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NO. 53595-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANA MATTSON-GRAHAM,
Appellant.

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

The Honorable J. Andrew Toynebee, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	2
Procedural Facts.....	2
Substantive Facts.....	2
C. ARGUMENT.....	5
1. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE’S WITNESS TO OFFER OPINION TESTIMONY ON MS. MATTSON-GRAHAM’S GUILT WHEN IT ALLOWED HIM TO TESTIFY THAT THE KICK WAS INTENTIONAL	5
2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A \$100 DNA FEE AS PART OF MS. MATTSON-GRAHAM’S SENTENCE WHEN DNA WAS COLLECTED FOR A PREVIOUS FELONY AND MS. MATTSON-GRAHAM IS INDIGENT	10
D. CONCLUSION.....	11

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993).....	6
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	8
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	6
<i>State v. Hudson</i> , 150 Wn. App. 646, 208 P.3d 1236 (2009).....	5
<i>State v. King</i> , 167 Wn.2d 324, 219 P.3d 642 (2009).....	7
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	6, 7, 8
<i>State v. Montgomery</i> , 163 Wn. App. 577, 183 P.3d 267 (2008).....	5, 6, 7
<i>State v. Quaale</i> , 182 Wn.2d 191, 340 P.3d 213 (2014).....	8
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	10, 11

RULES, STATUTES, AND OTHERS

Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System, FEDERAL BUREAU OF INVESTIGATION, available at https://www.fbi.gov/services/laboratory/biometricanalysis/codis/codis-and-ndis-fact-sheet	11
ORS 137.076.....	11

TABLE OF AUTHORITIES

	Page
RULES, STATUTES, AND OTHERS, continued	
RCW 10.10.160	10
RCW 43.43.7541	10
RCW 9A.36.031	7
WPIC 35.50	7

A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by allowing Sergeant Patrick to provide improper opinion testimony on Ms. Mattson-Graham's guilt when he testified that the kick was an intentional act and not an accident.
2. The trial court abused its discretion by imposing a \$100 DNA collection fee as part of Ms. Mattson-Graham's sentence when she was indigent and had previously provided DNA as a result of felony convictions in Oregon.

Issues Presented on Appeal

1. Did the trial court abuse its discretion by allowing Sergeant Patrick to provide improper opinion testimony on Ms. Mattson-Graham's guilt when he testified that the kick was an intentional act and not an accident?
2. Did the trial court abuse its discretion by imposing a \$100 DNA collection fee as part of Ms. Mattson-Graham's sentence when she was indigent and had

previously provided DNA as a result of felony convictions in Oregon?

B. STATEMENT OF THE CASE

Procedural Facts

The state charged Ms. Mattson-Graham with one count of criminal trespass in the first degree and one count of assault in the third degree. CP 1-3. A jury convicted Ms. Mattson-Graham of the assault and acquitted her on the trespass charge. CP 9-11; RP 75-76.

Substantive Facts

On March 17, 2019, Dana Mattson-Graham entered the Shell gas station located off Mulford Road in Toledo, Washington to buy a soda. RP 46, 49. After Ms. Mattson-Graham entered, the cashier told her to leave because he claimed she was not allowed inside the store or on the property where it is located. RP 47-51. Ms. Mattson-Graham promptly exited the store and went out into the parking lot where her car was broken down. RP 49, 94-95.

After about an hour, an unidentified individual called 911 to report Ms. Mattson-Graham for trespassing. RP 51. Detective Matthew Schlecht of the Lewis County Sheriff's Department

responded to the call and arrived at the Shell station about two hours after Ms. Mattson-Graham had left the store. RP 51, 53-54. Upon arrival, Detective Schlecht observed Ms. Mattson-Graham standing outside of a van parked behind the Shell station. RP 54. Schlecht told Ms. Mattson-Graham she could leave her broken down van in the parking lot temporarily but could not go to the coffee stand in the parking lot. RP 94-95.

Detective Schlecht contacted Ms. Mattson-Graham and asked her what happened. RP 55. Ms. Mattson-Graham replied that she went into the store to buy a soda, was told to leave, and then left immediately after. RP 55. Detective Schlecht arrested Ms. Mattson-Graham. RP 55-56.

After Detective Schlecht handcuffed Ms. Mattson-Graham, she became angry and began to yell at the detective and other officers who arrived as backup. RP 55-57, 105. The officers walked Ms. Mattson-Graham to Detective Schlecht's patrol car and placed her inside. RP 57. After Ms. Mattson-Graham was inside the patrol car, her leg got caught underneath the cage that separates the front and back seats of the patrol car. RP 98-99. Ms. Mattson-Graham continued to struggle and flail her limbs while she was inside the

car. RP 86, 88.

