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No. 37022-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Thomas McBride,

Appellant.

Whitman County Superior Court Cause No. 19-1-00097-4

The Honorable Judge Pro Tem Gary J. Libey

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. McBride's conviction for possession with intent to deliver was entered in violation of his Sixth and Fourteenth Amendment right to a jury trial.
2. Deputy Nebe's testimony invaded the province of the jury and infringed Mr. McBride's right to an independent jury determination of the facts.
3. Deputy Nebe's testimony included a nearly explicit opinion on Mr. McBride's guilt.
4. Deputy Nebe should not have been allowed to testify that Mr. McBride had control over the area where drugs were found.

ISSUE 1: Opinion testimony on the guilt of an accused person infringes the right to an independent jury determination of the facts. Did Mr. McBride's conviction violate his Sixth and Fourteenth Amendment right to a jury trial because Deputy Nebe opined that Mr. McBride "ha[d] control over" the area where drugs were found?

5. The trial judge improperly commented on the evidence in violation of Wash. Const. art. IV, §16.
6. The trial judge's improper comments infringed Mr. McBride's Fourteenth Amendment right to due process.
7. The trial judge violated the appearance of fairness doctrine by directing the prosecutor to introduce certain evidence.

ISSUE 2: A judge may not comment on the evidence, and must appear fair. Did the trial judge comment on the evidence, violate the appearance of fairness, and infringe Mr. McBride's right to due process by directing the prosecutor in her presentation of the State's case?

8. The admission of testimonial hearsay violated Mr. McBride's confrontation right under the Sixth and Fourteenth amendments.
9. The trial court erred by allowing the state to have the police officer read from an unmarked document containing inadmissible hearsay, in violation of ER 802.
10. The trial court erred by allowing Deputy Nebe to read from an unmarked transcript prepared by the prosecuting attorney's office.

ISSUE 3: The introduction of testimonial hearsay violates the confrontation clause unless the declarant is unavailable, and the defendant had a prior opportunity for cross-examination. Did the trial court violate Mr. McBride's confrontation right and ER 802 by allowing a police officer to read from an unmarked and unadmitted transcript interpreting a recorded conversation that the judge described as hard to hear?

11. Mr. McBride's conviction was based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.
12. The prosecutor improperly introduced irrelevant evidence suggesting that Mr. McBride had a propensity toward criminal activity.
13. Jurors should not have been allowed to consider Mr. McBride's numerous prior law enforcement contacts as substantive evidence of his guilt.
14. Jurors should not have been allowed to consider the three prior search warrants served at Mr. McBride's residence as substantive evidence of his guilt.

ISSUE 4: A criminal conviction may not be based on propensity evidence. Did Mr. McBride's conviction violate his Fourteenth Amendment right to due process because it was based in part on propensity evidence?

15. Mr. McBride was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
16. Defense counsel provided ineffective assistance by failing to object to inadmissible testimony that prejudiced Mr. McBride.
17. Defense counsel should have objected to Deputy Nebe's impermissible opinion on Mr. McBride's guilt.
18. Defense counsel should have objected to Deputy Nebe's testimony that he'd had numerous contacts with Mr. McBride and had served three prior search warrants at his house.
19. Defense counsel unreasonably allowed jurors to consider Deputy Nebe's testimony about prior contacts and search warrants as propensity evidence.

ISSUE 5: Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Was Mr. McBride denied his Sixth and Fourteenth

Amendment right to the effective assistance of counsel by his attorney's failure to object to inadmissible evidence?

INTRODUCTION AND SUMMARY OF ARGUMENT

At Mr. McBride's trial for possession with intent to deliver methamphetamine, Deputy Bryce Nebe was permitted to opine that Mr. McBride had control over the area where drugs were found. This nearly explicit opinion on Mr. McBride's guilt violated his right to a jury determination of the facts necessary for conviction.

At the court's direction, the prosecutor introduced portions of a transcript prepared by prosecuting attorney's office. The document interpreted a recording of a jail phone call that the trial court described as hard to hear. The member of the prosecutor's office did not testify at trial, and the purported transcript was not marked or offered as an exhibit. This violated ER 802 and Mr. McBride's Sixth and Fourteenth Amendment confrontation right. It also amounted to an unconstitutional comment on the evidence and violated Mr. McBride's due process right to a fair trial.

