Morfin was the shooter. RP 25, 62.

In convicting Morfin of the charged assaults, the court expressly relied on the identification testimony of the officers and the out-of-court identification made by the alleged eye witness, as recounted by the detective. CP 32; RP 164-65. As argued in this brief, defense counsel's failure to object to this impermissible opinion testimony and testimonial hearsay constituted deficient performance that clearly prejudiced Morfin. Reversal of his convictions is required.

B. ASSIGNMENT OF ERROR

Morfin received ineffective assistance of counsel.

Issue Pertaining to Assignment of Error

Where the only issue in the case was identity, did Morfin receive ineffective assistance of counsel when his attorney failed to move pre-trial to exclude, or in any other way object to, what amounted to impermissible opinion testimony and testimonial hearsay identifying Morfin as the shooter?

C. STATEMENT OF THE CASE

Following a bench trial in Franklin County Superior Court,[1] appellant Ramon Morfin was convicted of two counts of first degree assault while armed with a firearm, allegedly committed against Paula and Debra Villarreal on August 29, 2011. CP 17-33, 48-50. The court acquitted Morfin of the state's allegation the offenses were in some way gang-related. CP 48-50; RP 165-66.[2]

At the bench trial, Paula Villarreal testified that she and her son and daughter, Debra and Jose, and Jose's wife and baby were homeless and stayed a few nights with Paula's mother.[3] RP 71. The night of the shooting, they decided to rent a room at the Motel 6. RP 71.

Debra drove into the Motel 6 parking lot in her white Lincoln Town Car with Paula in the passenger seat. RP 79, 82, 84, 112. Jose and his wife pulled into the parking lot in their Chevy Corsica. RP 72, 84. While Debra and Jose went inside to get a room, Paula testified she "turned the car off because I was being nosey and I

[1] Morfin waived his right to a jury trial. CP 45.

[2] "RP" refers to the verbatim report of proceedings for the bench trial on December 24, 2014 and January 20, 2015. "1RP" refers to sentencing on February 25, 2015.

[3] To avoid confusion, this brief will refer to the Villarreals by their first names. No disrespect is intended.

wanted to hear what was going on." RP 71. For undisclosed reasons, she put the keys in the backseat. RP 162.

Paula testified that all of the sudden, Jose and Debra ran back towards the cars. RP 71. While looking for the keys, Debra said, "We got to go. We got to go." RP 71. Paula testified that twenty to thirty seconds later – after Debra got back in the car – Paula was shot in the left cheek and the bullet lodged in her jaw. RP 71-72.

Debra found the keys and started driving out of the parking lot. RP 72. As they drove away, the car was hit a few times by bullets. RP 72. One of the shots resulted in a flat tire. RP 72, 79. Just as Debra and Paula were approaching Oregon Avenue, Jose and his wife picked them up in their car, and they drove to the hospital. RP 72-73.

Paula did not identify Morfin as the person who shot her. RP 80. None of the other Villarreals testified. See RP 63.

Former Pasco police detective Kirk Nebeker testified that around 11:00 p.m. on August 29, 2011, he went to the Motel 6 to investigate. RP 13-15. When Nebeker arrived, patrol officers had identified three men in room 120 as possible suspects, including

Morfin, Jose Segura and David Martinez.[4] RP 14, 27-28, 54, 103. When Nebeker interviewed Morfin, he admitted being at the hotel, but denied any involvement in the shooting. RP 15.

Nebeker later obtained the motel's surveillance video and watched it early the next morning. RP 17, 25. At trial, Nebeker testified Morfin was wearing a long-sleeved, gray shirt and dark shorts that night when Nebeker interviewed him. RP 16. According to Nebeker, no one else was wearing that color combination; Nebeker claimed he noted the clothes of the people he interviewed that night, after-the-fact, once he reviewed the motel's surveillance video. RP 16, 27, 33-35.

