

NO. 75071-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD WHITAKER

Appellant.

FILED
Aug 31, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Tanya Thorp, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	5
1. WHITAKER WAS DENIED JURY INSTRUCTIONS SUPPORTING HIS THEORY OF THE CASE WHEN THE COURT REFUSED TO INFORM THE JURY THAT MERE POSSESSION OF A CONTROLLED SUBSTANCE IS INSUFFICIENT TO INFER INTENT TO DELIVER.....	5
2. THE OFFICER GAVE IMPROPER OPINIONS ON GUILT WHEN HE TOLD THE JURY HE BELIEVED HE HAD PROBABLE CAUSE TO ARREST, WHITAKER WAS THE MAN HE SAW SELL COCAINE, AND WHITAKER WAS THE CORRECT SUSPECT.....	10
a. <u>Lednický’s Testimony Invaded the Province of the Jury with Improper Opinions on Guilt</u>	11
b. <u>The Officer’s Improper Opinions on Guilt Require Reversal.</u>	15
3. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE OPINION TESTIMONY.....	17
4. APPEAL COSTS SHOULD NOT BE IMPOSED.....	19
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).....	11
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	19
<u>State v. Acosta</u> 101 Wn.2d 612, 683 P.2d 1069 (1984).....	6
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	17
<u>State v. Aumick</u> 126 Wn.2d 422, 894 P.2d 1325 (1995).....	10
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987).....	11
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	19
<u>State v. Campos</u> 100 Wn. App. 218, 998 P.2d 893 (2000).....	5, 9
<u>State v. Cobelli</u> 56 Wn. App. 921, 788 P.2d 1081 (1989).....	5
<u>State v. Cronin</u> 142 Wn.2d 568, 14 P.3d 752 (2000).....	6
<u>State v. Darden</u> 145 Wn.2d 612, 41 P.3d 1189 (2002).....	5
<u>State v. Ehrhardt</u> 167 Wn. App. 934, 276 P.3d 332 (2012).....	7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Goodman</u> 150 Wn.2d 774, 83 P.3d 410 (2004).....	5, 6
<u>State v. Hudson</u> 150 Wn. App. 646, 208 P.3d 1236 (2009).....	11
<u>State v. Irons</u> 101 Wn. App. 544, 4 P.3d 174 (2002).....	6, 9
<u>State v. Johnson</u> 152 Wn. App. 924, 219 P.3d 958 (2009).....	11, 18
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	16
<u>State v. Lord</u> 161 Wn.2d 276, 165 P.3d 1251 (2007).....	7
<u>State v. May</u> 100 Wn. App. 478, 997 P.2d 956 (2000).....	6
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	11, 16, 18
<u>State v. Quaale</u> 182 Wn.2d 191, 340 P.3d 213 (2014).....	11, 15
<u>State v. Smails</u> 63 Wash. 172, 115 P. 82 (1911).....	7
<u>State v. Stith</u> 71 Wn. App. 14, 856 P.2d 415 (1993).....	12
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	17, 18
<u>State v. Walters</u> 162 Wn. App. 74, 255 P.3d 835 (2011).....	5, 6, 9

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 17, 18

OTHER JURISDICTIONS

Cureton v. State
169 P.3d 549 (Wyo. 2007)..... 14

People v. Brown
116 Cal App.3d 820, 172 Cal. Rptr. 221 (1981)..... 13

State v. Byrd
318 S.C. 247, 456 S.E.2d 922 (S.C. App. 1995) 13

State v. Vilaladra
207 Conn. 35, 540 A.2d 42 (1988) 13

RULES, STATUTES AND OTHER AUTHORITIES

11 Washington Practice, Washington Pattern Jury
Instructions – Criminal 10.51 (3rd Ed. 2008) 8

RCW 10.73.160 19

RAP 14..... 19

RAP 15.2..... 20

Const. art. I, § 21..... 11

Const. art. I, § 22..... 11

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give appellant's proposed jury instruction that mere possession is insufficient to support an inference of intent to deliver a controlled substance. CP 33.

2. Appellant's right to a jury trial was violated when a police officer offered an improper opinion on guilt by testifying he had probable cause to arrest, appellant was the person he saw selling crack cocaine, and the arrest team arrested the correct suspect.

