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NO. 70667-5-I

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

**FILED**  
COURT OF APPEALS  
DIVISION ONE  
FEB 11 2014

STATE OF WASHINGTON,

Respondent,

v.

RUBEN AYON-ROSALES,

Appellant.

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COURT OF APPEALS  
DIVISION ONE  
FEB 11 2014

REC'D  
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King County Prosecutor  
Appellate Unit

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

The Honorable William Downing, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give a unanimity instruction.
2. The trial court violated appellant's constitutional right to a unanimous jury verdict.
3. Appellant was denied a fair trial when a state's witness expressed an opinion on guilt.

Issues Pertaining to Assignments of Error

1. Appellant was charged with one count of second-degree rape. When the State failed to elect which of two acts of sexual intercourse constituted the charge and the jury was not instructed it must be unanimous as to which act was proved, was appellant denied his constitutional right to a unanimous jury verdict?
2. A witness testified this was the first time anyone was raped in front of him. Did this testimony invade the province of the jury and violate appellant's constitutional right to a jury trial by expressing a direct opinion on guilt?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Ruben Ayon-Rosales with one count of second-degree rape – domestic violence. CP 1. The jury found him guilty and the court imposed an indeterminate sentence with a

standard range minimum term of 110 months and a maximum term of life. CP 124, 132. Notice of appeal was timely filed. CP 150.

2. Substantive Facts

Ayon-Rosales and M.B. were in a dating relationship for six years, beginning when she was sixteen and they both lived in Mexico. 2RP<sup>1</sup> 274-75. They separated, and she became pregnant with another man's child. 2RP 275, 337. Nevertheless, Ayon-Rosales paid for her to come to the United States and helped her find a job once she arrived. 2RP 291, 317-18. To obtain this job, she signed documents under penalty of perjury stating she was married, had five dependents, and had a valid social security number and green card, none of which is true. 2RP 330-33, 352.

The couple resumed their romantic relationship and lived together for approximately the next two years. 2RP 273, 277-78. In April 2011, the couple bought a car together, each contributing money to the down payment and financing the car in M.B.'s name. 2RP 318-20. Shortly thereafter, two things happened in quick succession. M.B. began dating a new boyfriend, Brandon Gregory, who she had met in March. 2RP 338-39, 340. And Ayon-Rosales was deported back to Mexico. 2RP 320. The car was parked at his mother's home. 2RP 320-21. Shortly after he was deported, M.B. and

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<sup>1</sup> There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Sept. 12, 2012 and July 17, 2013; 2RP – Jan. 28-31, 2013.

Gregory asked Ayon-Rosales' mother to borrow the car. 2RP 321. They never brought it back and were still using it at the time of trial. 2RP 325.

On September 23, 2011, Ayon-Rosales returned from Mexico and wanted to pick up some papers from the apartment. 2RP 292-93, 320, 341. He also wanted the car. 2RP 297. M.B. testified he hit her when she refused to give him the car keys. 2RP 295, 297. She testified he then forced her to have oral sex, threatened her with a butter knife from the kitchen, grabbed her hair when she tried to get away, and forced to her to have vaginal intercourse with him. 2RP 301-06. She testified that, afterwards, they sat on the sofa, he hugged her, and he asked her to forgive him. 2RP 306. She testified that, when he wasn't looking, she took the knife and hid it in the closet. 2RP 308.

Gregory had a key to the apartment, and stopped by to pick up a book he had left there, not expecting anyone to be home. 2RP 190-92. When he walked in, he saw M.B. and Ayon-Rosales naked. 2RP 193. His first thought was that M.B. was being unfaithful to him. 2RP 197. However, he changed his mind upon seeing her bloody, swollen face. 2RP 193. He testified M.B. cried and asked for help. 2RP 199.

M.B. claimed Ayon-Rosales then got dressed, stole her phone and credit cards, and left. 2RP 310. Gregory chased Ayon-Rosales, grabbed

him, and then lost hold of him when they tripped on the stairs outside. 2RP 200-01.

