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Court of Appeals
Division III
State of Washington

33983-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD F. KLEPACKI, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The State's offer of leniency for the witness's brother was prosecutorial misconduct.
2. The court's Admission of hearsay statements attributed to a forensic expert violated the confrontation clause.
3. Defense counsel's failure to challenge Ms. McGillivar's hearsay testimony about the finding of the gun violated Mr. Klepacki's right to the effective assistance of counsel.
4. Defense counsel's failure to challenge Detective Dresback's hearsay testimony about Mr. Wright's non-verbal statements violated Mr. Klepacki's right to the effective assistance of counsel and to confront witnesses.

B. ISSUES

1. Did the prosecutor act in excess of the recognized powers of the government by suggesting to a witness that she could promote an offer of leniency for her brother, who was a codefendant, by testifying against the defendant?
2. A law enforcement officer testified to relevant statements allegedly made to him by the State's forensic expert. Did

the court violate the defendant's right to confront witnesses by overruling defense counsel's objection?

3. A witness testified at length about a boy's discovery of a gun, including the place where it was found, based on statements the boy allegedly had made to her son who had repeated them to her. Did defense counsel's failure to object to this testimony violate the defendant's right to the effective assistance of counsel?
4. A law enforcement officer testified that an eyewitness had demonstrated for him the conduct of the shooter and he then allegedly reenacted this demonstration for the jury. Did defense counsel's failure to object to this hearsay violate the defendant's right to confront witnesses and his right to the effective assistance of counsel?

C. FACTUAL BACKGROUND

THE SHOOTING

Gray Wright was visiting his friend Ed Giesbrecht on the evening of January 4. (RP 216) Mr. Wright was getting ready to leave when they heard a loud banging on the door. (RP 217-18) As he went to open the

door, Mr. Giesbrecht stepped in front of him and reached for the doorknob. (RP 217) At that moment the door was kicked in. (RP 218)

As the door flew open, Mr. Wright was standing right behind Mr. Giesbrecht, about four feet from the door. (RP 218) He saw a man standing alone at the door. (RP 218) The man was short and stocky, about five feet seven or eight inches tall. (RP 222)

He was wearing a dark blue hoodie and a baseball cap turned backwards under the hood and had a blue bandanna covering part of his face. (RP 218-19) “No doubt it was a kid.” (RP 226)

The man reached in and shot Mr. Giesbrecht in the head. (RP 218) And in a moment he was gone, down the stairs to the sidewalk and heading north. (RP 218-19)

About 8:30 that evening Bernhard Dedicos was putting his kids to bed when he heard the sound of fireworks. (RP 203, 205) A few minutes later he walked outside and saw two people running by, heading north, then east on the alley between C and D Streets. (RP 203) One was wearing a striped, or possibly plaid, coat; the other was wearing a dark jacket. (RP 204, 210-11) When he heard Ed Giesbrecht had been shot, he called 911. (RP 205)

MR. KLEPACKI'S ARREST

Deputy Robert Brook began driving to Deer Park from Spokane about 9:20 pm. (RP 254) As he was driving along C Street he saw a man wearing a heavy winter coat run across on Arcadia into a wooded area. (RP 256) He put this information out on the radio and then got out of his car and began to pursue the man on foot. (RP 257) According to Deputy Brook, Deputy Steven Stipe eventually found Mr. Klepacki in some bushes near a school entrance. (RP 258) Mr. Klepacki was wearing a blue bandanna. (RP 260)

Deputy Stipe told the jury that he had information that another deputy had seen a white male attempting to duck down at the north side of the school. (RP 118) According to Deputy Stipe, Deputy Brooke had described an area where he saw Mr. Klepacki attempting to hide. (RP 121) Deputy Stipe told the jury he found Mr. Klepacki lying face-down against the school building and, with Deputy Brooke's assistance, pulled him out of the bushes. (RP 125, 127-289) Mr. Klepacki was wearing brown shoes, jeans, a blue bandanna around his neck, and a dark thermal jacket. (RP 130)

EVIDENCE FOUND AT TONY TUDOR'S HOME

On learning of Mr. Klepacki's arrest, Deputy Daniel Dutton suggested that law enforcement should investigate the home of Tracy Tudor, where he believed both Mr. Klepacki and Tracy's son Tony Tudor lived.¹ (RP 245, 248)

