Supreme Court No. 97556-6
(COA No. 35565-9-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MELVIN O'ROURKE,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Melvin O'Rourke, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review as designated in Part B. RAP 13.3, RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. O'Rourke seeks review of the Court of Appeals decision dated July 22, 2019, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did multiple instances of misconduct during testimony and in closing arguments prevent Mr. O'Rourke from receiving a fair trial?

2. Does the ineffective assistance of counsel require a new trial where counsel's performance fell below an objective standard of reasonableness and resulted in prejudice to Mr. O'Rourke?

3. Does cumulative error require reversal of Mr. O'Rourke's conviction, where misconduct and ineffective assistance prevented Mr. O'Rourke from receiving a fair trial?

D. STATEMENT OF THE CASE

The jury would not hear much of this, but Mr. O'Rourke was very close to Duane Hettinger before shooting him when he feared for his own life. RP 471, 474. The men developed a falling out over money stolen

from Mr. O'Rourke, who suffered from Parkinson's and other ailments at the time of his trial. RP 634.

Mr. O'Rourke believed he was justified when he shot Mr. Hettinger. He attempted to explain at his trial why Mr. Hettinger's movements towards him were threatening. RP 656. He was prevented from doing so by the prosecutor's objection and was not asked further questions on this issue. RP 656. The only evidence the jury ever heard about why Mr. O'Rourke shot Mr. Hettinger was that he not like the look Mr. Hettinger gave him. RP 654.

The prosecutor introduced numerous hearsay statements without objection, some in violation of the confrontation clause. The jury heard statements from a 911 call Mr. O'Rourke made, along with the statements of the investigating officers. RP 147, 157. These recordings contained significant hearsay, but no attempt was made by defense counsel to redact them. RP 147. The government played almost in their entirety the recordings of Mr. O'Rourke's three interrogations. RP 352, 435, 456. The only redaction of these recordings was to prevent the jury from hearing of Mr. O'Rourke's previous relationship with Mr. Hettinger. RP 475.

The prosecutor frequently stopped the recordings to ask the witnesses for their interpretation. The prosecutor asked the witnesses to give opinions about the recordings, without objection. RP 149, 151, 159,

166, 205. The prosecutor also asked a paramedic and an officer whether their encounter with the scene was among the worst they ever encountered. RP 145, 146, 146, 249.

The police witnesses did not have expertise beyond their general training, but the prosecutor asked for their opinions on forensic issues, including the amount of time it took for blood to coagulate and for Mr. Hettinger to die. RP 160, 180, 182.The prosecutor asked the witnesses their opinions on Mr. O'Rourke's guilt, asking whether his version of the incident made any sense. RP 195, 348. Defense counsel did not object.

The police subjected Mr. O'Rourke to three extensive interrogations. RP 352, 435, 456. These interrogations were modeled on the type of interrogations disapproved of in *Miranda v. Arizona*, isolating Mr. O'Rourke at the police station, minimizing his actions, engaging in trickery, and frequently accusing him of lying. RP 327, RP 395, RP 419, RP 413. The police concocted evidence, pretending there were witnesses and insisting Mr. O'Rourke stood over Mr. Hettinger to fire a second shot. RP 482-83. Despite the evidence of coercion, defense counsel stipulated to the admissibility of the statements. RP 108.

Two of the recordings played to the jury violated the privacy act, including the body mike recording and one of the interrogations. Neither of the recordings complied with the privacy act, as Mr. O'Rourke was not

notified of his right to refuse consent in either of these recordings. RP 147, 435. Despite the lack of warnings, the government played these recordings in full. Defense counsel did not challenge these recordings. RP 147, 435.

At trial, the prosecutor recognized the "gruesome" nature of the photographs he intended to introduce, including photographs of Mr. Hettinger's body at the scene and during the autopsy. RP 41. No attempt was made to limit any of these photos, all of which were stipulated to without objection. *See* RP 488-89, 584.

