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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 313778 - III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ARMANDO CORTEZ-LOPEZ, Appellant,

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE..... 2-6

IV. ARGUMENTS 6-51

A. **Cody Case’s Testimony that Mr. Cortez-Lopez was “trying to molest” the alleged victim was an improper opinion on Mr. Cortez-Lopez’s guilt and violated his Constitutional right to have the jury (rather than a witness) independently determine his guilt.**.....6

1. **Standard of Review**.....7

2. **Manifest Error**7

a. **The error is of Constitutional magnitude**8

b. **The admission of the improper testimony was manifest error. In other words, Mr. Cortez-Lopez has made a *plausible showing* that admitting Cody Case’s opinion that Mr. Cortez-Lopez was trying to molest the victim had practical and identifiable consequences in Mr. Cortez-Lopez’s trial.**9

c. **Merits: Cody Case’s statements that Mr. Cortez-Lopez was “trying to molest” the victim was an “explicit or almost explicit” opinion on Mr. Cortez-Lopez’s guilt.**11

d. **Admitting the improper opinions on Mr. Cortez-Lopez’s criminal intent and ultimate guilt was not harmless beyond a reasonable doubt. This Court should reverse his convictions.**22

B. The prosecutor’s misconduct throughout the trial deprived Mr. Cortez-Lopez of his right to a fair trial.	27
1. During cross examination of Cody Case, the prosecutor committed misconduct when he repeatedly used improper leading and compound questions, and as a result, misstated witness testimony during cross examination. He then propounded that misconduct when he re-stated the misstatement of the evidence as if it was what Mr. Case actually testified to and ultimately committed misconduct in closing argument when he argued as if that were a proven fact.	27
2. The prosecutor failed to prepare Mr. Case for trial and warn him against giving improper opinions on the state of mind of witnesses and the intent and guilt of the accused.	37
3. The Prosecutor Committed Misconduct Because He Seized upon Inadmissible and Highly Prejudicial Opinion Testimony to Convict Mr. Cortez Lopez Knowing that it Was Prejudicial and Inadmissible.	40
4. During closing argument, the prosecutor committed misconduct when he urged the jury to abrogate its fact-finding duty and render its verdict based upon Cody Case’s improper opinion testimony.	41
C. Even assuming, <i>arguendo</i>, that Mr. Cortez-Lopez waived his right to object to Mr. Case’s inappropriate opinion testimony (Argument “A”) and the prosecutor’s repeated and inappropriate attempts to capitalize on the inadmissible evidence was not prejudicial (Argument “B”), This Court should still reverse Mr. Cortez-Lopez’s conviction because his counsel was ineffective for failing to object to such testimony, which was obviously improper.	47

1. Deficient performance.	47
2. Prejudice.	50
D. Even if any one of the alleged errors described above do not warrant reversal, a new trial is required because the cumulative effect of each of the errors denied Mr. Cortez-Lopez a fair trial.	50
V. <u>CONCLUSION</u>	51

TABLE OF AUTHORITIES

United States Supreme Court Cases

Blakely v. Washington, 542 U.S. 296 (2004)8

Delaware v. Van Arsdall, 475 U.S. 637 (1986)23

Washington Supreme Court Cases

State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963)50

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987)9

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984)24, 51

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984)26

State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005)23, 30, 36

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001)9, 13

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009)51

State v. Gordon, 172 Wn.2d 671, 260 P.3d 884 (2011)23

State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000)51

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)23

State v. Kirkman, 159 Wn. 2d 918, 155 P.3d 125 (2007) passim

State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992)17

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008) passim

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)10

State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000)26

State v. Russell, 125 Wn.2d 882 P.2d 747 (1994)26, 37, 44

<i>State v. Scott</i> , 20 Wn.2d 696, 149 P.2d 152 (1944)	
<i>State v. Swanson</i> , 73 Wn.2d 698, 440 P.2d 492 (1968)	28
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006)	45
<i>State v. Yakima</i> , 37 Wn.2d 137, 222 P.2d 181 (1950)	

Washington Appellate Court Cases

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993)	
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992)	passim
<i>State v. Barr</i> , 123 Wn. App. 373, 98 P.3d 518 (2004)	7, 10, 11, 25
<i>State v. Farr-Lenzini</i> , 93 Wn. App. 453, 970 P.2d 313 (1999)	9
<i>State v. Haga</i> , 8 Wn. App. 481, 507 P.2d 159, <i>review denied</i> , 82 Wn.2d 1006 (1973)	9
<i>State v. Hudson</i> , 150 Wn. App. 646, 208 P.3d 1236 (2009)	13, 16, 25
<i>State v. Johnson</i> , 152 Wn. App. 924, 219 P.3d 958 (2009)	8
<i>State v. Jones</i> , 71 Wn. App. 798, 863 P.2d 85 (1993)	passim
<i>State v. Lindsay</i> , 171 Wn. App. 808, 288 P.3d 641 (2012)	37
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992)	10
<i>State v. Miles</i> , 139 Wn. App. 879, 162 P.3d 1169 (2007)	31, 32, 33
<i>State v. Moses</i> , 129 Wn. App. 718, 119 P.3d 906 (2005)	23
<i>State v. Olmedo</i> , 112 Wn. App. 525, 49 P.3d 960 (2002)	42
<i>State v. Read</i> , 100 Wn. App. 776, 998 P.2d 897 (2000)	41
<i>State v. Sullivan</i> , 69 Wn. App. 167, 847 P.2d 953 (1993)	

<i>State v. Torres</i> , 16 Wn. App. 254, 544 P.2d 1069 (1967)	28, 41
<i>State v. Trickel</i> , 16 Wn. App. 18, 553 P.2d 139 (1976)	39
<i>State v. We</i> , 138 Wn. App. 716, 158 P.3d 1238 (2007)	24
<i>State v. Whalon</i> , 1 Wn. App. 785, 464 P.2d 730 (1970)	53

Statutes and Rules

ER 403	24, 25
ER 611	28
RAP 2.5	7, 9, 10, 11, 25
RCW 9A.28.020	6, 20
RCW 9A.44.100	6, 20
RPC 3.2	41
RPC 3.4(e)	41

Secondary Sources

“Molest.” <i>Merriam-Webster.com</i> Merriam-Webster, n.d. Web. 13 Aug. 2013. < http://www.merriam-webster.com/dictionary/molest >.	21
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I. ASSIGNMENTS OF ERROR

1. The improper opinions made by a witness pertaining to Mr. Cortez-Lopez's criminal intent and ultimate guilt were of constitutional magnitude and not harmless beyond a reasonable doubt.
2. The prosecutor's misconduct during trial deprived Mr. Cortez-Lopez of his constitutional right to a fair trial.
3. Mr. Cortez-Lopez's counsel was constitutionally deficient and prejudicial because he did not properly object to the improper witness testimony nor the prosecutor's misconduct.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Cortez-Lopez made a plausible showing that Cody Case's improper witness testimony had practical and identifiable consequences on the outcome of his trial when Case was the State's only eyewitness and the victim directly refuted his testimony.
2. Whether this court should reverse Cortez-Lopez's guilty verdict due to the flagrant misconduct of the prosecutor.
3. Whether Mr. Cortez-Lopez's counsel's failure to object to the improper witness testimony and the prosecutor's misconduct prejudiced Mr. Cortez Lopez to the extent of denying him a fair trial.

III. STATEMENT OF THE CASE

At approximately 7:30 AM on Sunday, March 4, 2012, Cody Case was driving around the city of Sunnyside after completing a work shift at Sunnyside Safeway. RP 42-43. While stopped at a red light on Edison Street, Mr. Case watched as Mr. Armando Cortez-Lopez approached at a brisk pace, pulled his hood on tight and proceeded down an alley. RP 46. From this point, the story of Mr. Case, the State's key witness, and Ms. Maria Gonzalez, the victim, diverge.

Mr. Case's Testimony. Case testified that he watched as Cortez-Lopez passed by Ms. Gonzalez, then turned around, pushed her up against a garbage bin and pulled her pants down about four inches. RP 47-48. At this point, according to Mr. Case, Gonzalez elbowed Mr. Cortez-Lopez in the face. Id. Mr. Cortez-Lopez then shoved Ms. Gonzalez back into the garbage bin and placed his hands on her waist. RP 64-65. After sitting through a green light, Case ran a red light and drove down the alley. RP 47. Cortez-Lopez fled on foot, as Case followed in his car. RP 50. Eventually, Cortez-Lopez got into his own vehicle. RP 54.

Despite the fact that Mr. Cortez Lopez does not speak English, Mr. Case testified that he conversed with Mr. Cortez Lopez about the events that transpired. Mr. Cortez Lopez apparently told Mr. Case that everything was a "misunderstanding". RP 54. Case continued to pursue Cortez-Lopez through town before watching Cortez-Lopez enter his brother's bakery. RP 54-58. Case subsequently called the police. Id.

