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Court of Appeals
Division I
State of Washington

NO. 72934-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM RODGERS,

Appellant.

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

The Honorable John M. Meyer, Judge

BRIEF OF APPELLANT

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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 History</u>	2
2. <u>Trial Testimony</u>	2
3. <u>Opinion Testimony</u>	16
a. <i>Pretrial Motion to Exclude</i>	16
b. <i>Opinion Trial Testimony</i>	17
c. <i>Post Opinion Testimony Motion to Exclude</i>	21
C. <u>ARGUMENT</u>	23
1. RODGERS' WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN SEVERAL WITNESSES EXPRESSED THEIR OPINIONS ON HIS GUILT.....	23
a. <u>Multiple Witnesses Improperly Offered Opinions on Guilt</u>	25
b. <u>The Improper Opinion Testimony was Manifest Constitutional Error</u>	29
2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THIS HIGHLY PREJUDICIAL OPINION TESTIMONY.....	33
D. <u>CONCLUSION</u>	35

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Personal Restraint of Pirtle</u> 136 Wn.2d 467, 965 P.2d 593 (1998).....	33
<u>Seattle v. Heatley</u> 70 Wn. App. 573, 854 P.2d 658 (1993) <u>rev. denied</u> , 123 Wn.2d 1011 (1994)	23
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).....	23
<u>State v Dukich</u> 131 Wash. 50, 228 P. 1019 (1924)	23
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	33
<u>State v. Alexander</u> 64 Wn. App. 147, 822 P.2d 1250 (1992).....	28
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987) <u>rev. denied</u> , 123 Wn.2d 1011 (1994)	24, 28
<u>State v. Demery</u> 144 Wn.2d 753, 30 P.3d 1278 (2001).....	24
<u>State v. Farr-Lenzini</u> 93 Wn. App. 453, 970 P.2d 313 (1999).....	28
<u>State v. Haga</u> 8 Wn. App. 481, 507 P.2d 159.....	23
<u>State v. Hudson</u> 150 Wn. App. 646, 208 P.3d 1236 (2009).....	25
<u>State v. Jerrels</u> 83 Wn. App. 503, 925 P.2d 209 (1996).....	30

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Johnson</u> 152 Wn. App. 924, 219 P.3d 958 (2009).....	25, 26, 27, 28, 29, 30
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.2d 125 (2007).....	29
<u>State v. Lahti</u> 23 Wn. App. 648, 597 P.2d 937 <u>rev. denied</u> , 92 Wn.2d 1036 (1979).....	28
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	24, 26, 29
<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997).....	33
<u>State v. Thang</u> 145 Wn.2d 630, 41 P.3d 1159 (2002).....	30
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	33
<u>State v. Wigley</u> 5 Wn. App. 465, 488 P.2d 766 (1971) <u>rev. denied</u> , 82 Wn.2d 1006 (1973).....	23

FEDERAL CASES

<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	33, 35
--	--------

RULES, STATUTES AND OTHER AUTHORITIES

Black's Law Dictionary (7th ed.1999)	24
ER 701	23, 24
ER 704	23

TABLE OF AUTHORITIES (CONT'D)

	Page
U.S. Const. Amend. VI.....	33
Const. art. I, § 21.....	23
Const. art. I, § 22.....	23, 33

A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial when multiple witnesses gave opinion testimony as to appellant's guilt.

2. Appellant was denied his right to effective assistance of counsel when his attorney failed to object to improper opinion evidence.

Issues Pertaining to Assignments of Error

1. Opinion testimony on guilt invades the province of the jury and violates the constitutional right to a jury trial. During his trial for first degree premeditated murder, appellant's children and friend testified respectively, that that they believed in their gut, heart, and head that appellant was responsible. Appellant's daughter and love interest also testified they did not believe appellant when told about the death. Is reversal required where appellant's right to a fair trial was violated by these multiple improper opinions on guilt?

2. Trial counsel lodged two timely objections to this opinion evidence, which were overruled by the court. Assuming this objection was not sufficient to challenge all the offending opinion evidence on appeal, was defense counsel ineffective for failing to object to every instance of improper opinion evidence where appellant was prejudiced by witness testimony expressing an opinion that he was guilty?

B. STATEMENT OF THE CASE

1. Procedural History.

The Skagit County prosecutor charged appellant William Rodgers with one count of first degree premeditated murder by amended information. CP 14-15. A jury found Rodgers guilty. CP 354; 13RP¹ 118-20. The trial court sentenced Rodgers to 320 months imprisonment. CP 192-205; 13RP 158. The trial court also imposed 36 months of community custody. CP 193-205; 13RP 158. Rodgers timely appeals. CP 257.

2. Trial Testimony.

Rodgers was married to Sheri Rodgers. Together they had three children; Nicholas, Natasha, and Jeremiah.² 4RP 51, 101; 5RP 38-39. All three children described a pleasant childhood. 4RP 52, 101, 129-30; 5RP 47. They witnessed no physical or domestic violence between their parents. 4RP 65-66, 130-31, 146; 5RP 78, 91-92. Natasha described her parent's marriage as "great," and similar to what she wanted for herself as an adult. 4RP 101.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – July 30, September 12, and October 2, 2014; 2RP – October 9, 2014; 3RP – October 13, 14, and 15, 2015; 4RP – October 16, 2014; 5RP – October 20, 2014; 6RP – October 21, 2014; 7RP – October 22, 2014; 8RP – October 23, 2014; 9RP – October 24, 2014; 10RP – October 27, 2014; 11RP – October 28, 2014; 12RP – October 29, 2014; 13RP – October 30, 31, 2014 and January 5, 2015.