Mr. O'Rourke's lawyer confronted one of the prosecutor's witnesses with a no-contact order entered against Mr. Hettinger. RP 505. After the order was entered, the prosecutor argued extensively about the underlying allegations, suggesting Mr. O'Rourke was the initial aggressor, despite Mr. Hettinger's arrest. RP 511-12.

The prosecutor also relied on hearsay reports to suggest Mr. O'Rourke attempted to "trap" Mr. Hettinger by getting him to violate the no-contact order. RP 518. The prosecutor also elicited prior act evidence regarding threatening text messages Mr. O'Rourke reported to the police, along with two reports of theft. RP 628, 631, 632, 633.

In cross-examining Mr. O'Rourke, the prosecutor referred to facts not in evidence, including his claim that there were no police reports to support Mr. O'Rourke's testimony. RP 671, 672. The prosecutor also

inserted his own opinion into the case, especially during spoken objections and during closing arguments. RP 645, 655, 656, 659. At the close of his cross-examination of Mr. O'Rourke, he apologized to him for his mistreatment, forcing Mr. O'Rourke to accept his apology twice. RP 674.

E. ARGUMENT

1. This Court should accept review of whether the prosecutor's misconduct deprived Mr. O'Rourke of his right to a fair trial.

Because Mr. O'Rourke's lawyer never objected to the prosecutor's misconduct, the Court of Appeals held there was no error. App 4. Mr. O'Rourke asks this Court to accept review as the prosecutor's continuous misconduct prevented Mr. O'Rourke from receiving a fair trial. Mr. O'Rourke asks this Court to take review of this significant constitutional question and involves an issue of substantial public interest. RAP 13.4(b).

a. The prosecutor injected his own opinion into the proceedings, designed to inflame the jury's prejudice.

During Mr. O'Rourke's testimony, the prosecutor inserted his own opinion in his objections. Instead of state the basis for his objection, the prosecutor made inflammatory statements, as excerpted below:

Inflammatory statements interjected by the prosecutor during the testimony of Mr. O'Rourke	RP
I don't think that's at issue here because it's clear he killed the man.	645

I don't know how a horrible experience that happened to this man when he was four years old has any bearing on what happened two years ago in this apartment.	655
Mr. Bottomly is asking Mr. O'Rourke to speculate as to what was in Mr. Hettinger's mind and Mr. Hettinger isn't here to speak for himself.	656
There's no way he could possibly know what Mr. Hettinger meant when he said no.	659

It is improper for prosecutors to state their personal beliefs. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). These statements were designed to inflame the jury and to insert the prosecutor's personal opinion about Mr. O'Rourke's guilt. *United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). They prevented Mr. O'Rourke from receiving a fair trial.

b. The prosecutor misrepresented facts not in evidence, shifting the burden of proof to Mr. O'Rourke.

"[A] prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006). When the prosecutor repeatedly discussed other investigations and referred to police reports about these instances, he committed misconduct. RP 671, 672. These reports were hearsay, violated the confrontation clause, and were not admissible. Mr. O'Rourke objected once, but this did not stop the

prosecutor, who continued to examine Mr. O'Rourke with inadmissible statements. RP 672-73.

Improper statements regarding out-of-court hearsay interjected while cross-examining Mr. O'Rourke	**RP**
No, there aren't, sir, we've checked. The only report that we could find was the staircase and you didn't get hurt, he did.	671
Mr. O'Rourke, you tend to exaggerate in your reports.	672
There's none of that in the police report, sir. In the police report, you said he tried to push you, you caught yourself on the rail and were not injured whatsoever.	672

These statements were inadmissible. *State v. Hurtado*, 173 Wn. App. 592, 595, 294 P.3d 838 (2013). By using reports Mr. O'Rourke was incapable of confronting, the prosecutor also improperly shifted the burden to the defense, committing further misconduct. *In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). This was flagrant and ill-intentioned misconduct. *Id*. at 713.

c. The prosecutor appealed to the passions of the jury by forcing Mr. O'Rourke to accept an apology from him.