Meanwhile, M.B. began roaming the halls knocking on doors. 2RP 311. When some neighbors opened their door, she asked to use the phone to call the bank to cancel her card and ultimately told them her ex-boyfriend had been hitting her for hours. 2RP 312-13. The neighbors called 911. 2RP 313. The responding officers testified M.B.'s face was swollen and she appeared distraught. 2RP 72, 175-76. She told Officer Lloyd she had been struck multiple times. 2RP 74. He found a butter knife in the closet under a t-shirt. 2RP 76-78. A nurse examined M.B. at Harborview Medical Center and testified about her lacerations and abrasions that appeared to be the result of blunt force trauma to the head and chest. 2RP 111-28, 133-34. Photographs of her injuries were admitted at trial. 2RP 121-32.

Since this incident, M.B. has lived with Gregory, who is a United States citizen. 2RP 188-89, 206-07. The phone she uses is in Ayon-Rosales' name. 2RP 215. The car she and Ayon-Rosales bought together is still in her possession, and Gregory often drives it. 2RP 233. Gregory testified if M.B. had betrayed his trust, their relationship might have ended. 2RP 233-34.

A forensic scientist from the Washington State Patrol Crime Lab performed DNA testing on swabs taken from Ayon-Rosales and M.B. She

detected spermatozoa in the perineal and vaginal swabs, but none in the oral swab. 2RP 257. From the perineal swab, her test revealed a non-sperm fraction that matched M.B. and a sperm fraction that matched Ayon-Rosales. 2RP 263. From the vaginal swab, her test revealed a mixture of DNA that was 150 trillion times more likely to be a mixture of M.B. and Ayon-Rosales than of M.B. and an unrelated person. 2RP 263, 266.

When the prosecutor asked on re-direct how this experience had been traumatic for him, Gregory responded, “Well, because it was the first time ever someone got raped in front of me.” 2RP 238. Defense counsel objected, and the court stated, “Well, the context is given in a statement to the police detective. That was later.” 2RP 238. The prosecutor explained, “It’s in connection with that.” The court ruled, “That doesn’t expand the scope as broadly at the present time.” 2RP 238. The prosecutor agreed to, and did, move on. 2RP 238.

The jury instructions defined sexual intercourse as including any penetration of the vagina, however slight, and sexual contact involving the sex organs of one person and the mouth of another. CP 118. The court denied defense counsel’s request that the jury be instructed it had to be unanimous as to which sexual act formed the basis for conviction. 2RP 357. The court cited the exceptions for alternative means and a continuing course of conduct. 2RP 357.

In closing, the State argued the evidence showed both vaginal and oral sexual intercourse. 2RP 367-68. The defense argued it was possible M.B. and Ayon-Rosales had consensual sex, and then argued over the car. 2RP 381-82. The defense argued M.B. had a motive to lie about what happened to preserve her relationship with her new boyfriend, who represented a path to legal residency in the United States if the union resulted in marriage or children. 2RP 382.

C. ARGUMENT

1. AYON-ROSALES' RIGHT TO A UNANIMOUS JURY VERDICT WAS VIOLATED BECAUSE THE TRIAL COURT REFUSED TO GIVE A UNANIMITY INSTRUCTION.

An accused person has the constitutional right to a unanimous jury verdict. Const. art. 1, § 22; U.S. Const. amend. 6; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). When evidence is presented of multiple acts, any one of which could constitute the charged crime, the court must ensure the jury is unanimous as to which of the acts was committed. Petrich, 101 Wn.2d. at 572; State v. Furseth, 156 Wn. App. 516, 517-18, 233 P.3d 902 (2010). Jury unanimity may be preserved either by instructing the jury it must unanimously agree which act has been proved or by the prosecutor clearly electing one of the acts to rely on. Petrich, 101

Wn.2d at 572; 11 Washington Practice: Washington Pattern Jury Instructions – Criminal, WPIC 4.25 (3d Ed. 2011).

