

No. 39215-1-II

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

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DIVISION TWO
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STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

RENEE CURTISS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Kitty-Ann Van Doorninck (trial) and
The Honorable D. Gary Steiner (motions)

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Renee Curtiss' Sixth Amendment and Article I, § 21, rights to trial by impartial jury were violated when officers gave explicit or nearly explicit improper opinion testimony on her credibility, veracity and guilt.

2. Curtiss' Fifth Amendment and Article I, § 9 rights to pre-arrest silence and her state and federal due process rights were violated when testimony was elicited about and the prosecution implied a negative inference should be drawn from her failure to deny accusations made after she was read her rights.

3. The prosecutor committed misconduct in eliciting improper opinion testimony and testimony inviting a negative inference to be drawn from Curtiss' exercise of her right to remain silent.

4. The trial court erred in failing to suppress Curtiss' statements which were not knowing, voluntary and intelligent.

5. Curtiss assigns error CrR 3.5 "Conclusions as to Admissibility" 11, which provides:

There is no evidence that the defendant was threatened, tricked or cajoled into a waiver of will, based upon the actions of the detectives.

CP 454-55.

6. Curtiss assigns error CrR 3.5 "Conclusions as to Admissibility" 14, which provides:

The State has established by a preponderance of the evidence that the defendant's waiver of her right to remain silent was made knowingly, voluntarily and intelligently.

CP 454-55.

7. Curtiss assigns error CrR 3.5 “Conclusions as to Admissibility” 15, which provides:

The defendant’s statements were made freely and voluntarily without duress, promise or threat, and with a full understanding of her constitutional rights.

CP 454-55.

8. Curtiss assigns error CrR 3.5 “Conclusions as to Admissibility” 16, which provides:

The defendant’s statements to Detective Ben Benson and Denny Wood are admissible.

CP 454-55.

9. The prosecutor committed constitutionally offensive misconduct in misstating and minimizing her constitutionally mandated burden of proving the case beyond a reasonable doubt, the purpose of trial and the jury’s proper role and duty and the state cannot meet the heavy burden of proving the constitutional error harmless.

10. Curtiss’ state and federal rights to effective assistance of counsel were violated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Improper opinion testimony is a violation of the defendant’s constitutional rights to trial by jury. Such testimony occurs when a witness makes an explicit or nearly explicit statement about the defendant’s guilt, veracity or credibility.

Curtiss was on trial for allegations that she was an accomplice to her brother’s first-degree murder of Joseph Tarricone, based on the claim that she had asked her brother to come down from Alaska and kill

Tarricone and was there when he was killed. Curtiss maintained that she had found out her brother had killed Tarricone after the fact and had only helped him cover up the crime.

At trial, the officers who took Curtiss' statement repeatedly testified that they believed she was in the house when the killing occurred and had called her brother and asked him to kill Notaro. Is reversal required for the improper explicit or near explicit testimony on Curtiss' veracity, credibility and guilt where there was not overwhelming untainted evidence to support the conviction and the jury's decision rested entirely on whether it believed Curtiss' version of events?

Further, was counsel ineffective in failing to object to or try to minimize the impact of the improper testimony?

2. It is a violation of the state and federal rights to pre-arrest silence and to due process for the state to inquire about and imply a negative inference should be drawn from a defendant's pre-arrest, post-Miranda¹ warning silence. Even if the defendant makes a statement, the prosecution's use of any silence or failure to say certain things during that statement can only be used for impeachment if the defendant testifies and her failure to provide certain details in the pretrial statement is materially inconsistent with the defendant's claims in her testimony.

At trial, the prosecutor elicited testimony about Curtiss' "failure" to speak and deny the officers' accusations when the officers told Curtiss they thought she had, in fact, been in the house when the murder occurred

¹Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

and had also called her brother and asked him to commit the murder, implying that this “failure” somehow indicated her guilt. Is reversal required for this improper comment on Curtiss’ rights where the prosecution cannot satisfy its burden of proving the constitutional error harmless?

Further, was counsel ineffective in failing to object to or try to minimize this improper testimony?

3. After Curtiss was read her Miranda rights, when the officers asked if she knew about the murder, she said, “I don’t know what to say.” An officer then told her to be truthful and tell them what happened and Curtiss said, “I don’t know if I’m supposed to talk to an attorney.” The officers then told her it was her right to have an attorney and that it was a serious matter, but that the statute of limitations had already run for “rendering criminal assistance.” The officers admitted to telling her this in order to try to get her to keep talking, even though they admitted that, at the time, they were not investigating Curtiss for “criminal assistance” but rather as an accomplice for murder.

Did the trial court err in admitting Curtiss’ subsequent statements where the officers’ deception prevented Curtiss from making a knowing, voluntary decision about whether she should exercise her rights to counsel or silence and misled her as to the potential consequences of speaking, thus watering down the Miranda protections?

4. In closing argument, the prosecutor compared the degree of certainty that jurors would need in order to decide the state had proven its case beyond a reasonable doubt to the certainty they would have to have

to know what picture was depicted on a puzzle even if they did not have all of the pieces. She also told the jurors that they should find Curtiss guilty if they “know” in their “gut” or “heart” that she was. And she told them that the trial was a search for the truth, that they were supposed to declare the truth with their verdict and that the purpose of the trial was to decide the truth and find justice.

Is reversal required for all of these serious, prejudicial misstatements and minimizations of the prosecutor’s constitutionally mandated burden of proof, the jury’s role and duties and the purpose of the trial where the prosecution cannot prove these constitutional errors harmless?

Further, if the misconduct could have been cured by instruction, is reversal required based upon counsel’s ineffectiveness in failing to object to or attempt to address the prejudice caused by the prosecutor’s misconduct?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Renee Curtiss was charged by information with first-degree murder, which she was alleged to have participated in “acting as an accomplice.” CP 1; RCW 9A.32.030(1)(a); RCW 9A.08.020. After pretrial proceedings before the Honorable Judges D. Gary Steiner and Kitty-Ann Van Doorninck on March 25, November 10 and December 11 and 16, 2008, trial was held before Judge Van Doorninck on March 24-26,

30 and 31 and April 1, 2009.² The jury then found Curtiss' guilty as charged. CP 435. On April 24, 2009, the court sentenced Curtiss to serve life in prison. CP 456-463; 4RP 703. That sentence was amended on June 12, 2009, to add an exceptional mandatory minimum sentence of 40 years. CP 470-73, 475-77; 5RP 15. Curtiss appealed and this pleading follows. See CP 478-81.

2. Testimony at trial

Sometime between August and September of 1978, Joseph Tarricone stopped paying child support, stopped calling his family, stopped sending birthday gifts and stopped being seen in the places he lived and often visited. 4RP 65-69, 74, 89, 107, 111, 122-23. Tarricone, who lived in Alaska, traveled a lot for his business and so his daughter, Gina Chavez, assumed he was just out of town and did not think to report him missing until March of 1979, although she and several of his other family members said it was unusual for him not to have regular contact with them. 4RP 65-76, 80-82, 123. Chavez made a missing persons report to Officer Jerry Burger, then of the Des Moines Police Department, on March 21, 1979. 4RP 204. Chavez also gave Burger the name and phone number of the woman Chavez and some of her siblings thought of

²The verbatim report of proceedings consists of 9 bound volumes, which will be referred to as follows:

March 25, 2008, as "1RP;"
November 10, 2008, as "2RP;"
the volume containing the chronologically paginated proceedings of December 11 and 16, 2008, as "3RP;"
the volume containing the chronologically paginated proceedings of March 23 and 24, 2009, and the volumes containing March 25, 26, 30 and 31, and April 1 and 24, all chronologically paginated, as "4RP;"
the sentencing proceedings of June 12, 2009, as "5RP."

and had been introduced to as their dad's girlfriend, Renee Curtiss. 4RP 72-73, 77, 82, 109. Many of Tarricone's children had been upset by what they thought was his relationship with Curtiss, because Tarricone was in his 50's and Curtiss was 30 years younger, in her early 20's at the time. 4RP 100.

Burger left phone messages for Curtiss, who lived in Puyallup, and got a telephone call from someone on April 9, 1979, saying they were Curtiss. 4RP 208. That woman said Tarricone had come to her house in August or September of 1978 with airline tickets to Italy, wanting her to go to with him. 4RP 209. She said he got upset when she said no and threw the tickets, which she later cashed in, to the ground. 4RP 209. She said she had not seen him since. 4RP 208-09.

A cousin of Curtiss' said that, sometime after the summer of 1978, they spoke about Tarricone being missing and Curtiss said something about thinking he might be in trouble. 4RP 194, 200. The cousin also specifically recalled Curtiss saying something about Tarricone being Italian and maybe being involved with the Mafia. 4RP 201-202.