The prosecutor apologized to Mr. O'Rourke for losing his temper at the end of cross-examination, forcing him to accept the apology.

> MR. NICHOLS: I don't think I have any more questions then, I'm sorry. I'm sorry if I got a little bit upset.
>
> THE WITNESS: That's okay.
>
> MR. NICHOLS: I apologize.
>
> THE WITNESS: That's okay.

RP 674.

This improper appeal to the jury's passions and prejudice was designed to shift sympathy to the government. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). The prosecutor's acknowledgment of his misconduct during cross-examination was intended to minimize its impact and appeal to the emotions of the jury, getting tacit permission from Mr. O'Rourke. There was no way for Mr. O'Rourke to object to this misconduct without further inflaming the jury.

d. The prosecutions insertion of his opinion into his closing argument prevented Mr. O'Rourke from receiving a fair trial.

Improper comments in closing arguments may require reversal. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). When prosecutors insert their own opinion, they commit misconduct. *United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir. 2005). "The question for the jury is not what a prosecutor believes to be true or what 'we know,' rather, the jury must decide what may be inferred from the evidence." *Id*.

Improper statements appealing to the juror's emotions made during closing arguments	**RP**
And in my years, I've never seen anything like that where a killer so clearly reenacts the State's theory of what happened.	702
But we don't kill people for a look. Jesse James and John Wesley Hardin and Wyatt Earp, we kill -– yeah, people got killed for not looking right. This is a society of law and rule.	703

He has Parkinson's and we feel sorry for him. He's 69 or 70 years old and we feel sorry for him. But he killed a man in cold blood. The facts, not your sympathy.	704
I can't perceive of killing someone over a look. I don't understand that.	714
Imagine yourself –- I'm asking you to reenact a horrific event where you had to kill a friend to save your life. Mr. O'Rourke did it coldly, calmly, and deliberately. His face –- think about his face when he killed me in front of you and imagine that that's the last thing Duane Hettinger saw.	714

The prosecutor improperly inserted himself into the jury's province by framing his argument as his personal opinion. *Younger*, 398 F.3d at 1191. This is more than using the phrase "I think" by mistake. These were intentional insertions of opinion, meant to appeal to the jury's passion.

e. Review should be granted because this conduct deprived Mr. O'Rourke of a fair trial.

Our system of justice is based on the premise that proceedings must not only be fair but must "appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Prosecutorial misconduct violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); U.S. Const. amend. XIV; Const. art. I, § 3; § 22.

Trained and experienced prosecutors "do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the

prosecutor feels that those tactics are necessary to sway the jury in a close case." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1075 (1996). Knowing it was unlikely that the defense would challenge the misconduct, the prosecutor acted with a disregard he may not otherwise have taken. *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). In accepting review, this Court should examine whether the failure to object should, as the Court of Appeals held, be a bar to examining these issues or whether the fundamental fairness of the court proceedings require reversal. *State v. Monday*, 171 Wn.2d 667, 685, 257 P.3d 551 (2011) (Madsen, concurring).

There is a substantial likelihood these improper affected the outcome of Mr. O'Rourke's case. *Lindsay*, 180 Wn.2d at 440. Mr. O'Rourke asks this Court to accept review. RAP 13.4(b).

2. Review should also be granted to determine whether defense counsel's ineffective assistance requires a new trial.

The Court of Appeals held Mr. O'Rourke's attorney's ineffectiveness did not constitute prejudice under the *Strickland*. App 8. The Court determined Mr. O'Rourke's own defense supported the government's theory, but this is only because of his attorney's inability to present a defense. *Id*. The Court of Appeals did not address Mr. O'Rourke's argument, other than to hold *Strickland* did not apply. *Id*.

A new trial is required where counsel's performance falls below an objective standard of reasonableness and the poor work results in prejudice. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). U.S. Const. amend. VI; Const. art. I, § 22. The relevant question on review Court is not whether counsel's choices were strategic, but whether they were reasonable. *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); *see also Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The failure of Mr. O'Rourke's attorney to mount a defense deprived Mr. O'Rourke of his right to a fair trial. This issue warrants review, as it is a question of constitutional significance and is of substantial public interest. RAP 13.4(b).

a. The failure to challenge the government's evidence was ineffective and prejudiced Mr. O'Rourke.