Ayon-Rosales’ conviction must be reversed because the evidence showed two acts of penetration, each of which could form the basis for a rape conviction, but the prosecutor made no election and the court denied the request for a unanimity instruction. 2RP 357, 367-68. First, a unanimity instruction was necessary to ensure the jury agreed which of multiple acts in evidence was the basis for the conviction. The exception for alternative means statutes does not apply because the definition of sexual intercourse does not create alternative means. The exception for a continuing course of conduct does not apply because the evidence showed more than one unit of prosecution. Finally, the instruction was necessary because the evidence presented a rational basis for distinguishing between the two acts.

a. A Unanimity Instruction Was Required Because the Evidence Showed Two Distinct Acts, Either of Which Could Constitute the Charged Crime.

A unanimity instruction is required whenever the case is a “multiple acts” case. Furseth, 156 Wn. App. at 520 (citing State v. Bobenhouse, 166 Wn.2d 881, 892, 214 P.3d 907 (2009)). “A multiple acts prosecution occurs when ‘several acts are alleged and any one of them could constitute the crime charged.’” Furseth, 156 Wn. App. at 520 (quoting Kitchen, 110 Wn.2d at 411). This scenario arises in a prosecution for a single act of rape

when evidence is presented of “multiple, separate acts, ‘each of which is capable of satisfying the material facts required to prove’ the charged crime.” Furseth, 156 Wn. App. at 520 (quoting Bobenhouse, 166 Wn.2d at 894).

Second-degree rape, as charged in this case, requires proof of two elements: sexual intercourse and forcible compulsion. RCW 9A.44.050(1). The statutory definition of sexual intercourse includes both penetration of the vagina by a penis and “sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” RCW 9A.44.010(1). The statutory definition is satisfied by “any penetration, however slight.” RCW 9A.44.010(1). Forcible compulsion is defined as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury.” RCW 9A.44.010(6).

According to M.B.’s testimony, two separate acts of sexual intercourse by forcible compulsion occurred. First, M.B. testified Ayon-Rosales grabbed her head and put his penis in her mouth while she tried to push him away and he threatened her with a butter knife. 2RP 301-02. Next, M.B. testified he put his penis in her vagina, more than once, after hitting her in the face when she said no and dragging her back by her hair. 2RP 303, 305-06, 310. Each of these incidents, taken alone, would satisfy the statutory definitions of both sexual intercourse and forcible compulsion.

RCW 9A.44.010. Therefore, the jury was required to be unanimous as to which act it relied upon in reaching its verdict. Petrich, 101 Wn.2d. at 572.

b. This Case Does Not Fall Under the Alternative Means Exception Because the Statutory Definitions of Sexual Intercourse Do Not Create Alternative Means of Committing Rape.

The trial court incorrectly ruled this case fell under two exceptions under which a unanimity instruction is not required. 2RP 357. First, no unanimity instruction is required when the case is not a multiple acts case, but an “alternative means” case. State v. Crane, 116 Wn.2d 315, 325-26, 804 P.2d 10 (1991). An alternative means case arises when a statute provides for more than one way of committing the offense. Id. Even if the defendant’s conduct appears to satisfy more than one of the statutory alternatives, the jury need not be unanimous as to which alternative is proved so long as there is substantial evidence of each. Id. But this is not an alternative means case. While alternative statutory means of committing second-degree rape do exist, Rosales was only charged with, and the jury was only instructed on, one of them: forcible compulsion. RCW 9A.44.050; CP 1, 119.

The court may have been referring to the various definitions of sexual intercourse as alternative means, but definitional statutes do not create alternative means of committing rape. See, e.g., State v. Smith, 159 Wn. 2d

778, 785, 154 P.3d 873 (2007) (“[T]he reach of the alternative means doctrine has not been extended to encompass a mere definitional instruction.”); State v. Al-Hamdani, 109 Wn. App. 599, 606-07, 36 P.3d 1103 (2001) (definition of “mental incapacity” does not create another means by which rape can occur); State v. Marko, 107 Wn. App. 215, 216-17, 27 P.3d 228 (2001) (“[W]hen a jury instruction defines a term, *i.e.*, ‘threat,’ the definitions do not create additional means of committing the crime.”). This is not a case where the jury could properly have found the accused’s conduct fell under more than one statutory alternative. Therefore, the court erred in denying Ayon-Rosales’ request for a unanimity instruction based on the alternative means exception.

c. Rape Is Not a Continuing Course of Conduct Because Each Individual Act of Penetration May Form the Basis for a Separate Charge.