On direct, Nebeker identified exhibit 1 as an accurate copy of the surveillance video from the motel. RP 17. Before playing it, the prosecutor asked Nebeker to describe what the video showed. RP 17. Nebeker testified the video showed footage from various cameras positioned at different angles.

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[4] As indicated above, the state alleged the shooting was gang related. Police believed the occupants of this room to be Florencia gang members, who allegedly had a beef with the 18th Street gang, of which Debra and Jose were purportedly members. RP 20, 28, 76, 78.

RP 17. According to Nebeker, one of the cameras captured Jose and his girlfriend going into the hotel, while the "white Cadillac" backed out and headed toward the motel entrance by Oregon Avenue. RP 17. Next, the trunk of the white car popped open and someone got out, "and then you see it speed off and then later go back out on or Oregon Avenue." RP 17-18.

Nebeker testified that footage from another camera showed two men in white clothes running away from the hotel. RP 18.

Lastly, Nebeker described footage of the shooting and identified Morfin as the shooter:

> [A]nd there's another camera angle where you can see the eastern side of the complex by Oregon Avenue, and you can see a group of people hanging around a vehicle that I've known to belong to Mrs. Alejandro, a black Mercedes. And you can see people start to kind of scramble. You can see who I identify as Mr. Morfin lean over the car, and you can see the fire from the muzzle as shots go out. Then can you see people run and scramble, and then a different person in a dark shirt I believe to be Manuel Ramirez run back to the Mercedes and park it over on the south side, and it goes back into view of that camera over there.

RP 18.

While playing the video, the prosecutor next directed Nebeker to describe what it showed. RP 21-22. Again, Nebeker identified Morfin as the shooter:

> This would be the eastern side of the motel, and you can see Oregon Avenue on the other side of the arborvitae hedge. In the back corner with the apples, black Mercedes and several males around it.
>
> You can see one of those persons starting to lean over the top of the car.
>
> Those are the blasts from the muzzle of the gun. And he's wearing the same attire as Mr. Morfin when I interviewed him.
>
> And then this is who I believe is Manuel Ramirez, who also had long dark shorts, but he had a dark top, and he comes back and moves the black Mercedes. And you see a second ago the white car going southbound with the trunk open on Oregon Avenue.

RP 23-24. Nebeker further testified, "it wasn't until I saw that video that I saw it was Ramon [Morfin], and he had left." RP 25.

After passing on the information to lead detective Bradford Gregory, Nebeker interviewed Manuel Ramirez, whom Nebeker identified as moving the Mercedes. RP 25. The prosecutor ended direct with the following exchange about that interview:

> Q [prosecutor Teddy Chow]. Did you get a chance to interview Manuel -- ?
>
> A. [Nebeker]. Ramirez?
>
> Q. Yes.
>
> A. Yes, I did.
>
> Q. And as a result of that interview did that confirm your belief that it was Mr. Morfin?
>
> A. It did.

MR. CHOW: I have nothing further.

RP 25; see also RP 62 (eliciting same on further redirect examination).

On cross-examination, defense counsel Peyman Younesi elicited that Nebeker recognized Morfin from prior contacts when speaking to him that night. RP 30. Nebeker was familiar with Morfin's brother, but recognized Morfin as the person he spoke to that night. RP 30.

Nebeker acknowledged the video was blurry and that the facial features of the "[f]our to five, maybe six" individuals around the car were indiscernible. RP 41-42. Yet, as stated in Nebeker's report:

> A. Ok. "However, I am able to view the clothing, and I am able to see that the shooter who had the gun and appeared to be the only one to have a gun was wearing the same clothing and the same body build and appeared to have the same hair style as Ramon Morfin, who I had interviewed earlier.

RP 36.

On redirect, Nebeker expanded on his past contact with Morfin. RP 57. Nebeker testified that eleven years earlier, Morfin had run from him during "a field contact in Memorial Park." RP 57. Nebeker claimed he remembered Morfin "ever since." RP 57.

