

COURT OF APPEALS

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NO. 34670-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DUSTIN R. SNODGRASS,

Appellant.

BRIEF OF APPELLANT

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 ORIGINAL

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	v
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issues Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	7
D. ARGUMENT	
I. THE TRIAL COURT ERRED WHEN IT ADMITTED INTO EVIDENCE STATEMENTS THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION BECAUSE THE STATE FAILED TO PROVE THAT THE DEFENDANT WAIVED HIS RIGHTS TO SILENCE AND COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9 AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT	14
II. THE STATE VIOLATED THE DEFENDANT’S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9 AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT WHEN IT ELICITED EVIDENCE THAT THE DEFENDANT REFUSED TO ANSWER POLICE QUESTIONING CONCERNING THE ACCIDENT	18

III. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE ELICITED EVIDENCE CONCERNING THE DEFENDANT’S EXERCISE OF HIS RIGHT TO SILENCE, WHEN THE STATE CALLED UPON AN EXPERT TO RENDER AN OPINION OUTSIDE HER AREA OF EXPERTISE, AND WHEN THE PROSECUTOR REPEATEDLY EXPRESSED HIS PERSONAL OPINION DURING CLOSING ARGUMENT DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT 24

1. Trial Counsel’s Failure to Object to Evidence that the Defendant Exercised His Right to Silence Fell below the Standard of a Reasonably Prudent Attorney 25

2. Trial Counsel’s Failure to Object When the State Called upon an Expert Witness to Render Opinions Outside Her Area of Expertise Fell below the Standard of a Reasonably Prudent Attorney 26

3. Trial Counsel’s Failure to Object When the Prosecutor Repeatedly Expressed His Personal Opinion on the Evidence During Closing Argument Fell below the Standard of a Reasonably Prudent Attorney 31

4. Trial Counsel’s Deficient Performance During Trial Caused Prejudice 33

IV. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ALLOWED THE STATE TO REPEATEDLY FORCE THE DEFENDANT TO COMMENT ON THE CREDIBILITY OF THE STATE’S WITNESSES ... 34

V. THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT 39

E. CONCLUSION 42

F. APPENDIX

1. Washington Constitution, Article 1, § 3 43

2. Washington Constitution, Article 1, § 9 43

3. Washington Constitution, Article 1, § 21 43

4. Washington Constitution, Article 1, § 22 43

5. United States Constitution, Fifth Amendment 44

6. United States Constitution, Sixth Amendment 44

7. United States Constitution, Fourteenth Amendment 44

8. RAP 2.5(a) 45

TABLE OF AUTHORITIES

Page

Federal Cases

Church v. Kinchelse,
767 F.2d 639 (9th Cir. 1985) 25

Hoffman v. United States,
341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) 18

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 14, 16

Strickland v. Washington,
466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) 24, 33

State Cases

Queen City Farms, Inc. v. Central Nat’Ins. Co.,
126 Wn.2d 50, 882 P.2d 703, 891 P.2d 718 (1994) 27

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988) 32

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) 26

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) 14

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 17, 23

State v. Carlin, 40 Wn.App. 698, 700 P.2d 323 (1985) 26

State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956) 32

State v. Casteneda-Perez, 61 Wn.App. 354, 810 P.2d 74 (1991) 34

State v. Cobb, 22 Wn.App. 221, 589 P.2d 297 (1978) 25

State v. Devlin, 145 Wn. 44, 258 P. 826 (1927) 32

<i>State v. Earls</i> , 116 Wn.2d 364, 805 P.2d 211 (1991)	14, 18
<i>State v. Easter</i> , 130 Wn.2d 228, 922 P.2d 1285 (1996)	18-21
<i>State v. Farr-Lenzini</i> , 93 Wn.App. 453, 970 P.2d 313 (1999)	26-28
<i>State v. Foster</i> , 91 Wn.2d 466, 589 P.2d 789 (1979)	18
<i>State v. Fricks</i> , 91 Wn.2d 391, 588 P.2d 1328 (1979)	18
<i>State v. Hamlet</i> , 133 Wn.2d 314, 944 P.2d 1026 (1997)	39
<i>State v. Holland</i> , 98 Wn.2d 507, 656 P.2d 1056 (1983)	14
<i>State v. Hopson</i> , 113 Wn.2d 273, 778 P.2d 1014 (1989)	39
<i>State v. Jerrels</i> , 83 Wn.App. 503, 925 P.2d 209 (1996)	34, 35
<i>State v. Johnson</i> , 29 Wn.App. 807, 631 P.2d 413 (1981)	25
<i>State v. Johnson</i> , 90 Wn. App. 54, 950 P.2d 981 (1981)	39-41
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	22, 23
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995)	17
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984)	31, 34
<i>State v. Swagerty</i> , 60 Wn.App. 830, 810 P.2d 1 (1991)	28, 29, 31

Constitutional Provisions

Washington Constitution, Article 1, § 3	26, 31, 34, 38, 39
Washington Constitution, Article 1, § 9	14, 17-19
Washington Constitution, Article 1, § 21	26
Washington Constitution, Article 1, § 22	24, 34

United States Constitution, Fifth Amendment 14, 17-19, 26
United States Constitution, Sixth Amendment 24, 26
United States Constitution, Fourteenth Amendment 34, 38

Statutes and Court Rules

CrR 3.5 15
ER 702 27
ER 704 27
RAP 2.5(a) 22, 23

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it admitted into evidence statements the defendant made during custodial interrogation because the state failed to prove that the defendant waived his rights to silence and counsel under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment.

2. The state violated the defendant's right to silence under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment when it elicited evidence that the defendant refused to answer police questioning concerning the accident.

3. Trial counsel's failure to object when the state elicited evidence concerning the defendant's exercise of his right to silence, when the state called upon an expert to render an opinion outside her area of expertise, and when the prosecutor repeatedly expressed his personal opinion during closing argument denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

4. The trial court violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it allowed the state to repeatedly force the

defendant to comment on the credibility of the state's witnesses.

5. The cumulative effect of the errors in this case denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it admits into evidence a defendant's statements made during custodial interrogation when the state first fails to prove that the defendant waived his rights to silence and counsel under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment?