The trial court also ruled this case involved a continuing course of conduct, rather than multiple acts. 2RP 357. A unanimity instruction is not required when the basis for the charge is a continuing course of conduct rather than a distinct individual act. Crane, 116 Wn.2d 326. Under this analysis, the jury need only be unanimous as to the overall course of conduct rather than each or any individual act. Id. at 330. But the court erred in finding a “continuing course of conduct” in this case because the unit of

prosecution for rape is per act of penetration; it is not an ongoing offense. State v. Tili, 139 Wn.2d 107, 117, 985 P.2d 365 (1999).

i. The Unit of Prosecution Plays a Vital Role in Determining Whether There Are Multiple Acts or One Continuing Course of Conduct.

To determine whether there is a continuing course of conduct, courts evaluate the facts “in a common-sense manner.” Petrich, 101 Wn.2d at 571. In Petrich, the court rejected the idea of a continuing course of conduct because the incidents occurred in separate times and places, with the only commonality being that the victim was the same. Id. Later courts have considered whether the various acts shared a common purpose or objective. State v. Knutz, 161 Wn. App. 395, 408, 253 P.3d 437 (2011); State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).

Additionally, courts have considered whether the crime can be charged as a continuing course of conduct based on the Legislature’s intent as to the unit of prosecution. Furseth, 156 Wn. App. at 518; State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995); State v. Craven, 69 Wn. App. 581, 588-89, 849 P.2d 681 (1993) (because promoting child prostitution can be charged either for each act of prostitution or for a continuous course of conduct, failure to give a unanimity instruction was not error). Statutes where the Legislature contemplated ongoing offenses, such as promotion of prostitution or possession of narcotics, are distinguished

from statutes where the Legislature intended to punish per individual violation such as child molestation and rape. Furseth, 156 Wn. App. at 520 (discussing Bobenhouse, 166 Wn.2d at 894); State v. Gooden, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988) (discussing Petrich).

For example, in Furseth, the court looked to the unit of prosecution to determine whether the acts were a continuing course of conduct for purposes of a unanimity analysis. 156 Wn. App. at 518. Furseth was charged with possession of child pornography. Id. On appeal, he argued the multiple images he possessed were multiple acts that required the jury to be unanimous as to which images it relied on. Id. In rejecting this argument, this Court turned to the unit of prosecution for possession of child pornography. Id.

The court found the unit of prosecution determinative because it defines ““what act or course of conduct”” the Legislature has proscribed. Id. at 521. Because the unit of prosecution for possession of child pornography is per possession, not per image, the multiple images were not multiple acts that could constitute the charged crime. Id. at 518, 520-21. Furseth could only have been convicted of one count of possession, regardless of how many images he possessed at one time. Id. at 521. Therefore, the jury was not required to be unanimous as to which images formed the basis for the charge. Id. at 521-22.

However, four months after Furseth, in State v. Brown, 159 Wn. App. 1, 13, 248 P.3d 518 (2010), this Court rejected the statutory unit of prosecution as a factor in the course of conduct analysis. Brown was charged with five counts of violating a no-contact order, based on numerous violations on five dates. Brown, 159 Wn. App. at 6. On each date there were many individual acts of violation, such as 86 phone calls on one of the dates. Id. at 6-7. Two of the dates were consecutive dates in October 2007, and two were consecutive dates in December 2007. Id. at 6-7. Brown argued his multiple convictions for the consecutive dates violated double jeopardy because the violations on consecutive dates were one ongoing violation, one unit of prosecution. Id. at 9. He also argued the court erred in failing to require jury unanimity as to which underlying act supported each count. Id. at 13-14.