² To avoid confusion, this brief will refer to Sheri, Nicholas, Natasha, and Jeremiah Rodgers by their first names. No disrespect is intended.

In 2011, Rodgers began having an affair with a coworker named Meighan Nichols. 6RP 123-25, 128; 7RP 23-25. Rodgers asked his friend, Mark Thompson, to get him a second phone so he could keep in contact with Nichols without Sheri finding out. Thompson reluctantly agreed. 6RP 101-04. Rodgers told some friends that he was going through marital difficulties but intended to repair his marriage with Sheri. 4RP 141-42; 6RP 10; 7RP 53; 10RP 113, 120.

Rodgers' relationship with his children and Sheri became strained when they learned about the affair. 4RP 52-54, 64, 104-05, 134; 5RP 6, 41-42, 49-51, 78. Rodgers denied the affair with Nichols was sexual. 4RP 102. Friends described Rodgers as distracted and withdrawn during this time. Rodgers' friendships suffered as a result. 1RP 57, 73; 5RP 163; 6RP 103; 7RP 51, 67, 84, 96, 111. Friends, family, and coworkers noticed that Sheri began losing weight and had thinning hair. 4RP 105-06; 5RP 54-55; 7RP 11-12; 8RP 100, 111. Rodgers and Sheri began sleeping in separate bedrooms. 4RP 82-83; 6RP 136-37; 7RP 34.

Around this same time, William West met Rodgers and Sheri online. The three of them met twice for sexual intercourse. 6RP 21-23, 34-35. West found Rodgers "intense" and decided not to meet the two of them anymore. 6RP 24-25, 45. Rodgers encouraged West to continue seeing Sheri. 6RP 25, 35. West continued to have sexual intercourse with Sheri and emailed and

text messaged her. 6RP 26, 35. West and Sheri discussed divorce. West believed Sheri was unhappy and wanted to end her marriage. 6RP 26-27. West never witnessed any physical violence between Rodgers and Sheri. 6RP 31-32.

In the fall of 2011, Rodgers went to his family physician, Roger Estep, in “emotional turmoil.” 11RP 4-5, 17-18. Rodgers reported having nightmares, difficulty sleeping, depression, and anxiety. 11RP 6. Rodgers explained to Estep that he had suffered sexual abuse from his father as a child and had been traumatized by his military experience. 11RP 7-8, 24. Estep diagnosed Rodgers with post traumatic stress disorder (PTSD). 11RP 6-8. Estep prescribed Rodgers a sleep aid and anxiety and nightmare reducing medication. 6RP 9, 13, 23-24.

Estep saw Rodgers eight times between September 2011 and April 2012. 11RP 12. Rodgers was “emotionally distraught” and would cry during visits. 11RP 12-13. Estep was concerned that Rodgers would kill himself. 11RP 11. Estep never had any concerns that Rodgers would hurt anyone else. 11RP 15.

Beginning in October 2011, Rodgers also began visiting mental health counselor, Leanne Haywood. 10RP 125, 130. Haywood diagnosed Rodgers with PTSD and depression. 10RP 136. Rodgers told Haywood he was cutting himself as a way to relieve his emotional pain. 10RP 130-35.

Rodgers also told his children and friends about the childhood sex abuse he had suffered and that he was cutting himself to relieve his emotional pain. 1RP 56-57; 4RP 75-77, 138-39; 5RP 3-4, 9, 48, 75-76, 171; 6RP 106; 7RP 66-67; 10RP 114.

Nichols attended three counseling sessions with Rodgers. Rodgers' friend, Tim Livingston, also came to a counseling session. 10RP 131, 141. Sheri and the children attended none of the 22 counseling sessions Rodgers had with Haywood. 7RP 22; 10RP 131.

In February 2012, Rodgers appeared at a counseling session with bruises and scratches on his body. Rodgers told Haywood he had tripped over the family dog and fallen down the stairs. 10RP 140, 147. Haywood described Rodgers as especially upset, tearful, and tortured during a May 2012 counseling session. 10RP 142. Rodgers was suffering "sever flashbacks" from his PTSD. Haywood asked Rodgers if he needed to go to the hospital. 10RP 142-43, 148.

On May 27, 2012, Rodgers and Sheri went to Nate and Jonna Dunham's house for dinner. 7RP 111, 131. Nothing unusual happened during the dinner. 7RP 111-12, 123-24, 127-28, 131, 133. Nate Dunham opined that Rodgers and Sheri "seemed happy." 7RP 112. The Dunham's were not aware at the time that both Rodgers and Sheri were having extramarital affairs. 7RP 118-19, 128, 133. The following day Rodgers and

Livingston planned to pick up a barbecue Rodgers had purchased. 1RP 67-68. Sheri had plans to meet a friend at 9:00 a.m. for coffee. 8RP 101-03.

The morning of May 28, 2012, Rodgers called Livingston “very frantic,” and said that Sheri had fallen and was unresponsive. 1RP 23. Livingston went to Rodgers’ house and found Rodgers, “distraught, frankly, agitated.” 1RP 33, 62, 65. Sheri was lying on the stairs with her feet pointed downward. 1RP 29, 65. She was not breathing. 1RP 32, 66. Rodgers said he had not performed CPR because he didn’t want to hurt her. 1RP 33-34. Livingston noticed a small bruise on the left side of Sheri’s neck. 1RP 40. Rodgers had fresh scratches on his face and head. 1RP 38-39, 62-64. Rodgers told Livingston the family dog had scratched him. 1RP 39.

