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SUPREME COURT  
STATE OF WASHINGTON

NO. 80948-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BY RONALD D. CARPENTER

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STATE OF WASHINGTON, Respondent

v.

TYLER SHERWOOD KING, Petitioner

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CLARK COUNTY DISTRICT COURT CASE NO. 63660  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-02322-6  
COURT OF APPEALS NO. 36606-1-II

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

JOHN E. PETERSON, WSBA #38362  
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

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## STATEMENT OF THE CASE

### **Procedural History**

The Defendant was charged with Reckless Driving in violation of RCW 46.61.500 stemming from his conduct on April 5, 2006.

On October 5, 2006, after the trial court heard the Defendant's motion to dismiss for lack of jurisdiction, the Honorable Judge Darwin Zimmerman found that because the Defendant's driving constituted an emergency involving an immediate threat to human life or property under RCW 10.93.070, Officer Starks conducted a valid out-of-jurisdiction arrest. (RP 71).

On November 21, 2006, a jury found the Defendant guilty of Reckless Driving. (RP 283). The Defendant filed a timely notice of appeal to Clark County Superior Court. (CP \_\_).

On appeal, the court affirmed the Defendant's conviction, finding that Officer Starks conducted a proper out-of-jurisdiction arrest under RCW 10.93.070(2). Further, the court found that Officer Starks' opinion testimony did not deny the Defendant a right to a fair trial, and that defense counsel was not ineffective in failing to object to that testimony.

The Defendant filed for discretionary review to Division II of the Court of Appeals. The commissioner denied his motion, holding that because Defendant's trial counsel failed to object to Officer Starks'

opinion testimony, it could not be raised for the first time on appeal.

Further, the commissioner ruled that Officer Starks' out-of-jurisdiction arrest of the Defendant was valid under *Tacoma v. Durham*, 95 Wn. App. 876, 978 P. 2d 514 (1999). The Defendant's motion to modify the commissioner's ruled was denied.

The Defendant filed for discretionary review to this Court and it was accepted.

### **Trial**

On November 21, 2006, a jury convicted the Defendant of Reckless Driving for his conduct that occurred on April 5, 2006.

At trial, Officer Jeff Starks of the Vancouver Police Department testified that on April 5, 2006, he was entering onto southbound I-5 from the La Center exit when he observed the Defendant on his motorcycle about three car lengths ahead of him. (RP 163). Officer Starks noticed that the traffic that day "was a little congested." (RP 164).

From this location, Officer Starks saw that the Defendant was standing up on his motorcycle which Officer Starks had never seen done on a freeway. *Id.* The Defendant was traveling seventy miles per hour when he stood up on his motorcycle. (RP 165). While the Defendant was standing up, Officer Starks also noticed that he was not looking straight ahead but looking at a blue Dodge Durango located to the Defendant's

left. *Id.* Officer Starks observed what looked like the Defendant was taunting this other driver. *Id.*

Next, Officer Starks observed the Defendant sit down on his motorcycle, move into the slow lane and accelerate away at what Officer Starks estimated at one hundred miles per hour. (RP 166 – 167). Officer Starks testified that the only reason he caught up to the Defendant was because traffic slowed him down. (RP 167). Eventually, Officer Starks stopped the Defendant. (RP 169).

Upon contact with the Defendant, the Defendant admitted to Officer Starks that the people in the Durango were bothering him and that he did not know how fast he was going because his speedometer was broken. (RP 170).

After this testimony, the prosecutor had the following exchange with Officer Starks:

Prosecutor: So based on your training, experience and observations of the Defendant's driving, did you form an opinion regarding his driving?

Officer Starks: Yes, I did.

Prosecutor: and what is that opinion?

Officer Starks: I felt that the entire act of what he had done was reckless in my viewpoint.

Prosecutor: Okay. And what ... have you been trained on reckless driving ... the elements of reckless driving?

Officer Starks: Yes.

Prosecutor: Okay. So you felt this was within those elements?

Officer Starks: I did.

-(RP 170 – 171).

Defense counsel did not object to these statements. Officer Starks issued the Defendant a citation for Reckless Driving.

During cross-examination, defense counsel attacked Officer Starks' credibility. First, after reminding Officer Starks of a previous interview, she compelled Officer Starks to admit that he did not know what part of the motorcycle the Defendant was standing on. (RP 172 – 173). Second, she compelled Officer Starks to admit that the video recording system that was inside Officer Starks' police vehicle was not turned on while the Defendant stood up on his motorcycle. (RP 173 – 176). Third, she compelled Officer Starks to admit that he did not ride a motorcycle and did not have a motorcycle endorsement. (RP 176). Fourth, she compelled Officer Starks to admit that he did not use a radar or laser speed measuring device when he determined the Defendant's speed. (RP 176 – 177). Fifth, she questioned Officer Starks about whether his perception was incorrect in assuming that the Defendant stood up

recklessly instead of just an attempt to stretch and whether his perception was incorrect in assuming that the Defendant sped away recklessly instead of having a legitimate reason of getting out of a blind spot. (RP 177 – 178). Sixth, on re-cross examination, she showed Officer Starks the ticket that he wrote which indicated that he saw the Defendant standing on the seat of his motorcycle. (RP 185 – 186). Officer Starks stated that he did write the ticket but that he could not testify in court whether the Defendant was standing on the seat or not. (RP 186).