Deputy Nebe told the jury he'd had numerous prior contacts with Mr. McBride. He also testified that he'd served three prior search warrants at Mr. McBride's house. The testimony was introduced without limitation, and thus was available to the jury as substantive evidence of Mr. McBride's guilt. Mr. McBride's conviction violated his Fourteenth Amendment right to due process because it was based in part on propensity evidence.

Defense counsel did not object to Deputy Nebe's testimony about the earlier search warrants and his prior contacts with Mr. McBride. Nor did counsel seek instructions limiting the jury's consideration of this evidence. Counsel also failed to object to Deputy Nebe's opinion that Mr. McBride had control over the area where the drugs were found. Counsel's failures deprived Mr. McBride of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Seven adults lived together in a house in Oakesdale, Washington. RP (7/8/19) 144. Five of the residents were part of the McBride family, as this had been their family home. RP (7/8/19) 114, 144.

In May of 2019, police got a search warrant for the house. RP (7/8/19) 82. Police knocked and got no immediate response. RP (7/8/19) 82. After waiting a short time, police knocked in the door. RP (7/8/19) 96-100. Six people were in the house when police entered. RP (7/8/19) 89, 103-104.

Jeffrey Rower was in Mr. McBride's room, sitting on the bed. RP (7/8/19) 90, 148. Also on the bed was a scale and some white crystals. RP (7/8/19) 128-129. Mr. McBride was seated at the kitchen table when police came in. RP (7/8/19) 94. Upon entry, Deputy Cox accused Mr.

McBride of running to the back of the house, but Mr. McBride said he was washing dishes. RP (7/8/19) 84-86. Deputy Cox later acknowledged that Mr. McBride had difficulty walking. RP (7/8/19) 95. In fact, Thomas McBride generally uses a wheelchair to get around.¹ RP (7/9/19) 194.

In the hall attached to Mr. McBride's room was a garbage can, and under some paper police found methamphetamine. RP (7/8/19) 111. It was what police characterized as a large amount, but no distribution materials were found in the house. RP (7/8/19) 112-113, 130.

Police arrested Mr. McBride.² RP (7/8/19) 115. He was charged with possession of methamphetamine with intent to deliver. CP 1-2.

Prior to trial, the court directed the prosecuting attorney to prepare a transcript of Mr. McBride's telephone conversations recorded by the jail. RP (6/28/19) 42-43, 52. The transcript was prepared to assist the court in ruling on the admissibility of Mr. McBride's statements. RP (6/28/19) 42-43; RP (7/8/19) 52. This transcript was apparently made by staff in the prosecutor's office but never marked as an exhibit or filed with the court. RP (7/8/19) 52; Exhibit List filed 7/9/19, Supp. CP.

During trial, the court admitted recordings of Mr. McBride's telephone conversations from the jail. RP (7/8/19) 134-138. The court

¹At the second court appearance, the court noted that Mr. McBride's "infirmity" made him unable to stand for the court's entrance. RP (5/10/19) 12.

² Mr. McBride was the only occupant arrested. RP (7/8/19) 115.

noted that the recordings were “hard to hear.” RP (7/8/19) 134. When the prosecutor asked Deputy Nebe “[W]hat was Mr. McBride saying there?”, defense counsel objected. RP (7/8/19) 134.

The court intervened and told the prosecutor “[W]hat you’re meaning to intend to admit is the lines 27 through 33 on page 1” of the transcript.³ RP (7/8/19) 134. The document was prepared by prosecution staff who did not testify. RP (7/8/19) 52.

The judge allowed Nebe “to read from the transcription of what was said—exactly what was said.” RP (7/8/19) 134. When the prosecutor told the judge she didn’t have a copy of the transcript, the judge said “I have it.” RP (7/8/19) 135. When the prosecutor found her own copy, she asked the judge “[W]hat lines, your Honor?” RP (7/8/19) 135.

The judge replied “Lines 27 through 33. And that’s on page 1.” RP (7/8/19) 135. Following this remark from the court, the witness began reading from the document, even though the prosecutor had not asked a question. RP (7/8/19) 135. The member of the prosecutor’s staff who prepared the document did not testify, and was not shown to be unavailable.

³ This document was not marked by the clerk or otherwise made part of the trial court record. Exhibit List filed 7/9/19, Supp. CP.

