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Division III
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NO. 35565-9-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent

v.

MELVIN O'ROURKE,

Appellant.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESiii

A. ARGUMENT IN REPLY 1

1. The prosecutor’s misconduct was not harmless and requires reversal of Mr. O’Rourke’s conviction. 1

 a. The improper insertion of the prosecutor’s opinion during Mr. O’Rourke’s testimony was misconduct. 1

 b. Misrepresenting facts not in evidence, the prosecutor improperly shifted the burden of proof to Mr. O’Rourke..... 3

 c. The prosecutor’s apology for his misconduct at the end of the cross-examination of Mr. O’Rourke was an improper appeal to the passions and prejudices of the jury. 4

 d. Improper statements made during closing arguments were also designed to appeal to the emotions of the jury and prevented Mr. O’Rourke from receiving a fair trial. 5

 e. The failure to object should not be held against Mr. O’Rourke, where there were no strategic decisions for allowing the prosecutor to commit misconduct. 7

2. The ineffective assistance Mr. O’Rourke received by his trial lawyer requires a new trial..... 8

 a. The failure to object when the prosecution offered improper opinion evidence at trial was ineffective. 8

 b. No attempts were made to limit out-of-court statements recorded by the police from being heard by the jury..... 11

 c. No attempts were made to limit statements made by non-testifying witnesses..... 11

 d. Defense counsel did not ask to limit the number of “gruesome” photos the jury was allowed to see. 12

 e. Failure to challenge coerced statements. 13

 f. Prior act evidence unchallenged at trial..... 15

g. Violations of the confrontation clause.....	17
h. Defense counsel’s failure to object prejudiced the outcome of his case.....	19
3. Cumulative error requires a new trial.....	20
B. CONCLUSION.....	20

TABLE OF AUTHORITIES

United States Supreme Court

<i>Berger v. United States</i> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935)	3
<i>Colorado v. Connelly</i> , 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)	14
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)	17
<i>Michigan v. Bryant</i> , 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)	17
<i>United States v. Young</i> , 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)	1, 2

Washington Supreme Court

<i>Bellevue Plaza, Inc. v. City of Bellevue</i> , 121 Wn.2d 397, 851 P.2d 662 (1993)	10
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	17
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012)	8
<i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	7, 19
<i>In Re Pers. Restraint of Yung-Cheng Tsai</i> , 183 Wn.2d 91, 351 P.3d 138 (2015)	19
<i>Lewis v. State, Dep't of Licensing</i> , 157 Wn.2d 446, 139 P.3d 1078 (2006)	15
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010).....	8
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988)	5

<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	10
<i>State v. Broadaway</i> , 133 Wn.2d 118, 942 P.2d 363 (1997)	14
<i>State v. Crenshaw</i> , 98 Wn.2d 789, 659 P.2d 488 (1983).....	12
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001)	9, 10, 20
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980)	20
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009)	16
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007)	16
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014)	5, 7
<i>State v. Lopez</i> , 190 Wn.2d 104, 410 P.3d 1117 (2018)	19
<i>State v. McDonald</i> , 98 Wn.2d 521, 656 P.2d 1043 (1983).....	10
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	8
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	7
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008)	9
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	17
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	16
<i>State v. Unga</i> , 165 Wn.2d 95, 196 P.3d 645 (2008)	14
<i>State v. Walker</i> , 182 Wn.2d 463, 341 P.3d 976 (2015)	9
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	3
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007)	13
Washington Court of Appeals	
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992)	20

<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1075 (1996).....	7
<i>State v. George</i> , 150 Wn. App. 110, 206 P.3d 697 (2009).....	9
<i>State v. Mazzante</i> , 86 Wn. App. 425, 936 P.2d 1206 (1997).....	15
<i>State v. O’Cain</i> , 169 Wn. App. 228, 279 P.3d 926 (2012).....	18
<i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 143 P.3d 838 (2006).....	3, 4
<i>State v. Pierce</i> , 169 Wn. App. 533, 280 P.3d 1158 (2012)	2, 5, 6
Decisions of Other Courts	
<i>Harris v. Wood</i> , 64 F.3d 1432 (9th Cir. 1995)	19
<i>United States v. Brooks</i> , 508 F.3d 1205 (9th Cir. 2007).....	1, 4
<i>United States v. LaPierre</i> , 998 F.2d 1460 (9th Cir. 1993)	9
<i>United States v. Splain</i> , 545 F.2d 1131 (8th Cir. 1976).....	2
<i>United States v. Younger</i> , 398 F.3d 1179 (9th Cir. 2005)	6
Statutes	
RCW 9.73.090	15
Rules	
ER 402	16
ER 404	15, 17
ER 801	4
RAP 9.1.....	6
Constitutional Provisions	
U.S. Const. amend. VI.....	4