For about 12 years, there was no progress on finding Tarricone, but then his daughter, Jacqueline "Gypsy" Tarricone,³ who lived in Hawaii and had last seen her dad when he came for an unexpected visit in August of 1978, got frustrated with the lack of progress and decided the family either needed to find out what happened or have Tarricone declared dead. 4RP 86-92. She started her own investigation, talking to "cold case" files

³Because she uses the same last name as her father, for clarity Gypsy Tarricone will be referred to as "Gypsy" herein, with no disrespect intended.

people in King County, hiring a private investigator, speaking to law enforcement in Pierce County and contacting people in Alaska, with no results. 4RP 94-96. A King County Sheriff's Office "missing persons investigator" who did computer checks, phone calls and made other searches did not find any signs of "activity" in the United States and Canada from Tarricone. 4RP 357-59. Gypsy's efforts to get a death certificate from Alaska were also unsuccessful. 4RP 96.

In 1990, Tarricone's youngest son, Dean,⁴ suggested that some of the siblings call Curtiss on the phone and lie to her, pretending that Tarricone had left a life insurance policy in her name as well as Dean's. 4RP 97, 113. When they made that call, Dean had already called Curtiss' home and spoken to her mother, pretending to be an insurance adjuster for the fictitious policy. 4RP 115. During the call, which was recorded, Dean also lied to Curtiss about things like whether Tarricone had been seen in Alaska after last being seen at her house and whether he had been "pretty mad" with his family when he disappeared. 4RP 99-100, 115. Dean said he did not want Curtiss to think he "suspected her" so he just talked about "stuff" to try to keep her talking. 4RP 115.

In the call, Curtiss said she had not known anything about the insurance policy and expressed surprise when Dean told her Tarricone had not been seen or heard from. CP 337. She also told Dean that Tarricone had followed her around and harassed her on the phone because he would not take "no" for an answer and when he returned he she thought maybe

⁴Because he uses the same last name as his father, for clarity Dean Tarricone will be referred to as "Dean" herein, with no disrespect intended.

he had finally got her message. Id.

During that conversation, at some point, Curtiss said, "I'm, you know, I'm awfully sorry, I, you know, gosh." CP 353-54. She also said, "I'm awfully sorry he never showed up." CP 356-57.

Fred Reinicke of the Pierce County Sheriff's Department said he interviewed Curtiss after being contacted by Gypsy about Tarricone's disappearance in the fall of 1990, and Curtiss said she had not seen Tarricone since he had come to her home, showed her a briefcase with lots of money, asked her to marry him and closed up the briefcase and left when she refused. 4RP 213-5.

On June 4, 2007, workers for an excavation company were digging near where the garage used to be at the address where Curtiss used to live when they saw a black plastic bag a few feet down. 4RP 45-51. Inside were some bones, which a forensics officer later verified to be human. 4RP 51, 62, 131, 271. Other bones were also later found, though not a complete skeleton. 4RP 56-58, 143, 223. The bones appeared to have "tool marks" on some of them, which a medical examiner and a forensic anthropologist both thought was consistent with the use of a chain saw. 4RP 251, 258, 261, 361, 371-75.

None of the marks on the bones indicated the cause of death or showed any evidence of anything like gunshots. 4RP 255-66. In addition, nothing on the bones indicated whether the body was cut up before or after death, although the forensic anthropologist said some of the cuts appeared to have occurred at "around the time of death" because there was no fracturing. 4RP 378-84. The bones were from someone likely

over 40 years of age and had been buried at least 10 years. 4RP 384-85. Tests on the bones were compared with Tarricone's sister's mitochondrial DNA profile and Tarricone could not be excluded as the source. 4RP 231, 244-47.

Pierce County Sheriff's Detective Sergeant Ben Benson, the lead detective assigned to the case, began investigating based upon the suspicion that the bones belonged to Tarricone. 4RP 280-81. Ultimately, that investigation led to him talking to Curtiss' brother, Nicholas Notaro. 4RP 179. In 2008, Notaro said he did not know where Tarricone had gone. 4RP 508. Eventually, however, in an interrogation with Benson and another detective, Denny Wood, Notaro admitted that he had shot and killed Tarricone at the home where Curtiss and her mother used to live. 4RP 467-97.

Notaro related that, in September of 1978, Notaro had gone through an emergency appendectomy in Alaska and, when he was discharged from the hospital, had bought a gun, started drinking and ended up shooting his wife twice, killing her. 4RP 474-77. He said he did it because he wanted to have a relationship with someone else. 4RP 474-77. A few days after that, he had gone from Alaska to Seattle, bringing the gun in his luggage and calling to tell his mom he was coming to visit when he was at the airport in Fairbanks. 4RP 479-80. The night after he arrived, he had a conversation with his mom about Tarricone and Curtiss. 4RP 484-85. Notaro did not like Tarricone because he was "messing around with Renee" even though he was 20-25 years older than her. 4RP 485. Notaro also thought it always seemed like Tarricone was trying to

get Curtiss into bed. 4RP 485. According to Notaro, his mom asked him to “do something about” Tarricone, although she did not specifically ask him to do anything in particular. 4RP 486. A few days later, when Tarricone showed up at the house in the early afternoon, Notaro lured him down to the basement on the pretense of helping fix the washer, then shot Tarricone twice, killing him. 4RP 488-90.

Notaro said his mom was “a little shocked” by what Notaro had done, saying he did not have to kill Tarricone and asking why he had done it. 4RP 489. Notaro also said that Curtiss was not in the house at the time. 4RP 467-68, 488-91. Indeed, he said, she did not show up until the next night, Saturday. 4RP 492. By that time, Notaro had bought a jack-like object which he used to lift up Tarricone’s body and put it into a freezer, with his mom’s help. 4RP 490.

When Curtiss arrived at the home, Notaro said he took her to the basement and opened the freezer, showing her Tarricone. 4RP 492. Curtiss was shocked and a little angry, saying, “[y]ou didn’t have to kill him.” 4RP 492. Notaro, Curtiss and their mom then sat in the kitchen, trying to figure out what to do. 4RP 492-93. Notaro suggested getting a chain saw and cutting up the body, something he had learned of because of his interest in “True Crime” stories. 4RP 493. He then went with Curtiss to a store where they bought a chain saw. 4RP 493. They returned to the home and took Tarricone out of the freezer, after which Notaro cut him up with the help of Curtiss and his mom. 4RP 494. Notaro dug a hole in the backyard and Tarricone was put in plastic bags and buried there. 4RP 495-529.

Notaro was clear that no one told him to kill or harm Tarricone in any way. 4RP 467-68, 488, 497-98. He said Curtiss never asked him for “help” with Tarricone, did not ask or encourage Notaro to harm Tarricone and did not kill Tarricone herself. 4RP 497. He told the detective that Curtiss was not involved in the actual killing “one iota,” and that was the truth. 4RP 498.

Notaro admitted that he had lied in the past when he denied killing his wife and knowing where Tarricone had gone. 4RP 508-509, 520. He had also lied and told officers who questioned him about his wife’s murder that he had gotten rid of the gun by throwing it off a bridge into a river. 4RP 515-16. Instead, he had brought it down with him from Alaska because he wanted Curtiss to get rid of it for him. 4RP 483.

Notaro testified that he did not tell his mom or Curtiss that he had killed his wife until after he had also killed Tarricone, although someone had called him after surgery when he was “going in and out” and still at the hospital, before he killed his wife. 4RP 479, 481, 522. Notaro also said that Curtiss had not talked with him about her problems with Tarricone harassing her and did not say anything to Notaro while he was in Alaska about wishing Tarricone would go away or anything like that. 4RP 523-25. According to Officer Benson, in his statement, Notaro reported his mom calling him in Alaska and asking him to come down and help with Tarricone, because Curtiss was having some problems with him. 4RP 569-70.

Notaro admitted that he had initially told the officers that his mom had shot Tarricone and put him in the basement and that he and his mom

had cut up the body and buried it, but it was actually the truth that Notaro was the person who had done the shooting. 4RP 526, 571.

Curtiss was interviewed by Wood and Benson on March 24, 2008, and they told her that Notaro had been arrested for killing Tarricone. 4RP 176-78. Curtiss said she had been involved romantically with Tarricone for about a year in the late 1970's and had been in a business relationship with him before then, in Alaska. 4RP 159, 296-97. She told police that her mother had liked Tarricone and encouraged the relationship because Tarricone bought Curtiss gifts and jewelry and helped pay bills, but at some point the attention from Tarricone became unwanted. 4RP 159, 296-97. Curtiss had told Tarricone she did not want a relationship but he "wouldn't stop," persisting in asking her to marry him and not leaving her alone. 4RP 160. Curtiss said that was one of the reasons she had ended up moving away from Alaska with her then-fiancé. 4RP 161, 298.