3. Appellant's right to effective assistance of counsel was violated when counsel failed to object to improper opinion testimony by the police officer that appellant was the person he saw selling crack cocaine and the arrest team arrested the correct suspect.

Issues Pertaining to Assignments of Error

1. Did the court err in refusing to give appellant's proposed jury instruction that mere possession of a controlled substance is insufficient to support an inference of intent to deliver a controlled substance?

2. Did the police officer give an improper opinion on guilt and invade the province of the jury when he told the jury he had probable cause to arrest appellant, the arrest team arrested the person he saw selling crack cocaine, and the arrest team arrested the correct suspect?

3. Was defense counsel constitutionally ineffective in failing to object to improper opinion testimony that appellant was the person the officer saw selling crack cocaine and was the correct suspect?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Richard Whitaker with possession of cocaine with intent to deliver. CP 1. The jury found him guilty and the court imposed a standard range sentence. CP 60, 69. Notice of appeal was timely filed. CP 82.

2. Substantive Facts

In 2013, Seattle police conducted an operation they call a “see pop” at the corner of 2nd Avenue and Virginia Street in downtown Seattle. RP 84-85. At around 1 a.m. Officer Forrest Lednicky began observing the street corner from a hidden vantage point atop the Moore Theater. RP 31. At around 1:45 he saw a man, later determined to be Whitaker, walk up and stand with his back to the building, looking up and down Second Avenue for about 5 minutes. RP 84-85, 87-88. Because it was a chilly night, there were few if any other people on the street. RP 87.

Then Lednicky saw two other men approach, talk for a few minutes, step away, and pull out what appeared to be currency. RP 89-90. Lednicky believed they were combining their money, which, in his experience, drug

users often do before purchasing illegal narcotics. RP 89-90. When the two men returned Whitaker, all three walked north for a few steps, with their backs to Lednicky. RP 90. Lednicky's report did not mention them turning around again, yet he testified he saw Whitaker reach into the front of his pants, pull out a clear plastic baggie containing small white rocks, and hand one of the rocks to one of the other two. RP 91, 103. The other man unwrapped the white rock and placed it in his mouth. RP 91-92. Lednicky testified people often transport or conceal crack cocaine in their mouths because it is not soluble in water. RP 92.

Lednicky did not see any money change hands. RP 94. Although he claimed to be able to identify the small white rocks due to his use of binoculars, he could not see the denominations of the currency bills, even though the numbers are approximately the same size as the white rocks. RP 104-06. In fact, on cross-examination, he admitted he could not be completely certain the papers he saw even were actual currency. RP 106.

Nevertheless, Lednicky testified he believed he had probable cause to arrest Whitaker. RP 94. The court overruled defense counsel's relevance objection. RP 94. Lednicky testified he watched as the arrest team moved in and arrested Whitaker. RP 94. An objection was sustained when Lednicky told the jury the arrest team arrested the right person. RP 95. He then answered yes when asked whether the arrested person was, "the person you

observed selling crack cocaine.” RP 95. He told the arrested team they had “contacted the correct suspect.” RP 100.

The other two men walked away and were not detained. RP 94. Lednicky testified he focused on Whitaker rather than the two who walked away because he had a “moderate amount of crack cocaine.” RP 96.

At the precinct, Whitaker was subjected to a strip search. RP 144. Police found 10 individually wrapped pieces of off-white chunky material in the fly seam of Whitaker’s pants. RP 114-15, 145. One of the ten pieces was found to contain cocaine. RP 122. The others were not tested. RP 114-15.

Whitaker proposed the following jury instruction in addition to the pattern instructions on the elements of possession with intent to deliver: “An inference of an intent to deliver cannot be based on mere possession of a controlled substance, absent other facts and circumstances.” CP 33. The State agreed the instruction was a correct statement of the law, but argued it was akin to a comment on the evidence. RP 212. The court rejected the instruction on the grounds that it was misleading because the phrase “mere possession” was a “loaded statement;” the other instructions made the relevant legal standard sufficiently clear; and the court believed nothing prevented the defense from arguing its theory of the case. RP 213-14.