Other Authorities

Cleary, E., *McCormick on Evidence* (2d ed. 1972) 14

Hager, Eli, *The Seismic Change in Police Interrogations*, The Marshall Project (2017)..... 14

A. ARGUMENT IN REPLY

Throughout the Respondent's brief, counsel attempts to justify his actions by relying on his opinion that Mr. O'Rourke is guilty. Brief of Respondent at v, 33. The analysis this Court must conduct, however, is not merely to affirm the prosecution's opinion that Mr. O'Rourke is "guilty as charged", but to ensure Mr. O'Rourke received a fair trial. *Id.* The prosecution's argument is unable to demonstrate Mr. O'Rourke's trial was fair and reversal is required.

1. The prosecutor's misconduct was not harmless and requires reversal of Mr. O'Rourke's conviction.

a. The improper insertion of the prosecutor's opinion during Mr. O'Rourke's testimony was misconduct.

The prosecution asserts that inserting his opinion into Mr. O'Rourke's testimony was not improper because "the Appellant never denied shooting Mr. Hettinger." Brief of Respondent at 7. This is not the standard. Instead, the United States Supreme Court has held it is improper for prosecutors to express their personal opinion about the guilt of a defendant. *United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). Doing so threatens the integrity of the conviction. *United States v. Brooks*, 508 F.3d 1205, 1209-10 (9th Cir. 2007). In fact, a prosecutor's position of trust and experience can

induce a jury to give his opinions unwarranted weight. *United States v. Splain*, 545 F.2d 1131, 1135 (8th Cir. 1976).

It is especially disturbing that the prosecutor expressed his opinion during Mr. O'Rourke's testimony. Repeatedly, the prosecutor interrupted Mr. O'Rourke's testimony with his opinion. RP 645, 655, 656, 659. Rather than object and state the legal basis for the objection, the prosecutor told the juror what he thought and what his opinions were on the evidence. *Id.* This is improper and tainted Mr. O'Rourke's ability to present his defense. *Young*, 470 U.S. at 18. And while the prosecution also attempts to excuse his misconduct by stating he gave deference to Mr. O'Rourke's past victimization, this is not an excuse. Brief of Respondent at 9. It was not only improper because it was again the prosecutor's personal opinion, but was an attempt to appeal to the emotions of the jurors. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). As such, it is also grounds for reversal.

The prosecution finally argues inserting his opinion was harmless because Mr. O'Rourke admitted his guilt. Brief of the Respondent at 9. But Mr. O'Rourke did no such thing. He maintained throughout the trial his actions were justified. The very core of his defense was why he felt he had to defend himself. The speaking

objections made by the prosecutor took place at exactly the time Mr. O'Rourke was attempting to explain this to the juror. The prosecutor's decision to insert his opinion on Mr. O'Rourke's credibility at this critical moment in the trial was not harmless error and instead requires reversal. *See State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

b. Misrepresenting facts not in evidence, the prosecutor improperly shifted the burden of proof to Mr. O'Rourke.

The prosecution asserts his comments regarding facts not in evidence was proper because the jury heard evidence of the prior assault of Mr. O'Rourke by Mr. Hettinger in opening statements and cross examination. Brief of Respondent at 13. This Court should reject this assertion and hold this misconduct requires reversal.

The prosecution excuses the misconduct by arguing defense counsel referenced the assault in opening statements and that a witness testified in cross-examination about the reports. Brief of Respondent at 14-15. This does not allow the prosecution to testify to or refer to facts not in evidence. *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006). In fact, misconduct occurs where the prosecution builds its case on information not found in the record. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935) (A prosecutor

is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record).

The statements made by the prosecutor were not based on evidence heard at trial. It is unlikely these reports he referenced could have been entered into evidence as they violated the confrontation clause and were hearsay. U.S. Const. amend. VI, ER 801. The jury had no reason not to trust the prosecutor, forcing Mr. O'Rourke to disprove these allegations. This improper shifting of the burden of proof was improper. This Court should find the prosecutor's statements were improper, as they gave the jury grounds to find Mr. O'Rourke guilty that were not based on the evidence and shifted the burden to him.

