

67844-2

67844-2

NO. 67844-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERTO SANCHEZ-RODRIGUEZ,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 FEB 28 PM 4:18

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	4
a. <u>The alleged assaults</u>	4
b. <u>Comments on the evidence</u>	11
C. <u>ARGUMENT</u>	15
1. THE TRIAL COURT ERRED UNDER ER 404(B) WHEN IT ADMITTED EVIDENCE THAT SANCHEZ-RODRIGUEZ HAD PREVIOUSLY THREATENED TO KILL HIS WIFE.	15
2. DEPUTY CADMAN'S OPINION ON SANCHEZ-RODRIGUEZ'S GUILT DENIED HIM A FAIR TRIAL.	22
3. THE TRIAL COURT'S COMMENTS ON THE EVIDENCE VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED SANCHEZ-RODRIGUEZ A FAIR TRIAL.	27
4. THE CUMULATIVE IMPACT OF THE TRIAL ERRORS DENIED SANCHEZ-RODRIGUEZ A FAIR TRIAL.	35
D. <u>CONCLUSION</u>	36

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Myers</u> 49 Wn. App. 243, 742 P.2d 180 (1987).....	17
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	16, 17
<u>State v. Saunders</u> 91 Wn. App. 575, 958 P.2d 364 (1998).....	26
<u>State v. Smith</u> 104 Wn.2d 497, 707 P.2d 1306 (1985).....	33
<u>State v. Smith</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	16, 21
<u>State v. Thang</u> 145 Wn.2d 630, 41 P.3d 1159 (2002).....	22
<u>State v. Tharp</u> 27 Wn. App. 198, 616 P.2d 693 (1980) <u>aff'd</u> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	16
<u>State v. Thompson</u> 90 Wn. App. 41, 950 P.2d 977 <u>review denied</u> , 136 Wn.2d 1002 (1998).....	23
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	26
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 403	17
ER 404	1, 3, 15, 16, 17, 21, 35, 36
U.S. Const. Amend. VI	26

TABLE OF AUTHORITIES (CONT'D)

	Page
Wash. Const. art. 1, § 22	1, 23, 26
Wash. Const. art. 4, § 16	1, 27, 28
Webster's Third New Int'l Dictionary (1993)	34

A. ASSIGNMENTS OF ERROR

1. The trial court erred under ER 404(b) when it admitted evidence that appellant had previously threatened to kill his ex-wife.

2. A critical prosecution witness improperly expressed his opinion that appellant was guilty in violation of the Sixth Amendment and article 1, § 22 of the Washington Constitution.

3. Appellant was denied his Sixth Amendment right to effective representation when defense counsel failed to object to the improper opinion on his guilt.

4. The trial court repeatedly commented on the evidence in violation of article 4, § 16 of the Washington Constitution.

5. Cumulative trial error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. ER 404(b) prohibits the admission of prior bad acts evidence unless the evidence is admissible for a proper and limited purpose. In appellant's case, the trial court misread case law as authorizing the admission of evidence appellant previously threatened to kill his ex-wife. Did the prosecution's use of this prohibited evidence deny appellant a fair trial?

2. Witnesses must never offer an opinion, even by inference, as to a defendant's guilt. At appellant's trial, a sheriff's

deputy violated this prohibition. Did this violation deny appellant his constitutional right to a fair and impartial trial?

3. The deputy's opinion on appellant's guilt is manifest constitutional error that can be raised on appeal without an objection below. Assuming this Court disagrees, was defense counsel ineffective for failing to object to the deputy's opinion?

4. While instructing jurors, and several times during closing argument, the trial judge commented on the evidence regarding important and disputed trial issues in a manner favoring the prosecution. Did these comments also deny appellant a fair trial?

5. Assuming none of these errors alone warrant a new trial, does their combined effect warrant that result?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County Prosecutor's Office charged Roberto Sanchez-Rodriguez with two counts of assault in the second degree. The named victim in count 1 was Sanchez-Rodriguez's ex-wife, Jewell Jefferson. The named victim in count 2 was Jefferson's boyfriend, Derrick Sampson. CP 94-95. The State alleged that Sanchez-Rodriguez threatened both of them with an axe. CP 92-93.

The State moved to admit evidence that Sanchez-Rodriguez had previously threatened to kill Jefferson. The State argued that because the assault charges required proof of a reasonable apprehension of bodily injury, the prior threat to kill was relevant to establish Jefferson's state of mind. RP (10/3/11) 29-32.¹ The defense objected under ER 404(b). RP (10/3/11) 32-34. Both parties cited State v. Magers, 164 Wn.2d 174, 189 P.3d 126 (2008), in support of their respective positions. Supp. CP ____ (sub no. 36, Memorandum: ER 404(b)); RP (10/3/11) 32-34.