C. ARGUMENT

1. WHITAKER WAS DENIED JURY INSTRUCTIONS SUPPORTING HIS THEORY OF THE CASE WHEN THE COURT REFUSED TO INFORM THE JURY THAT MERE POSSESSION OF A CONTROLLED SUBSTANCE IS INSUFFICIENT TO INFER INTENT TO DELIVER.

A person may not legally be convicted of possession with intent to deliver a controlled substance based on mere possession of the substance. State v. Goodman, 150 Wn.2d 774, 783, 83 P.3d 410 (2004) (citing, *inter alia*, State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002)); State v. Cobelli, 56 Wn. App. 921, 925, 788 P.2d 1081 (1989). This is true even when police testify the person was in possession of an amount they deem greater than would be likely solely for personal use. State v. Campos, 100 Wn. App. 218, 222, 998 P.2d 893 (2000). Whitaker, charged with possession with intent to deliver cocaine, asked that the jury be instructed on this well-settled law. CP 33. Without the instruction that mere possession is insufficient, the jury could convict Whitaker on the basis of legally insufficient evidence. Therefore, the denial of this instruction requires reversal of his conviction.

Jury instructions, read as a whole, must permit a party to argue his theory of the case. State v. Walters, 162 Wn. App. 74, 82, 255 P.3d 835 (2011). A defendant is entitled to instructions on his theory of the case so long as the instructions are supported by the evidence, are not misleading,

and correctly state the law. Id. Defense counsel “should not have to convince the jury what the law is.” State v. Irons, 101 Wn. App. 544, 559, 4 P.3d 174 (2002) (citing State v. Acosta, 101 Wn.2d 612, 622, 683 P.2d 1069 (1984)).

Refusal to give a requested jury instruction is reversible error when the absence of the instruction prevents the accused from presenting his theory of the case or permits the jury to find criminal liability on an incorrect legal basis. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). A court abuses its discretion when it refuses a proposed jury instruction based on untenable grounds or for untenable reasons. Walters, 162 Wn. App. at 82.

The court abused its discretion here. Whitaker’s proposed instruction was a correct statement of the law and supported his theory of the case, denying any intent to deliver. Goodman, 150 Wn.2d at 783. It was not misleading, and without it, there was a grave danger that the jury would convict on a legally impermissible basis, namely, mere possession of a seemingly large quantity of cocaine. The court’s conclusion that the proposed instruction was somehow misleading is untenable.

The trial court seemed to believe that the jury would take the phrase “mere possession” as an indication from the court that no evidence beyond possession existed in this case. RP 213-14. This rationale is untenable in

light of the presumption that jury instructions fall upon reasonable and intelligent ears. See, e.g., State v. Lord, 161 Wn.2d 276, 278-79, 165 P.3d 1251 (2007); State v. Smalls, 63 Wash. 172, 183, 115 P. 82 (1911). The jury is told that its job is to determine the facts and that any apparent comment by the court on the weight of the evidence should be disregarded. CP 45-46. In light of the other instructions, a reasonable juror would take Whitaker's proposed instruction for exactly what it was: a clear statement of the minimum evidence necessary for a conviction, not a comment on whether that evidence existed in this case.

Similar instructions may be problematic if the instruction appears to exclude the possibility of other facts and circumstances that could amount to sufficient evidence. See State v. Ehrhardt, 167 Wn. App. 934, 939-40, 276 P.3d 332, 335-36 (2012). For example, in Ehrhardt, the court concluded the trial court was not obliged to give instruct the jury that mere possession of stolen property was "insufficient to find the defendant guilty of either theft 2 or burglary 2." Id. at 939. The court rejected the instruction as misleading because it did not inform the jury that other circumstances could, in fact, be sufficient proof of theft or burglary. Id. at 940.

Whitaker's proposed instruction, however, is not susceptible to this type of misunderstanding. It specifically mentions "other facts and circumstances" that may be sufficient evidence. CP 33. Thus, it does not

fall prey to the weakness identified in Erhardt. 167 Wn. App. at 940. The proposed instruction correctly and straightforwardly informs the jury that mere possession is insufficient absent other facts and circumstances. CP 33.