Deputy Cox told the jury that the garbage can with the methamphetamine buried under paper was within Mr. McBride's reach. RP (7/8/19) 88-89.

Deputy Nebe told the jury that Mr. McBride had "control" over the room. RP (7/8/19) 108. He also said that based on what Deputy Cox told him, Mr. McBride's behavior⁴ was consistent with trying to hide contraband. RP (7/8/19) 110.

Deputy Jordan told the jury that he could identify Mr. McBride because he'd contacted Mr. McBride numerous times in his career. RP (7/8/19) 120. He also said he knew the house because he'd served several warrants there in the past. RP (7/8/19) 123.

The defense did not object to any of this testimony. Nor did the defense attorney seek a limiting instruction. RP (7/8/19) 88-89, 108, 110, 120, 123.

The jury convicted Mr. McBride as charged, and he received a sentence of 30 months in prison. CP 62-64. Mr. McBride timely appealed. CP 71.

⁴ This was apparently Deputy Cox's claim that Mr. McBride ran inside the house after police knocked. RP (7/8/19) 108-112.

ARGUMENT

I. DEPUTY NEBE’S OPINION TESTIMONY INVADED THE PROVINCE OF THE JURY AND DEPRIVED MR. MCBRIDE OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL.

After testifying about his training and experience, Deputy Nebe opined that Mr. McBride “ha[d] control over that bedroom” where drugs were found. RP (7/8/19) 101-102, 108. Because the State bore the burden of proving dominion and control, this amounted to a nearly explicit opinion on Mr. McBride’s guilt. It violated Mr. McBride’s Sixth and Fourteenth Amendment right to a jury trial.⁵

A. Deputy Nebe provided an improper opinion on Mr. McBride’s guilt.

A criminal defendant has a constitutional right to an independent jury determination of the facts required for conviction. U.S. Const. Amend. VI; U.S. Const. Amend. 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) (*King I*).

⁵ In addition, counsel’s failure to object to the testimony infringed Mr. McBride’s right to the effective assistance of counsel, as argued below.

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

Because Mr. McBride did not have actual possession of the drugs, the prosecutor was required to show that he had dominion and control. CP 16. Jurors were permitted to consider, among other things, "whether the defendant had dominion and control over the premises where the substance was located." CP 16. The court's instructions allowed jurors to convict based solely on this factor.⁶ CP 16.

To prove dominion and control, the prosecutor asked Deputy Nebe "[W]ho would you say has control over that bedroom...?" RP (7/8/19) 108. Deputy Nebe answered "Thomas McBride." RP (7/8/19) 108.

The clear inference from this testimony was that Deputy Nebe believed Mr. McBride constructively possessed the drugs. Deputy Nebe's testimony was "a nearly explicit statement by the witness" that he believed Mr. McBride was in possession of the drugs. *See State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). The testimony violated Mr. McBride's constitutional right to a jury trial. *Quaale*, 182 Wn.2d at 199-202.

⁶ The instruction said that "[n]o single one of these factors *necessarily* controls your decision." CP 16 (emphasis added).

A police officer's improper opinion may be particularly prejudicial because it carries "a special aura of reliability." *King I*, 167 Wn.2d at 331 (quoting *Kirkman*, 159 Wn.2d at 928). Such is the case here: Deputy Nebe outlined his training and experience before testifying that Mr. McBride had control over the area where the drugs were located. RP (7/8/19) 101-102, 108. This bolstered his improper opinion and gave his testimony the special aura of reliability warned of by the Supreme Court in *King I* and *Kirkman*.

Deputy Nebe's testimony invaded the province of the jury and violated Mr. McBride's Sixth and Fourteenth Amendment right to a jury trial. *King I*, 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." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). 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.

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” expressing a persona opinion on the accused person’s guilt. *Kirkman*, 159 Wn.2d at 936; *see also King I*, 167 Wn.2d at 331-332. Here, Deputy Nebe’s testimony included a “nearly explicit” opinion on Mr. McBride’s guilt.

The trial court “could have corrected the error”⁷ 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 I*, 167 Wn.2d at 331-332.

⁷ *O'Hara*, 167 Wn.2d at 100.

