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No. 52464-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kevin Case,

Appellant.

Grays Harbor County Superior Court Cause No. 18-1-00134-2

The Honorable Judge Ray Kahler

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Mr. Case's right to present a defense under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§3 and 22.
2. The court violated Mr. Case's confrontation right under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22.
3. The court violated Mr. Case's constitutional rights by excluding critical evidence that was relevant and admissible.
4. The court erred by refusing to allow cross-examination on issues affecting the alleged victim Ms. Rothwell's credibility.

ISSUE 1: An accused person has a constitutional right to confront witnesses and to present relevant, admissible evidence necessary to the defense. Did the court violate Mr. Case's constitutional rights by limiting his cross-examination of the alleged victim Ms. Rothwell?

5. Mr. Case's convictions were entered in violation of his Sixth and Fourteenth Amendment right to a jury trial.
6. Mr. Case's convictions were entered in violation of his right to a jury trial under Wash. Const. art. I, §§21 and 22.
7. The testimony of a counselor who had not reviewed the case amounted to an improper opinion on the credibility of Ms. Rothwell's written statement and her courtroom testimony.
8. This counselor's testimony invaded the province of the jury and infringed Mr. Case's right to an independent determination of the facts.

ISSUE 2: Opinion testimony on the credibility of a witness infringes the right to an independent jury determination of the facts. Were Mr. Case's convictions obtained in violation of his Sixth and Fourteenth Amendment right to a jury trial, because they were based in part on an improper opinion as to the credibility of Ms. Rothwell's written statement and her courtroom testimony?

9. Mr. Case was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

10. Mr. Case's attorney provided ineffective assistance of counsel by failing to object to inadmissible testimony.

ISSUE 3: Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Was Mr. Case denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel by his attorney's failure to object to improper opinion testimony on the credibility of Ms. Rothwell's written statement and her courtroom testimony?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Kevin Case was accused of assaulting and threatening his girlfriend Cindy Rothwell. CP 1-2. Ms. Rothwell later told a jury that when she spoke to police, she “may have said things happened when they didn’t.” RP 109, 111, 158.

Mr. Case had returned to their house after staying several days with another woman. RP 121-122. Ms. Rothwell admitted that she was angry at Mr. Case when she told police he’d threatened and assaulted her. RP 121-122, 158.

She explained that she was “so angry... mad [and] vindictive” at the time she gave her statement to police. RP 158. She also said that she did not have a clear memory of the incident, even after working with her psychiatrist. RP 99, 102.

Mr. Case was charged with second-degree assault and felony harassment.¹ CP 1-2.

At trial, no evidence was admitted showing any prior history of abuse. Despite this, the State introduced testimony from a mental health counselor named Jason Cain, regarding the dynamics of domestic violence relationships. RP 209.

¹ He was acquitted of malicious mischief; that charge is not at issue in this appeal. CP 2, 38.

Cain testified that he had “intentionally kept [himself] ignorant” about the facts of the case. RP 217. He did not speak with Ms. Rothwell and did not even know what Mr. Case was accused of. RP 217.

Prior to trial, defense counsel sought to limit Cain’s testimony because Cain hadn’t met with Ms. Rothwell or reviewed the police reports. CP 8-9. Counsel did not ask that the evidence as a whole be excluded.² CP 8-9.

Cain testified that recantation is a “somewhat common” behavior of domestic violence victims.³ RP 218. He described minimization as “a very common phenomena [sic].” RP 218. He also testified that some survivors “attribute[e] the violence to themselves rather than the perpetrator,” but admitted that he did not often see that behavior in his practice. RP 219.

To rebut the State’s position—that Ms. Rothwell had falsely recanted—defense counsel wished to ask Ms. Rothwell if she’d been intimidated into changing her story. When counsel asked “Have you been threatened in any way to testify today?” the court sustained the State’s relevance objection. RP 159. The court also sustained a relevance

² The hearing on Mr. Case’s motions *in limine* has yet to be transcribed; Mr. Case is seeking permission to supplement the record with a transcript of that hearing.

