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WASHINGTON STATE  
SUPREME COURT

SUPREME COURT NO. 94596-9   
NO. ~~74527-1-I~~ 94527-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOEY MCFARLAND,

Petitioner.

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

The Honorable Bruce Weiss, Judge

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PETITION FOR REVIEW

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**TABLE OF CONTENTS**

	Page
A. <u>IDENTITY OF PETITIONER/COURT OF APPEALS DECISION</u> .....	1
B. <u>ISSUE PRESENTED FOR REVIEW</u> .....	1
C. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Trial Proceedings: State’s Case</u> .....	1
2. <u>Trial Proceedings: Defense Case</u> .....	5
3. <u>Appellate Proceedings</u> .....	7
D. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED</u> .....	9
THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER A POLICE OFFICER’S EGREGIOUS OPINION TESTIMONY ON GUILT AND CREDIBILITY IS HARMLESS WHERE IT UNDERCUTS THE ENTIRE DEFENSE THEORY.	9
E. <u>CONCLUSION</u> .....	14

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

James v. Robeck  
79 Wn.2d 864, 490 P.2d 878 (1971)..... 9

State v. Carlin  
40 Wn. App. 698, 700 P.2d 323 (1985)..... 11

State v. Carlson  
80 Wn. App. 116, 906 P.2d 999 (1995)..... 9

State v. Dolan  
118 Wn. App. 323, 73 P.3d 1011 (2003)..... 10

State v. Jerrels  
83 Wn. App. 503, 925 P.2d 209 (1996)..... 12

State v. Kirkman  
159 Wn.2d 918, 155 P.3d 125 (2007)..... 10, 11

State v. Montgomery  
163 Wn.2d 577, 183 P.3d 267 (2008)..... 9, 13

State v. Olmedo  
112 Wn. App. 525, 49 P.3d 960 (2002)..... 11

State v. Quaale  
182 Wn.2d 191, 340 P.3d 213 (2014)..... 13

**RULES, STATUTES AND OTHER AUTHORITIES**

RAP 2.5..... 10

RAP 13.4..... 1, 11, 14

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Joey McFarland asks this Court to grant review of the court of appeals' unpublished decision in State v. McFarland, No. 74527-1-I, filed April 24, 2017 (attached as an appendix).

B. ISSUE PRESENTED FOR REVIEW

Is this Court's review warranted under RAP 13.4(b)(3) where the State conceded and the court of appeals agreed that a police officer repeatedly gave his ultimate opinion on McFarland's guilt and the credibility of the key defense witness, but held that manifest constitutional error to be harmless beyond a reasonable doubt even though it undercut the entire defense theory?

C. STATEMENT OF THE CASE

The State charged McFarland with one count of residential burglary. CP 57. The State alleged that on October 22, 2014, McFarland entered and remained unlawfully in the home of Kyli and Joshua Clark, with intent to commit the crime of theft therein. CP 57. The jury found McFarland guilty as charged. CP 33-34.

1. Trial Proceedings: State's Case

Ms. Clark testified she woke up just before 7:00 a.m. on October 22 to her dogs barking. 3RP 140-41. The back sliding glass door was unlocked and there was a t-shirt on the back porch that was dry even though it was

raining outside. 3RP 142-43. Ms. Clark keeps a variety of purses on a table near the sliding door and found the one she used the previous day was missing. 3RP 144. The purse contained her house and car keys, wallet, phone, and other valuables. 3RP 145-46. She then noticed "very distinct muddy shoe prints" on the kitchen floor. 3RP 145. She called the police and waited for them to arrive. 3RP 144, 156.

The police arrived quickly, with Officer Ray Riches first on the scene and Officer Derek Carlile arriving shortly thereafter. 4RP 262-63. They found no sign of forced entry. 3RP 164; 4RP 238, 289. Riches examined the footprints and discovered the back gate was open. 4RP 269. The Clarks use a curtain rod to prop up the fence, which is quite heavy, and the rod must be moved in order to open the back gate. 3RP 153-55, 165-67. Because the burglary appeared to have happened very recently, Riches sent Carlile to canvass the neighborhood. 3RP 200-01; 4RP 266.

Carlile drove north in his patrol car. 3RP 202. Four to five houses away, Carlile saw a man, woman, and a dog in front of a house with a long driveway. 3RP 202. The man and woman "kind of bent down" upon seeing Carlile and "then went inside the house real quick." 3RP 202. Carlile thought this was suspicious, so went up to the house to speak with them. 3RP 202-04. Carlile told the man, McFarland, he was investigating a burglary and asked McFarland to come outside. 3RP 203-04. McFarland

initially refused, but then came outside and told Carlile he saw a couple people walking by about 30 minutes earlier. 3RP 204.