The trial court interpreted Magers as approving the admission of the prior threat to kill to establish Jefferson's current reasonable fear. RP (10/3/11) 34-38. The defense renewed its objection, arguing that Magers actually conflicted with the court's decision. RP (10/3/11) 37. The court maintained its ruling, but agreed that a limiting instruction should be given. RP (10/3/11) 38-40; CP 31-32.

A jury convicted Sanchez-Rodriguez on both counts, and the court imposed concurrent 17-month prison terms. CP 20, 36. Sanchez-Rodriguez timely filed his notice of appeal. CP 2-15.

¹ This brief refers to the verbatim report of proceedings as follows: "RP" without reference to a date refers to the successively paginated volumes for October 4, October 5, and October 6, 2011. All other volumes are referenced by "RP" and a specific date.

2. Substantive Facts.

a. The alleged assaults

Roberto Sanchez-Rodriguez and Jewell Jefferson were married ten years and have three children together. The couple divorced in September 2010. RP 22-23. Although Jefferson was awarded custody of the children, she believed that Sanchez-Rodriguez was a good dad overall and supported his contact with them so long as he made good choices. RP 23-24. Sanchez-Rodriguez made several attempts at reconciliation, but Jefferson declined. RP 24.

During the winter of 2011, Sanchez-Rodriguez moved to Montana for a construction job. RP 26-27, 219. He missed his children, however, and moved back to Washington at the end of March. Jefferson allowed him to stay temporarily at her Ferndale home so long as he refrained from drinking around the children. RP 21, 27, 220.

Jefferson had begun dating Derrick Sampson, who lived on Vancouver Island in British Columbia, Canada. RP 28, 80. On the afternoon of Friday, March 25, Jefferson left to spend a week with Sampson in B.C. RP 28, 83-84. She had not previously told Sanchez-Rodriguez she was leaving and he was a little upset. RP

28-29, 221. Sanchez-Rodriguez, along with two of Jefferson's older children, stayed with the three children at Jefferson's home. RP 29, 221.

During the week, Jefferson and Sanchez-Rodriguez remained in phone contact. According to Jefferson, on more than one occasion, Sanchez-Rodriguez sent text messages stating, "no boyfriend." RP 30.

Sampson drove Jefferson back to her home late on April 1, catching the last evening ferry. RP 30-31. While en route, Jefferson received a call from her daughter indicating that Sanchez-Rodriguez had been drinking, he was driving Jefferson's truck, and he had headed to the nearby Silver Reef Casino. RP 31-32, 39. Sampson and Jefferson diverted to the casino to see if they could find him. RP 32.

The couple arrived at the casino parking lot just before Sanchez-Rodriguez, who parked right behind Sampson's vehicle. RP 32-33. Jefferson told Sanchez-Rodriguez she wanted her truck, he asked why, and she told him because he had been drinking. RP 33-34. According to Jefferson, Sanchez-Rodriguez became angry. After some additional discussion, Jefferson told him she would drive him home. Sanchez-Rodriguez agreed, got

into the passenger seat, and slammed the door closed. RP 34-35. Sampson left for the house just ahead of them in his own vehicle. RP 36.

According to Jefferson, on the ride home, Sanchez-Rodriguez was making unfriendly comments regarding Sampson. RP 37-39. At one point, when she suggested Sanchez-Rodriguez should get out of the truck, he slapped her hard on the back. RP 36-37. She threatened to call the police and Sanchez-Rodriguez apologized. RP 37. The two continued to argue, however, as they drove to the house. RP 39.

According to Jefferson, after they pulled into the driveway of her home, Sanchez-Rodriguez said he had found a job and asked if he could move into the house with her and the children. When she said no, he punched her on the left side of the face. RP 39-40. Jefferson told Sanchez-Rodriguez she was calling the police and jumped out of the truck. RP 40. As she reached for her cell phone, Sanchez-Rodriguez told her not to call and picked up a pickaxe that was sitting near a stump in the front yard. RP 41-42.

According to Jefferson, Sanchez-Rodriguez raised the pickaxe up in the air and approached her. RP 43-44. Fearing she might be struck, she leaned into the cab of her truck to protect her

head. Sanchez-Rodriguez then pressed the pickaxe against her lower back and pushed her into the truck. RP 44-46.

Sampson initially parked his truck just beyond the driveway. RP 42. By the time Jefferson was pushed into her truck, however, Sampson had pulled into the driveway and approached Sanchez-Rodriguez. RP 46-47. According to Jefferson, Sanchez-Rodriguez charged Sampson with the pickaxe raised in the air. RP 47. Sampson was able to grab the pickaxe and the two wrestled for control. RP 47-48. As Jefferson spoke to a 911 operator, the two men traded punches. RP 48-49. By the time police arrived, Sampson had the axe and both men had separated. RP 53.