Deputy Jack Rosenthal was asked to assist in executing search warrants at the Tudor residence. (RP (RP 472) In the course of the search he found a blue bandanna, two dark baseball caps, and a pair of tennis shoes. (RP 473, 475-77) Tony Tudor, who was present at the time of the search, was wearing flip flops and a black hooded jacket. (RP 479, 48-83)

THE HOLSTER, THE CASING AND THE GUN

Hazel McGillivary contacted the police on January 23 to report a gun had been found. (RP 386) She told the jury her son had run across the street and told her "Mom, it's a real gun." (RP 387) Ms. McGillivary took a bag and went across the street with a neighbor. (RP 387) There was a gun in the gutter. (RP 387) The neighbor picked up the gun, and Ms. McGillivary took the gun from him, put it in the bag and called the police. (RP 387)

¹ Mr. Tudor's sister Cheyenne Woods later told the jury Mr. Klepacki only visited on weekends. (RP 393)

Ms. McGillivray explained that the boy, named Logan, had found the gun a block from the bus stop, next to the park and that several middle schoolers walked past there on C Street on their way to the Deer Park Middle School. (RP 388-89) According to Ms. McGillivray the gun was found three blocks, or about a five minutes' walk, from the middle school. (RP 389)

In the hours after the shooting, Deputy Travis Smith checked inside and outside the front door of Mr. Giesbrecht's residence for bullet casings, and didn't find any. (RP 310) Detective Kirk Keyser testified that a dog trained to look for such items in a snow environment was also used but did not find any shell casings. (RP 451) He eventually located a bullet behind a hole in the wall of Mr. Giesbrecht's living room. (RP 445-47)

Glenn Davis, forensic scientist with the Washington State Patrol Crime Laboratory identified the cartridge recovered from Mr. Giesbrecht's apartment as having been fired from the handgun allegedly found by young Logan. (RP 674, 691, 693)

Beau Baggenstoss, a forensic scientist with the Washington State Patrol, obtained a DNA profile of swabs obtained from the handgun. (RP 652, 661) Based on his analysis he determined neither Mr. Klepacki nor Mr. Tudor was a possible source of the DNA material. (RP 661)

Deputy Stipe testified that, with the assistance of canine Brax, he found a black nylon holster. (RP 292) According to the deputy, the holster was located in shrubs that were within ten feet of the place where the other deputies were handcuffing Mr. Klepacki, which was an unspecified distance from the bushes where Mr. Klepacki initially had been found. (RP 292)

Detective James Dresback told the jury he had asked firearms expert Glenn Davis whether there was “a comparison he could do to the gun . . . and the holster to see if they were in any way a match.” (RP 799, 801) He was then asked what was the response. (RP 801) Defense counsel interposed a hearsay objection, which the court overruled:

MR. PHELPS: I believe the state is asking Mr. Dresback to tell him what Mr. Davis told him.

MR. LINDSEY: Which has already been the subject of testimony, Your Honor.

THE COURT: Well, to the extent Mr. Davis has testified to this, and he has been cross-examined, then the confrontation issue has been satisfied, so you can ask this question.

(RP 801) At the request of the witness, the question was restated, and

Detective Dresback answered:

Q. (By Mr. Lindsey) As a result of your discussion with Mr. Davis about the holster, was it confirmed that the weapon that he tested and was the murder weapon would fit in that holster?

A. Yes. That part was. An exact match could not be made.

Q. But it would fit?

A. It would be a holster that a person with that kind of weapon would be able to use with that weapon, yes.

(RP 802)

THE TENNIS SHOES AND THE DOOR

Deputy Dutton testified that as he approached Mr. G's apartment the door was partly open, and he saw what appeared to be a tennis shoe print on the door. (RP 240) Detective Kirk Keyser observed and photographed the shoe impression pattern on the door. (RP 437) He later examined the shoes found in the Tudor home and told the jury that in his opinion the tread pattern on the bottom was similar to the pattern he had seen on the door. (RP 456) Deputy Rosenthal told the jury the tennis shoes were discovered in a bedroom, positioned side-by-side, toes inward, just under the bed itself. (RP 476) He recalled there was a scuff mark on one of the shoes. (RP 477) Kevin Jenkins, a forensic scientist with the Washington State Patrol, told the jury the right shoe had the same tread design and was the same approximate size as the impression on the door. (RP 623)

