

63014-8

63014-8

REC'D

JUN 23 2010

King County Prosecutor
Appellate Unit

NO. 63014-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RYAN RICHARDSON,

Appellant.

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

The Honorable Deborah D. Fleck, Judge

REPLY BRIEF OF APPELLANT

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 JUN 23 PM 4:02
[Signature]

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ISSUES IN REPLY</u>	1
B. <u>ARGUMENTS IN REPLY</u>	1
1. SAUNDERS IS GOOD LAW FOR THE PREMISE FOR WHICH THE APPELLANT RELIES ON IT.	1
2. COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE BECAUSE EACH INSTANCE OF CHALLENGED LAW ENFORCEMENT TESTIMONY CONSTITUTED IMPROPER, PREJUDICIAL OPINION TESTIMONY.....	2
3. THE STATE’S BRIEF FAILS TO SQUARELY ADDRESS THE CHALLENGED OPINION TESTIMONY BY THE FAMILY FRIEND AND SOCIAL WORKER.	4
C. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Demery</u> 144 Wn.2d 753, 30 P.3d 1278 (2001).....	2
<u>State v. Dolan</u> 118 Wn. App. 323, 73 P.3d 1011 (2003).....	6
<u>State v. King</u> 167 Wn.2d 324, 219 P.3d 642 (2009).....	2
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	1, 2
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	2
<u>State v. Saunders</u> 120 Wn. App. 800, 86 P.3d 232 (2004).....	1, 2

A. ISSUES IN REPLY

1. Is State v. Saunders¹ good law for, at a minimum, the premise for which the appellant relies on it?

2. Should this court reject the State's claim that that counsel provided effective assistance because the "majority" of the challenged law enforcement testimony was proper, given the State's prior acknowledgment that most of the challenged testimony was in fact improper?

3. Should this Court reject the State's assertion that *all* of the family friend and social work's testimony was admissible because *some* of the testimony was relevant?

B. ARGUMENTS IN REPLY

1. SAUNDERS IS GOOD LAW FOR THE PREMISE FOR WHICH THE APPELLANT RELIES ON IT.

The State argues Saunders found a constitutional error "manifest" without the proper analysis, undermining Mr. Richardson's reliance on that case. Brief of Respondent (BOR) at 21-22 (citing State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007)). But Saunders holds that "the admission of opinion testimony *may* be manifest error affecting a

¹ 120 Wn. App. 800, 86 P.3d 232 (2004)

constitutional right.” 120 Wn. App. 800, 811, 86 P.3d 232 (2004) (emphasis added).

In any event, Mr. Richardson relies on Saunders primarily for its salient application of the Supreme Court’s Demery² factors. In addition, he relies on, and effectively distinguishes, the post-Kirkman case State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008) to support his claim. This Court should therefore find that manifest constitutional error occurred and apply a constitutional harmless error test. See also State v. King, 167 Wn.2d 324, 333 n. 2, 219 P.3d 642 (2009) (when a claim is truly constitutional, the court should examine the effect the error had at trial according to the constitutional harmless error standard).

2. COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE BECAUSE EACH INSTANCE OF CHALLENGED LAW ENFORCEMENT TESTIMONY CONSTITUTED IMPROPER, PREJUDICIAL OPINION TESTIMONY.

The State first claims, inexplicably, that because defense counsel employed various strategies at other times, counsel’s failure to object to damaging and irrelevant law enforcement opinion testimony must have been strategic. BOR at 24. The State then argues “the majority of the challenged testimony is proper in any event.” BOR at 25. But the State’s

² State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001)

own prior acknowledgments of error reveal the second claim to be mistaken as well.

As a preliminary matter, Mr. Richardson does not claim each line of the statements set forth at pages 13-15 of the Brief of Appellant were improper opinion testimony. He challenges certain statements, and provides others so that the comments may be considered in context, as the law requires. As for the three portions of testimony Mr. Richardson does challenge, the State acknowledges two of them are erroneous and seems to acknowledge a third comes close. BOR at 20.

First, the State appears to acknowledge that Detective's Billingsley's statement, opining Mr. Richardson was not "forthright or honest" when denying intentional touching, was improper opinion testimony. BOR at 16. Billingsley testified regarding the interview, "At other times I felt [Richardson] wasn't being as forthright or as honest. He wouldn't make eye contact with me. His voice would get softer. He would just keep his eyes turned away from me." 4RP 42-43. Detective Billingsley then gave examples: Richardson's eye contact was poor when she asked if the touching was accidental during one incident and when Richardson acknowledged the possibility of contact while sleeping during the other. 4RP 43.