Taking advantage of the court's pretrial ruling, the prosecutor elicited the evidence that Sanchez-Rodriguez had previously threatened to kill Jefferson:

Q: What did he do when he picked [the axe] up?

A: He raised it up in the air and came walking towards me with it.

Q: What was going through your mind when he did this?

A: That he was going to kill me?

Q: Why did you think that?

A: He threatened to before.

RP 43.

Sampson testified that from his initial vantage – about 20 feet beyond the driveway – he saw Sanchez-Rodriguez get out of Jefferson's truck and heard him say, "no, no, no please." RP 89. Jefferson also got out of her truck and Sanchez-Rodriguez grabbed the pickaxe, which he used to "cross-check" her back into the truck. RP 89-91. Sampson backed up his truck, got out, and approached Sanchez-Rodriguez, who was still facing Jefferson and saying, "no boyfriends." RP 92-93.

According to Sampson, he said, "that's enough now," and Sanchez-Rodriguez turned toward him, still holding the axe, and responded, "this is what you want." RP 93. Sampson took control of the axe, throwing it aside, and Sanchez-Rodriguez punched him. RP 94-95. Sampson counterpunched and Sanchez-Rodriguez fell to the ground. Sampson then threw him in a mud puddle. RP 95. Sanchez-Rodriguez may have been unconscious for several minutes. RP 102-103, 107, 111. Police arrived shortly thereafter. RP 96.

Whatcom County Sheriff's Deputy Rod Cadman responded to the 911 call. RP 116-117. Sampson had a swollen lip. RP 130. Sanchez-Rodriguez, who appeared to be under the

influence of alcohol, agreed to speak with Deputy Cadman. RP 131, 134. Sanchez-Rodriguez explained that Sampson and Jefferson had tracked him down at the casino. Jefferson was angry and demanded her truck back. RP 135. Jefferson yelled at him on the drive back to her home and, when they arrived, began hitting him. RP 135-136. When he exited the truck, Sampson also attacked him, knocking him to the ground, where both Sampson and Jefferson kicked and hit him. RP 136. In self-defense, he grabbed the pickaxe, which he used to ward them off. RP 136. Sanchez-Rodriguez expressed confusion as to why they attacked him. RP 137.

During Deputy Cadman's testimony, the prosecutor asked Cadman to comment on Sanchez-Rodriguez's demeanor:

Q: Other than the symptoms of alcohol consumption that you described before, how would you characterize the Defendant's demeanor when you went and talked to him?

A: He was surprisingly calm.

Q: Why do you say surprisingly?

A: Well, given the, given the nature of what he just described, had just described to me, he had just described that he had been attacked by, you know, attacked, kicked and punched, you know, by two other people, and he described an attack that was violent enough where he picked up a pickaxe to

defend himself. Yet in talking to him, I would expect him to be upset over something like that, and he was surprisingly calm.

Q: Did he remain calm as you took him to jail?

A: Yes.

RP 138-139. Defense counsel failed to object to this testimony.

Sanchez-Rodriguez took the stand in his own defense. RP 217. In 2006, he suffered a head injury in a car accident, which still affects his memory. RP 219. He denied he had been drinking the day of the incident. RP 223. He also denied slapping Jefferson on the back as the two exited the casino parking lot. RP 225. According to Sanchez-Rodriguez, on the drive home, Jefferson threatened to take the children away and not permit him to see them again. RP 223. She continued with this threat when they arrived at her home and also threatened to call the police. When Sanchez-Rodriguez asked why, Jefferson simply repeated that she did not want him seeing the kids. RP 224-225.

Sanchez-Rodriguez also denied punching Jefferson upon their arrival at the home. RP 225. He testified they both exited the truck and continued to argue about the children. Jefferson then pushed him. RP 225-227. The last thing Sanchez-Rodriguez could recall by the time of trial was Sampson approaching him and

that a fight began. RP 227. He could not remember any additional details beyond the fact he attempted to get up off the ground at one point and the police arrived later. 227-231.

At the close of evidence, jurors were instructed on self-defense and the lesser-degree offense of assault in the fourth degree. CP 54, 57-60, 63-66. During closing arguments, the prosecutor asked jurors to reject Sanchez-Rodriguez's self-defense claim and find that Jefferson and Sampson were the victims of unprovoked assaults. RP 266-281. Defense counsel asked jurors to find that Sanchez-Rodriguez was the actual assault victim and acted in lawful self-defense when he used the pickaxe to fend off Jefferson and Sampson. RP 283-298.

b. Comments on the evidence

Several judicial comments on the evidence tainted Sanchez-Rodriguez's trial.

