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Division I
State of Washington
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SUPREME COURT
STATE OF WASHINGTON
5/18/2022
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CLERK

SUPREME COURT NO. 100938-1

NO. 83432-1-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAWN ROLFE,

Petitioner.

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

The Honorable Michael Evans, Judge
The Honorable Patricia Fassett, Judge

PETITION FOR REVIEW

DAVID B. KOCH
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
2200 6TH Ave., Suite 1250
Seattle, WA 98121
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Dawn Rolfe, the appellant below, asks this Court to review her case.

B. COURT OF APPEALS DECISION

Rolfe requests review of the Court of Appeals decision in State v. Rolfe, COA No. 83432-1-I, filed April 18, 2022, and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether admission of a recorded interrogation – wherein a detective expressed his opinion that petitioner was lying about her intentions and had conspired to commit triple murder – was impermissible opinion testimony in violation of the Sixth Amendment and Wash. Const. art. I, §§ 21, 22.

2. Whether defense counsel's failure to object to this opinion evidence denied petitioner her Sixth Amendment right to effective representation and a fair trial.

3. Whether review is appropriate under RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001).

D. STATEMENT OF THE CASE[1]

1. Trial Proceedings

The Cowlitz County Prosecutors Office charged Dawn Rolfe with seven criminal offenses in a four-count information. CP 23-26.

Counts 1 through 3 charged her with Attempted Murder in the First Degree and/or Conspiracy To Commit Murder in The First Degree, identifying the alleged victims as Richard Rolfe (Dawn Rolfe's estranged husband), Penelope Newberg-Rolfe (Dawn Rolfe's mother-in-law), and Stacy Peabody (Richard Rolfe's girlfriend). CP 1-2,

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[1] For a more comprehensive statement of the case, see Brief of Appellant, at 2-14.

23-25. Count 4 charged Rolfe with Unlawful Possession of a Firearm in the Second Degree. CP 26.

The primary trial witnesses were Dawn's[2] co-worker and friend, Brenda Mortensen; Cowlitz County Sheriff's Detective Lorenzo Gladson; and Dawn herself. RP 357, 408, 746. The primary disputed trial issue was whether Dawn actually intended harm to the three named victims or, as the defense claimed, she was merely engaged in fantasy as a way to cope with the end of her marriage and the resulting emotional and financial toll. RP 354-356, 833-834.

Brenda Mortensen testified that she first met Dawn about two years earlier while both women worked at Walmart. RP 358-359. The relationship became social, and they would meet for drinks at the Columbia Inn in Kalama. RP 359-360. Dawn and Richard's marriage

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[2] To distinguish between Dawn and Richard Rolfe, this petition refers to them by first names when discussing the trial evidence.

ended in January 2019, leaving Dawn upset but hopeful Richard would return. RP 361. Upon discovering that Richard had a new girlfriend, however, Dawn was angry and that anger grew as her financial situation deteriorated. RP 361-363. Dawn and Richard had always planned to inherit Newberg-Rolfe's property and move into her home upon her death, but that was no longer going to happen. RP 373.

Mortensen testified that she became concerned during a conversation with Dawn at the Columbia Inn on August 23, 2019. RP 365-366. Dawn said she wanted to kill her husband, his new girlfriend, and her mother-in-law. Mortensen perceived that Dawn was serious when she said she wanted to find someone to do it, or do it herself, and make it look like a home invasion robbery. RP 366-368.

At the time, Richard Rolfe and Stacy Peabody were living on Hidden Ridge Road in Kelso – on property

owned by Newberg-Rolfe – in a trailer parked just down the driveway from Newberg-Rolfe's residence. RP 369-370, 668-670, 681-682; exhibit 10. According to Mortensen, Dawn said she had been planning for months and watching them. RP 369. She wanted all three killed at that location and at the same time. RP 369.

According to Mortensen, Dawn hoped to hire someone else to carry out the plan and would offer the person a couple hundred dollars up front and a promise that the person could keep Newberg-Rolfe's valuable rings and the contents of her safe containing additional jewelry and cash. RP 374. Dawn said she knew some seedy Portland bars she wanted to visit the next day to find someone to carry out her plan. RP 376-377.

Mortensen went home and shared with her family what Dawn had said. RP 376. The next morning, she texted Dawn and asked her if she still wanted to go to Portland. When Dawn indicated that she did, Mortensen

contacted police, met with Detective Lorenzo Gladson, and agreed to cooperate with law enforcement. RP 376-378.