Although Nebeker claimed to have other contacts with Morfin, he acknowledged there were few actual "face-to-face" contacts:

> A. I – we have not talked face to face a whole lot, but I have been aware of him, and there has been multiple contacts.
>
> Q. With Mr. Morfin?
>
> A. Yes, and it could go a long stretch where there have been several years where I have not talked to him face to face.

RP 57-58.

Nonetheless, Nebeker maintained he recognized Morfin as the shooter in the video based on his clothing and "body shape." RP 58. When the prosecutor asked Nebeker to elaborate, Nebeker testified he "just knew:"

> A. I cannot get too specific. I can just tell you all the factors combined. And from the interview the moment that I saw the video footage that's when it clicked and I knew.

RP 58.

Lead detective sergeant Bradford Gregory also responded to the motel the night of the shooting. RP 108. He testified he interviewed David Marinez, as well as "a couple of the witnesses on the scene." RP 108-109. When asked if he "ever dealt with Morfin, even in the past," Gregory responded:

A. Not that I recall. I think I'd seen him before, but I don't know that I'd actually dealt with him.

RP 109.

As part of the investigation, Gregory also viewed the motel's surveillance video. RP 127-28. According to Gregory, the third video showed Morfin as the shooter:

> The third video shows Apolonia's Mercedes parked next to where we found the shell casings with several people standing around it. From viewing Mr., excuse me, Ramos[5] at the time I could clearly see that he's standing next to the vehicle. He takes what appears to be a shooter stance pointing towards where the Lincoln was parked, and then you can see fire coming out of the end of the gun. After the shooting I believe there were six of them standing around altogether. Six – five of them took off running toward the rooms, and then Mr. Morfin walks toward the room and then kind of jogs toward the room and then ends up out of our sight.

RP 128.

The prosecutor asked how Gregory identified Morfin as the shooter and the following exchange occurred:

> A. Body style, clothing. It was clearly him.
>
> Q. And you had contact with Mr. Morfin the prior night how he was dressed?
>
> A. Yes.

RP 129.

---

[5] Bradford clarified that when he said "Ramos," he meant Ramon. RP 129.

On cross, Gregory similarly testified he identified Morfin based on his "size, body style." RP 131. As Gregory further assured, "having seen him at the scene, it was him." RP 131.

D. ARGUMENT

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO INADMISSIBLE EVIDENCE IDENTIFYING MORFIN AS THE SHOOTER.

As indicated above, detective Nebeker and lead detective Gregory were allowed to give their opinion Morfin was the shooter depicted in an indiscernible video, based solely on his build and clothing. Whether the detectives could have testified Morfin was wearing clothing matching that of the shooter depicted in the video, neither detective should have been permitted to testify he was in fact the shooter. Because neither detective had sufficient prior contacts with Morfin to more correctly identify him than the fact-finder, the detectives' opinions he was the shooter in the video were inadmissible. Defense counsel's failure to move to exclude the detectives' identifications in advance of trial, or to otherwise object to, their identifications constituted ineffective assistance of counsel.

Defense counsel's failure to move to exclude or otherwise object to detective Nebeker's testimony recounting Ramirez's out-

of-court identification of Morfin as the shooter likewise constituted ineffective assistance of counsel. Because Ramirez did not testify and Morfin had no prior opportunity to confront him, the out-of-court identification was testimonial hearsay and inadmissible.

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 22, of the Washington Constitution guarantee a criminal defendant the rights to representation of counsel and due process of law. The right to counsel necessarily includes the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

A conviction is reversed for ineffective assistance of counsel where trial counsel's deficient performance prejudiced the accused. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's performance is deficient when it falls below an objective standard of reasonableness and is not undertaken for legitimate reasons of trial strategy or tactics. State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998); State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). The deficient performance is prejudicial where there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would

have been different. Strickland, 466 U.S. at 687-88; Saunders, 91 Wn. App. at 578. Because Morfin bases his ineffective assistance claim on counsel's failure to challenge the admission of evidence, he must also show that an objection to the evidence likely would have been sustained. Saunders, 91 Wn. App. at 578 (citing McFarland, 127 Wn.2d at 337, n.4).