In her closing argument, she started by asserting that Officer Starks based his opinion of Reckless Driving on assumptions and mistakes. (RP 273 – 274). First, she argued that Officer Starks assumed that the Defendant was like other motorcyclists who drive recklessly. (RP 274). Second, she argued that Officer Starks assumed that the Defendant was doing something reckless when he was side-by-side with another vehicle. *Id.* Third, she pointed out that Officer Starks has no experience riding a motorcycle. Fourth, she argued that Officer Starks made numerous mistakes on the ticket. (RP 275). Fifth, she argued that Officer Starks' opinion was based on his perception which was no more accurate than anybody else's. *Id.* Sixth, she pointed out that Officer Starks assumed that the Defendant would keep on speeding. (RP 275 – 276). Seventh, she argued that the Defendant admitted his mistake of speeding, but Officer

Starks had not admitted his mistake. *Id.* Eighth, she argued that the accusations in this trial were just as flawed as Officer Starks' ticket.

RESPONSE TO ASSIGNMENT OF ERROR NO. 1

**Because the Defendant failed to object at trial and because he has failed to demonstrate that the improper opinion testimony of Officer Starks is manifest constitutional error, this Court should affirm his conviction.**

The Defendant argues that he should be allowed to assert for the first time on appeal that Officer Starks' improper opinion testimony and the prosecutor's reference to his testimony in closing argument resulted in a violation of his right to a fair trial. Petitioner's Brief 8-13. However, because he fails to demonstrate that the improper opinion testimony of Officer Starks was manifest constitutional error, this Court should affirm his conviction.

Rule of Appellate Procedure (RAP) 2.5(a) prevents the Defendant from raising a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. Because this assignment of error is not a challenge to the trial court's jurisdiction or a challenge to the sufficiency of evidence, subsections (1) and (2) of RAP 2.5(a) are inapplicable.

Regarding RAP 2.5(a)(3), this Court has chosen a balanced approach when reviewing constitutional claims for the first time of appeal. On one hand, this Court has indicated that “[c]onstitutional errors are treated specially because they often result in serious injustice to the accused.” *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). On the other hand, this Court has also stated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *Id.* at 687 (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff’d in part, rev’d in part*, 99 Wn. 2d 663, 664, P. 2d 508 (1983)).

As a result, this Court has developed a two-part analysis to determine whether RAP 2.5(a)(3) should allow the Defendant to argue constitutional issues for the first time on appeal. *State v. Lynn*, 67 Wn. App. 339, 345, 835, P. 2d 251 (1992). First, the court must determine whether the alleged error is truly constitutional. *Id.* Second, the court must determine whether the alleged error is “manifest,” i.e., whether the error had “practical and identifiable consequences in the trial of the case.” *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001); *State v. Montgomery*, \_\_ Wn. 2d \_\_, 183, P. 3d 267, 2008 Wash. LEXIS 474, at \*22 (Filed May 15, 2008) (“This exception is a narrow one, and we have found

constitutional error to be manifest only when the error caused actual prejudice or practical and identifiable consequences.”). A purely formalistic error is insufficient to justify appellate consideration of a belated claim. *Lynn*, 67 Wn. App. at 345. Thus, to show manifest constitutional error, the Defendant must demonstrate that the testimony is inadmissible and that the outcome of this trial would have been different. *State v. Warren*, 134 Wn. App. 44, 57, 138 P. 3d 1081 (2006).

In *State v. Kirkman*, 159 Wn. 2d 918, 934 - 938, 155 P. 3d 125 (2007), this Court provided an outline of the scope of RAP 2.5(a)(3) as applied to improper opinion evidence. This Court expressly approved of the reasoning in *City of Seattle v. Heatley*, 70 Wn. App. 573, 585 - 586, 854 P. 2d 658 (1993) (asserting that an officer stating that the defendant was “obviously intoxicated” and “could not drive a motor vehicle in a safe manner” would not rise to “manifest constitutional error”) and *State v. Madison*, 53 Wn. App. 754, 762 - 763, 770, P. 2d 662 (1989) (holding that an expert witness’ testimony, without objection, that a young child’s conduct was “typical of a sex abuse victim” did not arise to manifest constitutional error) in that “[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error.” *Id.* Instead, this Court states that

“Manifest error,” requires an explicit or almost explicit witness statement on an ultimate issue of fact. *Id.*<sup>1</sup>

Just recently in *Montgomery*, this Court addressed whether improper opinion testimony could be challenged under RAP 2.5(a)(3) for the first time on appeal. 2008 Wash. LEXIS at \*22-24. In *Montgomery*, the defendant challenged his conviction of possession of pseudoephedrine with intent to manufacture methamphetamine under multiple theories. One of those theories, which this Court discussed in-depth, was whether improper opinion evidence could be challenged for the first time on appeal under RAP 2.5(a)(3). *Id.* at \*8-24. The Court based its discussion upon the testimony, admitted without objection, of two detectives as well as a chemist that the State called at trial. *Id.* at \*9-10.