The instruction Whitaker proposed is more akin to the commonly used pattern instruction on accomplice liability. Like Whitaker's proposed instruction, the last sentence of the definition of complicity informs the jury of one type of evidence that would, alone, be legally insufficient: "However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." 11 Washington Practice, Washington Pattern Jury Instructions – Criminal, 10.51 (3rd Ed. 2008). Jurors are presumed to understand that defining complicity as "more than mere presence" does not prevent them from deciding whether or not the evidence, in fact, shows more than mere presence in a given case. The same is true of Whitaker's proposed instruction requiring more than mere possession to prove intent.

The proposed instruction was essential to the defense theory of the case. Without it, there is a realistic danger that the jury convicted based solely on possession of cocaine. Aside from his possession of several rocks of crack cocaine, the primary evidence of intent to deliver was Lednicky's observation of what he believed to be a sale of drugs to two other persons. But defense counsel pointed out numerous reasons to doubt the accuracy of

Lednický's perceptions. For example, Lednický never mentioned in his report that Whitaker turned around after facing north, where Lednický could not see what transpired. RP 102-03. Lednický's observations were also in doubt because he claimed to be able to identify rocks of crack cocaine from a distance of 150 feet, but at the same time could not identify the denominations of the currency he allegedly observed that was approximately the same size. RP 104-05. The jury could have found reason to doubt the veracity and accuracy of Lednický's testimony.

Without Lednický's testimony, the jury was left with evidence that Whitaker possessed 10 rocks of crack cocaine. Even in a large amount, mere possession is legally insufficient to support an inference of intent to deliver. Campos, 100 Wn. App. at 222.

The jury could have relied on this legally insufficient basis for conviction because the prosecutor focused on amount of drugs found in Whitaker's possession as a basis for conviction during closing argument. He did so in picturesque and vivid fashion, telling the jury that possession of 10 rocks of cocaine was akin to carrying around 66 cans of beer. RP 256.

The court's refusal to give the requested instruction left counsel in the position of convincing the jury that mere possession is insufficient to show intent to deliver. This was error. Walters, 162 Wn. App. at 82; Irons, 101 Wn. App. at 559. The Supreme Court has observed "[t]he jury should

not have to obtain its instruction on the law from arguments of counsel.” State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995). Additionally, defense counsel’s closing argument that mere possession was insufficient was no substitute for accurate instructions, because the jury is told to “[d]isregard any remark, statement or argument that is not supported by . . . the law in [the court’s] instructions.” CP 46.

Whitaker was entitled to the instruction that informed the jury of the legal basis for his defense. Instead, he was left to try to persuade the jury of that legal basis. Without the instruction, there is a real danger that the conviction was based on the legally insufficient basis of mere possession. The court’s refusal to give the requested instruction requires reversal.

2. THE OFFICER GAVE IMPROPER OPINIONS ON GUILT WHEN HE TOLD THE JURY HE BELIEVED HE HAD PROBABLE CAUSE TO ARREST, WHITAKER WAS THE MAN HE SAW SELL COCAINE, AND WHITAKER WAS THE CORRECT SUSPECT.

Whitaker asks this Court to reverse his conviction because his constitutional right to a jury trial was violated by the officer’s opinion testimony as to his guilt and intent. First, the officer testified he believed he had probable cause to arrest Whitaker. RP 94. The court overruled Whitaker’s relevance objection. Id. Second, the officer went on to testify Whitaker was the man he saw selling cocaine and that the arrest team had contacted “the correct suspect.” RP 95, 100. All of these comments invaded

the province of the jury. Taken together or separately, they denied Whitaker a fair trial and require reversal of his conviction.

a. Lednicky's Testimony Invaded the Province of the Jury with Improper Opinions on Guilt.

The jury's role as fact-finder is essential to the constitutional right to a jury trial. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). That role is to be held "inviolable" under Washington's constitution. Const. art. I, §§ 21, 22. Therefore, "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Expressions of personal belief as to guilt are "clearly inappropriate" testimony in criminal trials. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

To determine whether an opinion is improper, courts consider (1) the type of witness involved, (2) the specific 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. State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009) (citing State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009)). Courts generally distinguish proper factual observations from testimony about guilt or intent. Quaale, 182 Wn.2d at 198–99; Montgomery,

163 Wn.2d at 595 (officer testimony improper because it contained explicit opinion on intent).

The officer's comments in this case amounted to testimony about guilt and intent, rather than mere factual observations. The testimony that Lednicky believed he had probable cause to arrest Whitaker was a legal conclusion, not a factual observation. While it is a legal conclusion officers are empowered to make, that does not excuse informing the jury directly about the officer's belief. See Montgomery, 163 Wn.2d at 595 ("The State argues the officers' opinions added nothing new because the jury already knows the defendant was arrested because the officers believed he was guilty. We believe this unavoidable state of affairs does not justify allowing explicit opinions on intent. The opinion testimony in this case was improper.").