Ultimately, the officers asked Curtiss if she knew about Tarricone being murdered, and Curtiss responded, "[y]es, I did know about it," and "I don't know what I'm supposed to say." 4RP 165, 299. Wood told her that the statute of limitations had run on "rendering criminal assistance," which seemed to make her feel at ease. 4RP 167. Curtiss then confessed to having helped Notaro with buying the chain saw and hiding the body after discovering that Notaro had killed Tarricone. 4RP 433-38, 453. At trial, Curtiss remembered getting ill when Notaro started the chain saw, so that she had to go back upstairs. 4RP 412. Curtiss also admitted to throwing the gun off a boat a few weeks later. 4RP 412, 437. Although she thought at one point about calling the police, she did not do so

because she did not want anything to happen to her mother. 4RP 411, 429.

Curtiss made it clear that she was not in the house when Tarricone was killed and had not asked her brother to kill him. 4RP 406, 409, 430.

Curtiss said she had found out her brother had killed Tarricone at the same time she found out about him killing his wife, sitting in the kitchen in the home after the fact. 4RP 409-10, 429-30. Wood and Benson testified that Curtiss admitted to speaking to her brother “several times” while Notaro was in Alaska, complaining about the problems with Tarricone and how he would not leave her alone. 4RP 162, 299-302. The officers also said that Curtiss admitted learning about her brother killing his wife before he left Alaska. 4RP 163, 299-302.

On cross-examination, however, Wood agreed that, although Curtiss had first said she thought she had heard it before Notaro had left Alaska, later in the statement she had clarified that, while it could have been before or after, she actually thought it was after. 4RP 189. She also was unclear about what she had said to Notaro about her problems with Tarricone. 4RP 190. Curtiss told the officers several times that she did not recall thinking Notaro was going to come down and help with Tarricone or at most thought he would talk to him. 4RP 191. Instead, she said, the main reason for her wanting him to come visit was that her mom was “a little overwhelming” and could be “very demanding” of Curtiss’ time and she thought if Notaro came down she “could get a break from everything for awhile.” 4RP 427, 453;

In her interview with the officers, Wood admitted, Curtiss had

difficulty sorting out the chronology of what had happened 30 years earlier. 4RP 189. Wood also conceded that, several times during the interview, Curtiss expressed signs of having problems remembering some details, especially about when she first learned of Notaro having murdered his wife. 4RP 183-84. Indeed, Wood reported, Curtiss said, “[o]h, it’s all a jumble,” and she seemed frustrated with trying to recall. 4RP 184.

With some questions, the officer admitted, Curtiss’ previous answers were misstated back to her. 4RP 185. For example, she was asked a couple of times how many times she had talked to her brother before he left Alaska and she said 3-4 times, but when officers asked later, they said, “now, you told us that you talked to Nick four to five times.” 4RP 185. At one point when the officers were asking the same questions over and over, Curtiss said, “I don’t want the questions to become my memory.” 4RP 184. She also said a little later that she was worried the repeated questions would “put words in her head that she doesn’t really recall.” 4RP 185.

Curtiss said that, during the interview, the detectives had asked several questions so many times their questions were becoming part of her memory, something she did not want. 4RP 454. She agreed that she had first told police that she could have learned about her brother killing his wife while he was in Alaska but explained that, once she had a chance to think about it, she remembered that she had been in the kitchen at her home when she learned that, so she had corrected that during the interview. 4RP 408, 430.

There was a lot that Curtiss did not recall about the incident 30

years later. She did not remember driving Notaro to the hardware store. 4RP 434. She did not remember how the bags were carried outside. 4RP 436. She did not recall whether she spoke to Tarricone the day he was killed. 4RP 409. She did not recall saying anything about Tarricone being in the Mafia and it did not seem like anything she would say. 4RP 442. She did not recall what she said to her brother when she spoke to him in the hospital, whether she picked him up at the airport, or how many holes were dug in the background. 4RP 409, 412, 455. For most of the times when she did not recall, she agreed generally that things could have happened the way others said but she just had no recollection. 4RP 409, 412, 440, 434, 436, 442. She also declined to say that other witnesses were not correct, saying she had “no reason to disbelieve” things they said that she did not recall. See 4RP 438-39.

Curtiss freely admitted that she had lied for 30 years about the last time she saw Tarricone and what had happened to him. 4RP 413, 443, 448-49, 450-51, 456. She had done it to protect her brother, her mother and herself. 4RP 413, 438. She made it clear she would not want to harm or kill Tarricone just because of his attention to her. 4RP 414. Curtiss said she had not killed Tarricone, was not there when he was killed, never asked her brother to harm Tarricone and did nothing to encourage the murder. 4RP 414.

At some point during their interview with Curtiss, the officers turned off the recorder and Wood confronted Curtiss, telling her that he thought she had actually been there when Tarricone was killed and had called her brother to come down from Alaska to commit the murder. 4RP

171-73, 303. For about 15-20 minutes, he kept telling her this belief and Curtiss said she could not really remember whether she was there and other details. 4RP 173-75, 188, 305-306.

Ultimately, Wood admitted, “the sum and substance” of what Curtiss told the officers was that she did not ask her brother to cause Tarricone any harm, nor did she provide a gun for him to do so. 4RP 189.

At some point, Notaro admitted, he told a coworker he had killed somebody. 4RP 533. That coworker testified that, sometime in the late 1980's, she was at work with Notaro and he told her that “him and one of his sisters had committed a murder” in the house where his mom lived, that the victim was his sister’s fiancé, that his sister called him and he flew down, that his sister lured the man downstairs where Notaro shot him, and that Notaro, his sister and his mom cut up the man, who Notaro said was having an affair with Notaro’s wife, and that they buried him under the porch. 4RP 544-45.

In previous interviews, however, the coworker had presented very different stories. 4RP 548-57. In one interview, she had said that Notaro had told her he killed the man and *then* brought him back to his mother’s house. 4RP 548. She had also said that Notaro did not say anything about the victim knowing Notaro’s sister or mother. 4RP 548, 557. In a 2007 interview, the coworker did not say anything about them using a chainsaw and did not say in any of her statements anything about the sister calling Notaro up in Alaska, the body being cut up or anything like that. 4RP 549-60. In a 2007 interview, the coworker had claimed Notaro had said his “sisters,” plural, were involved, and that Notaro had killed the man

and then brought him back to the house afterwards. 4RP 552, 555. The coworker claimed she had “remembered” those things later, admitting she had only said that a sister was involved in the actual murder after all her statements to police. 4RP 549-60.

Although at trial she claimed that she was not on “good or bad” terms with Notaro, the coworker conceded that she told police in 1994 that she was not, in fact, on good terms with him. 4RP 550.

The officer who spoke to the coworker in 1994 reported that, at the time, the coworker claimed that Notaro had made these disclosures to her in a telephone call, not while they were at work. 4RP 563. She also said that the man Notaro had killed was his wife’s lover and that Notaro offered to show her the weapon. 4RP 563. The coworker made no claim of a sister being involved in the homicide, or the victim being the sister’s fiancé, or the sister calling Notaro up in Alaska to ask him to come down to kill the man. 4RP 566.

Officer Benson also admitted that, when he interviewed her, the coworker did not tell him all the details she would later provide at trial about the conversation she said she had with Notaro. 4RP 581-82. In her 2007 interview with him, she never said anything about a sister being involved in the actual killing. 4RP 518-82. Instead, she had claimed that Notaro had told her that his two sisters had helped cut up the body. 4RP 482. Also conspicuously absent from the coworker’s 2007 version of events were the claims that a sister had called Notaro and asked him to commit the killing, and the victim being the sister’s fiancé. 4RP 583.

D. ARGUMENT

1. CURTISS' RIGHTS TO TRIAL BY JURY, TO SILENCE AND TO DUE PROCESS WERE VIOLATED AND THE PROSECUTOR COMMITTED MISCONDUCT IN CAUSING THOSE VIOLATIONS

Under both the Sixth Amendment and Article I, § 21, defendants have the right to trial by jury, which includes the right to have the jury serve as “the sole judge of the weight of the testimony” and the credibility of witnesses. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). As a result, it is impermissible for any witness to testify as to their opinion about the guilt, veracity or credibility of witnesses or the defendant. State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2008).