The first occurred during Jefferson's testimony and stemmed from the trial court's attempt to limit jurors' use of the evidence Sanchez-Rodriguez had previously threatened to kill her. Defense counsel submitted a proposed instruction, which the court amended and indicated it would read once Jefferson took the stand:

You may hear testimony regarding prior incidents

between Miss Jefferson and the Defendant. I am allowing this evidence, but you may consider the evidence only for the purpose of evaluating this witness' state of mind.

RP 6. Unfortunately, when it came time to read the instruction, the court modified its language, identifying who it believed was the victim in the case. After the prosecutor called Jefferson to the stand, the court told the jury:

[Y]ou may hear testimony from this witness about prior incidents between her and the Defendant. I'm allowing this evidence, but you may consider it only for the purpose of evaluating her state of mind, the victim's state of mind. You must not consider the evidence for any other purpose.

RP 20 (emphasis added).

The court commented on the evidence several more times during closing arguments.

First, as noted above, Sanchez-Rodriguez had been injured in a car accident, which he testified affected his memory. RP 219. While cross-examining Jefferson, defense counsel had her confirm Sanchez-Rodriguez's accident and his subsequent struggles with memory. RP 54. In closing argument, defense counsel argued this injury, plus the beating Sanchez-Rodriguez suffered during the fray, explained his current inability to recall what happened. RP 284-285.

In its rebuttal argument, the prosecutor took aim at this claim:

Prosecutor: Now, what else do we know? Counsel talked about concussions and head injury. There's been no medical evidence in the case at all. All we have for a story about the fact, about the Defendant's memory loss is, is him –

Defense: Objection. That mischaracterizes the testimony.

Court: I don't believe so.

Defense: Jewell Jefferson specifically stated that he suffered from a memory loss as a result of the accident.

Court: The jury has heard the testimony.

RP 309 (emphasis added).

The trial judge commented on the evidence again when defense counsel sought to portray Jefferson as a liar based on several false assertions in her statement to police. The court made its disagreement with the defense position apparent:

Defense: Without a doubt, look at reasonable, without a doubt, those statements they made under penalty of perjury were not true, and when Jewell Jefferson testified, there was some, a lot of emotion at different points in her testimony, but the most emotional she got wasn't when she was recounting the incident, wasn't when she was talking about how afraid she was that he was going to kill her because he had that axe. It was when she was confronted with her lies. That's when she broke down.

Prosecutor: Objection. That's improper argument to use that particular word.

Court: Inconsistencies would be a better term.

Defense: Your Honor, I would submit it's appropriate argument.

Court: The jury will disregard that.

RP 297 (emphasis added).

The court commented on the evidence yet again during the prosecutor's rebuttal argument. In asking jurors to find Sanchez-Rodriguez not credible, the prosecutor referenced Deputy Cadman's testimony concerning Sanchez-Rodriguez's demeanor at the scene:

Prosecutor: I would also ask you to, yes, please listen to Deputy Cadman. Trust Deputy Cadman. Deputy Cadman said this man's behavior was not consistent with what he said had happened.

Counsel –

Defense: Objection. That's – that mischaracterizations [sic] the testimony.

Court: I think it's what the deputy said.

Defense: Is the Court saying that's what the deputy said?

Court: I said it's an argument that can be made based on what the deputy said.

Defense: I maintain my objection.

RP 301-302 (emphasis added).

The prosecutor continued:

Mr. Sanchez said that he just endured an attack

that was so brutal, so scary that he had to take an axe and go after his ex-wife, yet he was unreasonably calm or unusually calm when he described that. Listen to Deputy Cadman. Please listen to Deputy Cadman. The Defendant's story did not match his demeanor at the time.

RP 302.

C. ARGUMENT

1. THE TRIAL COURT ERRED UNDER ER 404(B) WHEN IT ADMITTED EVIDENCE THAT SANCHEZ-RODRIGUEZ HAD PREVIOUSLY THREATENED TO KILL HIS WIFE.

A defendant must only be tried for those offenses actually charged. Consistent with this rule, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

The prosecution's attempts to use evidence of other crimes or bad acts must be evaluated under ER 404 (b), which reads:

(b) Other Crimes, Wrongs, or Acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

Admission of evidence under this rule is reviewed for an abuse of

discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court abused its discretion in Sanchez-Rodriguez's case.

