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Court of Appeals
Division III
State of Washington

NO. 34397-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO GUTIERREZ-VALDOVINOS,

Appellant.

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

The Honorable Henry Rawson, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant Francisco Gutierrez-Valdovinos' CrR 3.3 right to a speedy trial.
2. Mr. Gutierrez was denied his constitutional right to a fair trial by a jury when a police officer gave his opinion on Mr. Gutierrez' credibility.
3. Defense counsel was ineffective for failing to object to improper, prejudicial police testimony.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion and violate Mr. Gutierrez' right to a speedy trial when it continued his case because no courtroom was available? Assignment of Error 1.
2. Was Mr. Gutierrez denied his constitutional right to a fair trial by a jury when a police officer gave his opinion on the appellant's credibility by stating that he was "evasive" and that he initially refused to answer specific questions during a police interview at the appellant's house? Assignment of Error 2.
3. Does defense counsel's failure to challenge a law enforcement officer's testimony as to statements of the accused elicited during a police interview violate the Sixth Amendment right to effective assistance of counsel? Assignment of Error 3.

C. STATEMENT OF THE CASE

1. Procedural history

Francisco Gutierrez-Valdovinos was charged in the Okanogan County Superior Court on April 23, 2015 with one count of first degree theft. Clerk's Papers (CP) 159-60. RCW 9A.56.020(1)(a), RCW 9A.56.030(2)(a). The State alleged that on May 11, 2015, Mr. Gutierrez wrongfully obtained or exerted control over cash in the amount of \$6000.00 from a check allegedly written on the account of Alta Lake Golf Course and cashed the check at a business called La Milpa, located in Brewster, Washington. CP 159. The information was later amended to correct the date of the alleged offense. Defense counsel waived a CrR 3.5 hearing. 1RP at 57; CP 127.

2. Trial continuances

Mr. Gutierrez was arraigned on May 4, 2015. 1RP at 15-17. His trial date was scheduled by court order for July 21, 2015, giving him an "outside trial date" of August 3, 2015. 1RP at 16. On July 6, 2015, the trial court granted a continuance of the trial date to allow the defense additional time to prepare. 1RP at 17-18; CP 146. Counsel for Mr. Gutierrez signed a "Motion to Continue and Order Setting Dates," setting a review hearing for August 24,

2015. 1RP at 18; CP 146. On July 20, 2015, trial was re-set for September 1, 2015, and an order setting dates listed a speedy trial expiration date of September 1, 2015. CP 145. Mr. Gutierrez did not appear for a hearing on August 24, 2015, and new court dates were set on August 31, 2015. 1RP at 22; CP 143. The case was set for status conference on November 2, 2015 and set for trial on November 10, 2015, with an expiration date of December 30, 2015. 1RP at 22. Counsel and Mr. Gutierrez both signed an Amended Order Setting Dates. CP 143.

At a readiness hearing on November 6, 2015, the trial date was moved to December 1, 2015. 1RP at 28-29; CP 141. Another hearing took place November 23, 2015. 1RP at 31.

At the December 1 hearing, the trial court stated that the case would not proceed to trial as scheduled because “we have another case ahead of [this case] that’s going to go this morning.” 1RP at 33. The court indicated that it would attempt to have the case tried on December 3. 1RP at 34. Mr. Gutierrez stated that he had a telephone hearing regarding a child support matter in Pierce County the morning of December 3. 1RP at 33. At the December 1 hearing, defense counsel and Mr. Gutierrez again signed an Amended Order Setting Trial Dates. The new trial date was January 5, 2016 with an expiration date of February 4, 2016. CP 139.

Despite the Court's statement that the trial would start December 3, 2015, the record shows that trial did not occur on that date and a readiness hearing took place on December 21, 2015, and counsel again signed an Amended Order setting the case for another readiness hearing on January 4, 2016. CP 138. On January 4, defense counsel requested that the case start on Thursday, January 7, 2016. 1RP at 39. The State filed a motion to continue the trial until February 2 due to unavailability of an officer witness. 1RP at 43; CP 134-36. The defense did not oppose the continuance. The court stated:

The Court's not hearing any prejudice, so the Court would continue it to the next trial setting, which be February 2nd. That would extend the outside date by 30 days, which would be March 3rd.