2. Does the state violate a defendant's right to silence under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment when it elicits evidence that the defendant refused to answer police questioning concerning the crime charged?

3. Does trial counsel's failure to object when the state elicits evidence concerning the defendant's exercise of his right to silence, when the state calls upon an expert to render an opinion outside her area of expertise, and when the prosecutor repeatedly expresses his personal opinion during closing argument deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment?

4. Does a trial court violate a defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it allows the state to repeatedly force the defendant to comment on the credibility of the state's witnesses during cross-examination?

5. Is a defendant entitled to a new trial when the cumulative effect of errors rendered the trial unfair under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

Factual History

On Wednesday, November 23, 2005, Frederick Roehrick, his fiancée Crystal Snodgrass, Crystal's brother Dustin Snodgrass, and Dustin's two small children drove to the town of Murdock in Klickitat County to spend Thanksgiving with Crystal and Dustin's parents. RP 28-29, 278.¹ They traveled in a green Ford Contour that Dustin and his girlfriend had recently purchased. RP 28-29, 188-195, 277-280. Sometime during this visit Frederick, Crystal, and Dustin smoked methamphetamine together and Dustin took a drug called "soma," a central nervous system depressant used as pain medication. RP 28-36, 142. At about four in the morning on Saturday, November 23, 2005, the group left the house to return home, traveling westbound on State Route 14. RP 30-32, 278. Dustin, who had about five to six hours sleep, was driving. *Id.* Crystal was in the front passenger seat, and Frederick was in the back seat with Dustin's two children, who were in car seats. RP 22-23, 102, 278.

At about milepost 55 in Skamania County Dustin "nodded off" for a second and drove the vehicle off the right shoulder of the road, initially grazing a rock retaining wall and then hitting it with the right front portion of

¹The record in this case includes three volumes of continuously number verbatim reports, referred to herein as "RP."

the vehicle, thereby spinning the car around so it ended up facing southeast completely blocking the westbound lane. RP 22-23, 48-51 188, 280-281. The whole accident took between one and two seconds. RP 200-201. The impact pushed the engine of the small car partially into the passenger compartment, trapping Dustin and Crystal, although Frederick was able to crawl out. RP 49-55, 191-201. Frederick had suffered a broken elbow, a broken nose, and a broken tooth. RP 35-36. Within a few minutes the first passerby came upon the wreck and summoned aide. RP 19-23. By the time the police and ambulances arrived Dustin had his two children out of their car seats and in his arms. RP 61-63.

After assessing the scene the police and paramedics determined that Crystal was severely injured and needed immediate attention. RP 56. Unable to get the doors open, they decided to cut the front window out of the vehicle in order to remove the roof. RP 75-80. However, they were hampered by the fact that Dustin refused to hand out his children. *Id.* After trying to reason with him, they eventually placed a tarp over Dustin, his children, and Crystal in order to keep them from being hit with debris as they cut out the windshield and roof from the car. RP 64, 75-80. Once this was done the aide personnel were able to remove Crystal and Dustin, who finally handed over his children. RP 81. Separate ambulances then transported Crystal, Dustin and the children to the hospital in Hood River, Oregon. RP 82-86. Dustin

was very uncooperative as the aide personnel attempted to get him on to a backboard to keep him immobile during the trip to the hospital. *Id.*

Dustin remained uncooperative while at the hospital, walking into the emergency room against advise, and then refusing treatment once he was in the emergency room. RP 84-86. While in the emergency room he initially refused to give any information to state patrol officers who had responded to the hospital. RP 114. Although these officers saw no indication of alcohol intoxication, they believed that Dustin might have been using methamphetamine. RP 16-118. As a result, a Drug Recognition Evaluator (DRE) was called to the hospital. *Id.* Once there the DRE performed some tests, which he believed showed that Dustin had methamphetamine in his system. RP 126-144. At about this time other officers received word that Crystal had died as a result of her injuries. RP 120. Consequently they informed Dustin that they were going to draw his blood for testing. *Id.* He refused to cooperate and it eventually took a number of state patrol officers, nurses, and hospital personnel to hold him down to perform the blood draw. RP 121-1123.

The phlebotomist was initially unable to get blood out of Dustin's arms as the state patrol officers and the hospital personnel were unable to keep him sufficiently immobile to perform the procedure. RP 166-167, 172-176. Eventually she took off the defendant's shoes in order to draw blood out

of his feet. RP 175. When she did this a small baggie of methamphetamine fell out of one shoe. *Id.* She was then able to draw two vials of blood, which she gave to the state patrol officers. RP 175. A later test of this blood revealed methamphetamine at a level of 0.18 milligrams per liter and meprobamate at a level of 1.46 milligrams per liter. RP 260-263. Meprobamate is a metabolite of carisoprodol, commonly referred to as “soma.” *Id.*

Procedural History

By amended information filed February 23, 2006, the Skamania County Prosecutor charged the defendant Dustin Snodgrass with one count of Vehicular Homicide and one count of Vehicular Assault, alleging that the defendant’s operation of a motor vehicle had proximately caused the death of Crystal Snodgrass and caused substantial bodily harm to Frederick Roehnick, and that at the time the defendant’s ability to drive was “affected by intoxicating liquor or any drug.” CP 12-13. The state did not allege that the defendant committed these offenses under either the “reckless” or the “disregard of safety” alternatives. *Id.*

On March 13, 2006, the case came on for trial with the state calling 15 witnesses, three of whom were recalled and testified twice. RP i-iii. These witnesses testified to the facts included the preceding *Factual History*. RP 1-275. However, prior to trial the court held a CrR 3.5 hearing, during

which the state called Skamania County Sheriff's Deputy Summer Scheyer as its only witness. RP 5. Deputy Scheyer testified that on January 5, 2006 she interrogated the defendant, who was then in custody. RP 7, 14-15. Prior to beginning the interrogation, Deputy Scheyer read the defendant his "*Miranda*" rights from an "agency issued card." RP 7-8. However, at the time of the hearing she did not have that card with her and she did not read it into the record. *Id.* In fact, the only evidence concerning the "rights" that Deputy Scheyer read the defendant came from the following single question and answer:

Q. Did you tell him that anything he could -- he said could and would be used against him in a court of law?

A. Basically in summary, yes.

RP 8.