Mortensen and Dawn met again at the Columbia Inn on August 31, 2019. RP 379. According to Mortensen, Dawn seemed less angry and more "matter of fact" as she discussed her plan. RP 381-382. Dawn was more focused on needing a gun and expressed concern about her ability to get one because she believed she had a felony, although she had been unable to confirm that fact. RP 380-381. Dawn indicated that if she ever got caught, she would just say "it was all drunk talk" and, indeed, the two were drinking during this discussion. RP 381-382. According to Mortensen, she tried to talk Dawn out of her plan, but Dawn was not persuaded. RP 382-383.

The next planned meeting at the Columbia Inn was September 4, 2019, and this time Mortensen wore a

recording device.[3] RP 383-384. At the behest of police, Mortensen told Dawn she could get her a gun. RP 386, 393, 439-440. Dawn seemed excited by the offer. RP 386-387, 542. Dawn discussed how she had gone to a Strip Club in Portland and spoken to a customer there in an attempt to hire someone to carry out her plan. RP 388-389, 433-436, 465-466, 493-494, 505-508. She also indicated that she had recently driven by Newberg-Rolfe's property and again mentioned shooting the trio at that location. RP 390, 534-539.

On September 5, 2019, Mortensen texted Dawn to let her know she had the gun. RP 395.

On September 6, she spoke to Dawn on the phone, and the call was recorded by police. RP 395. Arrangements were made for Dawn to drive to

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[3] A recording of the full conversation was admitted as exhibit 2 and played for the jury. See RP 420-556.

Mortensen's home, where they would have pizza and beer and Dawn could pick up the gun.[4] RP 396.

Dawn drove to Mortensen's home that evening and their conversation inside the home was also recorded.[5] RP 397. Police had placed a firearm in Mortensen's car and were watching from nearby. RP 559-560, 563, 575-576. Eventually, Dawn exited Mortensen's house, opened Mortensen's car door, picked up the gun, closed the car door, and started heading for her truck. RP 576-577. Detective Gladson immediately approached and told Dawn she was under arrest. RP 577.

Detective Gladson interviewed Dawn at the Cowlitz County Sheriff's Office.[6] RP 596. Throughout the

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[4] A recording of the conversation was admitted as part of exhibit 4 and played for the jury. See RP 564-575.

[5] A recording of the conversation was admitted as part of exhibit 4 and played for the jury. See RP 578-596.

[6] A recording of the conversation was admitted as exhibit 3 and played for the jury. See RP 598, 609-663.

interview, Dawn consistently maintained that during all of her discussions about killing Richard, Newberg-Rolfe, and Peabody, she was just being stupid and "talking shit" during conversations that often involved alcohol consumption. RP 611-612, 616-617, 622-623, 627-628, 631, 633, 635, 637-638, 649, 651, 653-655, 658-659. It was all fantasy, a game, and she had simply used it as a process for venting about her situation. RP 618, 623-624, 629. She denied any intent to actually kill the three or have them killed. RP 616-617, 624, 632-637, 643-644, 652, 655, 659-660, 662. And her only intent regarding the firearm she retrieved from Mortensen's car was to sell it because she was broke. RP 611-612, 618-619, 622, 627, 639, 644, 650-651, 657, 659-662.

Dawn took the stand in her own defense. RP 746. She described the emotional toll of the separation, which ultimately led to a suicide attempt. RP 746-750. Consistent with her custodial interview, she explained that

her "plan" was nothing more than fantasized revenge that made her feel stronger and served as a mental escape. She never actually intended to cause harm to the three. RP 747, 751-753. Her only intention regarding the gun Mortensen offered was to sell it and use the money to pay bills. RP 756-757. She has never owned a gun and does not even know how to load one. RP 757. The recordings of her discussions with Mortensen left her embarrassed and ashamed. RP 757. But it was simply talk that helped get her through a mental crisis. RP 764-765, 770.

During closing arguments, the prosecution argued that Dawn's words and actions demonstrated she had actually intended the deaths of three people in a single event made to look like a home invasion robbery. RP 799-803. The defense conceded Dawn's guilt on the firearm charge in count 4,[7] but argued the State had failed

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[7] Her prior felony conviction, a 1990 Attempt To Elude, was established with a certified copy of the judgment from that case. See exhibit 6.

to prove intent to murder for counts 1 through 3. RP 833-834, 838. Consistent with Dawn's custodial interview and her sworn trial testimony, defense counsel argued the entire discussion of killing the three during a staged robbery was a lie, just a fantasy, and the product of a depressed and suicidal individual seeking to escape her new reality. RP 835-848.