During cross examination, defense counsel questioned Mr. Case about his ability to view the encounter from the substantial distance away he claimed to be. She also asked him how long the encounter took from beginning to end. RP 65. He responded that it took three minutes or less. RP 65. However, Mr. Case unexpectedly announced, "It's not often you see someone, you know, trying to molest someone." RP 65. On re-direct,

the prosecutor re-stated the quote in a question to Mr. Case, making it clear to the jury that Mr. Case's statement was heard by the whole jury. RP 69.

On direct examination, repeatedly used leading questions that when Mr. Case failed to testify exactly as the prosecutor had hoped. In questioning Mr. Case on direct, the State asked him, "How close were they when he grabbed her and pulled down his pants?" RP 48. Until this point, no witness had testified that Mr. Cortez-Lopez had pulled down his own pants. In closing, the State once again referenced the unsupported claim. "The fact of him pulling down his pants is significant to distinguish this between attempted rape and attempted indecent liberties." RP 165. Again, Cortez-Lopez failed to object to either statement.

Finally, many of these questions were asked without proper foundation and ultimately encouraged Mr. Case to speculate as to other witness's state of mind. For instance, when questioning Mr. Case about the incident, the prosecutor asked, "How did [Ms. Gonzalez] appear?" RP 50. In response, Mr. Case replied, "Scared, you know, worried." Id. Again, Mr. Case's testimony and speculative opinions appeared to conflict with the perceptions of other witnesses; this time, the conflicted with Officer Melissa Rivas testimony, who questioned Gonzalez regarding the

incident and testified that Ms. Gonzalez appeared fine, that she insisted she was fine, and “acted like nothing was wrong.” RP 113-14.

Ms. Gonzalez’s Testimony. Ms. Gonzalez testified immediately after Mr. Case. During her testimony, she told the jury a much different story about what happened on the morning of March 4, 2012. Ms. Gonzalez testified that both she and Mr. Cortez Lopez were present at the scene of the alleged crime, consistent with Mr. Case’s testimony. She also testified that Mr. Cortez Lopez grabbed her by the waist, over several layers of clothing. RP 74. However, her testimony differed substantially as to the nature of the physical contact and other facts bearing on whether or not Mr. Cortez Lopez’s intended to commit a crime by engaging in such contact.

Contrary to the testimony of Mr. Case, Ms. Gonzalez testified that although Mr. Cortez-Lopez grabbed her from behind, he never pulled down her pants. Instead, he only pulled down on her coat. RP 74. Ms. Gonzales also testified that Mr. Cortez-Lopez never pushed her up against the garbage bin, that he never spoke to her during the encounter, and that he ran away shortly after the encounter began. RP 74. She testify that she never fought back because she failed to think that it was necessary. RP 74, 82. At no point was she ever afraid that Mr. Cortez Lopez intended to sexually assault her. RP 82.

After the encounter, Ms. Gonzalez went home as if it were any other day. She did not run away. She did not call the police because she “didn’t think much about it because nothing really happened to” her. RP 77. In fact, she testified that she thought the entire encounter was a joke and laughed about it later with her daughter. RP 81.

Closing Argument. During closing argument, the State made it quite clear that it intended on relying on Mr. Case’s opinion that Mr. Cortez Lopez was *trying to molest* Ms. Gonzalez. In fact, the State exploited Case’s opinion three times.

The first words in the State’s closing set the tone for the argument: “It’s not often you see someone molesting someone, which is what we heard Cody Case say yesterday in his testimony.” RP 156. The prosecutor persisted. Halfway through his closing he reminded the jurors again about Mr. Case’s opinion as to Mr. Cortez Lopez’s criminal intent, “It’s not often you see someone being molested. That’s what Cody saw.” RP 163. Finally, during rebuttal the prosecutor remarked, “Cody, he testified about this yesterday. It’s not every day you – it’s not often you see someone molesting someone.” RP 172. Cortez-Lopez failed to object in each instance.

Mr. Cortez Lopez’s trial counsel failed to object to any of the above statements on any grounds. On November 27, 2012, Mr. Cortez-

Lopez was convicted of attempted indecent liberties – RCW 9A.44.100(1)(a) and 9A.28.020. CP 137. He was sentenced to life with a minimum of 44 months in prison. CP 145.

IV. ARGUMENT

A. CODY CASE’S TESTIMONY THAT MR. CORTEZ-LOPEZ WAS “TRYING TO MOLEST” THE ALLEGED VICTIM WAS AN IMPROPER OPINION ON MR. CORTEZ-LOPEZ’S GUILT AND VIOLATED HIS CONSTITUTIONAL RIGHT TO HAVE THE JURY (RATHER THAN A WITNESS) INDEPENDENTLY DETERMINE HIS GUILT.

1. STANDARD OF REVIEW

A claim of a manifest constitutional error is reviewed de novo.¹

2. MANIFEST ERROR.

Generally, a party must object to the admission of evidence at trial to preserve the issue for appeal. Under RAP 2.5(a)(3), however, a party may raise such an issue if it is a manifest error affecting a constitutional right. An error raised for the first time on appeal requires reversal if four requirements are met: (1) the alleged error involves a constitutional issue; (2) the alleged error is manifest from the record, meaning it had a practical and identifiable consequence on the trial; (3) the alleged error is in fact error (meritorious claim); and (4) the error was not harmless beyond a reasonable doubt.²

¹ *State v. Barr*, 123 Wn. App. 373, 380, 98 P.3d 518 (2004).

² *Id.*

In this case, the trial court admitted numerous statements from the State's most crucial eye-witness, Cody Case. The trial court allowed Cody Case to testify that he witnessed Mr. Cortez-Lopez "trying to molest" the alleged victim. These statements were incredibly prejudicial and directly expressed Cody Case's opinions as to Mr. Cortez-Lopez's intent and his ultimate guilt. Although defense counsel failed to object to these statements, they still meet the four requirements above. Reversal and a new trial is required.

a. THE ERROR IS OF CONSTITUTIONAL MAGNITUDE.

Every criminal defendant is entitled to a fair trial under article I, section 21 of the Washington State Constitution and the Sixth Amendment to the United States Constitution.³ A defendant's right to a jury trial

is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.⁴

The right to a jury trial assures that the jury will make an independent determination of the facts of the case.⁵ Witness testimony may, under circumstances like those in this case, infringe upon these important rights.

³ *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009).

⁴ *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004).

⁵ *Id.*

Generally, a witness may not offer his personal belief as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.⁶ Such impermissible opinion testimony is prohibited because it invades the province of the jury and violates the defendant's constitutional right to a jury trial.⁷ It is, therefore, well established that no witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially.⁸ Mr. Cortez-Lopez has alleged a constitutional error as required by RAP 2.5.

b. THE ADMISSION OF THE IMPROPER TESTIMONY WAS MANIFEST ERROR. IN OTHER WORDS, MR. CORTEZ-LOPEZ HAS MADE A *PLAUSIBLE SHOWING* THAT ADMITTING CODY CASE'S OPINION THAT MR. CORTEZ-LOPEZ WAS TRYING TO MOLEST THE VICTIM HAD PRACTICAL AND IDENTIFIABLE CONSEQUENCES IN MR. CORTEZ-LOPEZ'S TRIAL.

Under RAP 2.5(a)(3), once the defendant shows that an error is a “manifest constitutional error,” the defendant must show that the error resulted in actual prejudice. To demonstrate actual prejudice, the appellant

⁶ *State v. Farr-Lenzini*, 93 Wn. App. 453, 463, 970 P.2d 313 (1999) (in prosecution for attempting to elude, officer's testimony that defendant was trying to get away was improper opinion on guilt); *Montgomery*, 163 Wn.2d at 591.

⁷ *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); *State v. Montgomery*, 163 Wn.2d 577, 601-602, 183 P.3d 267 (2008); *Farr-Lenzini*, 93 Wn. App. at 463 (in prosecution for attempting to elude, officer's testimony that defendant was trying to get away was improper opinion on guilt).

⁸ *E.g. State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159, *review denied*, 82 Wn.2d 1006 (1973); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992).

need only present a *plausible showing* that the asserted error had a “practical and identifiable consequence” in the trial of the case.⁹ Such an error must have been “apparent on the record” and “should have been reasonably obvious to the trial court.”¹⁰

Washington courts have, on numerous occasions, held that this standard has been met when a witness inappropriately expresses his personal opinion as to the guilt, intent, or veracity of the defendant or the credibility of another witness.¹¹ On the other hand, courts have held that actual prejudice was lacking when the alleged violation required the court to speculate as to whether evidence *not admitted* would have been admissible and there was no showing that the evidence could have been introduced at the trial in question.¹²

Here, this case falls within the former category. It is certainly at least *plausible* Mr. Case’s improper testimony affected the outcome of this case. Mr. Cortez Lopez was charged with one count of attempting to

⁹ *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting *Kirkman*, 159 Wn.2d at 935); *Barr*, 123 Wn. App. at 381.

¹⁰ *Id.*

¹¹ See e.g., *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009) (allowing review and holding that it was “extremely” prejudicial for the court to admit testimony that the defendant’s wife “believed” molestation charges to be “true”); *Barr*, 123 Wn. App. at 381 (Officer’s opinions as to the defendant’s and victim’s credibility “were a crucial part of the State’s case” and were bolstered by his own training).

