

FILED  
Court of Appeals  
Division III  
State of Washington  
7/25/2018 4:26 PM

NO. 35565-9-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

---

STATE OF WASHINGTON,

Respondent,

v.

MELVIN O'ROURKE,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

---

TRAVIS STEARNS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 2

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR . 3

D. STATEMENT OF THE CASE ..... 4

E. ARGUMENT ..... 9

**1. Prosecutorial misconduct prevented Mr. O’Rourke from receiving a fair trial. .... 9**

    a. The prosecutor improperly inserted his own opinion into the proceedings during Mr. O’Rourke’s cross-examination..... 9

    b. The prosecutor misrepresented facts not in evidence, shifting the burden to Mr. O’Rourke during cross-examination..... 11

    c. By apologizing for his misconduct at the end of Mr. O’Rourke’s cross-examination, the prosecutor improperly appealed to the passions and prejudices of the jury. .... 13

    d. The prosecutor’s improper argument in his closing was designed to appeal to the emotions of the jury, preventing Mr. O’Rourke from receiving a fair trial. .... 14

    e. The misconduct deprived Mr. O’Rourke of his right to a fair trial. .... 16

**2. The failure to provide Mr. O’Rourke with effective assistance of counsel requires a new trial..... 17**

    a. By failing to contest the evidence presented at trial, Mr. O’Rourke’s attorney was ineffective. .... 18

    b. There were no objections when witnesses provided improper opinion testimony..... 19

        i. Inflammatory opinion testimony. .... 20

        ii. Interpreting statements made by others. .... 21

iii.	Improper expert opinion testimony. ....	23
iv.	Out-of-court assertions Mr. O’Rourke was lying, based on officer mistruths. ....	26
c.	No attempts were made to limit recordings of out-of-court statements being played to the jury. ....	29
d.	Out-of-court hearsay statements made by non-testifying witnesses were frequently played for the jury. ....	31
e.	There was no request to limit or redact the “gruesome” photographic exhibits. ....	34
f.	There was no challenge the statements Mr. O’Rourke made to police during custodial interrogations. ....	35
i.	Coerced statements. ....	36
ii.	Violations of the privacy act. ....	38
g.	There was no attempt to limit prior act evidence where the prosecutor claimed Mr. O’Rourke previously committed an assault against Mr. Hettinger. ....	40
h.	No challenges were made to testimonial evidence that violated the confrontation clause. ....	44
i.	Defense counsel’s failures prejudiced the outcome of this case and requires reversal. ....	46
<b>3.</b>	<b>Cumulative error denied Mr. O’Rourke his Fourteenth Amendment right to a fair trial. ....</b>	<b>47</b>
<b>F.</b>	<b>CONCLUSION .....</b>	<b>48</b>

## TABLE OF AUTHORITIES

### **Cases**

<i>Acord v. Pettit</i> , 174 Wn. App. 95, 302 P.3d 1265 (2013) .....	23
<i>Arizona v. Fulminante</i> , 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).....	36
<i>Ashley v. Hall</i> , 138 Wn.2d 151, 978 P.2d 1055 (1999).....	21
<i>Bellevue Plaza, Inc. v. City of Bellevue</i> , 121 Wn.2d 397, 851 P.2d 662 (1993).....	24
<i>Berger v. United States</i> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935).....	9
<i>Blackburn v. Alabama</i> , 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960).....	37
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	43
<i>Colorado v. Connelly</i> , 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).....	36
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	44
<i>Davis v. Washington</i> , 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).....	36, 45
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).....	9
<i>Harris v. Wood</i> , 64 F.3d 1432 (9th Cir. 1995) .....	47
<i>In re Dependency of G.A.R.</i> , 137 Wn. App. 1, 150 P.3d 643 (2007) ...	18
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012) .....	20
<i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	17, 46

<i>In Re Pers. Restraint of Yung-Cheng Tsai</i> , 183 Wn.2d 91, 351 P.3d 138 (2015).....	47
<i>In re Welfare of J.M.</i> , 130 Wn. App. 912, 125 P.3d 245 (2005) ....	18, 19
<i>Lewis v. State, Dep't of Licensing</i> , 157 Wn.2d 446, 139 P.3d 1078 (2006).....	30, 38, 39
<i>Michigan v. Bryant</i> , 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011).....	45
<i>Miranda v. Arizona</i> . 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	6, 36, 37
<i>Roe v. Flores–Ortega</i> , 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).....	17
<i>Rogers v. Richmond</i> , 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961).....	37
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010).....	17
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992) .....	48
<i>State v. Belgarde</i> , 110 Wn.2d 504, 755 P.2d 174 (1988) .....	13
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	24
<i>State v. Carlin</i> , 40 Wn. App. 698, 700 P.2d 323 (1985) .....	24
<i>State v. Crenshaw</i> , 98 Wn.2d 789, 659 P.2d 488 (1983).....	34
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001) .....	19, 25, 26, 47
<i>State v. Dolan</i> , 118 Wn. App. 323, 73 P.3d 1011 (2003).....	23, 24
<i>State v. Emmanuel</i> , 42 Wn.2d 1, 253 P.2d 386 (1953).....	40
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980) .....	18, 19, 47
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009) .....	40, 41
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1075 (1996).....	16

<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007) .....	41
<i>State v. George</i> , 150 Wn.App. 110, 206 P.3d 697 (2009) .....	21, 23
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011) .....	17
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012) .....	44
<i>State v. Johnston</i> , 143 Wn.App. 1, 177 P.3d 1127 (2007) .....	18
<i>State v. Koslowski</i> , 166 Wn.2d 409, 209 P.3d 479 (2009) .....	44
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014) .....	14, 17
<i>State v. Lopez</i> , 190 Wn.2d 104, 410 P.3d 1117 (2018) .....	47
<i>State v. Mazzante</i> , 86 Wn.App. 425, 936 P.2d 1206 (1997).....	39
<i>State v. McDonald</i> , 98 Wn.2d 521, 656 P.2d 1043 (1983).....	24
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	18
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	9, 16
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008) .....	19
<i>State v. O’Cain</i> , 169 Wn. App. 228, 279 P.3d 926 (2012).....	45
<i>State v. Perez-Mejia</i> , 134 Wn.App. 907, 143 P.3d 838 (2006) .....	11
<i>State v. Pierce</i> , 169 Wn. App. 533, 280 P.3d 1158 (2012) .....	13, 15
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	43
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699, 702 (1984).....	29
<i>State v. Saltarelli</i> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	40, 44
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	40
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003) .....	18
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	11