First, Detective Knechtel testified to the following after being asked by the prosecutor if he had formed any conclusions: “I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I’d seen those actions several times before.” *Id.* at \*8.

Second, the prosecutor and another Detective, Detective Blashill, had a two-part exchange. Initially, the prosecutor asked him why he had

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<sup>1</sup> In doing so, this Court expressly disapproved of the reasoning in *State v. Carlin*, 40 Wn. App. 698, 700 P.2d 323 (1995). *Kirkman*, 159 Wn.2d at 936.

not stopped the Defendant sooner. Blashill responded, “It’s always our hope that if the person buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the actual lab location.” *Id.* at \*9. On redirect examination, the prosecutor asked Blashill to just answer based on his training and experience. Blashill responded, “That those items were purchased for manufacturing.” *Id.*

Third, on redirect examination, a chemist examined combined purchases of the defendant and a co-defendant and testified, “these are all what lead me toward this pseudoephedrine is possessed with intent.” *Id.* at \*9-10.

After a thorough discussion of improper opinion testimony, this Court held that the above-quoted testimony was improper for four reasons. First, such testimony “went to the core issue and the only disputed element.” *Id.* at \*19. Second, the testimony included explicit expressions such as “I felt very strongly that . . .” and “we believe.” *Id.* at \*21. Third, in discussing the chemist’s testimony, this Court was troubled by the fact that the chemist parroted the legal standard while testifying. *Id.* Finally, this Court stated that because police officers’ opinions carry an “aura of reliability” and low probative value, such opinion evidence on guilty should not be permitted. *Id.* at \*21-22.

This Court, however, held that the Defendant could not challenge such testimony for the first time on appeal under RAP 2.5(a)(3). Central to this Court's analysis was whether improper opinion evidence prejudiced the defendant when the jury was properly instructed. *Id.* at \*22. By citing *State v. Kirkman*, 159 Wn. 2d 918, 937, 155, P. 3d 125 (2007), the *Montgomery* Court incorporated *Kirkman*'s discussion of how jury instructions give jurors the power to independently decide a case and, in some circumstances, cure mistakes. 2008 LEXIS, at \*22-23; *Kirkman*, 159 Wn. 2d at 937 - 938. In applying the principles in *Kirkman*, this Court in *Montgomery* stated that there was no actual prejudice because the jury was properly instructed that jurors "are the sole judges of the credibility of witnesses," and that jurors "are not bound" by expert opinions. *Id.* at \*23 (internal quotations marks omitted). Further, this Court stated that "[t]here was no written jury inquiry or other evidence that the jury was unfairly influenced, and we should presume the jury followed the court's instructions absent evidence to the contrary." *Id.*

This Court's analysis in *Montgomery* applies to the opinion testimony by Officer Starks in this case. Here, the prosecutor and Officer Starks had the following exchange:

Prosecutor: So based on your training, experience and observations of the Defendant's driving, did you form an opinion regarding his driving?

Officer Starks: Yes, I did.

Prosecutor: and what is that opinion?

Officer Starks: I felt that the entire act of what he had done was reckless in my viewpoint.

Prosecutor: Okay. And what ... have you been trained on reckless driving ... the elements of reckless driving?

Officer Starks: Yes.

Prosecutor: Okay. So you felt this was within those elements?

Officer Starks: I did.

-(RP 170 – 71).<sup>2</sup>

As in *Montgomery*, Officer Starks' testimony would be considered improper under current case law because it is an expression by a police officer that goes to the guilt of Defendant. However, as in *Montgomery*, because such testimony did not result in actual prejudice, it cannot not be raised for the first time on appeal under RAP 2.5(a).

When comparing the improper opinion testimony and its accompanying risk for prejudice in *Montgomery* with the testimony from Officer Starks in this case, it is the State's position that the testimony in

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<sup>2</sup> The prosecutor's method of questioning is virtually identical to what this Court recommends in *Montgomery*. See 2008 LEXIS at \*18-20.

