

NO. 34710-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER JOHNSON,

Appellant.

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

The Honorable Michael P. Price, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Appellant Alexander Johnson's neighbor was struck and bruised by a small projectile while the neighbor was outside investigating noises and a broken window. Johnson admitted previously leaving angry and homophobic notes on the neighbor's window. Johnson was tried on charges of second-degree assault, felony harassment, malicious harassment, and malicious mischief. Johnson asks this Court to reverse his convictions because his trial was marred by violations of his constitutional rights to an impartial jury, to be present at all critical stages of the proceedings, and to effective assistance of counsel.

First, during voir dire, Juror 2 declared she would believe any evidence presented by the prosecutor. Neither the court nor defense counsel made any attempt to rehabilitate her or remove her from the jury. Second, when Johnson returned to court after a lengthy absence, the court failed to make the required inquiry into whether his absence had been voluntary. Third, defense counsel failed to object to admission of the manufacturer's warning for Johnson's pellet gun. The warning was hearsay but was admitted and used to show the device was a deadly weapon. Fourth, two witnesses testified, without objection or instruction, to their opinions that Johnson was the shooter. Finally, the court erred in admitting irrelevant evidence that Johnson was an unauthorized tenant in his wife's apartment.

B. ASSIGNMENTS OF ERROR

1. Appellant's right to a trial by an impartial jury was violated when the court failed to excuse a juror who declared she would believe any evidence the State presented.

2. Defense counsel's deficient performance violated appellant's constitutional right to effective assistance of counsel.

3. Appellant's right to be present at all critical stages of the proceedings was violated when the court failed to inquire into the reasons for his absence after he returned to the trial.

4. The court erred in admitting hearsay regarding the properties of the pellet gun.

5. The court erred in admitting appellant's neighbor's opinion that appellant was the shooter.

6. The court erred in admitting the property manager's opinion that appellant was the shooter.

7. The court erred in admitting irrelevant evidence that appellant was an unauthorized tenant in his wife's apartment.

Issues Pertaining to Assignments of Error

1. Accused persons have a constitutional right to trial by an impartial jury. Before trial, Juror 2 declared her faith that any evidence presented by the prosecutor was true. Was appellant's right to an

impartial jury violated because (a) the court erred in failing to excuse the juror for cause and (b) defense counsel was ineffective in failing to request the juror be excused for cause?

2. When a defendant returns after missing part of the trial, the court must provide an opportunity to explain before making a final determination that the absence constitutes a knowing and voluntary waiver of the constitutional right to be present. Was appellant's right to be present violated when he returned after missing most of the trial and the court failed to afford him a chance to explain his absence?

3. Statements made outside of court are hearsay and are inadmissible to prove the truth of the statement unless an exception applies. Was appellant's right to effective assistance of counsel violated by his attorney's failure to object when the manufacturer's warning for the pellet gun was admitted to show the device was a deadly weapon?

4. No witness may testify as to an opinion regarding the guilt of the accused. Such opinions invade the province of the jury and violate the constitutional right to a jury trial. Here, appellant's neighbor and his apartment manager testified, without personal knowledge, that they believed appellant was the shooter. (a) Did the opinion testimony violate appellant's constitutional right to a jury trial? (b) Was defense counsel constitutionally ineffective in failing to object?

5. Only relevant evidence is admissible. Did the court err in overruling appellant's objection to testimony that he was an unauthorized tenant in his wife's apartment and had been denied permission to be added to the lease?

C. STATEMENT OF THE CASE

1. Procedural Facts

The Spokane County prosecutor charged appellant Alexander Johnson with felony harassment, second-degree assault, malicious harassment, and malicious mischief. CP 13-14. The jury found him guilty as charged, and the court imposed concurrent sentences at the high end of the standard range. CP 78-81, 89-90. Notice of appeal was timely filed. CP 107-08.

2. Substantive Facts

The night projectiles struck his neighbor Eric Leggett's window, and then Leggett himself, Johnson was in the apartment he shared with his wife¹ Noelle Beck. RP 389. Johnson told police that Beck, who had been outside, ran up to the apartment and said Leggett had been shot. RP 390. Upon hearing this, Johnson grabbed his pellet gun and ventured forth to protect the neighborhood. RP 390.

¹ Leggett describes Beck as Johnson's wife or fiancé. RP 340. Other witnesses describe her as his girlfriend. RP 250-51. This brief refers to her as his wife.

a. Neighborly conflict

Johnson and Leggett lived in adjacent apartment buildings on South Adams Street in Spokane. RP 250-51. An alley runs between the two buildings. RP 410. A railroad trestle crosses South Adams Street just beyond the far side of Johnson's building. RP 350-51, 416-17. Johnson and Leggett had corner apartments across the alley from each other, with windows looking out on both South Adams Street and the alley. RP 250-51. Johnson and Beck lived on the third floor, Leggett on the first. RP 250-51.

Melanie Kurtzhall, the manager of both Spokane Housing Authority apartment buildings, testified Beck was her tenant, while Johnson was a frequent unauthorized guest. RP 250-51. According to Kurtzhall, when she told the couple Johnson was not allowed, he would generally disappear for a few days and then return. RP 252. She claimed he been denied permission to be officially added to the lease. RP 252.

Johnson admitted to police he had "numerous issues" with Leggett, which culminated in Johnson placing angry notes on Leggett's window. RP 391-92. The notes were addressed to "Eric" and included statements such as "Wish for a quick death," and "We will take the man on the couch and your fag friends too." Exs. 1-4; RP 275-80. According to Leggett, he had been friendly with Johnson and Beck as neighbors for several years and was unaware of any issues between them. RP 340-42. He was openly gay, but

Johnson did not seem bothered by that fact. RP 342-43. However, another acquaintance testified Johnson was upset that Leggett was hitting on him. RP 372. After finding the notes on his window, Leggett reviewed surveillance video and recognized Johnson by his signature hat. RP 344-47. Fingerprint analysis also tied Johnson to the notes. RP 330-31.

b. Shots in the night

A few weeks after the incident with the notes, Leggett heard the sound of something hitting his window and went outside to investigate. RP 349. He went first to the alley directly outside the window. RP 349-50. The sound continued, but no one was there. RP 350. He then went out to Adams Street where he saw Beck near the railroad trestle screaming that someone had broken into her car. RP 351-52. As he walked towards her, he heard a zing and felt the pop of a small projectile hitting him in the rib cage. RP 352. He was already on the phone with 911 and was able to convey that he had been shot before dropping his phone. RP 354. The impact left a red welt on the right side of his back near his armpit that broadened into a bruise. RP 302, 356. It also put a small hole in his flannel shirt. RP 303. Leggett told police he believed Johnson was responsible. RP 356.

