NO. 48138-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS SMITH,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied the appellant's request for a lesser included offense instruction for fourth degree assault.

2. The State failed to establish that a golf club, as used, was a "deadly weapon."

3. The State presented insufficient evidence to prove each element of assault in the second degree beyond a reasonable doubt, depriving the appellant of his Fourteenth Amendment right to due process.

4. The appellant was denied a fair trial when a deputy sheriff testifying on behalf of the state expressed his opinion regarding the credibility of the complaining witness.

5. The deputy prosecutor committed prosecutorial misconduct by eliciting testimony from an officer witness as to the credibility of the state's key witness.

6. The deputy prosecutor committed misconduct during rebuttal argument and thereby denied Mr. Smith a fair trial.

7. The appellant was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the testimony from an officer witness as to the credibility of the state's key witness and where defense counsel failed to object to the State's impermissible shifting of the burden of proof during closing argument.

8. Cumulative error deprived Mr. Smith the due process right to a fair trial he was guaranteed by the Fourteenth Amendment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant Curtis Smith was charged with second degree assault for allegedly committing an assault with a deadly weapon. The alleged deadly weapon was a golf club. Mr. Smith asserted an alibi defense. The complaining witness—Jesse Cubbison—stated that Mr. Smith hit him on the arm with a golf club, breaking his wrist. A doctor who treated him stated that the fracture observed in an x-ray could have been a chronic condition from an earlier, healed fracture Mr. Cubbison had sustained. Was Mr. Smith entitled to a lesser included offense instruction for fourth degree assault when the jury could have found that although the appellant was present and committed an assault, the golf club was not a deadly weapon and therefore Mr. Smith was not guilty of second degree assault? (Assignment of Error 1).

2. Was the golf club used as a deadly weapon under the facts and circumstances of this case? (Assignment of Error 2).

3. The United States and Washington Constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt. To convict Mr. Smith of second degree assault, the State

had to prove he inflicted substantial bodily injury on Mr. Cubbison. Must Mr. Smith's conviction for second degree assault be reversed and dismissed where the evidence did not establish that Mr. Cubbison suffered any impairment or loss of any bodily function, or that his injury was even caused by the incident on the night in question? (Assignment of Error 3).

4. A deputy sheriff testified that the complaining witness—the only witness who testified regarding the identity of the person who hit him with a golf club—stated that the witness was "very forthcoming with the information" and "looked me right in the eye as I asked him specific questions." Was this improper opinion testimony on the credibly of Mr. Smith's sole accuser? (Assignment of Error 4).

5. Did the prosecutor commit reversible error by improperly eliciting opinion testimony from an officer witness as to the credibility of the state's key witness? (Assignments of Error 5 and 6).

6. Where the prosecutor, during rebuttal closing argument, made a "missing witness" argument, was Mr. Smith prejudiced by the state impermissibly shifting the burden of proof onto the defense? (Assignments of Error 5 and 6).

7. Where defense counsel (1) failed to object to improper opinion testimony from an officer witness and (2) where defense counsel

failed to object to the State's impermissible shifting of the burden of proof during closing argument, was appellant prejudiced by ineffective assistance of counsel? (Assignment of Error 7).

8. Even if no single error merits reversal, the cumulative effect of trial errors may render a trial fundamentally unfair under the Fourteenth Amendment. Does cumulative error require reversal of Mr. Smith's conviction? (Assignment of Error 8).

C. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jesse Cubbison lived in a trailer with his aunt and his then-girlfriend Jennifer Phrampus. Report of Proceedings[1] (RP) at 4-5. Tabitha Larson and a male identified as "Rocky" had also lived in the trailer, but Ms. Larson had moved out of the trailer approximately a week prior to the incident, which occurred May 28, 2015. 2RP at 5, 16. Mr. Cubbison stated that there was a dispute over missing property that belonged to Ms. Larson. 2RP at 16, 17. Rocky moved out of the trailer a day before the incident. 2RP at 5.

On May 28, 2015 at approximately 11:30 p.m., Ms. Phrampus heard a noise and saw two people outside the trailer near Mr. Cubbison's pickup truck. 2RP at 6. She went outside and ran down a ramp from the

[1] The Verbatim Report of Proceedings consists of two volumes, designated as follows: 1RP-(8/10/15); (8/17/15);(10/9/15); (10/12/15)(sentencing); and 2RP-(9/9/15)(jury trial).

front door of the trailer and yelled for Mr. Cubbison, who was sleeping. 2RP at 6. Mr. Cubbison went outside and saw a man he identified as Kevin McMahan push Ms. Phrampus to the ground. 2RP at 6, 11. He stated that he had prior conflict with Mr. McMahan, who used to date Ms. Phrampus. 2RP at 7.

Mr. Cubbison stated that he also saw a Toyota minivan parked outside that belonged to Rocky, and saw Rocky and Ms. Larson sitting in the van. 2RP at 7. He said that neither of them got out of the vehicle. 2RP at 17. He testified that he saw a man he identified as Curtis Smith—whom he had known since Mr. Smith was in his late teens or early 20s—breaking the passenger side portion of the front window of his truck with a golf club. 2RP at 8, 12, 14. After he saw Mr. McMahan shoving Ms. Phrampus, Mr. Cubbison said that Mr. McMahan came toward him with an axe handle in a threatening manner. 2RP at 11. Mr. Cubbison went back inside the trailer and Mr. McMahan followed him up the ramp and came five feet into the trailer. 2RP at 11. Mr. Cubbison retrieved a piece of exhaust pipe that was inside the trailer, causing Mr. McMahan to retreat. 2RP at 11. Mr. Cubbison followed him down the ramp and Mr. McMahan came toward him a second time wielding the axe handle. 2RP at 11. Mr. Cubbison said that while on the ramp he slipped and fell onto his back, but was unsure if he hit his head on the ramp handrail or if he

was hit with the axe handle. 2RP at 11. He stated that when he was on his back, the man he identified as Curtis Smith swung the golf club at him and he reached up to block the club. 2RP at 12. Mr. Cubbison claimed that the impact from the club "broke [his] wrist." 2RP at 12. He stated that Mr. McMahan and Mr. Smith then left in the van. 2RP at 12-13.