*Montgomery* posed far more risk in invading the province of the jury that in this case. As in *Montgomery*, the testimony in this case was from a police officer and was an expression of guilt. However, unlike *Montgomery*, the statements did not parrot the language of Reckless Driving but were simply generalized conclusory statements. Further, Officer Starks used the expression “I felt.” (RP 171). This is in contrast with the phrasing used in *Montgomery*, whose witnesses used stronger expressions such as “I felt very strongly” and “we believe.” 2008 LEXIS at \*8-10. Finally, in *Montgomery*, there was a cumulative effect of having three separate witnesses give direct expressions of guilt. Here, it is only Officer Starks that gave such an opinion. As a result, when comparing the improper testimony in *Montgomery* with the case at hand, the testimony in *Montgomery* posed more of a risk to invade the province of the jury than Officer Starks’ testimony.

As stated above, central to this Court’s analysis in *Montgomery* is whether the court properly instructed the jury. *Id.* at \*22-23. In this case, virtually the same jury instructions that this Court summarized in *Montgomery* were given in this case.<sup>3</sup> First, the jurors in this case were instructed that they were the sole judges of credibility for each witness.

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<sup>3</sup> The only instruction that was different from *Montgomery* was the expert witness instruction. Unlike in *Montgomery*, which had qualified the chemist as an expert, Officer Starks was not qualified as an expert. Therefore, the expert witness instruction was inapplicable in this case.

(RP 263). Second, they were given a list of eight separate factors to help them evaluate what weight they should give a witness. (RP 263). Third, the jurors were given the elements of Reckless Driving that the State had to prove beyond a reasonable doubt and that the Defendant's plea of guilty put all of those elements at issue. (RP 265 – 267). Fourth, the jury was instructed that the "lawyers' statements are not evidence . . . You must disregard any remark statement or argument that is not supported by the evidence or the law." (RP 263). As in *Montgomery*, this Court must presume that the jury followed the jury instructions and there were no questions from the jury or any other evidence that would indicate that they were unfairly influenced.<sup>4</sup> 2008 LEXIS at \*23.

In addition, the reasoning in *Kirkman* is also applicable. In *Kirkman*, this Court asserted that a defendant cannot later assert actual prejudice when he chose not to object for tactical reasons. 159 Wn. 2d at 937.<sup>5</sup> In this case, it appears from the record that defense counsel chose not to object for tactical reasons. Rather than object to Officer Starks' opinion, defense counsel it to attack Officer Starks' credibility. During her cross-examination of Officer Starks, defense counsel systematically attempted to tear down his credibility by pointing out the lack of factual

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<sup>4</sup> The only question by the jury concerned the time that appeared on the bottom of an exhibit to which the trial judge gave an answer to. RP 192-95.

<sup>5</sup> This will be more fully discussed in the "ineffective assistance of counsel" section.

basis for his conclusion that the Defendant's conduct was reckless. *See e.g.*, (RP 172 – 173) (questioning whether or not Officer Starks observed standing on the seat or on footpegs); (RP 173 – 174) (lack of video); (RP 176 – 177) (lack of radar or laser); (RP 177 – 178) (attacking the perception that Defendant did not stand up to stretch). In this way, defense counsel chose to allow Officer Starks to testify to his overall opinion and then tear down that opinion on cross-examination. However, this type of tactic was summarized by the court of appeals in *Madison* through the following language:

“Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to “manifest constitutional error” reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant unfortunate consequences. Even worse, and we explicitly are not referring to counsel in this case, it may permit defense counsel to deliberately let error be created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.”

53 Wn. App. at 762-63. As applied to this case, simply because defense counsel's tactical choice to not object to Officer Starks' testimony failed to result in an acquittal, such a choice does not give rise to actual prejudice

under RAP 2.5(a)(3). See *State v. Renfro*, 96 Wn. 2d 902, 909, 639, P. 2d 737 (1982) (“While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error.”).

As a result, there was no actual prejudice in this case because the jury was instructed to and had to make an independent evaluation of whether the facts provided by Officer Starks actually met all of the elements of the crime of Reckless Driving as he claimed they did. Because the Defendant cannot show actual prejudice that the jury was improperly influenced by Officer Starks’ testimony or by the prosecutor’s reference to it in closing argument, he cannot raise this issue for the first time on appeal under RAP 2.5(a)(3).

The only case the Defendant cites in support of his argument that Officer Starks’ testimony resulted in actual prejudice is *State v. Barr*, 123 Wn. App. 373, 98, P. 3d 518 (2004). Petitioner’s Brief 12-13. However, the circumstances in *Barr* are strikingly different from the circumstances in this case. In *Barr*, the defendant was convicted of second degree rape, unlawful imprisonment and vehicle prowl in the second degree. *Id.* at 378. Central to the State’s case was Officer’s Koss’ testimony that the defendant was deceptive during an interview with him. *Id.* at 378-79.