Jurors acquitted Rolfe on all three counts of Attempted Murder. CP 63, 65, 67. They convicted her on three counts of Conspiracy to Commit Murder, each with a firearm enhancement, and on the single count of Unlawful Possession of a Firearm. CP 64, 66, 68, 70, 72, 74-75. The court sentenced Rolfe to 398.25 months in prison, and Rolfe timely filed her Notice of Appeal. CP 87-89, 96-108.

2. Court of Appeals

Rolfe argued that her multiple convictions for Conspiracy to Commit Murder violated double jeopardy.

See BOA, at 14-21. The Court of Appeals agreed, striking two of the convictions and vacating the associated sentences. Slip op., at 3-4 (citing State v. Bobic, 140 Wn.2d 250, 966 P.2d 250 (2000)).

Pertinent to this petition, Rolfe also argued that the admission of improper opinion evidence denied her a fair trial. BOA, at 21.

Other than two redactions identified and made by the prosecution, jurors heard the recording of Detective Gladson's custodial interview of Rolfe in its entirety.[8]

As discussed above, throughout the interview, Rolfe repeatedly denied any intent to kill Richard, Stacy, or Penny. On the subject of Rolfe obtaining a firearm, the following exchange occurred:

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[8] At 3 minutes and 18 seconds, Dawn said, "I have assaults and stuff, like domestic violence." RP 332-333. At 40 minutes, 44 seconds, Detective Gladson said, "I don't believe you" and Dawn responded, " I know you don't believe me." RP 333. The prosecutor muted the recording to avoid jurors hearing these portions of the interview. See RP 612, 659.

Detective: Did -- at any point in time, did you and Brenda have a conversation where you talked about her purchasing a firearm because it's legal for her to do so, and then having it stolen from her vehicle?

Rolfe: Yeah. No, no. She brought it up. She's like, oh, I can purchase a firearm. I'm like, no, I don't want -- you know, no, you know. And, again, drunk talk at the Columbia Inn. Goofing off, laughing, just stupid drunk talk.

Detective: Were you drinking at work today?

Rolfe: No.

Detective: So, you went to her house sober to get that firearm?

Rolfe: Yeah, and then I was going to go to Portland [to] try to sell it.

(EXHIBIT MUTED PER COURT'S RULING.)

Detective: I believe that your intent was to see Richard, Stacy and Penny all dead.

RP 658-659 (emphasis added).

A short time later, after Rolfe indicated that she watches a lot of crime television – providing some of the topics for her fantastical conversations with Brenda

Mortensen – Detective Gladson decided to end the interview dramatically:

> Detective: Did you ever watch a crime show where the wife gets dumped after 25-year marriage and that her -- her husband stands to inherit his mom's riches, or 23 acres, and all her jewelry, her –
>
> Rolfe: [Indiscernible].
>
> Detective: -- triple wide and leaves his wife high and dry and the wife plots to do a triple homicide? Did you ever see that episode?
>
> Rolfe: No.
>
> Detective: That's what just happened.
>
> Rolfe: No, it didn't.
>
> Detective: Okay. Well, at this point you are under arrest and you are going to go to jail without bail until – until you see a judge, okay?
>
> Rolfe: Okay.

RP 662.

Rolfe argued on appeal that Detective Gladson's express statement, "I believe that your intent was to see

Richard, Stacy and Penny all dead" and, after reciting the precise circumstances in Dawn's case, his statement that "what just happened" is that Rolfe "plot[ed] to do a triple homicide" – were improper opinions on Rolfe's veracity, intent, and guilt, thereby denying her a fair trial. BOA, at 23-30.

Despite the absence of an objection by defense counsel, Rolfe pointed out that the constitutional claim was properly raised as manifest constitutional error under RAP 2.5(a)(3). BOA, at 30-31. Moreover, the claim was also properly raised as a violation of her constitutional right to the effective assistance of counsel. BOA, at 32-33.