Brown argued the State's positions were inconsistent when it charged multiple individual violations within a short time span but then also argued the acts were a continuing course of conduct to avoid a unanimity instruction. Id. at 13. This Court rejected this argument, essentially severing the unit of prosecution analysis from the unanimity analysis: "But the unit of prosecution analysis is a pure question of legislative intent, while the continuing course of conduct analysis discussed below, is a factual inquiry undertaken by the trial court. Accordingly, this argument fails." Id.

The Furseth court has the better of this argument. The Legislative intent regarding the unit of prosecution, the unit of conduct that constitutes the crime, should also determine what act the jury must agree on for conviction. This is directly in line with early cases discussing the multiple acts scenario that requires a unanimity instruction. A multiple acts prosecution occurs when “several acts are alleged and any one of them could constitute the crime charged.” Kitchen, 110 Wn.2d at 411 (emphasis added); Petrich, 101 Wn.2d at 571 (distinguishing continuing offense from several distinct acts, “each of which could be the basis for a criminal charge”). Where the unit of prosecution is per violation, any one violation could constitute the crime charged. Evidence of more than one unit of prosecution should trigger the requirement for a unanimity instruction.

ii. A Unanimity Instruction Was Required Here Because the State Presented Evidence of More than One Unit of Prosecution.

“[A] defining characteristic of a multiple acts case is . . . that each individual act could support a single, specific count.” Furseth, 156 Wn. App. at 522. This “defining characteristic” of a multiple acts case exists here because the unit of prosecution for rape is one act of penetration, however slight. Tili, 139 Wn.2d at 117. Because the unit of prosecution must play a vital role in determining whether there is a continuing course of conduct, it follows, then, that this Court should review de novo whether a unanimity

instruction is needed. See, e.g., State v. O'Brien, 164 Wn. App. 924, 928-29, 267 P.3d 422, 424 (2011) (unit of prosecution issues reviewed de novo on appeal); Brown, 159 Wn. App. at 14 (adequacy of jury instructions reviewed de novo); but see State v. Monaghan, 166 Wn. App. 521, 536, 270 P.3d 616, review denied, 174 Wn.2d 1014 (2012) (characterizing continuing course of conduct analysis as factual inquiry reviewed for abuse of discretion).

Tili was convicted of three counts of rape based on three acts of penetration occurring in quick succession. Tili, 139 Wn.2d at 110-12. On appeal, he argued the three convictions violated double jeopardy. Id. at 112-13. The court rejected this argument because, “Each penetration in this case clearly constitutes an independent unit of prosecution.” Id. at 117. The court held the unit of prosecution for rape was sexual intercourse, defined as any penetration. Id. Under this analysis, Tili was validly convicted of three separate counts of rape. Id.

In this case, the State charged only one count of rape. CP 1. However, under Tili, the two acts of penetration described by M.B. could support two separate convictions. Because each act could support a separate conviction, they are multiple acts, not a continuing course of conduct. Furseth, 156 Wn. App. at 521-22. The court erred in denying Ayon-Rosales’ request for a unanimity instruction. 2RP 357.

d. The Failure to Ensure Jury Unanimity Requires Reversal Because the Evidence Shows a Rational Basis for Distinguishing Between the Two Incidents.

The error in failing to require unanimity in a multiple acts case “stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act], resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” Bobenhouse, 166 Wn.2d at 893 (quoting Kitchen, 110 Wn.2d at 411). The failure to ensure jury unanimity is constitutional error, and reversal is required unless the State proves beyond a reasonable doubt that the error was not prejudicial. State v. Vander Houwen, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

The error is prejudicial unless the evidence offers no basis for the jury to rationally discriminate between the two acts. Bobenhouse, 166 Wn.2d at 894-95 (discussing State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990)). Here, there was a basis for the jury to discriminate between the alleged acts of oral and vaginal intercourse. The DNA testimony that Ayon-Rosales was a match came only from swabs from the perineal and vaginal area. 2RP 236, 266. No spermatozoa was detected in the oral swab. 2RP 257. The court erred in failing to ensure the jury was unanimous as to which act formed the basis of its verdict, and the State cannot meet its burden to prove that error harmless beyond a reasonable doubt.