Following the CrR 3.5 hearing the court orally ruled that the defendant's statements, while the product of custodial interrogation, were voluntarily made after a knowingly waiver of his rights. RP 16-18. As a result during trial Deputy Scheyer testified that she had interviewed the defendant and that during this interview, the defendant had admitted the following: (1) that he had been driving the vehicle, (2) that he had little sleep prior to driving, (3) that he denied using methamphetamine or any other drug, (4) that the accident had occurred when his was rear-ended by a truck, (5) that

Frederick had given him the methamphetamine the officer found in his shoe, (6) that he was upset at the scene of the accident because the aide personnel had not been paying enough attention to helping Crystal, and (7) that the defendant's time frame for the accident was erroneous. RP 99-111.

During trial, the state called State Patrol Officer Mike Wells, who testified that after the accident he was dispatched to Providence Hospital in Hood River to contact the defendant. RP 111-113. Without objection from the defense, the state elicited the fact that when Trooper Wells got to the hospital he approached the defendant, who refused to answer his questions.

RP 114. This testimony went as follows:

Q. Okay. And what happened when you attempted to contact this individual?

A. Well, I contacted him and I asked him if he was the driver of the vehicle. He refused to answer any questions. I asked what his name was. He refused to answer that. He avoided eye contact with me the whole time. I asked him if there was another vehicle involved. He said, what did the other cop say? He was very evasive, and I didn't get any information whatsoever from him.

RP 114.

During its case-in-chief the state also called Kari Gruendell as a witness. RP 232. Ms. Gruendell is a forensic scientist with the Washington State Patrol Crime Laboratory. *Id.* She has a bachelor's degree in biology with a minor in chemistry from Western Washington University. RP 232-233. She did not claim to be a physiologist, a nurse, or a medical doctor. RP

232-248, 256-264. Neither did she claim any training or expertise in the determining the effects of different drugs upon the human mind and body. *Id.* She also did not claim any knowledge, training, or experience in prescribing controlled substances or in determining what their therapeutic levels were. *Id.*

In her testimony, Ms. Gruendell testified that she performed a chemical analysis upon the blood sample of the defendant. Her tests revealed the presence of methamphetamine at a level of 0.18 milligrams per liter and meprobamate at a level of 1.46 milligrams per liter. RP 260. According to Ms. Gruendell, meprobamate is a metabolite of carisoprodol, commonly referred to as soma, a central nervous system depressant. *Id.* Without any objection from the defense, the state then called upon Ms. Gruendell to testify to the effects that methamphetamine and carisoprodol have upon the human body, and the fact that in her opinion the amount of methamphetamine in the defendant's blood well exceeded a therapeutic level. RP 262. This testimony included the following, once again without any objection from the defense. RP 264.

Q. In the later phase, if someone were, you say possible for them to fall asleep, what effect would meprobamate have with regards to the falling asleep?

A. So, oftentimes this drug is really hard to determine what it is for somebody that's just looking at symptoms because the symptoms sort of change completely from that early phase to that late phase.

And so in the later phase, it behaves more like a depressant.

And so meprobamate, being a depressant, is just going to enhance some of those symptoms that you may see -- the lack of coordination and that kind of stuff will become more of a, I guess, outstanding symptom at that point.

Q. Are you aware of what Soma is normally prescribed for, what condition?

A. Yeah, a lot of times back pain. It's a very -- it's a very -- I guess it's a very good central nervous system depressant because it works very well.

RP 263-264.

Following the close of the state's case, the defendant took the stand on his own behalf. RP 277-316. According to the defendant he had left Murdock about four in the morning and had not used methamphetamine or any other drug before driving. RP 281. While driving through Skamania County he "nodded off" for just a second, felt the car jerk, and then hit a rock wall. RP 280-281. Four times during cross-examination the state asked the defendant about his testimony and then asked "Is that what you're asking the jury to believe?" RP 298-299, 304, 307-308. On two occasions the court sustained a timely objection. RP 298-299, 307-308. On one occasion the defense made no objection. RP 299. On one other occasion the court overruled the defendant's objection. RP 304. The first, second, and fourth questions were as follows:

Q. So, you're asking the jury to believe that the results of the

blood tests are inaccurate?

...

Q. Your testimony is that despite them finding methamphetamine in your blood, you had not done methamphetamine for three days prior to this accident. Is that what you're asking the jury to believe?

...

Q. And you want the jury to believe, or you want them to believe whatever they want to believe, but I'm going to ask you this. You think that getting a full night's sleep till noon is the same as five hours of sleep with methamphetamine and meprobamate in your bloodstream. Is that what you're testifying to today?

RP 298, 299, 307.

The third time the prosecutor asked the question in the following form:

Q. You're asking the jury to believe that with three rear-facing mirrors, you saw no headlights approaching you from behind before you were struck?

MR. LANZ: And again, I'm going to object to form of the question, Your Honor.

THE COURT: Overruled. You may answer.

A. I'm asking the jury to believe what they would like to believe. I'm not asking the jury to believe anything other than what they would like to believe.

RP 304.

After this cross-examination the defense rested its case and the court preceded to instruct the jury with no objections or exceptions taken by the

defense. RP 319. During closing argument and without any objection from the defendant's attorney, the prosecutor gave his personal opinion as to the facts of the case on at least the following four separate occasions:

I think he [the defendant] was truthful about two things. Before I get to that . . .

. . .

I said I think he told the truth two times when he [the defendant] testified. The first time was when . . .

. . .

I believe that we've given you sufficient information as evidence that you have an abiding belief and that is how the accident happened.

. . .

If you believe someone was driving down the road with their lights off and hit and then ran, then find him not guilty. I don't think there's any evidence to that.

RP 337 lines 2-3, 338 lines 8-9, 339 lines 3-5, 339 lines 11-14.