Carlile noticed McFarland's shoes were similar to shoeprints inside the Clarks' home, so he radioed to Riches. 3RP 204-05. About that time McFarland's girlfriend, Leanna Fuller, came outside. 3RP 204-05. Fuller rented the apartment attached to the main house. 3RP 185, 202. When Riches arrived, he examined the shoes and took them into evidence. 4RP 271-72. Fuller went inside the apartment to get McFarland's slippers, which McFarland said he had been wearing earlier that morning to find Fuller's dog. 3RP 208-11. Carlile noted the slippers were dry, even though it had been raining that morning. 3RP 210-11.

Riches and Carlile returned to the Clarks' home to compare the shoeprints with the seized shoes. 3RP 211-12; 4RP 277. The shoes were the same size and had the same tread as the prints. 4RP 278-79. Believing they had probable cause to arrest McFarland for burglary, the officers went back outside to arrest him. 4RP 279.

Outside, Fuller was standing in the Clarks' driveway on the phone. 3RP 212. Ms. Clark's purse was sitting on the trunk of Carlile's patrol car. 3RP 213-14; 4RP 280. When Carlile asked Fuller why McFarland did not return the purse immediately, Fuller said McFarland found the purse while he was walking around that morning. 3RP 214. Carlile told Fuller to get

McFarland, but she said McFarland had already gone to work. 3RP 213. Carlile said, however, he saw McFarland watching them and then quickly go back inside Fuller's apartment. 3RP 214.

Officers surrounded Fuller's apartment, demanding McFarland come outside. 4RP 310. They asked Sergeant Adam Vermeulen, who was en route, to call McFarland and ask him to come out. 4RP 306-08. McFarland told Vermeulen he did not do anything wrong—he simply found the purse on the sidewalk and asked his girlfriend to return it. 4RP 309. During the standoff, Fuller was very agitated and ran back inside the apartment contrary to the officers' orders. 4RP 223-24.

McFarland was arrested when he came out several minutes later. 4RP 225-26, 283-84. At the scene, McFarland explained he found the purse and did not return it immediately because he did not want the police to think he stole it. 4RP 227. At the jail, McFarland said he found the purse in the street and picked it up hoping to find something good inside. 4RP 315-16. McFarland expressed concern that Fuller was pregnant and he was ruining her life. 4RP 252-53.

Police searched Fuller's apartment and found Ms. Clark's car key in another purse hidden underneath some insulation in the attic above Fuller's bedroom. 4RP 230-31, 288. Ms. Clark's house key was not found. 3RP

157-58. An adult tricycle was also missing from the Clarks' yard and was discovered in the front yard at Fuller's apartment. 3RP 159-60; 4RP 285.

2. Trial Proceedings: Defense Case

In August 2015, Fuller came forward admitting she committed the burglary, not McFarland. 2RP 8-9, 61. She testified for the defense at trial. 4RP 343. On the morning of the burglary, Fuller slipped on McFarland's shoes and stepped outside her apartment to smoke a cigarette and let her dog out. 4RP 347-48. Fuller explained she put on McFarland's shoes because they were right by the door and she intended to smoke only one cigarette before going back inside. 4RP 348. Fuller further explained she had not slept for four days due to her methamphetamine and heroin use, so "there's a lot of parts of during that time that are not very clear." 4RP 345-46.

When Fuller finished her cigarette, she did not see her dog. 4RP 350. Fuller's landlord confirmed that one of Fuller's dogs would roam the neighborhood. 3RP 189-90; 4RP 386. Fuller got on her bike to see if she could find her dog, riding up and down the street, still wearing McFarland's shoes. 4RP 350-52. Fuller explained there were two backyards her dog would often explore, so she checked one of them. 4RP 350-52. There she noticed purses through a sliding glass door, so she went inside and grabbed them. 4RP 352-55. Fuller then got on what she thought was her bike and rode back to her apartment. 4RP 354-55.



Fuller felt very scared, so when she got home, she woke up McFarland and “told him somewhere along the lines of what happened.” 4RP 353-56. Fuller explained McFarland “didn’t want any part of it” and told her to take the purses back. 4RP 357. Fuller recalled the police coming to her house, asking about the burglary, and seizing McFarland’s shoes. 4RP 359-61. Fuller explained she did not take responsibility at that point because she had been dating McFarland for only a month and did not know him very well. 4RP 361. She further explained, “I was using drugs. I was scared to go to jail, and get in big trouble. My addicted part of my personality was scared not to be able to use drugs, and that’s very selfish, but, I mean, that’s reality.” 4RP 362.