Sheri’s glasses were on the stairs. 1RP 28-29; 3RP 88. A pink scuba tank was at the bottom of the stairs. 7RP 149, 162. There was a pink mark on the wall next to the stairs. An “irregular shaped” hole was in the drywall near the fourth step. 3RP 127-28; 5RP 128; 6RP 59-62, 68, 75-76. Screws were missing from the center of the handrail on the steps. Sections of the handrail were also loose. 6RP 118; 10RP 54-55.

Shortly before emergency responders arrived, Rodgers’ next door neighbor, Jan Thorton, opened her window. 7RP 143-44. Thorton heard someone at the front of Rodgers’ house sob, and say, “I didn’t mean to hurt her.” 7RP 144-45.

Rodgers was hyperventilating when emergency responders arrived at the house. 3RP 101. Medics noticed bruising on Sheri's neck and left eye. 3RP 115, 123, 129-30. Rodgers had scratches on his face and head. 3RP 101, 116, 120, 148, 151, 154. Rodgers became "hysterical, very distraught, irrational," upon being told Sheri was dead. 3RP 147-48.

Paramedic, Yvonne North, and Battalion Fire Chief, Mike Voss, observed Rodgers clawing at, and rubbing gravel on his face and head. 3RP 134-35, 140, 143, 151, 154. Voss opined that Rodgers was trying to cover up combat wounds. 3RP 136, 139-40.

Fire chaplain, Alan Graves, spent about three hours with Rodgers after Sheri's death. 5RP 138, 143. Graves opined Rodgers' behavior was consistent with someone suffering grief and shock. 5RP 139, 145-47. Graves noticed scratch marks on Rodgers head but did not observe him self-inflict any injuries. 5RP 139-41, 144-45. Graves noted it was not unusual for someone in a similar situation to self-inflict injuries. 5RP 144-45.

Other friends arrived at Rodgers' house in the hours after the incident. 5RP 162; 6RP 108; 7RP 61, 99. Rodgers told them that he was helping Sheri move items the day of the incident. Sheri was at the bottom of the stairs when Rodgers returned after temporarily leaving the room. 7RP 63-64, 99-100. Rodgers believed Sheri had fallen down the stairs. CP 36-

37. Rodgers told Natasha and friends that he had been scratched by the dog. 4RP 116-17, 145; 5RP 177; 6RP 13, 109-09; 7RP 63, 101.

Rodgers began making funeral arrangements with Natasha the same day. 4RP 117-19. The burial cost was \$2,670. 5RP 152. Rodgers had previously obtained \$15,000 from his mother-in-law. 4RP 121-22, 147-48. Funeral director, Rex Watt, believed Rodgers reaction to Sheri's death was "perfectly natural." 5RP 150. Rodgers asked Watt to make Sheri's body viewable. Watt's opinion was that viewing was not appropriate because of bruising on Sheri's head, eyes, and cheeks. 5RP 151-53. Rodgers asked Watt about bruising on Sheri's neck. In response, Watt looked at Sheri's neck and saw bruising that looked like a handprint. 5RP 154-55.

Rodgers met with police and also explained to them that he was helping Sheri move items the day of the incident. Sheri was at the bottom of the stairs when Rodgers returned after temporarily leaving the room. CP 16-56; 3RP 100-01, 104; 4RP 14-17. Police obtained a DNA sample from Rodgers and permission from him to search the house. 3RP 162-63; 6RP 47; 8RP 16.

An autopsy was done on Sheri the day after the incident. 7RP 157-58; 8RP 22; 9RP 83, 86. Forensic pathologist, Daniel Selove, opined that Sheri died of strangulation. 9RP 87, 120-21, 123-25. Sheri had marks on her front left neck and a fractured larynx. 9RP 91, 106-07, 113, 115-18.

Selove believed those injuries were inconsistent with what someone would suffer from falling down the stairs. 9RP 92, 116-17, 133. Petechia was observed in Sheri's upper right eye. 9RP 127, 147-48. Selove ruled out positional asphyxiation as a possible cause of death. 9RP 125-26.

Selove also opined that Sheri suffered non-deadly injuries consistent with falling down the stairs. 9RP 87, 91-93, 97-98, 124. Selove opined injuries to Sheri's right hand, wrist, and forearm were consistent with defensive wounds. 9RP 99-104, 124, 138. Police concluded that blood underneath one of Sheri's right fingernails matched Rodgers' DNA profile, and the match was not expected to occur more frequently than one in 58-six-trillion. 8RP 58-59; 9RP 123, 130. Testing of Sheri's left hand showed the presence of male DNA but the amount was insufficient for testing. 8RP 57, 64-65. There was no physical damage to Sheri's fingernails. 9RP 132, 148.

Police took nail clippings from Rodgers' dog three days after the incident. 8RP 73-74, 82. Testing revealed no blood on the dog nail clippings. 8RP 59-60. Police acknowledged they did not know what happened with the dog between the time of the incident and when the nail clippings were obtained. 8RP 83.

Detective Jared Ely seized thumb drives and memory disks from Rodgers' house. 6RP 47, 53. Ely also seized a laptop computer from a dresser drawer in the master bedroom. 6RP 53; 7RP 167-68; 10RP 20. He

observed the same laptop in the kitchen of the house on the day of the incident. 7RP 168. The name of the laptop was "Bill PC" and the laptop software was registered to "Bill." 10RP 28.

The laptop contained Google internet searches and emails to Nichols. 10RP 22. Time stamps on the emails to Nichols matched time stamps in which Rodgers' username was logged in on the computer. 10RP 28-29, 110. A website which included, "25 methods for killing with your bare hands," was accessed on May 5, 2012. 10RP 37. Later activity at the same website included, "ten ways to commit the perfect crime." 10RP 40-41, 55. The website was accessed for about seven minutes. 10RP 60, 81. Ely did not have the full internet history for the laptop. 10RP 37. Ely could not say whether the website content was actually viewed. 10RP 42, 60, 71.