When an attorney fails to object, a new trial will be ordered where this Court finds the objection would have been sustained if it been raised, there was no legitimate strategic or tactical reasons for failing to object, and the result of the trial would have been different. *See State v. Ermert*, 94 Wn.2d 839, 849–50, 621 P.2d 121 (1980).

Mr. O'Rourke was deprived of a fair trial by his attorney's failure to object. By not objecting, the prosecution was able to introduce

inflammatory statements and improper opinion testimony designed to prejudice the jury. By not mounting a defense, as even the Court of Appeals observed, Mr. O'Rourke was deprived of effective assistance of counsel and a new trial is required. *Ermert*, 94 Wn.2d at 849–50.

b. The failure to challenge improper opinion testimony deprived Mr. O'Rourke of a fair trial.

Lay witnesses may only give opinions or inferences that are rationally based on the witness's perceptions, help the jury understand the testimony, and are not based on scientific or specialized knowledge. ER 701. Improper opinion testimony regarding their personal beliefs should be excluded. *Glasmann*, 175 Wn.2d at 712. Despite these well-settled rules, Mr. O'Rourke's attorney never objected when the prosecutor asked for opinion testimony designed to inflame the jury.

Witness on stand	**Prosecutors questions designed to inflame the jury**	**RP**
Foss	Q During your time as a law enforcement officer, have you had to respond to some pretty horrific scenes? A Yes.	145
Foss	Q Tell us a little bit? A There's been a couple of different suicides that I've had to respond to, car accidents, this particular one, so.	146
Foss	Q So, it's safe to say that you're no stranger to gunshot wounds and bleeding and so forth?	146

	A Firsthand or off the top of my head, I'd say this is probably the most major one that I've had.	
Bugbee	Q Have you been on other similar or even worse calls than this one? A Yes, I have.	249

These questions should have been excluded. ER 701. With no strategic reason for not objecting, Mr. O'Rourke's attorney failed to meet Strickland standards each time the prosecutor elicited improper opinion testimony, which was especially designed to inflame the jury.

Mr. O'Rourke's attorney failed to object when the prosecutor asked the officers to interpret videos shown to the jury. RP 149, 151, 159, 166, 205. Again, it is well established a witness may relate first-hand observations, but may not interpret the evidence unless it cannot be determined by the jury. ER 701, 704; *State v. George*, 150 Wn.App. 110, 117-18, 206 P.3d 697 (2009). In fact, the use of lay opinion by policemen is particularly dangerous and is only permissible when no alternative exists. *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993).

Mr. O'Rourke's attorney also failed to object when the prosecutor asked his witnesses to provide expert testimony when they were not experts. ER 702. The prosecution asked the officers for their opinion about Mr. O'Rourke's psychological condition. RP 160, 180. The prosecutor asked the officers if they believed or had heard of circumstances like what

happened in Mr. O'Rourke's case, which this Court has found reversible. *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 417, 851 P.2d 662 (1993). These questions were especially objectionable because of the "aura of reliability and trustworthiness" police and paramedics have. *State v. Demery*, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001).

In some instances, the witness did not have first-hand knowledge when they gave their opinion. *See* RP 149, 151. In others, the witness was asked to interpret their own hearsay statement, also violating the rule against hearsay. ER 801; *see also State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). In every case, the police inappropriately invaded the province of the jury. *George*, 150 Wn. App. at 199. Without a reason to object, this is further evidence of ineffective assistance of counsel.

c. No attempts were made to limit out-of-court statements.

The prosecutor sought to introduce many recordings from the scene of the shooting that should not have been admitted. RP 147 (911 call), RP 157 (body mike recording). Defense counsel did not object to allowing these recordings to be played in their entirety, even though there was no strategic reason for allowing them to be heard.