¹² *Lynn*, 67 Wn. App. at 346 (holding that without a practical showing that a co-defendant would have been available and *willing* to testify by waiving his Fifth Amendment Rights, the defendant failed to meet his burden to show a reasonable probability of prejudice).

sexually assault Ms. Gonzalez. During examination, the most crucial witness testified that he believed that Mr. Gonzalez was “trying to molest the victim.” This statement was extremely prejudicial, because if the jury accepted it as true, the jury very easily could have decided the case based upon it, rather than critically examining the *facts* on its own to determine Mr. Case’s actually intent.

The prosecutor’s subsequent use of the quoted opinion/statement throughout the trial—during re-cross and in arguing his case to the jury—only multiplied the plausibility that this statement caused the jury to give up its role as the sole judge of Mr. Cortez Lopez’s criminal intent and instead found him guilty based entirely on Mr. Case’s own personal evaluation of the facts. Such improper opinions on guilt are “reasonably obvious” to both defense attorneys and the court within the meaning of RAP 2.5. Mr. Cortez-Lopez has thus made a plausible showing of prejudice.¹³

c. MERITS: CODY CASE’S STATEMENT THAT MR. CORTEZ- LOPEZ WAS “TRYING TO MOLEST” THE VICTIM WAS AN “EXPLICIT OR ALMOST EXPLICIT” OPINION ON MR. CORTEZ-LOPEZ’S GUILT.

Improper opinion testimony constitutes manifest constitutional error when it amounts to an “explicit or almost explicit” opinion on the

¹³ See e.g., *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009); *Barr*, 123 Wn. App. at 381.

criminal intent or guilt of the accused.¹⁴ *Kirkman* the leading Supreme Court case on this issue. In *Kirkman*, the defendant was convicted of first-degree child rape.¹⁵ The defendant argued for the first time on appeal that the statements made by two expert witnesses who corroborated the story of the victim established manifest error. The Supreme Court rejected this argument, holding that the statements were not “nearly explicit opinions on guilt.”¹⁶ Soon after *Kirkman*, the Supreme Court issued its decision in *Montgomery*.¹⁷

In *Montgomery*, the Court affirmed its holding in *Kirkman* and likewise held that the statements were not “nearly explicit opinions on guilt.” Yet the tone expressed by the *Montgomery* was clearly one of frustration over having to decide “yet another” case in which a witness expressed objectionable opinions on the guilt of the accused. In a clear effort to prevent to reduce the incidence of improper opinions on guilt, the *Montgomery* Court took the time to remind prosecutors and defense attorneys alike that they have an ethical duty to “prepare” witnesses *before* they testify. That duty includes admonishing their own witnesses that they

¹⁴ *Montgomery*, 163 Wn.2d at 594-95

¹⁵ *Kirkman*, 159 Wn.2d at 922.

¹⁶ *Id.*

¹⁷ *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008)

may not express their personal opinions as to the veracity, intent, or guilt of the accused or any other witness.

As established throughout this brief, the facts in this case are far different than those in *Kirkman* and *Montgomery*. Those courts established several factors that the court should consider before it determines whether an opinion amounts to an explicit or nearly explicit opinion on guilt.

In making that determination, the court should consider the following: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.”¹⁸

Here, Mr. Case offered his unsolicited opinion as to Mr. Cortez Lopez’s mental state during the alleged sexual assault of Ms. Gonzalez. Specifically, he stated that Mr. Cortez Lopez was “trying to molest” her. Considering this statement in light of the type of witness who made it, the overall nature the testimony, the nature of the charges, the defendant’s defense, and the limited and conflicting evidence of guilt, Mr. Case’s statement amounted to an explicit or nearly explicit opinion on the defendant’s criminal intent or guilt.

¹⁸ *State v. Johnson*, 152 Wn. App. 924, 931, 219 P.3d 958 (2009); *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009) (citing *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001))).

**i. TYPE OF WITNESS AND NATURE OF THE
WITNESS'S TESTIMONY.**

In determining whether a statement is an explicit or nearly explicit opinion on the defendant's guilt, the court should consider the "type of witness" who made the statement as well as the "nature of the testimony" of that witness. In *State v Johnson*, the defendant was charged with two counts of child molestation. During the trial, Johnson's wife testified on her husband's behalf. She testified favorably for the defendant. In rebuttal, however, the State called an additional witness to impeach the defendant's wife's testimony. The rebuttal witness testified that she heard Johnson's wife say that she believed her husband was guilty. He was ultimately convicted of one count of child molestation. Johnson appealed, arguing that Johnson's wife's opinion about his guilt was an explicit opinion on his guilt of the child molestation charge. Division II agreed with Johnson and reversed his convictions, holding that the improper opinion testimony was manifest error, citing *Montgomery*.

Johnson is similar to this case in at least two important respects. First, both cases involved fact witnesses rather than expert witnesses. Second, in both cases, the nature of the improper opinions, if believed, were more likely to cause the jury to abrogate its fact finding duty without thinking critically about all other evidence in the case.

Type of Witness. In both *Johnson* and this case, the witness who gave the improper opinion on guilt were witnesses who testified to facts relevant to the case, rather than merely giving an opinion based upon science or general statistics. Although expert witness testimony can carry an “aura of reliability” that is not present with the testimony of fact witnesses, a jury is much more likely to adopted the opinion of a witness who has personal knowledge of the defendant personally (Johnson’s wife) or personally witnessed the crime in question (Mr. Case). Like the statement from Johnson’s wife as to Johnson’s guilt, Mr. Case’s improper opinion on Mr. Cortez Lopez’s guilt carried a great amount of prejudicial weight given the nature of the witness and the actual testimony.¹⁹

Nature of the Testimony. If a witness gives an improper opinion on guilt, the way the opinion is worded is important to determine whether or not it is an explicit or nearly explicit opinion on guilt. If, for instance, a witness merely states that the defendant’s actions are “consistent with” the intent required to prove the crime, the statement is less likely to constitute

¹⁹ The opinion testimony in this case is far more explicit and prejudicial than in cases likely to be cited by the State, such as *Kirkman*. 159 Wn.2d at 922 In those cases, the witness who gives the improper opinion testimony is often an expert witness who has never met the defendant and who certainly did not witness the alleged crime. Although the testimony of such witnesses often carries an “aura of reliability,” the risk of prejudice is often extremely low. But when the witness claims to have personally witnessed the alleged crime and then tells the jury that the defendant is guilty, the jury will be hard-pressed to ignore the witness’s testimony and evaluate the facts of the case independently on their own.

an explicit or nearly explicit opinion on guilt.²⁰ If on the other hand, witness states his opinion in conclusory terms, such as the defendant “did it” or that he “intended to” or “attempted to”, the statement is much more likely to be an explicit or nearly explicit opinion on guilt. Both *Johnson* and this case fall into of the ladder category.

In both cases, the proffered evidence did not just “assist the jury” in making a credibility determination. If believed by the jury, it answered the essential question before the jury: whether the defendant was guilty. Like the statement made by Johnson’s wife that she believed that he must have did it, Mr. Case’s testimony that Mr. Cortez-Lopez was “trying to molest” Ms. Gonzalez “shed little or no light on any witness's credibility or on evidence properly before the jury.”²¹ In essence, both statements are explicit or nearly explicit opinions on guilt because each statement “really tells us only what [the witness] believed” about the truth of the charges.²²

²⁰ See *State v. Hudson*, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009). In *Hudson*, Division II reversed rape conviction after a sexual assault nurse examiners (SANEs) testified as to the intent of the accused. The defendant did not dispute that the sexual encounter occurred or that he caused injuries. Thus, consent was the only issue for the jury. The SANEs testified that the injuries were “extensive ... [and] related to nonconsensual sex” and that it “was a very traumatic nonconsensual ... penetration.” . the expert opinion testimony that nonconsensual sex caused the injuries was akin to testimony that the defendant was guilty of rape. Importantly, the Hudson majority stated that if “the SANEs opined only that the evidence was consistent with nonconsensual sex [...], the testimony would probably have been proper under Montgomery.”

²¹ *Id.*

²² *Id.*

ii. THE IMPROPER OPINION MIRRORED THE CHARGES AND ATTACKED THE HEART OF THE DEFENSE, LACK OF CRIMINAL INTENT.

Improper opinions on the guilt are prohibited because they invade the province of the jury and encourage jurors to convict the defendant based upon the opinion of a witness rather than their own. Therefore, the witness's statement tells the jury what result to reach, it is an improper opinion on guilt. In a prosecution for child molestation, a crime that also requires proof of touching for sexual gratification, Division I has held that a witness offered an explicit opinion on guilt when a witness testified that the defendant "molested" the complaining witness.²³

In *State v. Jones*, the defendant was charged with one count Child Molestation and one count of Rape of a Child. Like indecent liberties, child molestation requires touching of the intimate parts for sexual gratification.²⁴ The victim in *Jones* disclosed the alleged abuse to a child social worker, Ms. Mitchell, who later testified at trial about the victim's disclosure of the abuse. On direct examination, the prosecutor asked Ms. Mitchell to give her "assessment" of the victim.