“Officer Koss testified that he was trained to use the Reid Investigative Technique that taught him to look for verbal and nonverbal clues that some was being deceptive.” *Id.* at 378. The improper opinion evidence that applied this technique was summarized by the court:

Q. Did you note any signs of deception when the defendant was being interviewed?

A. Yes. Yes, ma'am. What *I thought was deception*, one of the first things I noticed just in his contact with Detective Roe is he kept mentioning going to prison. Nobody had said that to him. He was just in an interview room at the station and that was a flag for me. *What I have been taught [by] some of these schools is people feel guilty and that they realize there is [sic] consequences and lots of times they'll verbalize those fears. So it was obvious to me he was afraid he was going to go to prison for this.* He mentioned it at least twice to Detective Roe and to me, as well, in our interview.

Q. Any other signs?

Q. What about this swearing on your grandmother's grave type thing?

A. At one point he made a statement about swearing on his daughter's life or something like that and I called him on it in the tape, if you remember, you know, *that's one of the big flags like that and like the utterances about the thing going to prison, those are big flags when you see those things start to bunch together. You get an idea somebody is being deceptive.*

Q. What about the nonverbal cues?

A. One of the things I noticed and in watching the tape when he was talking to Detective Roe he was sitting like

we are. As soon as I came in [and] started questioning his knees came up on the bench, his hands came in here and *that's a protective posture that we are taught to look for and they're protecting themselves*. They feel like they're under attack.

Q. Did he have any labored breath?

A. No, he wasn't huffing or puffing, the heaving. It seems disingenuous to me, didn't seem real.

Q. How about change in voice, inflexion [sic]?

A. There were times when I was pressuring him when I was trying that theme of being more direct with him, that he would react the same way, you know, he would hit the table. He would move out closer to me on the table and raise his voice as if he was upset, but then once we start talking again he would be right back down. *Again, it didn't seem genuine to me. It didn't seem like if he was really feeling these emotions and that worked up he would be hitting the table and stuff*. He wouldn't have these ups and downs so quickly.

*Id.* (internal citations omitted). Defense counsel did not object to any of these statements. *Id.* at 380.

The court started its analysis by stating that the Reid Investigative Technique has never been accepted as admissible evidence in Washington and testimony that asserted that the defendant's statements and body language were proof that he was guilty was clearly impermissible opinion testimony that gave rise to manifest constitutional error. *Id.* at 380-82. The court of appeals then found that Officer Koss' testimony also produced

actual prejudice because the untainted evidence of the victim losing control of her bowels and running down the street half naked while the defendant crawled under a car in the case did not overwhelm Officer Koss' testimony. *Id.* at 384.<sup>6</sup> Instead, Officer's Koss' testimony was central to the State's case. *Id.* at 381.

The circumstances in the present case are distinguishable from *Barr*. Unlike in *Barr*, Officer Starks improper testimony was not central to the State's case. Instead, it was a summation of his opinion after the jury had heard all of his observations in which he had based his opinion. Further, unlike in *Barr*, Officer Starks' testimony was a overall opinion of the Defendant's guilt whereas in *Barr*, Officer Koss linked that specific actions of the defendant with the conclusion that these actions demonstrated his guilt. Finally, unlike in *Barr*, there is overwhelming untainted evidence in this case that the Defendant drove recklessly. Here, the jury had already heard that the Defendant drove erratically by standing up on his motorcycle while driving around 70 miles per hour, staring at, and possibly taunting another vehicle, and driving away at around a hundred miles per hour, all while in congested traffic. (RP 158 – 165). As a result, there was overwhelming untainted evidence submitted to the jury

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<sup>6</sup> The court of appeals uses the term "harmless error," but its analysis is exactly the same as an analysis of actual prejudice. *Id.* at 383-84.

before Officer Starks gave his improper opinion. Thus, unlike in *Barr*, there was no actual prejudice to the Defendant that would warrant reversal.

RESPONSE TO ASSIGNMENT OF ERROR NO. 2:

**Because the Defendant fails to demonstrate that defense counsel's performance was deficient and because he fails to demonstrate that the performance resulted in prejudice, he fails to meet his burden of demonstrating ineffective assistance of counsel.**

The Defendant argues that defense counsel's failure to object to Officer's Starks' opinion testimony and her failure to object during the prosecutor's closing argument resulted in a violation of his right to counsel. Petitioner's Brief 13-16. However, because the Defendant cannot show that defense counsel's performance was deficient and because he fails to demonstrate that the performance resulted in prejudice, this Court should affirm his conviction.

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn. 2d 322, 334-35, 899 P. 2d 1251 (1995). In this analysis, a defendant must overcome a strong presumption that his counsel's representation was adequate and effective. *McFarland*, 127 Wn. 2d at 335; *State v. Brett*, 126 Wn. 2d 136, 198, 892 P. 2d 29 (1995).