Mr. Cubbison, who was sometimes employed as commercial fisherman, was treated by Dr. Kevin Mierzejewski following the incident. 2RP at 13, 35. Mr. Cubbison acknowledged that he had preexisting numbness in two of his fingers on his left hand from previous injuries he sustained to his wrist prior to the incident on May 28, and that he had injured or fractured his wrist on previous occasions. 2RP at 19. Mr. Cubbison testified that he continued to work as a car mechanic after the incident. 2RP at 19.

Dr. Mierzejewski treated Mr. Cubbison for an injury described as an abrasion on the dorsal surface of the left wrist accompanied by swelling of the area. 2RP at 36. He stated that his initial impression was that he had a fracture to his radius, but was unable to conclusively to say that the fracture was a fresh break or if it was from a pre-existing injury. Dr. Mierzejewski stated:

> My initial impression on that night was that he had a fracture of his radius, which is the bone . . . You have two bones in your forearm, the radius which is on the outside. And it looked to me that he

> what a fracture of his distal radius[,] so closer to his wrist than his elbow at that night. The official report later determined that that was most likely a chronic type injury.

2RP at 37.

Dr. Mierzejewski stated that he prescribed pain medication for Mr. Cubbison and his arm was placed in a splint, and he was directed to follow up with an orthopedic doctor. 2RP at 39. He stated that his conclusion was that "the x-ray looked like [the fracture to the distal radius] appeared chronic." 2RP at 39. Dr. Mierzejewski explained that if a fracture is chronic it may still appear as a fresh injury in an x-ray. He stated:

> [I]f the x-ray—you know, obviously it there's a big crack in the bone and the person's having pain at that point, then it's—the suspicion is quite high. It doesn't go so much to chronicity of an injury. And so it is possible that you can heal in a different way that looks like a fracture but is—but the age is longer than—than you know, an incident that happened that night.

2RP at 38.

Dr. Mierzejewski reiterated that at the time of treatment he was not completely sure that it was a fracture, and that what he saw was a possible fracture could have been an older, preexisting injury that had healed in way to look like a fracture. 2RP at 41-42. He stated that numbness that Mr. Cubbison experienced in his fingers was an indication of prior injury to his hand or wrist and that the distal radius fracture seen in the x-ray looked like an old healed injury or fracture. 2RP at 41-42.

Mr. Cubbison was given a splint and directed to follow up with an orthopedic doctor within about a week but there was no testimony that he had done so. 2RP at 39.

Grays Harbor County Deputy Sheriff Brian Rydman was dispatched following the report of the fight at the Wildwood Trailer Park in Ocosta, Washington, which is located near Aberdeen. 2RP at 53. He interviewed several people at the scene, including Mr. Cubbison. When questioned at trial, the prosecutor asked the deputy about his interview of Mr. Cubbison:

> Q: And during that statement, you indicated you have training and almost 25 years of experience in taking statements from people and making observations. Describe for us what you observed about Mr. Cubbison outwardly while he was giving the statement to you.
>
> A: Well, he was very forthcoming with the information. He—you know, he was very coherent about what had happened. He was able to answer my questions. He didn't hesitate as far as . . . Sometimes if people don't want to become quite forthright with their information, they'll tend to kind of talk in circles. He was able to answer the questions. he looked me right in the eye as I asked specific questions of him.
>
> Q: Okay.
>
> A: So . . . [h]e didn't seem to hold anything—anything back.

2RP at 56-57.

Jayne Peterson has been friends with Mr. Smith for approximately 18 years. 2RP at 70. She moved into a large house in April, 2015, and

Mr. Smith and his girlfriend Karissa Steuermann were helping her fix up the house by having a "painting party." 2RP at 70-71. The painting party took place during an approximately 48 hour period on May 27 and May 28, 2015. 2RP at 72-73, 77-78. Mr. Smith and Ms. Steuermann were staying in a motor home parked near Ms. Peterson's new house. 2RP at 77, 80.

Mr. Smith's witnesses stated that he was at the painting party the whole time and did not leave, and that he could not have been at Mr. Cubbison's trailer at the time of the incident. Ms. Peterson stated that Mr. Smith was with her at her house during that time, together with his girlfriend Ms. Steuermann and another man named Norm Mussetter. 2RP at 72-73, 76.

Ms. Steuermann stated that she and Mr. Smith were at a two day painting party at Ms. Peterson's house in Grayland on May 28, 2015, and that Mr. Smith was with her during the entire time and did not go to Mr. Cubbison's residence in Ocosta during that time. 2RP at 81-82. The prosecutor asked—without defense objection—why she did not "come forward" with the information that he was with her in Grayland the night of May 28. 2RP at 83.

Ms. Peterson suspected that Mr. Cubbison was exaggerating his injuries. 2RP at 73. She said that she saw him on a daily or near-daily

basis following the incident and that she did not see him wear a splint on his wrist except one occasion when she saw him at the courthouse. 2RP at 74. She stated that when he was at the courthouse he "had a splint thing on his wrist," but later the same day when she left the building and was waiting outside she saw him leave the building and noticed that he was not wearing the splint. 2RP at 74. Ms. Peterson also stated that she saw him "scrapping" a vehicle and chopping wood after the incident and he did not appear to be in pain. 2RP at 74. "There was nothing wrong with him," she stated. 2RP at 74.

Mr. Smith was charged by the Grays Harbor County Prosecutor's Office by information with assault in the second degree and third degree malicious mischief. The state alleged that Mr. Smith was armed with "a deadly weapon, to wit: a golf club" at the time of the assault. Clerk's Papers (CP) 1-3; RCW 9A.36.021(1)(a) and (c); Appendix A.

The matter came on for jury trial on September 9, 2015, the Honorable David Edwards presiding. 2RP at 3-127. The jury found Mr. Smith guilty of second degree assault as charged.