Before admitting evidence under ER 404 (b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is "whether the evidence as to other offenses is relevant and necessary to prove an essential ingredient of the crime charged." State v. Saltarelli, 98 Wn.2d 358, 362, 74 P.3d 119 (1982) (quoting Goebel, 40 Wn.2d at 21). Evidence is logically relevant if it is of consequence to the outcome of the action and tends to make the existence of the identified fact more or less probable. Saltarelli, 98 Wn.2d at 361-62.

Third, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential prejudice.² Saltarelli, 98 Wn.2d at 362-63. "Evidence of prior misconduct is likely to be highly prejudicial, and should be admitted only for a proper purpose and then only when its probative value clearly outweighs its prejudicial effect." State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995).

In a doubtful case, [t]he scale must tip in favor of the defendant and the exclusion of the evidence." State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). The State's burden when attempting to introduce evidence of other bad acts under one of the exceptions to ER 404 (b) is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

In Sanchez-Rodriguez's case, the trial court erred when it found that his prior threat to kill Jefferson was relevant for a proper, non-propensity purpose on the current assault charge involving

² Similarly, ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury"

Jefferson. This error stems directly from the court's misreading of the Supreme Court's opinion in Magers.

Magers was charged with second degree assault, unlawful imprisonment, and violation of a no-contact order for holding his girlfriend, Carrisa Ray, at her home against her will, threatening her with a sword, and having contact with her despite a court order. Magers, 164 Wn.2d at 177-179. Ray subsequently recanted her allegations against Magers. Id. at 179-180.

At trial, over a defense objection, the court admitted evidence of Magers' prior arrest in 2003 for domestic violence against Ray, the resulting entry of the no-contact order at issue, and the fact Magers had spent time in prison for fighting. Id. at 178, 180. The evidence was admitted under two theories: (1) it was relevant to prove Ray's reasonable fear of injury for the assault and (2) it was relevant in assessing Ray's credibility, *i.e.*, why she may have recanted her allegations. Id. at 180.

The Court of Appeals reversed Magers' assault and unlawful imprisonment convictions. Magers, 164 Wn.2d at 181. In a split opinion, the Supreme Court reinstated them.

A four-justice plurality held the evidence surrounding entry of the 2003 no-contact order properly admitted because Magers was

charged with violating that very order. *Id.* at 181. Regarding the prior fighting, the plurality held the evidence admissible to establish Ray's state of mind. The judges noted that in order to prove assault, the State had to establish "reasonable apprehension and imminent fear of bodily injury." *Id.* at 183. Analogizing to harassment cases – where lower courts had held evidence of prior misconduct relevant to establish reasonable fear the defendant would carry out a threat – the plurality held that evidence of prior violent misconduct was admissible to show "Ray's apprehension and fear of bodily injury was objectively reasonable" *Id.* The plurality also held the evidence admissible against Magers "to assist the jury in judging the credibility of a recanting victim." *Id.* at 186.

Two justices concurred in the result. They agreed evidence surrounding the 2003 no contact order was properly admitted as *res gestae* of the charged crimes, but disagreed with the plurality's legal analysis on the prior fighting. *Id.* at 194-195 (Madsen, J., concurring; joined by Fairhurst, J.). Notably, regarding state of mind, Justice Madsen wrote:

First, the majority holds that Kha Magers's prior fighting incident was properly admitted to show Ms. Carissa Ray's state of mind, i.e., that she reasonably feared bodily injury. But under the State's theory of second degree assault it was not required to prove that

Ms. Ray reasonably feared bodily injury. Rather, the State was required to prove that a reasonable person under the same circumstances would have a reasonable fear of bodily injury. Thus, the State did not have a burden to demonstrate Ms. Ray's state of mind as an element of assault. . . .

Id. at 194. The concurrence also took issue with the plurality's conclusion the evidence was admissible in Magers' case to explain Ray's recantation. Id. Ultimately, however, the concurrence agreed Magers' convictions should be reinstated because the improper admission of the fighting evidence was harmless error. Id. at 195.

Three judges dissented and would have affirmed the Court of Appeals. Magers, 164 Wn.2d at 195-199 (Johnson, J., dissenting; joined by Sanders, J., and Chambers, J.).

Sanchez-Rodriguez's case does not involve a recanting witness. Thus, that portion of Magers discussing the admissibility of prior acts of misconduct to assist jurors in assessing the credibility of a recanting victim does not apply. Moreover, because Sanchez-Rodriguez's prior threat to kill Jefferson – unlike the prior evidence surrounding the no-contact order in Magers – is not part of the res gestae of the current charges, that portion of Magers does not apply, either.

be acquitted of the charged crimes. But acquittal was far less likely once jurors learned that Sanchez-Rodriguez had a history of threatening to kill his ex-wife. The evidence demonstrated a propensity for violence.