Surveillance video did not capture the shooting. The video showed Johnson with a pellet gun in the lobby of the apartment building, on the sidewalk, and in the alley. RP 462-82. According to the time stamps, this

was before Leggett was shot. RP 462-82. Other witnesses encountered Johnson with his pellet gun in the apartment building hallway and lobby but could not say what time it had been. RP 290-91, 367. They described Johnson announcing he was protecting the neighborhood and pulling one man into the elevator to keep him safe. RP 290-91, 369.

c. Police investigation

Detective Randy Lesser obtained Johnson's pellet gun from the apartment. RP 393. He described it as being made to look like a rifle to the average person, with a scope on top. RP 395. He reported the results of his research on the device. RP 396. He searched the Internet and found a manufacturer's warning declaring that the pellet gun is not a toy and "Misuse or careless use may cause serious injury or death. May be dangerous up to 600 yards." RP 396-97. Suggested uses are "predator hunting and varmint hunting." RP 398.

There is a direct line of sight from Johnson and Beck's apartment windows to Leggett's first floor alley window and the location near the railroad trestle where Leggett was struck. RP 312, 418, 424. Leggett's alley window was broken. RP 315-17. The location of the hole in the window screen and the offset spot where the window glass was struck indicated a downward right trajectory consistent with a shot fired from Johnson and Beck's third floor window. RP 315-17, 413-14.

d. Neighborly conflict, reprise

Some time after the shooting incident, Leggett and Kurtzhall both described odd encounters with Johnson. Leggett saw Johnson make quick starting and stopping movements with his car across the street from Leggett's apartment. RP 358, 362. When Leggett told Kurtzhall about this, she said he should call 911 because Johnson was posturing to run him over. RP 362.

Kurtzhall testified that, after police visited her to review the surveillance video, she saw Johnson in his car across the street while she was outside smoking. RP 262-64. She claimed he made a motion as if he were shooting a gun and smiled. RP 263-64. She testified this frightened her because "I knew that he had taken this, whatever, pellet gun or whatever it was and shot Eric with it." RP 268.

e. Trial ensues

The first day of proceedings were spent largely on jury selection and the CrR 3.5 hearing regarding the voluntariness of Johnson's statements to police. During jury selection, counsel for both sides engaged in some confusing questions regarding the concepts of proof and belief. In the context of that discussion, the prosecutor asked Juror 2, "If I present evidence to you to prove a proposition and the evidence does prove that proposition, can you believe that?" RP 123. Juror 2 responded, "Yes." RP

124. But then she continued, "I have faith that you are giving us the truth and that the evidence that you're giving us is reliable, that the evidence that this party would give is reliable, so I would say if evidence is presented in court, I would believe it." RP 124.

No further questions were asked of this juror. The prosecutor ended her part of voir dire by asking if everyone would promise to apply the law and render a verdict based upon the evidence and the law only. RP 134. The transcript does not reflect any answer, only her subsequent comment, "Great. Thank you." RP 134. Defense counsel declared that everything he would have asked in a second round of questioning had already been covered and asked no more questions. RP 134. Defense counsel exercised no challenges for cause and no peremptory challenges. RP 135-40; CP 137-38. Juror 2 was selected to serve on the jury. CP 136-38.

Early in the second day of trial, the information was amended, and Johnson indicated his belief that the jury was already unfair to him. RP 211. After a bathroom break, he did not return to the courtroom. RP 220. Counsel phoned him but got no answer. RP 220-21. The court decided to issue a bench warrant, recess the trial until 1:30, and then continue if Johnson did not return. RP 229. Over the lunch break, hospitals and jails were contacted. RP 229, 237. At lunchtime, Beck arrived to have lunch with Johnson and was surprised to find him not there. RP 234. At 1:40

p.m., Johnson having been absent from court since 10:00 a.m., the court instructed the jury not to draw any inference from Johnson's absence and commenced with opening statements. RP 237-39. Five witnesses testified over the remainder of the day. RP 247-336.

The third day of trial began with Eric Leggett's testimony and no further information regarding Johnson's whereabouts. RP 338. Late in the morning, the prosecutor reported Johnson had been located and the police "PAC" team was about to enter his house to serve the arrest warrant. RP 427-28. Over the course of the morning, two more witnesses, in addition to Leggett, testified. RP 365-436. After lunch, the court reported that Johnson was in custody. RP 437. The court permitted Johnson to confer with counsel and then inquired whether Johnson wished to remain in the courtroom or not, reminding him of his right to be present, or not. RP 443, 446-47. The court warned Johnson no disrespectful behavior would be tolerated. RP 447. Johnson remained in the courtroom and in custody for the remainder of the trial, which consisted of the remainder of Detective Lesser's testimony and closing arguments. RP 462-546.

D. ARGUMENT

1. JOHNSON WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

During voir dire, Juror 2 made an unequivocal statement that she would believe the State's evidence. RP 124. This statement shows actual bias. Yet neither the court nor defense counsel took action. Inaction by both the court and defense counsel resulted in a violation of Johnson's constitutional right to an impartial jury.

The federal and state constitutions guarantee every criminal defendant the right to a fair and impartial jury. State v. Irby, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015), rev. denied, 184 Wn.2d 1036 (2016) (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995)). A potential juror must be excused for cause if his views would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” State v. Gonzales, 111 Wn. App. 276, 277-78, 45 P.3d 205 (2002) (quoting State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986)). Even if only one juror is biased or prejudiced, a defendant is denied his constitutional right to an impartial jury. Irby, 187 Wn. App. at 193 (citing In re Personal Restraint of Yates, 177 Wn.2d 1, 30, 296 P.3d 872 (2013)).

- a. Juror 2 should not have been allowed to serve due to actual bias.

Juror 2's statements that she would believe any evidence presented by the State indicated actual bias. RP 124; RCW 4.44.170. Actual bias warranting dismissal of a potential juror is defined as "a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging[.]" RCW 4.44.170. If a juror has formed an opinion, "such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190. The trial court should evaluate the juror's ability to be fair based on all the circumstances. Irby, 187 Wn. App. at 193-94 (citing Gonzales, 111 Wn. App. at 278).

Certain statements are "clear indicator[s] of bias" that should prompt either questioning to neutralize the bias or a challenge for cause. Irby, 187 Wn. App. at 195 (discussing Gonzales, 111 Wn. App. at 282). Juror 2's statements are of this ilk. She declared in open court her "faith" that the prosecutor is "giving us the truth and that evidence you're giving us is reliable." RP 124. These comments are similar to those deemed to show actual bias in Gonzales.