Defense counsel objected to the question, arguing that the question improperly called for an "opinion." The Court overruled the objection and

²³ *State v. Jones*, 71 Wn. App. 798, 802 (1993).

²⁴ *State v. Markle*, 118 Wn.2d 424, 435, 823 P.2d 1101 (1992) (indecent liberties includes the element "that an offender knowingly act for the purpose of gratifying sexual desire.").

allowed Ms. Mitchell to answer the question. Ms. Mitchell replied, "I felt that this child had been sexually *molested* by [the defendant] at that point."²⁵ The defendant was convicted of first-degree child molestation and first-degree rape of a child.²⁶ Jones appealed, arguing in part, the court erred in the improper opinion that the young victim had been "molested." Division I found that this opinion was an "explicit opinion" on the defendant's guilt, which "invaded the province of the jury," and was thus improper.²⁷

In this case, Mr. Case's statement that Mr. Cortez Lopez's was "trying to molest" the alleged victim here is just as much as an improper opinion on his guilt as that of the social worker in *Jones*. Just as the social worker in *Jones* testified that she believed that the victim had been molested, the State's most crucial Mr. Case testified that he personally believed that Mr. Cortez-Lopez was "trying to molest" the Ms. Gonzalez. RP 65. In light of the similarities of the charges and the statements made in each case, both statements were explicit or, at least nearly explicit opinion as to the guilt of each respective defendant.

²⁵ *Id.* at 812.

²⁶ *State v. Jones*, 71 Wn. App. 798, 802 (1993).

²⁷ *Id.* at 812-13. Although the court found that the statements were improper, because the evidence of Jones' guilt was "overwhelming," it held that any error was harmless and not reversible.

Both Statements claimed either that the witness believed that the defendant had either molested or attempted to molest the alleged victim. There are only two significant differences. First, the charges were clearly different: attempted indecent liberties versus child molestation. Second, the statements were slightly different: one statement that the defendant “had molested” the victim versus the other that the defendant “attempted to molest someone. However, these differences only prove the point: that each statement, although different, was an explicit or nearly explicit opinion on the guilt of the defendant *in light of the charged crime*.

In both cases, the defendants were charged with crimes in which an essential element of the base crime was sexual touching for sexual gratification (child molestation and indecent liberties). In order for Mr. Cortez-Lopez to be convicted of attempted indecent liberties, the State was required to prove beyond a reasonable doubt that Cortez-Lopez acted with the intent to have sexual contact with Ms. Gonzalez by forcible compulsion and took a substantial step towards that goal.²⁸

Although Mr. Cortez-Lopez was only charged with attempt—while Jones who was charged with the completed crime—Mr. Case’s statement used the word “attempt” to describe what he thought was an “attempted”

²⁸ RCW 9A.44.100; RCW 9A.28.020(1).

molestation, Mr. Case ultimately told the jury that Mr. Cortez Lopez was guilty of attempted indecent liberties (attempting to molest) rather than the completed crime (implied by the word “molesting” alone).

The probable effect of this statement on the jury was to encourage the jury to not evaluate other evidence critically and simply take the State’s key witness’s opinion as fact and find Mr. Cortez-Lopez guilty. The jury’s acquittal on the attempted rape charge only increases the chances that the jury abrogated that duty when deliberating. If the jury were to adopt Mr. Case’s opinion as their own, that Mr. Cortez Lopez was trying to “molest” or “touch” Ms. Conzalez rather than “rape” or “penetrate” her, it would necessarily have to acquit Mr. Cortez Lopez of the attempted rape charge. And that is exactly what the jury did.

In light of the evidence submitted and the specific crime charged, Mr. Case’s statement of opinion constituted an explicit or nearly-explicit opinion as to Mr. Cortez-Lopez’s criminal intent and therefore his guilt. To a reasonable juror, this statement conveyed one obvious message: Mr. Case—the State’s most crucial eye-witness—personally believed that Mr. Cortez-Lopez was guilty of the crime charged.

The State may try to differentiate *Jones* from this case because Jones was charged with Child “Molestation” and the witness there specifically use the word “molest,” whereas here, Cody Case used the

word “molest” to refer to the crime of Attempted Indecent Liberties. Such an argument would be meritless and would require the court to ignore both common sense and the practical effect of the statement on the jury.

Merriam Webster defines “molest” as “to make annoying sexual advances” or “*to force physical and usually sexual contact on*” another.²⁹ This is the likely definition that the jury thought of when it heard that statement. Applying this common sense definition, the phrase “trying to molest” is just as effective as parroting the legislature’s definition of attempted indecent liberties by forcible compulsion. At the very least this was a nearly explicit opinion as to Mr. Cortez Lopez’s guilt.

iii. THE JURY INSTRUCTION DID NOT AND COULD NOT PREVENT THE IMPROPER OPINION FROM INFRINGING UPON MR. CORTE LOPEZ’S RIGHT TO A FAIR TRIAL.

Every court should instruct the jury that they are the exclusive judges of the facts and credibility of witnesses.³⁰ The State may argue that, because this instruction was given in this case, Mr. Case’s statement was somehow not of constitutional magnitude or was harmless. Such an argument would effectively swallow the rule, however, because this instruction is given in virtually every criminal trial. Moreover, although

²⁹ “Molest.” *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 13 Aug. 2013. <<http://www.merriam-webster.com/dictionary/molest>>.

³⁰ See *Kirkman*, 159 Wn.2d at 922.

some cases have mentioned the jury instructions in passing, i.e. *Kirkman*, these statements are dicta and no case has ever upheld an otherwise explicit opinion on guilt based solely on the standard jury instruction based on juror credibility.

Moreover, as it pertains to this case, such an instruction carries little weight here when viewed in light of the extremely prejudicial nature of Mr. Case's testimony. The prejudicial impact was only exacerbated by the prosecutor's efforts to make that statement the theory of his entire case. Given the way that the prosecutor exploited the opinion throughout his closing argument, it is very unlikely that the jury "missed the point."

Under these circumstances, Mr. Case's statement that Mr. Cortez-Lopez was "trying to molest" the victim essentially took all important credibility and factual determinations away from the jury and amounted to an explicit or nearly explicit opinion Mr. Cortez-Lopez's guilt.

d. ADMITTING THE IMPROPER OPINIONS ON MR. CORTEZ-LOPEZ'S CRIMINAL INTENT AND ULTIMATE GUILT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT. THIS COURT SHOULD REVERSE HIS CONVICTION.

Constitutional errors may be harmless.³¹ This includes constitutional errors premised on the admission of improper witness

³¹ *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

testimony.³² However, once the appellant meets his burden to show constitutional error, the Court assumes that “the damaging potential of the [inadmissible testimony was] fully realized.”³³ An error is both constitutional in magnitude and “manifest” if it had a practical and identifiable consequence on the trial. Once he shows manifest constitutional error, the burden then shifts to the State “to prove that the error was harmless ... under the *Chapman* standard” beyond a reasonable doubt.³⁴ Put another way, the court must reverse the defendant’s conviction unless the State meets its burden to show that the untainted evidence was so overwhelming that it necessarily requires any reasonable juror to find the defendant guilty of the crime charged.³⁵

Here, the untainted evidence admitted at the trial certainly fails to meet this very “stringent” standard.³⁶ The extremely prejudicial nature of the statement, when combined with what is, at best, conflicting evidence of guilt, makes ensures that this error is not harmless

³² See *State v. Moses*, 129 Wn. App. 718, 732, 119 P.3d 906 (2005).

³³ *Moses*, 129 Wn. App. at 732 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

³⁴ *State v. Gordon*, 172 Wn.2d 671, 676 n.2, 260 P.3d 884 (2011).

³⁵ *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005). Moreover, many of the cases that have refused to review an alleged error such as this under RAP 2.5, have essentially held, at least in part, that there was an overwhelming evidence of guilt. Unlike in *Kirkman* and *Jones*, the evidence in this case was far from “overwhelming.” See *State v. Johnson*, 152 Wn. App. 924, 931, 219 P.3d 958 (2009).

³⁶ *State v. We*, 138 Wn. App. 716, 726-727, 158 P.3d 1238 (2007) (describing harmless error standard as “stringent”).

Prejudice. The potential prejudice caused by admitting Mr. Case's Statement is, just as in *Johnson*, extremely high and would certainly require exclusion of the statement under ER 403.

In *Johnson*, because the opinion of guilt came from the defendant's wife—a source that the jury would almost certainly not disregard—the court found the admission of the “highly prejudicial” testimony because the jury was effectively told that “Johnson's own wife believed the accusations.” As the *Johnson* Court correctly noted, this evidence “was clearly more prejudicial than probative under ER 403.”