Specific searches were not performed for "ten ways to commit the perfect crime," and "25 methods for killing with your bare hands." 10RP 41-42, 60, 71-72. Rather, internet "cookies" for the websites were placed on the laptop. 10RP 70, 76-77. Ely opined that the "cookies" would not exist if the website had not actually been clicked on. 10RP 76-77.

Between May 20 and 27, 2012, internet searches were conducted for "is it really possible to break someone's neck by twisting it with my hands like in the movies?" "how to break a chicken's neck," and "how dangerous is it to fall down stairs." 10RP 39-40, 43-47, 84. Ely also opined an internet

search for “how to break a neck,” was completed. 10RP 26, 39-40. Such a search was not contained in the laptop’s internet search history and Ely could not therefore determine an exact timeframe in which such a search was conducted. 10RP 26.

Information security officer, Leslie Trout, also examined Rodgers’ laptop and disputed some of Ely’s conclusions. 11RP 29-33. Like Ely, Trout concluded that specific searches were not performed for “ten ways to commit the perfect crime,” and “25 methods for killing with your bare hands.” Rather, internet “cookies” for the websites were placed on the laptop. 11RP 40-41, 49-53. Unlike Ely however, Trout opined that the “cookies” would be placed on the laptop even if the website link was not actually clicked on. 11RP 41-42, 48-53. Trout found no evidence that a search was completed for “top ten prison survival tips.” 11RP 48.

Trout opined that a search was completed for “how to break a ‘N.’” Google’s function auto-completed “N” to include the word neck, and a link containing that search string was then clicked on. 11RP 38, 65. Trout concluded, “there wasn’t sufficient evidence to show that the user searched for how to break a neck per se as much as it was auto-completed or how dangerous it is to fall down the stairs, but there were search strings that were part of that.” 11RP 46-47. Trout found no data files on the laptop that

corroborated that either of the searches were clicked on and viewed. 11RP 47-48.

At trial, Nichols maintained that despite their affair, she and Rodgers agreed they were not going to leave their respective spouses. 7RP 25. Rodgers told Nichols he would never ask her to leave her husband and that “if it worked out,” maybe they could be together in the future. 6RP 133. Nichols denied that Rodger ever mentioned hurting or killing Sheri. 7RP 32. Rather, Rodgers “mostly talked very lovely about” Sheri. 7RP 40. Nichols believed Rodgers was trying to work through things with Sheri. 7RP 32-33. Nichols also described seeing Rodgers experience a panic or flashback attack on one occasion. 7RP 43.

Nichols explained Rodgers would often help her conduct research for classes she was enrolled in. 6RP 129, 155; 7RP 25-27. Rodgers and Nichols also exchanged emails. 6RP 127; 11RP 85. In one email, Rodgers mentioned wanting to hit Sheri in the face. 6RP 149-50. In another email, Rodgers told Nichols he would give Sheri sleeping pills to avoid being sexually intimate with her. 7RP 18; 12RP 39-40. In late May 2012, Rodgers emailed Nichols describing how upset he was that Sheri blamed him for the breakdown of his family’s relationship. 12RP 34, 43-45. Shortly thereafter, someone alleged conducted the internet search for, “is it really possible to

break someone's neck by twisting it with my hands like in the movies?"
10RP 28-29, 39, 47-48, 110.

About two and a half years after the incident, Rodgers was interviewed separately by psychologist, Delton Young, and psychiatrist, Mark McClung. 9RP 8, 11-13, 34-35, 58, 78; Young and McClung came to different conclusions based on their interviews with Rodgers.

Young diagnosed Rodgers with PTSD, anxiety, and major depression. 9RP 41-43. Rodgers described to Young the events leading up to the incident. Rodgers explained that he was roughhousing with the dog and pulling on Sheri's bathrobe in an effort to get her to play. Sheri refused because she had a meeting. The dog then scratched Rodgers and Sheri. In response, Sheri slapped Rodgers which triggered a "dissociative flashback." Because of the "dissociate flashback," Rodgers believed he was being brutalized by his father and fighting for his life. 9RP 43-47. Rodgers could not recall what happened to Sheri but when his mental functioning cleared he saw her lying motionless at the bottom of the stairs. 9RP 44, 62. Rodgers concluded that he must have strangled Sheri. 9RP 64, 80. Rodgers denied to Young that he had completed the alleged internet searches about killing someone with bare hands. 9RP 61.

Rodgers told Young that he made up the story about helping Sheri move equipment in an effort to delay his arrest. Rodgers explained that he

intended to use the extra time to get his children home, say goodbye, and then commit suicide. 9RP 45-46, 63-64. Young noted that he would not be surprised if Rodgers' had engaged in self-harming behavior after the incident ended. 9RP 51.

Young opined that Rodgers account of the incident was consistent with what would occur in a "severe violent dissociate flashback." 9RP 44. Accordingly, Young opined that if Rodgers experienced a dissociative flashback his ability to form the requisite intent and understand the nature, quality, and wrongfulness of his alleged acts would have been "severely impaired." 9RP 48-49.

McClung also diagnosed with PTSD and depression. 12RP 21-22, 25, 65. In addition, McClung diagnosed Rodgers with antisocial and borderline personality trait disorder. 12RP 25. McClung noted that consistent with his PTSD, Rodgers "had a higher than usual history of dissociative experiences." 12RP 19.