THE BLOOD DNA EVIDENCE

Detective James Dresback testified that at the time of his arrest Mr. Klepacki had blood on his face. (RP 785)

Mr. Baggenstoss told the jury he examined a green jacket, which he identified as Item 30, that was reportedly obtained from Mr. Klepacki. (RP 659) He found three blood stains on the jacket. (RP 659) He testified DNA from one of these stains matched a reference sample identified as Item 33, reportedly collected from Mr. Klepacki.² (RP 659-60)

Mr. Baggenstoss testified he examined a hooded jacket, which he identified as Item 50, and which was reportedly obtained from Mr. Tudor.³ (RP 660) He found seven blood stains on the jacket. (RP 660) He testified DNA from these stains also matched the sample reportedly collected from Mr. Klepacki. (RP 660)

TESTIMONY OF TONY TUDOR'S SISTER

Mr. Tudor's sister, Cheyenne Woods, told the jury her brother called her on the phone the night of the shooting. (RP 394) She said he sounded shocked and he said to her "I'm scared. I don't know what to do. . . . Rick shot someone." (RP 398) The court admitted the alleged statement over defendant's objection, as an excited utterance. (RP 397)

² Item 30 is likely the item marked Exhibit 7, which was not admitted into evidence. (CP 147) Item 33 does not appear on the exhibit list. The record contains no information regarding how this item was obtained.

³ Items 50 is likely the item marked Exhibit 88, which was not admitted into evidence. (CP 147)

During cross-examination, Ms. Woods admitted she had never told anyone about this telephone call until about a week before Mr. Klepacki's trial. (RP 407) She recalled meeting two weeks earlier with the deputy prosecutor who told her the State needed more information "in order to convince the jury about Mr. Klepacki." (RP 411)

In the course of the trial, defense made a couple of attempts to have the judge review a recording of the deputy prosecutor's interview with Ms. Woods, but failed to provide any legal authority for his request. (CP 166, 987-89) Following trial, defense filed a motion for arrest of judgment and for a new trial. (CP 158-59) He attached the recording of the interview with Ms. Woods, and his affidavit describing the content of the recording. (CP 159, 162-167)

According to the affidavit, the prosecutor told Ms. Woods that Mr. Tudor's lawyer had called and asked her "[W]hat will you give Tony for coming forward and saying what happened." (CP 163) The prosecutor then told Ms. Woods she would be willing to attest to Mr. Tudor's statement "only if it could be corroborated." (CP 163) During the remainder of the interview, the deputy prosecutor repeatedly asked how to obtain a statement from someone "that I can verify that Tony's telling the truth." (CP 163-65)

Following a brief hearing, the court undertook to review the recording. (RP 994-95; Exh. D102) At the next hearing, the court indicated it had reviewed the recording. (RP 998-99) After summarizing the recording, the court ruled it did not portray anything rising to the level of prosecutorial misconduct. (RP 1000-1005)

D. ARGUMENT

1. THE DEPUTY PROSECUTOR'S OFFER TO HELP MS. WOODS'S BROTHER IF SHE PROVIDED TESTIMONY CORROBORATING HIS STATEMENTS EXCEED THE STATE'S TRADITIONAL AUTHORITY TO OFFER A WITNESS LENIENCY IN EXCHANGE FOR TESTIMONY.

The court may, in its discretion, dismiss a prosecution based on prejudicial government misconduct.

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

CrR 8.3(b).

This rule allows the trial court to dismiss cases "due to arbitrary action or governmental misconduct where there has been prejudice to the rights of the accused which materially affect the accused's rights to a fair

trial.” A defendant seeking dismissal under this rule must show both (1) governmental misconduct and (2) prejudice. *State v. Blackwell*, 120 Wn.2d 822, 831-32, 845 P.2d 1017 (1993).

The misconduct justifying dismissal need not be intentional, but may consist of simple mismanagement. *State v. Michielli*, 132 Wn.2d 229, 243, 937 P.2d 587 (1997). Dismissal under this rule is, however, an “ ‘extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial.’ ” *Blackwell*, 120 Wn.2d at 830 (quoting *City of Spokane v. Kruger*, 116 Wn.2d 135, 144, 803 P.2d 305 (1991)). “Discretion is abused when the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.” *Blackwell*, 120 Wn.2d at 830.