1RP at 44.

The case came on February 2 to once again reset trial dates, and on February 3 the court set a readiness hearing for February 8. On February 10, the court set a readiness hearing for February 29. 1RP at 46. The trial court stated that a case with an in-custody defendant would proceed the following day, and re-set Mr. Gutierrez' trial for March 1. The court stated:

It's been represented your matter is a one-day plus, basically we have also another individual that's one-day plus, but he's

incarcerated and you're not incarcerated, so the Court is taking the incarcerated case before your case. You both have the same expiration date, and so we're taking his case tomorrow for jury purposes, hoping to get it done Friday afternoon and completed this week.

1RP at 47-48.

The court entered an order setting the case for March 1, 2016 and an expiration date of March 31. 1RP at 48; CP 133.

The case was re-set again to March 8, and on March 7, the State moved to continue the trial due to unavailability of witness Parker Barth. CP 130. The court entered an order continuing the trial to March 29, and set a new expiration date of April 28, 2016 pursuant to CrR 3.3(f)(2). CP 128-29. On March 21 at a readiness hearing, the case was set for April 5. 1RP at 51.

The matter came on for jury trial on April 5, 2016, the Honorable Henry Rawson presiding. 1RP at 51-199, 2RP at 203-261.

3. State's case

Parker Barth, who operates the Alta Lake Golf Resort noticed when reviewing golf course bank statements several checks for large amounts that were drawn on the golf course account with signatures that he did not recognize. 1Report of Proceedings¹ (RP) at 154-57. Check no. 11773 drawn

¹The verbatim record of proceedings consists of two volumes, which are designated as follows: 1RP—April 22, 2015, May 4, 2015, July 6, 2015, July 20, 2015, August 31, 2015,

on the golf course account, written in the amount of \$6000.00, was made payable to Francisco Gutierrez-Valdovinos. 1RP at 160, 170. Only four people at the company are authorized to write checks and Mr. Barth stated that the signature on the returned check was not made by any of those authorized signers. 1RP at 158. The numerical sequence of the check was out of order and was from a series that had not been used by the course for several years. 1RP at 157.

The Alta Lake golf course employs appropriately thirty people each season, but Mr. Barth was unable to identify if Mr. Gutierrez had worked at the course in the past. 1RP at 165-67, 170. He stated that there was no record that check no. 11773 had been written to an employee or vender, and that he thought the check had been stolen from the golf course at some point in the past. 1RP at 167. Mr. Barth contacted the Okanagan Sheriff's Department on April 19, 2015 after discovering the returned check. 1RP at 159-63.

The following day, Ernesto Santos, Sr. owner of La Milpa, a bakery/deli in Brewster, Washington, reported to police that Mr. Gutierrez had cashed a check for \$6,000.00 from the Alta Lake golf course at his business. 1RP at 175. He stated that the check was subsequently returned by the bank

November 2, 2015, November 6, 2015, November 23, 2015, December 1, 2015, December 21, 2015, January 4, 2016, January 6, 2016, February 10, 2016, March 21, 2016, and April

as fraudulent. 1RP at 176, 183. Cashing checks is a service that La Milpa provides for one percent of the value of the check. 1RP at 174. The checks the business cashes are primarily payroll and tax refund checks. 1RP at 182. After receiving the returned check, Mr. Santos' son, Ernesto Santos, Jr., contacted Deputy Ron Oules and reported the incident. 1RP at 184.