Rodgers also described to McClung the events leading up to the incident. 12RP 50, 62, 74. Rodgers reported that after coming up on Sheri with his forearm, he fell into a fetal position, and things became "foggy" before gradually clearing. Rodgers was uncertain how much time had passed. 12RP 100-02.

Rodgers explained to McClung that he was engaging in self-harm when he rubbed gravel on his face and head. 12RP 51-52, 88. McClung questioned whether Rodgers intended to hide injuries by rubbing gravel on his face and head since his behavior was inconsistent with his normal self-harm habit of cutting himself. 12RP 52, 68, 88-90. McClung opined that Rodgers level of deceit exceeded what he would expect from someone involved in an extramarital affair. 12RP 29-30, 47, 70-71, 75, 108. McClung also believed Rodgers' obtaining of \$15,000 after the incident was inconsistent with someone intending to commit suicide. 12RP 49.

Unlike Young, McClung assumed that the alleged internet searches were conducted by Rodgers. 9RP 54-55, 60-61; 12RP 65-66. McClung explained that the internet searches were significant, but not necessary, to his conclusions. 12RP 71-72, 87-88. McClung opined that Rodgers' reported dissociative experience of fighting back against his father was inconsistent with the lack of any reported instances in which Rodgers had previously acted out violently toward his father. 12RP 57-58, 85. McClung also believed there should have been more evidence of Rodgers experiencing dissociate experiences previously. 12RP 75. McClung concluded that Rodgers mental disorder did not interfere with his ability to know the identity of who he was attacking and did not render him incapable of forming the requisite intent for the incident. 12RP 63-64, 106.

3. Opinion Testimony.

a. *Pretrial Motion to Exclude*

Before trial, Rodgers sought to exclude evidence that when he told his daughter, Natasha, of her mother's death over the telephone, she responded, "what? were you guys, were you guys fighting?" and "were, well if you guys weren't fighting, what happened?" 3RP 33-34; 4RP 4-10; CP 36-37. Natasha's statements were recorded because Rodgers was being interviewed at the police station at the time of the telephone call. CP 16-56. The trial court initially reserved its ruling. 3RP 34.

Defense counsel renewed his motion to exclude the statements the following day. 4RP 4. Defense counsel made clear that he was objecting to the both the recording, and to Natasha testifying about the statements she made on the recording. 4RP 4-7.

Defense counsel argued the statements were more prejudicial than probative under ER 403 because there was no history of physical violence or domestic violence between Rodgers and Sheri. 3RP 33; 4RP 8-10. Defense counsel noted his concern with Natasha's statements "is it plants a seed of there probably was a lot of DV or violence when that would be unsubstantiated with the record." 3RP 33; 4RP 8. Defense counsel also argued the statements were not relevant, could confuse and influence the

jury, and did not meet the criteria for being admitted as an excited utterance. 4RP 8-11.

The State acknowledged there was no history of physical violence, but maintained fighting could include arguing. 3RP 34; 4RP 8-9. The State also argued any confusion about what Natasha meant by fighting could be dealt with on cross-examination. 4RP 10. The State maintained Natasha's statements were admissible as excited utterances. 4RP 8.

The trial court denied the motion to exclude, finding Natasha's statements were not unduly prejudicial, not hearsay since Natasha would testify, and not offered for the truth of the matter asserted. 4RP 10-12. Defense counsel withdrew his objection to the statements on the basis of hearsay. 4RP 12.

b. Opinion Trial Testimony

Armed with this ruling, the prosecutor elicited through Natasha that when Rodgers told her that her mother had died in an accident, "the very, very, very first thought that came into my gut and out of my mouth was: were you guys fighting?" 4RP 112. Natasha, explained there was never physical or domestic violence between her parents, but there were "screaming matches." 4RP 113. Natasha further elaborated, "and when he told me that she fell down the stairs – and if they were fighting like I

literally thought that he could have just pushed her down the stairs. Why would she slip?" 4RP 113-14.

Rodgers' son, Nicholas, also testified about finding out that his mother had died. The following exchange occurred:

Q: When did you find out that your mother had passed away?

A: So I was with my unit in Korea. It was Memorial Day weekend. I received a Red Cross message. And the only thing it said is that I needed to get in touch with my family at home. I had no information. I finally called home. And I talked to my dad. And I knew immediately that -- I said: Dad what happened? And he said: You just need to get home. So in my heart the way that he told me --

Q: Hold on. He told you needed to get home?

A: Right

Q: Did you ask him anything further?

A: I was thinking about what was going on at home. I said: What happened?

Q: Did he respond to that?

A: No. He just said: You need to get home. Your mother has been in an accident. The way that he told me I knew in my gut, I wanted to say: Dad what did you do? Because of his tone, I knew if it truly was a car accident, a spare [*sic*] of the moment thing, I believe he would lay it all out there for me. He wouldn't mask it in some way or form.

4RP 56-57.

Nicholas testified that he had spoken with his parents by telephone the night before the incident. The prosecutor asked Nicholas about that conversation:

Q: What did your dad say?

A: It made me feel weird, but he laid out the entire next day to me. Oh, you know we just prepaid for our new barbecue, and I'm going to pick it up tomorrow. I'm going to make a meal for your mother. And it's going to be a really nice Sunday.

Q: Let me stop you there. You said it was weird. What about that was weird to you?

A: It was the way he was telling me his schedule. That wasn't something he did all the time. Like I said, our relationship was kind of strange throughout the whole next year. This was out of the blue. It felt weird. At the same time I was thinking, okay, alright, alright. It made me feel weird. But after the fact, it still makes me feel weird. Because to me inside my heart it makes me feel like there was an agenda there ultimately; that he was trying to pick his alibi or something like that. That's just how it made me feel.