Defendants are also entitled to the right to pre-arrest silence under both the Fifth Amendment and Article I, § 9. State v. Burke, 163 Wn.2d 204, 209, 181 P.3d 1 (2008); Griffin v. California, 380 U.S. 609, 614-15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is improper for a prosecutor to elicit testimony about the defendant’s exercise of this right or infer that guilt or any negative inference should be drawn from that exercise. See State v. Easter, 130 Wn.2d 228, 231, 922 P.2d 1285 (1996). Further, it is a violation of due process for the prosecution to use silence to impeach a defendant if that silence occurs after Miranda warnings are given, regardless whether the defendant testifies at trial, because it is “implicit” in those warnings that silence will carry no penalty. See Burke, 163 Wn.2d at 217; Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

For violations of the right to trial by jury, the right to pre-arrest silence and the right to due process, reversal is required unless the prosecution can satisfy the heavy burden of proving the constitutional error harmless. State v. Demery, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001); State v. Lewis, 130 Wn.2d 700, 705-706, 927 P.2d 235 (1996); Burke, 163 Wn.2d at 217.

In this case, reversal is required because both officers Wood and Benson repeatedly gave improper opinion testimony and Wood also gave testimony about Curtiss' failure to deny their accusations of her guilt after she had been given her Miranda warnings. Further, the prosecutor committed misconduct when she deliberately elicited that testimony and then relied on it when arguing guilt in closing. Because the evidence of Curtiss' guilt in this case was far from overwhelming and the conviction depended upon the jury deciding whether it believed Curtiss' version of events, the prosecution cannot meet the heavy burden of proving these constitutional errors "harmless."

As a threshold matter, all of these issues are properly before the Court. Improper comment on the defendant's exercise of the right to remain silent is manifest constitutional error, which may be raised for the first time on review under RAP 2.5. See State v. Curtis, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002). Similarly, an explicit or almost explicit witness statement on guilt or credibility is a manifest constitutional error which may be raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 936-38, 155 P.3d 125 (2007). On review, this Court should reverse.

a. Relevant facts

At trial, the prosecutor repeatedly elicited testimony about officers Wood and Benson and their belief that Curtiss was not telling the truth when she claimed she was not involved in Tarricone's killing. Wood described telling Curtiss he thought she was, in fact, there when Tarricone was killed and also "thought she called her brother and asked him to kill" Tarricone. 4RP 172. Benson also said that Wood told Curtiss that Wood believed she was in the house when Tarricone was killed and believed she had asked her brother to kill him. 4RP 303. Wood described responding to Curtiss' statements that she could not remember the details by telling her he believed that she had called her brother to have him "come and deal with" Tarricone" and that he believed she was inside the house at the time of the murder. 4RP 174.

Indeed, the prosecutor asked the officers if they were "courteous and professional" when they told Curtiss they thought "she was present in the house" when Tarricone was killed and that they "believed she had asked her brother to kill" Tarricone. 4RP 175, 305. Benson said Wood did not raise his voice "when he told Renee Curtiss that he believed that she was present in the house at the time of the killing and had actually asked her brother to kill" Tarricone. 4RP 305-306. On cross-examination, Wood was asked why he did not tape-record this part of the interview and he said that it was because this was a "whole other level" of interrogation when "you look them in the eye and tell them, I think you did this and I think you were there" as he did with Curtiss. 4RP 188.

The officers were also asked about Curtiss' response to the

accusations and Wood responded that Curtiss had just sat and stared and “didn’t deny it.” 4RP 173. Later, in cross-examination of Curtiss, the prosecutor asked Curtiss about this silence, and when Curtiss said she did not remember that part of the interview, the prosecutor then asked, “[d]o you remember **not denying the accusations?**” 4RP 451 (emphasis added).

In closing argument, the prosecutor declared that the reasonable inferences from the evidence “lead to one conclusion,” i.e., that Curtiss was present when the shooting occurred, despite what she had claimed. 4RP 602. The prosecutor then went over the evidence she said showed this conclusion, including that “Detective Wood asked the defendant whether she was upstairs or downstairs when the shooting happened. **She did not deny the accusations.**” 4RP 603 (emphasis added).

Also in closing, when arguing that Curtiss’ claim she had nothing to do with the murder and only helped after the fact was not “reasonable in light of all the other evidence,” the prosecutor reminded the jury about Wood’s belief that Curtiss was at the house when Tarricone was killed and that she asked her brother to kill him. 4RP 622. The prosecutor also reminded the jury that Wood had told Curtiss he had a hard time believing her claims that she could not remember whether she was there, then told the jury, “[w]ho would not remember if they were present during a murder? She remembers. She remembers.” 4RP 622-23.

- b. The testimony about the officer's beliefs that Curtiss was there during the murder and had asked her brother to commit it was improper opinion testimony

The officers' repeated testimony about Wood's belief that Curtiss was in fact at the home when the killing occurred and that she solicited her brother to commit it was improper opinion testimony on Curtiss' guilt, veracity and credibility, in violation of Curtiss' rights to trial by jury. To amount to an impermissible opinion, testimony need not be a direct comment; an "inference" of guilt is enough. See State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). Where, however, a comment is not an "explicit or almost explicit" comment on guilt, veracity or credibility, the issue will not be deemed manifest constitutional error which can be raised for the first time on appeal. Kirkman, 159 Wn.2d at 936-38.

Thus, the first inquiry for the reviewing court is to determine whether testimony is an improper opinion on guilt or credibility and whether it is explicit or almost explicit. See Demery, 144 Wn.2d at 759. To make that determination, the Court looks at the challenged testimony in light of 1) the type of witness involved, 2) the nature of the relevant testimony, 3) the charges for which the defendant is on trial, 4) the nature of the defendant's defense, and 5) the other evidence before the jury. Demery, 144 Wn.2d at 759 (quotations omitted).

Reviewing those factors in this case, the testimony was improper explicit or almost explicit opinion testimony. First, the witnesses giving the testimony were both officers. It is well-recognized that testimony of

officers is especially likely to hold sway with jurors, because it carries an “aura of reliability” and because of the status of officers in our society. See Montgomery, 163 Wn.2d at 594; Demery, 144 Wn.2d at 765. Second, the nature of the testimony was such that it was an opinion not only on veracity and credibility but indeed on guilt. The officers repeatedly described Wood’s “belief” that Curtiss had been in the home during the killing and had asked her brother to commit the murder, even though Curtiss had *denied* both of those things. 4RP 172, 174, 175, 188, 303, 305-306. Further, those denials were Curtiss’ entire defense. Thus, the nature of the charges and the type of defense show that the testimony was highly improper, because the officers’ testimony specifically conveyed the officer’s belief about Curtiss’ veracity and credibility in her denials and, as a result, her guilt. Indeed, Curtiss’ liability for the murder depended upon the prosecution’s theory that she was present for the murder and/or had asked for it to occur. And notably, the officers *never* described these repeated confrontations about Wood’s beliefs as a mere interrogation technique, which might have minimized the corrosive impact of the testimony. See Demery, 144 Wn.2d at 765. Instead, the opinions were described as Wood’s “thoughts,” which the prosecutor established had occurred to him “during the actual recording,” before he ever made them. 4RP 172.

Fourth, there was almost no other evidence of Curtiss’ guilt. Her brother denied her involvement. There was no physical evidence that she was involved. The only other “evidence” upon which the prosecution relied was inconsistencies in the version of events she and her brother

related over the years and the shaky claims made by the coworker, whose story had changed from not including any involvement by a sister in the murder to such involvement, remembered years later and after repeated police interviews.

Put simply, the officers' testimony told the jurors that the officers - or at least Wood - did not believe Curtiss' statements and thought she had participated in the murder, thus commenting not only on her credibility and veracity but also on her guilt and amounting to explicit or near explicit opinion testimony.

As a result, the prosecutor committed misconduct in eliciting that testimony. See State v. Jungers, 125 Wn. App. 895, 106 P.3d 827 (2005). Jungers, supra, is instructive. In that case, an officer testified that he believed seized drugs belonged to a defendant. This Court found that the prosecutor had not committed misconduct in eliciting that testimony, because the prosecutor had asked only a single innocuous question, not one designed to elicit the opinion. 125 Wn. App. at 902. In contrast, here, the prosecutor specifically, repeatedly asked questions designed to elicit the improper opinion, even repeating the "beliefs" herself over and over.

See 4RP 172⁵, 175⁶, 303⁷, 305-306.⁸ The improper testimony was not accidentally admitted; it was intentionally, and repeatedly elicited and emphasized, all of which amounted to misconduct.

In sum, there was no dispute that Tarricone was dead. Nor was there any dispute that Notaro killed him. The only question at trial was whether Curtiss was involved and knew about the killing in advance or found out after it occurred and simply helped cover it up. The officers' testimony, clearly conveying to the jury at least Wood's opinion that Curtiss was lying when she denied being present and asking her brother to kill Tarricone, amounted to explicit or near-explicit comments on not only her veracity and credibility but also her guilt. And the prosecutor committed misconduct in eliciting and relying on the testimony. This Court should so hold and should reverse.