Mr. Smith's counsel proposed and argued in favor of a lesser included offense instruction for fourth degree assault. CP 58; 2RP 88. Defense counsel argued that whether the golf club was a deadly weapon was a disputed issue:

> [t]he doctor, who indicated that he wasn't—he wasn't able to say for certain that this was—that this fracture was caused by this incident, that it could have been an old healed fracture that he saw and observed as being—as being the fracture for this one. Also, the other testimony of Mr. Cubbison indicating that he was still working, that it wasn't a prolonged time period that this injury took place. The other testimony from the other people as well indicating that they hadn't seen him after this incident with a splint or any sort of bandages or anything on the wound..

2RP at 88.

The trial court denied the requested instruction, finding that it was uncontroverted that Mr. Cubbison was attacked with a golf club and that he said his arm was fractured, and that the court did not see "under that scenario, a jury could conclude that Mr. Smith could be guilty of Fourth Degree Assault." 2RP at 89-90.

The jury acquitted Mr. Smith of malicious mischief, but found him guilty of second degree assault. 2RP at 124-25; CP 68, 69.

Mr. Smith had an offender score of "9" and a standard range of 63 to 84 months. 1RP (10/12/15) at 6, 7. The defense recommended a sentence of 63 months. CP 80. The State argued in its sentencing memorandum for 84 months. CP 72-78. The court imposed a standard range sentence of 84 months. RP (10/12/15) at 9; CP 87.

Timely notice of appeal was filed October 12, 2015. CP 98. This appeal follows

D. ARGUMENT

1. MR. SMITH WAS ENTITLED TO A LESSER INCLUDED OFFENSE INSTRUCTION FOR FOURTH DEGREE ASSAULT.

Mr. Smith asserted an alibi defense; Jayne Peterson stated that he was at her new house for an around-the-clock painting party on May 27 and 28, 2015. 2RP at 73. Mr. Cubbison testified, on the other hand, that Mr. Smith and three other people came to his residence between 11:00 p.m. and midnight on May 28, 2015 and Mr. Smith assaulted him with a golf club. 2RP at 12. The facts presented in the case could allow a jury to find the club that Mr. Smith is alleged to have used to hit him was not a deadly weapon. Accordingly, defense counsel requested a lesser included offense instruction for fourth degree assault. CP 56-59. The trial court refused to give the instructions, however, finding that the State's evidence showed that the assault was committed by using a golf club, and therefore "[h]ow can that be anything other than Second Degree Assault?" 2RP at 89. The court's ruling constitutes error that requires reversal of the conviction.

The right to have a lesser included offense instruction presented to the jury is statutory. *State v. Berlin,* 133 Wn.2d 541, 544-45, 947 P.2d 700 (1997). The pertinent statute provides, "[i]n all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that which he is charged in the indictment or information." RCW

10.61.006. The right to have a lesser included offense instruction presented to the jury is also part and parcel of the right of the accused to have the jury instructed on his theory of the case. *State v. Warden,* 133 Wn.2d 559, 564, 947 P.2d 708 (1997); *Berlin*, 133 Wn.2d at 546, 548.

Either party is entitled to request a lesser included offense instruction. *State v. Tamalini,* 134 Wn.2d 725, 728, 953 P.2d 450 (1998). A two-part test is used to determine when such an instruction is warranted: "First, each of the elements of the lesser offense must be a necessary element of the offense charged [legal prong]. Second, the evidence . . . must support an inference that the lesser crime was committed [factual prong]." *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The analysis under *Workman* "is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute." *Berlin* , 133 Wn.2d at 548; *State v. Lyon*, 96 Wn. App. 447, 450-51, 979 P.2d 926 (1999).

The various assault statutes proscribe but one offense, namely, assault. *State v. Garcia*, 146 Wn. App. 821, 193 P.3d 181, 185 (2008), review denied, 166 Wn.2d 1009, 208 P.3d 1125 (2009). Mr. Smith was charged with second degree assault under RCW 9A.36.021(1)(a) and (c). CP 1. RCW 9A.36.021(1)(c) provides:

> A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: ...
>
> (c) Assaults another with a deadly weapon; . . ..

RCW 9A.36.021(1)(c); Appendix A.

Assault is divided into degrees ranging from the most serious, first-degree assault (a class A felony) to fourth-degree assault (a gross misdemeanor). CP 1-2; RCW 9A.36.011; RCW 9A.36.021; RCW 9A.36.031; RCW 9A.36.041. Fourth-degree assault is a lesser degree of second-degree assault.

> The fourth degree assault statute provides:
> (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.
> (2) Assault in the fourth degree is a gross misdemeanor.

RCW 9A.36.041; Appendix A.

The instruction defining assault provided to the jury states:

> An assault is an intentional touching or striking of another person that is harmful or offense regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

CP 64 (Instruction 8).

Mr. Smith's request for a fourth degree assault instruction met the "legal" prong of the *Workman* test. The only difference between a fourth degree assault and a second degree assault "as charged and prosecuted," was the additional element of a deadly weapon for the second degree assault. Therefore, every element of the lesser offense, fourth degree assault, is a necessary element of the greater offense, second degree assault. This satisfies the "legal" prong of *Workman*.

The defense request for a fourth degree assault instruction also

met the "factual" prong of *Workman*. The factual component is satisfied when the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (citing *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). In other words, instructions should be given when evidence raises an inference that the lesser offense was committed to the exclusion of the charged offense. In determining whether the "factual" prong is met, "some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense." *State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993). The evidence must be assessed under the "factual" prong in the light most favorable to the party requesting the instruction. *State v. Cole*, 74 Wn. App. 571, 578-80, 874 P.2d 878, *rev. denied*, 125 Wn.2d 1012 (1994); *State v. Bergeson*, 64 Wn. App. 366, 367, 824 P.2d 515 (1992); *State v. Hanson*, 59 Wn. App. 651, 656 & n.6, 800 P.2d 1124 (1990). In addition, instruction on fourth degree assault is proper when the record supports "an inference that the assault was only committed with a non-deadly weapon." *State v. Winings*, 125 Wn. App. 75, 87, 107 P.3d 141 (2005).

The defense satisfied the "factual" prong because there was affirmative evidence that Mr. Smith only committed a fourth degree assault. Specifically, given the instruction and evidence at trial, the jury could have reasonably concluded that, under the circumstances, Mr. Cubbison did not sustain substantial bodily harm, or could have concluded that the golf club was not readily capable of causing death or substantial bodily injury.