Ernesto Santos, Jr., identified Mr. Gutierrez as the person who presented the check in a photo montage prepared by police. 1RP at 184-86. Mr. Santos, Jr. stated that he and his father were present at La Milpa when a man came into the business to cash a check for \$6000.00. 1RP at 183. The check was from the Alta Lake Golf Resort and made out to Francisco Gutierrez-Valdovinos. 1RP at 152. Mr. Santos, Jr. said that the check was returned by his bank as a fraudulent instrument. 1RP at 183. At the time it was cashed, Mr. Santos, Sr. wrote the man's Washington identification number on the check, which matched the identification number of Mr. Gutierrez. 1RP at 145, 175. Exhibit 1.

Brewster police officer Michael Robbins met with Ernesto Santos, Sr. and his son regarding the check on April 20, 2015. 1RP at 144-45. Mr. Santos, Sr. and his son both identified Mr. Gutierrez as the person who presented the check at La Milpa in a photo montage prepared by Officer

Robbins. 1RP at 146.

Deputy Oules and Officer Robbins went to Mr. Gutierrez' house in Bridgeport, Washington on April 21, 2015, and interviewed him inside his house after being let inside. 1RP at 190-91. Mr. Gutierrez said that he received the \$6000.00 check in the mail and a few days later took it La Milpa and cashed it. 1RP at 193-94, 196. Mr. Gutierrez said that he had worked at the Alta Lake golf course in 2003-04 and that he thought they had sent him a check for work he had previously performed. 1RP at 195. He stated that he had previously received checks in the amount of \$3000.00 and \$4000.00 from the golf course in the previous five months. 1RP at 195, 196, 197.

Deputy Oules further testified that Mr. Gutierrez did not have an envelope that the check arrived in, that Mr. Gutierrez was "evasive" when asked what he did with the money and that "he just wouldn't answer" some questions. 1RP at 197. He later stated that Mr. Gutierrez said that he "wasted" the money and bought clothes or that he gambled it. 1RP at 197-98.

Deputy Oules testified that during his interview with Mr. Gutierrez, he was at times evasive and would not immediately answer questions. The deputy stated:

Q: Did he tell, did he tell you where he got the check?

A: He did.

Q: What did he say?

A: He said he got it in the mail. And I, I asked him from who, there was . . . The answers, questions and answers, there was some voluntary answers pretty well, but then when there was pointed questions that were, I guess, I could call them more of a, of a . . . the answer would be a telling, you know, more specific about what you did, a lot of times there wasn't an answer, or you know, would just avoid answering that question. But generalized questioning, there was pretty free response.

1RP at 193-94.

During direct examination Deputy Oules also stated:

Q: And, again, what did he say he thought it was from?

A: From working at the golf course in 2003 or 2004.

Q: Okay.

A: There was no other explanation. You know, I mean, "Well, was it for wage?" "I don't know. Maybe they just owed me the money or felt they needed to give---"again, it was really generalized as where or how it why it came---

Q: He didn't have a copy of an envelope that it came in or anything like that?

A: No, he didn't have anything like that.

Q: Okay. Did you ask him what he did with the money?

A: I did.

Q: And what was his response?

A: Again, he was very evasive (sic), he just wouldn't answer. I had to probably press the hardest and try to get information on that, and basically he came around to his words were he wasted it.

1RP at 197.

The defense rested without calling witnesses. 2RP at 206-07.

During closing argument, defense counsel acknowledged that the check was in Mr. Gutierrez' possession and that he took it to La Milpa and endorsed it. 2RP at 232. Counsel argued that it was reasonable for Mr.

Gutierrez to believe that the check was a legitimate payment to him because he was a previous manager at the golf course. 2RP at 236-37.

4. **Verdict and sentencing**

The jury found Mr. Gutierrez guilty of first degree theft. 2RP at 243; CP 247. The court sentenced him within the standard range. 2RP at 254; CP 20. The court determined that he had the ability to work and imposed legal financial obligations of \$1360.50, and restitution of \$5940.00. RP at 255; CP 21-22.

Timely notice of appeal was filed on April 28, 2016. CP 1-11. This appeal follows.