1. Counsel's Failure to Object to the Detectives' Inadmissible Opinion Morfin Was the Shooter

A witness must testify based on personal knowledge, and a lay witness may give opinion testimony if it is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or the fact in issue. ER 602, 701; see State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), aff'd, State v. Clark, 129 Wn.2d 211, 916 P.2d 384 (1996). A witness may not offer opinion testimony by a direct statement or by inference regarding the defendant's guilt, but testimony is not necessarily objectionable simply because it embraces an ultimate issue the trier of fact must decide. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

A lay witness may give opinion testimony as to the identity of a person in a surveillance photograph as long as "there is some

basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." State v. George, 150 Wn. App. 110, 206 P.3d 697 (2009) (quoting Hardy, 76 Wn. App. at 190-91) (citations omitted). Opinion testimony identifying individuals in a surveillance photo runs "the risk of invading the province of the jury and unfairly prejudicing [the defendant]." George, 150 Wn. App. at 118 (quoting U.S. v. La Pierre, 998 F.2d 1460, 1465 (9th Cir. 1993)). But opinion testimony may be appropriate when the witness has had sufficient contacts with the person or when the person's appearance before the jury differs from his or her appearance in the photograph. George, 150 Wn. App. at 118 (citing La Pierre, 998 F.2d at 1465).

The circumstances of the detectives' identifications here are similar to those of detective Jeff Rackley's identification in State v. George. Lionel George and Brian Wahsise were convicted inter alia of a robbery that occurred at the Days Inn in Fife. George, 150 Wn. App. at 112-113. While working in the back office at the Days Inn, Karen Phillips heard someone say, "[L]ay down, Shut up. Lay down." George, 150 Wn. App. at 112 (citation to record omitted). Shortly thereafter, Christine Huynh, who had been working the front

desk, came into the office and told Phillips she had just been robbed. Id.

Moments earlier, Huynh had seen what she described as a red Ford Bronco pull up to the hotel entrance and three Hispanic or Native American men enter the lobby. A heavyset man wearing a leather jacket and beanie pointed a gun at her and demanded money. After taking the money, the man directed Huynh to get on the floor and not look up. Meanwhile, the two other men stole a flat screen television from the lobby. George, 150 Wn. App. at 112-13.

After the men left, Huynh saw the vehicle head toward the freeway and called 911. Officer Thomas Gow and Detective Jeff Rackley attempted to stop a dark red van with an obscured plate that was travelling in the wrong lane. Eventually, the van stopped and the officers ordered the occupants out. George got out of the driver's seat, looked at Rackley and ran. Wahsise and another man exited from the sliding passenger door and eventually obeyed the officers' command to get on the ground. George, at 113.

Including the driver, there were 9 people in the van, several of Native American ancestry. Rackley testified that many of the occupants were too intoxicated to get out of the van or walk around.

The officers took the van's occupants into custody. Inside the van, the police located a flat screen television and gun. George, at 113.

George was apprehended shortly after running from the van. Huynh arrived with Rackley and identified George as the person who pointed the gun at her. And Rackley identified George as the person who got out of the driver's seat and ran. George, 150 Wn. App. at 114.

A poor quality surveillance video recorded the Days Inn robbery. The jury viewed the video and 67 still frame images from the video. The court also admitted a video and three photographs from the van arrest scene and booking photographs of Wahsise and George, both listing their height and weight. George, 150 Wn. App. at 115.

At trial, Rackley testified about his interactions with George and Wahsise on the day of their arrest. Rackely saw George at the van and at the hospital. He also identified Wahsise as one of the first two men who got out of the van's passenger sliding door. He watched Wahsise after ordering him to get on the ground and when he met with him in an interview room at the police station. Rackley compared the characteristics of George and Wahsise to the

characteristics of the other van passengers and noted their heights and weights. Id.