Citing this Court's precedential holding in Demery, Rolfe noted that it did not matter that Detective Gladson's improper opinions were revealed during the taped interview rather than part of his live testimony. BOA, at 26-30. Rolfe also noted that certain Court of Appeals opinions had misread Demery to hold just the opposite, i.e., otherwise

improper opinions are fine so long as they were revealed during a recorded interview played for jurors. BOA, at 28-29 (citing State v. Notaro, 161 Wn. App. 654, 255 P.3d 774 (2011); State v. Smiley, 195 Wn. App. 185, 379 P.3d 149, review denied, 186 Wn.2d 1031, 385 P.3d 110 (2016)).

In response, the State did not cite or acknowledge Demery, instead citing to Notaro and Smiley for the proposition that a detective's opinions are properly revealed to jurors when made during the course of interrogation. BOR, at 8-14.

Following the State's lead, in rejecting Rolfe's claims, the Court of Appeals utterly failed to acknowledge or discuss Demery, citing only Court of Appeals decisions:

> These exchanges [in which the opinions were expressed] both occurred during police interrogation. Courts have determined that testimony recounting similar statements made in the police interrogation process are not expressions of personal beliefs amounting to improper opinion testimony. . . . The role of Detective Gladson's statements as an interrogation tactic rather than personal belief is

> clear where, as here, the jury heard the actual statements as made during the interrogation.

Slip op., at 5-6 (citing Notaro, Smiley, and State v. Curtiss, 161 Wn. App. 673, 250 P.3d 496, review denied, 172 Wn.2d 1012, 259 P.3d 1109 (2011)). The Court found no manifest constitutional error and found no ineffective assistance of counsel. Slip op., at 6-7.

E. ARGUMENT

REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(1) BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH DEMERY.

In criminal trials, opinion testimony "as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses" is clearly inappropriate. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Such testimony violates the defendant's federal and state constitutional right to a jury trial, which includes the independent determination of the facts by the jury. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014);

State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985) (citing Stepney v. Lopes, 592 F. Supp. 1538, 1547-49 (D. Conn. 1984)), overruled on other grounds by City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993).; U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22.

While interrogating Rolfe, Detective Gladson offered explicit statements on ultimate and disputed issues of fact – whether Rolfe was telling the truth when she denied an intent to cause anyone's death. Detective Gladson's opinion that she was not believable and his opinion that she had plotted a triple homicide was apparent to Rolfe's jury.

These improper opinions went to *the* core issue in the case – whether Rolf was truthfully indicating this was fantasy (in which case she was not guilty) or, instead, whether she should not be believed and had actually intended to kill. As the defense acknowledged during its

closing argument, this was the sole issue for jurors to decide. See RP 833-834 (jurors should focus "really just on one issue . . . whether or not there's proof beyond a reasonable doubt that Dawn Rolfe intended murder"; "it's all about whether there is intent; okay? I'll concede that the State has proven everything else if they have proven intent beyond a reasonable doubt").

The key to analyzing this issue is this Court's decision in State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) — a decision that has unfortunately been misconstrued by subsequent courts over the years.

The issue in Demery was whether statements made by police officers in a taped interview accusing the defendant of lying constitute impermissible opinion testimony regarding the veracity of the defendant when those statements are played for jurors. Demery, 144 Wn.2d at 758.

Demery consisted of a four-justice lead opinion, a one-justice concurrence, and a four-justice dissent. The lead opinion concluded "statements made by police officers during a taped interview accusing the defendant of lying do not carry this aura of reliability because such statements are part of a police interview technique commonly used to determine whether a suspect will change her story during the course of an interview. The officers' statements are not testimony and are admissible to provide context to the relevant responses of the defendant." Id. at 765 (Owens, J., lead opinion).

In contrast, the four-justice dissent concluded, "There is no meaningful difference between permitting the jury to hear an officer directly call a defendant a liar in open court and permitting the jury to hear an officer call a defendant a liar on a tape recording. If we quite clearly forbid the former there is no reason to tolerate the latter." Id. at 773 (Sanders, J., dissenting). "It matters not

whether the opinion was rendered in the context of an interrogation interview or in context of direct testimony in open court. The end result is the same: The jury hears the officer's opinion." Id. at 767.

Chief Justice Alexander's lone concurrence agreed with the dissent that the trial court committed error when it denied the defense motion to redact "the officer's accusation that Demery was not telling them the truth." Id. at 765 (Alexander, C.J., concurring). Chief Justice Alexander voted to affirm, however, because the error was harmless. Id.