<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007) .....	34, 35
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	17
<i>Taylor v. Kentucky</i> , 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).....	47
<i>United States v. Bess</i> , 593 F.2d 749 (6th Cir. 2000).....	10
<i>United States v. Brooks</i> , 508 F.3d 1205 (9th Cir. 2007).....	10, 11
<i>United States v. LaPierre</i> , 998 F.2d 1460 (9th Cir. 1993) .....	21, 22
<i>United States v. Splain</i> , 545 F.2d 1131 (8th Cir. 1976).....	10
<i>United States v. Young</i> , 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).....	10
<i>United States v. Younger</i> , 398 F.3d 1179 (9th Cir. 2005) .....	14, 15
<i>Wheat v. United States</i> , 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).....	9
<i>Williams v. Taylor</i> , 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).....	47
<b>Statutes</b>	
RCW 9.73.090 .....	39
RCW 9.73.090(b).....	39
<b>Other Authorities</b>	
Cleary, E., <i>McCormick on Evidence</i> (2d ed. 1972) .....	36
Hirsch, Alan, <i>Going to the Source: The New Reid Technique &amp; False Confessions</i> , 11 Ohio St. J. Crim. L. 803 (2014).....	38

Leo, Richard A. Leo & Deborah Davis, <i>From False Confession to Wrongful Conviction: Seven Psychological Processes</i> , 38 J. Psychiatry & Law 9 (2010).....	36
--	----

**Rules**

ER 401 .....	44
ER 402 .....	41
ER 403 .....	29, 44
ER 404 .....	35, 40, 43
ER 701 .....	19, 21, 26
ER 702 .....	23
ER 704 .....	21
ER 801 .....	23
ER 802 .....	31
ER 901 .....	30

**Constitutional Provisions**

Const. art. I, § 22 .....	9, 17, 44
Const. art. I, § 3 .....	9, 47
Const. art. I, § 9 .....	37
U.S. Const. amend. 14 .....	9, 37, 47
U.S. Const. amend. 5 .....	37
U.S. Const. amend. 6 .....	17, 44

## A. INTRODUCTION

Melvin O'Rourke was 66 years old when he faced trial for shooting his friend, Duane Hettinger. Mr. O'Rourke believed he was justified in his actions but was unable to present his defense because of prosecutor's misconduct and his attorney's ineffective assistance.

The prosecutor's misconduct deprived Mr. O'Rourke of a fair trial. The prosecutor improperly inserted his opinion into evidence, misrepresented facts not in evidence, shifted the burden, and appealed to the passions and prejudices of the jury. This misconduct was flagrant and ill-intentioned and requires a new trial.

Mr. O'Rourke's attorney consistently failed to object to the misconduct and to evidence that was irrelevant, inadmissible, and overly prejudicial. Had defense counsel objected, the court would have excluded the improper evidence. There was no reason or strategy for not objecting. Because Mr. O'Rourke suffered prejudice from his attorney's failure to object, a new trial is required.

And while the errors independently require a new trial, the cumulative error also justifies reversal.

## B. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct when he cross-examined Mr. O'Rourke and in his closing argument by inserting his opinion into evidence, misrepresenting facts not in evidence, shifting the burden, and appealing to the passions and prejudices of the jury in violation of the federal and state constitutional right to a fair trial

2. Mr. O'Rourke's defense counsel provided ineffective assistance of counsel by failing to object when the jury was allowed to hear irrelevant, inadmissible, and overly prejudicial evidence. Mr. O'Rourke was deprived of his right to a fair trial, as guaranteed under the Sixth and Fourteenth amendments of the United States Constitution and article I, section 22 of Washington's constitution, by his attorney's serial failure to object to irrelevant, inadmissible, and overly prejudicial evidence.

3. Out-of-court statements that non-testifying witnesses had reported past criminal activity to the police were entered into evidence in violation of the confrontation clause as guaranteed by the Sixth Amendment.

4. Cumulative error prevented Mr. O'Rourke from receiving a fair trial.

### C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct violates the fundamental fairness required for the very concept of justice. A prosecutor commits misconduct by inserting his opinion into evidence, arguing facts not in evidence, appealing to the passions and prejudices of the jury, and shifting the burden to the defense. Should this court reverse Mr. O'Rourke's conviction where the prosecutor's misconduct deprived Mr. O'Rourke of his right to a fair trial?

2. When the failure to object results in a denial of due process, a new trial is required. Mr. O'Rourke was denied due process by the ineffective assistance of his attorney, who failed to object when the prosecutor introduced to the jury irrelevant, inadmissible, and overly prejudicial evidence. With no objection, the prosecutor introduced improper opinion testimony, recorded hearsay statements, "gruesome" photographic exhibits, coerced statements, statements recorded in violation of the privacy act, and improper prior act evidence. If defense counsel had objected, it is likely the court would have excluded the improperly admitted evidence. No strategic decision can justify the failure to object. Is a new trial required where Mr. O'Rourke's counsel committed ineffective assistance by failing to object to the

inadmissible, irrelevant, and overly prejudicial evidence heard at Mr. O'Rourke's trial?

3. A witness's out-of-court statements to police about criminal activity is hearsay and inadmissible under the confrontation clause when the witness does not testify. The prosecution elicited out-of-court statements regarding multiple prior acts reported to the police. Was this evidence admitted in violation of the confrontation clause?

4. Even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied a defendant the right to a fair trial. While the errors assigned above provide an independent basis for reversal, should a new trial be ordered because of cumulative error?

#### D. STATEMENT OF THE CASE

While the jury would only learn some of this, Mr. O'Rourke had been very close to Duane Hettinger before the shooting and cared deeply for him. RP 471, 474. They developed a falling out over money Mr. Hettinger stole from Mr. O'Rourke. RP 634. Mr. O'Rourke suffered from numerous ailments, including Parkinson's disease and a lack of natural testosterone and was in his late sixties at the time of trial. RP 5, 211, 644.

Mr. O'Rourke believed he was justified in shooting Mr. Hettinger. At his trial for murder in the second degree, Mr. O'Rourke attempted to explain why he believed Mr. Hettinger's movements towards him while they were sitting in Mr. O'Rourke's apartment were threatening. RP 656. He was prevented from doing so by the prosecutor's sustained objection and was not asked further questions on this issue. RP 656. The only evidence the jury ever heard about why Mr. O'Rourke shot Mr. Hettinger was that he not like the look Mr. Hettinger gave him. RP 654.

During the trial, the prosecutor introduced numerous hearsay statements without objection, some of which also violated the confrontation clause. The jury heard statements from a 911 call Mr. O'Rourke made after the shooting, along with the recordings the officers made while investigating the scene. RP 147, 157. These recordings contained significant hearsay statements, but no attempt was made by defense counsel to redact the recordings. RP 147. In addition, the government played, in almost their entirety, the recordings of Mr. O'Rourke's three interrogations. RP 352, 435, 456. The only redaction of these recordings was to prevent the jury from hearing of Mr. O'Rourke's previous relationship with Mr. Hettinger. RP 475.

The prosecutor frequently stopped the recordings to ask the witnesses for their interpretation of what was being said. The prosecutor asked the witnesses to give an opinion about what was said on the recording, without objection. RP 149, 151, 159, 166, 205. In addition, the prosecutor asked a paramedic and a police officer whether their encounter with the scene was among the worst or horrific scene that they had ever encountered. RP 145, 146, 146, 249.