When the police left, McFarland told Fuller to take the purses back, so she “walked them down to the house, and set them on the . . . police car.” 4RP 364. She acknowledged when she returned the purse it did not have everything in it. 4RP 366. Fuller explained when she initially returned home with the purse, she was “paranoid about everything, and hid some of the contents of the purse inside my place. And then when I brought it back, I was just in a hurry to get it back, so I gathered what I could find, and then took it back.” 4RP 366.

3. Appellate Proceedings

On appeal, McFarland challenged several statements Officer Carlile made during his testimony regarding his opinion on McFarland's guilt and credibility, as well as Fuller's credibility. Br. of Appellant, at 9-21. For instance, on direct examination, Carlile testified he told Fuller, "look, I know Joey broke into the neighbor's house and stole the purse, all the neighbor wants is her purse back." 3RP 210. Carlile then opined:

Leanna looked at me, like, in fear, like, as if I knew some deep, dark secret or something that she didn't want me to know, like she had been caught, like they had been caught red-handed, as if I know that Joey had done the burglary. And she was very scared for him.

3RP 210. Similarly, Carlile testified he asked McFarland "why he wasn't honest with [the police] earlier." 4RP 228.

On cross-examination, defense counsel asked Carlile about McFarland expressing concern for Fuller's wellbeing during the jail interview. 4RP 247. Carlile responded, "I don't necessarily believe that. I believe he's more so minimizing that he went inside the house, and stole the purse in a burglary, rather than finding it on the side of the road. That's my personal belief." 4RP 247-48.

On redirect, regarding McFarland's explanation that he had been wearing slippers earlier that morning, Carlile opined, "I was, like, okay, that's not true. You know, I felt like it was a complete lie because the shoes

would have been wet . . . .” 4RP 256. Carlile also gave his opinion on Fuller’s version of events, explaining he was “very shocked” by it. 4RP 256. He continued, testifying he believed Fuller’s story “was absolutely asinine, that she would have done that burglary. I couldn’t grasp that whatsoever.” 4RP 256-57. When the prosecutor asked why Carlile thought that, Carlile explained all the evidence “added up, showing me that [McFarland] wasn’t being fully truthful, he wasn’t being honest, and he was trying to create some story of how his tracks could be covered.” 4RP 257. Though not objected to, McFarland argued these explicit opinions on guilt and credibility were manifest constitutional error that violated McFarland’s right to a fair trial by a jury. Br. of Appellant, 20-21.

The court of appeals noted “several statements by Officer Carlile were invited by defense counsel’s questions regarding the theory that the officers prematurely concluded McFarland was the guilty party.” Opinion, at 8. Nevertheless, the court held “the state properly concedes the officer went beyond the scope of the defense questions and improperly emphasized his personal beliefs.” Opinion, at 8. The court further held “[t]he State also properly concedes that its questions resulted in several examples of improper opinion testimony on the credibility of McFarland and Fuller.” Opinion, at 8. Thus, the court concluded Officer Carlile’s impermissible opinion

testimony was manifest constitutional error, reviewable for the first time on appeal. Opinion, at 9.

Despite the fact that Officer Carlile's opinion testimony struck at the heart of the defense—that Fuller was responsible for the burglary—the court of appeals held the manifest constitutional error was harmless. Opinion, at 11. The court reasoned “the physical evidence is entirely consistent with McFarland's guilt and inconsistent with Fuller's testimony.” Opinion, at 10. The court therefore affirmed McFarland's conviction. Opinion, at 13.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER A POLICE OFFICER'S EGREGIOUS OPINION TESTIMONY ON GUILT AND CREDIBILITY IS HARMLESS WHERE IT UNDERCUTS THE ENTIRE DEFENSE THEORY.

Washington courts have long held it is exclusively the jury's role “to weigh the evidence and determine the facts.” State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). As such, no witness, lay or expert, may “give an opinion on another witness'[s] credibility” or the “veracity of the defendant.” State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995) (citing numerous cases). Opinion testimony is “clearly inappropriate” in a criminal trial when it contains expressions of personal belief “as to the guilt

of the defendant, the intent of the accused, or the veracity of witnesses.”

Montgomery, 163 Wn.2d at 591.