4RP 58-59.

Other witnesses explained how they discovered Sheri had died. When asked how he felt after being told that Sheri was dead, William West responded: "I didn't feel good about it. I had the feeling that Bill had something to do with that." 6RP 31. Defense counsel's objection was sustained and West's answer stricken. 6RP 31.

The same theme of witnesses explaining how they discovered Sheri had died continued throughout the State's case-in-chief. Thompson was asked during direct examination if he noticed anything about Rodgers' behavior after arriving at the house after Sheri's death:

Q: Did you notice anything strange about how he [Rodgers] was acting any point?

A: Well, at one point he stared at me, gave me this look that made me doubt what happened.

Q: Why do you say that?

A: It was just, I don't know how to describe it. It was a look of I knew in my head what did you do, Bill?

Q: That's what you thought?

A: That's what I thought.

6RP 110.

Defense counsel immediately objected on the basis that Thompson was speculating. The State maintained Thompson was properly describing his own personal reaction to Rodgers' action. The trial court overruled the objection. 6RP 110.

Finally, Nichols was asked about her telephone conversation with Rodgers a few days after the incident. The following exchange occurred:

Q: And what was his – was he emotional when you were talking?

A: Yes

Q: What did he sound like?

A: He sounded sad.

Q: Did you talk about anything else?

- A: I said I asked him about the dog, and he said that he had gotten scratched. And I said: Bill, are you sure that's what happened? And he said: Yes, that Sheri was upset that he was rough housing with the dog.
- Q: Why did you ask if he was sure that was what happened?
- A: I don't know.

6RP 158-59.

c. Post Opinion Testimony Motion to Exclude.

After Natasha, Nicholas, Thompson, and Nichols had finished testifying, defense counsel sought to exclude further witnesses from testifying about “gut feels” that Rodgers was responsible. 7R 87. Defense counsel noted, “whether or not my client did anything wrong is a question reserved for the jury, not the individual witnesses.” 7RP 87.

The State maintained the witnesses had properly testified to “their sensory reaction to a piece of information.” 4RP 87-88. The State noted that many witnesses had known Rodgers for years and were entitled to express their opinions based on that knowledge. 4RP 89.

The trial court questioned why such witness statements were relevant. 4RP 88. The trial court explained:

I've kind of been waiting for this issue to be raised. Because I had wondered – I mean to me, depending on how it's phrased, it does invade the province of the jury. Somebody saying well I felt he must have done something wrong or something like, isn't that for the jury to consider?

4RP 88.

The trial court concluded by nothing, “certainly speculation should not be encouraged. On the other hand, I mean there’s been so much already that I’m not sure what difference a little more would make.” 4RP 89-90.

C. ARGUMENT

1. RODGERS' WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN SEVERAL WITNESSES EXPRESSED THEIR OPINIONS ON HIS GUILT.

The jury's fact-finding role is essential to the constitutional right to a jury trial. Sofie v. Fibreboard Corp., 112 Wn.2d 636; 656, 771 P.2d 711 (1989). That role is to be held "inviolable" under Washington's constitution. Const. art. I, §§ 21, 22. Therefore, it has long been the general rule that witnesses are to state facts and not express inferences or opinions. State v. Haga, 8 Wn. App. 481, 491, 507 P.2d 159 (citing State v Dukich, 131 Wash. 50, 228 P. 1019 (1924); State v. Wigley, 5 Wn. App. 465, 488 P.2d 766 (1971)), rev. denied, 82 Wn.2d 1006 (1973).

These general prohibitions are not without exception. Under ER 704, "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." For lay witnesses, evidence is "otherwise admissible" only if also admissible under ER 701. Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994). That rule provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear

understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 701.

Under these evidentiary rules, and in light of the constitutional right to trial, certain opinion testimony remains absolutely prohibited, however: "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), rev. denied, 123 Wn.2d 1011 (1994). Opinion testimony is that "based on one's belief or idea rather than on direct knowledge of the facts at issue." State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (quoting Black's Law Dictionary 1486 (7th ed.1999)). Expressions of personal belief as to guilt are "clearly inappropriate" testimony in criminal trials. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). An explicit or nearly explicit opinion on credibility or guilt is manifest constitutional error that may be raised for the first time on appeal. Montgomery, 163 Wn.2d at 595.

Rodgers' right to a fair trial was compromised when his children, friend, and love interest were called upon to express opinions as to Rodgers' guilt, rather than facts. Admission of these opinions on guilt, which invaded the province of the jury, was manifest constitutional error that violated Rodgers' right to a fair trial.

a. Multiple Witnesses Improperly Offered Opinions on Guilt.

To determine whether an opinion is improper, courts consider (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. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009) (citing State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009)).

Here, Rodgers children, friend, and love interest, repeatedly expressed opinions that Rodgers was guilty. Rodgers' daughter, Natasha, asked, "were you guys fighting?" when Rodgers' told her about her mother's death. 4RP 112-13. The trial court overruled defense counsel's ER 403 objection. 3RP 33-34; 4RP 4-12.

At trial, Natasha further elaborated that when Rodgers told her that her mother had been in an accident, "I don't think I necessarily utterly believed him for a moment in time." 4RP 112. Natasha explained, "and when he had told me that she fell down the stairs – and if they were fighting like I literally thought that he could have just pushed her down the stairs. Why would she slip?" 4RP 113-14.

Nicholas testified that when told by Rodgers that his mother had been in accident, "I knew in my gut, I wanted to say, Dad, what did you do?"