Instruction 10, which defined "deadly weapon" for purposes of the second degree assault charge, provides:

> Deadly weapon means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 65.

Substantial bodily harm means a temporary but substantial disfigurement or impaired function of a body part. RCW 9A.04.110. The statutory definition creates two categories of deadly weapons. *Winings*, 125 Wn. App. at 87. Firearms and explosives are deadly weapons per se. *Id.* Other objects are deadly weapons only if they are capable of causing death or substantial bodily harm under the circumstances in which they are used. *Id.* The circumstances of use include intent, present ability of use, degree of force, part of the body to which it was applied, and the physical injuries inflicted. *Id.* at 88 (citing *State v. Shilling*, 77 Wn. App. 166, 171, 889 P.2d 948 (1995)).

On the basis of the testimony presented, there is a reasonable probability the jury would have inferred the appellant committed only fourth-degree assault.

Based on the testimony of Dr. Mierzejewski and Ms. Peterson, the jury could have concluded that Mr. Cubbison did not suffer substantial bodily injury. Dr. Mierzejewski testified that although his initial impression after treating Mr. Cubbison on May 28 was that he

sustained a fractured radius, he testified that the "official report later determined that was most likely a chronic type injury." 2RP at 37. He stated that there was no additional testing to contradict that assessment. 2RP at 39. Dr. Mierzejewski stated that Mr. Cubbison had an abrasion on the dorsal surface of his wrist and "a little bit of swelling to the area." 2RP at 36. The record does not show that Mr. Cubbison sought follow up treatment as was recommended or that he was unable to use the arm subsequently. He testified that he had broken or injured his left arm in the past and that he had preexisting numbness in two fingers as a result of the previous injuries. 2RP at 19.

Ms. Peterson stated that she saw him at the courthouse with a splint on his wrist, but that after she left the building she saw him exit the courthouse without the splint. 2RP at 74. Other than that occasion, she did not see him wearing a splint, and he did not appear to be in pain when she saw him. 2RP at 74. She said that she saw him "scrapping" a car and also saw him chopping wood and "[t]here was nothing wrong with him." 2RP at 74.

Regarding the "deadly weapon" alternative charged under RCW 9A.36.021(1)(c), the jury could conclude that under the circumstances in which Mr. Smith is alleged to have used the golf club, it was not readily capable of causing death or substantial bodily injury. The jury could

conclude that the club was not a deadly weapon for purposes of second degree assault. Applying the factors from *Shilling*, the club was not used as a deadly weapon. Regarding the intent of the assailant, there was no testimony regarding the intent of the assault alleged; the possible intent of going to the trailer was mentioned in only the most vague manner and centered around property belonging to Tabitha Larson that was alleged to be missing. 2RP at 16. There was no evidence regarding the degree of force Mr. Smith was alleged to have used. Under the circumstances, the jury could therefore conclude that the state failed to meet its burden of proving beyond a reasonable doubt that the club was a deadly weapon.

It was error for the trial court to refuse to instruct the jury on fourth degree assault as a lesser included offense. Fourth degree assault was legally included in the second degree offense charge and the evidence affirmatively supported an inference that only the lesser offense was committed. Therefore, this Court should reverse the conviction for second degree assault. *Warden*, 133 Wn.2d at 564-65.

2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. SMITH OF ASSAULT IN THE SECOND DEGREE.

a. The State bears the burden of proving all essential elements of an offense beyond a reasonable doubt.

Due process under the Fourteenth Amendment of the United States Constitution requires the state to prove all necessary facts of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the state, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. *State v. Chapin*, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State failed to prove Mr. Smith inflicted substantial bodily harm.

In Jury Instruction 9, substantial bodily harm was defined as follows:

> "Substantial bodily harm" means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

CP 65, (Instruction 9).

Even in the light most favorable to the state, the evidence fails to establish that Mr. Cubbison suffered substantial bodily harm caused by this incident. "'Substantial' as used in RCW 9A.36.021(1)(a), signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." *State v. McKague,* 172 Wn.2d 802, 262, P.3d 1225 (2011).

Mr. Cubbison testified that Mr. Smith swung a golf club at him and he blocked it with his arm, breaking his wrist. 2RP at 12. He admitted, however, that he had had broken, injured, or fractured his left arm in the past, although "not in the same place," and that he had chronic numbness in two fingers prior to the incident. 2RP at 18-19. Dr. Mierzejewski testified that the facture he observed to the radius ulna "was most likely a chronic type injury," and that he did not know of additional testing to contradict that diagnosis. 2RP at 37, 39. He prescribed pain medication and his wrist was put in a splint, and he was instructed to follow up own an orthopedic surgeon. 2RP at 39. No evidence was presented that Mr. Cubbison followed up treatment by seeing an orthopedic surgeon as directed by Dr. Mierzejewski. Ms. Peterson testified that she did not see Mr. Cubbison wearing the splint after the incident except when she saw him at the courthouse. 2RP at 74.

Based on his history of pre-existing injuries and failure to seek medical treatment after the incident, it is impossible to determine whether the proximate cause of the fracture suffered by Mr. Cubbison was the incident on May 28 or suffered in the years he spent as a mechanic and commercial fisherman.

Taken in a light most favorable to the state, the evidence proved that Mr. Smith participated in an assault on Mr. Cubbison. The state did not establish, however, that Mr. Cubbison suffered substantial bodily harm. By entering a conviction in the absence of proof beyond a reasonable doubt of each element, the trial court violated Mr. Smith's Fourteenth Amendment right to due process.

c. The prosecution's failure to prove all essential elements requires reversal.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Jackson,* 443 U.S. at 319; *Green*, 94 Wn.2d at 221.

The Fifth Amendment's Double Jeopardy Clause bars retrial of a case such as this, where the state fails to prove an essential element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Because the State failed to prove the element that Mr. Cubbison inflicted

substantial bodily harm, in conjunction with the argument presented in Section 1, *supra*, the Court must reverse the conviction. *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 995).