Similarly, here, the State's most crucial witness told the jury that he thought Mr. Cortez Lopez was “trying to molest” the alleged victim, who in fact denied the allegation. RP 162-63. Mr. Case was the State's only eyewitness and the victim herself directly refuted his testimony as to the crucial issue of intent. RP 162-63. In fact, Ms. Gonzalez, never wanted to press charges and thought the entire affair was a joke. RP 81.

Mr. Case's statements were far more prejudicial than the improper opinions in *Kirkman*, because unlike in that case, other parts of the witness's testimony did not somehow mitigate the prejudice caused by the improper opinion. In *Kirkman*, the improper opinion testimony only seemed to validate the victim's claims. The risk that these statement encouraged the jury to give up its role as the finder of fact was relatively

low.³⁷ Alternatively, here, Mr. Case's testimony was so unfavorable to Mr. Cortez Lopez, that parts of his testimony show an almost unsettlingly desire on his part to validate the charges through his own testimony.

As such, the statements Mr. Case made were far more prejudicial than those made by the experts in *Kirkman*. By claiming that he witnessed Mr. Cortez-Lopez "trying to molest" Ms. Gonzalez, Mr. Case denied Mr. Cortez-Lopez his right to a fair and impartial jury trial.³⁸

Limited Untainted Evidence of Guilt. As stated above, this case depended entirely on eyewitness testimony, namely that of Mr. Case.³⁹ His testimony was likely vital for any conviction. In stark contrast to Mr. Case's testimony, the victim testified that Mr. Cortez Lopez was no more than a nuisance to her, but certainly did not testify that Mr. Cortez Lopez was attempting to rape or molest her. In fact, she told the jury that she thought Mr. Cortez Lopez was playing a joke on her and that she was not threatened. It is highly improbable that these facts could even produce sufficient evidence for a conviction, let alone necessarily require a finding of guilt.

³⁷ *Id.* at 932.

³⁸ *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

³⁹ *See Barr*, 123 Wn. App. at 384 (constitutional error not harmless because "[a]t its heart, the ultimate issue here revolved around an assessment of the credibility of [defendant] and [victim]"); *Hudson*, 150 Wn. App. at 656.

As for Cody Case's testimony, after purging his speculation as to Mr. Cortez Lopez's intent from the record, his testimony might arguably be sufficient for the jury to convict, but even that argument is tenuous. Cody Case's testimony was fraught with inconsistencies, many of which likely made him appear overly eager to aid in the prosecution of Mr. Cortez Lopez.

His explanation for his presence at the scene of the alleged sexual advance (that he always likes to drive around) by Cortez Lopez was also suspect. In any event, these facts do not necessarily lead to a finding of guilt. Under these facts, State cannot meet its burden to show that the admission of Cody Case's opinions on Mr. Cortez Lopez's intent and ultimate guilt were harmless beyond a reasonable doubt. This court must reverse his conviction and remand for a new trial.

B. THE PROSECUTOR'S MISCONDUCT THROUGHOUT THE TRIAL DEPRIVED MR. CORTEZ-LOPEZ OF HIS RIGHT TO A FAIR TRIAL.

In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial.⁴⁰ To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and prejudicial effect.⁴¹ Prejudice is established when there is a substantial

⁴⁰ *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

⁴¹ *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

likelihood that the misconduct affected the jury's verdict.⁴² Failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and prejudicial that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.⁴³ In prosecuting any trial, the prosecutor must remind himself that although it is an adversarial system, he must not

conduct a vendetta when trying any case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided. We recognize that the conduct of a trial is demanding and that if prosecutors are to perform as trial lawyers, a zeal and enthusiasm for their cause is necessary. However, each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants receive fair trials and justice is done. If prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means. Courts must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance.⁴⁴

Throughout Mr. Cortez Lopez's trial, the State repeatedly disregarded Mr. Cortez Lopez's right to a fair trial. In several ways the

⁴² *Id.* at 533.

⁴³ *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

⁴⁴ *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976). On direct examination, unless an exception applies, a prosecutor may not ask the defendant leading questions. ER 611(c) provides that leading questions should not be used during direct examination "except as may be necessary to develop the witness' testimony."⁴⁴ When a prosecutor asks a witness a leading question, he necessarily suggests to the witness what he wants the answer to be.⁴⁴ The prosecutor improperly used leading questions to coach Mr. Case's testimony throughout his direct examination.

prosecutor's acts amounted to misconduct. No objection was made to this misconduct. However, that misconduct, taken individually and together prejudiced Mr. Cortez Lopez and that prejudice denied him a fair trial.

1. DURING CROSS EXAMINATION OF CODY CASE, THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE MISSTATED WITNESS TESTIMONY DURING CROSS EXAMINATION. HE THEN PROPOUNDED THAT MISCONDUCT WHEN HE RE-STATED THE MISSTATEMENT OF THE EVIDENCE AS IF IT WAS WHAT MR. CASE ACTUALLY TESTIFIED TO AND ULTIMATELY COMMITTED MISCONDUCT IN CLOSING ARGUMENT WHEN HE ARGUED AS IF THAT WERE A PROVEN FACT.

a. THE PROSECUTOR SET UP HIS OWN ERROR BY ENGAGING IN IMPROPER LEADING QUESTIONS OF ITS MOST CRUCIAL WITNESS.

The prosecutor improperly used leading questions to coach Mr. Case's testimony throughout his direct examination. This improper line of questioning ultimately infected his testimony with facts not in evidence. And revealed a concerted effort manipulate his testimony so that Mr. Case would testify consistently with the State's case theory.⁴⁵

In this case, this State's case relied principally on the testimony of Mr. Case. To bolter his testimony, during the presentation of evidence and during closing argument, the prosecutor used unfair tactics to align

⁴⁵ Although a prosecutor does not generally engage in misconduct when he improperly uses leading questions, the prosecutor's persistent pursuit of such a course of action is a factor that the court should consider once misconduct is established. *State v. Swanson*, 73 Wn.2d 698, 440 P.2d 492 (1968)

witness testimony with his theory of the case. To unfair games began when the prosecutor repeatedly asked its most crucial witness leading questions on direct examination, in an effort to get the witness to testify favorably for the State. In questioning Mr. Case as it did, it became apparent that the State wanted to induce Mr. Case to testify not consistent with his memory, but instead consistently with the State's case theory, i.e. that Mr. Cortez Lopez was trying to rape Ms. Martinez.

This State's case relied principally on the testimony of Mr. Case.

In pre-trial motions, the Prosecutor revealed his case theory to the court:

The state anticipates that the evidence as it comes out in the trial will be that the defendant observed the woman in the alleyway behind the garbage. He sort of walks past. He's fiddling with himself, touching his crotch in a way, and this is witnessed by Mr. Case. Then he pulls over the hood, ties it down, goes behind the victim, pulls down her pants, and then it's interrupted.

One important fact, when he's getting into his car again, the witness appears to see or believes to see the defendant kind of zipping himself back up. He's getting to a point where he's going to expose himself or use himself in a means for the crime. So the intent is that he's going to accomplish these crimes.

This passage foreshadowed the evidence that the prosecutor would slowly squeeze out of Mr. Case. On the direct examination of Cody Case, the prosecutor did not limit himself to open-ended questions. Instead, at times, the prosecutor used leading questions that clearly suggested what

the answer was to support the case theory above. As detailed below, while these leading questions, by themselves do not amount to misconduct without an objection, the failure to object does not excuse the prosecutor from misstating the evidence in doing so.

b. THE PROSECUTOR COMMITTED MISCONDUCT WHEN, AFTER NUMEROUS LEADING QUESTIONS, HE MISSTATED MR. CASE'S TESTIMONY AND CREATED THE FALSE IMPRESSION THAT MR. CASE ACTUALLY MADE THOSE FABRICATED STATEMENTS.

During closing argument, it is misconduct for the prosecutor to argue from facts not in evidence.⁴⁶ Such conduct is improper, “not because the facts are inadmissible, but because no witness is willing and available to testify as to those facts.”⁴⁷ Relatedly, our Supreme Court recognized in *Sate v Davis* that it is improper for a prosecutor to “invent dialogue” or otherwise attribute words to the defendant when those statements are not part of the record.⁴⁸ It is also improper for a prosecutor to allude to facts that are not in evidence when the prosecutor has no intention of introducing such evidence.⁴⁹

Such a misconduct is especially problematic here, when it occurs during direct rather than during closing argument, as happened here.

⁴⁶ *State v. Miles*, 139 Wn. App. 879, 888, 162 P.3d 1169 (2007).

⁴⁷ *Id.*

⁴⁸ *State v. Davis*, 175 Wn.2d 287, 338, 290 P.3d 43 (2012).

⁴⁹ *State v. Miles*, 139 Wn. App. 879, 888, 162 P.3d 1169 (2007).

Counsel must limit closing arguments to facts in evidence. Even when restating what the prosecutor might have believed he heard the witness say, the prosecutor must be careful to accurately characterize the defendant's testimony.