“To establish deficient performance, a defendant must demonstrate that the representation fell below an objective standard of reasonableness under professional norms.” *State v. Hicks*, 163 Wn. 2d 477, 486 181 P. 3d 831 (2008) (quoting *State v. Townsend*, 142 Wn.2d 838, 843-44, 15 P.3d 145 (2001)) (internal quotation marks omitted). Further, when judging the reasonableness of trial counsel’s performance, the reviewing court must consider all of the circumstances of the case at the time of counsel’s conduct. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

In proving deficient performance, a defendant cannot rely upon trial strategy and or trial tactics. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Deciding whether and when to object to the admission of evidence is “a classic example of trial tactics.” *Madison*, 53 Wn. App at 763. “While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error.” *Renfro*, 96 Wn. 2d at 909. Further, a reviewing court need not find that the challenged conduct was in fact based upon a specific strategy or tactic, but only whether the challenged conduct “can be characterized as

legitimate trial strategy or tactics.” *State v. McNeal*, 145 Wn. 2d 352, 362, 37 P. 3d 280 (2002).

To show prejudice, a defendant must show with reasonable probability that, absent defense counsel’s unprofessional errors, the outcome of the trial would have been different. *In re Pers. Restraint of Davis*, 152 Wn. 2d 647, 672-73, 101 P. 3d 1 (2004).

In this case, it appears from the record that defense counsel chose not to object for tactical reasons. The record demonstrates that defense counsel chose not to object to Officer Starks improper opinion in order to attack his credibility during cross-examination. During cross-examination, defense counsel systematically attempted to undermine Officer Stark’s credibility by pointing out his lack of factual basis that would support his conclusion that the Defendant’s conduct was reckless.

First, defense counsel attacked Officer Starks’ credibility by attempting to impeach him with testimony from a previous interview in which he stated that he could not say whether the Defendant was standing on the pegs or the seat of the motorcycle. (RP 172 – 173). During this discussion, it appears from the record that she attempted to infer to the jury that Officer Starks’ lack of specificity meant that Officer Starks was testifying to observations that he did not clearly see. *Id.*

Second, she attacked his credibility by pointing out that the video recording system that was inside Officer Starks' police vehicle was not turned on while the Defendant stood up on his motorcycle. (RP 173 – 176). It appears from the record that this questioning of Officer Starks was an attempt to show the jury that there was a lack of corroborating evidence to support his observations and his conclusion that the Defendant drove recklessly. *Id.*

Third, she attacked his credibility by asking whether Officer Starks rode a motorcycle and whether he had a motorcycle endorsement to which Officer Starks answered “No I do not” to both questions. (RP 176). It appears from the record that defense counsel was attempting to show the jury that Officer Starks was unfamiliar with the operation of motorcycles because he does not ride one and has not been trained to ride one. Again, this put the inference before the jury that Officer Starks did not know what is reckless conduct on a motorcycle.

Fourth, she attacked his credibility by asking whether he used a radar or laser speed measuring device when he determined the Defendant's speed. (RP 176 – 177). Officer Starks stated that he did not use such a device in determining speed but only used his visual observation to estimate the Defendant's speed. (RP 177). It appears from the record that defense counsel was attempting to show the jury that Officer Starks

departed from his usual procedure of visually estimating speed and then confirming it by using a speed measuring device. *Id.* As with the lack of visual evidence, this testimony created the inference that there was a lack of corroborating evidence to support Officer Starks conclusion that he was driving over 100 miles per hour and his conclusion that the Defendant drove recklessly.

Fifth, she attacked his credibility by attempting to impeach him through a past interview concerning Officer Starks' perceptions. (RP 177 – 178). Specifically, she questioned him whether his perception was incorrect in assuming that the Defendant stood up recklessly instead of just an attempt to stretch and whether his perception was incorrect in assuming that the Defendant speed away recklessly instead of having a legitimate reason of getting out of a blind spot. *Id.* Again, this questioning created the inference that Officer Starks assumed that the Defendant acted recklessly when his conduct might have been based upon legitimate reasons.

Sixth, on re-cross examination, defense counsel again attacked his credibility by showing Officer Starks the ticket that he wrote which indicated that he saw the Defendant standing on the seat of his motorcycle. (RP 185 – 186). Officer Starks stated that he did write the ticket but that he could not testify in court whether the Defendant was standing on the

seat or not. (RP 186). It appears from the record that this line of questioning attempted to infer to the jury that Officer Starks' changed his story from when he wrote the ticket to when he testified in court.

Finally, in her closing argument, defense counsel's theory of the case mirrored her cross-examination of Officer Starks. She started her argument by asserting that Officer Starks based his opinion of Reckless Driving on assumptions and mistakes. (RP 273 – 274). First, she argued that Officer Starks assumed that the Defendant was like other motorcyclists who drive recklessly. (RP 274). Second, she argued that Officer Starks assumed that the Defendant was doing something reckless when he was side-by-side with another vehicle. *Id.* Third, she pointed out that Officer Starks has no experience riding a motorcycle. Fourth, she argued that Officer Starks made numerous mistakes on the ticket. (RP 275). Fifth, she argued that Officer Starks' opinion was based on his perception which was no more accurate than anybody's. *Id.* Sixth, she pointed out that Officer Starks assumed that the Defendant would keep on speeding. (RP 275 – 276). Seventh, she argued that the Defendant admitted his mistake of speeding, but Officer Starks has not admitted his mistake. *Id.* Eighth, she argued that the accusations in this trial were just as flawed as Officer Starks' ticket.