The 911 tape was introduced with foundation. ER 901. The body mike recording violated the privacy act. *See Lewis v. State, Dep't of*

Licensing, 157 Wn.2d 446, 452, 139 P.3d 1078 (2006). Had defense counsel objected, they would have been excluded.

More importantly, both of these recordings contained multiple hearsay statements that were harmful to Mr. O'Rourke. *See* RP 147, 148, 149, 150, 151, 152, 160, 161, 162, 165, 166, 171, 172, 177, 178, 179, 182, 184, 185, 186, 197, 198, 206. Defense counsel's objection would have excluded these statements. There was no strategic reason for this prejudicial hearsay to have been heard by the jury.

d. No request was made to limit the "gruesome" photographic evidence.

No one disagreed the photographs of Mr. Hettinger's death were gruesome. RP 41. Dozens of photographs were shown to the jury, from both the scene and the medical examiner's office. RP 488-89, 584. No attempts were made to limit the number the jury could see, despite there being no issue about how Mr. Hettinger's death occurred.

Trial courts must use discretion when allowing gruesome photos to be introduced. *State v. Crenshaw*, 98 Wn.2d 789, 807, 659 P.2d 488 (1983). Where non-inflammatory testimony suffices, photographic evidence should be limited. *Id.* Autopsy photographs are especially prejudicial. *State v. Yates*, 161 Wn.2d 714, 770, 168 P.3d 359 (2007).

No such attempts were made by Mr. O'Rourke's attorney. Had Mr. O'Rourke's attorney asked to limit the photographs, it is the court would have granted the request. *Yates*, 161 Wn.2d at 770. There was no strategic decision for not limiting this prejudicial evidence.

e. Defense counsel did not challenge the admissibility of Mr. O'Rourke's statements.

Although Mr. O'Rourke's attorney had the opportunity to challenge the statements Mr. O'Rourke made to the police, he stipulated to their admissibility. RP 108. This was ineffective because there was evidence the statements should have been excluded.

Two statements the prosecution used violated the privacy act, which requires the police to inform a subject they are recording a conversation. *Lewis,* 157 Wn.2d at 452. Both the body mike recording and the second interrogation violated the privacy act. RCW 9.73.090(b). Because the act was not complied with, these statements would have been excluded. *State v. Mazzante*, 86 Wn. App. 425, 430, 936 P.2d 1206 (1997).

Mr. O'Rourke's post-*Miranda* statement was coercive. The tactics used by the police were remarkably similar to those employed in *Miranda v. Arizona*. 384 U.S. 436, 455-57, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Like *Miranda*, the officers employed several factors to get Mr. O'Rourke

to confess, including isolation, minimization, trickery, and negation of Mr. O'Rourke's version of the events. *Id*.

The court could have found these statements were coerced. The police engaged in classic psychological tactics. Alan Hirsch, *Going to the Source: The New Reid Technique & False Confessions*, 11 Ohio St. J. Crim. L. 803, 805 (2014). They isolated him at the police station. RP 327. They consistently minimized his actions. RP 395. They engaged in trickery. RP 419. They frequently told Mr. O'Rourke he was lying, knowing he was not. RP 413. These were grounds for suppression.

f. No attempts were made to limit other act evidence.

Evidence of other acts is generally inadmissible. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). Exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged crimes. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). No attempts were made to limit other act evidence, despite its inadmissibility and prejudicial effect on the evidence. *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986).

The jury heard evidence of a prior incident between Mr. Hettinger and Mr. O'Rourke where Mr. Hettinger was arrested for pushing Mr. O'Rourke down some stairs. RP 508. On re-examination, the prosecutor spent considerable time inquiring into what happened after the assault,

especially about subsequent contacts between Mr. O'Rourke and Mr. Hettinger. This examination was based on hearsay statements, including what other officers knew. RP 511, 518, 628, 629, 630. Defense counsel did not object when the prosecutor introduced these hearsay statements.