Rackely testified that he had viewed the surveillance video "hundreds of times" before trial and identified George as the person standing at the Days Inn counter and Wahsise as one of the two men stealing the television. George, at 115 (citation to record omitted). Although Rackley could not make out facial features in the surveillance video, he identified Wahsise and George "by their build, the way they carry themselves, the way they move, what they were wearing, and then talking to them later ...." Id. at 115-16 (citation to record omitted).

George objected to Rackley's identification on grounds the identity of the individuals depicted in the video was the ultimate issue for the jury to decide. The court overruled the objection, reasoning the jury could decide whether Rackley's testimony was credible and what weight, if any, to give it. Id. at 116.

On appeal, George and Wahsise argued the court erred in allowing Rackley to give his lay opinion testimony about the identity of the men in the Days Inn video, arguing that Rackley was in no better position to identify the men than the jury. Id. at 117. In resolving the issue, Division Two looked to cases where such

identifications had been upheld and noted there had been a personal relationship or close familiarity between the individual identified and the person identifying him. See e.g. Hardy, 76 Wn. App. at 192 (officer identifying Hardy from video of drug transaction had known Hardy for several years and considered him a friend); United States v. Saniti, 604 F.2d 603, 604-05 (9th Cir. 1979) (identification testimony came from roommates); U.S. v. Beck, 418 F.3d 1008, 1014-15 (9th Cir. 2005) (identification testimony came from probation officer); and U.S. v. Towns, 913 F.2d 434, 445 (7th Cir. 1990) (identification testimony came from former girlfriend).

Based on these authorities, the court concluded the trial court abused its discretion in admitting Rackley's identification testimony:

> Here, Rackley observed George as he exited the van and ran away and at the hospital that evening. Rackley observed Wahsise when Wahsise exited the van and was handcuffed and while Wahsise was at the police station in an interview room. Rackley based his surveillance video identifications on each defendant's build, the way they carried themselves, the way they moved, what they were wearing, how they compared to each other, how they compared to the rest of the people in the van, and from speaking with them on the day of the crime. These contacts fall far short of the extensive contacts in Hardy and do not support a finding that the officer knew enough about George and Wahsise to express an opinion that they were the robbers shown on the very poor quality

> video. We hold that the trial court erred in allowing Rackley to express his opinion that George and Wahsise were the robbers shown on the video.

George, 150 Wn. App. at 119.

Just as Rackley's contacts with George and Wahsise fell "far short of the extensive contacts in Hardy," Nebeker and Gregory's contacts likewise fell far short. Like Rackley, the Pasco detectives based their identifications on the defendant's build and clothing. Yet, neither had any type of relationship with Morfin, let alone extensive contacts. While Nebeker testified Morfin once ran away from him eleven years earlier, Nebeker acknowledged he had few face-to-face contacts with Morfin. Moreover, there were stretches of several years where Nebeker had no contact with Morfin whatsoever. He was therefore in no better position to correctly identify him than the fact-finder who could directly observe Morfin and his mannerisms at trial and compare and/or contrast those observations with the shooter depicted on the surveillance video.

Gregory's likeliness to correctly identify Morfin from the video was even less than Nebeker's, as he had no prior contact with Morfin before the night in question. Gregory testified only that he thought he might have seen Morfin before. That is an insufficient contact to make Gregory more likely to correctly identify Morfin than

the fact-finder. Under Division Two's decision in George and the authorities it relied upon, neither detective's lay opinion that the shooter in the video was Morfin was admissible.

Deficient performance is established when defense counsel fails to object to inadmissible evidence. See, State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 72, 758 P.2d 982 (1988) (lack of timely objection to admission of child hearsay statements constitutes deficient performance). Because the detectives' improper testimony was a direct opinion on Morfin's guilt, there was no legitimate tactical or strategic reason not to object to the testimony. Defense counsel's failure to object fell far below an objective standard of reasonableness.