Detective Schlecht reached across her body to buckle her seat belt. RP 58-59. As Detective Schlecht was buckling her in, Ms. Mattson-Graham's leg struck the detective's thigh. RP 59, 84. Detective Schlecht stumbled backwards but did not fall to the ground. RP 59, 90. Detective Schlecht was eventually able to buckle Ms. Mattson-Graham's seatbelt and secure her in the patrol car with the help of the other officers. RP 85.

During the state's case-in-chief, it questioned Sergeant Samuel Patrick, who was working as Detective Schlecht's backup officer, about whether the kick was intentional. RP 86. Over Ms. Mattson-Graham's objections, the trial court allowed Sergeant Patrick to testify that he believed the kick was intentional:

[PROSECUTOR]: When she kicked the deputy, was that an attempt to keep him from grabbing her leg?

[DEFENSE COUNSEL]: Objection. Speculation.

[TRIAL COURT]: Sustained.

[PROSECUTOR]: Was the kick an intentional act?

[SGT. PATRICK]: It appeared to be.

[DEFENSE COUNSEL]: Objection. Asked and answered.

[TRIAL COURT]: Sustained.

[PROSECUTOR]: Was the kick an accident?

[DEFENSE COUNSEL]: Objection. Speculation.

[TRIAL COURT]: I'll allow you to answer if you believe you can answer that.

[SGT. PATRICK]: It did not look like an accident.

RP 86-87.

The trial court imposed a standard range sentence and included a \$100 DNA collection fee in Ms. Mattson-Graham's sentence while finding her indigent and that she had prior felony convictions in Oregon. RP 169; CP 78, 98-99. Ms. Mattson-Graham filed a timely notice of appeal. CP 87-94.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE'S WITNESS TO OFFER OPINION TESTIMONY ON MS. MATTSON-GRAHAM'S GUILT WHEN IT ALLOWED HIM TO TESTIFY THAT THE KICK WAS INTENTIONAL

A witness may not offer an opinion as to the defendant's guilt, either directly or by inference. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009) (citing *State v. Montgomery*, 163 Wn. App. 577, 591, 183 P.3d 267 (2008)). Allowing a witness to

express an opinion on the defendant's guilt invades the province of the jury and violates the defendant's constitutional right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

Whether opinion testimony is admissible depends on the circumstances of each case. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). In determining whether a statement is impermissible opinion testimony, courts analyze all of the circumstances in the case with emphasis on (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (3) the type of defense, and (5) the other evidence before the trier of fact. *Kirkman*, 159 Wn.2d at 928 (citing *Demery*, 144 Wn.2d at 759). Opinion testimony is more likely to be improper when it is tailored to parrot the essential elements contained in the trial court's instructions to the jury. *Heatley*, 70 Wn. App. at 581.

In criminal trials, a witness may not testify to his or her personal beliefs as to the defendant's guilt, the intent of the accused, or the veracity of a witness. *Montgomery*, 163 Wn.2d 591 (citing *Kirkman*, 159 Wn.2d at 927). A trial court's decision on whether to admit opinion testimony is reviewed for an abuse of

discretion. *Kirkman*, 159 Wn.2d at 927.

Under *Kirkman*, police testimony constitutes improper opinion testimony for the following reasons: First, “[a] law enforcement officer's opinion testimony may be especially prejudicial because the ‘officer's testimony often carries a special aura of reliability.’” *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (citing *Kirkman*, 159 Wn.2d at 928).

Here, under *King* and *Kirkman*, Sergeant Patrick's testimony was improper for three reasons. First, the testimony that the kick was “intentional act” and not “an accident”, carried the special aura of reliability that is deemed prejudicial. RP 86; *Kirkman*, 159 Wn.2d at 928. Second, intent is an essential element the state was required to prove. An assault is an “*intentional* striking or touching” that is “harmful or offensive.” WPIC 35.50 (emphasis added). Ms. Mattson-Graham's intent is an essential element of the charge. RCW 9A.36.031(1)(g).

It is inappropriate for a witness to offer opinion testimony regarding a defendant's intent, because this is a matter for the jury to decide. *Montgomery*, 163 Wn.2d at 591. Allowing Sergeant Patrick to testify Ms. Mattson-Graham intentionally kicked Detective

Schlecht denied Ms. Matson-Graham her right to a jury determination of an essential element of the crime charged.

Third, and finally, Sergeant Patrick's opinion testimony frustrated Ms. Mattson-Graham's defense. Ms. Mattson-Graham's defense relied on showing that the kick was not intentional but rather an unintended result of trying to disengage her legs that were stuck under the cage separating the front and back seats. RP 86, 88, 98. Sergeant Patrick's testimony substituted his own opinion of Ms. Mattson-Graham's intent for a factual determination by the jury on whether she intentionally committed an assault. Testimony that infringes on the jury's role in a criminal trial in this way is the type of testimony identified as improper and warranting reversal. *Kirkman*, 159 Wn.2d at 927.