Because Mr. O'Rourke's attorney never challenged the evidence, the court never considered its relevance or weighed its prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Had the court been given the opportunity, it is likely it would have excluded the prior act evidence based on relevance and prejudice. ER 403, ER 404.

g. No challenges were made to confrontation clause violations.

Out-of-court statements to a police officer alleging a crime occurred are testimonial and may not be admitted absent the opportunity to cross-examine the declarant. *State v. Koslowski*, 166 Wn.2d 409, 426-27, 209 P.3d 479 (2009); U.S. Const. amend. VI; Const. art. I, § 22. When a violation of the confrontation clause is not raised at trial, it may be waived. *State v. Burns*, 193 Wn.2d 190, 211, 438 P.3d 1183 (2019).

The question of whether it was "fairly common knowledge within all law enforcement that Mr. O'Rourke and Mr. Hettinger were having regular contact after the order was entered" violated the confrontation clause. RP 511. Likewise, the reports stating another officer witnessed injuries to Mr. O'Rourke when Mr. Hettinger was arrested for assaulting

him and that there were other reports of violence or threats to Mr. O'Rourke by Mr. Hettinger also violated the confrontation clause. RP 629, 630, 632. The jury also heard other previous reports made to police in violation of the confrontation clause. RP 160, 628, 631, 632, 633.

No reasonable strategic decision exists to justify the failure to challenge this evidence. It was harmful for the jury to hear Mr. O'Rourke might have previously assaulted Mr. Hettinger. The reports created a presumption of propensity and a sense Mr. O'Rourke was a dangerous man deserving of incarceration. This failure to object constituted ineffective assistance.

h. The result of the trial would have been different with the effective assistance of counsel.

Counsel's critical lapses made it impossible for Mr. O'Rourke to win at trial and far more difficult for him to succeed on appeal. *See Orange*, 152 Wn.2d at 814. Mr. O'Rourke's only defense was that the homicide was justified. Critical to this defense was his credibility and to not be seen as an aggressor. But the improper evidence admitted without objection painted Mr. O'Rourke as a liar killing Mr. Hettinger without reason. Had the jury not heard the inadmissible evidence, there is a reasonable probability the outcome of the trial would have been different.

Defense counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Lopez*, 190 Wn.2d 104, 115–16, 410 P.3d 1117 (2018). Where the "plethora and gravity" of defense counsel's deficiencies render the proceedings fundamentally unfair, a new trial is required. *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995). This point was reached in Mr. O'Rourke's case. He asks this Court to accept review. RAP 13.4 (b).

3. The cumulative error of the misconduct and ineffective assistance also warrants review.

Even where no single error standing alone merits reversal, the errors combined may deprive a person of a fair trial. U.S. Const. amend. XIV, Const. art. I, § 3; *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Reversal is mandated 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 above errors supplies a stand-alone basis for reversal, this Court should also accept review of whether their cumulative effect demands reversal. *Id*.

F. CONCLUSION

Based on the foregoing, Mr. O'Rourke respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 16th day of August 2019.

Respectfully submitted,

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APPENDIX

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FILED
JULY 23, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. MELVIN R. O'ROURKE, Appellant.	))))))))))	No. 35565-9-III UNPUBLISHED OPINION

KORSMO, J. — Melvin O'Rourke appeals from his conviction for second degree murder, arguing that the prosecutor committed misconduct and his counsel performed ineffectively. We affirm.

FACTS

Mr. O'Rourke invited his friend Duane Hettinger to come to his home on July 30, 2015, despite the fact that O'Rourke had obtained a no-contact order prohibiting Hettinger from contacting him. The ostensible purpose of the meeting was to enter a repayment plan for reimbursement for items Hettinger allegedly stole from him. Hettinger entered the residence, O'Rourke locked the door behind him, and the two men sat in chairs. After 20 minutes of silently sitting and staring at the floor, Hettinger stood

up. Believing that Hettinger was coming for him, O'Rourke pointed a gun at him. Hettinger put up his arms and said "no."

