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No. 36489-5-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**William Gadberry,**

Appellant.

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Spokane County Superior Court Cause No. 18-1-02678-5

The Honorable Judge Maryann C. Moreno

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Gadberry's conviction for second-degree assault was entered in violation of his Sixth and Fourteenth Amendment right to a jury trial.
2. Deputy Johnston provided testimony that invaded the province of the jury and infringed Mr. Gadberry's right to an independent jury determination of the facts.
3. Deputy Johnston's testimony included a nearly explicit opinion on Mr. Gadberry's guilt.

**ISSUE 1:** Opinion testimony on the guilt of an accused person infringes the right to an independent jury determination of the facts. Did Mr. Gadberry's conviction violate his Sixth and Fourteenth Amendment right to a jury trial because of an officer's nearly explicit opinion that he was the primary aggressor in the conflict with Learn?

4. Mr. Gadberry was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
5. Defense counsel provided ineffective assistance by failing to object to inadmissible testimony that prejudiced Mr. Gadberry.
6. Defense counsel should have objected to Deputy Johnston's impermissible opinion on Mr. Gadberry's guilt, Learn's prejudicial testimony regarding prior assaults, and Detective Rickett's inadmissible profile testimony linking Mr. Gadberry to the worst domestic violence perpetrators.

**ISSUE 2:** Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Was Mr. Gadberry denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel by his attorney's failure to object to inadmissible evidence?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

William and Steve Gadberry lived with their mother. RP (9/18/18) 151-152, 185-186. In the winter of 2017, Quinn Learn was down on her luck and homeless. She moved into the Gadberry home to help their mother, who suffered multiple health issues. RP (9/18/18) 117-119, 147, 185-187, 201.

In late June of 2018, their mother fell ill and was hospitalized. RP (9/18/18) 117-120, 152. Because of their mother's ill health, other siblings saw to her affairs and decided to sell the house. RP (9/18/18) 121, 152. This meant that the two Gadberry brothers and Learn needed to vacate the premises by the end of June. RP (9/18/18) 121, 189.

On June 19, 2018, Mr. Gadberry confronted Learn about his belief she was taking items with her that were not hers. RP (9/18/18) 123, 189, 202. She had multiple items visible in her vehicle that William Gadberry believed were his or his mother's, including blankets and a fishing pole. RP (9/18/18) 129-130, 140, 156-157, 188-190. Learn claimed that it was her own pole, and that all of the items she had packed were her own. RP (9/18/18) 140-141, 190.

The two scuffled inside and fell on the floor. RP (9/18/18) 124-135, 158-159. The two combatants did not agree on much else about how this happened and what happened next. Learn would later claim that Mr.

Gadberry attacked and tried to kill her. RP (9/18/18) 124-136. Mr.

Gadberry said that Learn punched him, and after they fell, he struggled to free himself. RP (9/18/18) 191-197. Mr. Gadberry's brother called the police. RP (9/18/18) 153-154.

When Deputy Walker arrived, they were arguing at the van outside. RP (9/17/18) 91. He saw that William Gadberry had scratches and blood on his face and Learn had red marks on her. RP (9/17/18) 94, 101, 195.

The State charged William Gadberry with second degree assault, attempted murder, and harassment. CP 1-2.

At trial, Deputy Johnston told the jury that he had been trained to determine who the primary aggressor had been in an altercation, though he gave no insight into how this could be done. RP (9/17/18) 112. He opined that Mr. Gadberry had been scratched by a person who was defending herself. RP (9/17/18) 113. The defense did not object to this testimony. RP (9/17/18) 112-114.

Learn claimed that Mr. Gadberry had choked her with a belt and tried to kill her. RP (9/18/18) 124-135. She said that Mr. Gadberry told her he ought to kill her. RP (9/18/18) 124-126. She said he dragged her upstairs and outside to the van by the belt. RP (9/18/18) 130. During cross-examination, she included in an answer that this was not the first time Mr. Gadberry had assaulted her. RP (9/17/18) 138. The defense did

not object to the non-responsive nature of the claim and did not move to strike or otherwise limit the jury's consideration of it. RP (9/17/18) 138. Later in the examination, Learn returned to the topic and claimed Mr. Gadberry had hit her and grabbed her around the neck before. RP (9/17/18) 145. Again, the defense did not object or seek to limit the jury's consideration. RP (9/17/18) 144-145.

The State called Detective Ricketts, who claimed domestic violence and strangulation expertise. RP (9/17/18) 162-181. He interviewed Learn the day after the incident, and he told the jury that he saw "significant" injuries, and classified Learn's signs as "upper 15 percent" of "serious strangulations." RP (9/17/18) 174-175. He told the jury that strangulations mean "higher level of lethality" in a relationship and described multiple ways a strangulation could kill a person, noting that it can kill "rather easily." RP (9/17/18) 177-179. The defense did not object to any of this testimony, nor did the defense attorney cross-examine Detective Ricketts. RP (9/17/18) 161-180.