Five justices, consisting of the four-justice dissent and the one-justice concurrence, agreed that statements of opinion as to guilt are inadmissible whether presented through live testimony or recordings of interrogation. Id. at 765, 773. That is the precedential rule of law set by Demery. "A principle of law reached by a majority of the court, even in a fractured opinion, is not considered a

plurality but rather binding precedent." In re Detention of Reyes, 184 Wn.2d 340, 346, 358 P.3d 394 (2015) (citing Wright v. Terrell, 162 Wn.2d 192, 195-96, 170 P.3d 570 (2007) (precedent on point of law established by adding up the concurring and dissenting opinions)).

Subsequent appellate decisions, however, have wrongly treated the lead opinion in Demery as its precedential holding to arrive at a rule that opinions on guilt or veracity of a witness are admissible if they describe an interrogation tactic. See Notaro, 161 Wn. App. at 668-69 (citing lead opinion in Demery); Curtiss, 161 Wn. App. at 697 (same); Smiley, 195 Wn. App. at 189-90 (relying on Notaro). This Court then continued the trend in In re Pers. Restraint of Lui, 188 Wn.2d 525, 555-56, 397 P.3d 90 (2017) (permitting "statements made during interrogation accusing a defendant of lying if such testimony provides context for the interrogation.").

Review is needed to clear up an area of the law that is vital to fair criminal trials.

The binding precedent in Demery is the four-justice dissenting opinion plus the one-justice concurring opinion. Lui cannot be interpreted as a repudiation of the true majority holding in Demery because there is no recognition of its true holding. Lui, 188 Wn.2d at 555-56. Merely citing to the 4-justice lead opinion in Demery does not transform that minority viewpoint into precedent when there is no discussion about how five justices in the dissenting and concurring opinions disavowed the lead opinion. The Supreme Court does not overrule binding precedent *sub silentio*. Broom v. Morgan Stanley DW Inc., 169 Wn.2d 231, 238, 236 P.3d 182 (2010) (citing State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999)); Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 280, 208 P.3d 1092 (2009).

Time and again, this Court has emphasized that it will overturn precedent "only upon 'a clear showing that an established rule is incorrect and harmful.'" In re Detention of McHatton, 197 Wn.2d 565, 572, 485 P.3d 322 (2021) (quoting State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (quoting In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Lui did not reference this standard, further evidence that the Lui court did not realize what it was doing in citing to the lead opinion as if it represented the holding of Demery.

Lui's citation to Demery could be read as dicta. The issue in Lui was whether counsel was deficient in not objecting to testimony of officers that editorialized at trial on what the defendant said during interrogation. Lui, 188 Wn.2d at 555-56. There was no challenge to a statement made during interrogation being repeated in court, the issue in Demery and in Rolfe's case. See Malted

Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 531, 79 P.3d 1154 (2003) ("Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.").

In any event, the Court of Appeals decision in Rolfe's case conflicts with the majority holding in Demery, warranting review under RAP 13.4(b)(1).

F. CONCLUSION

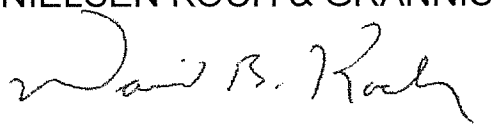
Rolfe respectfully asks this Court to grant her petition and reverse the Court of Appeals.

I certify that this petition contains 3,731 words excluding those portions exempt under RAP 18.17.

DATED this 18th day of May, 2022.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



DAVID B. KOCH, WSBA No. 23789
Attorneys for Petitioner

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAWN RENEE ROLFE, Appellant.	No. 83432-1-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — A jury convicted Dawn Renee Rolfe of three counts of conspiracy to commit murder with firearm enhancements and one count of unlawful possession of a firearm. On appeal, Rolfe claims that her three counts of conspiracy to commit murder violate double jeopardy. She also raises evidentiary issues and ineffective assistance of counsel. We agree that the multiple conspiracy convictions violate double jeopardy, requiring us to vacate two of the counts. We affirm the remaining count and remand for resentencing.

FACTS

Dawn and Richard Rolfe[1] had been married for more than 25 years. Richard left Rolfe in January 2019, and moved to his mother's 23 acre property. In April of that year, Richard began dating Stacy Peabody. Peabody moved in with Richard a few months later.

Rolfe had hoped that she and Richard would get back together. Rolfe

[1] We refer to Richard Rolfe by his first name simply for the purpose of clarity due to the fact that he and Appellant share the same last name.