In Gonzales, Juror 11 expressed outright faith in the truthfulness of the police, declaring, “the way I was brought up, the police are always, you know-unless they are proven otherwise, they are always honest and straightforward, and tell the truth. So I would have a very difficult time deciding against what the police officer says.” Gonzales, 111 Wn. App. at 278. Defense counsel clarified and asked if, given conflicting stories, she would “presume the police officer was telling the truth.” Id. at 279. She answered, “Yes, I would.” Id. Defense counsel followed up again, asking whether she could follow an instruction to presume the defendant innocent, and she answered, “I don’t know.” Id. Later the prosecutor asked a similar question, whether the defendant still has a presumption of innocence even if a police officer takes the stand against him. Id. She again answered, “I don’t know.” Id. No further questions were asked of her and the court denied defense counsel’s challenge for cause. Id. at 280.

On appeal, the court concluded Juror 11 had “unequivocally admitted a bias regarding a class of persons (here, a bias in favor of police witnesses).” Id. at 281. The court found Juror 11 had demonstrated actual bias and did not express confidence in her ability to follow the court’s instructions on the presumption of innocence. Id. at 282. The court held Juror 11 should have been excused and Gonzales was entitled to a new trial. Id. While not specific to police, Juror 2’s statements in this case were also

an unequivocal statement of bias in favor of a certain type of evidence, namely, evidence presented by the prosecutor. RP 124.

Even when a juror indicates actual bias, the juror can be rehabilitated if he or she subsequently expresses the ability, or at least the willingness to try, to follow the court's instructions to be impartial. But here, as in Gonzales, "no rehabilitation was attempted." 111 Wn. App. at 281. Group questioning, as occurred in the remainder of the voir dire in this case, cannot rehabilitate a biased juror: "questions directed to the group cannot substitute for individual questioning of a juror who has expressed actual bias. Irby, 187 Wn. App. at 196. Here, the prosecutor subsequently asked whether everyone would promise to apply the law and render a verdict based upon the evidence and the law only. RP 134. But there was no attempt to neutralize the bias or gain an individual assurance from Juror 2 that she would be fair instead of simply assuming the truth of everything presented by the prosecutor. This was insufficient. The record indicates Juror 2 was actually biased.

- b. The court erred in failing to dismiss or rehabilitate Juror 2.

Trial judges have an independent obligation to ensure an impartial jury by not seating a juror who has manifested actual bias. Irby, 187 Wn. App. at 193. "When a juror makes an unqualified statement expressing

actual bias, seating the juror is a manifest constitutional error.” Id. at 188. Thus, this issue is properly raised for the first time on appeal. RAP 2.5; Irby, 187 Wn. App. at 193.

CrR 6.4(c)(1) states that “[i]f the judge after examination of any juror is of the opinion that grounds for challenge are present, he or she shall excuse that juror from the trial of the case.” This rule makes clear not merely that a trial judge *may* excuse a potential juror where grounds for a challenge for cause exist, notwithstanding the fact that neither party exercised such a challenge. In fact, the judge is obligated to do so. State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012). Although the court has discretion in considering all the circumstances, removal of the juror is mandatory when the juror is unable to try the issues impartially. Irby, 187 Wn. App. at 194-96; Gonzales, 111 Wn. App. at 277-278; RCW 4.44.170(2). As discussed above, Juror 2 manifested actual bias in favor of the prosecution and an inability to fairly and impartially assess the evidence presented. RP 124.

This court should follow Irby in rejecting any argument that Juror 2’s statement should not be taken literally. Irby, 187 Wn. App. at 197. In Irby, a potential juror declared she would “like to believe he’s guilty.” Id. The State, however, argued there may have been something in the juror’s tone or demeanor that outweighed the literal meaning of the words. Id. The court

rejected this proposition on two grounds. First, it would make juror bias claims essentially unreviewable without an objection in the trial court. Id. Second, the court was “unable to imagine how the sentence ‘I would like to say he’s guilty’ could be uttered in a tone of voice that would excuse the complete lack of follow-up questions.” Id.

The Irby court’s reasoning is consistent with federal case law indicating that any doubts about bias must be resolved against the juror. United States v. Nell, 526 F.2d 1223 (5th Cir. 1976). The court in Nell noted:

We have no psychic calibers with which to measure the purity of the prospective juror; rather, our mundane experience must guide us to the impartial jury promised by the Sixth Amendment. Doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist’s protestations of a purge of preconception is positive, not pallid.

Id. at 1230. Even assuming the court had some doubt that Juror 2 would be unable to set her prejudice aside, the court was required to resolve that doubt against the juror and in favor of Johnson’s right to an impartial jury. As in Irby, the court abused its discretion in failing to inquire further or discharge Juror 2.

Allowing a biased juror to serve requires reversal of Johnson’s convictions. In Irby, where Juror 38 declared, “I would like to say he’s guilty,” the court held that the juror “demonstrated actual bias and that

seating her was manifest constitutional error requiring reversal of all convictions.” 187 Wn. App. 197. The court further noted, “The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of prejudice.” *Id.* at 193 (citing United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000)).

Irby demonstrates that reversal is also required here, regardless of counsel’s conduct. However, reversal is also required because defense counsel’s failure to challenge Juror 2 constituted ineffective assistance.

- c. Counsel’s failure to challenge Juror 2 for cause was unreasonably deficient performance that undermines confidence in the outcome of the trial.

Counsel was ineffective in failing to challenge Juror 2 for cause. Every person accused of a crime is entitled to effective assistance of legal counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That constitutional right is violated when counsel’s performance is unreasonably deficient and there is a reasonable probability that, without the errors, the outcome of the trial would have been different. State v. Ortiz, 196 Wn. App. 301, 306-07, 383 P.3d 586 (2016) (discussing Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Ineffective assistance of counsel is manifest constitutional error that may be raised for the first time

on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007)); RAP 2.5.

The failure to challenge juror 2 was deficient performance because counsel failed to protect his client's right to an impartial jury. There was no strategic or tactical reason to allow a biased juror to serve. It is true, the court had an independent duty to either neutralize Juror 2's statements indicating bias or remove her from the jury. Irby, 187 Wn. App. at 193. But when the court fails in this duty, defense counsel "certainly should" challenge a biased juror for cause: State v. Slert, 186 Wn.2d 869, 877, 383 P.3d 466 (2016) (citing CrR 6.4(c)).

Courts have found legitimate trial strategy in not exercising a challenge for cause in several scenarios, but none of those circumstances exist here. For example, counsel may validly opt not to object when follow-up questioning shows an ability to be impartial. See, e.g., State v. Castro, 141 Wn. App. 485, 493, 170 P.3d 78 (2007) ("Juror 5 told the court she could be impartial, even considering her history. It is a legitimate trial strategy not to challenge a juror who states she can be impartial."); State v. Alires, 92 Wn. App. 931, 937, 966 P.2d 935 (1998) (four jurors admitted bias against Hispanics, but then did not answer when asked if they would be unable to set aside that bias and decide the case based on the evidence). Here, there was no follow-up questioning.