Although the police witnesses never claimed to have an expertise beyond their training as police, the prosecutor asked them for expert opinions on forensic issues, including the amount of time it takes for blood to coagulate and the time it took for Mr. Hettinger to die. RP 160, 180, 182. The prosecutor also asked the witnesses their opinions on Mr. O'Rourke's guilt, asking them whether his version of what happened made any sense. RP 195, 348.

The police subjected Mr. O'Rourke to three extensive interrogations. RP 352, 435, 456. These interrogations were modeled on the type of interrogations disapproved of in *Miranda v. Arizona*, isolating Mr. O'Rourke at the police station, minimizing his actions, engaging in trickery and frequently accusing him of lying. RP 327, RP 395, RP 419, RP 413. The police concocted evidence, pretending that

there were witnesses that did not exist and insisting that Mr. O'Rourke stood over Mr. Hettinger to fire a second shot into his body when no evidence of a second shot existed. RP 482-83. Despite the evidence of coercion, defense counsel stipulated to the admissibility of the statements. RP 108.

Two of the recordings played to the jury violated the privacy act, including the body mike recording and one of the interrogations. Neither of the recordings complied with the privacy act, as Mr. O'Rourke was not notified of his right to refuse consent in either of these recordings. RP 147, 435. Despite the lack of warnings, the government played these recordings in full. Defense counsel did not challenge these recordings. RP 147, 435.

At trial, the prosecutor recognized the "gruesome" nature of the crime scene photographs he intended to introduce, including photographs of Mr. Hettinger's body at the scene and during the autopsy. RP 41. No attempt was made to limit any of these photos, all of which were stipulated to without objection. *See* RP 488-89,<sup>1</sup> 584.

---

<sup>1</sup> This citation contains an index to where each photograph was introduced into evidence. Defense counsel stipulated to the entry of each exhibit.

Mr. O'Rourke's lawyer confronted one of the prosecutor's witnesses with a no-contact order entered against Mr. Hettinger in favor of protecting Mr. O'Rourke. RP 505. After the order was entered, the prosecutor argued extensively about the underlying allegations, suggesting Mr. O'Rourke was the initial aggressor, despite Mr. Hettinger's arrest. RP 511-12.

In addition, the prosecutor relied on hearsay reports to suggest Mr. O'Rourke attempted to "trap" Mr. Hettinger by getting him to violate the no-contact order. RP 518. The prosecutor also elicited prior act evidence regarding threatening text messages Mr. O'Rourke reported to the police, along with two reports of theft. RP 628, 631, 632, 633.

In cross-examining Mr. O'Rourke, the prosecutor referred to facts not in evidence, including his claim that there were no police reports to support Mr. O'Rourke's testimony. RP 671, 672. The prosecutor also inserted his own opinion into the case, especially during spoken objections and during closing arguments. RP 645, 655, 656, 659. At the close of his cross-examination of Mr. O'Rourke, he apologized to him for his mistreatment, getting Mr. O'Rourke to accept his apology twice. RP 674.

A jury convicted Mr. O'Rourke as charged.

E. ARGUMENT

**1. Prosecutorial misconduct prevented Mr. O'Rourke from receiving a fair trial.**

Trial proceedings must not only be fair, they must “appear fair to all who observe them.” *Wheat v. United States*, 486 U.S. 153, 160, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Prosecutorial misconduct violates the “fundamental fairness essential to the very concept of justice.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); U.S. Const. amend. 14; Const. art. I, § 3; Const. art. I, § 22.

Prosecutors play a central and influential role in protecting the fundamental fairness of the criminal justice system. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). A prosecutor is a quasi-judicial officer and has a duty to act impartially, relying upon information in the record. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935).

*a. The prosecutor improperly inserted his own opinion into the proceedings during Mr. O'Rourke's cross-examination.*

Prosecutors may not vouch for their witnesses' veracity or inject their own opinions or experience into the proceedings. *United States v.*

*Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)  
(prosecutor’s expression of personal opinion of guilt is improper); *see*  
*United States v. Brooks*, 508 F.3d 1205, 1209-10 (9th Cir. 2007)  
(prosecutor “threatens integrity” of conviction by indicating  
information not presented to the jury supports the government’s case).

These arguments are particularly harmful because a prosecutor  
“carries a special aura of legitimacy” as a representative of the  
government. *United States v. Bess*, 593 F.2d 749, 755 (6th Cir. 2000).  
Thus, “the prosecutor’s opinion carries with it the imprimatur of the  
Government and may induce the jury to trust the Government’s  
judgment rather than its own.” *Young*, 470 U.S. at 18-19. A  
prosecutor’s “position of trust and experience in criminal trials may  
induce the jury to accord unwarranted weight to his opinions regarding  
the defendant’s guilt.” *United States v. Splain*, 545 F.2d 1131, 1135  
(8th Cir. 1976).

During Mr. O’Rourke’s testimony, the prosecutor inserted his  
own opinion when he made improper speaking objections. Rather than  
state the basis for his objection to a question, the prosecutor made  
inflammatory statements, as excerpted below:

<b>Inflammatory statements interjected by the prosecutor during the testimony of Mr. O'Rourke</b>	RP
I don't think that's at issue here because it's clear he killed the man.	645
I don't know how a horrible experience that happened to this man when he was four years old has any bearing on what happened two years ago in this apartment.	655
Mr. Bottomly is asking Mr. O'Rourke to speculate as to what was in Mr. Hettinger's mind and Mr. Hettinger isn't here to speak for himself.	656
There's no way he could possibly know what Mr. Hettinger meant when he said no.	659

It is improper for prosecutors to state their personal belief regarding the credibility of a witness. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). By making these assertions in the middle of Mr. O'Rourke's testimony, the prosecutor improperly tainted Mr. O'Rourke's ability to testify and to present a defense. This misconduct prevented Mr. O'Rourke from receiving a fair trial.

*b. The prosecutor misrepresented facts not in evidence, shifting the burden to Mr. O'Rourke during cross-examination.*

“[A] prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty.” *State v. Perez-Mejia*, 134 Wn.App. 907, 916, 143 P.3d 838 (2006); *Brooks*, 508 F.3d at 1209-10. A prosecutor threatens the integrity of a

conviction by indicating information not presented to the jury supports its case. *Id.*

In his cross-examination of Mr. O'Rourke, the prosecutor repeatedly discussed investigations that had been conducted and police reports that were never entered into evidence. RP 671, 672. These reports violated the confrontation clause, were pure hearsay, and were completely inadmissible. Nevertheless, when the prosecutor argued with Mr. O'Rourke about prior acts, including when Mr. Hettinger assaulted Mr. O'Rourke and about the threats Mr. O'Rourke received, he brought up the reports twice. RP 671, 672. Defense counsel objected the second time the prosecutor made improper statements. RP 672. This did not stop the prosecutor, who continued to badger Mr. O'Rourke with his editorials regarding hearsay statements. RP 672-73.