³ He testified, however, that he was “reluctant to... say the majority would recant.” RP 220.

objection when defense counsel asked “[D]id you feel pressured testifying in any way?” RP 159.

The prosecutor argued in closing that domestic violence survivors “[v]ery frequently recant or minimize what happened.” RP 323. The court overruled Mr. Case’s objection to this argument. RP 323.

During deliberations, jurors asked “Have the police responded to that home for a situation involving Mr. Case and Ms. Rothwell prior to this incident?” Jury Note filed July 19, 2018, Supp. CP Jurors also wanted to know Mr. Case’s criminal history. Jury Note filed July 19, 2018, Supp. CP. The court responded by telling jurors they’d received all the evidence. CP 23.

Mr. Case was convicted of fourth-degree assault and felony harassment.⁴ CP 35-38, 52. The court imposed a total of 72 months of confinement, and Mr. Case appealed. CP 57-58, 68.

ARGUMENT

I. THE COURT VIOLATED MR. CASE’S CONFRONTATION RIGHT AND HIS RIGHT TO PRESENT A DEFENSE BY EXCLUDING CRITICAL EVIDENCE.

The State sought to portray Ms. Rothwell’s testimony as a false recantation stemming from domestic violence. Mr. Case wanted to rebut

⁴ He was acquitted of second-degree assault and malicious mischief. CP 35-38, 52.

this view by showing that she hadn't been threatened or pressured into repudiating her statement to police.

The trial court's refusal to allow cross-examination infringed Mr. Case's confrontation right and his right to present a defense. *State v. Darden*, 145 Wn.2d 612, 620-626, 26 P.3d 308 (2002); *State v. Jones*, 168 Wn.2d 713, 719-720, 230 P.3d 576 (2010).

A. By restricting cross-examination of Ms. Rothwell, the trial court violated Mr. Case's constitutional rights to confrontation and to present his defense.

The constitution guarantees an accused person the right to confront adverse witnesses U.S. Const. Amends. VI, XIV; art. I, §§3, 22; *Darden*, 145 Wn.2d at 620. The confrontation right grants defendants "extra latitude in cross-examination to show motive or credibility." *State v. Lile*, 188 Wn.2d 766, 792, 398 P.3d 1052 (2017).

The constitution also guarantees an accused person the right to present a defense. *Jones*, 168 Wn.2d at 720. This includes the right to introduce relevant and admissible evidence. *Jones*, 168 Wn.2d at 720.

Evidence is relevant "if it has any tendency to make the existence of any consequential fact more probable or less probable." *Washington v. Farnsworth*, 185 Wn.2d 768, 782-83, 374 P.3d 1152 (2016) (citing ER 401). The threshold to admit relevant evidence is low; "[e]ven minimally relevant evidence is admissible." *Darden*, 145 Wn.2d at 621.

Some types of evidence “are ‘always relevant.’” *Lile*, 188 Wn.2d at 794 (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). Thus, “any fact that goes to the trustworthiness of a witness may be elicited if it is germane to the issue.” *Id.* The “more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore...credibility.” *Darden*, 145 Wn.2d at 619.

In this case, the prosecution based its case on Ms. Rothwell's written statement to police. Despite this, the court restricted Mr. Case's cross-examination of Ms. Rothwell. RP 159. As a result, Mr. Case was prevented from introducing critical evidence regarding the credibility of Ms. Rothwell's written statement and her courtroom testimony. RP 159. This violated his confrontation right and his right to present a defense. *Darden*, 145 Wn.2d at 621; *Jones*, 168 Wn.2d at 720.

Ms. Rothwell's written statement was “essential... to the prosecution's case.” *Darden*, 145 Wn.2d at 621. Accordingly, any evidence bearing on Ms. Rothwell's credibility was relevant, and defense counsel should have been granted “extra latitude in cross-examination.” *Lile*, 188 Wn.2d at 792.