Improper opinion testimony constitutes manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3), where there is “an explicit or almost explicit witness statement on an ultimate issue of fact.” State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Carlile made numerous explicit statements on McFarland’s guilt, as well as McFarland’s and Fuller’s credibility. Regarding McFarland’s guilt, Carlile testified his “personal belief” was McFarland “went inside the house, and stole the purse in a burglary.” 4RP 247-48. He likewise testified he “kn[e]w” McFarland “stole the purse” and Fuller looked “like they had been caught red-handed” when he told her that. 3RP 210. Regarding McFarland’s credibility, Carlile testified McFarland was not “honest” or “fully truthful” with the police. 3RP 228; 4RP 257. Carlile opined McFarland “was trying to create some story of how his tracks could be covered,” which Carlile believed was “not true” and was “a complete lie.” 4RP 256-257. Regarding Fuller’s credibility, Carlile believed her version of events was “absolutely asinine.” 4RP 256-57.

Given these blatant statements on ultimate issues of fact, the court of appeals properly accepted the State’s concession that Officer Carlile’s impermissible opinions on guilt and credibility constituted manifest constitutional error. See State v. Dolan, 118 Wn. App. 323, 328-30, 73 P.3d

1011 (2003) (finding manifest constitutional error where police officer and case worker opined the mother did not bruise the child's neck, which suggested the defendant did).

The issue presented in this case is whether such egregious opinion testimony is harmless beyond a reasonable doubt where it goes directly to the defense theory and the defendant's guilt. This is a significant question of constitutional law, warranting this Court's review under RAP 13.4(b)(3).

Constitutional error is presumed prejudicial, and the State bears the burden of establishing the error was harmless beyond a reasonable doubt. State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). Constitutional error is harmless only when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id.

"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; see also State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985). ("Particularly where [an opinion on guilt] is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial."). Carfile was one of only two officers who had the opportunity to speak with and observe both McFarland and Fuller immediately after the burglary. His

opinions on guilt and credibility were likely quite persuasive to the jury, who had no such opportunity.

The case also hinged on McFarland's and Fuller's credibility. Fuller took responsibility for the burglary, explaining she slipped on McFarland's shoes when she stepped outside to smoke a cigarette. 4RP 347-48. While looking for her dog, Fuller was enticed by purses she saw through the Clarks' sliding glass door and snatched them. 4RP 352-55. Carlile's opinion that this story was "absolutely asinine" significantly undercut the defense, as did his "personal belief" that McFarland, not Fuller, committed the burglary. 4RP 247-48, 256-57.

Fuller's testimony was further undermined by Carlile's testimony that when he told Fuller he believed McFarland stole the purse, she looked like she "kn[e]w that Joey had done the burglary." 3RP 210; State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996) ("A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so."). But Fuller's facial expression could also be explained by her realization that McFarland was about to be arrested for her burglary. Carlile's testimony essentially foreclosed this reasonable alternative.

The evidence supported both Fuller's and the State's version of events. For instance, before the police arrived, Fuller told McFarland she stole the purses. 4RP 353-56. The ensuing events were consistent with

McFarland telling Fuller to return the purses, as Fuller testified he did. 4RP 357, 364. McFarland's story that he found the purse while walking around was also consistent with an attempt to cover for Fuller, given his concern for her wellbeing. Of course, however, Carlile testified he did not "necessarily believe that," and instead thought McFarland was lying "to create some story of how his tracks could be covered." 4RP 247, 257.

Officer Carlile's repeated, explicit opinions on guilt and credibility effectively deprived the jury of the opportunity to independently consider those issues of fact. It is easy to see how jurors could be swayed by a police officer's personal belief that a defendant is lying or guilty. See Montgomery, 163 Wn.2d at 594 ("[I]t is very troubling that the testimony in this case was quite direct and used explicit expressions of personal belief such as 'I felt very strongly that . . . ' and 'we believe.'"); State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014) (finding police officer testimony prejudicial where he opined the defendant was impaired based on a horizontal gaze nystagmus (HGN) test, casting an aura of scientific certainty and "significantly increasing the weight the jury likely attached to it").

Carlile's impermissible opinions on guilt and credibility undercut every aspect of the defense, resulting in significant prejudice to McFarland. This manifest constitutional error violated McFarland's right to a fair trial by a jury. Because the error was not harmless under the circumstances, this



Court should grant review under RAP 13.4(b)(3), reverse the court of appeals, and remand for a new trial.

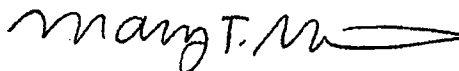
E. CONCLUSION

For the aforementioned reasons, McFarland respectfully asks this Court to grant review under RAP 13.4(b)(3).