4RP 57. Nicholas added that when told about Rodgers' plans on the day of the incident, that "inside my heart," he believed Rodgers was trying to establish an alibi. 4RP 59.

Similarly, Thompson, testified that when he arrived at the house after the incident, Rodgers stared at him and Thompson "knew in my head what did you do, Bill?" 6RP 110. Defense counsel's objection to Thompson's statement was overruled. 6RP 110.

Finally, Rodgers' love interest, Nichols, testified that when Rodgers told her about the incident and that he was scratched by a dog, she responded, "Bill, are you sure that's what happened?" 6RP 158-59.

Each of these statements either expressly stated or implied that in the opinion of the witnesses, Rodgers was guilty of murdering his wife. These statements were not direct witness observations, but rather, expressions of personal belief that Rodgers was guilty based on what amounted to a "gut feeling." See Montgomery, 163 Wn.2d at 594 (phrases like "I felt strongly that..." and "we believe" indicates direct or explicit expression of personal belief). These opinions invaded the province of the jury and denied Rodgers his right to a fair trial.

Johnson is instructive in this regard. Division Two of this Court reversed a conviction for child molestation in Johnson because of improper opinion testimony. Johnson, 152 Wn. App. at 927. That case involved out-

of-court statements attributed to Johnson's wife indicating she believed the victim's allegations. Id. at 931. The victim, her mother, and her stepfather all related an incident in which Johnson's wife confronted the victim, T.W., about the accusations and demanded she prove it was true. According to the witnesses, when T.W. recounted details of Johnson's intimate anatomy and sexual habits, his wife burst into tears, acknowledged it must be true, and hours later attempted suicide by overdose. Id. at 932-33. The court reasoned this testimony "sheds little or no light on any witness's credibility or on evidence properly before the jury and really only tells us what [Johnson's wife] believed." Id. at 933.

The Johnson court held it was manifest constitutional error to admit Johnson's wife's opinion and reversed his conviction despite the lack of objection below. Id. at 933-34. The court noted, "[T]he jury should not have heard collateral testimony that Johnson's wife believed T.W.'s allegations." Id. at 934. The court reasoned that this testimony "served no purpose except to prejudice the jury," and Johnson was thereby denied a fair trial. Id. at 934.

Like Johnson's wife, the statements by Natasha, Nicholas, Thompson, and Nichols that they believed in their gut, heart, and head that Rodgers was responsible, only tells what they believed. As in Johnson, their beliefs shed no light on witness credibility or any other question properly

before the jury. See also State v. Lahti, 23 Wn. App. 648, 649-50, 597 P.2d 937 (testimony that witness expressed suspicions about defendant's conduct constituted improper opinion, substituting witness's judgment for jury's), rev. denied, 92 Wn.2d 1036 (1979)). Rather, the testimony simply conveyed that Rodgers' own children, friend, and love interest believed he was guilty.

The Johnson Court determined that a single witness's opinion on guilt warranted reversal of the conviction. Here, the opinion evidence saturated Rodgers' trial. Four separate witnesses directly or implicitly offered opinions on Rodgers's guilt during two separate days of trial.

Rodgers' right to a fair trial was violated because these opinions on his guilt had no probative value regarding any issue properly before the jury and served only to prejudice the jury against him. His conviction should be reversed. See, Johnson, 12 Wn. App. at 934; State v. Farr-Lenzini, 93 Wn. App. 453, 465, 970 P.2d 313 (1999) (reversing where improper lay opinion on defendant's guilt shown to invade jury's province); State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (reversing where expert "effectively testified" that the defendant was guilty as charged by stating his belief that the child was not lying about sexual abuse); Black, 109 Wn.2d at 349, 745 P.2d 12 (reversing where expert testimony that the victim suffered from rape trauma syndrome constituted "in essence" a statement that the defendant was guilty where defense was consent).

b. The Improper Opinion Testimony was Manifest Constitutional Error.

Even assuming defense counsel's timely objections to Natasha's statement and Thompson's testimony were not sufficient to preserve the issue; this Court should reach the issue and reverse because this was manifest constitutional error. See Johnson, 152 Wn. App. at 934. Improper opinion testimony is constitutional error because it violates the right to trial by a fair and impartial jury. Id. The constitutional error is manifest when 1) the opinion is explicit or nearly explicit, and 2) it causes actual prejudice or has practical and identifiable consequences. Montgomery, 163 Wn.2d at 595; State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.2d 125 (2007).

Both criteria are met in this case. As discussed above, all the statements unambiguously conveyed to the jurors the witness's opinions that Rodgers was guilty. The opinion testimony caused prejudice and affected the jury because the instructions were insufficient to correct the error, the opinions of Rodgers' children, friend, and love interest were inherently likely to affect the jury regardless of instruction, and the opinion testimony went to an ultimate issue the jury had to decide.

In Montgomery, the court concluded there was no manifest constitutional error in large part because the jury was properly instructed, including an instruction that the jury was not bound by expert opinion. 163

Wn.2d at 595-96. Here, the jury was properly instructed that it is the sole judge of witness credibility. CP 59 (instruction 1). But it was also instructed to consider all the admitted evidence, including testimony. CP 58-59 (instruction 1); CP 72 (instruction 13). Nothing in the instructions told the jury it could not consider, or should disregard, the opinions of Rodgers' children, friend, and love interest as evidence of guilt.

Even if it had been instructed to do so, it is unlikely the jury would be able to follow that instruction. The opinions of a defendant's family members are particularly prejudicial. See e.g. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996) ("A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so."); Johnson, 152 Wn. App. at 933-34 (improper opinion testimony highly prejudicial because conveyed to the jury that Johnson's own wife believed the accusations). These were not just any witnesses offering opinions as to Rodgers' guilt; they were his own children, friend, and love interest.