Evidence that meets the “minimally relevant” standard can only be excluded if the State proves that it is so prejudicial as to disrupt the

fairness of the fact-finding process at trial. *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 622. No state interest is compelling enough to prevent evidence that is of high probative value (or if the defendant's need for the evidence outweighs the state's interest in exclusion). *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 619, 622.

Here, the trial court should have allowed Mr. Case to cross-examine Ms. Rothwell on matters relating to her credibility. The State asked jurors to believe her written statement, and to reject her trial testimony as a false recantation stemming from domestic violence. RP 318-320, 323. The defense wished to show that she had not been threatened or pressured into falsely recanting.

The evidence was at least "minimally relevant." *Darden*, 145 Wn.2d at 621. Through Cain's testimony, the prosecutor sought to paint Ms. Rothwell as a victim of domestic violence who falsely recanted. RP 209-235. The State emphasized this in closing, and defense counsel's objection to the argument was overruled. RP 323. The State advanced no justification warranting exclusion of the proffered evidence. RP 159.

Mr. Case should have been allowed to show that she hadn't been threatened or pressured to recant. The evidence was more than "minimally relevant."⁵ *Jones*, 168 Wn.2d at 720. It went to the very heart of the case.

The excluded evidence was critical to the defense. In its absence, jurors may well have believed that Mr. Case threatened Ms. Rothwell or pressured her to renounce her prior statement. Because the testimony was "of *high* probative value... 'no state interest can be compelling enough to preclude its introduction.'" *Jones*, 168 Wn.2d at 720 (emphasis in original) (quoting *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

The trial court violated Mr. Case's constitutional rights to confrontation and to present a defense when it prohibited cross-examination into the subject. *Id.*, at 721; *Darden*, 145 Wn.2d at 622. Mr. Case's convictions must be reversed. *Darden*, 145 Wn.2d at 622.

B. The violation is not harmless beyond a reasonable doubt.

Constitutional violations require reversal unless the State can establish harmlessness beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). Even non-constitutional error is

⁵ Even if the excluded evidence were only minimally relevant, it should not have been excluded absent prejudice so great "as to disrupt the fairness of the fact-finding process." *Jones*, 168 Wn.2d at 720. The State did not show prejudice of that magnitude. Furthermore, any improper prejudicial effect could have been cured with an instruction. *See, e.g., State v. Sublett*, 176 Wn.2d 58, 70 n. 5, 292 P.3d 715 (2012) ("[L]imiting instructions are assumed to cure most risks of prejudice.")

prejudicial unless it can be described as trivial, formal, or merely academic. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000).

Here, the State cannot prove beyond a reasonable doubt that the error was trivial, formal, or merely academic. *Lorang*, 140 Wn.2d at 32. Nor can it show that “any reasonable jury would have reached the same result without the error.” *Jones* 168 Wn.2d at 724; *see also Lorang*, 140 Wn.2d at 32.

The trial amounted to a contest between Ms. Rothwell’s written statement and her live testimony. Given the prosecutor’s reliance on the written statement and its attempts to undermine Ms. Rothwell’s testimony, the excluded evidence was critical to the defense. The court’s error was not harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 378.

The trial court violated Mr. Case’s constitutional right to present a defense and to confront adverse witnesses. *Jones*, 168 Wn.2d at 720; *Darden*, 145 Wn.2d at 620-622. The State cannot show that the error was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. Mr. Case’s convictions must be reversed, and the case remanded with instructions to admit the excluded evidence. *Id.*

C. The Court of Appeals must review the trial court's decision *de novo* because it infringed Mr. Case's constitutional rights.

The Supreme Court has issued conflicting opinions on the proper standard of review when discretionary decisions violate an accused person's constitutional rights. The better approach is to review *de novo* a trial court's evidentiary rulings (and other discretionary decisions) where they infringe constitutional rights.