DATED this 23rd day of May, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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# Appendix

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

STATE OF WASHINGTON,	)	No. 74527-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
JOEY L. MCFARLAND,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: April 24, 2017

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VERELLEN, C.J. — Joey McFarland appeals his conviction for residential burglary committed while the victim was present. He argues he was denied his constitutional right to a fair trial by a jury when a police officer expressed his opinion on guilt and witness credibility. But the overwhelming, untainted evidence of McFarland's guilt is sufficient to convince this court beyond a reasonable doubt that the improper testimony did not affect the jury verdict. Therefore, we hold that the error was harmless. McFarland's other issues are not compelling. We affirm.

FACTS

Just before 7:00 a.m. on October 22, 2014, Kyli Clark woke to her dogs barking. She went downstairs and found the sliding glass door leading to her fenced in backyard unlocked. She saw a t-shirt from her laundry inside the house was now on the back porch and was dry even though it was raining outside. Kyli kept her purses on a small table near the sliding door and noticed one was missing. The purse contained her

No. 74527-1-1/2

house and car keys, wallet, phone, and other valuables. Kyli then noticed "very distinct muddy shoe prints" leading from the sliding door to the small table where she kept her purses and dry laundry from the night before. She called the police.

Officer Ray Riches arrived within two to three minutes of Kyli's call, and Officer Derek Carlile arrived shortly thereafter. Officer Riches examined the shoeprints inside the house and noticed that they were still wet. He walked around the house with Kyli and discovered the backyard gate was open. Kyli explained they use a heavy curtain rod to prop up the fence and that the rod must be moved in order to open the gate. Kyli further explained the rod was positioned towards the top of the fence so her children could not reach it. Because the burglary appeared to have happened very recently, Officer Riches sent Officer Carlile to canvass the neighborhood.

Officer Carlile drove north in his patrol car. Four to five houses away, Officer Carlile noticed a long driveway that led to an apartment shared by Leanna Fuller and her boyfriend Joey McFarland. Fuller and McFarland were outside. Officer Carlile noticed Fuller was petite and barely five-feet tall. McFarland was taller than Officer Carlile, who was five-feet ten inches. Fuller and McFarland both bent down when they saw Officer Carlile and quickly went inside the apartment. Officer Carlile thought this was suspicious, so he walked down the driveway to speak with them.

Officer Carlile told McFarland and Fuller he was investigating a burglary and asked them to come outside. McFarland came outside and told Officer Carlile he had seen two people walking by about 30 minutes earlier. Officer Carlile noticed McFarland was wearing Nike high top shoes and asked to see the bottom of them. The tread pattern matched Officer Carlile's recollection of the pattern of the muddy shoeprints on

the Clarks' floor, so he radioed to Officer Riches. About this time, Fuller came outside. When Officer Riches arrived, he confirmed the shoe tread matched the muddy prints and took the shoes into evidence. McFarland said the shoes, size 10 men's, were not his.

McFarland told the officers he had been near the Clarks' house earlier that morning looking for Fuller's dog, but that he had been wearing slippers. Fuller retrieved the slippers from the apartment and McFarland confirmed they were the ones he had been wearing earlier. Officer Carlile noticed the slippers were dry, even though it had been raining that morning.

The officers returned to the Clarks' home to compare the shoeprints with the seized shoes. The shoes matched the prints in size and tread. The officers then went back outside to arrest McFarland. Outside, they found Fuller standing in the Clarks' driveway on the phone. Kyli's purse was sitting on the trunk of Officer Carlile's patrol car. Some of Kyli's property was still inside the purse, but her house and car keys were not. Fuller told the officers McFarland had found the purse while walking around earlier, and that he wanted her to return it because he had already left for work. Officer Carlile, however, saw McFarland hiding nearby in some bushes and noticed him run back inside the apartment.

The officers followed McFarland back to the apartment. They asked Sergeant Adam Vermeulen, who was en route, to call McFarland and ask him to come outside. McFarland told Sergeant Vermeulen over the phone that he found the purse on a sidewalk. During the standoff, Fuller was very agitated and ran back inside the

No. 74527-1-1/4

apartment contrary to the officers' orders. When McFarland came outside several minutes later, he was arrested.

By the time McFarland was questioned at the police station, he had told several versions of events. Officer Carlile asked him why he lied earlier and McFarland explained he did not want the police to think he had stolen the purse. McFarland said he might have gone through the Clarks' gate and into their backyard while looking for Fuller's dog. He said he went through Kyli's purse but found no keys inside.

Police searched the apartment shared by McFarland and Fuller pursuant to a warrant. They found Kyli's car key in another one of her purses hidden underneath some insulation in the attack. An adult tricycle was also missing from the Clarks' yard and was found in the front yard of the apartment.