<b>Improper statements regarding out-of-court hearsay interjected while cross-examining Mr. O'Rourke</b>	RP
No, there aren't, sir, we've checked. The only report that we could find was the staircase and you didn't get hurt, he did.	671
Mr. O'Rourke, you tend to exaggerate in your reports.	672
There's none of that in the police report, sir. In the police report, you said he tried to push you, you caught yourself on the rail and were not injured whatsoever.	672

By arguing that police reports not entered into evidence did not support Mr. O'Rourke's assertions, the prosecutor committed

misconduct. This burden-shifting deprived Mr. O'Rourke of his ability to present a defense and requires a new trial.

*c. By apologizing for his misconduct at the end of Mr. O'Rourke's cross-examination, the prosecutor improperly appealed to the passions and prejudices of the jury.*

At the end of his cross-examination of Mr. O'Rourke, the prosecutor apologized to Mr. O'Rourke for losing his temper. RP 674. The prosecutor completed his cross-examination with the following colloquy with Mr. O'Rourke.

MR. NICHOLS: I don't think I have any more questions then, I'm sorry. I'm sorry if I got a little bit upset.

THE WITNESS: That's okay.

MR. NICHOLS: I apologize.

THE WITNESS: That's okay.

RP 674.

This was an improper appeal to the jury's passions and prejudice and improper designed to shift sympathy to the government. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) (citing *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). The prosecutor's acknowledgment of his misconduct was designed to minimize its impact and appeal to the emotions of the jury, getting tacit

permission for his misconduct from Mr. O'Rourke. This was improper and an additional grounds for a new trial.

*d. The prosecutor's improper argument in his closing was designed to appeal to the emotions of the jury, preventing Mr. O'Rourke from receiving a fair trial.*

A prosecutor's closing arguments impermissibly taint the jury's deliberations when the comments made "were improper and prejudicial." *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). Here, the prosecutor's misconduct persisted in closing arguments. Much like cross-examination, he inserted his own opinion of Mr. O'Rourke's guilty into the proceedings. RP 702. Courts have emphasized that prosecutors may not inject their opinion into cases, and using language such as "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. *United States v. Younger*, 398 F.3d 1179, 1191 (9th Cir. 2005). "The question for the jury is not what a prosecutor believes to be true or what 'we know,' rather, the jury must decide what may be inferred from the evidence." *Id.*

<b>Improper statements appealing to the juror's emotions made during closing arguments</b>	RP
And in my years, I've never seen anything like that where a killer so clearly reenacts the State's theory of what happened.	702

But we don't kill people for a look. Jesse James and John Wesley Hardin and Wyatt Earp, we kill -- yeah, people got killed for not looking right. This is a society of law and rule.	703
He has Parkinson's and we feel sorry for him. He's 69 or 70 years old and we feel sorry for him. But he killed a man in cold blood. The facts, not your sympathy.	704
I can't perceive of killing someone over a look. I don't understand that.	714
Imagine yourself -- I'm asking you to reenact a horrific event where you had to kill a friend to save your life. Mr. O'Rourke did it coldly, calmly, and deliberately. His face -- think about his face when he killed me in front of you and imagine that that's the last thing Duane Hettinger saw.	714

By framing his arguments in this way, the prosecutor improperly inserted his opinion into the province of the jury. *Younger*, 398 F.3d at 1191. This improper argument constituted misconduct.

The prosecutor also improperly appealed to the passion and prejudice of the jury by asking them to reenact the shooting. RP 714. It is improper for a prosecutor to ask jurors to put themselves in the shoes of the victim. *Pierce*, 169 Wn. App. at 554. By asking them to reenact the shooting and to “think about his face when he killed me” the prosecutor committed the same misconduct. *Id.* Equally, this Court has recognized that it is far more improper to put the jury in the shoes of a defendant, as the prosecutor also attempted to do in this argument. This had no place in a closing argument and constituted misconduct.

*e. The misconduct deprived Mr. O'Rourke of his right to a fair trial.*

Like the evidentiary errors examined in the section on ineffective assistance, no attempt was made to curb the prosecutor's misconduct, during the evidentiary phase or in closing arguments. While this Court has generally recognized that when conduct is not objected to, review requires that the conduct be flagrant and ill-intentioned, Mr. O'Rourke asks this Court to consider the failure to object in the larger context of his lawyer's unwillingness to otherwise object when evidence was improperly introduced at trial. *See, e.g., Monday*, 171 Wn.2d at 685 (Madsen, concurring) (Reversal required "because integrity of the system demands it.")

Trained and experienced prosecutors "do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1075 (1996). The prosecutor's actions should be judged under this standard. Knowing that it was unlikely that he would be challenged, the prosecutor acted with a disregard he may not otherwise have taken. This Court should recognize 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 that the improper arguments affected the outcome, he asks this Court for reversal. *Lindsay*, 180 Wn.2d at 440.

**2. The failure to provide Mr. O'Rourke with effective assistance of counsel requires a new trial.**

An attorney renders constitutionally inadequate representation when there is no legitimate strategic or tactical reason for conduct that prejudices the accused. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); U.S. Const. amend. 6; Const. art. I, § 22. Even if defense counsel has a strategic or tactical reason for certain actions, the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

A new trial is required where counsel's performance falls below an objective standard of reasonableness and where the poor work results in prejudice. *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)). To assess prejudice, the defense must demonstrate there is a reasonable probability of a different outcome, but need not show counsel's conduct altered the result of the case. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

*a. By failing to contest the evidence presented at trial, Mr. O'Rourke's attorney was ineffective.*

The failure to object to evidence can deprive a person of due process. *In re Welfare of J.M.*, 130 Wn. App. 912, 925, 125 P.3d 245 (2005). In *J.M.*, trial counsel did not object to the admissibility of documents containing out-of-court statements and witness opinion. *Id.* at 922. This Court reversed, finding due process was denied. *Id.* at 925; *see also In re Dependency of G.A.R.*, 137 Wn. App. 1, 15, 150 P.3d 643 (2007). When an attorney fails to object, a new trial will be ordered where this Court finds that the objection would have been sustained if it been raised, there was no legitimate strategic or tactical reasons for failing to object, and that the result of the trial would have been different. *See State v. Johnston*, 143 Wn.App. 1, 20, 177 P.3d 1127 (2007); *see also State v. Ermert*, 94 Wn.2d 839, 849–50, 621 P.2d 121 (1980).

The improprieties in this case demonstrate the need for a new trial. Mr. O'Rourke's trial attorney consistently failed to object when

the prosecution introduced improper evidence at trial. By not objecting, the prosecution was able to introduce inflammatory statements and improper opinion testimony designed to prejudice the jury against Mr. O'Rourke. The failure to object to the improper evidence was not reasonable. With defense counsel's objection, the evidence would have been excluded. There is no reason why defense counsel did not object. Because Mr. O'Rourke was prejudiced by his attorney's failure to object and there is a reasonable probability the result would have been different, a new trial is required. *J.M.*, 130 Wn. App. at 925; *Ermert*, 94 Wn.2d at 849–50.