3. DEPUTY RYDMAN'S OPINION TESTIMONY OF MR. CUBBISON'S CREDIBILTY DENIED MR. SMITH A FAIR TRIAL

Defense counsel failed to object to the opinion testimony of Deputy Sheriff Rydman regarding the credibility of the sole witness who claimed that Mr. Smith was present at his trailer the night of May 28.

The deputy's testimony, set forth below, was manifest constitutional error that Mr. Smith may raise for the first time on appeal. In the alternative, defense counsel was prejudicially ineffective for failing to object to the testimony. In either event, this Court should reverse Mr. Smith's conviction.

a. Defense counsel failed to object when the state elicited inadmissible opinion from Deputy Rydman regarding Mr. Cubbison's credibility.

Mr. Smith's counsel failed to object to the deputy sheriff's testimony opining that Mr. Cubbison was "very forthcoming" and made eye contact with him as he asked specific questions. Deputy Rydman testified when asked about taking Mr. Cubbison's statement:

> Q: And during that statement, you indicated that you have training and almost 25 years of experience in taking statements from people and making observations. Describe for us what you observed about Mr. Cubbison outwardly while he was giving the statement to you?

A: Well, he was very forthcoming with the information. He—you know, he was very coherent about what had happened. He was able to answer my questions. He didn't hesitate as far as . . . Sometimes if people don't want to become quite forthright with their information, they'll tend to kind of talk in circles. He was able to answer the questions. he looked me right in the eye as I asked specific questions of him.

2RP at 56-57.

b. Admission of the foregoing testimony was manifest constitutional error that Mr. Smith may raise for the first time on appeal.

The role of the jury is to be held "inviolate." Wash. Const. art. I, §§ 21, 22. The jury's fact-finding role is essential to the constitutional right to trial by a jury of one's peers. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). In general, a witness may not offer opinion testimony regarding the guilt or veracity of the defendant. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); see also *State v. Rafay*, 168 Wn. App. 734, 805, 285 P.3d 83 (2012). "Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." Id. (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." Id.; see also Wash. Const. art. I, § 22; U.S. Const. amend. VI.

That protection applies to opinion testimony regarding the credibility of

the other witnesses as well. Opinion testimony regarding the accused person's guilt or the credibility of a witness violates the right to trial by jury and the due process right to a fair trial. U.S. Const. amends VI, XIV; art I, § 21;*State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) aff'd on other grounds, 165 Wn.2d 870, 205 P.3d 916 (2009).

"To determine whether a statement constitutes improper opinion testimony, a court considers the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." *Rafay*, 168 Wn. App. at 805-06 (citing *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); see also *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). "Testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a special aura of reliability." *Kirkman,* 159 Wn.2d at 928-29 (citing *Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001); see also *State v. Notaro*, 161 Wn. App. 654, 661, 255 P.3d 774 (2011). However, "testimony that is based on inferences from the evidence, does not comment directly on the defendant's guilt or on the veracity of a witness, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt." *Rafay,* 168 Wn. App. at 806.

In this case, the deputy's opinion testimony was similar to that offered in *State v. Saunders*, 120 Wn. App. 800, 812, 86 P.3d 232 2004) in

which a police officer testified Saunders' answers to questions "weren't always truthful." The *Saunders* court applied the test from *State v. Demery* and considered the totality of the circumstances including (1) the type of witness, (2) the nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Saunders*, 120 Wn. App. at 812-13 (citing *Demery*, 144 Wn.2d at 765). In concluding the testimony was an improper opinion, the Court noted police witnesses have an "aura of reliability," the testimony dealt directly with the defendant's credibility, and the charges were very serious. *Saunders*, 120 Wn. App. at 813.

Mr. Cubbison's testimony was critical to the state's case as he was the sole person to claim that Mr. Smith was present at his residence and that it was Mr. Smith who hit him.

The other *Demery* factors also show the deputy's testimony was improper. In *Saunders*, the impermissible opinion unfairly undermined the defendant's alibi; here, opinion testimony that Mr. Cubbison was "very forthcoming," as opposed to people he had interviewed in his 25 years of experience who "tend to kind of talk in circles" if they don't want to be honest,[2] undermined the alibi defense that he was at the painting party.

As in *Saunders*, the charge here is very serious; Mr. Smith faced his

[2] 2RP at 56-57

second "strike" offense, had a high "offender score" due to previous convictions, and faced a standard range of a minimum of 63 months in prison. Moreover, the evidence against Mr. Smith consisted almost entirely of Mr. Cubbison's testimony. Therefore, the credibility of the witness was the single most critical aspect of the state's case.

As in *Saunders*, the *Demery* factors show this testimony was impermissible opinion on the credibility of another witness. The improper opinion testimony is preserved for review despite defense counsel's failure to object. Improper opinion testimony may be manifest constitutional error that can be raised for the first time on appeal. *Saunders*, 120 Wn. App. at 811, 813 (citing *Demery*, 144 Wn.2d at 759); RAP 2.5(a). *Saunders* held the officer's statement "was improper opinion testimony, and that the admission of this evidence was constitutional error." *Saunders*, 120 Wn. App. at 813. The error here was likewise constitutional.

Manifest constitutional error occurs when the error causes actual prejudice or has "practical and identifiable consequences." *Montgomery*, 163 Wn.2d at 595. The Court noted "would not hesitate to find actual prejudice and manifest constitutional error" if there were indications the opinions influenced the jury's verdict. *Id.* at 596 n. 9

This Court should therefore find this was manifest constitutional error and apply a constitutional harmless error test. See *State v. King*, 167

Wn.2d 324, 333 n. 2, 219 P.3d 642 (2009) (reversing on other grounds but stating that if a claim is truly constitutional, the court should examine the effect the error had on the defendant's trial according to the constitutional harmless error standard).

Constitutional error is presumed prejudicial, and the state bears the burden of proving it was harmless. *Saunders*, 120 Wn. App. at 813 (citing *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985)). The state cannot meet its burden in the present case. While this case and *Saunders* are similar in some respects, they diverge at the harmless error analysis. The Court affirmed Saunders's conviction because overwhelming untainted evidence supported the verdict. *Saunders,* 120 Wn. App. at 813. Also, the Court found only one instance of improper opinion testimony in that case. *Id.* at 811-13. Here, there is a paucity of evidence that Mr. Smith was at the trailer. There is no physical or forensic evidence and no recording made to support the state's contention. There is no eyewitness testimony placing Mr. Smith as the assailant other than Mr. Cubbison. 2RP at 27. Therefore, the damaging effect of the deputy's testimony vouching for the state's key witness cannot be overstated.