As the aforementioned questioning and closing argument demonstrates, the legitimate trial tactic that defense counsel used by not objecting to Officer Starks' improper opinion testimony was to demonstrate on cross-examination and through closing argument that his conclusion that the Defendant was driving recklessly was not supported by a factual basis. Because this is a legitimate trial tactic, defense counsel's failure to object was not deficient performance.

Finally, if this Court deems defense counsel's failure to object a deficient performance, the Defendant still fails to demonstrate that the outcome of the trial would not have been different had such testimony been excluded. First, the jury heard evidence that the Defendant drove erratically by standing up his motorcycle while driving around 70 miles per hour, stared at, and possibly taunted another vehicle, and drove away at around a hundred miles per hour, all while in congested traffic. (RP 158 – 165). As a result, there was overwhelming evidence that supported the Defendant's Reckless Driving conviction that was untainted by Officer Starks' improper opinion. Second, defense counsel's strategy likely enhanced the Defendant's chances for acquittal because it created a juxtaposition between his conclusion that the Defendant drove recklessly with his lack of factual basis underlying that conclusion. Finally, as stated above, Officer Starks' improper testimony was cured by the submitted

jury instructions and the Defendant cannot point to any evidence that would demonstrate that the jury had difficulty understanding the instructions or any other evidence that would indicate that they did not follow them.

For the aforementioned reasons, the Defendant has failed to demonstrate deficient performance by defense counsel and has failed to demonstrate that such a failure resulted in actual prejudice. As a result, this Court should affirm his conviction.

RESPONSE TO ASSIGNMENTS OF ERROR NO. 3 & 4:

**Because Defendant's conduct of standing up on his motorcycle and accelerating to 100 mph arose to an emergency involving an immediate threat to human life or property, Officer Starks possessed out-of-jurisdiction authority to stop and arrest him pursuant to RCW 10.93.070(2).**

The Defendant argues that Officer Starks lacked extra-territorial authority to stop and arrest him for Reckless Driving in violation of RCW 46.61.500 because his conduct of standing up on his motorcycle at 70 mph and accelerating to 100 miles per hour, all while in traffic, did not arise to an "emergency involving an immediate threat to human life or property," as defined by RCW 10.93.070(2). Petitioner's Brief 16-20. Because the Defendant's conduct did rise to an emergency that posed an immediate threat to human life and/or property, Officer Starks' lawfully stopped and arrested the Defendant for Reckless Driving. As a result, it was proper for

the trial court to deny the Defendant's motion to dismiss for lack of jurisdiction upon a finding that Officer Starks' arrest of the Defendant was valid under RCW 10.93.070(2).

RCW 10.93.070(2) is part of the "Washington Mutual Aid Peace Officer Powers Act of 1985" which expanded police authority to enforce the laws of Washington outside an officer's jurisdiction. *See* RCW 10.93.001; *City of Tacoma v. Durham*, 95 Wn. App. 876, 879, 978, P. 2d 514 (1999). RCW 10.93.070(2) states the following:

"In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency or has been exempted from the requirement therefor by the Washington state criminal justice training commission may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:

(2) In response to an emergency involving an immediate threat to human life or property;"

When a reviewing court applies RCW 10.93.070(2), it must follow the Legislature's intent, as articulated through the following language:

"It is the intent of the legislature that current artificial barriers to mutual aid and cooperative enforcement of the laws among general authority local, state, and federal agencies be modified pursuant to this chapter. This chapter

shall be liberally construed to effectuate the intent of the legislature to modify current restrictions upon the limited territorial and enforcement authority of general authority peace officers . . . .”

RCW 10.93.001(2), (3).

Washington appellate courts have effectuated the Legislature’s intent when applying RCW 10.93.070(2).<sup>7</sup> For example, in *City of Tacoma v. Durham*, Pierce Transit supervisor Dwayne Stewart observed the defendant drive erratically within the City of Tacoma. 95 Wn. App. at 877. The defendant’s erratically driving included running a red light, nearly hitting Stewart’s vehicle, weaving across a center line, and rolling backward at a stop light. *Id.* After Stewart called 911, Tacoma police officer Quinn caught up to the defendant’s vehicle, but not until within the city of Lakewood. *Id.* On appeal, the defendant “argued that his arrest was invalid because Officer Quinn, a member of the Tacoma Police Department, lacked authority to arrest him in Lakewood.” *Id.*

The court of appeals held that the arrest was valid under alternative theories. First, the court held that the arrest was valid under RCW 10.93.070(6) because the arrest occurred when Officer Quinn was in fresh