D. **ARGUMENT**

1. **MR. GUTIERREZ' RIGHT TO A SPEEDY TRIAL WAS VIOLATED WHEN THE COURT CONTINUED HIS TRIAL TWICE BECAUSE OF JUDICIAL UNAVAILABILITY**

A defendant is guaranteed the right to a speedy trial by both the federal and state constitutions. *Barker v. Wingo*, 407 U.S. 514, 531-32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); U.S. Const. amend. VI; Const. art. I, § 22. This right “is as fundamental as any of the rights secured by the Sixth Amendment.” *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009) (quoting *Barker*, 407

U.S. at 515 n.2). This right is also fundamental under Washington's speedy trial rule. *State v. Ross*, 98 Wn. App. 1, 4, 981 P.2d 88, opinion amended, 990 P.2d 962 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 405 (2000). The determination of whether a defendant's time for trial has elapsed requires application of the court rules to the particular facts of the case and is, therefore, reviewed de novo. *State v. Swenson*, 150 Wn.2d 181, 186, 75 P.3d 513 (2003). *State v. Lackey*, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009), review denied, 168 Wn.2d 1034, 230 P.3d 1061 (2010).

Under CrR 3.3(h), “[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice.” An out of custody defendant must be brought to trial within ninety days of the case’s commencement date. CrR 3.3(b)(2). Periods during which the trial court has granted a continuance are excluded from the rule. CrR 3.3(e)(3). In addition, if any period of time is excluded under these exceptions, the time for trial does not expire sooner than thirty days after the end of the excluded period. CrR 3.3(b)(5). It is the responsibility of the court to ensure compliance with the rule. CrR 3.3(a)(1). *State v. Kenyon*, 167 Wn.2d 130, 139, 216 P.3d 1024 (2009).

The initial commencement date is the date of arraignment. CrR 3.3 (c)(1). If the time for trial expires “without a stated lawful basis for further

continuances, the rule requires dismissal and the trial court loses authority to try the case.” *State v. Saunders*, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009). Under CrR 3.3(f)(2), a case may be continued on motion of a party, but only if “such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” When a continuance is granted, the court “must state on the record or in writing the reasons for the continuance.” CrR 3.3(f)(2).

In this case, Mr. Gutierrez was arraigned on May 4, 2015. The case was continued multiple times and trial did not occur until 11 months later on April 5, 2016.

On November 6, 2015 the court set trial for December 1, 2015. CP 141. On December 1 the court reset the trial due to another case that was proceeding to trial that morning. 1RP at 33. The court stated:

So, Mr. Gutierrez, we have another case ahead of you that’s going to go this morning. We knew this was probably going to happen, indeed it is, and so at the point to continue to afford you your so-called time for trial, your speedy trial right, we’re going to try and do this on Thursday morning, which is December the 3rd.

1RP at 33-34.

The court’s Amended Order Setting Dates recited that the order is entered “in compliance with CrR 3.3(f)(1).” CP 139. Despite the judge’s comment, the case was not tried on December 3; the court record shows that the

next hearing was December 21, 2016. 1RP at 37-38; CP 138. The State was subsequently granted a continuance due to witness unavailability, and the case was reset several more times to February 2. The trial did not occur once again, and at a readiness hearing on February 10, the court continued the case again, stating that another case was proceeding first and set Mr. Gutierrez' case for March 1. 1RP at 46-47; CP at 133.

The record does not support the trial court's decisions to continue the case on December 1, 2015 and February 10, 2016.

When continuing the trial on February 10, the court did not find that a continuance was "required in the administration of justice," as required by CrR 3.3(f)(2), only that another case had the same trial expiration date as Mr. Gutierrez, and that the other defendant was in custody. 1RP at 47. Nor did the court find that Mr. Gutierrez would not be prejudiced in the presentation of his defense. 1RP at 46-47. By continuing the case without making the required findings, the court failed to strictly comply with the dictates of CrR 3.3, and thus violated Mr. Gutierrez' right to a speedy trial.

In addition, on both dates the court failed to balance Mr. Gutierrez's right to a speedy trial against the perceived necessity to re-set the speedy trial date. Given the inadequate inquiry and insufficient findings, the record does not support the court's decisions to postpone the trial beyond Mr. Gutierrez's speedy

trial expiration date.