The court provided jurors with an oral instruction telling them they could consider the evidence only in evaluating Jefferson's state of mind. RP 6. But this did not cure the erroneous admission of the evidence. Rather than a limiting instruction, jurors needed a curative instruction. See State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002). Moreover, the prosecutor exacerbated the prejudice when, during closing argument, he reminded jurors of the prior death threat. RP 267. Sanchez-Rodriguez is entitled to a new trial.

2. DEPUTY CADMAN'S OPINION ON SANCHEZ-RODRIGUEZ'S GUILT DENIED HIM A FAIR TRIAL.

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Included within this prohibition are opinions on whether a particular individual told the truth. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); Black, 109 Wn.2d at 349.

This prohibition stems from the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution, which guarantee the right to a fair trial before an impartial trier of fact. A witness's opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. Demery, 144 Wn.2d at 759; State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977, review denied, 136 Wn.2d 1002 (1998).

In determining whether testimony is impermissible, trial courts consider the circumstances of the case, including the following factors: "(1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense, and' (5) 'the other evidence before the trier of fact.'" State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (quoting Demery, 144 Wn.2d at 759).

Here, the witness was a Whatcom County Sheriff's Deputy, meaning his testimony carried an "aura of reliability" with jurors. Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765). The nature of the testimony was that Deputy Cadman did not believe Sanchez-Rodriguez because, unlike Jefferson and Sampson, he was not acting consistently with his version of events. This was critical at trial because there was no uninvolved third party

or other trial evidence to indicate who was the assaulter and who was the victim. Rather, Sanchez-Rodriguez's self-defense claim turned on jurors believing his version of events, a version Cadman clearly did not find credible.

The circumstances at Sanchez-Rodriguez's trial are similar in effect to those in State v. Haga, 8 Wn. App. 481, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). In Haga, an ambulance driver testified that the defendant's reaction to news of his wife's death was unusually "calm and cool." Haga, 8 Wn. App. at 490. This Court concluded the driver's testimony improperly implied his opinion that the defendant was guilty and required a new trial. Haga, 8 Wn. App. at 491-492. The Supreme Court has described Haga as involving "an indirect opinion on the guilt of the defendant." State v. Aguirre, 168 Wn.2d 350, 361, 229 P.3d 669 (2010).

Defense counsel failed to object to Deputy Cadman's improper opinion evidence. This Court should find the error can be raised anyway as manifest constitutional error under RAP 2.5(a)(3). Witness statements satisfy this standard when they constitute "an explicit or almost explicit" personal opinion on the defendant's credibility or guilt. State v. Kirkman, 159 Wn.2d 918, 936-937, 155 P.3d 125 (2007). Cadman's testimony satisfies this standard.

The Supreme Court has declined to find opinion testimony manifest error because it presumed jurors followed instructions telling them they were the sole judges of credibility and not bound by an expert's opinion. See Montgomery, 163 Wn.2d at 595-596; Kirkman, 159 Wn.2d at 937. Sanchez-Rodriguez's jury received similar instructions. See CP 41, 47. But these instructions did not prohibit jurors from adopting Deputy Cadman's improper opinion. Moreover, no two cases are identical. In this case, the prosecutor strongly encouraged jurors to use Cadman's opinion in finding Sanchez-Rodriguez guilty. See RP 301-302 (prosecutor repeatedly implores jurors to "please listen to" and "trust" Deputy Cadman's opinion that Sanchez-Rodriguez's story of self-defense did not match his demeanor).

As a constitutional error, the State bears the burden of demonstrating that Deputy Cadman's opinion on Sanchez-Rodriguez's guilt was harmless beyond a reasonable doubt; it is presumed prejudicial. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). In a case where jurors were presented with conflicting versions of events, Cadman's opinion that Sanchez-Rodriguez was acting inconsistently with innocence cannot be dismissed as harmless.

Alternatively, were this Court to find the issue does not satisfy RAP 2.5(a)(3), it should address the claim under the rubric of ineffective assistance of counsel.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993).

A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met.

There could be no legitimate tactic behind counsel's failure to object to the deputy's opinion that Sanchez-Rodriguez was

guilty; an objection would have kept the evidence out; and it is probable the outcome would have differed given the prosecutor's significant use of the deputy's improper opinion to sway jurors during closing argument.

Deputy Cadman's improper opinion on Sanchez-Rodriguez's guilt also requires a new trial.

3. THE TRIAL COURT'S COMMENTS ON THE EVIDENCE VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED SANCHEZ-RODRIGUEZ A FAIR TRIAL.

Article 4, § 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this constitutional prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Moreover, this constitutional violation may be raised for the

first time on appeal. The failure to object or move for mistrial at the trial level is not a prohibition to appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show that no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (subject of comment “never challenged in any way by defendant”; harmless).