Mr. Gadberry testified that Learn punched him multiple times before they fell to the floor. RP (9/18/18) 190-191, 206. They fell together into her room, where she tried to gouge out his eyes and he struggled to get up.<sup>1</sup> RP (9/18/18) 190-194. He said that she had grabbed the belt, but

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<sup>1</sup> Mr. Gadberry suffers from multiple disabilities, including a shoulder injury and ineffective knees. RP (9/18/18) 205, 207.

at some point he did try to use it to neutralize her so he could free himself. RP (9/18/18) 193-194, 204-206. He denied trying to choke her and explained that he was defending himself.<sup>2</sup> RP (9/18/18) 190-208.

The jury acquitted Mr. Gadberry of attempted murder and harassment. CP 47, 49. He was convicted of second degree assault. CP 45. He was sentenced within the standard range. CP 54-55. He timely appealed. CP 66.

## **ARGUMENT**

### **I. DEPUTY JOHNSTON’S TESTIMONY INVADED THE PROVINCE OF THE JURY AND DEPRIVED MR. GADBERRY OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL.**

Deputy Johnston testified that he had training and experience identifying the aggressor in a conflict. His testimony conveyed his belief that Mr. Gadberry was the aggressor in the struggle with Learn. The testimony amounted to an impermissible opinion on guilt. This violated Mr. Gadberry’s constitutional right to a jury trial.

#### **A. Johnston’s testimony provided “a nearly explicit statement... that [he] believed the accusing victim.”**

A criminal defendant has a constitutional right to an independent jury determination of the facts required for conviction. U.S. Const.

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<sup>2</sup> Apparently after Mr. Gadberry was arrested, Learn used his car to assault her boyfriend. RP (9/17/18) 16-20; CP 3-4. Though still facing that charge at the time of Mr. Gadberry’s trial, the jury was not informed of these events. RP (9/17/18) 16-20.

Amend. VI, XIV; Wash. Const. art. I, §§21 and 22; *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213, 217 (2014). A witness’s opinion on guilt is improper whether made directly or by inference. *Id.*; *State v. King*, 167 Wn.2d 324, 331-332, 219 P.3d 642 (2009).

In this case, Deputy Johnston improperly provided an opinion on guilt. This violated Mr. Gadberry’s constitutional right to a jury trial. *King*, 167 Wn.2d 324, 331-332

The only issue at trial was whether Mr. Gadberry lawfully used force in self-defense.<sup>3</sup> CP 39-42. Johnston’s testimony resolved this issue against Mr. Gadberry.

Johnston testified that he’d received “training on how to identify a primary aggressor.” RP (9/17/18) 112. This lay the groundwork for his opinion that Mr. Gadberry started the fight.

After telling jurors that he’d been trained on identifying the primary aggressor, Johnston explained that Washington law required officers to “make those determinations based on training and experience” in order to arrest the aggressor and “protect who we believe might need protection.” RP (9/17/18) 112-113. He then testified that a scratch on Mr. Gadberry’s face was a “defensive wound.” RP (9/17/18) 113. Other

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<sup>3</sup> He admitted his involvement in a physical altercation but testified that Learn started the fight by punching him and trying to gouge his eyes out. RP (9/18/18) 190-191. He also said that he felt he needed to defend himself against her. RP (9/18/18) 196.

evidence showed that officers arrested Mr. Gadberry and sought to book him into jail. RP (9/17/18) 100; RP (9/18/18) 165-166.

The clear inference from this testimony was that Deputy Johnston (and the other officers) believed Mr. Gadberry was the primary aggressor. The testimony was “a nearly explicit statement by the witness that the witness believed the accusing victim.” *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Deputy Johnston’s testimony violated Mr. Gadberry’s constitutional right to a jury trial. *Quaale*, 182 Wn.2d at 199-202.

A police officer’s improper opinion may be particularly prejudicial because it carries “a special aura of reliability.” *King*, 167 Wn.2d at 331 (quoting *Kirkman*, 159 Wn.2d at 928). Such is the case here: Johnston made repeated references to his training and told jurors that he had responded to “countless domestic violence calls.” RP (9/17/18) 112-113. This bolstered his improper opinion and gave his testimony the special aura of reliability warned of by the Supreme Court in *King* and *Kirkman*.