Courts have also found legitimate trial strategy when the juror's remarks were equivocal. See, e.g., State v. Johnston, 143 Wn. App. 1, 17, 177 P.3d 1127 (2007) (“The remarks of the jurors identified by Mr. Johnston as evidence of bias are merely equivocal and do not establish any probability that the jurors had an actual bias against Mr. Johnston); State v. Noltie, 116 Wn.2d 831, 838-39, 809 P.2d 190 (1991) (no probability of actual bias where juror indicated discomfort with the subject matter and a “fear that it would be difficult for her to be impartial”). Juror 2's remarks were not equivocal. She declared outright she would have faith in the truth of any evidence presented by the prosecutor. RP 124.

And courts have found legitimate trial strategy where the record shows defense counsel was carefully exercising challenges and specifically opted not to challenge the juror in question. See State v. Lawler, 194 Wn. App. 275, 374 P.3d 278 (2016). In Lawler, Juror 23 said she did not know how she could be impartial given her prior experiences, and, when asked if she could set that aside, she indicated it would “be a pain in the neck” to do so. Id. at 279-80. Defense counsel followed up with several other potential jurors about their prior experiences, but did not go back to Juror 23. Id. at 280. The defense then challenged three jurors for cause and exercised five of the six peremptory challenges but did not ask that Juror 23 be excused. Id. The court concluded from this that defense counsel was alert to the

possibility of biased jurors, but for some reason wanted Juror 23 on the jury. Id. at 288. Such a conclusion is not warranted on the facts of this case. Counsel failed to challenge any jurors for any reason. RP 26-141; CP 137-38. The record does not show a reasoned decision to keep Juror 2.

Juror 2 showed actual bias in favor of the prosecution. RP 124. She expressed no awareness or understanding of her duty as a juror to be an independent judge of the weight of the evidence and the credibility of the testimony to be presented. RP 124-41. She was not questioned and did not indicate that she could set aside her preconceived decision. RP 124-41. Counsel's failure to take any action in the face of a biased juror was unreasonably deficient performance. Prejudice is shown by the fact that Juror 2 was actually biased and was permitted to serve on the jury. Irby, 187 Wn. App. 183, 193 (presuming prejudice when biased juror actually serves).

Juror 2 expressed views that prevented the performance of her sworn duty as a juror. Both trial counsel and the court failed in their respective duties to ensure Johnson received a fair trial by an impartial jury. His convictions should be reversed.

2. JOHNSON'S RIGHT TO BE PRESENT WAS VIOLATED WHEN THE COURT FAILED TO INQUIRE, AFTER HIS RETURN, ABOUT THE REASON FOR HIS ABSENCE.

The trial court failed in its duty to protect Johnson's constitutional right to be present at his trial, to appear and defend in person and to confront

the witnesses against him. After a bathroom break the day after jury selection, Johnson did not return to the courtroom. RP 220. He returned the next afternoon, after being taken into custody by police. RP 437. Johnson's right to be present was violated because trial continued in his absence, and the court failed to inquire, upon his return, whether his absence was voluntary.

- a. This violation of the right to be present is manifest constitutional error that may be raised for the first time on appeal.

Both the state and federal constitutions protect the fundamental right of an accused person to be present at a criminal trial. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); U.S. Const. amends. V, VI, XIV; Const. art. 1, sec. 22. "This right derives from basic due process of law and the defendant's right to confront witnesses." State v. Cobarruvias, 179 Wn. App. 523, 527, 318 P.3d 784 (2014) abrogated on other grounds by State v. Thurlby, 184 Wn.2d 618, 359 P.3d 793 (2015). The right to presence accrues at every critical stage of the proceedings, and particularly includes substantive testimony subject to the right to confront witnesses via cross-examination. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The defendant has the right to be present whenever the court is considering factual questions and whenever "his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge."

In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). Whether an accused person's constitutional right to be present has been violated is a question of law, reviewed de novo on appeal. Irby, 170 Wn.2d at 880.

Slert, 186 Wn.2d 869, does not preclude review of this issue for the first time on appeal. In Slert, the court held counsel's failure to object waived the error involving Slert's right to be present. 186 Wn.2d at 875-76. However, the court also recognized, "there are cases, such as Irby, where prompt objection can be excused based on the particular facts of the case." Id. at 875-76.

Johnson's case is factually very different from Irby or Slert, because it involves absence not for a portion of jury selection, but for most of the substantive testimony. Under these facts, the Court should refer to the well-established precedent describing how a court may find a voluntary waiver of the right to be present. Thurlby, 184 Wn.2d at 625-26; Garza, 150 Wn.2d at 365-66; State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). That procedure does not include a mere failure to object. Id. On the contrary, it requires a presumption against waiver and a three-part analysis by the trial court. Garza, 150 Wn.2d at 367-68. Thus, the question is not whether

Johnson's attorney objected at the time. The only question is whether the presumption against waiver was overcome. It was not.

- b. The court failed to inquire whether Johnson had waived his right to be present by voluntarily absenting himself.

The court failed to engage in the required inquiry to determine whether Johnson had voluntarily waived his constitutional right to be present at the trial. A voluntary absence, after trial has begun, constitutes an implied waiver of the right to be present. Garza, 150 Wn.2d at 367. If the defendant is voluntarily absent, trial may continue without him. Id. The trial court determines whether the absence is voluntary by following a three-part process. Id. (discussing test established by Thomson, 123 Wn.2d at 880). First, the court makes an initial inquiry into the totality of the circumstances. Id. Second, the court makes a preliminary determination regarding voluntariness. Id. Third, if the person subsequently returns, the court must afford the person an "adequate opportunity to explain his absence." Id.

The third part of the inquiry is at issue in this case. The third step allows the accused person a chance to rebut the court's preliminary finding that the absence was voluntary. Garza, 150 Wn.2d at 367. At a bare minimum, the court must "listen to the defendant's explanation" of the absence. Cobarruvias, 179 Wn. App. at 533. The court must then determine

what actually happened and assess the reasonableness of the defendant's actions in light of the totality of the circumstances. Id.

The presumption against waiver is the “overarching principle” of the entire inquiry. Garza, 150 Wn.2d at 368. Throughout all three steps, the court “indulges every reasonable presumption against waiver.” Id. at 367-68. “[A] trial court need not expressly state the presumption against waiver, nor must it begin its analysis of voluntariness anew when evaluating the third prong of the Thomson analysis.” Thurlby, 184 Wn.2d at 628. However, the court must view the defendant's explanation “in a generous light,” applying every reasonable inference against waiver. Id. at 629-30.