II. THE TRIAL COURT VIOLATED THE APPEARANCE OF FAIRNESS BY COMMENTING ON THE EVIDENCE.

The prosecutor sought to have Deputy Nebe translate or interpret Mr. McBride's words on a recorded conversation that Nebe was not a part of. When faced with defense counsel's objection, the court intervened, telling the prosecutor "[W]hat you're meaning to intend to admit [sic] is the lines 27 through 33 on page 1" of the transcript. RP (7/8/19) 134. When the prosecutor couldn't find her copy, the judge said "I have it." RP (7/8/19) 134. When the prosecutor found her own copy and asked "[W]hat lines, Your Honor?", the judge reiterated that the prosecutor should ask the officer about "Lines 27 through 33... on page 1" of the transcript. RP (7/8/19) 135. Deputy Nebe then read from the document even though the prosecutor had not asked a question. RP (7/8/19) 135.

This exchange gave jurors the appearance that the judge, the prosecutor, and the officer were working together against Mr. McBride. It also amounted to a comment on the evidence and violated Mr. McBride's Fourteenth Amendment right to due process.

A. The trial court violated the appearance of fairness doctrine.⁸

A judicial proceeding violates the appearance of fairness unless "a

⁸ Appearance of fairness claims are reviewed *de novo*. *In re Disciplinary Proceeding Against King*, 168 Wn.2d 888, 899, 232 P.3d 1095 (2010) (*King II*).

reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing.” *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). The doctrine is violated upon a showing of “potential bias.” *Id.* The test is an objective one, which contemplates “a reasonable observer [who] knows and understands all the relevant facts.” *Id.*

Here, the interchange regarding the prosecutor’s purported transcript violated the appearance of fairness. *Id.* Any reasonable observer would have the impression that the court was helping the prosecution present its case against Mr. McBride.

In front of the jury, Judge Libey told the prosecutor which evidence the State should introduce. RP (7/8/19) 134-135. When the prosecutor couldn’t find her copy of the document, Judge Libey announced that he had a copy. RP (7/8/19) 134-135. He pointed her to the specific lines in the transcript that she should introduce into evidence. RP (7/8/19) 134-135.

This record gives the impression of “potential bias.” *Id.* The jury and Mr. McBride himself likely viewed the judge as a second prosecutor rather than a neutral arbiter.

Because the trial court violated the appearance of fairness, Mr. McBride's conviction must be reversed. *Id.* The case must be remanded for a new trial. *Id.*

B. The trial court improperly commented on the evidence in violation of Wash. Const. art. IV, §16.

Under the state constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. IV, §16. Judicial comments are presumed prejudicial. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007).

A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted.⁹ *Id.*, at 743-745. This is a higher standard than normally applied to constitutional errors. *Id.*; *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). *Cf. State v. DeLeon*, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (outlining constitutional standard for harmless error).

Here, Judge Libey improperly commented on the evidence. By announcing that he had a copy of the transcript, directing the prosecutor's attention to a specific portion of it, and prompting Deputy Nebe to read

⁹ Judicial comments invade a fundamental right, and thus can always be raised for the first time on review. RAP 2.5(a)(3); *Jackman*, 156 Wn.2d at 743. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

from that portion, the court gave the appearance that he was aligned with the State.

The judge also implied that the transcript was a reliable interpretation of the recorded conversation.¹⁰ Furthermore, these comments improperly emphasized the evidence. By directing the prosecutor to introduce certain portions of the transcript, the judge suggested that the evidence was important, reliable, and should be provided to the jury. The judicial comment violated Wash. Const. art. IV, §16.

To be error, the record does not need to affirmatively show an absence of all possible prejudice. *Jackman*, 156 Wn.2d at 743. Because the court emphasized the evidence outlined in the transcript, jurors may have viewed it as significant to their determination of Mr. McBride's guilt. Absent the improper comment, some jurors may have had a reasonable doubt as to Mr. McBride's guilt. Because of this, the conviction must be reversed. *Id.*

¹⁰ This implication came in spite of the fact that no party to the conversation affirmed the accuracy of the transcript, nor did the preparer of it.

III. THE INTRODUCTION OF TESTIMONIAL HEARSAY VIOLATED ER 802 AND MR. MCBRIDE’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT WITNESSES.