Sanchez-Rodriguez’s trial was replete with improper judicial comments.

As previously noted, during the evidentiary portion of trial, when instructing jurors on the limited purpose for which it should consider prior incidents between Sanchez-Rodriguez and

Jefferson, the court identified Jefferson as the victim in the case. RP 20 (“[Y]ou may hear testimony from this witness about prior incidents I’m allowing this evidence, but you may consider it only for the purpose of evaluating her state of mind, the victim’s state of mind.”).

While a trial court’s use of the term “victim” does not necessarily convey its personal opinion of the case, doing so is neither encouraged nor recommended. Moreover, whether such a reference rises to an impermissible comment will depend on the particular facts and circumstances of the case. State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44, review denied, 97 Wn.2d 1018 (1982).

In Alger, a rape case, the defense and prosecution jointly presented a stipulation to be read by the trial judge regarding two elements of the charged crime. The trial judge informed jurors:

There has been a stipulation, that is an agreement between the State, the Plaintiff, and Mr. Alger and his lawyer, that Mr. Alger’s age is 36, and, that he has never been married to the victim, . . .

Alger, 31 Wn. App. at 248-249. Not surprisingly, this Court concluded that counsels’ stipulation was not a judicial comment on the evidence. Id. at 249. It would have been clear to Alger’s jury,

from the trial court's comments, that this was a stipulation *by the parties* and nothing more. In contrast, in Sanchez-Rodriguez's case, the court identified the victim for jurors while instructing them on the applicable law.

Since the primary factual issue for Sanchez-Rodriguez's jury was to identify the true victim or victims in the case, the court's identification of Jefferson as a victim was an extremely serious comment on the evidence. Because the court indicated that Jefferson was a victim, Sampson was necessarily a victim, too. Moreover, their status as victims indicated that Sanchez-Rodriguez was not a victim and that his version of events and his self-defense claim should be rejected. The court's comment resolved in the prosecution's favor a vigorously contested factual and legal dispute.

The court also commented on the evidence several times during closing arguments.

First, discussing Sanchez-Rodriguez's failed memory on the stand, the prosecutor argued there was no evidence – beyond Sanchez-Rodriguez himself – to support his claimed loss of memory. RP 309. When defense counsel objected and argued that the prosecutor had mischaracterized the evidence, the trial

court responded, "I don't believe so." RP 309. In fact, the court's stated belief was incorrect. As defense counsel then noted, Jewell Jefferson had confirmed that Sanchez-Rodriguez has suffered memory problems ever since a head injury sustained in a 2006 car accident. See RP 54.

The judge's mistaken opinion regarding the absence of evidence supporting memory loss concerned another important trial issue. During closing argument, the State spent considerable time mocking Sanchez-Rodriguez's claim that he could no longer remember anything after Sampson approached. See RP 299 (referring to defense counsel's closing argument, "That's a new one, I'm more credible because I can't remember what happened."); RP 301 (defendant "less than truthful about what his memory was because that's convenient. 'I just don't remember what happened.' Then you don't have to give any particulars at all. Wash your hands of it."); RP 303 ("We don't have a version of events from him because he said he doesn't remember. He just checked out after that portion of the factual narrative."); RP 305 ("the Defendant doesn't have to worry about [inconsistencies in his story] because he just said, you know what, I don't remember. My statement to the, to the officer is good enough for me to argue my

theory of the case. I'm just not going to put myself out there."); RP 308 ("Defendant can't even support his own story at the scene with his testimony on the stand.").

If jurors believed the prosecutor's argument that Sanchez-Rodriguez's memory loss was simply a convenient way to avoid having to address the details of his self-defense claim on the stand, they were far more likely to reject his version of events and his self-defense claim. By indicating that the prosecutor's mistaken assertion – that there was no evidence supporting Sanchez-Rodriguez's claimed memory loss – was factually correct, the trial court placed the weight of its authority behind that assertion.

The trial judge made a similar grievous error when he sustained the prosecutor's objection to defense counsel's use of the word "lies." Defense counsel argued that Jefferson broke down on the stand "when she was confronted with her lies." RP 297. The prosecutor objected, stating it was "improper argument" to use the word "lie." The court responded by saying "inconsistencies would be a better term" and then instructed jurors to disregard defense counsel's argument Jefferson was a liar. RP 297.

There was nothing improper about arguing that Jefferson had lied. See State v. McKenzie, 157 Wn.2d 44, 59, 134 P.3d 221

(2006) (where counsel shows other evidence contradicts witness's testimony, counsel may call witness a liar); see also State v. Smith, 104 Wn.2d 497, 510-511, 707 P.2d 1306 (1985) (counsel may comment on a witness's veracity if based on the evidence); State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990) (same).