Perez-Mejia, 134 Wn. App. at 916; *Brooks*, 508 F.3d at 1209-10.

c. The prosecutor's apology for his misconduct at the end of the cross-examination of Mr. O'Rourke was an improper appeal to the passions and prejudices of the jury.

The prosecution attempts to justify his on the record apology, which Mr. O'Rourke was forced to accept, as an act of civility, citing the preamble to the Rules of Professional Conduct. Brief of Respondent at 17. This Court should find otherwise and hold the prosecutor's decision to apologize for his mistreatment of Mr. O'Rourke during cross-examination was improper, as it was designed to appeal to the

passions and prejudices of the jury, designed to shift sympathy to the government. *Pierce*, 169 Wn. App. at 553 (citing *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)).

In fact, the prosecutor's apology had no place before the jury. If the prosecutor could not control his emotions, he should have requested a recess from the court. By requiring Mr. O'Rourke to accept his apology for getting "upset," the prosecutor signaled to the jury that his conduct was acceptable. It is inconsequential that the apology was genuine or not. It was improper in a trial and had the result of shifting sympathy towards the prosecutor. *Pierce*, 169 Wn. App. at 553. It is an additional ground for reversal.

d. Improper statements made during closing arguments were also designed to appeal to the emotions of the jury and prevented Mr. O'Rourke from receiving a fair trial.

Just as critical as cross-examination, a prosecutor's closing argument can impermissibly taint jury deliberations. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). And while the prosecution argues his comments were just an effort to highlight certain facts for the jury, this argument fails to address what the prosecution actually argued. Brief of Respondent at 18.

Prosecutors may not interject their opinion into cases, as frequently occurred here. *United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir. 2005). Using language like “I’ve never seen anything like that,” “we don’t,” “we feel sorry for,” “I can’t perceive” is improper. RP 702, 703, 704, 714. It does not matter what the prosecutor believes, knows, or thinks, but only what the evidence shows. *Younger*, 398 F.3d at 1191. By framing his arguments this way, the prosecutor committed misconduct.

Additionally, the prosecution argues the record fails to reflect what actually occurred in the courtroom. Brief of Respondent at 17. Of course, direct appeals are a review of the record. RAP 9.1. The prosecution has not moved to supplement the record, nor would it be likely it would be allowed under the circumstances argued here. Based on the record, there does not appear to be an issue the prosecutor asked the jurors to put themselves in the shoes of the victim, conduct which is disapproved of by this court. *Pierce*, 169 Wn. App. at 554. This was misconduct and an additional grounds for reversal.

e. The failure to object should not be held against Mr. O'Rourke, where there were no strategic decisions for allowing the prosecutor to commit misconduct.

As did Mr. O'Rourke's opening brief, the prosecutor's brief recognizes Mr. O'Rourke's attorney failed to object to the prosecutor's misconduct. Brief of Respondent at 19. The prosecution then describes this Court's jurisprudence as a "rabbit hole." *Id.* at 20 (questioning *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1075 (1996)). But there is no opinion which overrules *Fleming* or any of the other cases that allow this Court to examine misconduct when it is not objected to. *See, e.g., State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Certainly, this Court must analyze the decision by counsel not to object in determining whether Mr. O'Rourke received a fair trial. But where there do not appear to be any strategic decisions behind this failure, this Court should find that Mr. O'Rourke's ability to challenge the governmental misconduct was hampered by his attorney's failure to object. *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). Because the misconduct prevented Mr. O'Rourke from receiving a fair trial and there is a substantial likelihood the improper arguments affected the outcome, Mr. O'Rourke asks this Court for reversal. *Lindsay*, 180 Wn.2d at 440.

2. The ineffective assistance Mr. O'Rourke received by his trial lawyer requires a new trial.

The prosecution argues Mr. O'Rourke received effective assistance of counsel, arguing his failure to object was not ineffective. Brief of Respondent at 21. This Court should hold otherwise and find Mr. O'Rourke was deprived of his Sixth Amendment right to effective assistance of counsel. A new trial is therefore required. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995)).

a. The failure to object when the prosecution offered improper opinion evidence at trial was ineffective.