Over objection, the trial judge allowed Deputy Nebe to read from a purported transcript prepared by a member of the prosecutor’s staff. The prosecutor office staff had interpreted a recorded conversation that the judge described as “hard to hear.” There was no showing that the office staff member was unavailable, the other purported participant in the conversation did not testify, and Mr. McBride did not have a prior opportunity for cross-examination. This violated ER 802 and infringed Mr. McBride’s Sixth and Fourteenth Amendment confrontation right.

A. The trial court erred by directing the prosecutor to introduce testimonial hearsay in violation of Mr. McBride’s confrontation rights.

The Sixth Amendment prohibits the introduction of testimonial hearsay at a criminal trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable, and the accused had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 59. The core

definition of testimonial hearsay includes statements “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford*, 541 U.S. at 52.

In this case, the purported transcript prepared by the prosecutor falls within *Crawford*'s core definition of testimonial hearsay. It was prepared under circumstances which would lead an objective witness to reasonably believe that it would be available for use at a later trial. *Id.*

In fact, the court directed the prosecutor to have someone from her office prepare the transcript prior to trial. RP (6/28/19) 42-43; RP (7/8/19) 52. The member of the prosecution staff produced a statement based on their interpretation of the recording. RP (6/28/19) 42-43; RP (7/8/19) 52, 134-135. Any reasonable person would believe that the document would be available for use at trial. *Id.*

The person who prepared the document did not testify. There was no showing that the person was unavailable, and Mr. McBride did not have a prior opportunity for cross-examination. He objected to its introduction. RP (7/8/19) 134-138. Under these circumstances, introduction of the evidence violated Mr. McBride's right to confront the witnesses against him. *Id.*

The case is analogous to cases involving an interpreter. *See United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013). In such cases, the prosecution seeks to introduce officer testimony conveying statements made through an interpreter. *Id.* at 1323-1324. Where an interpreter is used, the defendant has the right to confront the interpreter. *Id.*, at 1324. The interpreter “is the declarant of the English-language statements” heard by the officer. *Id.*; *see also Taylor v. State*, 226 Md. App. 317, 130 A.3d 509 (2016); *State v. Morales*, 173 Wn.2d 560, 269 P.3d 263 (2012), *as corrected on denial of reconsideration* (Mar. 7, 2012).

Testimony from an officer who relays the translation provided by an interpreter is “classic hearsay,” consisting of the officer’s “in-court declaration of a statement made by the interpreter...in order to prove the truth of the matter asserted.” *Morales*, 173 Wn.2d at 574; *see also State v. Garcia-Trujillo*, 89 Wn.App. 203, 948 P.2d 390 (1997); *State v. Huynh*, 49 Wn.App. 192, 742 P.2d 160 (1987).

Here, the prosecutor’s office assistant “interpreted” the recording of Mr. McBride’s telephone call, which the trial court described as “hard to hear.” RP (7/8/19) 134. Over objection, Deputy Nebe was permitted to relay that interpretation to the jury. RP (7/8/19) 134-138.

Mr. McBride did not have the opportunity to cross-examine the declarant, and there was no showing that the prosecutor’s staff member

was unavailable. This admission of the evidence violated Mr. McBride's Sixth and Fourteenth Amendment right to confront adverse witnesses.

Charles, 722 F.3d at 1323-1324.

The error requires reversal of Mr. McBride's conviction.

Crawford, 541 U.S. at 52-69. The case must be remanded for a new trial.

Id.

- B. The document, prepared by a member of the prosecutor's office staff who interpreted the audio recording of Mr. McBride's phone calls, was inadmissible under ER 802.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is generally inadmissible. ER 802.

Hearsay that is included within hearsay "is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule." ER 805. This case involves two layers of out-of-court statements, only one of which is admissible.

The first layer consists of Mr. McBride's statements contained on the recording. The statements themselves are not hearsay because they are

the admissions of a party. ER 801(d)(2). They were admissible – in the form of the recording itself.¹¹

However, the second layer of hearsay was not admissible. The second layer consists of the staff member’s “interpretation” of the recording, which the court described as “hard to hear.”¹² RP (7/8/19) 134. The prosecutor’s office assistant purported to give an accurate translation of the semi-audible conversation but did not testify and was not subject to cross-examination. *See Charles*, 722 F.3d at 1323-1324.