4. PROSECUTORIAL MISCONDUCT DENIED MR. SMITH A FAIR TRIAL

The state and federal constitutions guarantee an accused the right to a fair trial. U.S. Const. amend. 6, 14; Const. art. 1, §§ 3, 22.

Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial." *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Where there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict, the accused is deprived of a fair trial. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); *State v. Reed*, 102 Wn.2d 140, 145, 684 P. 2d 699 (1984).

a. The Prosecutor's rebuttal argument improperly shifted the burden of proof.

The state bears the burden of proving each element of its case beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. at 364. The prosecutor cannot make arguments that shift the state's this burden to the defense. *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990), cert. denied, 499 U.S. 948 (1991).

A defendant has no duty to call a witness, and the absence of that duty is a "corollary of the State's burden to prove each element of the crime charged beyond a reasonable doubt." *State v. Contreras,* 57 Wn. App. 471, 788 P.2d 1114, *review denied,* 115 Wn.2d 1014 (1990). This burden of proof is enshrined in the federal and state constitutions. *See In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Hanna,* 123 Wn.2d 704, 710, 871 P.2d 135 (1994), reversed on other grounds on petition for writ of *habeus corpus* sub nom *Hanna v.*

Riveland, 87 F.3d 1034 (9th Circ. 1996); 14th Amend.; Art. 1, § 3.

Indeed, it is misconduct for a prosecutor to argue that a defendant has a duty to present exculpatory evidence, as this shifts the prosecution's burden to prove its case onto the defendant---to disprove it. See *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990), review denied, 15 Wn.2d 1029, cert. denied, 499 U.S. 948 (1991).

There is a very limited exception which applies only in certain circumstances, called the "missing witness" inference. See *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). Under that exception, where a party fails to call a witness who is "peculiarly available" to that party and whose testimony the party would naturally and necessarily present as an important part of their case, an inference may be drawn that the party failed to call the witness because the testimony would in fact not be favorable. See *State v. Blair*, 117 Wn.2d 479, 489, 816 P.2d 718 (1991).

Although proper use of the "missing witness" inference does not amount to a per se impermissible burden shift, there can be such a shift where the inference does not apply. *Blair*, 117 Wn.2d at 488-89. Thus, in criminal cases, reviewing courts should strictly construe the inference and carefully scrutinize any comment allegedly made under the inference, because of the important constitutional rights involved if the inference does

not apply.

In this case, the trial court held that the missing witness inference did not apply. 2RP at 92. The court stated:

> I just don't believe that any of the people who didn't show up here today were uniquely within the control of either of you. I think you're—I think both of you were dealing with people who you can't count on to deliver the mail on time. Okay? So the fact that they're not here today should be no surprise to anybody. And I wouldn't fault either of you for a witness not being here today given what I now know about the people that were involved in this incident. So I don't think a missing witness instruction is appropriate.

2RP at 91-92.

The defense has no duty to present evidence and a prosecutor may not imply that the defense has a duty to present exculpatory evidence. *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209 (1991), rev. denied, 118 Wn.2d 1007 (1991). Where a prosecutor's argument is flagrant and ill-intentioned and could not be remedied by a curative instruction, no objection is required to preserve the error for appeal. Where reviewing courts have repeatedly announced that a certain type of comment constitutes misconduct, a prosecutor making such a comment may be deemed to have acted flagrantly and with ill intent. *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

Here, the defense offered testimony that Mr. Smith was at an

around-the-clock, two day painting party at Ms. Peterson's house. 2RP at 71-72, 75-78. Among the people named who were painting Ms. Peterson's house during this period were Mr. Smith and his girlfriend Ms. Steuermann, and Norm Mussetter. 2RP at 78.

As defense counsel argued, there was a lack of evidence supporting Mr. Cubbison's contention that Mr. Smith was at his trailer on May 28. In response, the prosecutor improperly shifted the burden to the defense, suggesting that Ms. Peterson and Ms. Steuermann should have "come forward" prior to trial and that the defense should have called Mr. Mussetter as a witness. 2RP at 83.

The state asked Ms. Steuermann:

> Q: And so when you heard that your boyfriend of three years was being accused of this, is it accurate that you chose not to come forward and say that he was with you?
>
> A: when did I choose–
>
> Q: Did you ever do that?
>
> A: No, I did not.

2RP at 83.

The state also asked both Ms. Peterson and Ms. Steuermann if they knew Mr. Mussetter. 2RP at 83.

During closing, the state implied Mr. Smith's witnesses had a duty to tell law enforcement about Mr. Smith's location on May 28. The state

argued: "Ms. Steuermann testified that despite the fact that she has been dating Mr. Smith for three years and apparently had an explanation for where her boyfriend was, she told no one. She didn't come tell law enforcement. She said nothing." 2RP at 111.

In rebuttal, the state then implied that the defense should have produced Mr. Mussetter at trial:

> [Deputy Rydman] found Mr. Mussetter, whose name you heard mentioned as being one of the people at Ms. Peterson's house. But he found him at a location that was not one of the ones that had been given to him to check.
>
> Ask yourself, "Why did they not come forward? Why. . . Did they have any reasons that they didn't want to contacted earlier?

2RP at 122.

The constitutionally impermissible problem with this argument is that it shifted the burden to the defense to explain the state's failure to produce evidence. Such burden-shifting is misconduct; the only conclusion is that the misconduct was flagrant and ill- intentioned in this close case. Because the evidence of Mr. Smith's identity and participation was far from overwhelming, this Court should reverse.

b. As the court ruled, the State was not entitled to the missing witness inference.