Appellate courts review constitutional issues *de novo*. *State v. Armstrong*, 188 Wn.2d 333, 339, 394 P.3d 373, 377 (2017). The Supreme Court has applied the *de novo* standard to discretionary decisions that would otherwise be reviewed for abuse of discretion. *Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

In *Jones*, for example, the court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719.⁶ Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would

⁶ Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

have been for abuse of discretion had the defendant not argued a constitutional violation. *Id.*

However, the court has not applied this rule consistently. For example, one month prior to its decision in *Jones*, the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*—the defendant alleged a violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

This inconsistency should not be taken as a repudiation of *Jones* and *Iniguez*. This is so because cases applying the more deferential abuse-of-discretion standard to errors that violate constitutional rights have not grappled with either case. *See, e.g., State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013). In *Dye*, the court indicated that “[a]lleging that a ruling violated the defendant's right to a fair trial does not change the standard of review.” *Id.*, at 548.

The *Dye* court did not cite *Iniguez* or *Jones*. *Id.*, at 548. Furthermore, the petitioners in *Dye* did not ask the court to apply a *de novo* standard. *See* Petition for Review (*Dye*)⁷ and Petitioner’s

⁷ Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20prv.pdf> (last accessed 1/23/19).

Supplemental Brief (*Dye*).⁸ As the *Dye* court noted, the petitioner “present[ed] no reason for us to depart from [an abuse-of-discretion standard].”⁹ *Id.* There is no indication that the *Dye* court intended to overrule *Iniguez* and *Jones*. *Id.*

In a more recent case, the court applied an abuse of discretion standard despite the petitioner’s claim of a constitutional violation. *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017). In *Clark*, the court announced it would “review the trial court’s evidentiary rulings for abuse of discretion and defer to those rulings unless no reasonable person would take the view adopted by the trial court.” *Id.* (internal quotation marks and citations omitted). Upon finding that the lower court had excluded “relevant defense evidence,” the reviewing court would then “determine as a matter of law whether the exclusion violated the constitutional right to present a defense.” *Id.*

Although the *Clark* court cited *Jones*, it did not suggest that *Jones* was incorrect, harmful, or problematic, and did not overrule it. *See Armstrong*, 188 Wn.2d at 340 n. 2. (“For this court to reject our previous

⁸ Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf> (last accessed 1/23/19).

⁹ By contrast, the Respondent in *Dye* did argue for application of an abuse-of-discretion standard. *See Dye*, Respondent’s Supplemental Brief, pp 8-9, 17-18, available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%200brief.pdf> (last accessed 1/23/19).

holdings, the party seeking that rejection must show that the established rule is incorrect and harmful or a prior decision is so problematic that we must reject it.”)

The *Clark* court did not even acknowledge its deviation from the standard applied by the *Jones* court. *Id.* Nor does the *Clark* opinion mention *Iniguez*. Furthermore, as in *Dye*, the respondent in *Clark* argued for the abuse-of-discretion standard, and petitioner did not ask the court to apply a different standard. *See* Respondent’s Supplemental Brief (*Clark*), p. 16;¹⁰ Petitioner’s Supplemental Brief (*Clark*).¹¹

This court should follow the reasoning in *Iniguez* and *Jones*. This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye* and *Clark*.

Constitutional errors should be reviewed *de novo*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. This rule encompasses discretionary decisions that violate constitutional rights.¹² A rule that would permit review for abuse of discretion would leave the constitutional

¹⁰ Available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf> (accessed 1/23/19).

¹¹ Available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf> (accessed 1/23/19).

¹² *But see State v. Blair*, --- Wn.App. ---, ___, 415 P.3d 1232 (2018).

rights of an accused person up to the discretion of the individual judge presiding over that person's trial.

Furthermore, the two-part standard set forth in *Clark* is meaningless: an abuse of discretion resulting in the exclusion of relevant and admissible defense evidence will always violate the right to present a defense. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281. Such cases will turn on harmless error analysis, not on *de novo* review of the error's constitutional import.

Jones and *Iniguez* set forth the proper standard. Given the Supreme Court's inconsistency on this issue, review here should be *de novo*.¹³

Jones, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281.