The court failed to do so here. The court essentially skipped the third step in the analysis entirely. Upon Johnson's return to the courtroom, Johnson was not afforded any opportunity to explain his absence. RP 443-47. The only inquiry was whether he wished to be present going forward. RP 446-47. Instead of “indulg[ing] every reasonable presumption against waiver,” the court appears to have assumed Johnson had waived his right to be present through voluntary absence.

It is immaterial that Johnson was returned to trial after being taken into custody by police. Nothing in the case law suggests that the fact of arrest should entirely eliminate the third step of the mandated three-part inquiry. Cf. Cobarruvias, 179 Wn. App. at 527-28, (engaging in three-part

inquiry despite fact that Cobarruvias was returned to court after being arrested). The fact of the arrest and Johnson's comments about the fairness of the trial are circumstances the court could consider in making its voluntariness determination based on the totality of the circumstances. But the circumstances cannot justify failing to engage in the inquiry and depriving Johnson of the ability to have his say.

The trial court's voluntariness determination is reviewed for abuse of discretion. Garza, 150 Wn.2d 365-66. "A trial court has abused its discretion when its 'decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" Id. at 366 (citing State v. Woods, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001)). Use of an incorrect legal standard also constitutes an abuse of discretion. Cobarruvias, 179 Wn. App. at 528 (citing State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). The failure to exercise discretion is also an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Here, the trial court failed to apply the correct legal standard and failed to exercise its discretion when it did not ask Johnson to explain his absence upon his return to the courtroom. The court was concerned about allowing Johnson to be present or not, about his clothes/appearance, and about his courtroom demeanor. RP 437-39, 442, 447. The parties discussed whether his absence could be used by the State as evidence of flight that

shows consciousness of guilt. RP 439-42, 450-57. The court inquired of Johnson regarding his decision whether to remain in the courtroom or waive his presence going forward. RP 443-44, 446-47. During the course of the discussion, Johnson passed a note to counsel wanting to address the court. RP 454. But this did not occur. RP 437-61. Nor did the court make a final determination that Johnson's absence had been voluntary. 437-61.

The failure to listen to what Johnson had to say about his absence and make a final determination on the question of voluntary waiver was an abuse of discretion. The court misapplied the law when failed to engage in the third step of the inquiry by asking Johnson to explain his absence. Garza, 150 Wn.2d at 367. The court also misapplied the law by failing to apply the presumption against waiver, instead assuming, without inquiring, that Johnson's absence had been voluntary. Thurlby, 184 Wn.2d at 629-30. The court failed to exercise discretion when it did not make a final determination on voluntariness after hearing Johnson's explanation. The court abused its discretion in continuing the trial and Johnson's right to be present was violated.

- c. The State cannot prove beyond a reasonable doubt that this constitutional error did not affect the verdict.

When there has been a denial of the right to be present, to appear and defend in person, the State bears the burden to prove, beyond a reasonable

doubt, that the error could not have contributed to the verdict. Irby, 170 Wn.2d at 885-87. The State cannot meet that burden here. Due to his absence, Johnson was unable to confront most of the witnesses against him. He missed all of the testimony against him except for part of Detective Lesser's testimony. RP 220-437. Johnson was unable to hear the testimony, give his attorney his insights, or suggest questions for cross-examination. As the person closest to the events and with the greatest stake in the outcome, Johnson was likely to have useful input. The State cannot show that his absence during virtually all the testimony did not contribute to the verdict.

Where a finding of voluntary waiver is unjustified, a mistrial must be granted. Garza, 150 Wn.2d at 371; State v. Atherton, 106 Wn. App. 783, 790-91, 24 P.3d 1123 (2001). Because the trial court failed to offer Johnson the opportunity to explain his absence and failed to make a renewed finding on voluntary waiver, a new trial is required on all counts.

3. JOHNSON'S ATTORNEY WAS INEFFECTIVE IN FAILING TO OBJECT TO HEARSAY INDICATING THE PELLET GUN WAS A DEADLY WEAPON.

In addition to failing to object to the biased juror described above, counsel also performed deficiently when he failed to object to out-of-court statements by the pellet gun manufacturer that the detective found on the Internet. Reasonable defense counsel would have objected because the manufacturer's warning was hearsay, inadmissible under any exception to

the general ban. It is reasonably probable that, without this error, the trial would have had a different outcome because the court was likely to sustain an objection and, without an objection, the jury likely relied on the warnings to find the pellet gun was a deadly weapon, an essential element of second-degree assault.

a. The manufacturer's warning is inadmissible hearsay.

Hearsay, any out-of-court assertion offered to show that the assertion is true, is inadmissible unless a rule or statute provides otherwise. ER 801, ER 802. The pellet gun manufacturer's warning was obvious hearsay. The statements in the warning asserted the dangerousness of the pellet gun and the likelihood that it could cause serious harm or death. RP 395-98. The State presented it to the jury to prove that very proposition. RP 395-98, 545. The manufacturer's warning is hearsay.

The warning does not fall under any of the exceptions to the hearsay ban. First, warning labels are not business records because they are carefully crafted for purposes of precluding legal liability. Under Washington's Uniform Business Records Act, a record is competent evidence if "the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to

justify its admission.” RCW 5.45.020. The act applies to “payrolls, accounts receivable, accounts payable, bills of lading” and records that are “the routine product of an efficient clerical system.” In re Welfare of J.M., 130 Wn. App. 912, 923-24, 125 P.3d 245 (2005). The act does not apply to documents involving the exercise of professional judgment or skill. Id. No attempt was made to meet the conditions of the business records act here. The police officer is not a custodian of records for the manufacturer, and attorneys likely drafted the warning, exercising their professional judgment and skill in order to limit liability. The warning is not a business record.

The manufacturer’s warning is also not a learned treatise under ER 803(18). This rule involves an exception to the hearsay ban for “statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority.” The manufacturer of a product has an interest that precludes being classified as a reliable authority. See In re C.R. Bard, Inc., MDL No. 2187, Pelvic Repair Sys. Prod. Liab. Litig., 810 F.3d 913, 924 (4th Cir. 2016) (manufacturer’s warning not admissible under federal hearsay exception for market reports in part because motivation is to preclude liability).

Nor was the warning admissible as the basis for an expert opinion. Under ER 703 and 705, facts and data upon which a testifying expert bases his or her opinion may be disclosed to the jury even if inadmissible. But

again, there was no attempt to meet the conditions for presenting the basis for an expert opinion. The officer who read the warning label was not testifying as an expert offering his own opinion; he simply read verbatim the warning label, which he found on the Internet. RP 396-98.

The Texas Court of Appeals has expressly held that the manufacturer's warning for a pellet gun was inadmissible hearsay. Meno v. State, 681 S.W.2d 294, 295 (Tex. App. 1984). In that case, counsel objected to admission of the written manufacturer's warning for the Crosman CO 2 pellet revolver, which read, "CAUTION: not a toy. Adult supervision required. Misuse or careless use may cause serious injury or death. May be dangerous up to 400 yards." Id. The trial court overruled the objection, but, on appeal, the court accepted the state's concession that the warning was inadmissible hearsay. Id.