The State charged McFarland by amended information with one count of residential burglary committed while the victim was present.

In August 2015, 10 months after the burglary, Fuller told defense counsel it was she, not McFarland, who had committed the burglary.

The case was tried in October 2015. Fuller testified for the defense. She explained she had not slept for days before the burglary because she was on drugs and that she had difficulty remembering what had happened. Despite her lack of memory, Fuller testified that on the morning of October 22, she slipped on McFarland's Nike high tops and stepped outside to smoke a cigarette and let her dog out. Her dog ran away so she got on a bike to follow. She did not remember what bike.

Fuller said she rode toward the Clarks' house and went into their backyard. She did not remember a fence or a gate or whether it was open or closed. In the backyard,

Fuller noticed purses through the sliding glass door. She did not remember if it was a slider door, whether it was open or closed, or whether it was locked. Fuller went inside, took some purses, and left on a bike. She did not remember what bike.

Fuller testified she went home, took off McFarland's shoes, and changed her clothes. She woke up McFarland and "told him some[thing] along the lines of what happened."<sup>1</sup> McFarland told Fuller to return the purses because he had been through similar situations and "didn't want any part of it."<sup>2</sup>

Fuller said that when the police first arrived, she was outside again but could not remember why. She and McFarland both talked to the police but she could not remember what they said. Fuller said nothing when the police asked for McFarland's shoes because she was scared.

When the police left, McFarland told Fuller to take the purses back, so she "walked them down to the house, and set them on the . . . police car."<sup>3</sup> Fuller said she lied when she told the police McFarland had left for work. She said that when she initially got the purses, she "hid some of the contents . . . inside my place," and when she returned the purses, she "was just in a hurry" to get them back "so I gathered what I could find, and then took it back."<sup>4</sup>

Fuller testified she finally came forward in August 2015 because "I got sober, and really thought out my priorities."<sup>5</sup> She acknowledged she had previously claimed that

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<sup>1</sup> Report of Proceedings (RP) (Oct. 21, 2015) at 356.

<sup>2</sup> Id. at 357.

<sup>3</sup> Id. at 364.

<sup>4</sup> Id. at 366.

<sup>5</sup> Id. at 368.

McFarland's defense attorney had read her the police reports, but she could no longer remember if that was true. She also acknowledged her version of events changed from one interview to the next. Fuller believed that if she were convicted of the burglary she would be facing less time than McFarland because "I know my record's not that bad."<sup>6</sup>

The jury found McFarland guilty of residential burglary and returned a special verdict form finding the victim was present in the dwelling during the burglary. The trial court sentenced McFarland to 84 months confinement:

McFarland appeals.

### ANALYSIS

#### IMPROPER OPINION TESTIMONY

For the first time on appeal, McFarland contends that Officer Carlile testified to an improper opinion on guilt and witness credibility.

During direct examination, Officer Carlile testified,

[Fuller] looked at me . . . in fear . . . as if I knew some deep, dark secret or something that she didn't want me to know, like she had been caught, like they had been caught red-handed, as if I kn[ew] that [McFarland] had done the burglary. And she was very scared for him.<sup>7</sup>

McFarland did not object. On cross-examination, defense counsel immediately began eliciting statements to reflect the theory that the investigating officers prematurely concluded McFarland was the guilty party and that their resulting investigation was incomplete and inconsistent:

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<sup>6</sup> Id. at 388.

<sup>7</sup> RP (Oct. 20, 2015) at 210.



Defense: I'm going to start by asking you a little bit about your state of mind, your state of mind as an investigator, just to kind of get an idea what your perspective was, and what you were thinking, as you did your work.

Carlile: Okay.

Defense: It's fair to say that by the time [Fuller] brought you that purse, you already had a pretty firm belief that they were involved in this burglary?

Carlile: That [McFarland] had done it, yes.

Defense: And in fact, yeah, you were pretty confident that [McFarland] had done it, and you didn't need that purse to be delivered to you, to form that opinion; right?

Carlile: Not necessarily.

Defense: By the time, really, that you matched the shoes, you had a pretty firm idea in your head that he's the guy who went inside the house?

Carlile: That's correct.<sup>(8)</sup>

Defense counsel followed up with questions that emphasized what he believed were mistakes, flaws, and omissions in the investigation, suggesting they were a result of the officer's rush to judgment:

Defense: [B]y the time Mr. McFarland was making any statements to you, you had already formed the opinion that he was guilty of this burglary?

Carlile: True.