Johnston’s testimony invaded the province of the jury and violated Mr. Gadberry’s Sixth and Fourteenth Amendment right to a jury trial. *King*, 167 Wn.2d at 331-332. The conviction must be reversed, and the case remanded for a new trial. *Id.*

B. The Court of Appeals should review *de novo* this manifest constitutional error.

Alleged constitutional errors are reviewed *de novo*. *Blomstrom v. Tripp*, 189 Wn.2d 379, 389, 402 P.3d 831 (2017). A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3).

To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.”<sup>4</sup> *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

Consistent with these principles, the Supreme Court has determined that the manifest error standard is met whenever the jury is presented with “a nearly explicit statement by the witness that the witness believed the accusing victim.” *Kirkman*, 159 Wn.2d at 936; *see also King*, 167 Wn.2d at 331-332. Here, Deputy Johnston’s testimony included a “nearly explicit” opinion on Mr. Gadberry’s guilt.

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<sup>4</sup> The showing required under RAP 2.5 (a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Lamar*, 180 Wn.2d at 583.

Johnston testified that he'd been trained to identify the primary aggressor in a conflict, that Mr. Gadberry had defensive wounds (indicating that Learn acted in self-defense), and that officers were required to arrest the aggressor to "protect who we believe might need protection." RP (9/17/18) 112-113.

This testimony, combined with evidence that the officers arrested Mr. Gadberry and sought to book him into the jail amounted to a "a nearly explicit statement" that Deputy Johnston and the other officers "believed the accusing victim." *Kirkman*, 159 Wn.2d at 936.

The trial court "could have corrected the error"<sup>5</sup> by admonishing jurors to disregard the improper opinion testimony. The error is manifest and may be raised for the first time on appeal. RAP 2.5(a)(3); *King*, 167 Wn.2d at 331-332.

**II. MR. GADBERRY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Mr. Gadberry's attorney failed to object to three categories of inadmissible evidence. Counsel had no strategic reason to allow the testimony into evidence, and the error prejudiced his client. This deprived Mr. Gadberry of the effective assistance of counsel.

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<sup>5</sup> *O'Hara*, 167 Wn.2d at 100.

- A. Defense counsel failed to object to inadmissible evidence; counsel's errors prejudiced Mr. Gadberry.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Mr. Gadberry was denied the effective assistance of counsel by his attorney's failure to object to inadmissible evidence. The conviction must be reversed because counsel's error adversely impacted the verdict.

To obtain relief on an ineffective assistance claim, a defendant must show "that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010); *Kyllo*, 166 Wn.2d at 862. Although courts apply "a strong presumption that defense counsel's conduct is not deficient," a defendant rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Counsel performs deficiently by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection

would likely have been sustained and the result of the trial would have been different without the inadmissible evidence. *Id.*

Here, defense counsel should have objected to three categories of highly prejudicial testimony. First, counsel failed to object to Deputy Johnston's improper opinion testimony. RP (9/17/18) 113. As outlined above, the testimony was "a nearly explicit statement by [Deputy Johnston] that [he] believed the accusing victim." *Kirkman*, 159 Wn.2d at 936. The testimony was inadmissible and should have been excluded. *Quaale*, 182 Wn.2d at 199-202.

Second, counsel should have sought to exclude Learn's claims of prior assaults. RP (9/18/18) 138, 145. A motion *in limine* could have been heard prior to trial, outside the jury's presence. Any probative value was substantially outweighed by the danger of unfair prejudice, and the evidence was inadmissible propensity evidence. It should have been excluded under ER 403 and ER 404(b). *See, e.g., State v. Slocum*, 183 Wn. App. 438, 333 P.3d 541 (2014).

Instead of bringing a pretrial motion to exclude the evidence, defense counsel actually elicited the testimony on more than one occasion.<sup>6</sup> RP (9/18/18) 138, 145. Because the testimony was introduced

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<sup>6</sup> Arguably, some of the testimony may have been admissible for the limited purpose of showing Learn's "reasonable fear" as an element of the harassment charge. CP 34. However, the prosecutor did not seek to introduce the evidence; instead, defense counsel placed it before the jury on cross examination. Furthermore, counsel did not seek an instruction limiting the jury's consideration of the evidence.

without any limitation, jurors were free to consider it for any purpose. This allowed the jury to use the evidence as propensity evidence. *See State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

Third, counsel should have objected when the prosecutor introduced profile testimony comparing Mr. Gadberry to other domestic violence perpetrators. RP (9/18/18) 174-178. The evidence was inadmissible and should have been excluded under ER 402 and ER 403.