The State has long been permitted to secure the testimony of an accomplice in exchange for promises of leniency. *United States v. Singleton*, 165 F.3d 1297, 1301–02 (10th Cir. 1999).

From the common law, we have drawn a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency. . . . Indeed, [n]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.

. . .

This ingrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government. It follows that if the practice can be traced to the common law, it has acquired stature akin to the special privilege of kings.

Id. at 1301-02 (*internal citations omitted*). The court reasoned that in following this practice, the prosecutor acts as the “alter ego of the sovereign.” *Id.* at 1302. This prerogative does not accord the prosecutor unfettered discretion to engage in obtaining the testimony of a witness by methods outside the limits of this tradition:

Our conclusion in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally exercised by the sovereign. A prosecutor who offers something other than a concession normally granted by the government in exchange for testimony is no longer the alter ego of the sovereign and is divested of the protective mantle of the government.

Id.

The offer made to Ms. Woods during the interview, does not fall within the State’s traditional prerogative. Ms. Woods was not an accomplice and she was not promised leniency in exchange for her testimony. Instead she was offered the possibility of leniency for her brother in exchange for her securing or providing testimony that would corroborate his alleged claim that Mr. Klepacki was the person holding the gun.

During the interview Ms. Woods repeatedly assured the deputy prosecutor that she had no information that would corroborate her brother's claims. But a few days later Ms. Woods told the jury her brother had called her and said that Mr. Klepacki had just shot Mr. Griesbach.

This represents an unwarranted expansion of the traditional powers possessed by the State in criminal prosecutions. In this case it provided the State with the only evidence supporting the theory Mr. Klepacki was the shooter. The evidence shows both misconduct and resulting prejudice. The trial court abused its discretion in denying the defense motion; the prosecution should be dismissed. *See CrR 8.3(b)*.

2. DETECTIVE DRESBACK'S TESTIMONY RELATING MR. CLARK'S STATEMENTS, WHICH HAD ALLEGEDLY SUGGESTED A CONNECTION BETWEEN THE HOLSTER AND THE GUN, VIOLATED THE CONFRONTATION CLAUSE.

a. The Statement Was Inadmissible Hearsay.

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless a specific exception applies. ER 802.

Detective Dresback effectively testified that in their prior conversation Mr. Davis had confirmed that the gun found by young Logan

was the murder weapon and that it would fit in the holster, that a person with that kind of weapon would be able to use the holster and that it would fit. (RP 802) The substance of the detective's testimony constituted a statement made by (or at least attributed to) Mr. Davis prior to trial. It could only have been offered for its truth, namely that the murder weapon fit the holster found near Mr. Klepacki. The detective's testimony related statements made by the declarant, Mr. Davis, the statements were made prior to trial and were offered for the truth of the matter assert. The evidence was inadmissible hearsay and the court erred in admitting it over defense counsel's objection.

The court reasoned that if Mr. Davis had already testified to the substance of the statements, and had been available for cross-examination regarding the alleged facts, then the confrontation clause was satisfied and the statements were admissible.

ER 801(d)(1) provides "A statement is not hearsay if—[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, *and* the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper

influence or motive” See *Peralta v. State*, 191 Wn. App. 931, 953, 366 P.3d 45 (2015), *review granted in part, denied in part*, 185 Wn.2d 1027, 377 P.3d 719 (2016) (citing *State v. Harper*, 35 Wn. App. 855, 857-58, 670 P.2d 296 (1983)); *United States v. Gonzalez*, 533 F.3d 1057, 1060-61 (9th Cir. 2008). “[A] witness’s prior consistent statements cannot be introduced merely to corroborate or bolster [his] testimony.” *Peralta*, 191 Wn. App. at 953.

The record does not show the alleged hearsay was admissible to rebut allegations of recent fabrication or as a prior inconsistent statement. Moreover, an examination of Mr. Davis’s testimony discloses that he was not asked about, and did not discuss, the holster about which Detective Dresback testified, and thus was not subject to cross-examination regarding any such statements.