Moreover, the record shows that had an objection been lodged and the relevant authority cited, it likely would have been sustained. Not only does the case law show the detectives' testimony was impermissible, but the court here was concerned by the admission of other opinion testimony. RP 165-66. In fact, the court disregarded the opinion of Pasco police analyst David Reardon that the shooting was gang-related, despite defense counsel's stipulation he qualified as an expert. RP 116, 166. The court found his opinion to be "unduly conclusory to sustain that

particular finding." RP 165. Likewise, had the court been alerted to the relevant authorities and limitations regarding lay opinions identifying persons in video, it would have exercised the same caution with respect to Nebeker and Gregory's opinion testimony.

Counsel's failure to object to the detectives' impermissible opinion testimony prejudiced Morfin's defense. The only issue in the case was identity. The court expressly relied on the detectives' opinion Morfin was the shooter in convicting him of the charged assaults:

> The video itself would not allow an individual who hasn't observed these folks at the scene to make much of it. You can observe the difference in the color of the clothing. You can observe general size and carriage of the individuals, but not much more than that. So the Court has to rely upon the identification of the individuals who observed all the folks present and either give credence or not to their identification.
>
> In this instance the Court does, and finds that there is sufficient proof beyond a reasonable doubt that the defendant was the shooter in this instance.

RP 165.

Without the detectives' impermissible opinion Morfin was the shooter, which they were in no better position to give than the fact-finder, the court may well have had a reasonable doubt about the

shooter's identity. As a result, this Court should reverse Morfin's convictions.

2. Counsel's Failure to Object to the Detective's Inadmissible Testimony Ramirez Confirmed Morfin Was the Shooter

An accused person has both state and federal constitutional rights to confront witnesses. Article I, section 22 guarantees an accused shall have the right . . . to meet the witnesses against him face to face. Wash. Const. art. I, § 22 (Amend. 10); State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87, cert. denied, 75 U.S. 3247 (2006). Likewise, the Sixth Amendment protects the right of the accused to confront the witnesses against him, including those whose testimonial statements are offered through other witnesses. Davis v. Washington, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The essence of the right to confrontation is the right to meaningfully cross-examination one's accusers. Id. at 50, 59. Consequently, unless the speaker is unavailable and the accused had an earlier opportunity to cross-examine, hearsay evidence of a testimonial statement is inadmissible. Id. at 68. This Court reviews

alleged confrontation clause violations de novo. State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

"Hearsay" is any out-of-court statement offered as "evidence to prove the truth of the matter asserted." ER 801(c); ER 802; State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). A statement includes nonverbal conduct intended as an assertion. ER 801(a)(2).

The "core class" of testimonial statements includes those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52.

In Davis, the Court elaborated on what did and did not constitute testimonial statements. Non-testimonial statements may occur in the course of police interrogation when, objectively viewed, the primary purpose of the interrogation is to enable police to meet an ongoing emergency. Davis, 547 U.S. at 822. In contrast, statements are testimonial when, objectively viewed, there is no such ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id., 547 U.S. at 822; accord, State v. Ohlson, 162 Wn.2d 1, 11-12, 168 P.3d 1273 (2007).

Generally speaking, a police officer's testimony may not incorporate the out-of-court statements of an informant or dispatcher. Johnson, 61 Wn. App. at 549; State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). A police officer may describe the context and background of a criminal investigation, but such explanation must not include out-of-court statements. State v. O'Hara, 141 Wn. App. 900, 910, 174 P.3d 114 (2007), reversed on other grounds, 167 Wn.2d 91, 217 P.3d 756 (2009).

The prosecutor elicited from Nebeker that he interviewed Manuel Ramirez, and Ramirez confirmed Nebeker's belief Morfin was the shooter. RP 25, 62. Although Nebeker did not expressly state Ramirez identified Morfin as the shooter, he may as well have. The conclusion Ramirez must have identified Morfin is inescapable. Otherwise, what he said would not have confirmed Nebeker's belief Morfin was the shooter.