O'Rourke shot Hettinger and, after the victim stopped breathing, called 911 to report that he had shot a burglar and that the wounded man was still breathing. In subsequent interviews with law enforcement, he admitted that he locked the door so that Hettinger could not "get out real quick" and that he did not call 911 until Hettinger was dead. He also told police that he shot Hettinger because he had been stealing from him. In one interview he claimed not to know how Hettinger entered the apartment. A single second degree murder charge was filed.

The case proceeded to jury trial. The defense successfully obtained an instruction on self-defense. Mr. O'Rourke testified on both direct and cross-examination about the shooting, including the facts related above. He explained how he had to go behind a chair, retrieve his gun from a pile of laundry, locate and put the magazine in, and "rack" the gun before aiming it, with some difficulty, at Hettinger. When asked by his attorney why he believed Hettinger was going to step towards him, Mr. O'Rourke responded: "When I was a kid, my dad raped me when I was four." Report of Proceedings (RP) at 655. The prosecutor objected on relevance grounds and the court sustained the objection because the answer was nonresponsive, but the answer was never struck. *Id.* Defense counsel rephrased the question and Mr. O'Rourke started explaining that "I was able

throughout my early years to see before . . ." when another objection was raised and sustained. RP at 656.

Counsel was directed to limit his client's response to a description of the physical behavior Hettinger exhibited that made Mr. O'Rourke believe his guest was moving to attack him. Counsel assured the court that was what he had been trying to accomplish. Counsel then asked "what did your eyes see or what did you perceive" that made him think Hettinger was coming for him. *Id*. He answered: "His eyes had the look that I had seen many, many times before." RP at 656-657. His counsel confirmed the answer—"So, his eyes had a look, right?" "Yes." RP at 657.

During cross-examination, Mr. O'Rourke recreated the shooting with a toy gun and the prosecutor playing the role of Mr. Hettinger. The State also presented a witness who testified that O'Rourke told him he purchased a gun for the express purpose of shooting Hettinger "if he ever stole from him again." RP at 285.

The defense urged the jury to find self-defense, but the jury returned a guilty verdict and also returned a special verdict that Mr. O'Rourke was armed with a firearm at the time of the crime. The trial court imposed a high-end standard range sentence. Mr. O'Rourke appealed to this court. A panel considered his case without hearing argument.

ANALYSIS

This appeal presents claims of prosecutorial misconduct and attorney ineffectiveness. We address those two issues in the noted order and do not separately address his claim of cumulative error.

Prosecutorial Misconduct

Mr. O'Rourke alleges that the prosecutor committed misconduct on multiple bases, but primarily by asserting his personal opinion during cross-examination and closing argument. Because any potential error was curable by timely objection, the argument fails.

Claims of prosecutorial misconduct are considered in accordance with well settled standards. The appellant bears the burden of demonstrating prosecutorial misconduct on appeal and must establish that the conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 718-719. The allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Reversal is not required where the alleged error could have been obviated by a curative instruction. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). The failure to object constitutes a waiver unless the remark was so flagrant and ill-intentioned

that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.*; *State v. Swan*, 114 Wn.2d 613, 665, 790 P.2d 610 (1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Finally, a prosecutor has "wide latitude" in arguing inferences from the evidence presented. *Stenson*, 132 Wn.2d at 727.

These standards are reflections of a basic truth of appellate litigation. Appellate courts review trial court rulings; where there is no trial court ruling to challenge, appellate review normally is not available. RAP 2.5(a). There are certain exceptions to this doctrine that recognize a small class of errors that can be reviewed even in the absence of a trial court challenge. The most common of those exceptions, found in RAP 2.5(a)(3), permits review of a manifest error affecting a constitutional right. A party claiming the existence of manifest constitutional error is first required to establish the existence of error that is constitutional in nature. If such an error is demonstrated, the party must then show that the error was not harmless and actually had an identifiable and practical impact on the case. *State v. Kirkman*, 159 Wn.2d 918, 934-935, 155 P.3d 125 (2007); *State v. Scott*, 110 Wn.2d 682, 687-688, 757 P.2d 492 (1988).