Moreover, the two continuances are based on courtroom congestion, which is not a permissible reason for a continuance. Routine court congestion is not a permissible reason for a continuance. *State v. Mack*, 89 Wn.2d 788, 793, 576 P.2d 44 (1978). Delay based upon court congestion is “contrary to the public interest in prompt resolution of cases, and excusing such delays removes the inducement for the State to remedy congestion.” *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005). Where a continuance is based on docket congestion or courtroom management, the speedy trial rule is violated unless (1) good cause is shown on the record for the finding and (2) the finding is tied to specific, articulable facts, rather than a generalized assertion. *State v. Kenyon*, 167 Wn.2d at 134 (reversing where trial court continued trial because trial judge was in a criminal trial and second county judge was on vacation; the “trial court should have documented the availability of pro tempore judges and unoccupied courtrooms” because, under CrR 3.3(f), it is “required to ‘state on the record or in writing the reasons for the continuance’ when made in a motion by the court or by a party”); *State v. Cannon*, 130 Wn.2d 313, 327, 922 P.2d 1293 (1996) (reaffirming that a generalized assertion of docket congestion is not good cause for continuance).

State v. Kenyon is compelling authority this case. In *Kenyon*, on the eve of

the confined defendant's speedy trial deadline, the trial court granted a continuance due to the unavailability of a judge –the presiding judge was presiding over another criminal case and the other county superior court judge was on vacation. *Kenyon*, 167 Wn.2d at 134. The court made no other findings, but extended the speedy trial date during the continuance period. The Supreme Court found court congestion and courtroom unavailability are not valid bases for a continuance. *Id.* at 137. The Court held “simply because the rule now allows ‘unavoidable or unforeseen circumstances’ to be excluded in computing the time for trial does not mean judges no longer have to document the details of unavailable judges and courtrooms.” *Id.* at 139. Because the record contained no information on the number or availability of unoccupied courtrooms or the availability of visiting or pro tempore judges to hear criminal cases, the defendant's speedy trial right was violated. *Id.* at 137, 139.

Just as in *Kenyon*, the record in this case contains no information regarding the details of unavailable judges and courtrooms. The court entered no findings whether there were visiting judges or pro tempores who could have heard Mr. Gutierrez' case in another courtroom. The State cannot demonstrate this error was harmless beyond a reasonable doubt.

Accordingly, the conviction must be reversed and the charge dismissed with prejudice. CrR 3.3(h); *Kenyon, supra; Saunders*, 153 Wn. App. at 216-217.

2. **MR. GUTIERREZ WAS DENIED HIS
CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY A
JURY WHEN DEPUTY OULES REPEATEDLY
EXPRESSED HIS OPINION ON GUTIERREZ'
CREDIBILITY**

- a. **Washington courts hold it is unconstitutional for a witness to give his opinion on the defendant's guilt or credibility.**

The role of the jury is "inviolable" under the Washington Constitution. Const. art I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the jury trial right. U.S. Const. amend. VI; Const. art. I, §§ 21, 22; *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Washington courts likewise recognize it is exclusively "the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses." *State v. Demery*, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (plurality opinion).

"Generally, no witness may offer testimony in the form of an opinion regarding the veracity of the defendant. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury." *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

Improper opinion testimony violates the defendant's constitutional right to a jury trial. *State v. Montgomery*, 163 Wn.2d 577, 590,

183 P.3d 267 (2008); *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Thus, an explicit or nearly explicit opinion on the defendant's guilt or credibility can constitute a manifest constitutional error, which may be challenged for the first time on appeal. *Kirkman*, 159 Wn.2d at 936; RAP 2.5(a).