The detective’s testimony purporting to relate statements made to him by Mr. Davis falls clearly within the definition of hearsay and was inadmissible. The reasons offered by the court in overruling the objection are not supported by either the law or the record. The ruling was both an error of law and an abuse of discretion.

b. Admission Of The Statement Violated The Confrontation Clause.

The admission of “testimonial” hearsay against a defendant may violate his Sixth Amendment right to confrontation if he does not have the opportunity to cross-examine the out-of-court declarant. *United States v. Marshall*, 259 F. App’x 855, 861 (7th Cir. 2008) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). An alleged violation of the confrontation clause is reviewed de novo. *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

Testimonial statements include those “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *State v. Fisher*, 130 Wn. App. 1, 13, 108 P. 3d 1262 (2005), (quoting *Horton v. Allen*, 370 F.3d 75, 84 (1st. Cir.2004)). A forensic expert’s statement to a police officer should be considered testimonial for purposes of the confrontation clause:

“[T]he great majority of legal commentators subscribe to the view that laboratory reports ought to be deemed testimonial.” *United States v. Crockett*, 586 F. Supp. 2d 877, 887 (E.D. Mich. 2008) “Those reports are prepared with the primary intent of ‘establish[ing] or prov[ing] past events

potentially relevant to later criminal prosecution.” *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 164 L.Ed.2d 224 (2006)).

Crime laboratory reports are out-of-court statements designed to prove a fact (often an essential element) in a criminal case. Law enforcement gathers, tests, and reports on the sample, solely with the intent of using the test results in a criminal prosecution. Thus, the forensic ipse dixit reports exemplify the accusatory statements targeted by the Confrontation Clause, and admission of the reports is the admission of testimony produced by “government officers . . . with an eye toward trial.” Presented at trial, these police crime laboratory reports have “unique potential for prosecutorial abuse--a fact borne out time and again throughout a history with which the Framers were keenly familiar.”

Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 504-05 (2006) (citing *Crawford*, 541 U.S. at 56-57 n.7).

The statement attributed to Mr. Davis was the functional equivalent of a crime laboratory report. Mr. Davis had provided the jury with his credentials as an expert respecting firearms, and Detective Dresback’s testimony suggested he consulted Mr. Davis regarding such matters, including the possible relationship between the murder weapon in the present case and a piece of evidence that was associated with the accused. Mr. Davis would have reasonably believed that the opinions he related to Detective Dresback would be used by the prosecution at trial.

If a hearsay declarant testifies as a witness and is subject to full and effective cross-examination, hearsay is admissible under the

Confrontation Clause. *California v. Green*, 399 U.S. 149, 158, 164, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (emphasis added). So long as the declarant is asked about the prior hearsay statement, the availability requirement of the Confrontation Clause is satisfied. *United States v. Owens*, 484 U.S. 554, 559-60, 108 S.Ct. 838, 842-43, 98 L.Ed.2d 951 (1988).

“[T]he admission of hearsay statements will not violate the confrontation clause if the hearsay declarant is a witness at trial, is asked about the event *and the hearsay statement*, and the defendant is provided an opportunity for full cross-examination.” *State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999) (emphasis added); see *State v. Price*, 158 Wn.2d 630, 639-40, 146 P.3d 1183 (2006) (*quoting In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 15-16, 84 P.3d 859 (2004)).

Mr. Davis did testify at Mr. Klepacki’s trial, but his testimony preceded that of Detective Dresback and he did not make any statement as to whether “the weapon that he tested and was the murder weapon would fit in that holster.” (RP 802) He was not asked about the statement and was not subject to “full and effective cross-examination” regarding the statement.

The State’s use of Mr. Davis’s alleged statement regarding a possible relationship between the holster and the murder weapon violated

Mr. Klepacki's confrontation right, strongly suggesting that the holster found near Mr. Klepacki was used to carry the murder weapon.

c. The State Cannot Carry The Burden Of Showing The Error Was Harmless.

A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict cannot be attributed to the error. *State v. Lui*, 179 Wn.2d 457, 495, 315 P.3d 493, *cert. denied*, 134 S.Ct. 2842 (2014). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). A reviewing court uses the “ ‘overwhelming untainted evidence’ ” test in its harmless error analysis. *Coristine*, 177 Wn.2d at 391 (quoting *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985)). The State must show that the error was not plausibly relevant to the verdict and that the error could not plausibly have been the cause of a guilty verdict from an honest, fair-minded, and reasonable jury. *Coristine*, 177 Wn.2d at 393.