Defense: So when the jury hears you relaying his statements, it's fair to say that's also coming through the filter of your own expectation that he is guilty, whatever he says?

Carlile: I'm taking what was told to me, and portraying it the best that I possibly can.

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<sup>8</sup> RP (Oct. 21, 2015) at 240.

Defense: Now, it's fair to say that when he talks about—you know, when you record statements of him saying that maybe he was in the side yard, looking for his dog, you felt like that was excuse-making; correct?

Carlile: Absolutely.

.....

Defense: So he's taking the blame, correct[?]

Carlile: He is.

.....

Defense: And what's on his mind is his girlfriend's well-being, and what's going to happen to her?

Carlile: I don't necessarily believe that. I believe he's more so minimizing that he went inside the house and stole the purse in a burglary, rather than finding it on the side of the road. That's my personal belief.<sup>9</sup>

Defense counsel challenged Officer Carlile's interpretation of Fuller's reaction to his suggestion that McFarland committed the burglary. Defense counsel also focused on the lack of investigation into Fuller. On redirect, the State followed up with questions about what evidence led Officer Carlile to form his opinions. Officer Carlile offered his opinion on Fuller's confession.

Although several statements by Officer Carlile were invited by defense counsel's questions regarding the theory that the officers prematurely concluded McFarland was the guilty party, the State properly concedes the officer went beyond the scope of the defense questions and improperly emphasized his personal beliefs. The State also properly concedes that its questions resulted in several examples of improper opinion testimony on the credibility of McFarland and Fuller.

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<sup>9</sup> RP (Oct. 21, 2015) at 246-48.

Improper opinion testimony violates the defendant's constitutional right to a jury trial by invading the fact-finding province of the jury.<sup>10</sup> A witness is not allowed to give an opinion on another witness's credibility.<sup>11</sup> Opinions on guilt are generally improper whether made directly or by inference.<sup>12</sup> Because improper opinion testimony violates a constitutional right, a defendant may generally raise the issue for the first time on appeal.<sup>13</sup> Under RAP 2.5(a)(3), we may consider a manifest error affecting a constitutional right raised for the first time on appeal.

"Where a defendant contends a manifest error occurred at the trial level, we review the error employing a four-part test."<sup>14</sup>

First, we determine whether the alleged error is a constitutional error. Second, we determine whether the alleged error is manifest. Key to this determination is "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." Third, if we find the alleged error to be manifest, then we must address the merits of the constitutional issue. Finally, if we determine that a constitutional error occurred, then we undertake a harmless error analysis.<sup>15</sup>

Because improper opinion testimony invades the province of the jury and thus violates a constitutional right of the defendant, we need not address the first three points in the test.<sup>16</sup> Instead, we now must determine whether the admission of the improper opinion testimony was harmless error. A constitutional error is harmless "if the

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<sup>10</sup> State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

<sup>11</sup> State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995).

<sup>12</sup> State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

<sup>13</sup> State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 232 (2004).

<sup>14</sup> State v. Thach, 126 Wn. App. 297, 312-13, 106 P.3d 782 (2005) (citing State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

<sup>15</sup> Id. (internal citations omitted) (quoting Lynn, 67 Wn. App. at 345).

<sup>16</sup> Id. at 312; Dolan, 118 Wn. App. at 329.

appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error."<sup>17</sup> In Washington, we determine whether the error was harmless by applying the "overwhelming untainted evidence" test, meaning "the appellate court looks only at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt."<sup>18</sup>

Here, there is no dispute that the burglary took place and was committed by McFarland or Fuller or both.<sup>19</sup> The evidence of McFarland's guilt is overwhelming. First, the physical evidence is entirely consistent with McFarland's guilt and inconsistent with Fuller's testimony. Within minutes after the robbery, McFarland was found a few houses away wearing size 10 Nike high tops with the tread matching the wet muddy shoeprints inside the Clarks' house. The slippers McFarland claimed to have been wearing while looking for Fuller's dog that rainy morning were dry.

Although the petite Fuller hypothetically could have been wearing those exact same size 10 Nike high tops when she rode a bike to look for her dog that ran away, the timeline is entirely inconsistent with such a scenario. Kyli's husband Joshua testified that he left for work the morning of the burglary at 5:45 a.m. Joshua testified that the sliding back door was closed and locked when he left. Kyli awoke to her dogs barking just before 7:00 a.m. She immediately noticed wet muddy shoeprints on the floor, her missing purse, and the open sliding glass door and called the police.