The prosecution argues the opinion testimony was allowable because it was not inflammatory. Brief of Respondent at 21. The prosecution does not, however, explain how his decision to use the word “horrific” to describe the scene is not inflammatory, especially when no witness used this word. RP 221. Like *Glassman*, the decision to use this word was inflammatory. *In re Glasmann*, 175 Wn.2d 696, 712, 286 P.3d 673 (2012). And while the prosecution argues there are no cases other than *Glassman* that prohibit opinion testimony and *Glassman* is limited to PowerPoint slides, this is simply a misreading of the law. *See*, Brief of Appellant at 19 (citing *State v. Montgomery*, 163

Wn.2d 577, 591, 183 P.3d 267 (2008); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Consistently, Washington courts prohibit inflammatory opinion testimony from tainting trials. *State v. Walker*, 182 Wn.2d 463, 468, 341 P.3d 976 (2015). This Court should not find differently. There was no strategic reason for allowing the prosecutor to elicit testimony about how “horrific” the crime scene was and the failure to object was ineffective.

Likewise, the decision to allow the prosecutor to ask witnesses to interpret visual and audio evidence was improper. The prosecution argues this was proper lay opinion testimony. Brief of the Respondent at 24. Our Courts have held otherwise, warning that when an officer offers their opinion on evidence it runs “the risk of invading the province of the jury and unfairly prejudicing” the accused. *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). Here, the officer was allowed to interpret statements that were not made to him, nor when he was present. RP 149, 151, 159. This was not helpful to the jury and inappropriately invaded its province. *State v. George*, 150 Wn. App. 110, 117-18, 206 P.3d 697 (2009). With no strategic reason for not objecting to this testimony, this Court should find these failures to object were ineffective.

In addition, the failure to object when the prosecutor asked the officers if Mr. O'Rourke's behavior made "sense" was improper or whether his behavior was consistent with that of other burglary victim's was ineffective. Consistently, Washington's Supreme Court has held that phrases like "do you believe," "does it make sense," and "have you ever heard" are objectionable because witnesses are not permitted to speculate or express their personal beliefs about a defendant's guilt or innocence. *See, e.g., Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 417, 851 P.2d 662 (1993); *State v. McDonald*, 98 Wn.2d 521, 529, 656 P.2d 1043 (1983); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). They are especially objectionable when asked to a police officer because of the "aura of reliability and trustworthiness" police officers and paramedics have. *Demery*, 144 Wn.2d at 763 (citations omitted). Had defense counsel objected, it is likely these statements would have been excluded. *Id.* With no strategic decision to justify the failure to object, this Court should also find Mr. O'Rourke's attorney ineffective when he allowed this improper opinion testimony to be heard by the jury.

b. No attempts were made to limit out-of-court statements recorded by the police from being heard by the jury.

Next, the prosecution argues Mr. O'Rourke's attorney made a strategic decision when he did not ask to redact accusations Mr. O'Rourke was a liar out of the statement he made to the police. Brief of Respondent at 26. He argues because Mr. O'Rourke admitted to the shooting that having a different out-of-court version of the events before the jury was actually helpful. *Id.* at 27. These are difficult arguments to defend. First, if the statements had been redacted, the jury would not have known the police thought he was a liar. Second, the prosecution appears to have misinterpreted Mr. O'Rourke's defense, which was based on justification rather than that the shooting did not occur. Instead, this Court should find the failure to object was ineffective and warrants a new trial.

c. No attempts were made to limit statements made by non-testifying witnesses.

Likewise, there was no strategic decision to allow the prosecution to build its case on hearsay. The prosecution argues in its brief that the out-of-court statements were either not hearsay or were trivial. Brief of Respondent at 27-28. But this assertion is inconsistent with the record. Officers were asked to interpret what others said on

critical issues, like how Mr. Hettinger had been shot and when he died. RP 153, 155. The tapes played to the jury did not only contain statements of the officers who testified, but of others who did not appear. RP 197-200. This is not trivial hearsay, but was critical to the government's case. With no strategic reason to allow this hearsay evidence to be heard by the jury, it was ineffective to fail to object.

d. Defense counsel did not ask to limit the number of "gruesome" photos the jury was allowed to see.