The prosecutor did not exercise care in this instance. The prosecutor's mischaracterization of Mr. Case's testimony is similar to situations in which the prosecutor improperly attempts to impeach a witness with extrinsic evidence, but fails to introduce such evidence.⁵⁰ In both instances, the prosecutor is using an evidentiary tool (leading questions and impeachment evidence) for improper means: to submit evidence to the jury that might otherwise be inadmissible.⁵¹ In either case, the fundamental rule remains the same, "And a prosecutor who asks questions that imply the existence of a prejudicial fact must be prepared to prove that fact."⁵²

In *Miles*, the defendant was found guilty of delivery of a controlled substance.⁵³ The defendant claimed that at the time of the crime he was recovering from a gunshot wound and would have been unable to drive, and thus unable to commit the crime. During cross-examination of the

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 882.

defendant, the prosecutor attempted to refute the defendant's claim when he brought forth evidence that the defendant had been participating in boxing matches around the time period during which the delivery occurred.⁵⁴

Miles had failed to object or offer curative instructions, but Division II reversed his conviction. The *Miles* Court reasoned that the error was reversible because the jury might not have reached the same result if the prosecutor had not improperly attempted to introduce evidence of the boxing matches.⁵⁵ The prosecutor's questions directly challenged Miles's incapacity claim, going to the heart of Miles's defense by strongly suggesting to the jury that Miles had participated in a number of fights during the time he claimed to be incapacitated.

Here, the prosecutor's conduct was similarly egregious. Just as the prosecutor in *Miles* improperly used impeachment evidence to introduce facts not in evidence, the prosecutor here used leading questions to re-state the victim's testimony on direct examination. The following passage is taken from the prosecutor's direct examination of Mr. Case:

Q: And was he doing anything with himself?

A: *I didn't see much of it.* As he was running away he was fiddling with himself right there, you know, trying to keep them up or not.

Q: Fiddling? What do you mean?

⁵⁴ *Id.* at 882-85.

⁵⁵ *Id.* at 889.

A: Touching himself up front.

Q: Up front where?

A: He had his hands by his crotch.

Q: How close were they when he grabbed her and pulled down **his** pants?

A: He was right up against her, body to body

RP 48.⁵⁶ There are numerous issues with this line of questioning.

First, the question “was he doing anything with himself?” was a leading question and improper on direct. Mr. Case was not a young witness and was having no problems testifying.

Second, even Mr. Case’s own testimony expressed reservations about testifying about what he saw, the prosecutor persisted with questions that seemed designed to put words in Mr. Case’s mouth that fit the prosecutor’s case theory.

Mr. Case admitted, for instance, that he “didn’t see much of” what Mr. Cortez Lopez was doing with his hands, which necessarily includes the act of pulling his pants up or down. This statement strongly implies that Mr. Case did not actually see what was going on with Mr. Cortez Lopez’s pants, including if and why they might be falling down. Yet,

⁵⁶ Furthermore, the prosecutor’s improper question was comprised of a compound question, one which further confuses the issues for the jury. Mr. Case’s answer to the question “How close were they when he grabbed her and pulled down his pants?” cannot be interpreted as an acknowledgement that the prosecutor’s statement was true. The question presented was compound, consisting of two separate questions – “How close were they when he grabbed her?” and “how close were they when he pulled down his pants?”. Case’s response could have reasonably been an answer to the first question, the second, or both. Contextual clues lend to the theory that Mr. Case was answering only the first question – “how close were they when he grabbed her?”

because the prosecutor persisted with the leading question, he convinced Mr. Case to testify somewhat consistently with the State's case theory, i.e. that the defendant pulled his pants down and was ready to rape the victim.

Third, in trying to restate Mr. Case's testimony, the prosecutor assumed at least two facts not in evidence, i.e. that Mr. Cortez Lopez pulled his own pants down, and that when he did, he was "close" to Ms. Gonzalez when he did. Until this point, Mr. Case never testified that Mr. Cortez-Lopez "pulled down" his own pants. Moreover, even if the evidence supported the inference that Mr. Cortez Lopez pull his pants down, no evidence was presented to show that pulled down his own pants *while* he was near Ms. Gonzalez.

In the dialogue that led up to the prosecutor's manipulation of Mr. Case's testimony, his questioning focused on the events which occurred as Mr. Cortez-Lopez fled the scene. Mr. Case's story (that Cortez-Lopez was holding up his pants as he ran away) and the account that the Prosecutor gives to the jury (that Mr. Cortez-Lopez pulled down his own pants and assaulted the victim from a close proximity) told vastly different stories that could certainly affected the outcome of the case. Mr. Case implied that Cortez-Lopez was trying to *prevent* his pants from falling down, while the prosecutor attempted to fabricate a situation in which Cortez-Lopez *intentionally* pulled down his pants.

Although the prosecutor argued that this fact supported the attempted rape charge (which the jury found un-proved), if the jury in fact believed that Mr. Cortez Lopez's pants were down, it certainly would also support the indecent liberties charge as well. By creating such a prejudicial fact on direct examination, the prosecutor unfairly misled the jury to conclude that Mr. Cortez Lopez did in fact pull down his pants and tried to either rape the victim, or at least attempted to touch her with his sexual organs, thus constituted indecent liberties.

In sum, by asking the leading questions on direct examination and before any other witness had testified, the prosecutor essentially coached Mr. Case as he testified, so that his testimony would better support the State's theory of the case, i.e. that Mr. Cortez Lopez pulled down his pants and attempted to rape Ms. Gonzalez or alternatively, have sexual contact with her. Even if this was a reasonable inference, it was not properly made during the direct examination.

And because the prosecutor improperly put words in Mr. Case's mouth during direct examination rather than during closing, the prejudicial impact was far greater than it would have been if it occurred only during closing. By manipulating Mr. Case's testimony in this way, the prosecutor unfairly induced the jury to believe that Mr. Cortez Lopez pull down his pants and attempt to rape or "molest her."

c. THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE RE-STATED THE FABRICATED EVIDENCE DURING CLOSING ARGUMENT AND ARGUED IT AS IF IT WERE A PROVEN FACT.

Although counsel will have a great deal of latitude during closing argument, it is improper to refer in *closing argument* to matters that are not in the record.⁵⁷ The *Davis* Court made it quite clear that a prosecutor may not fabricate witness testimony during closing argument.⁵⁸ Here, the misconduct was worse because the prosecutor fabricated favorable witness testimony *while the witness was testifying*, which gave the testimony the false sense that it was in fact true testimony.

In closing, the State once again referenced the unsupported claim as if it were a proven fact: “The fact of him pulling down his pants is significant to distinguish this between attempted rape and attempted indecent liberties.” RP 165. Although it might have been proper for the prosecutor to argue that this was a reasonable inference during closing, the prosecutor did not argue that this was a reasonable inference during closing.

By essentially testifying for Cody Case through improper leading questions, the prosecutor manufactured facts not actually in evidence: that Mr. Cortez-Lopez pulled down his pants during his encounter with Ms.

⁵⁷ *State v. Lindsay*, 171 Wn. App. 808, 831-832, 288 P.3d 641 (2012).

⁵⁸ *State v. Davis*, 175 Wn.2d 287, 338, 290 P.3d 43 (2012).

Gonzalez. By arguing to the jury that this was a proven fact rather than a reasonable inference, the prosecutor assumed the rule of the witness and thus committed misconduct. The error was both improper and prejudicial, and as such, Mr. Cortez-Lopez's conviction must be reversed.⁵⁹

2. THE PROSECUTOR COMMITTED MISCONDUCT BECAUSE HE FAILED TO PREPARE MR. CASE FOR TRIAL AND DENIED MR. CORTEZ LOPEZ A FAIR CHANCE TO OBJECT TO MR. CASE'S INADMISSIBLE AND HIGHLY PREJUDICIAL OPINION ON GUILT.

A prosecutor's duty is not merely to zealously advocate for the State, but also to ensure the accused receives a fair trial.⁶⁰ A prosecutor violates this duty if he intentionally introduces inadmissible evidence in a manner that denies the defendant a fair the opportunity to object to the inadmissible evidence.⁶¹

Such an improper trial tactic denies the defendant a fair chance to prevent the potential prejudice of having the jury hear the evidence and it denies the trial court a fair opportunity to rule on the evidence's admissibility. This rule recognizes that before the defendant must be allowed to prevent or mitigate the prejudice of the evidence *before the jury hears it*. After all, "the bell once rung cannot be unring."⁶²

⁵⁹ *Russell*, 125 Wn.2d at 86.

⁶⁰ *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008) (*Huson*, 73 Wn.2d at 663).

⁶¹ *Id.*

⁶² *State v. Trickel*, 16 Wn. App. 18, 30, 553 P.2d 139 (1976) (discussing the effect of highly prejudicial information).