Citations and pin cites are based on the Westlaw online version of the cited material.

became very angry when she discovered that Richard had a girlfriend. Her financial situation deteriorated and she blamed Richard for her difficulties. Rolfe grew increasingly angry and resentful.

One day, over drinks with her friend and co-worker, Brenda Mortensen, Rolfe explained that she wanted to kill Richard, his mother, and Peabody. Rolfe said she had been planning for a couple of months. She wanted to find someone to carry out the murders to look like a home invasion, but was willing to do it herself if necessary.

Mortensen alerted police and agreed to help with the investigation. Mortensen met with Rolfe to offer assistance in obtaining an untraceable firearm and recorded their conversation. The police arrested Rolfe when she went to Mortensen's house to pick up the gun. The State charged her with one count of second degree unlawful possession of a firearm and three counts of attempted murder in the first degree with firearm enhancements and three charges of conspiracy to commit murder in the first degree with firearm enhancements in the alternative.

During trial, the jury heard approximately three hours of recordings Mortensen made of her conversations with Rolfe. The State also introduced a recording of Rolfe's interview with Detective Lorenzo Gladson. Additionally, Rolfe, Richard, his mother, Peabody, Rolfe's son, and other police officers testified.

The jury acquitted Rolfe of the attempted first degree murder charges but convicted her of the three alternative charges of conspiracy to commit first

degree murder with firearm enhancements. The jury also convicted Rolfe of unlawful possession of a firearm. The court sentenced Rolfe to a standard range sentence of 398.25 months, including firearm sentencing enhancements.

ANALYSIS

Double Jeopardy

Rolfe claims that her multiple convictions for conspiracy to commit murder violate the constitutional protections against double jeopardy. The State concedes and we agree.

Under the Fifth Amendment of the United States Constitution, no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. 5. Additionally, article I, section 9 of the Washington State Constitution provides that "[n]o person shall . . . be twice put in jeopardy for the same offense." WASH. CONST. art. I § 9. The double jeopardy doctrine protects defendants from "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3) punished multiple times for the same offense." State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006) as amended (June 19, 2006). Double jeopardy claims are questions of law that are reviewed de novo. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009).

The Washington Supreme Court has determined that for double jeopardy purposes, the unit of prosecution for conspiracy is "an agreement and an overt act rather than the specific criminal objects of the conspiracy." State v. Bobic, 140 Wn.2d 250, 266, 966 P.2d 250 (2000). A single agreement to commit

multiple crimes amounts to one violation of the conspiracy statute when each crime is a step in the advancement of the scheme as a whole. Bobic, 140 Wn.2d at 266. Here, the State concedes that under the controlling case law, Rolfe's actions support only one conviction for conspiracy. We accept this concession, vacate two of the convictions for conspiracy to commit first degree murder with firearm enhancements, and remand for resentencing.

Improper Opinion

Rolfe argues that she was denied a fair trial because the recording of her interview with Detective Gladson included improper opinions on her veracity, intent, and guilt. Rolfe failed to object to this evidence.

We may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). As an exception to the rule, a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). "The defendant must demonstrate that '(1) the error is manifest, and (2) the error is truly of constitutional dimension.' " State v. Dillon, 12 Wn. App. 2d 133, 139–40, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020) (quoting State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)). This requires the defendant to identify a constitutional error and show how the error actually affected their rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Rolfe alleges that Detective Gladson provided improper opinions that violated her constitutional right to a jury trial. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." State v. Montgomery,

163 Wn.2d 577, 590, 183 P.3d 267 (2008). "The general rule is that no witness, lay or expert, may 'testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.' " City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). When determining whether statements are impermissible opinion on guilt, courts consider the circumstances of the case including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. Heatly, 70 Wn. App. at 579. Expressions of personal belief as to the guilt of defendant, intent of the accused, or veracity of witnesses are improper opinion testimony. Montgomery, 163 Wn.2d at 591.

According to Rolfe, the improper opinions arose when the jury heard a recording of her police interview. The recording included a statement from Detective Gladson, "I believe that your intent was to see Richard, Stacy, and Penny all dead." Detective Gladson then indicated that he believed that Rolfe was intending to commit a triple homicide.