Here, as with the interpreter in *Morales*, Deputy Nebe relayed statements made by the prosecutor’s office staff. *Id.*; *Morales*, 173 Wn.2d at 574. The statements were introduced for their truth – that Mr. McBride spoke the words described in the document. *Morales*, 173 Wn.2d at 574. They were hearsay and should have been excluded. *Id.*

Deputy Nebe should not have been permitted to read from the document. Instead, as counsel suggested, “the recording says what the recording says and the jury can hear what they will hear.” RP (7/8/19) 134. The trial court should have sustained Mr. McBride’s objections, and excluded the evidence. *Id.*

¹¹ Alternatively, the State could have introduced Mr. McBride’s statements by producing the testimony of Mr. McBride’s interlocutors.

¹² And in which the prosecutor’s office assistant did not participate.

IV. MR. McBRIDE’S CONVICTION VIOLATED DUE PROCESS BECAUSE IT WAS BASED IN PART ON PROPENSITY EVIDENCE.

During direct examination, Deputy Nebe told jurors that he’d served three search warrants at Mr. McBride’s house. RP (7/8/19) 123. He also testified that he’d “contacted Mr. McBride numerous times in [his] career.” RP (7/8/19) 120. The testimony suggested that Mr. McBride had a propensity toward criminal activity. The jury’s consideration of this testimony as substantive evidence of guilt violated Mr. McBride’s due process right to a fair trial.

The use of propensity evidence to prove a crime violates due process.¹³ U.S. Const. Amend. XIV; *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993). A due process violation occurs if there are no permissible inferences to be drawn from the evidence. *Id.*, at 1384.

Due process requires that people be convicted “because of what they have done, not who they are.” *Id.*, at 1386. The danger posed by propensity evidence is that jurors will convict based on a person’s “suspicious character and previous acts.” *Id.*, at 1385.

Here, Deputy Nebe improperly suggested that Mr. McBride had repeatedly been involved in criminal activity. RP (7/8/19) 120, 123. There were no permissible inferences that could be drawn from the evidence. *Id.*

¹³ The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

The evidence was not relevant to the charged crime. Instead, it suggested to jurors that Mr. McBride was a bad actor, deeply involved in reprehensible criminal behavior.

Believing Mr. McBride had a history of criminal activity, some jurors may have voted to convict simply to remove him from the community regardless of the strength of the evidence. Others may have believed he was more likely guilty of the charged crime because of his propensity toward criminality.

The conviction was entered in violation of Mr. McBride's right to due process.¹⁴ *Id.* Jurors were allowed to consider inadmissible propensity testimony as substantive proof of Mr. McBride's guilt. *See State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). There were no permissible inferences that could be drawn from the evidence. *McKinney*, 993 F.2d at 1384. The conviction must be reversed, and the case remanded for a new trial. *Id.*

¹⁴ The due process violation is a manifest error affecting Mr. McBride's constitutional right to a fair trial. It may be argued for the first time on appeal, and the issue must be reviewed *de novo*. *O'Hara*, 167 Wn.2d at 100; *Watness v. City of Seattle*, --- Wn.App. ---, ___, 457 P.3d 1177 (2019). In addition, Mr. McBride was denied the effective assistance of counsel by his attorney's failure to object, as argued below.

V. MR. MCBRIDE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. McBride's attorney failed to object to Deputy Nebe's inadmissible opinion testimony. He did not object or seek a limiting instruction when the State introduced improper evidence suggesting Mr. McBride had a propensity toward criminal activity. Counsel had no strategic reason to allow the testimony into evidence, and the errors prejudiced his client. This deprived Mr. McBride of the effective assistance of counsel.¹⁵

An accused person is guaranteed 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. McBride 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 errors adversely impacted the verdict. *Id.*

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);

¹⁵ If counsel's objection regarding the purported transcript is insufficient to preserve the confrontation and evidentiary errors, Mr. McBride was denied the effective assistance of counsel on that basis as well. *See* RP (7/8/19) 134-138.

State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). 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 Deputy Nebe’s improper opinion testimony. RP (7/8/19) 108. As outlined above, the testimony was “a nearly explicit statement” by Deputy Nebe that Mr. McBride had dominion and control over the drugs. *See Kirkman*, 159 Wn.2d at 936. The testimony was inadmissible and should have been excluded. *Quaale*, 182 Wn.2d at 199-202.