Moreover, the prosecutor exacerbated the prejudicial nature of the improper opinion testimony by commenting on it in closing argument. See State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002). The prosecutor referred to Natasha's opinion that Rodgers was guilty, explaining, "she's

been a defender of her father until those last few moments. She found out she didn't believe it." 13RP 17.

Finally, here the opinion testimony went directly to the ultimate issue the jury had to decide; whether Rodgers killed his wife with premeditated intent. The State's case for premeditation rested on the internet searches allegedly completed by Rodgers. 3RP 7-8, 13-17; 7RP 141; 10RP 104-07; 13RP 31-32. Whether Rodgers actually completed the internet searches was in dispute however. Detective Ely acknowledged he did not have the "full internet history" for specific dates, and therefore did "not have a full picture." 10RP 37. Additionally, Ely admitted specific searches were not performed for "ten ways to commit the perfect crime," and "25 methods for killing with your bare hands." 10RP 41-42, 60, 71-72. Ely also could not say whether the various websites were actually looked at it, and if so, for how long. 10RP 41-42, 59-61, 71-72.

Trout's testimony cast further doubt on the alleged internet searches. Trout opined internet data for "top ten prison survival tips," "ten ways to commit the perfect crime," and "25 methods for killing with your bare hands" was placed on the computer via "cookies" rather than by a user clicking on internet links. 11RP 40-41, 48-53. Trout further opined that the specific internet searches for "how to break a neck," and "how dangerous is

it to fall down the stairs” were partly completed by Google’s auto complete feature. 11RP 46-48.

Whether Rodgers had the capacity to form the intent required for murder was also very much in dispute. Both Young and McClung opined that Rodgers suffered from depression and post traumatic stress disorder. 9RP 41-43; 12RP 21-22, 25, 65. Young testified that Rodgers’ account of the incident was consistent with a “severe violent dissociative flashback.” 9RP 44. Accordingly, Young opined that if Rodgers experienced a dissociative flashback his ability to form the requisite intent and understand the nature, quality, and wrongfulness of his alleged acts would have been “severely impaired.” 9RP 48-49. Although McClung believed it “more likely than not,” that Rodgers’ mental disorder did not render him incapable of forming intent, there was no testimony Rodgers’ mental disorder could not render him incapable. 12RP 63-64, 106.

Given the intimate nature of the opinion testimony, the prosecutor’s comments during closing argument, the lack of instruction regarding opinion testimony, and the fact that the opinion testimony went directly to the ultimate issue the jury had to decide, their admission was not harmless. This Court should conclude this error affected the jury’s verdict, find manifest constitutional error, and reverse.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THIS HIGHLY PREJUDICIAL OPINION TESTIMONY.

Alternatively, if this Court concludes this issue was not preserved, Rodgers was denied his right to effective assistance of counsel.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Thomas, 109 Wn.2d at 225-26 (adopting two-prong test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

The failure to object to this improper and highly prejudicial opinion on guilt was unreasonably deficient. Legitimate trial strategy or tactics may constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). But there is no possible strategic reason for permitting

improper opinion testimony that Natasha, Nicholas, and Nichols believed Rodgers was responsible for the murder. This opinion testimony went directly to an ultimate issue the jury had to decide. An objection to this improper opinion testimony would likely have been sustained. Indeed, the trial court sustained a previous objection to testimony that West, “had the feeling that Bill had something to do with it.” 4RP 31. Although defense counsel did object to Natasha’s statement, he did so under ER 403, rather than on the basis of improper opinion testimony. 3RP 33-34; 4RP 4-12.

Moreover, defense counsel clearly recognized the prejudice from this improper opinion testimony, albeit too late. After the testimony from Natasha, Nicholas, Thompson, and Nichols, defense counsel brought a motion to preclude further witnesses from testifying to “gut feels and speculation on the ultimate issue.” 7R 87. The trial court’s comment that it had “been waiting for this issue to be raised,” and reasoning that such questions were irrelevant and “does invade the province of the jury,” further suggest that timely defense objections would have been sustained. 7RP 88-89.

Rodgers has also shown prejudice. As discussed in argument one, infra, there is a reasonable probability that introduction of this improper opinion evidence affected the jury’s verdict. Rodgers’ conviction should be reversed because counsel’s failure to object was objectively unreasonable

and undermines confidence in the outcome of the trial. See Strickland, 466 U.S. at 669.

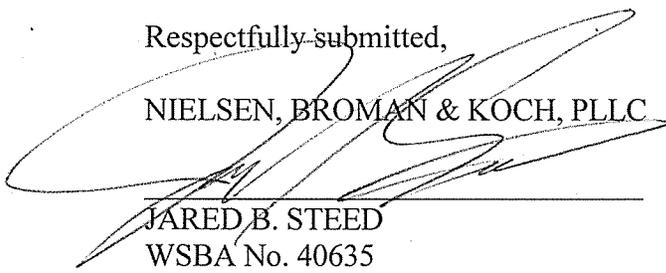
D. CONCLUSION

For the reasons discussed above, this Court should reverse Rodgers' conviction and remand for a new trial.

DATED this 2nd day of November, 2015.

Respectfully submitted,

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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 72934-9-1
)	
WILLIAM RODGERS,)	
)	
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 2ND DAY OF NOVEMBER, 2015, 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] WILLIAM RODGERS
DOC NO. 379032
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF NOVEMBER, 2015.

x Patrick Mayovsky