Indeed, Sanchez-Rodriguez' entire defense was based on convincing jurors that Jefferson and Sampson had orchestrated an attack against Sanchez-Rodriguez and were lying about events surrounding the altercation; their version of events and Sanchez-Rodriguez's version of events simply could not be reconciled. One side or the other was lying.

To help convince jurors that Jefferson and Sampson were the liars, defense counsel spent considerable time pointing out ways in which Jefferson's trial testimony differed from her statement to police and Sampson's testimony. See RP 59-65, 100-101 (discrepancies regarding direction Jefferson facing when pushed into cab of truck, whether Sanchez-Rodriguez swung pickaxe at her, and whether she grabbed pickaxe in attempt to wrestle it away); RP 66-67, 69 (whether Jefferson told responding officers that Sampson had punched Sanchez-Rodriguez several times); RP 47, 97, 101-103, 105-106 (whether Sanchez-Rodriguez

charged Sampson with the pickaxe in the air or, instead, merely turned around to find himself face-to-face with Sampson). At one point during this questioning, Jefferson apparently broke down on the stand. RP 65 (court asks Jefferson if she “needs a moment”).

Counsel was referring to this cross-examination when she argued that Jefferson broke down because she had been confronted with some of her lies. The trial judge had no right to recharacterize Jefferson’s conflicting assertions as mere “inconsistencies,” a description not necessarily involving a deliberate misrepresentation of the facts. Compare Webster’s Third New Int’l Dictionary (1993) at 1144 (inconsistent) with 1305 (lie). If the prosecutor disagreed that Jefferson’s conflicting stories were the result of lies, he was free to argue they were mere inconsistencies. But the court was not free to affirmatively weigh in on the side of the State on this important and disputed issue.

Finally, the trial court commented on the evidence again when the prosecutor discussed Deputy Cadman’s opinion on Sanchez-Rodriguez’s guilt. The prosecutor told jurors, “Trust Deputy Cadman. Deputy Cadman said this man’s behavior was not consistent with what he said had happened.” RP 301. When defense counsel objected and stated this mischaracterized the

testimony, the court responded, "I think it's what the deputy said." CP 301. When defense counsel asked the court to clarify, the court changed its response to "I said it's an argument that can be made based on what the deputy said." RP 302. But that's not what the court initially said and not what jurors would have heard.

To be fair, the prosecutor's characterization of Cadman's testimony was not inaccurate. But the trial judge should not have indicated his personal thoughts to jurors about what this witness said. By itself, this comment would not warrant a new trial. But it does not stand alone. Rather, it was merely the last in a series of comments favoring the prosecution.

Because several of the court's improper comments were directed at important and disputed issues, alone or in combination, they denied Sanchez-Rodriguez a fair trial.

4. THE CUMULATIVE IMPACT OF THE TRIAL ERRORS DENIED SANCHEZ-RODRIGUEZ A FAIR TRIAL.

Cumulative trial error may deprive a defendant of his constitutional right to a fair trial. Coe, 101 Wn.2d at 789; State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

Assuming this Court concludes that neither the violation of ER 404(b), the improper opinion on guilt, nor the multiple

comments on the evidence, individually, warrants a new trial, the combined effect of these errors certainly warrants that result. In combination, these errors eased significantly the State's ability to convince jurors it had proved Sanchez-Rodriguez's guilt while simultaneously impeding Sanchez-Rodriguez's ability to establish reasonable doubt. In combination, they denied him his constitutional right to a fair trial.

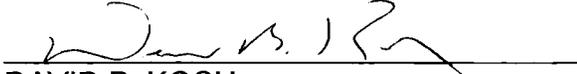
D. CONCLUSION

The trial court erred under ER 404(b) when it admitted evidence that Sanchez-Rodriguez had previously threatened to kill his ex-wife and erred when it repeatedly and blatantly commented on the evidence in a manner detrimental to the defense. In addition, Deputy Cadman improperly expressed his opinion that Sanchez-Rodriguez was guilty. These errors warrant remand for a new and fair trial.

DATED this 28th day of February, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DAVID B. KOCH,
WSBA No. 23789

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 67844-2-1
)	
ROBERTO SANCHEZ-RODRIGUEZ,)	
)	
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 28TH DAY OF FEBRUARY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JAMES HULBERT
WHATCOM COUNTY PROSECUTOR'S OFFICE
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] ROBERTO SANCHEZ-RODRIGUEZ
DOC NO. 353353
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF FEBRUARY, 2012.

x *Patrick Mayovsky*

**FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 FEB 28 PM 4:18**