II. MR. CASE'S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

Cain testified that recantation is "somewhat common" among domestic violence victims. RP 218. He also testified that DV survivors minimize abuse and sometimes blame themselves for their injuries. RP 218-219.

The prosecution relied on this testimony as an improper opinion on the credibility of Ms. Rothwell's courtroom testimony. RP 323. The

¹³ The Supreme Court has granted review of a case involving this issue. *See State v. Arndt*, No. 95396-1 (April 3, 2019).

testimony invaded the province of the jury and violated Mr. Case's constitutional right to a jury trial.

A. Cain's testimony invaded the exclusive province of the jury.

An accused person has a constitutional right to an independent jury determination of the facts required for conviction. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22; *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213, 217 (2014). Testimony regarding the credibility of another witness violates this right because it "invades the exclusive province of the jury." *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91, 95 (2007), *aff'd on other grounds*, 165 Wn.2d 870, 204 P.3d 916 (2009).

Here, Cain's testimony amounted to an improper opinion regarding the credibility of Ms. Rothwell's courtroom testimony. *State v. Thach*, 126 Wn. App. 297, 314, 106 P.3d 782 (2005). Indeed, that is how the prosecutor used Cain's testimony in closing. RP 318-323.

In *Thach*, an officer was permitted to explain why police collect a written statement from domestic violence victims. *Thach*, 126 Wn. App. at 314. The officer "referred to a study showing that many women recant their statements at trial because of fear, further abuse, or financial difficulties." *Id.*

The *Thach* court found the officer's testimony improper. *Id.* Under the circumstances, such testimony "becomes an opinion on the credibility of the victim's courtroom testimony."¹⁴ *Id.*

As in *Thach*, the State called Cain to impeach Ms. Rothwell's courtroom testimony. Cain testified that recantation is a "somewhat common" behavior of domestic violence victims. RP 218. He also testified that DV survivors tend to minimize abuse and sometimes blame themselves for their injuries. RP 218-219.

Like the officer's testimony in *Thach*, Cain's testimony amounted to an improper opinion on the credibility of Ms. Rothwell's courtroom testimony. RP 218. Cain implied that jurors should believe Ms. Rothwell's written statement because her courtroom testimony was not credible. The prosecutor was allowed to make this argument in closing. RP 318-323.

The jury struggled with this issue, as can be seen from its questions to the court. Jurors asked for Mr. Case's criminal history and wished to know if police had responded to prior incidents. Jury Note filed July 19, 2018, Supp. CP. These questions suggest that jurors wanted to know how much weight they should accord Cain's explanation for Ms. Rothwell's courtroom testimony.

¹⁴ In *Thach*, the defendant raised no objection. The *Thach* court noted that the evidence was overwhelming and concluded the error was not manifest. *Id.* The appellant did not raise an ineffective assistance claim. *Id.*

Cain’s testimony invaded the province of the jury and violated Mr. Case’s constitutional right to a jury determination of the facts. *Thach*, 126 Wn. App. at 314; *Sutherby*, 138 Wn. App. at 617. The error was not harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 378. Accordingly, Mr. Case’s convictions must be reversed, and the case remanded with instructions to exclude Cain’s testimony on retrial. *Sutherby*, 138 Wn. App. at 617.

B. The error may be raised for the first time on appeal and should be reviewed *de novo*.

Constitutional errors are reviewed *de novo*. *Armstrong*, 188 Wn.2d at 339. A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.”¹⁵ *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

¹⁵ The showing required under RAP 2.5 (a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Lamar*, 180 Wn.2d at 583.

Here, the prosecutor introduced opinion testimony suggesting that Ms. Rothwell's written statement was credible and that her courtroom testimony was not. RP 218-219, 323. The testimony was improper. *Thach*, 126 Wn. App. at 314; *Sutherby*, 138 Wn. App. at 617.