The language of the warning in this case is strikingly similar to that in Meno, which is not surprising since the manufacturer at issue is the same, the Crosman company. Id. at 295; RP 396. The manufacturer's warning is an out-of-court statement offered to prove the warning's claim that the pellet gun is dangerous. RP 396-98, 545. As such, it is hearsay and inadmissible under the rules of evidence. Meno, 681 S.W.2d at 295; see also Sharpe v. Pugh, 21 N.C. App. 110, 113, 203 S.E.2d 330, 333, aff'd, 286 N.C. 209, 209

S.E.2d 456 (1974) (manufacturer's warning admissible to show warning was given but not to show that drug was unsafe).

b. A reasonable defense attorney would have objected.

Counsel's failure to object to the manufacturer's warning as hearsay was unreasonably deficient performance under the first prong of the Strickland test. Strickland, 466 U.S. at 688 (defendant must show counsel's representation fell below objective standard of reasonableness). Strickland's presumption that counsel's decisions were "sound trial strategy" no longer applies here. Id. at 689. The failure to object to inadmissible evidence cannot be condoned as a trial strategy when the evidence is central to the State's case. See State v. Dawkins, 71 Wn. App. 902, 910, 863 P.2d 124 (1993).

Dawkins is illustrative. The State charged Dawkins with molesting two girls and presented evidence of Dawkins's prior sexual contact with one of the girls to show his "lustful disposition." Although "lustful disposition" evidence may have been admissible under ER 404(b), the trial court could have excluded it if its prejudice outweighed its probative value. Defense counsel failed to object to the evidence. The jury convicted Dawkins of the charge as to that girl only. 71 Wn. App. at 904-06. The trial court granted a new trial based on ineffective assistance, finding the evidence would probably have been excluded as unfairly prejudicial and the jury probably

relied on the evidence to convict. Id. at 906, 910-11. This Court affirmed the trial court. Id. at 911.

Here, counsel failed to object to inadmissible hearsay purporting to establish that a pellet gun is a deadly weapon, which was an essential element of second-degree assault. RP 396-98; RCW 9A.36.021. The manufacturer's warning was central to the State's case because it was far from self-evident that the pellet gun would be deemed a deadly weapon. See, e.g., State v. Taylor, 97 Wn. App. 123, 125, 982 P.2d 687 (1999) ("Whether a BB gun is a deadly weapon in fact is a question for the trier of fact.") (citing State v. Carlson, 65 Wn. App. 153, 161-62, 828 P.2d 30 (1992)); State v. Majors, 82 Wn. App. 843, 847, 919 P.2d 1258, 1261 (1996) ("We acknowledge that a BB gun will not be capable of causing death or serious injury in most situations.").

A deadly weapon is one which, under the circumstances of its use, is "readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). To support its deadly weapon argument, the State presented testimony by Detective Lesser that he had researched the item on the Internet. RP 396. He then read into the record manufacturer's warning that he found. RP 396. The warning states that the pellet gun is not a toy and "Misuse or careless use may cause serious injury or death. May be

dangerous up to 600 yards.” RP 396-97. Suggested uses are “predator hunting and varmint hunting.” RP 398.

Without the out-of-court statement of the gun’s manufacturer, the jury would have been left with only the actual harm caused by the pellet gun: a broken window, a red welt that became a bruise, and a small hole in a flannel shirt. RP 302-03, 317, 356. The deadly weapon question requires consideration of the “circumstances in which it is used, attempted to be used, or threatened to be used.” RCW 9A.04.110(6); CP 63. So the jury could not rely on some hypothetical close range use of the pellet gun to cause serious damage to sensitive target such as an eye. The jury was required to consider its actual use, at quite a distance to cause only a bruise on the back/arm-pit. Without the manufacturer’s warning, it is reasonably probable the jury would have entertained a reasonable doubt as to whether the pellet gun was a deadly weapon.

Moreover, establishing the pellet gun as a deadly weapon elevated the assault to second degree. RCW 9A.36.021(1)(c). Second-degree assault is a “most serious offense,” a so-called “strike offense” under the law mandating life imprisonment without the possibility of parole for those convicted of a most serious offense on three separate occasions. RCW 9.94A.570; RCW 9.94A.030(33), (38). On testimony so central to the State’s case on such a serious charge, the failure to object is not a legitimate

strategy. See Dawkins, 71 Wn. App. at 910. Counsel's performance was deficient.

- c. The manufacturer's warning was likely to influence the outcome of the trial.

The failure to object to the manufacturer's warning requires reversal of Johnson's conviction. Johnson was prejudiced because the error "undermines confidence in the outcome" of the case and gives rise to a reasonable probability that, without counsel's error, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A timely objection would likely have been sustained because, as discussed above, the testimony is hearsay that meets none of the exceptions to ER 801. Without the manufacturer's warning, the outcome of the trial would have been different because, as discussed above, the jury could easily have found reason to doubt whether the pellet gun was a deadly weapon.

Additionally, the fact that the warning comes from the manufacturer makes it very influential with juries. Meno, 681 S.W.2d at 295. In Meno, the court explained the manufacturer's warning was "not merely another opinion. It emanated from the source most likely to have first-hand knowledge of the gun's capabilities and potential: the manufacturer." Id. at 296. In light of the conflicting evidence in that case, "any doubt in the minds of the jurors would, in all likelihood, have been resolved by the inadmissible

hearsay evidence.” Id. Therefore, there was a reasonable probability the error contributed to the verdict. Id. The same is true here.

Finally, the manufacturer’s warning was likely to have influenced the jury’s decision because the prosecutor specifically relied on it in closing argument. RP 545. After defense counsel disputed in closing whether the pellet gun amounted to a deadly weapon, the prosecutor read the manufacturer’s warning to the jury again and declared, “That right there makes that pellet gun a deadly weapon.” RP 545.

Counsel’s failure to object to the manufacturer’s warning prejudiced Johnson. His second-degree assault conviction should be reversed due to ineffective assistance in violation of his constitutional right to counsel.

4. JOHNSON’S TRIAL WAS TAINTED BY OPINIONS ON GUILT THAT INVADED THE PROVINCE OF THE JURY.

Two witnesses, Kurtzhall and Leggett, both testified to inadmissible and improper opinions on Johnson’s guilt in violation of Johnson’s right to a trial by jury. The jury’s role as fact-finder is essential to the constitutional right to a jury trial. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). That role is to be held “inviolable” under Washington’s constitution. Const. art. I, §§ 21, 22 Therefore, “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12

(1987). Expressions of personal belief as to guilt are “clearly inappropriate” testimony in criminal trials. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Johnson and Leggett’s “clearly inappropriate” testimony was manifest constitutional error, and the failure to object was another instance of ineffective assistance by defense counsel.