2. IMPROPER OPINION TESTIMONY ON GUILT VIOLATED AYON-ROSALES' RIGHT TO A FAIR TRIAL.

Witnesses may not, whether directly or by implication, offer opinions as to the guilt of an accused person. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Opinions on guilt violate the constitutional right to a jury trial by intruding on the jury's role. Montgomery, 163 Wn.2d at 590. In short, "witnesses should not tell the jury what result to reach." Id. at 591 (discussing Fed. R. Evid. 702 advisory committee notes).

To prevent such issues in this case, counsel moved in limine to exclude opinions on guilt. CP 91. The court ruled, "No opinions will be elicited." 2RP 38. Despite this ruling, Gregory testified this was the first time someone was raped in front of him. 2RP 238. Counsel's objection was brushed aside without a clear ruling. 2RP 238. This testimony invaded the province of the jury and violated Rosales' right to a jury trial.

a. Gregory's Testimony Was Improper Because He Directly Opined that What Occurred Was the Crime of Rape.

Courts consider five factors in determining whether opinion testimony improperly invades the province of the jury: (1) the type of witness involved, (2) the 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. Demery, 144 Wn.2d at 759. Witnesses may express opinions that are rationally based on their perceptions and are helpful to the jury. ER 701. Such opinions are not necessarily objectionable solely because they encompass an ultimate issue of fact. ER 704. However, expressions of personal belief as to the guilt of the defendant are “clearly inappropriate.” Montgomery, 163 Wn.2d at 591 (citing, inter alia, Demery, 144 Wn.2d at 759).

Gregory’s testimony in this case was a “clearly inappropriate” opinion on guilt. Opinions, even by qualified experts, that sexual intercourse was not consensual, are improper in a rape case. See, e.g., State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236 (2009). In Black, a rape conviction was reversed due to improper opinion testimony regarding “rape trauma syndrome” that implied the complaining witness was telling the truth and was, indeed, raped. 109 Wn.2d at 349. In Hudson, this Court relied on Black to reverse a rape conviction because two nurses testified at trial that the complaining witness’ injuries were caused by non-consensual sex. Hudson, 150 Wn. App. at 653. Whether the complaining witness consented to the sexual activity is a legal issue for the trier of fact alone. Id. at 655 n. 3.

Gregory’s opinion in this case was likewise improper. Although not cloaked in the authority of a medical expert, Gregory’s testimony likewise

conveyed a direct opinion on the legal question of guilt, which should be reserved solely for the jury. His testimony, “it was the first time ever someone got raped in front of me,” directly states a personal belief in Ayon-Rosales’ guilt of the crime of rape. 2RP 238. He essentially told the jury what conclusion to reach.

Gregory is neither a police officer nor an expert, and as M.B.’s boyfriend, it is perhaps unsurprising he would corroborate her account. However, the mere fact that the jury might presume Gregory would believe M.B. does not excuse permitting him to testify to that opinion directly. See Montgomery, 163 Wn.2d at 595 (“The State argues the officers’ opinions added nothing new because the jury already knows the defendant was arrested because the officers believed he was guilty. We believe this unavoidable state of affairs does not justify allowing explicit opinions on intent.”).

The charge of rape is one that frequently comes down to competing versions of events and pits the credibility of the complaining witness against that of the accused. The defense in this case was the absence of forcible compulsion, also largely a question of credibility. Gregory’s testimony that M.B. was raped in front of him goes directly to the only issue before the jury. And in that context, it directly vouches for M.B.’s credibility and Ayon-Rosales’ guilt. Even medical experts, giving opinions on the cause of

injuries, may not testify the defendant committed the charged crime. Hudson, 150 Wn. App. at 655. Gregory's opinion was improper because he did just that.

b. Review Is Warranted Because Counsel Preserved the Error by Pre-Trial Motion and Objection and Gregory's Explicit Opinion on Guilt Is Manifest Constitutional Error.