The error had practical and identifiable consequences at trial, and given what the trial judge knew at the time, he could have corrected the error. *O'Hara*, 167 Wn.2d at 100. The error is manifest and may be raised for the first time on appeal. RAP 2.5(a)(3); *Id.*

III. MR. CASE'S CONVICTIONS MUST BE REVERSED BECAUSE HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To obtain relief on an ineffective assistance claim, a defendant must show "that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him."¹⁶ *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

¹⁶ Ineffective assistance is an issue of constitutional magnitude that the court can consider for the first time on appeal. *Kyлло*, 166 Wn.2d at 862; RAP 2.5 (a)(3).

Prejudice is established when there is a reasonable probability that counsel's deficient performance affected the outcome of the proceeding. *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018). This "reasonable probability" standard is less than a preponderance; it requires only a probability sufficient to undermine confidence in the outcome. *Id.*

Counsel performs deficiently by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*; see also *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), *aff'd on other grounds*, 165 Wn.2d 474, 198 P.3d 1029 (2009).

Defense counsel should have objected to Cain's testimony. *Thach*, 126 Wn. App. at 314. The testimony amounted to an improper opinion on Ms. Rothwell's credibility. *Id.* It invaded the exclusive province of the jury and violated Mr. Case's constitutional right to an independent jury determination of the facts required for conviction. *Id.*; *Sutherby*, 138 Wn. App. at 617.

In addition, counsel should have objected under ER 402, ER 403, and ER 702. The State did not show a history of domestic violence

between Mr. Case and Ms. Rothwell. Absent a pattern of abuse, Cain's testimony regarding the dynamics of domestic violence relationships lacked an adequate foundation. *Cf. State v. Ciskie*, 110 Wn.2d 263, 279, 751 P.2d 1165 (1988).

Testimony regarding the dynamics of domestic violence presupposes a history of abuse. *Id.* The State failed to show such a history in this case. No evidence was introduced showing a pattern of the type outlined in other cases involving similar testimony. *Id.*; *see also State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984).

Absent proper foundation, Cain's testimony was not relevant. *See* ER 401. It should have been excluded under ER 402. Furthermore, any probative value was substantially outweighed by the danger of unfair prejudice. Counsel should have objected under ER 403.

Because it lacked relevance, Cain's testimony was also not helpful; it could not "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. A proper objection under ER 702 would likely have been sustained.

Counsel's failure to object "fell below an objective standard of reasonableness." *A.N.J.*, 168 Wn.2d at 109. It also prejudiced Mr. Case.

Cain's testimony directly contradicted the defense theory – that Ms. Rothwell testified truthfully after giving a false statement to police.

The prosecutor used Cain's opinion to argue that the written statement was credible and her in-court testimony should be disbelieved. RP 318-323.

There is a reasonable probability that the improper evidence affected the outcome. *Lopez*, 190 Wn.2d at 116. The case turned on the jury's perceptions of Ms. Rothwell. If jurors believed her written statement over her courtroom testimony, they would have little choice but to convict.

The error was compounded by the trial court's decision limiting cross-examination of Ms. Rothwell. RP 159. Mr. Case sought to show that she hadn't been threatened or pressured into recanting. RP 159. Through Cain's testimony, the prosecutor was able to suggest that Ms. Rothwell changed her account because she was a battered person. RP 218-219.

Counsel's failure to object deprived Mr. Case of the effective assistance of counsel. *Saunders*, 91 Wn. App. at 578. The convictions must be reversed, and the case remanded for a new trial. *Id.*

CONCLUSION

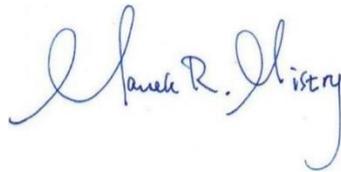
For the foregoing reasons, Mr. Case's convictions must be reversed. The case must be remanded for a new trial.

Respectfully submitted on April 7, 2019,

BACKLUND AND MISTRY

Handwritten signature of Jodi R. Backlund in blue ink.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 7, 2019.



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