*b. There were no objections when witnesses provided improper opinion testimony.*

Lay witnesses may only give opinions or inferences that are rationally based on the witness's perceptions, help the jury understand the testimony, and are not based on scientific or specialized knowledge. ER 701. Opinion testimony may only be admitted after a trial court determines its admissibility. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Statements of personal belief should be excluded at trial. *Id.* at (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

i. Inflammatory opinion testimony.

At trial, the prosecutor asked the police and paramedics who responded to Mr. O'Rourke's emergency call whether they had ever seen crimes scenes as "horrific" as Mr. O'Rourke's house. RP 145. This improper opinion testimony regarding their personal beliefs was designed to inflame the jury. *In re Glasmann*, 175 Wn.2d 696, 712, 286 P.3d 673 (2012). Mr. O'Rourke's attorney never objected to these improper questions.

Witness on stand	<b>Prosecutors questions designed to inflame the jury</b>	RP
Foss	Q During your time as a law enforcement officer, have you had to respond to some pretty horrific scenes? A Yes.	145
Foss	Q Tell us a little bit? A There's been a couple of different suicides that I've had to respond to, car accidents, this particular one, so.	146
Foss	Q So, it's safe to say that you're no stranger to gunshot wounds and bleeding and so forth? A Firsthand or off the top of my head, I'd say this is probably the most major one that I've had.	146
Bugbee	Q Have you been on other similar or even worse calls than this one? A Yes, I have.	249

Had defense counsel objected, it is likely these statements would have been excluded. There was not strategic reason for failing to object. It was ineffective to fail to do so.

ii. Interpreting statements made by others.

When the prosecution offers visual or audio evidence, it is the jurors' role to form opinions and conclusions from it. *See Ashley v. Hall*, 138 Wn.2d 151, 156, 978 P.2d 1055 (1999). A witness may relate first-hand observations, but may not interpret the evidence unless it cannot be determined by the jury. ER 701; ER 704; *State v. George*, 150 Wn.App. 110, 117-18, 206 P.3d 697 (2009).

An officer's opinion about evidence shown to the jury is of dubious value and 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). The use of lay opinion by policemen is particularly dangerous and should only be offered when there is no alternative. *Id.*

Here, the police officers were allowed to give their opinion about statements made during the 911 recording and when the body mike recording was played. The recordings were played without objection. RP 147 (911 call), RP 157 (Body mike recording). The

prosecutor frequently stopped the recordings to ask the witnesses to provide their opinion on what Mr. O'Rourke said. *E.g.*, RP 149, 151, 159, 166, 205. Mr. O'Rourke's attorney never objected when the prosecutor asked the witnesses to provide their opinions. *See below.*

Witness on stand	<b>Officers interpreting out-of-court statements during direct examination</b>	RP
Foss	Q He was still alive? A That's what it sounded like, yes.	149
Foss	Q What did Mr. O'Rourke just do at 1:07? A It sounded like he chuckled a little bit.	151
Foss	Q We heard on the sound portion there that Mr. O'Rourke called it in as a burglary, is that correct? A Yes, that's how dispatch put it out.	159
Foss	Q What were you commenting about? A The blood. Q Yes. A Telling Commander Daniel about the blood and that where the chest wound was -- or where the wounds in the body and stuff were and that the blood was pretty thick.	166
Foss	Q At this point, you and Commander Daniel are talking about the blood trail from -- A Yes. Q -- from the chair to the door? A Yes, sir.	205

It was improper to allow the officers to interpret the recordings for the jury. *LaPierre*, 998 F.2d at 1465. In some instances, the witness

did not have first-hand knowledge of the events they gave their opinion on. *See* RP 149, 151. In others, the witness was asked to interpret their own out-of-court hearsay statement, also violating the rule against hearsay. ER 801; *see also State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (opinion not based on personal knowledge or expertise is prohibited). In every case, the police inappropriately invaded the province of the jury in interpreting the evidence for them. *George*, 150 Wn. App. at 199. Had Mr. O'Rourke's attorney objected to any of these statements, it is likely they would have been excluded. The jury should not have heard the officer's interpretation of the recordings.

iii. Improper expert opinion testimony.

The prosecutor also asked the witnesses to provide an improper expert opinion. Expert opinion testimony is only admissible if it is provided by a person who is qualified to provide an expert opinion. ER 702, *Acord v. Pettit*, 174 Wn. App. 95, 111, 302 P.3d 1265 (2013). The danger of prejudice is greater where the opinion is expressed by a government official, such as a police officer, because their opinion may improperly influence the fact finder and thereby deny the defendant of

a fair and impartial trial. *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985).

The prosecutor asked police witnesses with no apparent qualifications for their expert opinion on Mr. O'Rourke's psychological condition and on the time of Mr. Hettinger's death. RP 160, 180. The officers were also able to give their opinion on blood coagulation, with no medical training or other experience in the timing of coagulation. RP 167, 221. Defense counsel made no objection to any of this improper opinion testimony. Had an objection been made to any of this evidence, it is likely it would have been sustained. *See, Dolan*, 118 Wn. App. at 329.

The prosecutor also asked police witnesses for their personal opinion regarding Mr. O'Rourke's guilt. 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). These questions were especially objectionable 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.*

Examples of the improper expert opinion testimony are detailed here.

Witness on stand	<b>Improper expert opinion testimony from police officers on direct examination</b>	RP
Foss	Q Did you see any indication whatsoever that he was in shock? A Not to my knowledge, no.	160
Foss	Based on what you saw, did you believe that Mr. Hettinger had just barely died before you got there? A No, no.	180
Foss	The statement that he made other times that he was still breathing, was that consistent with what you saw? A No, sir.	182
Foss	Q Does it make any sense to you, in your experience as a law enforcement officer or in your experience as a common person, to lock the burglar in the house with you? A No, sir.	195
Daniel	Q Officer or Commander Daniel, you’ve investigated an awful lot of burglaries? A Yes. Q Have you ever heard of a burglary where the victim locked the burglar in the house while they were in there with them? A I can’t say that I have, no.	348

	Q Does that even make any sense?	
	A No.	

Had defense counsel objected to any of this improper expert opinion testimony it likely would have been excluded. ER 701; *Demery*, 144 Wn.2d at 763. There was no reasonable strategy to explain why the witnesses were allowed to provide their opinion on the evidence.

iv. Out-of-court assertions Mr. O'Rourke was lying, based on officer mistruths.

The prosecutor introduced the entire recording of Mr. O'Rourke's three interrogations. RP 325. Although these recordings contained multiple assertions that Mr. O'Rourke was a liar based on false allegations made by the police, his lawyer did not try to redact the recordings. RP 325. A limiting instruction was given asking the jurors not to speculate about the conclusions the officers drew from their investigation, but the jury was not told how to interpret the intentional lies the officers told to Mr. O'Rourke in an attempt to get him to make a statement. RP 326.