In addition, at the end of closing, the prosecutor invited the jury to return a verdict of guilty based upon his "hope" that it would. RP 340. Specifically, the prosecutor stated: "I hope that you will come back with guilty on both counts." RP 340. After deliberation, the jury returned verdicts of guilty on both counts. CP 83-84. The court later imposed a sentence within the standard range, after which the defendant filed timely notice of appeal. CP 91-106, 107-124.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ADMITTED STATEMENTS THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION BECAUSE THE STATE FAILED TO PROVE THAT THE DEFENDANT WAIVED HIS RIGHTS TO SILENCE AND COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, §9 AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

Under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before a defendant's custodial statements may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: " (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him." *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

In the case at bar the state informed the court and the defense that it intended to introduce the defendant's answers made during custodial interrogation. As a result prior to trial the court held a hearing as required under CrR 3.5, during which the state called Deputy Summer Scheyer as its only witness. RP 5. Deputy Scheyer testified that on January 5, 2006, she interrogated the defendant, who was then in custody. RP 7, 14-15. Deputy Scheyer also testified that prior to beginning the interrogation she read the defendant his "*Miranda*" rights from an "agency issued card." RP 7-8. However, the state did not ask her to repeat just what those rights were. In fact, the only evidence concerning the "rights" that Deputy Scheyer read the defendant came from the following single question and answer:

Q. Did you tell him that anything he could -- he said could and would be used against him in a court of law?

A. Basically in summary, yes.

RP 8.

This evidence shows that Deputy Scheyer may have informed the defendant of the second of his four core rights included in *Miranda*. However, this is where the state's evidence ended. Deputy Scheyer did not testify that she informed the defendant that (1) he had the right to silence, (2) that he had a right to consult with counsel before and during questioning, and (3) if he cannot afford counsel, one will be appointed to him. Neither did the

state present any other evidence that anyone else informed the defendant of these rights. Thus, the trial court erred when it ruled that the state could introduce the defendant's statements made during custodial interrogation into evidence at trial.

In this case, the state may argue that Deputy Scheyer's testimony that she read the defendant "his *Miranda* rights" from an "agency approved" card is itself sufficient to prove that he was informed of his "right to silence" and "right to counsel." However, any such argument must necessarily fail because there is no evidence that the "agency approved" card that the deputy used was adequate to inform the defendant of his *Miranda* rights. In essence, such an argument begs the question the trial court was called upon to answer. The card Deputy Scheyer used might have been a sufficient statement of *Miranda* and it might not have been. Absent introduction of that card or a reading of that card into evidence, the state failed to prove that Deputy Scheyer adequately warned the defendant of his rights under *Miranda*.

The state may also argue that since the defendant testified, the state was free to use the defendant's custodial statements as impeachment. While this would be a correct statement of the law as mentioned previously, it does not save the error in the case at bar because the state did not introduce the defendant's custodial statements as impeachment after he testified. Rather, the state introduced them at trial as substantive evidence during its case-in-

chief. Thus, the fact that the defendant later testified does not resolve the trial court's error in allowing the introduction of the statements. As a result the trial court's ruling and the state's actions introducing the defendant's statements into evidence violated the defendant's right to silence under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment.

As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

In this case at bar the introduction of the defendant's custodial statements as substantive evidence causes significant prejudice to the defendant's case. This evidence included the defendant's admission that he had little sleep prior to driving, along with his statements on time frames that Deputy Scheyer testified were grossly erroneous. The introduction of this evidence was not harmless and entitles the defendant to a new trial.

II. THE STATE VIOLATED THE DEFENDANT'S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 9 AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT WHEN IT ELICITED EVIDENCE THAT THE DEFENDANT REFUSED TO ANSWER POLICE QUESTIONING CONCERNING THE ACCIDENT.

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9 contains an equivalent protection. *State v. Earls, supra*. The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or make closing arguments inviting the jury to infer guilt from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls, supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the state charged the defendant with multiple counts of vehicular homicide. At trial the chief investigating officer testified that he found the

defendant in a gas station bathroom shortly after the accident and the defendant “totally ignored” him when he asked what happened. The police officer also testified that upon further questioning the defendant looked down, “once again ignoring me, ignoring my questions.” Following conviction the defendant appealed, arguing that this testimony violated his Fifth Amendment right to silence.

In addressing this issue the Washington Supreme Court first reviewed the rights protected under both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, stating as follows:

The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. To enforce this principle, upon arrest, an accused must be advised he or she can remain silent.

At trial, the right against self incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant’s silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, “[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation.” The purpose of this rule is plain. An accused’s Fifth Amendment right to silence can be circumvented by the State “just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.”

State v. Easter, 130 Wn.2d at 235-236 (citations omitted).

In *Easter*, the prosecution tried to take the statements admitted at trial out of Fifth Amendment analysis by arguing that they were “pre-arrest,” and

thus not constitutionally protected. The court noted: “[t]he State argues pre-arrest silence may be used to support the State’s case in chief because the Fifth Amendment is designed to deal only with ‘compelled’ testimony, and Easter was under no compulsion to speak at the accident scene prior to his arrest.” *Easter*, 130 Wn.2d at 237-38. The Court rejected this argument, holding as follows:

We decline to read the Fifth Amendment so narrowly as the State urges. An accused’s right to silence derives, not from *Miranda*, but from the Fifth Amendment itself. The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding. Indeed, the *Miranda* warning states the accused is entitled by the Fifth Amendment to remain silent; *Miranda* indicates the right to silence exists prior to the time the government must advise the person of such right when taking the person into custody for interrogation. When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence. A “bell once rung cannot be unring.” The State’s theory would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant’s pre-arrest silence as evidence of guilt.

The State’s belief that the Fifth Amendment applies only to “compelled testimony” also implies that an accused acquires the right to silence only when advised of such right at the time of arrest. This is not so. No special set of words is necessary to invoke the right. In fact, an accused’s silence in the face of police questioning is quite expressive as to the person’s intent to invoke the right regardless of whether it is pre-arrest or post-arrest. If silence after arrest is “insolubly ambiguous” according to the *Doyle* court, it is equally so before an arrest.

State v. Easter, 130 Wn.2d 238-239 (citations omitted).