Whether testimony constitutes an improper opinion depends on the circumstances of each case, including the type of witness, the nature of the charges, the defense presented, and the other evidence in the case. *State v. Demery*, 144 Wn.2d at 759. It is well established that a witness may not testify about the credibility of another witness. *Demery*, 144 Wn.2d at 758-58; *State v. Jones*, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). When the jury learns the witness's opinion of the defendant's credibility, reversal may be required. *Id.* "Particularly where an opinion on the veracity of a defendant is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and deny the defendant of a fair and impartial trial." *State v. Notaro*, 161 Wn. App. 654, 661, 255 P.3d 774 (2011) (citing *Dolan*, 118 Wn. App. at 329).

Opinion testimony is "clearly inappropriate" in a criminal trial when it contains "expressions of personal [beliefs] to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." *State v. Montgomery*, 163

Wn.2d at 591.

In *Demery*, the trial court admitted a videotaped interview in which the police accused Demery of lying and said they did not believe his story. 144 Wn.2d at 756 n.2. Four justices held the taped statements were not opinion testimony, reasoning they were different from trial testimony, which bore an added “aura of special reliability and trustworthiness.” *Id.* at 763 (plurality opinion) (quoting *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987)). However, four justices concluded the taped statements were essentially the same as live testimony by an officer and were therefore inadmissible opinion testimony. *Id.* at 773 (Sanders, J., dissenting). The final justice found the videotaped statements to be impermissible opinion evidence but believed the error was harmless. *Id.* at 765-66 (Alexander, J., concurring). Thus, a majority concluded the officers’ taped statements that Demery was lying were inadmissible opinions on Demery’s credibility.

In *State v. Jones*, 117 Wn. App. 89, 90, 68 P.3d 1153 (2003). Jones was convicted of unlawfully possessing a firearm. A police officer saw Jones making furtive movements and discovered the gun under the passenger seat of the car where Jones was sitting. *Id.* During an interview, the officer kept insisting Jones must have known about the gun. *Id.* at 91.

At trial, the officer explained he “addressed the issue that, you know, I

just didn't believe him. There was no way that someone was sitting in that car, and everything that had transpired from my eyes." *Id.* On appeal, Jones argued the prosecutor committed flagrant and ill-intentioned misconduct by eliciting this testimony. *Id.* at 90-91.

After analyzing *Demery*, the *Jones* Court found "no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him." *Id.* at 92. Either way, "the jury learns the police officer's opinion about the defendant's credibility." *Id.* The court held the officer's testimony that he believed Jones was lying during the interrogation constituted inadmissible opinion evidence. *Id.* The error was prejudicial and required reversal because the case hinged on Jones's credibility. *Id.*

Here, Deputy Oules' testimony that Mr. Gutierrez would not answer "pointed questions" and that he was "evasive" when asked what he did with the money received from the check was improper opinion as to the veracity of the defendant. Deputy Oules was not providing a factual recitation of his interview with Mr. Gutierrez, but instead giving his opinion that Mr. Gutierrez was not cooperative and therefore his explanation that he received the check in the mail for work previously performed was by implication not credible. 1RP

at 197.

- b. **Deputy Oules' impermissible opinion testimony was a manifest constitutional error that prejudiced the outcome of the trial.**

At trial, Deputy Oules testified to his personal opinion on Mr. Gutierrez' credibility by characterizing his responses as "evasive" and also by stating that he did not answer some "pointed" questions. IRP at 196.

Defense counsel did not object to Deputy Oules improper opinion testimony. However, impermissible opinion testimony may be reversible error because such evidence violates the accused's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *State v. Quaalie*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). The deputy's implied opinion regarding Mr. Gutierrez' credibility constitutes a manifest constitutional error, which this Court may review on appeal under RAP 2.5(a)(3), when there is an "an explicit or almost explicit witness statement on an ultimate issue of fact." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).