Mr. O'Rourke was interrogated three times before he was given a lawyer. The first time took place shortly after he was taken to the police station, where he was interrogated by Commander Daniel and

Detective Denny. RP 327. He was interrogated a second time solely by the commander 9 to 10 hours later. RP 434. The third interrogation was done jointly by the two men shortly before Mr. O'Rourke was provided with an attorney. RP 457.

In the first interview, Mr. O'Rourke was able to tell his version of events without challenge. After a short break, the officers returned. This time, Mr. O'Rourke was consistently accused of lying. RP 405, 409, 425, 427, 430, 431, 432, 433. When the commander took over as the sole interviewer, he continued to accuse Mr. O'Rourke of lying. RP 452, 454. This tactic did not change in the third interview. RP 457.

Witness on stand	<b>The un-redacted accusations Mr. O'Rourke lied during interrogations of Mr. O'Rourke</b>	RP
	<b>Accusations of lying (first interrogation)</b>	
Denny	That was incorrect, right?	405
Denny	You're making another lie on top of another lie on top of another lie.	409
Denny	Your story is just falling apart. I don't understand why you don't want to tell the truth.	425
Denny	So, Mel, stop giving us lines of BS. It isn't working and it's just getting worse.	427
Daniel	But it's an even bigger deal to lie about it, okay? To make false statements to try to mislead us, okay?	430
Daniel	You caught yourself in I don't know how many lies, I quit counting.	431

Denny	You lied to us.	432
Daniel	Mel, I'm going to give you one more chance to be God honest and tell us what happened.	433
	<b>Accusations of lying (second interrogation)</b>	
Daniel	Mel, I don't know why you don't want to tell the truth there.	452
Daniel	We've caught you in some fibs, okay? And, you know, that doesn't look good.	454
	<b>Accusations of lying (third interrogation)</b>	
Denny	And so, there's quite a difference in what you said happened and what we found with the physical evidence right there.	457
Denny	Now, don't you think it's time to tell the truth?	460
Daniel	Then there is no reason for you to lie here.	469

When the commander took over as sole interviewer, he created untrue stories about the shooting, crafting witnesses and pretending there was other evidence inculcating Mr. O'Rourke. He told Mr. O'Rourke the investigators recovered two spent rounds when they only recovered one. RP 439. On many occasions, he asked Mr. O'Rourke about the second shot he took when he knew that the gun had only been fired once. RP 439. The officer accused Mr. O'Rourke of standing over the body, firing his gun while Mr. Hettinger lay on the ground, even though no evidence supported this theory. RP 444, 446, 452. These

continued in the third interview. The officers again returned to the second shot, which they knew had not been taken. RP 459.

The prosecutor waited until the close of the commanders' direct examination to tell the jury that the stories the commander told Mr. O'Rourke were not true, specifically about outside witnesses, the second shot, and his knowledge of blood splatter evidence. RP 481-83. By this point, the damage was done.

While these sort of confrontations are not constitutionally impermissible, they were not relevant. ER 403. The jury should not have heard the police accuse Mr. O'Rourke of lying about events they made up. This testimony was unduly prejudicial and should have been excluded. *See e.g., State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699, 702 (1984) (Reversible misconduct for calling the defendant a liar four times). There was no reasonable strategy that justified allowing the jury to hear the officers accuse Mr. O'Rourke of lying.

*c. No attempts were made to limit recordings of out-of-court statements being played to the jury.*

The prosecutor sought to introduce many recordings from the scene of the shooting, including the 911 call and the body recording of one of the investigating officers. RP 147 (911 call), RP 157 (Foss's

body mike recording). Defense counsel did not object to allowing these recordings to be played in their entirety.

The 911 tape lacked foundation. ER 901. It was introduced when Officer Foss testified. RP 147. Other than announcing that the disk contained radio traffic and the 911 call, no other foundation was laid by the prosecutor. RP 147. The 911 operator did not testify, nor where there any other attempts to lay a foundation for this call. The court would likely have excluded this testimony, had defense counsel made a proper objection.

The body mike recording violated the privacy act. While it was not a private conversation, the law is clear that officers must inform detainees when they are recording their conversation. *Lewis v. State, Dep't of Licensing*, 157 Wn.2d 446, 452, 139 P.3d 1078 (2006). There was no evidence Mr. O'Rourke was ever informed that he was being recorded. The remedy for this breach of the privacy act is exclusion of the recording. *Id.* Had defense counsel objected, it is likely the court would have ruled in Mr. O'Rourke's favor.

In addition, Officer Foss's body recording contained many other conversations that took place between those investigating the shooting. On many occasions, the prosecutor stopped this recording in order to

clarify what an out-of-court witness said and to elicit hearsay. RP 147, 148, 149, 150, 151, 152, 160, 161, 162, 165, 166, 171, 172, 177, 178, 179, 182, 184, 185, 186, 197, 198, 206. Defense counsel did not object to any of the hearsay statements being used at trial. Had counsel objected, it is likely the court would have found the out-of-court statements to be hearsay within hearsay and would have excluded the evidence. There was no strategic reason for not asking for the evidence to be excluded.

*d. Out-of-court hearsay statements made by non-testifying witnesses were frequently played for the jury.*

Hearsay is not admissible at trial. ER 802. When the government sought to introduce recordings that were taken when the emergency responders arrived at Mr. O'Rourke's house, no attempt was made to redact what the jury heard. These recordings contained frequent hearsay statements. Mr. O'Rourke's attorney did not object when these hearsay statements were played.

Witness on stand	<b>Hearsay statements from non-testifying witnesses, as told by witness on the stand</b>	RP
Foss	Q Where did he say Mr. Hettinger was injured? A The side and the chest.	153
Foss	Q At what time -- what time did the clock on the 911 call say when Mr. O'Rourke finally told the	155

	operator that Mr. Hettinger was no longer breathing? A According to the recording, about 3:25, 3:30.	
Foss	DISPATCH: It sounds like the shooter is the RP. (Indiscernible) gun shot (indiscernible). OFFICER FOSS: Okay. (Radio noise – indiscernible) DISPATCH: The gun is sitting on the table a few feet away from it. OFFICER FOSS: Okay.	159 250
Foss	OFFICER FOSS: Duane, can you hear me? Duane, can you hear me? DISPATCHER: 119, go ahead.	165
Foss	EMT: Okay. It looks like two shots. OFFICER FOSS: (Indiscernible) one in the chest and then we've got one (indiscernible). (Indiscernible) EMT: Do you know who this is? OFFICER FOSS: Duane Hettinger.	172
Foss	CAPTAIN DANIEL: Where does this white t-shirt come in? OFFICER FOSS: It was right -- I didn't touch the white t-shirt.	199
Denny	We had the Clarkston Fire Department come over and check his blood sugar level. Q And? A They said he was okay.	627
Denny	We've heard about a prior incident where law enforcement was involved with Mr. Hettinger and Mr. O'Rourke. Are you familiar with that police report?	628

	A Yes.	
	Q Who actually called the police?	
	A In the first incident, it was Christopher Kahn.	