Given this analysis, the Supreme Court reversed, finding an error of

constitutional magnitude, and insufficient proof by the state that the error was harmless beyond a reasonable doubt.

The facts in the case at bar are strikingly similar to those in *Easter*. In both cases the defendants were the drivers of vehicles involved in an accident. In both cases the motor vehicle accident resulted in the death of another person. In both cases a police officer confronted the defendant after the accident in an attempt to determine what had happened. In *Easter* the officer found the defendant in a gas station bathroom and in the case at bar State Patrol Officer Wells found the defendant at the hospital. In both cases the defendants refused to answer the officer's questions. Trooper Wells testified as follows on this issue:

Q. Okay. And what happened when you attempted to contact this individual?

A. Well, I contacted him and I asked him if he was the driver of the vehicle. He refused to answer any questions. I asked what his name was. He refused to answer that. He avoided eye contact with me the whole time. I asked him if there was another vehicle involved. He said, what did the other cop say? He was very evasive, and I didn't get any information whatsoever from him.

RP 114.

This testimony, particularly the part about the defendant avoiding eye contact, is almost a mirror image of the testimony in *Easter*. It is just as violative of the defendant's right to silence as was the testimony in *Easter*. In this case, the state may well admit the error in eliciting this testimony but

argue that under RAP 2.5(a) the defendant may not raise this issue for the first time on appeal. Subsection (a) of this rule states:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RAP 2.5(a).

In *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), the court stated the following concerning what was and was not a “manifest” error of constitutional magnitude. The court stated:

[T]he asserted error must be “manifest” – i.e., it must be “truly of constitutional magnitude.” The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights; it is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.

State v. McFarland, 127 Wn.2d at 333 (citations omitted).

As the previous quote from Trooper Wells’ testimony reveals, the “claimed error” is clearly within the record. Furthermore, this error directly affected the defendant’s right to silence and punished him for exercising it. One might well ask what the relevance of this line of questioning was. In other words, why did the state elicit this evidence? The answer is that the state was arguing to the jury that the defendant must be guilty and his use of

methamphetamine must have affected his ability to drive because were it not, he would not have refused to answer Trooper Wells' questions. Not only did this evidence directly impinge upon the defendant's right to silence, but it caused significant prejudice to the defendant's case.

As a complete review of the record reveals, the evidence was overwhelming that the defendant drove a motor vehicle with methamphetamine in his blood. However, the evidence was tenuous at best on the issue of how his use of methamphetamine negatively affected his ability to operate a motor vehicle. Thus, by eliciting this evidence the state was able to strengthen its argument that the defendant's ability to drive was affected by his methamphetamine use because had it not been, the defendant would have been willing to answer the trooper's questions. Consequently, in the context of RAP 2.5(a), the state's comment on the defendant's exercise of his right to silence not only significantly prejudiced that right, but it also thereby prejudiced the defendant's right to a fair trial. As such, the error was "manifest" and the defendant may raise it for the first time on appeal.

As was stated in Argument I an error of constitutional magnitude entitles the defendant to a new trial unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Brown, supra*. If the defendant in this case is correct that the error was "manifest" under RAP 2.5(a)(3) as explained in *McFarland*, then it was necessarily prejudicial and

not “harmless beyond a reasonable doubt.” As an error that affected the outcome of the trial, it entitles the defendant to a new trial.

III. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE ELICITED EVIDENCE CONCERNING THE DEFENDANT’S EXERCISE OF HIS RIGHT TO SILENCE, WHEN THE STATE CALLED UPON AN EXPERT TO RENDER AN OPINION OUTSIDE HER AREA OF EXPERTISE, AND WHEN THE PROSECUTOR REPEATEDLY EXPRESSED HIS PERSONAL OPINION DURING CLOSING ARGUMENT DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d

at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when (1) the state introduced evidence that the defendant exercised his right to silence, (2) the state called upon an expert to express opinions outside her field of expertise, and (3) the prosecutor expressed his personal opinion during closing argument on the credibility of witnesses and the guilt of the defendant. The following presents this argument.

1. Trial Counsel’s Failure to Object to Evidence that the Defendant Exercised His Right to Silence Fell below the Standard of a Reasonably Prudent Attorney.

As was presented in Argument I, the introduction of evidence that the defendant refused to speak with Trooper Hill at the hospital violated the

defendant's right to silence under Washington Constitution, Article 1, § 9 and United States Constitution, Fifth Amendment. As a manifest error of constitutional magnitude that affected the outcome of the trial, the defendant may present the argument for the first time on appeal. *See* Discussion *supra*. In addition, as the previous argument should make clear, this evidence was highly prejudicial and no possible tactical reason existed for defense counsel to fail to object. Thus, under *Strickland*, trial counsel's failure to object fell below the standard of a reasonably prudent attorney and meets the first requirement of establishing a claim of ineffective assistance.

2. Trial Counsel's Failure to Object When the State Called upon an Expert Witness to Render Opinions Outside Her Area of Expertise Fell below the Standard of a Reasonably Prudent Attorney.

Under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment, it is the jury's duty to determine the defendant's guilt or innocence, and no witness may directly or indirectly give an opinion as to the defendant's guilt. *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). Any such opinion invades the jury's duty to decide the facts and violates the defendant's constitutional rights. *State v. Carlin*, 40 Wn.App. 698, 700 P.2d 323 (1985). Furthermore, as the court stated in *State v. Farr-Lenzini*, 93 Wn.App. 453, 461, 970 P.2d 313 (1999). "the closer the tie between an opinion and the ultimate issue of fact, the stronger the

supporting factual basis must be.”

While opinion evidence of guilt is inadmissible, under ER 702, a qualified expert may testify in the form of an opinion if such evidence will assist the trier of fact to understand the evidence.” This rule states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702.

In addition, the fact that this evidence may “embrace” an ultimate issue before the jury does not make evidence admissible under ER 702 inadmissible. As ER 704 states:

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ER 704.