Error may be predicated on admission of evidence when a timely objection was made and the grounds for the objection were apparent from the context. ER 103(a)(1). That is the case here. Counsel was aware of the risk of improper opinions because she made a motion in limine to exclude them. CP 91; 2RP 38. The motion was granted. 2RP 38. Then, when a direct opinion was offered in the course of the trial, she objected. 2RP 238. While she did not directly state at the moment the reason for her objection, that reason was apparent from the pre-trial motion and the nature of the testimony. CP 91; 2RP 38, 238. Therefore, this Court should find the error was preserved for appellate review. ER 103(a)(1); RAP 2.5(a).

However, even if this Court finds counsel's pre-trial motion and subsequent objection insufficient, this was manifest constitutional error that may be reviewed for the first time on appeal. RAP 2.5(a)(3). In determining whether opinion testimony is manifest constitutional error, courts look at whether there was an "explicit or almost explicit" opinion on guilt, whether

the jury was otherwise properly instructed that it is the sole judge of the witness credibility, whether there were potential tactical reasons not to object, and whether there is any indication the jury was influenced by the opinion. Montgomery, 163 Wn.2d at 595-96; State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007).

Gregory's testimony gave an "explicit or nearly explicit" statement about the ultimate issue before the jury: whether what occurred between M.B. and Ayon-Rosales was consensual sexual activity or rape. Kirkman, 159 Wn.2d at 936. There were no potential strategic reasons for not objecting to this testimony; in fact, counsel did object. 2RP 238. And the court's response to that objection makes it more likely the jury was influenced by the opinion. In the face of counsel's objection, the court neither clearly sustained the objection nor instructed the jury to disregard nor reminded the jury of its role nor referred the jury to the instructions regarding its role. 2RP 238. If it had done any of these things, there might be reason to rely on the presumption that the jury follows the general instruction. But given the court's vague response to the objection, and without any instruction to disregard, the jury was likely to give weight to Gregory's opinion. Even if counsel's objection was insufficient to preserve the error, this Court should nonetheless consider it as manifest constitutional error. RAP 2.5(a).

c. Because the Case Turns on Credibility, the Error Is Prejudicial and Requires Reversal.

Constitutional error is presumed prejudicial unless the State proves, beyond a reasonable doubt that the jury would have reached the same result without the error. Hudson, 150 Wn. App. at 656. The State must show there is overwhelming untainted evidence that necessarily leads to a finding of guilt. Id. It cannot do so when the central issue in the case is credibility. Id. When the case turns on who the jury believes, opinion testimony “cannot” be found harmless. Id.

Like Hudson, this case turns on credibility, not overwhelming evidence. The DNA testing tells the jury nothing about whether M.B. consented. 2RP 267. The other evidence including testimony about and photographs of M.B.’s injuries does not amount to overwhelming evidence of how or when those injuries were incurred. Additionally, M.B.’s credibility was called into question by evidence she made false statements under penalty of perjury in order to obtain employment in the United States. 2RP 330-33. The defense was that her accusation against Ayon-Rosales was part and parcel of her attempts to remain in this country by preserving her relationship with a serious boyfriend and potential spouse who is a citizen. 2RP 376, 382. There is no reason the jury would not rely, at least in part, on Gregory’s opinion in deciding whether to believe M.B.’s account.

D. CONCLUSION

Ayon-Rosales' conviction should be reversed because the trial court failed to exclude improper opinion testimony that invaded the jury's role as factfinder and failed to ensure a unanimous verdict as to which act was committed.

DATED this 11<sup>th</sup> day of February, 2014.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70667-5-1
	)	
RUBEN AYON-ROSALES,	)	
	)	
Appellant.	)	

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**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 11<sup>TH</sup> DAY OF FEBRUARY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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COURT OF APPEALS  
FEBRUARY 11 2014

FEB 11 2014

[X] RUBEN AYON-ROSALES  
DOC NO. 363989  
MONROE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2014.

x Patrick Mayovsky