No eyewitness identified Mr. Klepacki at trial. The evidence against him consisted, in large part, of this possible link between him and the gun that was eventually found.

During closing argument the deputy prosecutor told the jury:

“And Mr. Klepacki hiding in the bushes next to the holster. . . . We have Mr. Klepacki running through the woods here, making eye contact before going into the bushes where he wouldn’t obey commands initially and had to be extricated. The holster is found next to him.” (RP 927)

“Well, there was debris and litter around, and [the canine] didn’t hit on any of that except for the freshly placed holster next to Mr. Klepacki.” (RP 928)

“We have a gun without a holster and a holster without a gun. What does that tell us? They belong together.” (RP 929)

Because defense counsel was denied the opportunity to clarify, qualify or negate the alleged opinion of the forensics expert, Mr. Klepacki was prejudiced by the State’s violation of his right to confront the witness.

3. FAILURE TO CHALLENGE Ms. McGillivar’s
PREJUDICIAL HEARSAY TESTIMONY
DENIED MR. KLEPACKI THE EFFECTIVE
ASSISTANCE OF COUNSEL.

The federal and state constitutions guarantee effective assistance of counsel. *See* U.S. Const. amend. VI; Washington Const. Art. I, § 22. To prove ineffective assistance of counsel, appellant must show that his counsel’s deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420–21, 114 P.3d 607 (2005). Counsel’s performance is deficient when it falls below an objective standard of

reasonableness. *State v. Varga*, 151 Wn.2d 179, 198, 86 P.3d 139 (2004). Prejudice occurs when, but for deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

ER 801(c) defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 802 provides that “[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute.”

In describing her discovery of what turned out to be the murder weapon, Ms. McGillivray told the jury a little boy named Logan had found the gun, brought it to the school bus stop and dropped it, or actually tossed it, in the gutter. (RP 387-88) She further explained that the boy named Logan had found the gun a block from the bus stop next to the park and that middle school students walked past there on C Street on their way to the Deer Park Middle School. (RP 388-89) According to Ms. McGillivray the gun was found three blocks, or about a five minutes’ walk, from the middle school where Mr. Klepacki was arrested. (RP 389)

Ms. McGillivray’s testimony clearly established that she was not present when the gun was brought to the bus stop and had no knowledge as to how or when the gun came to be in the gutter by the bus stop. Her

testimony showed that she had had no personal knowledge of where it was originally found. Her testimony necessarily is a restatement of what she understood of statements made by her son and/or the boy who allegedly found the gun. Apart from the fact that she came into possession of the firearm and gave it to the police, Ms. McGillivray's testimony consisted almost entirely of hearsay.

There is a strong presumption counsel's performance was reasonable. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). When counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim of ineffective assistance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). " 'The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.' " *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (citing *Strickland*, 466 U.S. 668), *review denied*, 113 Wn.2d 1002 (1989).

Here however, the evidence was so incriminating that failure to object cannot be considered trial tactics. The prosecutor relied on the statements to show that the gun was found near the location where Mr. Klepacki had been discovered, supporting the inference he had left it there, and suggesting that in doing so he endangered young children:

“The neighbors who found the gun put it up here right along a path that kids take to get to the middle school (indicating).” (RP 928)

Had counsel objected and asked for the testimony to be stricken, evidence of any connection between Mr. Klepacki and the murder weapon could not have been considered by the jury. The prejudicial effect of this evidence can hardly be overstated.

4. DETECTIVE DRESBACK’S DEMONSTRATION OF HOW MR. WRIGHT ALLEGEDLY RECREATED THE SHOOTING VIOLATED MR.KLEPACKI’S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO CONFRONT WITNESSES.

Hearsay statements may consist of nonverbal conduct intended to be an assertion, and as such they are inadmissible when offered in evidence to prove the truth of the matter asserted. ER 801(a), (c). “[A] declarant’s non-verbal conduct can be a statement for the purposes of hearsay . . . if it is intended by the declarant as an assertion.” *State v. Lee*, 159 Wn. App. 795, 819, 247 P.3d 470 (2011); *see also* Fed. R. Evid. 801, advisory committee’s notes (“Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement.”). “[N]onverbal conduct contains a testimonial component whenever the conduct reflects the actor’s communication of his thoughts to another.”