However while an expert witness may express an opinion that will assist the jury in understanding the facts or issues before it, that witness may not express an opinion outside his or her area of expertise. *Queen City Farms, Inc. v. Central Nat’Ins. Co.*, 126 Wn.2d 50, 882 P.2d 703, 891 P.2d 718 (1994). For example, in *State v. Farr-Lenzini, supra*, the defendant was convicted of felony eluding after a trial in which the state elicited evidence from a State Trooper that in his expert opinion, based upon his training and

experience, the defendant's driving indicated that she was aware that the officer was attempting to catch and stop her. The defendant appealed, arguing that the trial court erred when it admitted this evidence because the state failed to lay a proper foundation that the officer had sufficient expertise to render such an opinion.

On review, the Court of Appeals reversed, holding as follows:

The record here does not indicate that the trooper was qualified to testify as an expert on the driver's state of mind. There is no evidence that he had the specialized training or experience necessary to recognize the difference between a distracted speeding driver and an eluding driver. Assuming there is a profile of an eluding driver and that it would be admissible, it was not mentioned here. Consequently, we find there was an insufficient foundation to qualify the trooper as an expert for purposes of expressing an opinion as to Farr-Lenzini's state of mind. An opinion that lacks a proper foundation is not admissible under ER 702.

State v. Farr-Lenzini, 93 Wn.App. at 461.

Similarly, in *State v. Swagerty*, 60 Wn.App. 830, 810 P.2d 1 (1991), the state convicted the defendant of rape and he appealed, arguing that the trial court erred when it precluded the defendant's expert from testifying concerning his diminished capacity defense. At trial the defendant did not dispute the fact of intercourse but argued that his voluntary consumption of alcohol and a number of illegal drugs prevented him from knowing that he was committing the act that constituted the crime charged. The trial court precluded his expert from so testifying.

On review the court addressed two issues: (1) whether the expert was qualified to render the opinion that the defendant desired, and (2) whether such evidence was even relevant, given the fact that the crime charged did not require a specific intent. The court stated the following concerning the first issue:

[W]hether a proposed expert is sufficiently qualified to express an opinion that “will assist the trier of fact to understand the evidence or to determine a fact in issue” (ER 702) is a matter within the trial court’s discretion, and this is not less true when diminished capacity testimony is offered than when other expert testimony is offered. Here, Hutt testified that he was an alcohol counselor who had a correspondence degree in sociology, but no training in toxicology, pharmacology, psychology, chemistry or physics. Given these particular qualifications, the trial court acted within its discretion when it determined Hutt was not qualified to give an opinion that would assist the jury.

State v. Swagerty, 93 Wn.App. at 836 (citations omitted).

In the case at bar the state called Kari Gruendell as an expert witness. Ms. Gruendell is a forensic scientist with the Washington State Patrol Crime Laboratory and has a bachelor’s degree in biology with a minor in chemistry. She did not claim to be a physiologist, a nurse, or a medical doctor. Neither did she claim any training or expertise in the determining the effects of different drugs upon the human mind and body. She also did not claim any knowledge, training, or experience in prescribing controlled substances or in determining what their therapeutic levels were.

In her testimony, Ms. Gruendell testified that she performed a

chemical analysis upon the blood sample of the defendant. Her tests revealed the presence of methamphetamine at a level of 0.18 milligrams per liter and meprobamate at a level of 1.46 milligrams per liter. According to Ms. Gruendell, meprobamate is a metabolite of carisoprodol, commonly referred to as Soma, a central nervous system depressant. Without any objection from the defense, Ms. Gruendell then proceeded to testify to the effects that methamphetamine and carisoprodol have upon the human body, and the fact that in her opinion the amount of methamphetamine in the defendant's blood well exceeded a therapeutic level. This testimony included the following, once again without any objection from the defense.

Q. In the later phase, if someone were, you say possible for them to fall asleep, what effect would meprobamate have with regards to the falling asleep?

A. So, oftentimes this drug is really hard to determine what it is for somebody that's just looking at symptoms because the symptoms sort of change completely from that early phase to that late phase. And so in the later phase, it behaves more like a depressant.

And so meprobamate, being a depressant, is just going to enhance some of those symptoms that you may see -- the lack of coordination and that kind of stuff will become more of a, I guess, outstanding symptom at that point.

Q. Are you aware of what Soma is normally prescribed for, what condition?

A. Yeah, a lot of times back pain. It's a very -- it's a very -- guess it's a very good central nervous system depressant because it works very well.

RP 263-264.

As the record reveals, Ms. Gruendell was certainly qualified to testify as to what the substances she found in the defendant's blood were. However, as with the expert in *Swagerty*, she was entirely unqualified to testify to the effects those drugs have upon a person who ingests them. Neither did she possess any expertise in determining what the proper uses are for those drugs or what a proper therapeutic level was for those drugs. Since the effect of these drugs upon the defendant's ability to drive was the pivotal issue in this case and no other evidence was presented concerning how these drugs affected a person's ability to drive, no reasonably prudent attorney would fail to make a timely objection to this improper opinion evidence. Put another way, there was no possible tactical advantage to knowingly fail to object. Thus, trial counsel's failure to object fell below the standard of a reasonable prudent attorney.

3. Trial Counsel's Failure to Object When the Prosecutor Repeatedly Expressed His Personal Opinion on the Evidence During Closing Argument Fell below the Standard of a Reasonably Prudent Attorney.

Under both Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment a prosecutor should never assert his or her personal opinion as to the "credibility of a witness" or the "guilt or innocence of an accused." *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699

(1984). Any such expression of “personal belief in the defendant’s guilt” is “not only unethical but extremely prejudicial.” *State v. Case*, 49 Wn.2d 66, 68, 298 P.2d 500 (1956). Thus, a prosecutor should never introduce “evidence of any matter immaterial or irrelevant to the single issue to be determined.” *State v. Devlin*, 145 Wn. 44, 49, 258 P. 826 (1927). The courts “will not allow such testimony, in the guise of argument, whether or not defense counsel objected or sought a curative instruction.” *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

During closing argument in the case at bar and without any objection from the defendant’s attorney, the prosecutor gave his personal opinion as to the facts of the case on at least the following four separate occasions:

I think he [the defendant] was truthful about two things. Before I get to that . . .