- c. The testimony about Curtiss' failure to deny the accusations were improper comments on her exercise of her rights

The right of the accused to remain silent guarantees that the

⁵"When you told the defendant, Ms. Curtiss, **that you believed that she was present in the house when Joseph was killed and that she, in fact, asked her brother to kill Joseph Tarricone**, what was her response?" 4RP 172 (emphasis added).

⁶"Were you professional and courteous when you told Renee Curtis that **you thought she was present in the house when Joseph Tarricone was killed?**" and "Were you professional and courteous when you told Renee Curtiss that **you believed she had asked her brother to kill Joseph Tarricone?**" 4RP 175 (emphasis added).

⁷"And then you heard the testimony of Detective Wood this morning that he told Renee Curtiss that **he believed that she was present in the house at the time that Joseph was killed, and that he believed she had, in fact, asked her brother to kill Joseph Tarricone**, correct?" 4RP 303 (emphasis added).

⁸"Did Detective Wood ever raise his voice when he told Renee Curtiss that **he believed that she was present in the house at the time of the killing and had actually asked her brother to kill Joseph Tarricone?**" 4RP 305-306 (emphasis added).

prosecution cannot use a defendant's silence against her to prove or suggest guilt. See State v. Clark, 143 Wn.2d 731, 756, 24 P.3d 1006, cert. denied sub nom Clark v. Washington, 534 U.S. 1000 (2001). While mere reference to the defendant's silence is not necessarily a violation, when the State invites the jury to infer guilt from the exercise of the right to silence, that is improper. Id.

To determine whether there is a violation of the right and due process, the Court must look at when the silence occurs and whether the defendant testifies, to see whether impeachment by silence is allowed. See Jenkins v. Anderson, 447 U.S. 231, 232-33, 240, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980); Burke, 163 Wn.2d at 214. If the defendant does not waive the right to remain silent and does not testify at trial, there can be no use of the silence, even for impeachment. Burke, 163 Wn.2d at 217. Due process also "prohibits impeachment based on silence after Miranda warnings are given, even if the accused testifies at trial." Burke, 163 Wn.2d at 217. Further, while federal courts have found no violation "if a defendant testifies at trial and is impeached for remaining silent before arrest and before" Miranda warnings are given, in this state, the use of such prearrest silence to impeach a defendant's testimony at trial is only permissible when it involves a defendant's failure to include certain claims in a pretrial statement and then only when that failure is materially, factually inconsistent with the defendant's claims at trial. See Burke, 163 Wn.2d at 217; see also, State v. Scott, 58 Wn. App. 50, 55, 791 P.2d 559 (1990).

Here, the comments were regarding Curtiss' silence after she was

read her Miranda rights, when she was confronted with Wood's "beliefs" that Curtiss had actually been in the house when the killing had occurred and had solicited her brother to do it, contrary to what Curtiss had said. And the comments were not limited to a mere "passing reference" to that silence, nor were they proper "impeachment." A comment is only a "passing reference" if it merely involves mention of a defendant's silence, without any implication to suggest that silence was evidence of guilt and without any effort by the prosecution to use that silence to its advantage. Lewis, 130 Wn.2d at 706-707. Here, the testimony was not such a reference, because the prosecutor repeatedly elicited mention of Curtiss' silence in the face of accusation, including confronting Curtiss with it herself. The testimony was clearly elicited for the purposes of implying that, had Curtiss been not guilty or her version of events credible, she would have denied the accusations when they were made. And that was the implication made not only by the testimony but by the reminder of the testimony by the prosecutor in closing argument.

Further, the prosecutor's acts here cannot be said to have been proper "impeachment." Where a defendant waives their right to remain silent and makes a statement to police, a prosecutor may draw attention to the defendant's failure to include certain claims in their statement when there is inconsistency between that failure and the defendant's testimony at trial. See, e.g., Scott, 58 Wn. App. at 55. Put another way, the prosecutor may comment on "partial silence" by asking questions about the defendant's "failure to incorporate the events related at trial into the statement given police" or "may challenge inconsistent assertions." State

v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988). But the “prior silence” must be regarding critical *facts* and it must directly conflict with later testimony, not just be a failure to speak generally. See, e.g., State v. Seeley, 43 Wn. App. 711, 715, 719 P.2d 168, review denied, 107 Wn.2d 1005 (1986).

Here, the testimony was not so limited. First, it was elicited on direct examination, well before the defendant decided whether to testify. Second, it was not drawing attention to some factual inconsistency between the defendant’s claim of events at trial and her statement to police. Instead, it was limited to simply telling the jury that Curtiss *failed to deny* that she was present in the house during the killing and solicited her brother to commit it, and thus imply her guilt. Indeed, there could be no other reason to ask Curtiss if she remembered “not denying the accusations” of the officer, save to convey the message that, if Curtiss had *not* been guilty, she would necessarily have engaged in such denial. And in case the jury had forgotten about that failure to deny guilt, the prosecutor reminded them of it in closing argument. The testimony and arguments amounted to improper comments on Curtiss’ exercise of her post-Miranda Fifth Amendment and Article I, § 9 rights, in violation of those rights and her due process rights, and this Court should so hold.

d. The prosecution cannot meet the heavy burden of proving these constitutional errors harmless

Both of these constitutional errors compel reversal, because the prosecution cannot meet its heavy burden of proving them harmless beyond a reasonable doubt. See, Easter, 130 Wn.2d at 231, 242; State v.

Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009). Under that test, the error is presumed prejudicial and reversal is required unless the state can show that the overwhelming, untainted evidence was such that *any* rational trier of fact would “necessarily” have found the defendant guilty. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Further, the Court must assume that the damaging potential of the evidence was “fully realized.” State v. Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006) (quotations omitted).

At the outset, it is important to note that the overwhelming untainted evidence test is not the same as the test used when the challenge on appeal is to the sufficiency of the evidence to convict. State v. Romero, 113 Wn. App. 779, 786, 54 P.2d 1255 (2002). For a “sufficiency” challenge, this Court views the evidence in the light most favorable to the state, drawing all reasonable inferences therefrom. State v. Thompson, 69 Wn. App. 436, 848 P.2d 1317 (1993). The question for the reviewing court is not whether any reasonable trier of fact would necessarily have found the defendant guilty absent the error; it is whether any reasonable trier of fact *could have* found the defendant so guilty. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The focus is thus on the minimum required to uphold the conviction, i.e., whether any jury could conceivably have found guilt based upon the evidence before it. See id.

In contrast, with the “overwhelming untainted evidence” test, the focus is on whether there is so much evidence of guilt that every jury

hearing that evidence would necessarily have found guilty, absent the offending evidence. Rather than asking whether the evidence met the minimum required to convict, the issue is whether every jury faced with the untainted evidence would have reached the conclusion of guilt. See, State v. Evans, 96 Wn.2d 1, 7, 633 P.2d 83 (1981). And evidence sufficient to satisfy the more minimal “sufficiency” challenge is not necessarily sufficient to satisfy the “overwhelming untainted evidence” test. See, Romero, 113 Wn. App. at 786; Evans, 96 Wn.2d at 7.

Thus, in Romero, the same evidence which was sufficient to withstand an insufficiency challenge on review was not enough to satisfy the constitutional harmless error test. 113 Wn. App. at 783-95. The defendant had been arrested and charged with first-degree unlawful possession of a firearm after there were reports of shots fired at a mobile home park in the middle of the night. He was seen coming around the front of that mobile home holding his right hand behind his body and refused to stop and show his hands but instead ran away. The home he was later found in had shell casings on the ground outside. Descriptions of the shooter matched him and a witness identified him, although she got the color the shirt he was wearing wrong. 113 Wn. App. at 783-95. While the Court found that a reasonable jury could have convicted based upon that evidence, the answer was far different when the question was whether the constitutional error of an officer’s comment on the defendant’s right to remain silent was harmless. 113 Wn. App. at 794. Because the state’s evidence was disputed by Romero’s testimony and the improper comments “could have” had an effect on the jury’s verdict, the

constitutional harmless error test was not met and reversal was required. 113 Wn. App. at 794; see also, State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) (despite the strength of the case against the defendant, because there was some evidence in the defendant's favor, constitutional harmless error test could not be met).

Further, where a conviction is based upon a determination of credibility, the admission of improper opinion testimony in violation of the defendant's rights can not be deemed constitutionally harmless, because such testimony necessarily affects the jury's ability to make a fair, unbiased determination on that point. See, Hudson, 150 Wn.2d at 656; see State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004), review denied, 154 Wn.2d 1009 (2005).