State v. Barry, 183 Wn.2d 297, 311, 352 P.3d 161, 169 (2015) (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 595 n. 9, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990)).

A rare instance of non-verbal conduct intended by the declarant as an assertion is provided in *Graham v. State*, 643 S.W.2d 920 (Tex.Crim.App.1981), *op. on. Reh'g*, 643 S.W.2d at 925 (1983):

Gustin testified that he showed several photographs to the victim after asking her to identify the individual who had shot and robbed her. When shown appellant's photograph, Rogers made a shooting motion with her hand. Gustin's testimony concerning Rogers' actions and conduct was only significant as indicating her belief that appellant was the individual who had shot her. Such conduct was assertive in nature and testimony concerning that conduct was hearsay.

643 S.W.2d at 925 (1983).

The facts in the present case are similar. Detective Dresback interviewed Mr. Wright, the only eyewitness to the shooting. In the course of that interview Mr. Wright allegedly demonstrated how the shooter was holding the gun and the detective first described and then attempted to reproduce Mr. Wright's actions:

- Q. And how that demonstration -- I mean, what was the demonstration?
- A. He held his finger up like a gun in a fashion that he recalls seeing the shooter, he believed the shooter held the gun.
- Q. How did he demonstrate; what was it that you saw? Left hand, right hand?

A. It was the right hand up over his shoulder, like this
(indicating).

(RP 845) Those actions constituted a non-verbal statement describing the declarant's recollection of the shooter's conduct.

“We can see no difference in pointing at the appellant . . . and in mentioning his name. The gesture may be as eloquent as the spoken word—and as effective.” *Barry*, 183 Wn.2d at 310. Once again, the State introduced a hearsay statement, attributed to a witness who had already testified and had not been asked about the alleged statement. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004). “Testimonial” statements may include “material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Id.* at 51, 124 S.Ct. at 1364. Mr. Wright would have understood that the officer was interviewing him to obtain information for use in prosecuting the shooter.

Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. *State v. Stephens*, 93 Wn.2d 186, 190–91, 607 P.2d 304 (1980). The State cannot show that the error “was not plausibly relevant to the verdict and that the error could not plausibly have been the cause of a guilty verdict from an honest, fair-

minded, and reasonable jury.” *Coristine*, 177 Wn.2d at 393. The prosecutor repeatedly relied on Detective Dresback’s testimony to establish a central element of her theory of the case.

“We had the demonstration of the shooting of the arm up over the shoulder.” (RP 924)

“We know that friends and neighbors saw the door kicked in. That there was a young man standing in front who looked scared. A shooter had his arm over his shoulder. . . . We had the demonstration of the shooting of the arm up over the shoulder. . . .” (RP 924)

“Mr. Klepacki’s arm was on Mr. Tudor. . . . That Mr. Klepacki stood behind with a gun over Mr. Tudor’s shoulder.” (RP 925)

Mr. Wright, the eyewitness, plainly testified that the shooter was alone. Apart from Detective Dresback’s non-verbal hearsay testimony, no evidence supports the suggestion that Mr. Klepacki was standing behind Mr. Tudor and reached over his shoulder with a gun. But this theory is essential to Mr. Klepacki’s conviction. If the shooter was alone at the time of the shooting, then no evidence supports the theory Mr. Klepacki was an accomplice to the murder.

On the other hand, the evidence suggesting Mr. Klepacki was himself the shooter rests on evidence tending to connect him with possession of the gun. That evidence was admitted in error and should not

be considered in evaluating the prejudicial effect of the uncontroverted testimony.

E. CONCLUSION

The charges should be dismissed because the State's conduct was flagrantly improper. Alternatively, the conviction should be reversed and Mr. Klepacki should be granted a new trial at which he receives effective assistance of counsel and his right to confront the witnesses against him is protected.

Dated this 12th day of December, 2016.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 33983-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
RICHARD F. KLEPACKI,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on December 12, 2016, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Brian O'Brien
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I certify under penalty of perjury under the laws of the State of Washington that on December 12, 2016, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on December 12, 2016.


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