. . .

I said I think he told the truth two times when he [the defendant] testified. The first time was when . . .

. . .

I believe that we’ve given you sufficient information as evidence that you have an abiding belief and that is how the accident happened.

. . .

If you believe someone was driving down the road with their lights off and hit and then ran, then find him not guilty. I don’t think there’s any evidence to that.

RP 337 lines 2-3, 338 lines 8-9, 339 lines 3-5, 339 lines 11-14.

In addition, at the end of closing, the prosecutor invited the jury to return a verdict of guilty based upon his “hope” that it would. RP 340. Specifically, the prosecutor stated: “I hope that you will come back with guilty on both counts.” RP 340. As the case law cited above explains, each one of these statements by the prosecutor was highly improper and prejudicial. Thus, no tactical advantage could be gained by failing to object to these arguments. As a result, trial counsel’s failure to object fell below the standard of a reasonable prudent attorney and constitutes the first leg of a claim of ineffective assistance of counsel.

4. Trial Counsel’s Deficient Performance During Trial Caused Prejudice.

As was mentioned under *Strickland*, in order to sustain a claim of ineffective assistance of counsel the defendant must prove both that trial counsel’s conduct fell below the standard of a reasonably prudent attorney and that this failure caused prejudice. *Strickland, supra*. “Prejudice” in this context means that but for counsel’s errors, the result of the trial would probably have been an acquittal. In this case, any one of the three claimed deficiencies by counsel would meet this requirement. As a result, trial counsel’s failures to object denied the defendant his right to effective assistance of counsel and he is entitled to a new trial.

IV. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ALLOWED THE STATE TO REPEATEDLY FORCE THE DEFENDANT TO COMMENT ON THE CREDIBILITY OF THE STATE'S WITNESSES.

Under both Washington Constitution, Article 1, § 22 and United States Constitution, Fourteenth Amendment, a defendant is entitled to have his or her case decided upon the evidence adduced at trial, not upon the opinions of attorneys, the court or the witnesses concerning either the credibility of witnesses or the guilt of the defendant. *State v. Casteneda-Perez*, 61 Wn.App. 354, 360, 810 P.2d 74 (1991). Thus it is improper for the prosecutor to elicit evidence of any person's personal opinion about a witness's credibility. *State v. Reed, supra*. As part of this right, it is also improper for the state to attempt to get the defendant to comment on the credibility of the state's witnesses. *State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994).

For example, in *State v. Jerrels*, 83 Wn.App. 503, 925 P.2d 209 (1996), the defendant was convicted of Rape of a Child and Child Molestation after a trial in which the trial court permitted the state to ask the defendant's wife whether or not she believed that the complaining witnesses were telling the truth. The defendant then appealed, arguing that this line of questioning denied him his right to a fair trial. In addressing this argument,

the Court of Appeals first noted that it was error for the court to allow a witness to comment on the credibility of another witness. The court stated:

A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. Such questioning invades the jury's province and is unfair and misleading. The questions asked of Mrs. Jerrels were clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred. In another sexual abuse case, we held recently that reversible error occurred when a pediatrician was allowed to testify that, based on the child's statements, she believed the child had been abused.

State v. Jerrels, 83 Wn.App. at 507-508 (citations omitted).

As the court states: "A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth." Thus, it was error in *Jerrels* for the prosecutor to ask the defendant's wife whether or not she believed the complaining witnesses. In the same manner it was error in the case at bar for the prosecutor to seek to compel the defendant to comment upon his own credibility and to speculate as to whether or not the jury would believe his testimony as opposed to the testimony of the state's witnesses. This happened on four separate occasions during cross-examination when the state asked the defendant about his testimony and then asked: "Is that what you're asking the jury to believe?" RP 298-299, 304, 307-308. On two occasions the court sustained a timely objection. RP 298-299, 307-308. On one

occasion the defense made no objection. RP 299. On one other occasion the court overruled the defendant's objection. RP 304. The first, second, and fourth questions were as follows:

Q. So, you're asking the jury to believe that the results of the blood tests are inaccurate?

...

Q. Your testimony is that despite them finding methamphetamine in your blood, you had not done methamphetamine for three days prior to this accident. Is that what you're asking the jury to believe?

...

Q. And you want the jury to believe, or you want them to believe whatever they want to believe, but I'm going to ask you this. You think that getting a full night's sleep till noon is the same as five hours of sleep with methamphetamine and meprobamate in your bloodstream. Is that what you're testifying to today?

RP 298, 299, 307.

The third time the prosecutor asked the question in the following form:

Q. You're asking the jury to believe that with three rear-facing mirrors, you saw no headlights approaching you from behind before you were struck?

MR. LANZ: And again, I'm going to object to form of the question, Your Honor.

THE COURT: Overruled. You may answer.

A. I'm asking the jury to believe what they would like to believe. I'm not asking the jury to believe anything other than what

they would like to believe.

RP 304.

The fact that counsel twice objected to this improper cross-examination belies any claim that he made a tactical decision when he failed to object on the fourth occasion. However, even if this failure to object is waived, the trial court still erroneously overruled another objection, as is noted above. In so doing, the trial court erred and violated the defendant's right to a fair trial.

In this case, the prosecutor's grossly improper questions caused prejudice in that it invited the jury to believe the defendant untruthful because the prosecutor believed him to be untruthful. Given the lack of any properly admissible evidence on the issue of how the methamphetamine affected the defendant's ability to drive, this improper cross-examination cannot be seen as harmless beyond a reasonable doubt. Certainly the introduction of evidence that the defendant exercised his right to silence and the prosecutor's improper argument were each sufficient to sway the jury from a "not guilty" verdict to one of "guilty."