Appellant's initial problem is that all but one of the alleged instances of misconduct were not challenged at trial.[1] Thus, the "flagrant and ill-intentioned"

[1] In one instance, a defense objection to the prosecutor's statement was sustained. Appellant does not attempt to argue that the trial court's ruling was ineffectual.

standard applies and appellant must demonstrate that the alleged misconduct was beyond cure. He cannot meet that standard. For instance, noting a handful of comments by the prosecutor using words such as "I don't think" and "I don't know" during argument on objections, Mr. O'Rourke opines that the prosecutor was injecting his personal beliefs into the litigation. That is an exceptionally long leap in logic that is not borne out by the context of the statements. More fundamentally, even if such an interpretation could be placed on the prosecutor's arguments to the bench, it is not a necessary interpretation and any concerns would easily have been cured by the trial court.

The appellant's remaining arguments fare no better. He identifies some argumentative questions asked by the prosecutor, but fails to demonstrate that they were so egregious that the trial court could not have corrected the problem by having the prosecutor rephrase the question. He notes some instances when the prosecutor cross-examined him about reports he made to the police involving early incidents with Hettinger and alleges that the questions injected facts into the current trial. Again, he does not demonstrate that the trial court could not have corrected the problem.[2]

Since there has been no demonstration of incurable error, Mr. O'Rourke's claim of prosecutorial misconduct necessarily fails.

[2] A timely objection might have led to the prosecutor introducing the reports into evidence in order to contradict Mr. O'Rourke's testimony and arguably done more damage than the questions would have.

Ineffective Assistance of Counsel

Mr. O'Rourke next argues that his trial counsel performed ineffectively by not objecting to evidence offered at trial.

We also consider this issue in accordance with well settled law. Counsel's failure to live up to the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). Review is highly deferential and we engage in the presumption that counsel was competent; moreover, counsel's strategic or tactical choices are not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts apply a two-prong test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-692. When a claim can be resolved on one ground, a reviewing court need not consider both *Strickland* prongs. *Id*. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

When counsel's alleged ineffectiveness, as here, involves evidentiary matters, an appellant has an exceptionally difficult challenge. As a general matter, an objection must be made at trial to perceived errors in admitting or excluding evidence; the failure to do so precludes raising the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). "'[A] litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.'" *Id*. (quoting *Bellevue Sch. Dist.*

405 v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)). Thus, challenges to counsel's handling of evidence are circumscribed by the *Strickland* presumption. As a general principle, the decision whether or not to object to evidence is a classic example of trial tactics and will not provide a basis for finding counsel performed ineffectively. *E.g.*, *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) ("The decision of when or whether to object is a classic example of trial tactics."). A reviewing court presumes that a "failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing cases).

It is highly doubtful that Mr. O'Rourke has overcome the presumption that the various failures to object were not trial tactics. However, we need not decide that issue because it is very clear that any error did not undermine our confidence in the verdict and did not constitute prejudice under the *Strickland* standard.

There was no prejudice because the essential facts of this case were undisputed and the evidence that Mr. O'Rourke belatedly now claims should have been challenged did not impact the ultimate decision before the jury—was the killing justified? His own testimony supported the State's evidence that Mr. O'Rourke now challenges and his demonstration of the shooting for the jury left no doubt how it took place. The focus for the jury's decision was Mr. O'Rourke's claim that he was justified in shooting Hettinger. Little of the unchallenged evidence addressed that aspect of the case, and none of that

evidence carried weight in assessing Mr. O'Rourke's explanation for shooting an unarmed man, particularly where his own testimony strongly suggested that he acted to punish the victim rather than to protect himself.

Mr. O'Rourke failed to establish his *Strickland* burden of proving that he was prejudiced by his counsel's alleged failure to object. Accordingly, he failed to demonstrate that he was deprived of his right to counsel.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Siddoway, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT, v. MELVIN O'ROURKE, PETITIONER.	)))))))))	COA NO. 35565-9-III

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Superior Court Case Number:	15-1-00121-5

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