Officer Riches arrived within two to three minutes of Kyli's call. When he saw that the muddy shoeprints were still wet, he told Officer Carlile, who arrived minutes

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<sup>17</sup> State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

<sup>18</sup> State v. Ramirez, 49 Wn. App. 332, 339, 742 P.2d 726 (1987) (citing id. at 426).

<sup>19</sup> The court gave an accomplice liability instruction.

No. 74527-1-I/11

later, to drive through the neighborhood to look for suspects. Officer Carlile drove past four to five houses before finding McFarland and Fuller outside in a driveway. Fuller and McFarland both bent down when they saw Officer Carlile and quickly went inside their apartment. Officer Carlile approached the apartment and asked McFarland and Fuller to come outside. When McFarland came outside, Officer Carlile immediately noticed he was wearing Nike high tops that matched the tread of the shoeprints inside the Clarks' house. There is no viable switching of the Nike high tops from Fuller to McFarland in that limited timeline.

Moreover, the physical evidence of the height and strength required to remove the heavy curtain rod to open the Clarks' back gate excludes Fuller as the perpetrator. And Fuller's testimony did not merely have gaps; she gave multiple inconsistent versions of events, none of which fit the physical evidence. No coherent scenario reconciles the physical evidence with Fuller's version of events. The overwhelming, untainted evidence of McFarland's guilt is sufficient to convince this court beyond a reasonable doubt that the improper testimony did not affect the jury verdict. Therefore, we hold that the error was harmless.<sup>20</sup>

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<sup>20</sup> McFarland also asserts that he received ineffective assistance of counsel because his defense counsel failed to object to the opinion testimony. For the same reasons supporting harmless error, he fails to establish any prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (prejudice, as an element of ineffective assistance, is established if the defendant shows there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.).

#### COURT COSTS

McFarland contends that the sentencing court erred by imposing \$200 in "court costs." McFarland claims this fee is discretionary, and therefore should have been waived by the sentencing court. McFarland is incorrect.

A pertinent statute requires that courts impose a filing fee on certain criminal defendants. "Upon conviction or plea of guilty, . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars."<sup>21</sup> Sentencing courts do not have the discretion to decline to impose mandatory legal financial obligations.<sup>22</sup>

At sentencing, the court repeatedly stated that it was imposing "a \$500 victim penalty assessment, a \$100 biological sample fee, [and] a \$200 filing fee."<sup>23</sup> While the judgment and sentence lists \$200 in "court costs," it is clear from the record that the \$200 in court costs is, in fact, the mandatory filing fee. McFarland has not explained how the \$200 in court costs could be anything else in light of the filing fee being otherwise not ordered. Accordingly, there was no error.<sup>24</sup>

#### APPELLATE COSTS

McFarland asks the court to deny the State appellate costs. Newly amended RAP 14.2 requires us to follow a trial court finding of indigency unless the State provides sufficient new evidence to overcome that finding:

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<sup>21</sup> RCW 36.18.020(2)(h).

<sup>22</sup> State v. Clark, 191 Wn. App. 369, 373, 362 P.3d 309 (2015).

<sup>23</sup> RP (Dec. 28, 2015) at 20; RP (Dec. 16, 2015) at 456.

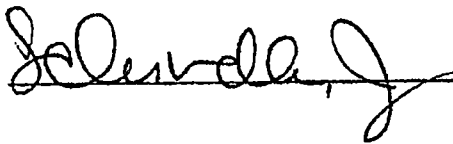
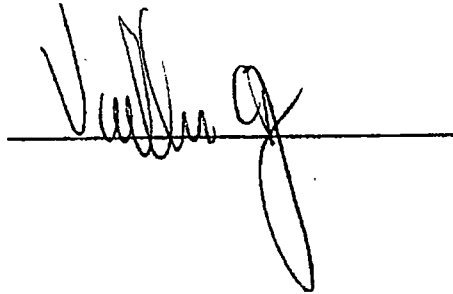
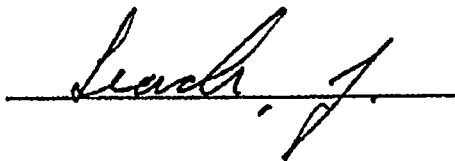
<sup>24</sup> McFarland also asserts that he received ineffective assistance of counsel because his defense counsel failed to object to the imposition of the \$200 filing fee. For the reasons discussed herein, his assertion fails.

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

Here, after the trial court entered the judgment and sentence, the trial court signed an order authorizing McFarland to seek appellate review at public expense and appointment of an attorney. RAP 14.2 places the burden on the State to show McFarland's position has changed. The State has not done so. If the State has evidence indicating that McFarland's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner.

Affirmed.

WE CONCUR:



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