Defense counsel should also have objected when the State elicited testimony that Deputy Nebe had numerous prior contacts with Mr. McBride and had served three search warrants at his house. RP (7/8/19) 120, 123. This evidence suggested that Mr. McBride had a propensity

toward criminal activity. Its admission violated his Fourteenth Amendment right to due process. *McKinney*, 993 F.2d at 1384.

In addition, counsel should have objected to the propensity evidence under ER 403. Any probative value was substantially outweighed by the danger of unfair prejudice. ER 403; *see, e.g., State v. Briejer*, 172 Wn.App. 209, 227, 289 P.3d 698 (2012).

Furthermore, the evidence was inadmissible under ER 404(b), which provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b); *see State v. Slocum*, 183 Wn.App. 438, 457, 333 P.3d 541, 551 (2014); *State v. Fuller*, 169 Wn.App. 797, 831, 282 P.3d 126 (2012). The evidence suggested that Mr. McBride acted in conformity with his criminal character. Counsel should have objected under ER 403 and ER 404(b).

The prior contacts and earlier search warrants were not admissible for any purpose. They should not have been admitted to prove Mr. McBride’s propensity toward criminal activity. ER 403; ER 404(b); *McKinney*, 993 F.2d at 1384.

Even if the propensity evidence were admissible for a limited purpose, counsel provided deficient performance by failing to seek a limiting instruction. Because the testimony was introduced without any

limitation, jurors were free to consider it for any purpose. *See Myers*, 133 Wn.2d at 36. This allowed the jury to use the propensity evidence as substantive proof of Mr. McBride's guilt. *Id.*

A motion *in limine* could have been heard prior to trial, outside the jury's presence. Instead of bringing a pretrial motion to exclude the evidence, defense counsel failed to object when Deputy Nebe testified about his numerous prior contacts with Mr. McBride and the three prior search warrants he'd served at Mr. McBride's house. RP (7/8/19) 120, 123.

Defense counsel should have objected to Deputy Nebe's inadmissible opinion testimony and to testimony suggesting Mr. McBride's propensity toward criminal activity.¹⁶ No tactical reason justified the introduction of improper opinion testimony invading the province of the jury. Nor was there any reason to allow jurors to hear propensity evidence suggesting that Mr. McBride was a bad actor predisposed toward criminal activity.

Counsel's failure to object prejudiced Mr. McBride. Jurors heard Deputy Nebe's belief that Mr. McBride had control over the area where the drugs were found. RP (7/8/19) 108. His opinion had the "special aura

¹⁶ Furthermore, if his objections regarding the transcript were insufficient to preserve the constitutional and evidentiary errors, Mr. McBride was denied the effective assistance of counsel regarding those issues.

of reliability” that attends an officer’s testimony. *King I*, 167 Wn.2d at 331 (quoting *Kirkman*, 159 Wn.2d at 928). Jurors also heard that Mr. McBride had numerous prior contacts with law enforcement, and that officers had searched his house on three prior occasions. RP (7/8/19) 120, 123.

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. McBride 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.*

CONCLUSION

Deputy Nebe improperly opined that Mr. McBride had control over the area where drugs were found. This infringed Mr. McBride’s right to a jury determination of the facts required for conviction. His conviction must be reversed because the introduction of the evidence violated his right to a jury trial.

The trial court violated the appearance of fairness and commented on the evidence by directing the prosecutor and Deputy Nebe to introduce

a specific portion of a transcript prepared by the prosecutor's office. The improper comments violated Mr. McBride's Fourteenth Amendment right to due process, requiring reversal of his conviction.

In addition, the purported transcript was testimonial hearsay, introduced in violation of ER 802. The error infringed his Sixth Amendment right to confront the witnesses against him. The violation requires reversal of his conviction.

Finally, defense counsel failed to object to the introduction of inadmissible evidence that prejudiced Mr. McBride. This deprived him of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

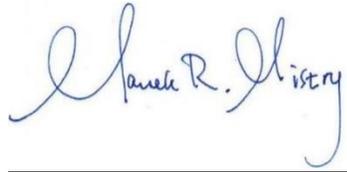
For all these reasons, the case must be remanded to the Superior Court for a new trial.

Respectfully submitted on April 3, 2020,

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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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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 April 3, 2020.



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BACKLUND & MISTRY

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