The prejudice here is that the jury could have heard the prosecutor's rebuttal as a variation of a "missing witness" argument, which

the court disallowed. 2RP at 92. The prosecutor suggested that Mr. Mussetter should have been produced to testify and confirm Mr. Smith's alibi. This constituted was flagrant misconduct because under no view of the record could the state be entitled to argue the missing witness inference.

This Court should reverse and remand for a new trial because it was prejudicial misconduct in violation of Mr. Smith's due process rights were when the prosecutor argues that the defendant somehow failed in his burden of proof and thus his denials of guilt should not be believed.

As a threshold matter, there is no question that the trial court correctly found that the inference did not apply. A witness is not "peculiarly available" to a party just because they are friends or know each other really well. See, *State v. David*, 118 Wn. App. 61, 67, 74 P.3d 686 (2003), remanded on other grounds, 154 Wn.2d 1032, 119 P.2d 852 (2005), on remand, 130 Wn. App. 232, 122 P.3d 764 (2005), remanded on other grounds, 160 Wn.2d 1001, 156 P.3d 903 (2007), on remand, 140 Wn. App. 1018, 2007 WL 2411693 (2007).

In addition, the inference is not available if the testimony of the witness would be cumulative or not relevant to important parts of the case. *State vs. Blair*, 117 Wn.2d at 489. Here, the testimony would presumably be that he attended the paint party and Mr. Smith was there—

which is merely cumulative of Ms. Peterson's and Ms. Steuermann's testimony. Thus, the prosecution—the proponent of the inference—could not have established that the testimony would have been anything other than cumulative to support Mr. Smith's alibi defense. Here, the prosecutor's argument boiled down to the inference that the jury should not believe Mr. Smith's version of events, because if he was telling the truth, he would have presented Mr. Mussetter as a witness, and his friends would have "come forward" to the police prior to trial to tell them that Mr. Smith was with them at the painting party. The obvious inference was that he was lying about not being at the trailer park and not being guilty, because he failed to present testimony from a third witness who could have corroborated his alibi.

Thus, the prosecutor used Mr. Smith's failure to present evidence as "evidence" that he lacked credibility in denying his guilt. See, *e.g., Thomas v. United States*, 447 A.2d 52, 58 (D.C. 1982) (missing witness inference essentially "creates evidence from non-evidence" at the risk that the jury will give undue weight to that "evidence").

In this case, the Court should reverse and remand for a new trial. Where, as here, the error involves the prosecution's shifting a burden of proof to the defendant to provide evidence to disprove the state's case, it involves a violation of the constitutional rights to due process . Under the

constitutional harmless error test, this Court must presumptively reverse for such error unless and until the prosecution meets the very heavy burden of proving that the error was "harmless." *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The constitutional harmless error test requires proof that every reasonable jury would necessarily have convicted even absent the error - in other words, evidence so "overwhelming" that it was impossible to conceive that anyone could have possibly had a doubt about guilt and thus failed to convict. See *State v. Evans,* 96 Wn.2d 1, 7, 633 P.2d (1981). This evidence is more than the minimum required for a sufficiency challenge.

In State v. Romero, 113 Wn. App. 779, 786, 54 P.2d 1317 (1993),the defendant was charged with having unlawful possession of a firearm after shots were heard being fired near a trailer home in a mobile home park. *Romero*, 113 Wn. App. at 784. Romero was seen near the home, ran from officers, was found near a shotgun and some shell casings, looked like description of the man, and was identified by an eyewitness who was relatively sure of the identification. *Romero*, 113 Wn. App. at 784. The Court upheld the conviction against a sufficiency challenge, finding the evidence ample to meet that test. *Id.*

But the same evidence was not sufficient when weighed in light of a prosecutor drawing a negative inference from the defendant's exercise of his right to remain silent. 113 Wn. App. at 795-96. Because *Romero* had denied guilt and disputed the evidence, the Court held that the jury was faced with questions of credibility which could have been affected by the

error. *Id.* In short, there was no way to say beyond a reasonable doubt that the jury would necessarily have convicted if the inference had not been drawn, because the jurors could well have evaluated credibility differently. *Id.* As a result, the Court held, the constitutional harmless error test was not met.

The harmless error test is not met in this case. The evidence against Mr. Smith is even weaker than that in *Romero*. Aside from Mr. Cubbison's word, there was nothing proving that it was Mr. Smith and not some other person at the trailer court. James Bolin—the trailer park manager—testified that he could not see faces other than to say that one was wearing a hoodie and that "the other two" were "silhouettes." 2RP at 27. Had the jury not heard the improper argument that it should find Mr. Smith less credible and thus convict because he failed to present evidence, it could easily have had questions about the credibility of Mr. Cubbison.

The prosecution cannot meet the heavy burden of proving that this error is constitutionally harmless beyond a reasonable doubt. Moreover, the record shows the missing witness inference was unavailable to the state and properly denied by the trial court. The prosecutor therefore engaged in misconduct by arguing that inference. Where the state's case was weak and the defense presented a reasonable alibi defense, there is a substantial likelihood the misconduct affected the jury's verdict. Accordingly, this Court should reverse should reverse and remand for a new trial.

5. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE

FOREGOING OPINION TESTIMONY AND FAILURE TO OBJECT TO THE PROSECUTION'S BURDEN-SHIFTING ARGUMENT VIOLATED MR. SMITH'S RIGHT TO EFFECTIVE REPRESENTATION

a. Mr. Smith is entitled to effective assistance of counsel.

Both the federal and state constitution's guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn,* 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland v. Washington,* 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), *cert. denied,* 510 U.S. 944 (1993). The right to counsel means the right to the effective assistance of counsel. *State v. Riley,* 122 Wn.2d 772, 780, 863 P.2d 554 (1993) citing *Strickland v. Washington,* 466 U.S. at 686. A defendant has not had effective assistance of counsel when the performance of counsel was deficient and the deficient performance prejudiced the defendant. *Riley,* 122 Wn.2d at 780.

To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v.*

Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas,* 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland,* 466 U.S. at 693; *Thomas,* 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland,* 466 U.S. at 694; *Thomas,* 109 Wn.2d at 226.