The prosecutor states there was no ineffective assistance in asking to limit the number of photos of Mr. Hettinger's dead body because it was the medical examiner who asked for them to be seen by the jury and not the prosecution. Brief of Respondent at 28. While now describing the photos as "not so 'gruesome,'" this is not how they were described to the court when the prosecutor, and not the medical examiner, sought to have them introduced at trial. RP 41. And as the prosecution has stated repeatedly in its brief, the cause of Mr. Hettinger's death was not in dispute. Brief of Respondent at 29-30.

Washington's Supreme Court has stated discretion must be exercised in the use of gruesome photographs. *State v. Crenshaw*, 98 Wn.2d 789, 807, 659 P.2d 488 (1983). In situations where proof of the criminal act may be proved through testimony and non-inflammatory

evidence, prosecutors should limit their use of gruesome and repetitive photographs. *Id.* In addition, the Supreme Court recognizes autopsy photos are clearly more prejudicial than other photographic evidence. *State v. Yates*, 161 Wn.2d 714, 770, 168 P.3d 359 (2007).

Defense counsel made no attempt to limit the number of photographs the jurors saw, either of Mr. Hettinger's body at the scene or during the medical examiner's autopsy. The prosecutor introduced over a hundred photographs of the scene, including at least 23 photographs of the decedent. See RP 488-89. In addition, the prosecutor introduced 21 autopsy photographs, including those showing Mr. Hettinger's organs removed from his body. RP 584. Had Mr. O'Rourke's attorney asked to have the photographs limited, it is likely his request would have been granted. *Yates*, 161 Wn.2d at 770. There was no strategic decision for not limiting this prejudicial evidence from being seen by the jury.

e. Failure to challenge coerced statements.

The prosecution does not disagree that Mr. O'Rourke's attorney did not challenge the admissibility of his statements, but posits they were consistent with his defense and therefore should not have been challenged. Brief of Respondent at 30. The prosecution also argues that

the violation of the Privacy Act does not make sense in light of the strategy offered at trial. *Id.*

The techniques used by the police to coerce Mr. O'Rourke's confession are not sound police tactics and are no longer endorsed as sound investigatory tactics. Eli Hager, *The Seismic Change in Police Interrogations*, The Marshall Project (2017).¹ Had Mr. O'Rourke challenged these statements, the court may have excluded them. *State v. Unga*, 165 Wn.2d 95, 100-01, 196 P.3d 645 (2008); *State v. Broadway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). Instead, by allowing the jury to have hear his statement, all other aspects of the trial became "superfluous." *Colorado v. Connelly*, 479 U.S. 157, 182, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (Brennan, J., dissenting) (citing E. Cleary, *McCormick on Evidence* 316 (2d ed. 1972)).

Additionally, Mr. O'Rourke's recorded statements should have been excluded as violations of the Privacy Act. While the prosecution's brief only argues this "dubious attack" "does not make sense," Washington's law is clear that the Privacy Act must be strictly followed before a recorded statement may be used at trial. *Lewis v. State, Dep't*

¹ <https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations#.ctbyflUgz>.

of Licensing, 157 Wn.2d 446, 452, 139 P.3d 1078 (2006). With no evidence Mr. O'Rourke was informed of his rights under the Privacy Act, his recorded statements should have been excluded on that basis alone. RCW 9.73.090(b); *State v. Mazzante*, 86 Wn. App. 425, 430, 936 P.2d 1206 (1997). There was no strategic reason for not challenging these violations, which were some of the most damaging statements Mr. O'Rourke made. Had the court been asked, it would have ruled in Mr. O'Rourke's favor. RCW 9.73.090(b). There is no reason why Mr. O'Rourke's attorney did not move to exclude these statements.

f. Prior act evidence unchallenged at trial.

The prosecutor excuses defense counsel's failure to object to other act evidence by arguing prior incidents between Mr. O'Rourke and Mr. Hettinger were central to Mr. O'Rourke's defense. Brief of Respondent at 15. This Court should instead find there was no strategic reason for defense counsel's failure to object when the prosecutor introduced evidence Mr. Hettinger had violated no-contact orders with Mr. O'Rourke at Mr. O'Rourke's invitation.

ER 404(b) states evidence of other acts is generally inadmissible. The potential high risk of prejudice requires courts to

closely scrutinize evidence of prior acts and only admit them if certain criteria are met. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Before prior act evidence is admitted, a court must find by a preponderance of the evidence the prior act occurred, identify the purpose for which the evidence is sought to be introduced, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 173, 163 P.3d 786 (2007). The evidence must also be relevant. *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009); ER 402.