If the prosecutor fails to introduce evidence in a way that allows the defendant a fair opportunity to object *before its admission*, the prosecutor has engaged in unfair trial tactics and “crosses the line” that separates zealous advocacy from unfair trial tactics and can deprive the defendant of a fair trial.⁶³

As the *Montgomery* Court established, every prosecutor must prepare his witnesses for testifying at trial.⁶⁴ The purpose of the rule is simple: preparing each witness before he testifies helps prevent the witness from revealing prejudicial information, such as improper opinions on guilt, out prejudicial statements before the defendant can object to them and ovoid undue and unfair prejudice. To serve that goal, the *Montgomery* Court announced the following guidelines for witness preparation:

At a minimum, trial advocates **must** explain to witnesses the decorum of a courtroom, the difference between direct and cross-examination, any orders in limine entered by the court, **and the rules against speculation or expression of personal beliefs or opinions** unless specifically requested.⁶⁵

Unfortunately, the prosecutor in this case almost certainly failed to follow these simple guidelines with regard to preparing its most crucial witness, Mr. Case. Mr. Case’s opinion was, without a doubt, improper. The Case made it abundantly clear to the jury that he believed Mr. Cortez

⁶³ *Id.*

⁶⁴ *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

⁶⁵ *Id.*

Lopez was guilty when he announced to the jury, without warning, that Mr. Cortez Lopez was “trying to molest” Ms. Gonzalez. Because the prosecutor is charged with knowledge of what constitutes an improper opinion, he must have realized that the statement was improper.

In this case, at crucial points of Mr. Case’s testimony, the prosecutor failed to protect Mr. Cortez Lopez from prejudicial opinions on guilt in line with the type of questioning suggested by the *Montgomery* court and required by the rules of evidence. A prosecutor may not try to introduce evidence in a way that deprives the defendant of a fair opportunity to object to the evidence.⁶⁶

Next, in addition to promoting the improper statements as to the defendant’s state of mind, the prosecutor also encouraged Mr. Case to express an improper opinion as to the state of mind of the alleged victim, Ms. Gonzalez. On direct examination of Cody Case, the prosecutor asked Mr. Case a question that was clearly designed to have him speculate as to the mental state of the alleged victim, Ms. Gonzalez, “How did she *appear?*” RP 50. The prosecutor did not ask him to describe physical observations about her or other observations of fact. In response, Mr. Case speculated as to her state of mind, saying that she appeared, “Scared, you

⁶⁶ *State v. Montgomery*, 163 Wn.2d 577, 593, 183 P.3d 267 (2008) (citing RPC 3.4(e) (attorney must not allude to inadmissible evidence); RPC 3.2 (attorney must make reasonable efforts to expedite litigation)).

know, worried.”

3. THE PROSECUTOR COMMITTED MISCONDUCT BECAUSE HE SEIZED UPON INADMISSIBLE AND HIGHLY PREJUDICIAL OPINION TESTIMONY TO CONVICT MR. CORTEZ LOPEZ KNOWING THAT IT WAS PREJUDICIAL AND INADMISSIBLE.

As a quasi-judicial officer of the court, prosecutors have a duty to provide the defendant with a fair trial.⁶⁷ A prosecutor may not question a witness in a way that encourages the witness to offer an improper opinion on the intent or guilt of the accused.⁶⁸ The Rules of Evidence and long-standing Washington case law put all trial attorneys on notice that soliciting such improper comments is improper.⁶⁹ In *Montgomery*, the Court went so far as to give guidelines for questioning witnesses so that they may avoid accidentally inducing a witness to produce prejudicial statements about the defendant’s veracity, criminal intent, or guilt.

A prosecutor may, for example, ask a witness if anyone threatened the defendant, if a person had anything in his hands, or made any movement toward the defendant.⁷⁰ These questions are permissible

⁶⁷ *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976)

⁶⁸ *Montgomery*, 163 Wn.2d at 593.

⁶⁹ *Id.* (“the advisory committee to Federal Rule of Evidence 702 explained that witnesses should not tell the jury what result to reach and that opinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusions.”).

⁷⁰ *State v. Read*, 100 Wn. App. 776, 786-87, 998 P.2d 897 (2000)

questions based upon the witnesses' personal observations of what they perceived that the defendant actually *did*.

This approach permits the defense to timely state objections and the court to rule on the admissibility of evidence. It permits the [witness] to explain why the evidence is consistent with [the defendant's alleged intent] without expressing an opinion as to the guilt or innocence of the accused. Finally, it permits the jury to perform its proper function.⁷¹

On the other hand, a prosecutor may not ask a witness questions that are likely to cause the witness to speculate as to what the defendant was *thinking* when those acts occurred. Such improper questions occur when the prosecutor asks questions that are likely to cause the witness to speculate as to the mental state of a witness or the defendant. Those questions may include, for example, asking a witness if the defendant had any reason to defend himself, if he had any reason to pull out a weapon at that time, or if he had any reason to shoot the victim.⁷²

4. DURING CLOSING ARGUMENT, THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE URGED THE JURY TO ABROGATE ITS FACT-FINDING DUTY AND RENDER ITS VERDICT BASED UPON CODY CASE'S IMPROPER OPINION TESTIMONY.

A prosecutor may not elude to evidence not admitted at trial.⁷³ Such conduct violates the prosecutor's duty to seek convictions based

⁷¹ *Id.* at 605.

⁷² *State v. Olmedo*, 112 Wn. App. 525, 531, 49 P.3d 960 (2002).

⁷³ *Alexander*, 64 Wn. App. at 149

upon sound reason and the facts that he actually proved. In *State v. Alexander*, the prosecutor committed such misconduct, as did the one here. In that case, Division I reversed the defendants convictions for two counts of first-degree rape of a child.⁷⁴ The prosecutor elicited testimony from the victim's mother and counselor "that the defendant did it," then repeatedly referenced the testimony in closing argument.⁷⁵

As happened here, Alexander did not, however, object to the prosecutor's improper comments during closing argument. The court held "that the prosecutor's repeated attempts in closing to instill inadmissible evidence in the jurors' minds was flagrant and ill-intentioned and therefore constituted misconduct."⁷⁶

This case parallels *Alexander* in all important aspects. The improper testimony elicited in both cases, for instance, were clearly improper opinion testimony that went to the defendant's guilt and were therefore, highly prejudicial. Here, that the defendant was "trying to molest" the victim, is just as egregious as the testimony elicited in *Alexander*, "that the defendant did it." RP 65.

Although the defendant's attorney in *Montgomery* did apparently object to the testimony, unlike here, the failure to object here should be

⁷⁴ *Alexander*, 64 Wn. App. at 149

⁷⁵ *Id.* at 155.

⁷⁶ *Id.* at 156.

excused because the way that the testimony was originally introduced denied Mr. Cortez Lopez a fair opportunity to mitigate the prejudice of that statement. As stated in *Montgomery*, a prosecutor has a duty to ensure that the State's witnesses do not offer improper opinions as to the guilt of the accused. This duty would have little force if the prosecutor is allowed to elicit such testimony and then use it as his entire theory of the case, which is exactly what happened here. That is especially true here, in a case in which the eyewitness testimony conflicted greatly with all other evidence, including the testimony of the alleged victim, who thought the whole affair was a joke.

In addition, both prosecutors made an obvious and concerted effort to put these improper comments in front of the jury during testimony and during closing argument. Here, just as in *Alexander*, the prosecutor repeatedly tried to use the improper comments on guilt as a weapon to against the defendant to convict him. Each prosecutor used the improper tactics during testimony and closing argument. In fact, the prosecutor seized upon this evidence at least three times during closing argument and made the improper comments to bolster his theory of his case and to undermine that of the defense.

In his *first sentence* of closing argument the prosecutor told the jury: "It's not often you see someone molesting someone, which is what

we heard Cody Case say yesterday in his testimony. RP 156. Later, he said, “It’s not often you see someone being molested. That’s what Cody saw.” RP 163. Finally, during rebuttal the prosecutor remarked, “Cody, he testified about this yesterday. It’s not every day you – it’s not often you see someone molesting someone.” During three of the most critical points in his closing argument—the beginning, middle, and rebuttal—the prosecutor referenced Mr. Case’s impermissible testimony declaring the guilt of Cortez-Lopez. These statements were not made in passing, and instead served as the State’s overarching theme to prove its case.

The prosecutor not only elicited improper testimony from his only eyewitness, he then used that testimony as the foundation for his closing argument. The State repeatedly attempted to instill inadmissible evidence in the jurors’ mind.⁷⁷ The conduct was improper, prejudicial, and could not have been cured by additional instruction.⁷⁸ Thus, Cortez-Lopez’s conviction must be reversed.

5. ALTHOUGH MR. CORTEZ LOPEZ’S COUNSEL FAILED TO OBJECT TO THE PROSECUTOR’S MISCONDUCT, THE FAILURE TO OBJECT IS EXCUSED.

When the prosecutor introduces evidence in a manner that denies an opponent the opportunity to object and the trial court the opportunity to

⁷⁷ *Alexander*, 64 Wn. App. at 156.

⁷⁸ *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

rule on the objection, the rules regarding waiver do not apply.⁷⁹ Likewise, an objection not required where it would have been so damaging that no instruction could have cured its prejudice.⁸⁰ For reasons unknown, Mr. Cortez Lopez's counsel did not object to the statement. Perhaps she consciously failed to object because she did not want to emphasize the prejudicial testimony. Or, perhaps she failed to realize the impropriety of such a statement. In either case, the blame for his failure to object should not be placed on the defendant, because it was not his duty to prepare Mr. Case for trial and warn him against making such an improper statement.