Counsel's legitimate strategy or tactics do not constitute ineffective assistance unless, those tactics would be considered incompetent by lawyers of ordinary training and skill in the criminal law." *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

b. Counsel failed to object when the state elicited improper opinion testimony from Deputy Rydman regarding Mr. Cubbison's credibility

Counsel's failure to object was objectively unreasonable in light of the defense theory, which was an alibi defense, which necessarily hinged on Mr. Cubbison's credibility. Therefore, there was no strategic reason to allow the deputy to express his opinion that the state's key witness was "forthcoming" and open when he asserted that Mr. Smith was the person who hit him with a golf club. See *Thomas*, 109 Wn.2d at 228 (counsel's failure to take steps consistent with defense theory of the case deemed deficient).

To show prejudice, Mr. Smith need not show counsel's deficient performance more likely than not altered the outcome of the proceeding. *Id.* at 226. Rather, he need only show a reasonable probability that the outcome would have been different but for the mistake, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." *In re Fleming*, 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (quoting *Strickland*, 466 U.S. 668).

Any objection or motion to strike was likely to have been granted, as the testimony was demonstrably inadmissible opinion evidence. Moreover, the deputy's testimony damaged Mr. Smith's defense beyond repair. Defense counsel's failure to shield Mr. Smith from the prejudice of such inadmissible testimony undermined his defense and denied him a fair

trial.

a. Defense counsel's failure to object to improper opinion evidence and burden-shifting argument denied Mr. Smith effective assistance of counsel.

Where the prosecutor during the State's rebuttal makes an improper argument, defense counsel's failure to object may be deemed a waiver. The reviewing court must determine whether the improper remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that cannot be removed by a curative instruction. *State v. Gregory*, 158 Wn.2d 795, 147 P.3d 1201, 1244 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998)).

The prosecutor attempted to shift the burden of proof by asking the jury to consider the absence of evidence from the defense by failing to have Mr. Mussetter testify and because Ms. Peterson and Ms. Steuermann did not "come forward." 2RP at 122. The prosecutor argued that Deputy Rydman had been able to find Mr. Mussetter, one of the people who was at the painting party:

> He found Mr. Mussetter, whose name you heard mentioned as being one of the people at Ms. Peterson's house. But he found him at a location that was not one of the ones of the ones that had been given to him to check.
> Ask yourself: "Why did they not come forward? Why . . Did they have any reason that they didn't want to be contacted earlier?

2RP at 122.

There was no tactical reason for counsel to waive objection to this improper argument. Counsel's failure to object in light of the prosecutor's misconduct in closing argument was objectively unreasonable.

As argued above, there is a substantial likelihood the jury found Mr. Smith guilty based on bolstering of the credibility of the state's key witness by the deputy's testimony. The prejudice from counsel's failure to object was increased by the state's misconduct in shifting the burden of proof. The jury had only the testimony of Mr. Cubbuson to suggest that Mr. Smith was one of the people at his trailer on May 28.

Based on the foregoing, defense counsel's representation fell below an objective standard of reasonableness, and here, the attorney's deficient performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.. There is a reasonable probability that trial counsel's deficient performance affected the verdict. Because Mr. Smith was denied effective assistance of counsel, this Court should reverse the conviction and remand for a new trial.

6. CUMULATIVE ERROR DENIED MR. SMITH HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. amend. XIV; *Walker v. Engle,* 703 F.2d 959, 963 (6th Cir.) (errors may cumulatively produce a trial that is fundamentally unfair), *cert. denied,* 464 U.S. 962 (1983); *Coe,* 101 Wn.2d at 789. The doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander,* 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Although each of the errors set forth above, viewed on its own, engendered sufficient prejudice to merit reversal, the errors together from the multiple instances of misconduct and abject failure of defense counsel to effectively represent his client at this crucial point created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict.

The evidence against Mr. Smith depended on Mr. Cubbison's credibility, and Mr. Smith's alibi defense required a favorable assessment of his credibility as propounded through his witnesses Ms. Steuermann and Ms. Peterson. The prosecutor's repeated and egregious misconduct improperly bolstered the prosecution witnesses and painted Mr. Smith's defense as untrustworthy due to failure to proffer a third alibi witness. Thus, even if

this Court is not persuaded that the errors, standing alone, require the conviction to be reversed, this Court should conclude the cumulative effect of the errors was to deprive Mr. Smith a fair trial.

F. CONCLUSION

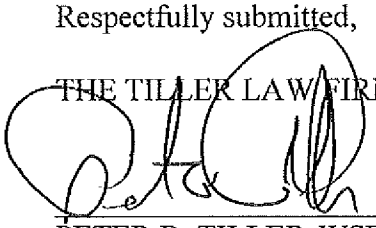
For the foregoing reasons, Curtis Smith respectfully requests this Court reverse his conviction and remand the case for further proceedings. In addition, a new trial is required because of unconstitutional opinion testimony by the deputy sheriff. Because testimony resulted in manifest constitutional error, Mr. Smith may raise these claims for the first time on appeal.

Alternatively, defense counsel was ineffective for failing to object to testimony the deputy. Last, even if each error taken alone does not constitute reversible error, the cumulative effect of the errors denied Mr. Smith a fair trial.

DATED: April 28, 2016.

Respectfully submitted,

THE TILLER LAW FIRM

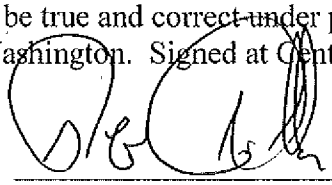


PETER B. TILLER-WSBA 20835
Of Attorneys for Curtis Smith

CERTIFICATE OF SERVICE

The undersigned certifies that on April 28, 2016, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to Ms. Katherine Svoboda Grays Harbor County Prosecutor, 102 West Broadway, Room 102, Montesano, WA 98563, and appellant, Mr. Mr. Curtis Smith Doc#842993, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326 true and correct copies of this Opening Brief of Appellant.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 28, 2016.



PETER B. TILLER

APPENDIX A

RCW 9A.36.041
Assault in the fourth degree.

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.
(2) Assault in the fourth degree is a gross misdemeanor.

RCW 9A.36.021
Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

TILLER LAW OFFICE

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Transmittal Letter

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Comments:

No Comments were entered.

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