> DETECTIVE GLADSON: Did you ever watch a crime show where the wife gets dumped after 25-year marriage and that her -- her husband stands to inherit his mom's riches, or 23 acres, and all her jewelry, her --
> MS. ROLFE: [Indiscernible].
> DETECTIVE GLADSON: -- triple wide and leaves his wife high and dry and the wife plots to do a triple homicide? Did you ever see that episode?
> MS. ROLFE: No.
> DETECTIVE GLADSON: That's what just happened.
> MS. ROLFE: No, it didn't.

These exchanges both occurred during police interrogation. Courts have determined that testimony recounting similar statements made in the

police interrogation process are not expressions of personal beliefs amounting to improper opinion testimony. See State v. Curtiss, 161 Wn. App. 673, 697, 250 P.3d 496 (2011); State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011); State v. Smiley, 195 Wn. App. 185, 189-90, 379 P.3d 149 (2016). The role of Detective Gladson's statements as an interrogation tactic rather than personal belief is clear where, as here, the jury heard the actual statements as made during the interrogation.

The recorded statements are not improper opinion testimony and therefore do not satisfy the manifest constitutional error exception to RAP 2.5(a). We decline to address the merits of Rolfe's challenge to admission of this evidence.

Ineffective Assistance of Counsel

Rolfe claims that her trial counsel was ineffective for failing to object to admission of the alleged opinion testimony.

For a successful claim of ineffective assistance of counsel, a defendant must establish both objectively deficient performance and resulting prejudice. State v. Emery, 174 Wn.2d 741, 754-55, 278 P.3d 653 (2012). Where ineffective assistance is predicated on a failure to object, the defendant must show that representation "fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (footnotes omitted. Courts engage in a strong presumption of effective representation. State v. McFarland,

127 Wn.2d 322, 335, 899 P.2d 1251 (1995) as amended (Sept. 13, 1995). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." Strickland, 466 U.S. 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant alleging ineffective assistance of counsel shows prejudice when there is a reasonable probability that but for counsel's error, the result of the trial would have been different. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563, 572 (1996).

Given the overwhelming evidence, there is no reasonable probability the outcome of the trial would have been different with an objection. In particular, the jury heard Mortensen's detailed testimony and listened to recordings of the conversations in which Rolfe plotted the murders. Rolfe cannot establish prejudice to support her ineffective assistance of counsel claim.

Motion for Mistrial

Rolfe claims the trial court erred by denying her motion for a mistrial in response to witness testimony suggesting evidence of other crimes.

Trial courts should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure a fair trial. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). When determining if a trial irregularity is so prejudicial as to require a mistrial, we analyze the (1) seriousness of the irregularity, (2) whether the irregularity was cumulative of other admissible evidence, and (3) whether the court could cure the irregularity with an instruction to disregard the remarks. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). We review a trial court's denial of a motion for mistrial for abuse of

discretion. Rodriguez, 146 Wn.2d at 269. "A trial court's denial of a motion for mistrial will be overturned only when there is a 'substantial likelihood' that the error prompting the request for a mistrial affected the jury's verdict." Rodriguez, 146 Wn.2d at 269, (internal quotation marks omitted) (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

When testifying, Richard was asked if he had much contact with Rolfe after he left her in January 2019. Richard responded, "Not really. A little bit at the beginning from a case that she was going through from when I – I left." Rolfe moved for a mistrial alleging the testimony violated the motion in limine prohibiting testimony about a prior arrest. The trial court concluded "there was no reference to really anything" and denied the motion for mistrial. When asked whether the parties wanted a curative instruction for the jury, Rolfe declined.

The trial court had ruled on a motion in limine to limit any testimony concerning a prior domestic violence charge against Rolfe. The court allowed testimony about the argument between Rolfe and Richard as long as "there's no direct reference to any assaultive behavior, and obviously no reference to any arrests that were made or charges filed." Richard's mention of his involvement in "a case" with Rolfe could be considered a violation of the motion in limine. However, Richard's statement was general and did not specify Rolfe's involvement in a criminal case or domestic violence case. No other witnesses testified similarly. The court offered to give a curative instruction, but Rolfe indicated that curative instruction would be counterproductive. The trial court's

assessment of the comment and resulting denial of the motion for a mistrial was not an abuse of discretion.

We vacate two of Rolfe's convictions for conspiracy to commit murder with firearm enhancements, affirm the remaining count, and remand for resentencing.

Smith, A.C.J.

WE CONCUR:

Coburn, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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