Here, there was no question that Notaro committed the murder. But the evidence of Curtiss' involvement in that act was thin. There was no physical evidence linking her to the crime. There were no witnesses who saw her involved. The only evidence against her was the inconsistencies in her statements and those of Notaro, and the claim from a coworker that he might have implicated one of his sisters in a murder committed against her "fiancé," a description which did not fit Tarricone. In this context, both the improper comments on Curtiss' exercise of her rights and the improper opinion testimony cannot be deemed harmless under the constitutional harmless error standard. This Court should so hold and should reverse.

e. In the alternative, counsel was ineffective

Although both the improper opinion evidence and the comments

on Curtiss' exercise of her rights are manifest constitutional error which can be raised for the first time on appeal, reversal can also be granted on these issues because of counsel's ineffectiveness in failing to object to or attempt to minimize the harm caused by the improper evidence. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989); see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial.

State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, those standards have been met. There was no legitimate tactical reason to fail to object to and ask for correction of the repeated admission of the officer's improper opinions on Curtiss' credibility, veracity and guilt. Nor was there a legitimate reason to fail to object and try to minimize the damage caused by the comments on Curtiss' rights to remain silent. In a case such as this, where the only real issue is whether the jury will believe the defendant's version of events or that of the state, improper opinions and comments on the defendant's rights have the obvious potential of being decisive in the jury's decision-making process. Any reasonably competent attorney would thus have seen the risk of failing to object and would have objected or even moved for mistrial based on the offensive testimony and argument. And any court would have erred had it failed to uphold objections to such offensive evidence. Even if this Court finds that the improper opinions and comments could somehow have been "cured," reversal is still required based on counsel's ineffectiveness in failing to make such attempts.

2. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS CURTISS' STATEMENTS TO WOOD AND BENSON

Under both the state and federal constitutions, a citizen has a right to an attorney during custodial interrogation. See State v. Radcliffe, 164 Wn.2d 900, 905, 194 P.3d 250 (2008); Davis v. United States, 512 U.S. 452, 457, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); 5th Amend.; Art. I, § 9. To this end, they must be informed of their rights under Miranda, supra. A person who has been advised of her Miranda rights may

certainly waive them, but the prosecution bears the heavy burden of proving that a confession is made knowingly, voluntarily and intelligently. See State v. Gilcrist, 91 Wn.2d 603, 607, 590 P.2d 809 (1979).

In this case, the trial court erred in holding that Curtiss' statements to Wood and Benson were admissible, because the officers engaged in conduct which rendered the statements not knowing and voluntary by deliberately misleading Curtiss about the potential consequences of speaking, thus diluting the protections Miranda guarantees.

a. Relevant facts

Before trial, Curtiss moved to suppress the statements she made to Wood and Benson, arguing that the officers had used trickery and misstatements in order to prevent her from invoking her right to counsel. 3RP 167.

At the suppression hearing, Wood admitted that, before they interviewed her, Curtiss explained that her husband had serious heart problems, his condition was "pretty dire," and he was in the hospital. 3RP 63. Although the officers offered to physically go with Curtiss to the hospital so they could interview her later, they did not offer to reschedule the interview, so the impression was that Curtiss was not going to be out of their sight until they had conducted their interrogation. 3RP 64.

Wood and Benson also testified that, at the time they read Curtiss her rights and she signed the rights form, the officers had not told her that she was under investigation for anything but had only said they wanted to talk to her about her brother being in trouble. 3RP 15, 37-40, 71-72, 110. Benson conceded, however, that, at the time they read Curtiss her rights,

the officers believed she “possibly was involved in the murder of Joseph Tarricone.” 3RP 71-72, 110.

After awhile, when Benson told Curtiss he was investigating Tarricone’s murder and that Notaro had been arrested for it, the officers also implied that Notaro had incriminated Curtiss in the murder in some way. 3RP 40-41. They admitted, however, that, in fact, Notaro had specifically said that she was *not* involved. 3RP 67, 142.

At that point, Curtiss said she knew Tarricone and spoke about her relationship and problems with him. 3RP 41. When Benson asked whether Curtiss knew about Tarricone’s murder, she responded, “I don’t know what to say.” 3RP 42. Wood told her to be truthful and tell the officers what happened and Curtiss then said, “I don’t know if I’m supposed to talk to an attorney.” 3RP 43.

In response, Wood said that was why they had read the rights to her and it was her right to have an attorney. 3RP 43. He also said it was a very serious matter. 3RP 43. He asked her if she understood and she said she did. 3RP 43.

A moment later, Wood admitted, he told Curtiss that “the statute of limitations had expired for rendering criminal assistance.” 3RP 43, 113-14.

Wood admitted that the reason he said that was to put Curtiss at ease and try to get her to keep talking. 3RP 65. Benson concurred. 3RP 143. Wood and Benson also admitted that they knew Curtiss could be charged not with just rendering but murder. 3RP 66, 143-44. Indeed, Wood conceded, it was murder he was investigating and his questions

were directed towards “issues of accomplice liability” for that murder.

3RP 66. Benson also admitted that they were well aware that the statute of limitations had not run for murder but said nothing about that to Curtiss. 3RP 143-44.

Wood said the reason he did not give Curtiss the full “legal information” about her possible liability if she spoke to them was because he wanted her to talk. 3RP 67.

Right after the comment about the statute running, the officers just went on with the questioning. 3RP 146. Curtiss then gave her statement admitting to having been involved in the disposal of the body and possibly having talked with her brother about her problems with Tarricone, asking for his help. 3RP 44-46. The tape-recorded statement was made after this point and after Curtiss was reread her rights and waived them. 3RP 46.

At the suppression hearing, counsel argued that the officers’ deliberate deceptions regarding the possible use of Curtiss’ statement against her by telling her the statute of limitations had run was effectively misleading legal advice, not just trickery about facts. 3RP 168. With their deception, he noted, the officers had effectively told Curtiss she did not need an attorney and would suffer no consequences from talking because the statute of limitations had run - something the officers admitted they had said in an effort to keep Curtiss talking. 3RP 169. The deception here “went right to the heart of *Miranda*, the need for legal advice,” counsel noted, and the result was that the subsequent statements should be suppressed. 3RP 171.

In denying the motion to suppress, the court held that it was not

required for the police to tell Curtiss “all the legal ramifications of making a statement,” finding it significant that Curtiss had been read her rights in traffic-type cases before. 3RP 172-73. The court concluded that the officers did not do anything “inappropriate or over the line” so that the statements were voluntary, knowing and intelligent. 3RP 173.

Later, at trial, although Wood initially denied that he was trying to dissuade Curtiss from asking for an attorney in making the “limitations” statement, he ultimately admitted he wanted her to continue talking and knew if she asked for an attorney, he would have had to stop talking to her immediately. 4RP 181. He also conceded that, when he told her the statute of limitations had run on rendering, his purpose was to try to keep her from asking for a lawyer. 4RP 181.

The prosecution’s claims that Curtiss was guilty were based in very large part on the statement Curtiss made after the “limitations” comment, including inconsistencies in that statement. See 4RP 600-642, 682-686.

b. The statements were not knowing, voluntary and intelligent and should have been suppressed

The trial court erred in refusing to suppress the statements made after the officers’ declarations about the statute of limitations, because the officers’ improper deceptions were specifically designed to mislead Curtiss about her Miranda rights and thus rendered her subsequent statements not knowing, voluntary and intelligent.

As a threshold matter, the trial court’s conclusion as to admissibility 11 is more properly a conclusion of law. The decision that a

statement is voluntary is a legal one, subject to de novo review, and not a finding of fact. See Miller v. Fenton, 474 U.S. 104, 110, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). Further, factual findings must be supported by substantial evidence, defined as evidence sufficient to convince a rational, fair-minded trier of fact of the truth of the declared premise. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Despite the court's declaration of "no evidence" of any tricks, cajolery or anything of the sort, there was, in fact, such evidence - the officers' own testimony.

In any event, there is a strong presumption against waiver of the defendant's rights under Miranda and courts must "indulge every reasonable presumption" against it. See e.g., Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). The trial court's conclusion 11, simply ignoring the evidence to the contrary, fell far short of reflecting such mandated indulgence.