The prosecutor also played many other hearsay statements, including those made by the officers who testified. Officer Foss's testimony included a recording of him speaking to other officers at the scene about what he discovered in Mr. O'Rourke's apartment and how Mr. O'Rourke behaved when he first made contact. RP 197-200, RP 205-06. Officer Foss was permitted to recap what he told officers on the night of Mr. Hettinger's death. RP 231. Mr. O'Rourke's lawyer never objected when the recordings were played. He only objected when another witness was asked to comment on statements made in the recordings. RP 320. The court sustained counsel's objection, but then allowed the hearsay statements to be played to the jury again. RP 321.

The government also played the "radio traffic" that included multiple hearsay statements, including those from the dispatch operator. The operator described the scene in one particular instance. RP 260-262. During the course of the testimony, the paramedic was asked to interpret what was being said. RP 260. No objection was made to this hearsay testimony either.

*e. There was no request to limit or redact the “gruesome” photographic exhibits.*

In voir dire, the government warned the jury that it intended to show them “gruesome photos.” RP 41. In all, dozens of photos were introduced to the jury, showing the scene and Mr. Hettinger’s dead body, both at the scene and during the medical examiner’s investigation. RP 488-89, RP 584. Defense counsel made no attempt to redact or limit the number of photos the jury’s had to see.

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 that 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 counsel objected, it is likely that the court would have limited the number of photographs the prosecutor could have introduced. The photographs of Mr. Hettinger's body were minimally relevant because the officer moved his body before the photographs were taken. RP 198-99. The autopsy photography photographs were even less relevant as there was no dispute that Mr. O'Rourke was the shooter. To the extent they were helpful to explain how one bullet could have entered Mr. Hettinger's body twice, the photographs could have been limited to minimize their prejudice. ER 404(b). No such attempts were made by Mr. O'Rourke's attorney. 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.

*f. There was no challenge the statements Mr. O'Rourke made to police during custodial interrogations.*

Mr. O'Rourke made a series of statements to the police which were recorded, both at the scene and later at the police station. Although Mr. O'Rourke's attorney had the opportunity to challenge

these statements, he stipulated to their admissibility. RP 108. In fact, there were good reasons for challenging the statements, which may have resulted in their exclusion. Two of the recorded statements violated the privacy act. In addition, the interrogation at the station, while after *Miranda*, were coercive in nature. There was no strategic reason for stipulating to the admissibility of the statements.

i. Coerced statements.

“Confession evidence ... tends to define the case against a defendant, usually overriding any contradictory information or evidence of innocence.” Richard A. Leo & Deborah Davis, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 38 J. Psychiatry & Law 9, 12 (2010). When a confession is used, “other aspects of the trial are superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.” *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)). It is a structural error to admit a coerced statement. *Arizona v. Fulminante*, 499 U.S. 279, 290, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

The Fifth Amendment and article I, section 9 of the Washington Constitution forbid the government from compelling a suspect in a criminal case to be a witness against himself. U.S. Const. amend. 5; Const. art. I, § 9. The Due Process Clause of the Fourteenth Amendment also demands that the government refrain from tactics designed to procure confessions through either physical or psychological coercion. U.S. Const. amend. 14; *Rogers v. Richmond*, 365 U.S. 534, 540, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961); *see also Blackburn v. Alabama*, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960) (“coercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition”). Coercive interrogations are antithetical to the underlying principle in our criminal law that the State must use evidence to establish guilt instead of proving its charge against the accused out of his own mouth. *Id.* at 541.

The tactics used by the police against Mr. O’Rourke were remarkably similar to those employed in *Miranda v. Arizona*. 384 U.S. 436, 455-57, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Like *Miranda*, the officers employed several factors to get Mr. O’Rourke to confess, including isolation, minimization, trickery, and negation of Mr.

O'Rourke's version of the events. *Id.* Like *Miranda*, these methods were created "for no purpose other than to subjugate the individual to the will of his examiner" *Id.*

Had Mr. O'Rourke's attorney challenged the evidence, the court could have found the custodial statements were coerced. The police engaged classic psychological tactics to get Mr. O'Rourke to confess. Alan Hirsch, *Going to the Source: The New Reid Technique & False Confessions*, 11 Ohio St. J. Crim. L. 803, 805 (2014). They isolated him at the police station. RP 327. They consistently minimized his actions. *E.g.* RP 395. They engaged in trickery, inventing witnesses and evidence. *E.g.* RP 419. Once the accusatory portion of the interrogation began, they frequently told Mr. O'Rourke he was lying. *E.g.* RP 413. These were grounds for suppression.

Instead, Mr. O'Rourke's attorney stipulated that the statements were voluntary. RP 112. There was no strategic reason for this. The statements harmed Mr. O'Rourke's defense and could have been suppressed. The failure to challenge these statements was unreasonable.

ii. Violations of the privacy act.

As argued previously, the privacy act requires police to inform a suspect when they are being recorded. *Lewis*, 157 Wn.2d at 452. Two

of the recordings played to the jury in their entirety violated the privacy act. Had Mr. O'Rourke's attorney moved to exclude these statements, the court would have granted the motion.

First, the body mike recording violated the privacy act. Even when it is not a private conversation, officers must inform detainees when they are recording their conversation. *Lewis*, 157 Wn.2d at 452. There was no evidence Mr. O'Rourke was ever informed that he was being recorded. The remedy for this breach of the privacy act is the exclusion of the recording. *Id.* Had defense counsel objected, it is likely the court would have ruled in Mr. O'Rourke's favor.

The second police interrogation, taking place ten hours after the first, violated the privacy act. The act is clear that recorded statements made by the police of suspects require strict compliance with the privacy act. RCW 9.73.090(b); *State v. Mazzante*, 86 Wn.App. 425, 430, 936 P.2d 1206 (1997). Compliance requires the police to record the rights of the suspect, along with the waiver. RCW 9.73.090(b). There are no legislative exceptions which exempt the police from the obligation, even where there is independent evidence of knowing, intelligent and a voluntary written waiver of those rights. *Id.* at 430.

There was no strategic reason for not challenging these violations of the privacy act. Some of the most damaging statements made by Mr. O'Rourke occurred on these recordings. Had the court been asked, it would have ruled in Mr. O'Rourke's favor. There is no reason why Mr. O'Rourke's attorney did not move to exclude these statements.

*g. There was no attempt to limit prior act evidence where the prosecutor claimed Mr. O'Rourke previously committed an assault against Mr. Hettinger.*

Evidence of other acts is generally inadmissible. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). Exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged crimes. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). Courts must be wary of the potential risk prior act evidence has in prejudicing an accused and be aware of situations "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (citations omitted). 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).