The State makes a similar acknowledgment regarding Detective Knudson's testimony about his opinions regarding Mr. Richardson's statements to Brunson. BOR at 17-18.

In contrast, the State posits that polygrapher Brunson, who told jurors he conveyed to Mr. Richardson his "disbelief" based on his prior experience as a detective, came close to testifying as to his opinion. But the State insists such testimony merely provided the "necessary context." BOR at 19-20. For the reasons explained in the opening brief, however, this Court should reject such a claim. Brunson's opinions went well beyond that necessary to provide context for Mr. Richardson's statements.

In summary, contrary to the State's claim, it acknowledges pages earlier that the "majority" of the challenged law enforcement testimony was, in fact, improper. This Court should, accordingly, reject the State's attempt to gloss over counsel's ineffectiveness by characterizing the bulk of the challenged testimony as perfectly acceptable. BOR at 25.

3. THE STATE'S BRIEF FAILS TO SQUARELY ADDRESS THE CHALLENGED OPINION TESTIMONY BY THE FAMILY FRIEND AND SOCIAL WORKER.

The State argues "testimony from [the family friend and the social worker] regarding [A.C.'s mother's] inappropriate reaction to A.C.'s disclosures of abuse" was relevant and admissible. BOR at 32. Mr.

Richardson does not dispute testimony regarding the mother's reaction to A.C.'s disclosure was admissible to some degree. He challenges instead the damaging, irrelevant testimony by the family friend and social worker conveying their opinions on the propriety of the mother's reaction.

As set forth in the Brief of Appellant, family friend Heidi Page testified that A.C.'s mother reacted angrily to the disclosure and suggested to A.C. that Mr. Richardson was sleeping at the time of one of the incidents. 3RP 23-24. When the State asked for Page's opinion of the mother's reaction, counsel objected, contending such testimony would be speculative. The court sustained the objection on relevance grounds. 3RP 31. The State later asked Page, "Did there come a time when you stopped associating with [the mother] . . . and *why*?" 3RP 32 (emphasis added). Page stated, "When I found out that she was going to visit [Richardson] in jail I quit communicating with her." 3RP 32. Despite its earlier objection, counsel did not object to the question or the answer.

Social worker Melinda Larrison testified the State filed a dependency petition based on doubts A.C.'s mother could protect her. 4RP 176-77. Larrison was concerned about the mother's lack of "moral outrage" to the abuse allegations. 4RP 181. The court sustained counsel's foundation objection to that testimony. 4RP 181. Larrison then testified that in her 25 years as a caseworker, she had observed that most parents

reacted to a child's allegation of sexual abuse by another with "moral outrage," whereas A.C.'s mother did not. 4RP 183; 5RP 9-11. Defense counsel did not object.

As argued in the opening brief, Page's opinion as to the mother's reaction to A.C.'s disclosure was at best irrelevant. But as a longtime family friend and mother of A.C.'s best friend, such opinion was also very prejudicial. Worse because of her professional standing, Larrison's testimony comparing the mother to other parents had no relevance to any matter of consequence. At the same time, however, it conveyed her "professional" belief in the truth of A.C.'s allegations and therefore Mr. Richardson's guilt.

Opinions must be based on knowledge. Lay opinion is based on personal knowledge, while expert opinion is based on scientific, technical, or specialized knowledge. State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003). As argued in the opening brief, these opinions were not based on either type of knowledge and were therefore inadmissible. Moreover, in each case, the failure to object was not strategic: Counsel initially objected but failed to lodge a continuing objection when the State persisted in presenting the evidence. Finally, under the circumstances it was at least reasonably likely the improper opinion testimony swayed the jury.

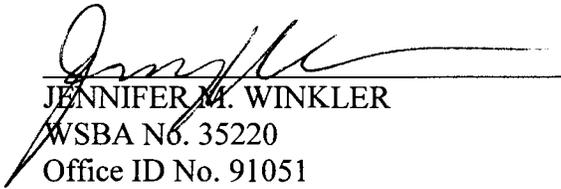
C. CONCLUSION

For the reasons stated above and in the appellant's opening brief, this Court should grant the relief requested.

DATED this 23rd day of June, 2010.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH, PLLC


JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63014-8-1
)	
RYAN RICHARDSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RYAN RICHARDSON
DOC NO. RYAN RICHARDSON
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 1899
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF JUNE, 2010.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2010 JUN 23 PM 4:02