To determine whether the defendant's statements were made knowingly, voluntarily and intelligently, the Court looks at the "totality of the circumstances" surrounding the interrogation. See State v. Broadaway, 133 Wn.2d 118, 131-32, 942 P.2d 363 (1997). Court have held that it is permissible for officers to engage in some degree of lying when conducting interrogations and such lying, promises or misrepresentations do not, by themselves, automatically render statements by a defendant inadmissible. Id. Deceptions do, however, cast doubt about whether a statement was voluntarily and knowingly made, because they can have the effect of either overcoming a defendant's will and bringing about confessions which are not the product of free self-

determination or confusing the defendant as to their rights. See State v. Burkins, 94 Wn. App. 677, 696, 973 P.2d 15, review denied, 138 Wn.2d 1014 (1999); see also Hart v. Florida, 323 F.3d 884, 893-94 (11th Cir.), cert. denied sub nom Crist v. Hart, 540 U.S. 1069 (2003).

Put simply, the defendant's waiver of her rights is only voluntary if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and must be made with "full awareness" of both the right being abandoned and "the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). Where there is deception or misrepresentation by the police, the question is whether there is a direct causal relationship between that conduct and the defendant's confession. Broadaway, 133 Wn.2d at 131-32. The issue is not one of "but for" causation, i.e., not whether the defendant would have spoken if there was no interrogation, but whether the decision to speak "is a product of the suspect's own balancing of competing considerations" and the officers have not prevented the suspect from making a rational decision. See id.; see United States v. Miller, 984 F.2d 1028, 1031 (9th Cir.), cert. denied, 510 U.S. 894 (1993). Coercion and deception are examined from the perspective of the suspect, to determine how the officer's actions would affect a reasonable person. See, e.g., Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

Thus, in deciding whether a statement should have been suppressed in light of deception, the Court must examine not only the suspect's age, physical and mental condition and the environment and

circumstances surrounding the interrogation but also the police conduct and how it affected the defendant's decision to speak. Broadaway, 133 Wn.2d at 132; see Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

In this case, the statements made after the officers misled Curtiss about the potential consequences of speaking by telling her the statute of limitations had run were not knowing, voluntary and intelligent, because they were not made with "full awareness" of the rights she was waiving or the consequences of the decision to speak and were not the product of a free and deliberate choice but rather the product of the deception.

At the outset, Curtiss is *not* arguing that she made an unequivocal request for an attorney so that all interrogation had to cease. See, e.g., Radcliffe, 164 Wn.2d at 905; Davis, 512 U.S. at 457. Instead, she is arguing that the officers' deliberate misrepresentations, done with the admitted goal of preventing her from exercising her rights to silence or to counsel and keep her talking, rendered her subsequent statements involuntary and unknowing. See, e.g., Hart, 323 F.3d at 894-95. Regardless whether an unequivocal request for counsel is made, when a defendant raises questions about whether such a request *should* be made, that is a clear indication that the defendant does not fully understand her right to counsel and is seeking clarification. Id. While officers are not required to cease interrogation or limit their questioning to clarifying the defendant's confusion, any answers or information they give in response to that confusion can cause subsequent statements to be inadmissible as involuntary and not knowing. See, e.g., United States v. Beale, 921 F.2d

1412,1435 (11th Cir.), cert. denied, 502 U.S. 829 (1991).

Thus, where, *inter alia*, an officer undercut and misrepresented the potential consequences of speaking and the Miranda warnings by telling the defendant that honesty would not hurt him, that rendered the resulting confession not knowing and voluntary. Hart, 323 F.3d at 894-95. Similarly, where a defendant was misled about the consequences of speaking to officers by them saying that signing the waiver form would not hurt him, the confession had to be suppressed. Beale, 921 F.2d at 1435.

Put simply, regardless of the suspect's signature on a waiver form, police do not have "carte blanche to lie to the suspect about his Miranda rights if he indicates that he does not understand them" by asking for clarification. Hart, 323 F.3d at 895 n. 21. This is so even when the police engage in deception about the rights after the suspect is properly advised of those rights and waives them. See, United States v. Anderson, 929 F.2d 96, 98 (2nd Cir. 1991). Thus, in Anderson, when an officer told the defendant, after he waived his rights, that if he asked for a lawyer "it would permanently preclude him from cooperating with the police," the subsequent statement was not knowing, voluntary and intelligent because it occurred after the misstatement about the consequences of asking for a lawyer. Id.

Here, the officer's comments in response to Curtiss' questions about her rights similarly deceived her about those rights and the consequences of waiving them. Telling Curtiss that the statute of limitations had run just after Curtiss said she did not know what she was

supposed to say and did not know if she should talk to a lawyer was akin to telling her that there would be no potential consequence from speaking and that she did not really need a lawyer. Indeed, the officers *admitted* that it was their purpose in making the “limitations” comment to *keep* Curtiss from invoking her rights to counsel and to silence and make sure she kept talking. 3RP 43, 67, 113-14, 144; 4RP 181-182, 301. Thus, it must have been clear to the officers in context that Curtiss was questioning whether she should continue to waive those rights and wanting to know the potential results of doing so. The answer they gave, deliberately misleading her about the potential consequences of continuing to speak and about the need for an attorney, were in direct contradiction to the very Miranda warnings they had already given - i.e., that anything she said could and would be used against her.

In making its erroneous decision that the statement should not be suppressed, the trial court was focused primarily whether the officers were required to tell Curtiss “all the legal ramifications of making a statement,” a concern which was misplaced. 3RP 172-73. The issue was not whether the officers had to give comprehensive information about such ramifications but whether, in the advice they gave, they intentionally misled Curtiss about the possible effects of waiving her rights. See Broadaway, 133 Wn.2d at 131-32. Because Curtiss’ subsequent statements were the product of the officers’ misrepresentations about the possible need for her to exercise her rights and a deliberate deception designed to undercut the Miranda protections, the statements were not made knowingly, voluntarily and intelligently, and this Court should so

hold.

As a result, reversal is required. The prosecution's case against Curtiss was largely based upon this part of her statement. Indeed, the bulk of the prosecution's argument in closing was about how the prosecutor believed that this part of the statement showed Curtiss' guilt - so much so that the prosecutor actually read parts of the statement in her argument.

See 4RP 600-642, 682-686.

3. THE PROSECUTOR COMMITTED SERIOUS,
CONSTITUTIONALLY OFFENSIVE MISCONDUCT
AND COUNSEL WAS AGAIN INEFFECTIVE

Reversal is also required because the prosecutor committed misconduct in misstating and minimizing her burden of proof and misstating the function and purpose of a trial and the jury's role.

a. Relevant facts

In closing argument, the prosecutor stated the language of the instruction on her burden of proof beyond a reasonable doubt, then went on:

Now, reasonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say with some certainty, beyond a reasonable doubt what that puzzle is. The Tacoma Dome.

4RP 641. After a moment, the prosecutor said, "[w]hen you put the puzzle together, there is absolutely no doubt that she is guilty." 4RP 641.

Finally, the prosecutor stated:

The word "verdict" in Latin means "to speak the truth." We ask that you return a verdict that you know speaks the truth, a verdict of guilty to Murder in the First Degree.

4RP 642.

In rebuttal closing argument, the prosecutor declared:

Detectives Benson and Wood are professionals. They're simply doing their jobs, serving the citizens of Pierce County. Detective Wood told Renee Curtiss that this was a very serious matter and that she should be truthful. He also advised her that she could have an attorney at any time. Detectives Benson and Wood are searching for the truth and only for the truth. Detective Benson had not determined whether or not he would arrest Renee Curtiss prior to completing the interview.

This trial is a search for the truth and a search for justice, and the evidence in this case is overwhelming. The defendant is guilty of Murder in the First Degree as an accomplice. Consider all the evidence as a whole. Do you know in your gut - do you know in your heart that Renee Curtiss is guilty as an accomplice to murder? The answer is yes.

We are asking you to return a verdict that you know is just, a verdict of guilty to Murder in the First Degree.

4RP 686 (emphasis added).

b. The arguments were all misconduct

All of these arguments were improper and misconduct. First, the prosecutor committed constitutionally offensive misconduct by her arguments 1) comparing the degree of certainty that jurors would have to have to find that the state had proven Curtiss' guilt beyond a reasonable doubt to the certainty they would need to decide what picture was depicted on a puzzle, and 2) telling the jurors they should convict if they "know" in their "gut" or "heart" that Curtiss was guilty. Under both the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged, beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648,

794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). It is misconduct for a public prosecutor, with all of the weight of her office behind her, to misstate the applicable law when arguing the case to the jury, and this is especially true where the misstatements affect the defendant's constitutional rights. See, e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Further, due process not only requires the prosecution to carry the full weight of its burden of proof but also protects the defendant's right to a fair trial, which can be violated by improper statements of a prosecutor which mislead the jury as to the law. Davenport, 100 Wn.2d at 763.

Here, both those due process protections were violated by the prosecutor's arguments below, because the prosecutor's comments were a serious misstatement of the crucial burden of proof the prosecution was required to carry and the result was denial of Curtiss' right to a fair trial.