- a. Kurtzhall and Leggett both offered improper opinions on guilt that invaded the province of the jury.

Kurtzhall and Leggett’s opinion testimony was manifest constitutional error that invaded the province of the jury. Kurtzhall’s comments arose in the context of discussing Johnson’s behavior after the shooting. She claimed he made a gun-like gesture with his fingers in her direction from across the street. RP 263-64. She explained this gesture frightened her because “I knew that he had taken this, whatever, pellet gun or whatever it was and shot Eric with it.” RP 268.

On direct examination, the prosecutor focused on Leggett’s opinion of who shot him, as relayed to police at the time.

Q. And at that time, did you indicate to the police who you thought was responsible for your injuries?

A. I did.

Q. And who was the person you thought responsible for your injuries?

A. Alex Johnson.

Q. Okay. And that's the same Alexander Johnson who you believe put the notes on your window?

A. Yes, ma'am.

Q. Okay. Now, is it because of the incident from March 21 that you believed Mr. Johnson to be responsible for the April 12 incident?

A. That and the vantage of the – of their apartment, yes, to be able to shoot both the window and me in a different perspective. I thought it was very likely and I directed the officers to go that direction with their investigation.

RP 356.

This testimony was nothing more than Leggett's and Kurtzhall's opinions. In determining whether there has been improper opinion testimony, courts generally distinguish proper factual observations from testimony about guilt or intent. Quaale, 182 Wn.2d at 198-99; Montgomery, 163 Wn.2d at 595 (officer testimony improper because it contained explicit opinion on intent). Kurtzhall's testimony might have been permissible if she had witnessed the shooting. In that case, it would be a factual observation based on personal knowledge. But Kurtzhall saw nothing the night of this incident. Leggett likewise did not see who shot him or his window. RP 363. Their testimony as to the identity of the shooter were nothing more than an opinion that Johnson was guilty.

The State may claim Kurtzhall's testimony was necessary to establish that Johnson's gesture frightened her. But Kurtzhall's state of mind

in reaction to his gesture is irrelevant to any issue before the jury in this case. Johnson was not charged with harassing or intimidating her. Even assuming his gesture was admissible, her reaction was not.

An explicit or even a nearly explicit opinion on guilt can be manifest constitutional error that can be raised for the first time on appeal when it causes identifiable consequences that prejudice the defendant at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 936, 155 P.3d 125 (2007). The opinions that Leggett was the shooter were nearly explicit opinions that Johnson was guilty.

This Court should find it had practical and identifiable consequences because the prejudice here is greater than that in Montgomery, 163 Wn.2d 577. In Montgomery, the court found improper opinion testimony but found the error was not manifest because the jury could be presumed to have followed the instructions that it is the sole judge of credibility and has the ability to disregard expert opinion. Id. at 595-96. Here, the instructions regarding the jury's role in judging credibility and its ability to disregard expert opinion were the same as those given in Montgomery. CP 45-47, 54. But the Montgomery court explained it would not hesitate to find manifest constitutional error were there any indication the improper opinions influenced the verdict. 163 Wn.2d at 596 n. 9. That is the case here.

The prejudice is greater here than in Montgomery because two different witnesses offered virtually the same opinion, without comment or objection by either attorney or the court. RP 268, 356. Moreover, Leggett and Kurtzhall would not have appeared to be testifying on the basis of specialized knowledge so as to be covered by the instruction governing expert testimony. See CP 54. Under these circumstances, the explicit opinions on guilt were likely to influence the jury and reversal is required.

b. Alternatively, Counsel Was Also Ineffective in Failing to Object to Leggett's and Kurtzhall's Opinions on the Identity of the Shooter.

If this Court should conclude the opinion testimony was insufficiently preserved for appeal, it should nonetheless find reversible error on the basis of counsel's failure to object. Counsel's deficient performance prejudiced Johnson because it permitted the State to bolster its case with Leggett's and Kurtzhall's opinions as to Johnson's guilt.

Improper opinions on guilt are constitutional error that violates the right to a jury trial. State v. Quaale, 182 Wn.2d 191, 201-02, 340 P.3d 213 (2014). There is no strategic or tactical reason not to take steps to ensure the trial is not tainted by improper opinion testimony going directly to the issue of guilt.

Additionally, Leggett's statement was also inadmissible under the rules prohibiting hearsay. A statement made outside of courtroom testimony

is hearsay, even when the speaker is present in court and testifies about that statement. State v. Sua, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003) (discussing ER 801).

The statement is hearsay under ER 801 because it was offered and used to prove the truth of the matter asserted, namely, that Johnson was the guilty party, because there was no other relevant purpose possible. The State may claim it was offered to show the reason why the police began to investigate Johnson. But this is not a proper purpose for evidence. The police's reason for investigating is not relevant to any question that is properly before the jury. See State v. Edwards, 131 Wn. App. 611, 613, 128 P.3d 631 (2006) (evidence inadmissible to show officers' reasons for starting their investigation); State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991) (rejecting evidence purporting to show officers' state of mind in executing search warrant); State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (rejecting police dispatch evidence to "show the officer's state of mind in explaining why he acted as he did."). For second-degree assault, the only questions the jury had to answer were whether Johnson shot Leggett, whether he did so with a deadly weapon, and whether he had the requisite intent. RCW 9A.36.021. Similarly, the malicious harassment, felony harassment, and malicious mischief charges do not contain any element that could be proved with reference to the officers' state of mind. RCW

9A.36.080; RCW 9A.46.020; RCW 9A.48.090. The only relevant mental states are Johnson's and Leggett's. Id. Neither the police officers' state of mind nor their decision to investigate Johnson has any bearing on that issue.

None of the exceptions permitting prior statements by a witness applies here. Prior statements may be admissible if inconsistent with the witness' trial testimony, if consistent with the trial testimony and used to rebut a charge of fabrication, or if the statement is one identifying a person "after perceiving him." ER 801(d)(1). Leggett's previous opinion that Johnson shot him is not inconsistent with his testimony. It cannot rebut a charge of recent fabrication because no one suggested he was lying about his opinion that Johnson was guilty. And it is not a proper statement of identification because it was not made after perceiving the person. Leggett did not see or perceive who shot him. RP 363.

Counsel's failure to object was ineffective under the Strickland test because it was unreasonably deficient performance that undermines confidence in the outcome of the trial. Strickland, 466 U.S. at 687-89. Reasonably competent counsel would have recognized the testimony as improper opinion and hearsay and objected. Counsel is presumed to know and be familiar with court rules such as the rules of evidence. State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989).