This Court condemned a similar comment about probable cause by a prosecutor in State v. Stith, 71 Wn. App. 14, 21-23, 856 P.2d 415 (1993). The prosecutor in Stith made several improper comments, including telling the jury, "So the question of probable cause is something the judge has already determined." Id. at 17. The court concluded this comment "indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court." Id. at 22. The argument was "tantamount to arguing that guilt had already been determined." Id.

Moments after pronouncing his opinion on probable cause, Lednicky again opined on Whitaker's guilt, answering yes when asked if the arrest team contacted "the person that you observed selling crack cocaine." RP 95. He then announced that the arrest team had contacted "the correct suspect." RP 100. Lednicky did not limit himself, as the court suggested in Montgomery, to identifying behaviors that were, in his experience, consistent with the sale of narcotics. See 163 Wn.2d at 592-93 (approving of expert testimony that certain facts are "consistent with" a certain conclusion to avoid improper opinions on guilt). He directly opined that he saw Whitaker selling cocaine and that Whitaker was the correct suspect. RP 95. Taken alone or together, these comments clearly imply Lednicky's personal belief in Whitaker's guilt.

Other jurisdictions have held that testimony that the accused person is a drug dealer constitutes an impermissible opinion on the character or intent of the accused. See, e.g., People v. Brown, 116 Cal App.3d 820, 829, 172 Cal. Rptr. 221 (1981) (officer's opinion that defendant was working as "runner" for drug dealer was improper opinion on defendant's guilt); State v. Vilalastra, 207 Conn. 35, 43, 540 A.2d 42, 47 (1988) (improper to inquire whether in expert's opinion defendant was a drug seller); State v. Byrd, 318 S.C. 247, 249, 456 S.E.2d 922 (S.C. App. 1995) (state conceded impropriety of testimony that defendant was the "largest drug dealer cocaine-wise that

I've investigated in this end of the state"); Cureton v. State, 169 P.3d 549, 551 (Wyo. 2007) (officer's opinion permissible because she never stated conclusion about whether Cureton was a drug dealer). Lednicky's testimony that he saw Whitaker selling crack cocaine was no different than opining he was a drug dealer. This was an impermissible opinion on guilt.

These comments are even more problematic because they came from Lednicky. It is well established that opinion testimony by police officers carries a special "aura of reliability," over that of lay witnesses. Montgomery, 163 Wn.2d at 595.

The nature of the charges and the other evidence also indicates this opinion testimony was improper. When intent is the only disputed element, opinions purporting to establish the defendant's state of mind are particularly problematic. See Montgomery, 163 Wn.2d at 594 (finding improper opinion on guilt in part because opinion "went to the core issue and the only disputed element, Montgomery's intent."). Whitaker was charged with possession of cocaine with intent to deliver. CP 1. The only disputed issue at trial was the intent. The only evidence of intent to deliver, beyond mere possession, was Lednicky's testimony. Instead of merely reporting his observations and allowing the jury to draw conclusions, Lednicky opined as to the legal meaning of what he had seen, that what he had seen was a sale of cocaine. RP 95. He further opined that Whitaker was "the correct suspect." RP 100.

Given Lednicky's status as a police officer and the fact that his testimony was the only evidence of the only disputed element of the charge, his testimony amounted to a direct opinion on Whitaker's guilt.

b. The Officer's Improper Opinions on Guilt Require Reversal.

Improper opinions on guilt are constitutional error that violates the right to a jury trial. State v. Quaaale, 182 Wn.2d 191, 201-02, 340 P.3d 213 (2014). Constitutional error requires reversal unless the State can prove beyond a reasonable doubt the error did not contribute to the verdict. Id. The State cannot do so here. Lednicky's opinion that he had probable cause to arrest was likely to sway the jury. It was particularly likely to do so in this case, where the only disputed issue was Whitaker's mental state, a question that is rarely, if ever subject to direct evidence. The jury was likely to simply rest on Lednicky's opinion of the inferences to be drawn from what he saw. While it is true that jurors are instructed that they alone are to determine the weight of the evidence, the jury is also instructed that it may give credence to expert opinions. CP 45, 52. When the judge overruled the objection, the jury was likely to believe this testimony was a proper expert opinion that they could rely on to determine guilt.