While the prosecutor's brief focuses on the assault Mr. Hettinger committed, at trial the focus was on whether Mr. O'Rourke allowed Mr. Hettinger to violate a no-contact order. RP 511, 518, 628, 629, 630. The prosecutor referred to out-of-court documents to establish Mr. O'Rourke invited Mr. Hettinger to have regular contact with him. *Id.* No objections were made, even when the prosecutor suggested Mr. O'Rourke was actually the aggressor in the prior incident. RP 628. The prosecutor also discussed other reports Mr. O'Rourke made, without objection. RP 632-33.

“Under ER 404(b) evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (citing ER 404(b); *Carson v. Fine*, 123 Wn.2d 206, 221, 867 P.2d 610 (1994)). Without an objection, the court was deprived of its opportunity to determine whether the rules of evidence were satisfied. There was no apparent strategic decision behind this decision not to object. It is further grounds for reversal.

g. Violations of the confrontation clause.

The prosecution also argues the out-of-court statements made by the government’s witnesses did not violate the confrontation clause and that therefore no objection was necessary. Brief of Respondent at 30. The prosecution misunderstands the rule for when out-of-court statements offered for the truth of the matter may be admitted. The law is clear that statements made to police investigating a completed offense fall within a core class of testimonial statements. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); *Michigan v. Bryant*, 562 U.S. 344, 373, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).

The question of whether it was “fairly common knowledge within all law enforcement that Mr. O’Rourke and Mr. Hettinger were having regular contact after the order was entered” violated the confrontation clause. RP 511. Likewise, whether the reports stated whether another officer had witnessed injuries to Mr. O’Rourke when Mr. Hettinger was arrested for assaulting him and whether there were any other reports of violence or threats to Mr. O’Rourke by Mr. Hettinger also violated the confrontation clause. RP 629, 630, 632. The jury also heard, without objection, other previous reports made to police. RP 160, 628, 631, 632, 633.

No reasonable strategic decision exists to justify the failure to challenge this evidence. It was harmful to Mr. O’Rourke for the jury to hear he might have previously assaulted Mr. Hettinger. This court has held the defense has the burden of raising a confrontation clause objection or this Court will not address it on appeal. *State v. O’Cain*, 169 Wn. App. 228, 239, 279 P.3d 926 (2012). The additional reports created a presumption of propensity and a sense Mr. O’Rourke was a dangerous man who deserved to be incarcerated. *Id.* This Court should find Mr. O’Rourke’s lawyer ineffective for his failure to evidence entered into evidence in violation of the confrontation clause.

h. Defense counsel's failure to object prejudiced the outcome of his case.

Counsel's critical lapses in preservation make it far more difficult for Mr. O'Rourke to succeed on this appeal. *See Orange*, 152 Wn.2d at 814 (ruling counsel's failure to raise the issue on direct appeal prejudicial because the defendant would have received far better standard of review). Mr. O'Rourke's only defense was justification and his credibility, along with not being seen as the aggressor, was critical.

Without objection, the prosecution was able to establish Mr. O'Rourke was a liar who killed Mr. Hettinger without good cause. Had the jury not heard the improper opinion evidence, prior act evidence, and coerced statements, there is a reasonable probability the outcome of the trial would have been different.

Defense counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *State v. Lopez*, 190 Wn.2d 104, 115–16, 410 P.3d 1117 (2018) (quoting *In Re Pers. Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 99, 351 P.3d 138 (2015)). At some point, the "plethora and gravity" of defense counsel's deficiencies render the proceedings fundamentally unfair and requires a new trial. *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995). The failures to object constituted ineffective assistance

of counsel and has hampered Mr. O'Rourke's appeal. *State v. Ermert*, 94 Wn.2d 839, 843, 621 P.2d 121 (1980). This Court cannot say the failure to object to this evidence was harmless beyond a doubt. *Demery*, 144 Wn.2d at 759. A new trial should be ordered.

3. Cumulative error requires a new trial.

The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Although each of the errors detailed above supplies a stand-alone basis for reversal of Mr. O'Rourke's convictions, this Court should conclude their cumulative effect on Mr. O'Rourke's right to a fair trial demands reversal.

B. CONCLUSION

Mr. O'Rourke asks this Court to reverse his conviction and order a new trial.

DATED this 15th day of March, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35565-9-III
)	
MELVIN O'ROURKE,)	
)	
APPELLANT.)	

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