Admission of improper opinion evidence violates the constitutional right to a jury trial and requires reversal unless the error was harmless beyond a reasonable doubt. *State v. Dolan*, 118 Wn. App. at 330 (citing *Chapman v.*

California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Demery*, 144 Wn.2d at 759; *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)). Constitutional error is presumed prejudicial, and the State bears the burden of establishing the error was harmless beyond a reasonable doubt. *State v. Olmedo*, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). Constitutional error is harmless only when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.*

Unlike *Demery*, the improper admission of opinion testimony was not harmless. The testimony in question came from a law enforcement officer. “Testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer’s testimony often carries a special aura of reliability.” *State v. Kirkman*, 159 Wn.2d at 928. The deputy’s opinion of Mr. Gutierrez’ credibility likely had a significant effect on the verdict because Mr. Gutierrez’ exaptation that he thought he was owed the money from the golf course was plausible; Mr. Barth was unable to categorically state that Mr. Gutierrez had never worked at the golf course, which had employed dozens if not hundreds of people over the years.

Testimony from Deputy Oules that Mr. Gutierrez’ statement was “evasive” and that he did not answer direct, pointed questions likely carried

significant weight with the jury on this crucial determination of credibility. See *State v. Demery*, 144 Wn.2d at 765 (testimony from law enforcement officer carries “special aura of reliability”).

Deputy Oules’ opinion as to credibility undercut the defense, which was solely that Mr. Gutierrez’ believed the check was for work that he had performed in the past at the golf course, resulting in significant prejudice to the defense. This manifest constitutional error violated Mr. Gutierrez’ right to a fair trial by a jury. Because the error was not harmless, this Court should reverse and remand for a new trial. *State v. Black*, 109 Wn.2d 336, 349-50, 754 P.2d 12 (1987).

3. **MR. GUTIERREZ RECEIVED INEFFECTIVE ASSISTANCE DUE TO COUNSEL’S FAILURE TO OBJECT TO IMPROPER, PREJUDICIAL POLICE TESTIMONY**

If this Court concludes the issue of impermissible opinion testimony discussed in section 2, supra, was not preserved because defense counsel did not object, then that failing deprived Mr. Gutierrez of his right to effective assistance of counsel.

Every accused person enjoys the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22; *Strickland v.*

Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the accused. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *Thomas*, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. *Strickland*, 466 U.S. at 689; *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

"A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Appellate courts review ineffective assistance claims de novo. *State v. Shaver*, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

No sound trial strategy can explain defense counsel's complete failure to object during the deputy's impermissible opinion testimony the trial court

would surely have sustained objections to the opinion testimony. The failure to recognize the issue was exacerbated by defense counsel's failure to even cross-examine the deputy, which reiterated to the jury the deputy's implied belief that Mr. Gutierrez was evasive and therefore guilty. 1RP at 199. Defense counsel's performance was particularly deficient given that jurors could be swayed by the deputy's aura of reliability as a police officer.

Failure to object to impermissible testimony cannot be characterized as a reasonable defense strategy. Where a failure to object is unjustified on grounds of trial tactics, it constitutes deficient performance. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (deficient performance for failing to object to introduction of defendant's prior drug convictions); *State v. Klinger*, 96 Wn. App. 619, 623, 980 P.2d 282 (1999) (deficient performance for not moving to suppress marijuana found in storage shed behind defendant's cabin); *State v. C.D.W.*, 76 Wn. App. 761, 764, 887 P.2d 911 (1995) (deficient performance for failing to object to admission of defendant's confession).

Furthermore, defense counsel had a duty to know the law and object accordingly. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize

and cite appropriate case law); see also *State v. Ermert*, 94 Wn.2d 839, 848, 850-51, 621 P.2d 121 (1980) (failure to preserve error can constitute ineffective assistance).

For the reasons discussed in section 2, *supra*, Deputy Oules' opinion testimony was prejudicial. There is a reasonable probability that the result of the trial would have been different had the improper opinion testimony been objected to and, accordingly, excluded.

This Court should reverse and remand for a new trial because Mr. Gutierrez was denied his right to effective assistance of counsel. *Thomas*, 109 Wn.2d at 232.

4. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Mr. Gutierrez does not substantially prevail on appeal, he asks that no appellate costs be authorized under RAP 14.2. RCW 10.73.160(1) provides that appellate courts “*may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘*may*’ has a permissive or discretionary meaning.” *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State’s request for appellate costs. *State v. Sinclair*, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State’s request for costs).