While not objected to, the second and third opinions (answering yes when asked if Whitaker was the person he observed selling cocaine and

testifying he was “the correct suspect”) only contributed to the likelihood that the officer’s opinion played a role in the jury’s decision. Moreover, those opinions, despite the failure to object, also require reversal.

A nearly explicit opinion on credibility or guilt is manifest constitutional error that may be raised for the first time on appeal. Montgomery, 163 Wn.2d at 595. In determining whether opinion testimony is manifest constitutional error, courts look at whether there was an “explicit or almost explicit” opinion on guilt, whether the jury was otherwise properly instructed that it is the sole judge of the witness credibility, whether there were potential tactical reasons not to object, and whether there is any indication the jury was influenced by the opinion. Montgomery, 163 Wn.2d at 595-96; State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007).

Here, Lednicky told the jury Whitaker was a drug dealer and was the correct suspect. RP 95, 100. These were nearly explicit opinions on guilt. Although the jury was properly instructed, the jury was likely to credit these opinions because the court overruled the objection to Lednicky’s testimony about probable cause. RP 94. Overruling the objection implicitly gave the jury permission to credit Lednicky’s opinion of the evidence as if it were proper expert opinion testimony. There was no strategic reason not to object; in fact, counsel had objected to a nearly identical question only moments earlier when the prosecutor asked Lednicky if the arrest team

arrested the right person. RP 95. This Court should also consider these additional comments as manifest constitutional error under RAP 2.5.

The jury here was exposed to improper opinions by a police officer that there was probable cause to arrest, that Whitaker was a drug dealer, and that he was the correct suspect. Taken alone or separately, these comments by the officer invaded the province of the jury and deprived Whitaker of a fair trial.

3. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE OPINION TESTIMONY.

Alternatively, if this Court finds the error was not preserved for review, the comment still requires reversal for ineffective assistance of counsel in failing to object. A conviction should be reversed for ineffective assistance of counsel when counsel's performance was deficient and there is a reasonable probability the error affected the outcome. Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The failure to object to these clearly improper and highly prejudicial opinions on guilt was unreasonably deficient. Legitimate trial strategy or tactics may constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). But there is no possible strategic reason for

permitting improper opinion evidence showing the officer's belief that Whitaker was a drug dealer and was "the correct suspect." RP 95, 100.

Prejudice exists when there is a reasonable probability the outcome would have been different but for the attorney's deficient performance, *i.e.*, "a probability sufficient to undermine confidence in the reliability of the outcome." Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226. Here, the outcome would likely have been different, had counsel objected. First, an objection to improper opinion would likely have been sustained under Montgomery, discussed above. 163 Wn.2d at 594-95. Indeed, only moments earlier, the court had sustained counsel's objection to the question whether the arrest team had arrested the right person. RP 95. A proper objection would have led the trial court to understand that the new question, whether Whitaker was the person Lednicky observed selling crack cocaine, was similarly improper, as was Lednicky's subsequent testimony that the arrest team contacted "the correct suspect." RP 95, 100.

Without Lednicky's conclusory opinion that Whitaker was a drug dealer and the correct suspect, it is reasonably probable the jury would have more critically examined whether Lednicky was really in a position to see what he claimed to have seen, and would have been far more likely to find reasonable doubt as to Whitaker's intent.

4. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Whitaker indigent and entitled to appointment of appellate counsel at public expense. CP 80-81. If Whitaker does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Whitaker’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory legal financial obligations and also waived the interest. CP 68; RP 304. Whitaker declared he had no assets and no income since 2008. CP 77-78. The trial court found him “unable by reason of poverty to pay for any of the expenses of appellate review.” CP 80. The

finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Whitaker has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the foregoing reasons, Whitaker asks this Court to reverse his conviction.

DATED this 31st day of August, 2016.

Respectfully submitted,

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