Prior to admitting prior act evidence, 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. *Fisher*, 165 Wn.2d at 949; ER 402.

Most significantly, the court heard evidence of a prior incident between Mr. Hettinger and Mr. O'Rourke where Mr. Hettinger was ultimately arrested for pushing Mr. O'Rourke down some stairs during an argument. RP 508. While defense counsel introduced the order as evidence Mr. Hettinger had been ordered to stay away from Mr. O'Rourke, he did not inquire into the underlying facts.

When the prosecutor re-examined the witness, he spent considerable time inquiring into what happened after the assault, especially about subsequent contacts between Mr. O'Rourke and Mr. Hettinger. This examination was based on hearsay statements, including what other officers knew about the contacts. RP 511, 518, 628, 629, 630. Defense counsel did not object when the prosecutor introduced these hearsay statements.

Witness on stand	<b>Hearsay statements regarding prior acts elicited during direct examination</b>	RP
Daniel	Wasn't it fairly common knowledge within all law enforcement that Mr. O'Rourke and Mr. Hettinger were having regular contact after the order was entered? A Yes.	511
Daniel	In the scenario that Mr. Bottomly described where Melvin invites Mr. Hettinger over to his house, he's trapping Mr. Hettinger into committing a crime? A Yeah, typically, in those situations we will submit a report to the Prosecutor to let the Prosecutor know that the other party had, you know, made an overt act to invite somebody over to their house and typically no charges would be brought.	518
Denny	And what did Mr. O'Rourke report to the police that Mr. Hettinger had done to him? A He had pushed him, causing him to fall back into the stairwell.	628
Denny	According to the police report, did he have any injuries at all? A No, he did not. Q Was anyone injured? A Mr. Hettinger was.	629
Denny	Sergeant Denny, are there any other reports of violence by Mr. Hettinger on Mr. O'Rourke reported by anyone in the Spillman system? A No, there's not.	630
Denny	Are there any other reports in the Spillman system of verified threats by Mr. Hettinger to Mr. O'Rourke? A Not that I'm aware of.	632

Defense counsel also did not object when the prosecutor introduced other prior act evidence, including his argument that Mr. O'Rourke was actually the aggressor in the incident when Mr. Hettinger was arrested for assault and that there were no reports to support Mr. O'Rourke's claims of prior abuse. RP 628. He also discussed a report Mr. O'Rourke made regarding thefts and one regarding threatening texts Mr. O'Rourke received. RP 632, 633.

Witness on stand	<b>Prior act evidence admitted without objection</b>	RP
Foss	Prior police contacts with Mr. O'Rourke	160
Denny	Assault resulting in no contact order being issued against Mr. Hettinger.	628
Denny	Threatening text messages to Mr. O'Rourke reported on May 11, 2015	631
Denny	Report of theft from Mr. O'Rourke reported on July 17, 2015	632
Denny	Report of theft from Mr. O'Rourke reported on May 17, 2015	633

“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)). Only after the court has concluded the evidence

satisfies the requirements of ER 401 and ER 404(b) can the court appropriately balance the probative value against the prejudicial effect, as required by ER 403. *Saltarelli*, 98 Wn.2d at 363. Because Mr. O'Rourke's attorney never challenged the evidence, the court never considered its relevance or weighed its prejudice. Had the court been given the opportunity, it is likely the court would have excluded the prior act evidence based on relevance and prejudice. ER 403, ER 404.

*h. No challenges were made to testimonial evidence that violated the confrontation clause.*

Out-of-court statements to a police officer alleging a crime occurred are testimonial and may not be admitted at trial absent the opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *State v. Koslowski*, 166 Wn.2d 409, 426-27, 209 P.3d 479 (2009); U.S. Const. amend. 6; Const. art. I, § 22. A violation is reviewed de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

The statements discussed in the previous section were also admitted in violation of the confrontation clause. Statements to police investigating a completed offense fall within the 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 that 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 that Mr. O’Rourke was a dangerous man who deserved to be incarcerated. This Court should

find Mr. O'Rourke's lawyer ineffective for his failure to evidence entered into evidence in violation of the confrontation clause.

*i. Defense counsel's failures prejudiced the outcome of this case and requires reversal.*

There can be no question that 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 to this charge was that the homicide was justified. Critical to this defense was his credibility and for him not to be seen as an aggressor.

The improper evidence admitted without objection by Mr. O'Rourke's attorney painted Mr. O'Rourke as a liar killing Mr. Hettinger without reason. Had the jury not heard the stream of improper opinion evidence, prior act evidence, and coerced statements, there is a reasonable probability that 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)). While it may be true that the law presumes counsel is effective, there is a point where 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 failure to object constituted ineffective assistance of counsel and has hampered Mr. O’Rourke’s appeal. *Ermert*, 94 Wn.2d at 843. 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 denied Mr. O’Rourke his Fourteenth Amendment right to a fair trial.**

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial under the Fourteenth Amendment and art. I, § 3 of Washington’s constitution. U.S. Const. amend. 14, Const. art. I, § 3; *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (considering the accumulation of trial counsel’s errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (concluding that

“the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”). 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 that their cumulative effect on Mr. O’Rourke’s right to present a defense demands reversal. In addition, the overriding probative value of the prior act evidence was not outweighed by its heightened prejudicial effect, and the prosecutor’s misconduct created an enduring prejudice that denied Mr. O’Rourke a fair trial. His conviction should be reversed.

#### F. CONCLUSION

Mr. O’Rourke was deprived of his right to a fair trial by the ineffective assistance of his defense attorney and the misconduct of the prosecutor. The ineffective assistance and the misconduct provide independent grounds for reversal, as does their cumulative effect. Mr.

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

DATED this 25th day of July 2018.

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.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, NINA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF JULY, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |   |                   |  |
|---|-------------------|--|
| <input checked="" type="checkbox"/> BENJAMIN NICHOLS, DPA<br>[bnichols@co.asotin.wa.us]<br>ASOTIN COUNTY PROSECUTOR'S OFFICE<br>PO BOX 220<br>ASOTIN, WA 99402-0220 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> MELVIN O'Rourke<br>402370<br>WASHINGTON STATE PENITENTIARY<br>1313 N 13TH AVE<br>WALLA WALLA, WA 99362-1065                     | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                |

SIGNED IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF JULY, 2018.

X 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711

# WASHINGTON APPELLATE PROJECT

July 25, 2018 - 4:26 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35565-9  
**Appellate Court Case Title:** State of Washington v. Melvin R. O'Rourke  
**Superior Court Case Number:** 15-1-00121-5

### The following documents have been uploaded:

- 355659\_Briefs\_20180725162458D3050607\_3384.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was washapp.072518-10.pdf*

### A copy of the uploaded files will be sent to:

- bnichols@co.asotin.wa.us
- greg@washapp.org

### Comments:

\*\*This is being refiled for the purpose of correcting the filing attorney information.\*\*

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 701  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20180725162458D3050607**