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<sup>7</sup> *City of Tacoma v. Durham*, 95 Wn. App. 876, 978 P.2d 514 (1999) is the only case that the State is aware of that directly applies RCW 10.93.070(2). Even though *Vance v. Department of Licensing*, 116 Wn. App. 412, 65 P.3d 668 (2003) has language that echoes subsection two of RCW 10.93.070, its holding is based upon subsection three. *Id.* at 416.

pursuit. *Id.* at 881. Secondly, the court stated that there “was an independent basis for a valid arrest” under RCW 10.93.070(2). *Id.* The court stated that the defendant’s “erratic driving was an immediate threat to human life or property.” *Id.* As a result, such driving presented an emergency in which Officer Quinn reasonably responded to across jurisdictional lines. *Id.*

As in *Durham*, the Defendant’s actions in this case present an emergency which was an immediate threat to human life or property. Here, the Defendant’s erratic driving included standing up on his motorcycle while driving around 70 miles per hour, staring at, and possibly taunting another vehicle, and then driving away at around a hundred miles per hour. (RP 158 – 165). Further, Officer Starks indicated that the traffic, at the time, was “a little congested.” (RP 165). Just as the defendant’s erratic driving in *Durham* posed an immediate threat to human life or property, the Defendant’s erratic driving created an emergency that posed an immediate threat to the lives of other motorists or property that were in close proximity to the Defendant as he recklessly drove south on Interstate 5 on April 5, 2006. As a result, Officer Starks’ arrest of the Defendant for Reckless Driving was justified under RCW 10.93.070(2).

Similarly, in *Vance v. Department of Licensing*, 116 Wn. App. 412, 65 P. 3d 668 (2003), the court held that the Defendant’s driving of 53

miles per hour in a 40 miles per hour zone gave the arresting officer out-of-jurisdiction authority to stop the defendant under the fresh pursuit doctrine in RCW 10.93.070(6). *Id.* at 416. Even though the court specifically based its holding under RCW 10.93.070(6) which is the doctrine of fresh pursuit, the language the court used echoes RCW 10.93.070(2). Specifically, the court stated that the defendant's speeding of 13 miles per hour over the speed limit "posed a public danger." *Id.* This is unique because dangerousness is not a part of the analysis of the fresh pursuit doctrine. *See* RCW 10.93.070(6); RCW 10.93.120. It is relevant, however, because it indicates the level of liberal construction that the Legislature intended when applying RCW 10.93 as a whole. As applied to this case, if 13 miles per hour over the speed limit poses a public danger, then traveling around 100 miles per hour after standing up on one's motorcycle at 70 miles per hour presents an immediate risk to human life or property.

Finally, the crime of Reckless Driving occurs when one "drives any vehicle in willful or wanton disregard for the safety of persons or property." RCW 46.61.500(1). In addition, RCW 46.61.465 states that driving in excess of the speed limit is *prima facie* evidence of driving in a reckless manner. The unique disposition of this case is that the factual basis that supports the Defendant's conviction for Reckless Driving is

virtually the same as what supports Officer Starks' ability to make an out-of-jurisdiction arrest under RCW 10.93.070(2). In fact, the State cannot conceive of any factual scenario where an officer would possess probable cause to arrest for Reckless Driving, but not possess a factual basis that resulted in an emergency situation involving immediate threat to persons or property under RCW 10.93.070(2). As defined, Reckless Driving requires that a defendant put another citizen's safety or property in danger. This is the same standard that forms the basis of an emergency situation under RCW 10.93.070(2). Therefore, it is the State's position that an out-of-jurisdiction officer's probable cause to arrest for Reckless Driving, will always satisfy the factual basis under RCW 10.93.070(2). Here, the same erratic driving that gave Officer Starks probable cause to arrest for Reckless Driving, is the same factual basis that supports an emergency situation under RCW 10.93.070(2).

For the above stated reasons, Officer Starks lawfully stopped and arrested the Defendant for Reckless Driving because the Defendant's conduct rose to an emergency that posed an immediate threat to human life and/or property pursuant to RCW 10.93.070(2). As a result, it was proper for the trial court to deny the Defendant's motion to dismiss for lack of jurisdiction.

CONCLUSION

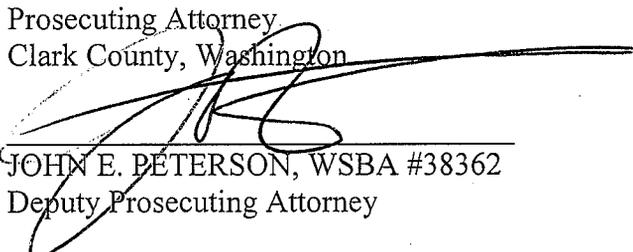
For each of the foregoing reasons, the State respectfully requests  
this court deny the Defendant's appeal in all respects.

DATED this 27 day of June, 2008.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
JOHN E. PETERSON, WSBA #38362  
Deputy Prosecuting Attorney