Only with the benefit of hindsight is it readily apparent that an immediate objection was crucial to reduce the enduring prejudice of the statement throughout the rest of the trial when the prosecutor decided to use it as the "smoking gun" to convict Mr. Cortez Lopez.

Of course, if defense counsel known that the State was planning to use that improper opinion as the theory of its case, and repeat it throughout the trial, any competent defense counsel certainly would have objected. Yet, once the prosecutor repeated the statement on cross, the damage on the jury was already done.

At this point, a curative instruction would likely have had little

⁷⁹ *See id.*

⁸⁰ *State v. Weber*, 159 Wn.2d 252, 272, 149 P.3d 646 (2006)

effect on the jury, having heard the statement once from the witness and again restated by the prosecutor. Counsel's failure to object should be excused because the prosecutor's actions and inactions effectively denied counsel a fair opportunity to mitigate the prejudice of the improper statement. These failures constituted misconduct.

It is difficult to imagine the prosecutor asking that question and hoping for any other answer than one that speculated about the alleged victim's state of mind. There was no effort by him to confine the witness's testimony to observations of fact, as required by the rules of evidence and *Montgomery*. Moreover, this statement was extremely prejudicial because it tended to negate Ms. Gonzalez's credibility that she thought the entire incident was a joke. Defense counsel apparently decided not to object. Such a failure should be excused under the circumstances because the State failed to properly prepare its most crucial witness and instruct him to not give such improper opinions.

C. EVEN IF MR. CORTEZ-LOPEZ WAIVED HIS RIGHT TO OBJECT TO MR. CASE'S INAPPROPRIATE OPINION TESTIMONY (ARGUMENT "A") AND THE PROSECUTOR'S REPEATED AND INAPPROPRIATE ATTEMPTS TO CAPITALIZE ON THE INADMISSIBLE EVIDENCE WAS NOT PREJUDICIAL (ARGUMENT "B"), THIS COURT SHOULD STILL REVERSE MR. CORTEZ-LOPEZ'S CONVICTION BECAUSE HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO SUCH TESTIMONY, WHICH WAS OBVIOUSLY IMPROPER.

The purpose of the requirement of effective assistance of counsel is to *ensure a fair and impartial trial*.⁸¹ To establish ineffective assistance of counsel, Mr. Cortez Lopez must show that his trial attorney's performance was deficient and that he was prejudiced by the deficiency.⁸² Here, even if this Court somehow finds that Mr. Cortez Lopez is not entitled to relief as described above, his trial counsel must surely have been ineffective for failing to object to the multitude of errors, as described above. Any one, or any combination of these errors has deprived Mr. Cortez Lopez of his right to a fair trial and is therefore, prejudicial.

1. Deficient Performance.

The first element of *Strickland* is met by showing that counsel's performance was not reasonably effective under prevailing professional norms.⁸³ As stated above, defense counsel failed to object to the numerous improper opinions of witnesses as to Mr. Cortez Lopez's guilt.

First, as stated above, the prosecutor was allowed to question the State's most crucial witness, Mr. Case, repeatedly using leading questions. It is a fundamental rule of evidence that leading questions are generally improper on direct examination, unless an exception applies. No such exception applied here. In several instances, the prosecutor essentially

⁸¹ *State v. Thomas*, 109 Wn.2d 222, 223, 743 P.2d 816 (1987).

⁸² *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁸³ *Strickland*, 466 U.S. at 687.

testified for the witness and placed facts in evidence that the witness might not have otherwise testified to without such improper questioning. Failure to object to this improper line of question was deficient performance.

Second, Cody Case made several improper statements as to what he thought to be Mr. Cortez Lopez's criminal intent and the state of mind of the alleged victim. Under both Supreme Court precedent and the Rules of Evidence, these kinds of comments by witnesses have been inadmissible for decades. Reasonably competent counsel would have objected to these comments, as they were clearly inadmissible and occurred numerous times throughout the trial, Cortez Lopez's guilt. Yet, Defense counsel failed to object. This failure to object constituted ineffective assistance of counsel.

Third, the prosecutor committed misconduct by using the improper comments as the entire theme for his closing argument. To reasonably competent counsel, the impropriety of these comments should have been obvious. Reasonably competent counsel would have objected, and the court would have sustained the objection.

Although the State might attempt to respond by arguing that failure to object was a tactical reason, such an argument should be objected to excuse deficient performance. The only perceivable "trial tactic" for defense counsel's failure to object to the initial opinions on guilt would be

the desire to not emphasize the improper testimony. Yet, any such reason certainly disappeared when the prosecutor continued to capitalize on the improper opinion testimony, repeating it throughout testimony and in closing argument.

Likewise, there was no legitimate trial tactic to fail to object to the prosecutor's improper use of the testimony, which surely weighed on the jury as it determined Mr. Cortez Lopez's guilt. The improper statements addressed the most contested issue at trial: whether Mr. Cortez Lopez intended to attempt to sexually assault Ms. Gonzalez by force. The prosecutor's improper use of this testimony could easily have encouraged the jury to not critically evaluate the evidence at trial and abrogate its duty as the sole judge of Mr. Cortez Lopez's actions and whether they proved that he intended to commit the crime charged. Mr. Cortez-Lopez's counsel was deficient for failing to object to such clearly inadmissible testimony and the prosecutor's improper use of it.

2. Prejudice.

"Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the *fundamental fairness of the proceeding whose result is being challenged.*"⁸⁴

⁸⁴ *Strickland*, 466 U.S. at 696.

Effective assistance of counsel is, therefore, a fundamental requirement to ensuring that the defendant received a fair trial. Had trial counsel objected to some or all of the above errors, competent counsel would have objected to it and the trial court would have sustained the objection.

The prejudice engendered by these prejudicial tactics to admit inadmissible evidence (leading questions and failure to prepare witnesses) was huge in this particular case. Mr. Cortez-Lopez was convicted in large part because of the testimony of Mr. Case. The inadmissible evidence that should have been excluded was so damning to the defense that the prosecutor chose to make it the most important part of his closing argument. The evidence of Mr. Cortez-Lopez's guilt was scant.

D. EVEN IF ANY ONE OF THE ALLEGED ERRORS DESCRIBED ABOVE DO NOT WARRANT REVERSAL, A NEW TRIAL IS REQUIRED BECAUSE THE CUMULATIVE EFFECT OF EACH OF THE ERRORS DENIED MR. CORTEZ-LOPEZ A FAIR TRIAL.

The cumulative error doctrine applies to cases in which “there have been several trial errors that standing alone may not be sufficient to justify reversal, but, when combined, may deny a defendant a fair trial.”⁸⁵ In this

⁸⁵ *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the

case if for some reason the above errors did not, by themselves, warrant reversal, surely the combination of each of them created a prejudicial effect great enough to cast doubt on the fairness of this trial to warrant reversal. This court should reverse Mr. Cortez-Lopez's conviction a remand for a new trial.

V. CONCLUSION

For the reasons stated above, Mr. Cortez Lopez respectfully requests that the court grant the relief as designated in his opening brief.

DATED this 16th day of September, 2013.



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Attorney for Appellant

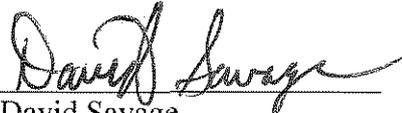
defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel)); *State v. Fisher*, 165 Wn.2d 727, 772, 202 P.3d 937 (2009).

PROOF OF SERVICE

On September 17, 2013, I filed this Brief of Appellant with one copy to the Washington Court of Appeals, located at One Union Square, 600 University Street, Seattle, WA 98101.

On September 17, 2013 I deposited into the United States Postal Service for delivery of a copy of this Brief with proof of service to the Yakima County Prosecutor, Appellate Division, at 128 North 2nd Street, Room 329, Yakima, WA 98901.

I also deposited into the United States Postal Service for delivery a copy of this Brief with proof of service to Armando Cortez-Lopez, DOC No. 362357, at Coyote Ridge Corrections Center, 1301 N Ephrata Ave, Connell, WA 99326.

A handwritten signature in cursive script that reads "David Savage". The signature is written in black ink and is positioned above a horizontal line.

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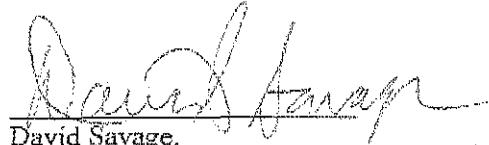
AMENDED PROOF OF SERVICE

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Because of an initial error in the listed DOC number and address for Appellant, Mr. Cortez-Lopez, on October 7, 2013, I filed by fax this Amended Proof of Service with the Washington State Court of Appeals, Division III with the corrected DOC and address (listed above). I also mailed a copy of this Amended Proof of Service to the Yakima County Prosecutor. Finally, I mailed a new copy of this appeal and Amended Proof of Service to Mr. Cortez-Lopez at the correct address, above.



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