Recently, in, State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), this Court condemned the same kind of argument the prosecutor made here in making the "puzzle" analogy:

The prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were. . . improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden. **By comparing the certainty required to convict with the certainty people often require when they make everyday decisions-both important decisions and relatively minor ones-the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson.** This was improper.

153 Wn. App. at 431-32 (emphasis added).

Indeed, many courts have disapproved of comparing the decision-

making which occurs in a criminal case with the decision-making that jurors engage in on a daily basis, even regarding important matters. More than 40 years ago, a federal court recognized that, while “[a] prudent person” acting in “an important business or family matter would certainly gravely weigh” the considerations and risks of such a decision, “such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). Just a few years later, the highest court in Massachusetts found that comparing everyday decisions to the decision of a jury about whether the state had met its constitutional burden “understated and tended to trivialize the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.” Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272 (Mass. 1977).

Courts in federal jurisdictions and in other states such as Vermont, Massachusetts and California have also reached the same conclusion: that analogies to even important personal decisions improperly “trivialize[] the proof-beyond-a-reasonable-doubt standard” and create the impermissible risk of convictions based on something less than the constitutionally mandated standard. See, State v. Francis, 561 A.2d 392, 396 (Vt. 1989); see also, U.S. v. Noone, 913 F.2d 20, 28-29 (1st Cir. 1990), cert. denied, 500 U.S. 906 (1991); People v. Johnson, 119 Cal. App. 4th 976, 14 Cal. Rptr. 3d 780 (Cal. 2004); Commonwealth v. Rembiszewski, 461 N.E.2d 201, 207 (Mass. 1984).

The reasoning for these rulings is sound:

The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.

Ferreira, 364 N.E.2d at 1273 (quotation omitted) (emphasis added). As the First Circuit has noted, “[t]he momentous decision to acquit or convict a criminal defendant cannot be compared with ordinary decision-making without risking trivialization of the constitutional standard.” Noone, 913 F.2d at 28-29.

Here, the prosecutor did not compare the certainty required to decide the case with that required to make *important* personal decisions - she compared it to the completely unimportant matter of what picture is shown on a jigsaw puzzle. Rather than reflecting the gravity of the decision the jurors had to make and the true weight of the prosecutor’s constitutional burden, the prosecutor’s arguments trivialized the juror’s decision into something far less. As a result, the jurors were misled about the proper standard to apply, believing they only had to be as sure of guilt to convict as they were sure that it a puzzle depicted a certain picture when there was only part of the puzzle completed - a standard far more akin to the preponderance standard than the weighty burden of proof beyond a reasonable doubt.

And this misconduct was further exacerbated by the prosecutor’s parting “shot” in rebuttal closing argument. Telling the jury they should convict if they “know” in their gut or heart that Curtiss was guilty was yet another misstatement of the jury’s role and the prosecutor’s burden.

Again, a person can “know” something for the purposes of making a personal decision without being anywhere near having the degree of certainty required to decide that same thing has been proven beyond a reasonable doubt. See Ferreira, 364 N.E.2d at 1273. Indeed, people are willing to act on what they think they “know” even when they have a great deal of uncertainty, so that using such language again minimizes the prosecutor’s burden of proof. See, e.g., Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954); Anderson, 153 Wn. App. at 432.

Finally, the prosecutor further increased the damages caused by her other acts of misconduct and the minimization and misstatement of her burden of proof by mischaracterizing the trial as a “search for truth” and a “search for justice,” by exhorting the jury to “speak the truth” and by telling them that was what their verdict was supposed to do. 4RP 642, 686. It is not the jury’s role to declare or decide the “truth” about what happened; they are instead tasked solely with deciding whether the prosecution has met its burden of proving all essential elements of its case, beyond a reasonable doubt. See, e.g., State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995); State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Similar arguments have been repeatedly condemned in this state as misstating the jurors’ role and presenting them with a “false choice” i.e., requiring them to choose which witnesses are lying or telling the truth. See, Wright, 76 Wn. App. at 826. The choice is “false” because jurors need not decide that anyone is lying or telling the truth in order to

perform its function, even if the versions of events seem to be inconsistent. Barrow, 60 Wn. App. at 876.

As this Court recently stated in Anderson, “[a] jury’s job is not to ‘solve’ a case. . . [or] ‘declare what happened on the day in question. Rather the jury’s duty is to determine whether the State has proven its allegations against a defendant beyond a reasonable doubt.” 153 Wn. App. at 429.

These arguments - and the misstatements - were not trivial but went to the heart of the entire case against Curtiss. Unlike other misstatements of the law, misstatement of the correct standard of proof beyond a reasonable doubt is especially egregious because of its impact on the constitutional rights of the defendant and the very core of our criminal justice system. The correct standard of proof beyond a reasonable doubt is the “touchstone” of that system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Indeed, as the U.S. Supreme Court has recognized, correct application of the standard is the primary “instrument for reducing the risk of convictions resting on factual error.” Id.

Further, as this Court noted in Anderson, the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed. Anderson, 153 Wn. App. at 431. As a result, the Supreme Court has noted that it is essential that a jury be properly informed of the correct standard of proof beyond a reasonable doubt. See State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). In addition, that standard

has been subject to so many years of litigation and is now so carefully defined that the Court warned against the “temptation to expand upon the definition of reasonable doubt,” because such expansion is likely to result in improper dilution of the prosecution’s constitutional burden and the presumption of innocence. Bennett, 161 Wn.2d at 317-18.

Reversal is required. Because the prosecutor’s multiple acts of misconduct misstated and minimized her constitutionally mandated burden of proof and the jury’s proper role, the misconduct directly affected Curtiss’ constitutional due process rights to have the prosecution shoulder the burden of proving its case against her beyond a reasonable doubt. As a result, the constitutional “harmless error” standard applies. See, e.g., Easter, 130 Wn.2d at 242. As noted, *infra*, the untainted evidence against Curtiss is extremely thin, so that the case rested almost solely on whether the jury believed Curtiss or not. And it is questionable whether there can be “untainted evidence” when the constitutional error is a misstatement of the standard applicable to *all* of the evidence, i.e., the correct burden of proof and the jury’s role and purpose of the verdict.

Put simply, a jury which was not improperly misled as to the true burden of proof the prosecution had to shoulder could well have found that the state failed to prove Curtiss’ guilt as an accomplice to murder beyond a reasonable doubt, believing instead that she was only guilty of helping hide the body after the fact. And a jury which was not told their job and duty was to declare the “truth” instead of deciding if the state had proven its case might easily have found, given the dearth of evidence, that the burden had not been met. Just as the constitutional harmless error

standard cannot be met to overcome the errors in the admission of the improper opinion evidence and the improper comments on Curtiss' rights, it cannot overcome the constitutionally offensive misconduct here.

c. In the alternative, counsel was ineffective

In the unlikely event this Court finds that the prosecutor's misstatements of and minimization of her constitutionally mandated burden of proof, the jury's role and their duty could have been cured if counsel had objected and requested curative jury instructions, this Court should nevertheless reverse based on counsel's ineffectiveness in failing to take those steps. The "strong presumption" that counsel's representation was effective is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. Studd, 137 Wn.2d at 551. Here, there could be no "tactical" reason for failing to object to the prosecutor's serious minimization and misstatement of her burden of proof, and the duty and role of the jury. An objection to the misstatements would likely have been sustained, because any reasonable trial court would have recognized that the prosecution's arguments were clearly improper and minimized the constitutional protections to which Curtiss was entitled.

As a result of counsel's ineffectiveness, the jurors' minds were tainted with the evocative image of the "puzzle" metaphor, which invited them to convict based upon a preponderance, "more likely than not" standard rather than the constitutionally mandated burden the prosecutor should have shouldered. The jury was further misled into thinking they should convict if they simply had a belief in their "gut" and their "heart"

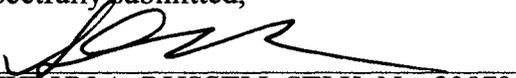
that she was guilty - an amorphous, emotion-based standard which again was more akin to a preponderance standard than the proper one. And finally they were told they were supposed to declare the "truth," not simply decide whether the state had proven its case to the constitutionally required standard. Counsel's ineffectiveness provides yet another ground upon which the constitutionally infirm convictions in this case should be reversed.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 24th day of March, 2010.

Respectfully submitted,


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CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached brief, first class postage prepaid, to opposing counsel and the defendant at the following address on this date:

- TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S,
Tacoma, WA. 98402;
- TO: Renee Curtiss, DOC 330281, WCCW, 9601 Bujacich Rd. N.W.,
Gig Harbor, WA. 98332-8300.

DATED this 24th day of March, 2010.



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