State v. Johnson is directly on point. In Johnson, the lieutenant did not testify to the contents of the informant's statement, but the trial court allowed testimony, based on the statement, that he had reason to suspect the appellant was involved in drug trafficking. Division One noted that cases from other jurisdictions have held that a law enforcement officer's

testimony concerning an informant's or eyewitness's statement is inadmissible hearsay even when the officer does not repeat the contents of the statement, but only testifies that the statement led police to investigate or arrest the defendant. See State v. Irving, 114 N.J. 427, 555 A.2d 575 (1989); State v. Hardy, 354 N.W.2d 21, 23 (Minn.1984); Posted v. State, 398 So.2d 851, 854 (Fla.Dist.Ct.App.1981); Favre v. Henderson, 464 F.2d 359 (5th Cir.1972). The Johnson court held that when the inescapable inference from the testimony is that a nontestifying witness has furnished the police with evidence of the defendant's guilt, the testimony is hearsay, notwithstanding that the actual statements made by the nontestifying witness are not repeated. Johnson, 61 Wn.App. at 547. Under Johnson, Nebeker's testimony was hearsay.

The next question is whether the hearsay statements were testimonial. To determine whether statements elicited through police questioning trigger the confrontation clause, the question is whether, objectively considered, the interrogation that took place produced testimonial statements. Davis, 547 U.S. at 826. Under the primary purpose test, courts must objectively appraise the

interrogation to determine whether its primary purpose is to enable police to meet an ongoing emergency. Id. at 822.

At the time of Nebeker's interrogation of Ramirez, there was no ongoing emergency. The record makes clear Nebeker's primary purpose was to strengthen his case against Morfin as the shooter. RP 37-39. In that vein, he used a "ruse" with Ramirez in an effort to get him to positively identify Morfin. RP 37. Thus, the detective's testimony that Ramirez confirmed his belief that Morfin was the shooter was not only objectionable as hearsay, but it was testimonial.

As indicated above, deficient performance is established when defense counsel fails to object to inadmissible evidence. See, Leavitt, 49 Wn. App. at 359 (lack of timely objection to admission of child hearsay statements constitutes deficient performance). Because the detective's testimony recounting the out-of-court identification directly implicated Morfin as the shooter, there was no legitimate tactical or strategic reason not to object to the testimony.

Defense counsel's failure to object fell far below an objective standard of reasonableness. Had defense counsel timely objected on hearsay or confrontation clause grounds, the court likely would

have sustained the objection, based on the aforementioned authorities.

Counsel's failure to object to the detectives' impermissible opinion testimony prejudiced Morfin's defense. As indicated, the only issue in the case was identity. The court expressly relied on Ramirez's out-of-court identification in convicting Morfin:

> Detective Nebeker spoke to Manuel Ramirez Salazar, a witness to the shooting. Mr. Salazar was the person who moved the Mercedes Benz immediately after the shooting to a different location in the Motel 6 parking lot and was familiar with those present at the shooting. He confirmed the shooter as being Ramon Morfin.

CP 32 (finding of fact 2.6). There is a reasonable probability that without Ramirez's identification, the court would have had a reasonable doubt Morfin was the shooter. This Court therefore should reverse Morfin's convictions.

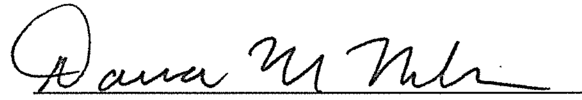
E. CONCLUSION

Morfin's defense was prejudiced by defense counsel's repeatedly ineffective assistance. This Court should reverse his convictions.

Dated this 31st day of August, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

LAW OFFICES OF

NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. NELSON
JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI

State v. Romon Morfin, Jr.

No. 33169-5-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 31st day of August, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Franklin County Prosecutor's Office
appeals@co.franklin.wa.us

Ramon Morfin, Jr.
DOC No. 302052
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

Signed in Seattle, Washington this 31st day of August, 2015.

x