Mr. Gutierrez, a seasonal worker, had not worked for a substantial length of time, but started work approximately two weeks prior to trial. 2RP at 249. At sentencing, the court imposed fees, including a jury fee, \$500.00 victim assessment, \$220.50 in court costs, \$250.00 for court appointed counsel, \$100.00 felony DNA collection fee, and a \$40.00 “booking fee.” CP 54; 2RP at 254-55.

The trial court also entered an order finding Mr. Gutierrez indigent for purposes of the appeal. CP 12-13. There has been no order finding that Mr. Gutierrez’ financial condition has improved or is likely to improve. RAP 15.2(f) specifies “[t]he appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” This Court must therefore presume Mr. Gutierrez remains indigent and give him the benefits of that indigency. RAP 15.2(f).

In *Sinclair*, Division One concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Gutierrez’ continuing indigence, this Court should exercise its discretion and deny any requests for costs in the

event the State is the substantially prevailing party. Imposing discretionary appellate costs in such circumstances would be inequitable and unjust.

For these reasons, this Court should not assess appellate costs against Mr. Gutierrez in the event he does not substantially prevail on appeal.

E. CONCLUSION

Based on the foregoing facts and authorities, Mr. Gutierrez respectfully requests this court to reverse and dismiss his conviction with prejudice.

This Court also should exercise its discretion and deny any request for appellate costs, should Mr. Gutierrez not prevail in his appeal.

DATED: February 22, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

ptiller@tillerlaw.com

Of Attorneys for Francisco Gutierrez-Valdovinos

CERTIFICATE OF SERVICE

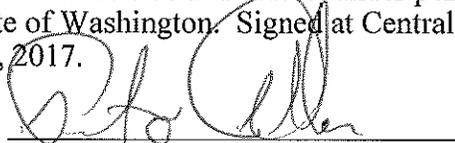
The undersigned certifies that on February 22, 2017, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Renee Townsley, Clerk of the Court, Court of Appeals, Division III, 500 N Cedar St. Spokane, WA 99201, and copies were mailed by U.S. mail, postage prepaid, to the following:

Karl Sloan
Okanogan County Prosecuting Attorney
PO Box 1130
Okanogan, WA 98840-1130

Renee Townsley
Clerk of Court
Court of Appeals Div. III
500 N Cedar St.
Spokane, WA 99201-1905

Mr. Francisco Gutierrez-Valdovinos
1626 Douglas Ave.
Bridgeport, WA 98813

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 22, 2017.


PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Francisco Gutierrez-Valdovinos

APPENDIX A

RULE CrR 3.3

TIME FOR TRIAL

(a) General Provisions.

(1) Responsibility of Court. It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) Precedence Over Civil Cases. Criminal trials shall take precedence over civil trials.

(3) Definitions. For purposes of this rule:

(i) "Pending charge" means the charge for which the allowable time for trial is being computed.

(ii) "Related charge" means a charge based on the same conduct as the pending charge that is ultimately file in the superior court.

(iii) "Appearance" means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) "Arraignment" means the date determined under CrR 4.1(b).

(v) "Detained in jail" means held in the custody of a correctional facility pursuant to the pending charge. Such detention excluded any period in which a defendant is on

electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) Construction. The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

(6) Reporting of Dismissals and Untimely Trials. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g)

(b) Time for Trial.

(1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5)

(3) Release of Defendant. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) Return to Custody Following Release. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(d) Trial Settings and Notice---Objections---Loss of Right to Object.

(1) Initial Setting of Trial Date. The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the

date set for trial.

(2) Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) Proceedings on Unrelated Charges. Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) Continuances. Delay granted by the court pursuant to section (f).

(4) Period between Dismissal and Refiling. The time between the dismissal of a charge and the refiling of the same or related charge.

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) Defendant Subject to foreign or Federal Custody or Conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) Juvenile Proceedings. All proceedings in juvenile court.

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) Disqualification of Judge. A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made

before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.