There was no possible strategic reason for failing to object. Even if the jury had already heard the opinions, the jury could have been instructed to disregard them. Courts presume that that juries follow the court's instructions. Montgomery, 163 Wn.2d at 596. These were not merely passing mentions, such that counsel could have decided not to reinforce or further emphasize it. The prosecutor did not stop with Leggett's testimony that he told police Johnson was the shooter. The prosecutor delved into the reasons for that opinion and then repeated it over the course of several questions. RP 356.

Counsel's failure to object "undermines confidence in the outcome" because it led to admission of Leggett's and Kurtzhall's opinions, which were likely to influence the jury and affect the outcome of the trial. Strickland, 466 U.S. at 694. First, an objection would likely have been sustained (on either opinion or hearsay grounds) and, if counsel had requested, the court would likely have instructed the jury to disregard the improper opinions and rely on its own judgment, which is presumed to cure any prejudice. Montgomery, 163 Wn.2d at 596. But without any objection or instruction, and with two different witnesses offering opinions, the jury was likely to assume those opinions were valid evidence.

The opinion testimony undermines confidence in the jury's decision regarding the identity of the shooter. Therefore, Johnson's convictions for

second-degree assault, malicious mischief, and malicious harassment must be reversed either on the basis of manifest constitutional error or ineffective assistance of counsel.

5. THE COURT ERRED IN OVERRULING JOHNSON'S OBJECTION TO IRRELEVANT TESTIMONY THAT HE WAS AN UNAUTHORIZED TENANT.

Johnson's status as an unauthorized tenant who had been denied permission to be added to Beck's lease had no logical nexus to the charges. Therefore, defense counsel properly objected on relevance grounds when Kurtzhall testified Johnson was living as an unauthorized guest in Beck's apartment in the Spokane Housing Authority apartment building and had been asked to leave. RP 250-52. Kurtzhall's testimony was not a mere brief mention of Johnson's status. She testified in detail about how after being asked to leave, he would disappear for a few days and then return. RP 252. She further elaborated on the fact that his application to be officially added to Beck's lease had been denied. RP 252. This testimony painted Johnson in a negative light in ways unrelated and irrelevant to the charged offenses. The court erred in overruling counsel's objection.

- a. Johnson's tenancy status was irrelevant to any issue at trial.

Only relevant evidence is admissible. ER 402. Evidence is relevant if it has any tendency to make more or less likely any fact that is of consequence to the determination of the action. ER 401. Put another way,

- b. Counsel was ineffective in failing to specifically object that Johnson's tenancy status constituted propensity evidence that was far more prejudicial than probative.

In the event this Court concludes the trial court did not abuse its discretion in finding the evidence relevant, counsel was also ineffective in failing to point out that the evidence amounted to evidence of bad character, inadmissible under ER 404(b) and unfairly prejudicial under ER 403. The rules of evidence generally forbid evidence of other acts used to show a propensity for criminal conduct. ER 404(b). Even assuming some minimal relevance to Johnson's tenancy status, such relevance is far outweighed by the danger of unfair prejudice. First, Johnson's repeated returns despite being told to leave portrays him as a rule-breaker and someone more likely to break the law. This raises the "forbidden inference" that one who breaks the law on one occasion is likely to have done so on a different occasion. State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). ER 404(b) is aimed at preventing conviction based on this type of propensity reasoning. Id.

The analysis under ER 404(b) also incorporates balancing of probative value against the danger of unfair prejudice under ER 403. The unfair prejudice described in ER 403 refers to the danger that the jury will make a decision based on an emotional response rather than on the evidence.

State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). Upon hearing that he was denied permission to be added to the lease, the jury was likely to conclude not only that Johnson was a rule-breaker or scofflaw, but also someone with a criminal history that would preclude his being added to the lease. This suggestion of criminal history raises a great danger of unfair prejudice because it is likely to provoke an emotional response against Johnson.

Counsel's inaction is inexcusable because, even if the trial court admitted this evidence, defense counsel could requested an instruction restricting the jury's use of the evidence to its proper purpose and not for any reasoning about general bad character or criminal propensity. See State v. Gresham, 173 Wn.2d 405, 423, 269 P.3d 207 (2012) ("If evidence of a defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, the defendant is entitled to a limiting instruction upon request."). The jury is presumed able to follow such an instruction. State v. Mohamed, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016).

Counsel clearly did not have the strategy of not drawing attention to the evidence. Were that the case, he would not have objected at all. Instead, he objected but failed to mention the predominant problem, the danger of unfair prejudice and criminal propensity inferences. RP 252. It is well established that a relevance objection does not preserve for appellate review

an issue of prior misconduct under ER 404(b) or unfair prejudice under ER 403. State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007) (citing State v. Kendrick, 47 Wn. App. 620, 634, 736 P.2d 1079 (1987); State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985)). A reasonable defense attorney would have seen the potential prejudice and objected on that basis.

- c. The court's error in admitting the evidence and counsel's failure to offer a more specific objection both caused prejudice to Johnson's case.

Evidentiary error requires reversal when there is a reasonable probability the error affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), as amended (July 19, 2002). Defense counsel's error similarly requires reversal when it is reasonably probable that, without the error, the outcome would have been different. Ortiz, 196 Wn. App. at 307 (quoting Strickland, 466 U.S. at 687). The erroneous admission of this evidence, and counsel's failure to raise a proper objection, prejudiced Johnson and likely affected the outcome of the trial. Without this evidence, the jury would not be told Johnson was anything but a normal, law-abiding citizen living with his wife. Coming from such an individual, a claim that he grabbed his weapon, such as it was, and went out to defend the neighborhood against a threat was far more likely to be believed.

Without a proper instruction, the jury would assume it could consider that evidence for any purpose, including Johnson's bad character. See

Mohamed, 186 Wn.2d at 244 (“a jury cannot be expected to limit its consideration of that evidence to a proper purpose without an appropriate instruction to that effect.”). The court’s overruling defense counsel’s relevance objection only made matters worse. After the only objection was overruled jurors would even more naturally assume this was perfectly acceptable evidence that they could consider for any purpose. Like the opinion testimony, the erroneous admission of this testimony requires reversal of Johnson’s convictions for second-degree assault, malicious mischief, and malicious harassment because it likely played a substantial role in the jury’s decision on the identity of the shooter.

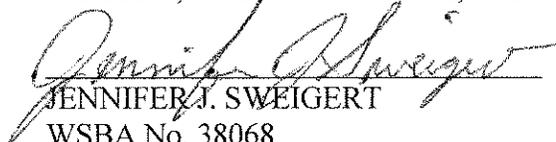
D. CONCLUSION

For the foregoing reasons, Johnson requests this Court reverse his convictions.

DATED this 26th day of April, 2017.

Respectfully submitted,

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State V. Alexander Johnson

No. 34710-9-III

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



John Sloane
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