An expert opinion in the form of “profile” testimony creates the risk of “unfair prejudice and the ensuing false impression the jury might derive about the value of the expert's ostensible inference.” *State v. Braham*, 67 Wn. App. 930, 935, 841 P.2d 785 (1992).<sup>7</sup> Such evidence has “virtually no probative value” and is unduly prejudicial because it implies a specific person’s guilt based on characteristics of known offenders. *Id.*, at 939; *see also State v. Crow*, --- Wn.App.2d ---, \_\_\_, 438 P.3d 541 (2019).

Detective Ricketts, who was presented as a strangulation expert, testified that Learn’s injuries—allegedly sustained during her struggle with Mr. Gadberry— were in “the top 15 percent” of the most serious

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<sup>7</sup> *See also State v. Maule*, 35 Wn. App. 287, 293, 667 P.2d 96 (1983); *State v. Steward*, 34 Wn. App. 221, 223, 660 P.2d 278 (1983); *State v. Petrich*, 101 Wn.2d 566, 576, 683 P.2d 173, 180 (1984), *modified in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

strangulations. RP (9/18/18) 174-175. He went on to imply that she was at “more risk [of] being killed or very seriously injured” in the future; he also talked about his experience investigating strangulation homicides in domestic violence cases.<sup>8</sup> RP (9/18/18) 177-178.

This testimony linked the allegations here to the behavior of other offenders. It increased the risk that Mr. Gadberry would be convicted “not for what he did but for what others are doing.” *Crow*, --- Wn.App.2d at \_\_\_\_\_. It suggested to jurors that Mr. Gadberry was even worse than the typical domestic violence perpetrator.

Profile testimony is inadmissible under ER 401, ER 402, and ER 403. *Braham*, 67 Wn. App. a937-939. A reasonable defense attorney would have objected. *Id.* The evidence suggested that Mr. Gadberry was among the worst offenders and raised the specter of future lethality. Mr. Gadberry’s lawyer provided deficient performance by failing to protect his client from the irrelevant, highly prejudicial evidence. *Saunders*, 91 Wn. App. at 578.

Defense counsel should have objected to all three categories of inadmissible evidence. No tactical reason justified the introduction of improper opinions that invaded the province of the jury, claims that Mr.

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<sup>8</sup> Although Learn and Mr. Gadberry were not intimate partners, the State charged each crime as a domestic violence offense. CP 1-2. Jurors returned a special verdict finding that the two were members of the same family or household. CP 46.

Gadberry had previously assaulted Learn, and inadmissible profile testimony. *Id.*

Counsel's failure to object prejudiced Mr. Gadberry. His entire case rested on his self-defense claim. Jurors heard that the officers believed he was the aggressor, that he had a propensity for assaulting Learn, that he was among the worst 15% of domestic violence perpetrators, and that there was some risk he would kill Learn in the future.

Having heard all this, the jury was more likely to convict than if the inadmissible evidence had been excluded. Accordingly, there is a reasonable probability that defense counsel's failure to object affected the outcome of the trial. *Kyllo*, 166 Wn.2d at 862. Mr. Gadberry was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* His conviction must be reversed, and the case remanded for a new trial. *Id.*

B. The Court of Appeals should review this constitutional issue *de novo*.

Ineffective assistance is an issue of constitutional magnitude that can always be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5 (a)(3). An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *State v. Drath*, --- Wn.App.2d---, \_\_\_, 431 P.3d 1098 (2018).

The Court of Appeals should review Mr. Gadberry's ineffective assistance claim *de novo*.

### **CONCLUSION**

Mr. Gadberry's conviction rested in part on inadmissible opinion testimony. Deputy Johnston conveyed to the jury his opinion—shared by the other officers—that Mr. Gadberry was the aggressor in his conflict with Learn. The evidence violated Mr. Gadberry's constitutional right to a jury determination of the facts necessary for conviction.

Defense counsel should have objected to the impermissible opinion testimony. Counsel should also have objected to Learn's claims regarding prior assaults, and to inadmissible profile testimony that linked Mr. Gadberry to the worst domestic violence offenders. Counsel's failure to object to these three categories of inadmissible evidence prejudiced Mr. Gadberry and infringed his constitutional right to the effective assistance of counsel.

Mr. Gadberry's conviction for second-degree assault must be reversed. The case must be remanded for a new trial, with instructions to exclude the inadmissible evidence.

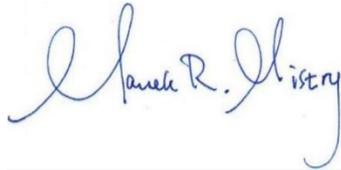
Respectfully submitted on June 26, 2019,

**BACKLUND AND MISTRY**

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A handwritten signature in blue ink that reads "Manek R. Mistry". The signature is written in a cursive style with a large initial 'M'.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 26, 2019.



---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

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## Transmittal Information

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