The admission of an improper opinion on the defendant's guilt is an error of constitutional magnitude, meaning the error is only harmless if the state can establish beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Quaale*, 182 Wn.2d 191, 201-02, 340 P.3d 213 (2014) (citing *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

The state cannot meet this burden in Ms. Mattson-Graham's case. The record contains evidence that Ms. Mattson-Graham was flailing her limbs, including her legs, while officers were attempting to put her in the patrol car and when she got one of her legs stuck under the cage separating the front and back seats. RP 86, 88, 98, 113.

Although the officers described Ms. Mattson-Graham's actions as a "kick," there is evidence casting doubt on whether the kick was intentionally directed at Detective Schlecht rather than an attempt to remove her foot from the cage or simply resist being put into the patrol car. The state's solution to this ambiguity in the evidence was to have Sergeant Patrick provide his opinion that the kick was intentional, thereby deciding the ultimate issue in the trial. The error in admitting the improper opinion testimony was not harmless, therefore this court should reverse her conviction and order a new trial.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT IMPOSED A \$100 DNA FEE AS PART OF MS. MATTSON-GRAHAM'S SENTENCE WHEN DNA WAS COLLECTED FOR A PREVIOUS FELONY AND MS. MATTSON-GRAHAM IS INDIGENT

RCW 43.43.7541 imposes a \$100 DNA collection fee on defendants convicted of a felony or certain misdemeanors. RCW 43.43.7541. The Washington State Legislature amended this statute effective June 7, 2018 to include language specifying that this fee may only be collected from a defendant once. *State v. Ramirez*, 191 Wn.2d 732, 738, 426 P.3d 714 (2018).

Following *Ramirez*, the DNA fee is treated as a discretionary LFO where law enforcement has already collected an indigent defendant's DNA. RCW 43.43.7541; *Ramirez*, 191 Wn.2d at 747. Subsequently, a trial court may not impose discretionary LFOs on an indigent defendant where law enforcement previously collected his or her DNA. RCW 10.10.160(3); *Ramirez*, 191 Wn.2d at 747.

Here, the trial court impermissibly imposed the \$100 DNA collection fee as part of Ms. Mattson-Graham's sentence despite her indigency and prior Oregon felony convictions. CP 78, 98-99. Oregon state law requires defendants to submit a DNA sample to

law enforcement if they are convicted of a felony. ORS 137.076. Both Oregon and Washington participate in the federal Combined DNA Index System (CODIS). See *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FEDERAL BUREAU OF INVESTIGATION, available at <https://www.fbi.gov/services/laboratory/biometricanalysis/codis/codis-and-ndis-fact-sheet> (describing participants in CODIS).

Imposing the DNA collection fee when Ms. Mattson-Graham already provided a DNA sample that has been shared with law enforcement in Washington constitutes an abuse of discretion and is contrary to law. Under *Ramirez*, this fee must be vacated. *Ramirez*, 191 Wn.2d at 747.

Ms. Mattson-Graham respectfully requests that this court strike the DNA fee from her judgment and sentence.

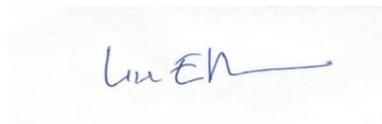
D. CONCLUSION

The trial court abused its discretion by allowing Sergeant Patrick to provide improper opinion testimony on the ultimate issue related to the assault charge. This testimony likely affected the outcome of Ms. Mattson-Graham's trial. Furthermore, the trial court abused its discretion by imposing a \$100 DNA collection fee as part

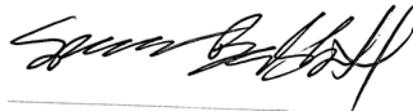
of Ms. Mattson-Graham's sentence when she has previously provided a DNA sample to law enforcement and was indigent at sentencing. Ms. Mattson-Graham respectfully requests that this court reverse her conviction and order a new trial. In the alternative, she respectfully requests that this court strike the \$100 DNA collection fee from her judgment and sentence.

DATED this 17th day of December 2019.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is centered on a light blue rectangular background.

LISE ELLNER, WSBA No. 20955
Attorney for Appellant

A handwritten signature in black ink, appearing to read "Spencer Babbitt", is centered above a horizontal line.

SPENCER BABBITT, WSBA No. 51076
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I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov and Dana Mattson-Graham, 2387 SE 152nd Avenue, Portland, OR 97233 a true copy of the document to which this certificate is affixed on December 17, 2019. Service was made by electronically to the prosecutor and Dana Mattson-Graham by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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