However, by far the most egregious error on counsel's part was in failing to object when the state's forensic scientist gave improper opinion evidence on the effects of methamphetamine and soma on the human body. In this case, the state's evidence was not weak on the elements of who was

driving, or that the defendant had methamphetamine in his system. By contrast, the evidence that the defendant had soma in his system while driving was extremely weak. The state's expert did not testify that the defendant actually had soma in his system. Rather, she testified that he had a metabolite of soma in his system, indicating that at some point in the past he had ingested the drug. She did not claim to know how long the metabolite stays in the human body and she did not render an opinion that the defendant had soma in his system while driving. It is true that the defendant had a number of witnesses who were able to testify that in their experience people who use methamphetamine were volatile and uncooperative. However, the state had no witnesses to testify that methamphetamine negatively affects a person's ability to drive. Thus, had the court properly sustained the defendant's objections, the jury more likely than not would have returned a verdict of acquittal.

V. THE CUMULATIVE EFFECT OF THE ERRORS IN THIS CASE DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

Under the doctrine of harmless error, a trial court's error of a non-constitutional magnitude do not warrant reversal of a conviction unless the defendant can show a reasonable probability that but for the errors, the jury would have returned a verdict of acquittal. *State v. Hamlet*, 133 Wn.2d

314, 327, 944 P.2d 1026 (1997). Absent such a showing, the error is deemed harmless. *Id.* Under the same rule, error of constitutional magnitude does not warrant reversal of a conviction if the state proves beyond a reasonable doubt that without the error, the jury would still have convicted. *State v. Hopson*, 113 Wn.2d 273, 778 P.2d 1014 (1989). If the state meets its burden in this instance, the error is again deemed harmless. *Id.* However, when the court makes multiple errors, each of which alone is deemed harmless, the defendant is yet entitled to a new trial if it appears reasonably probable that the cumulative effect of those errors materially affected the outcome of the trial. *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1981). In such a case, the cumulative effect of the otherwise harmless errors has denied the defendant the right to a fair trial under Washington Constitution, Article 1, § 3. *State v. Jerrels*, 83 Wn.App. 503, 925 P.2d 209 (1996).

For example, in *State v. Johnson*, *supra*, the defendant was convicted of first degree illegal possession of a firearm and first degree assault out of a single incident in which he allegedly intentionally shot a person in the leg. Following conviction, the defendant appealed, arguing that the trial court erred in that (1) it admitted evidence of his prior rape conviction, in spite of his willingness to stipulate that he had a conviction for a prior serious offense, (2) it allowed the state to elicit the fact that he had stated a self-defense claim at omnibus (although he did not pursue it at trial, (3) the court

did not allow the defense to cross-examine a state's witness on prior inconsistent statements as well as on the issue of bias, and (4) the court allowed the state to impeach a defense witness with the fact of a probation violation.

The state argued that even if the defendant was correct, the argued errors were harmless. The Court of Appeals did find error, and it agreed that each of the errors standing alone was harmless. However, the court found that the cumulative effect of the errors was not harmless. The court stated:

Although none of the errors discussed above alone mandate reversal, it appears reasonably probable that the cumulative effect of those errors materially affected the outcome. First, the admission of Johnson's rape conviction and Johnson's prior claim of self-defense were prejudicial because they improperly allowed the jury to infer that Johnson was a bad character and that his defense was not credible. The refusal to allow the impeachment of Purcell with his prior inconsistent statement implicated Johnson's constitutional rights to confront adverse witnesses and reasonably could have influenced the jury's evaluation of Purcell's credibility. Although the admission of Martin's probation violation appears harmless, it added to the cumulative effect of a fundamentally unfair trial.

The jury reasonably could have reached a different outcome absent these errors. Consequently, we must reverse the conviction.

State v. Johnson, 90 Wn.App. at 74 (citations omitted).

In the case at bar, the trial court erred when it (1) allowed evidence of the defendant's statements made during custodial interrogation absent proper *Miranda* warnings, (2) when it allowed evidence of the fact that the defendant had exercised his right to silence, and (3) when it allowed the state during

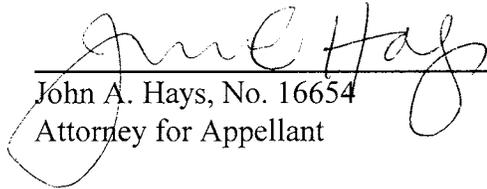
closing argument to repeatedly give a personal opinion on the credibility of witnesses and the defendant's guilt. In addition, trial counsel's failure to object when (1) the state elicited evidence that the defendant invoked his right to silence, (2) when the state elicited opinion evidence outside the expertise of its expert, and (3) when the state improperly forced the defendant to render an opinion on the credibility of the state's witnesses all fell below the standard of a reasonable prudent attorney. Even were each of these errors harmless in themselves, their cumulative effect denied the defendant his right to a fair trial just as did the cumulative effect of the errors in *Johnson*. As a result, the defendant is entitled to a new trial.

CONCLUSION

The court's ruling and the prosecutor actions in introducing inadmissible and prejudicial evidence in this case denied the defendant a fair trial. In addition, trial counsel's repeated failures to object to such evidence denied the defendant effective assistance of counsel. As a result, the defendant is entitled to a new trial.

DATED this 21st day of November, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final

judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RAP 2.5(a)

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

FILED
CLERK OF COURTS

06 NOV 29 PM 1:17

STATE OF WASHINGTON

BY [Signature]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 DUSTIN R. SNODGRASS,)
10 Appellant,)

CLARK CO. NO. 05-1-00119-2
APPEAL NO: 34670-2-II

AFFIDAVIT OF MAILING

11 STATE OF WASHINGTON)
12 COUNTY OF SKANAMIA) vs.

13 CATHY RUSSELL, being duly sworn on oath, states that on the 27TH day of
14 NOVEMBER, 2006, affiant deposited into the mails of the United States of America, a
15 properly stamped envelope directed to:

15 PETER BANKS
16 SKAMANIA COUNTY PROSECUTING ATTORNEY
17 P.O. BOX 790
18 STEVENSON, WA 98648

DUSTIN R. SNODGRASS #799095
WA STATE PENITENTIARY
P.O. BOX 520
WALLA WALLA, WA 99362

17 and that said envelope contained the following:

- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 27TH day of NOVEMBER, 2006.

21 [Signature]
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 27th day of NOVEMBER, 2006.

23 [Signature]
24 NOTARY PUBLIC in and for the
25 State of Washington,
Residing at: Kelso, wa 99626
Commission expires: 10-24-09

