No. 318966

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

RYAN ALLEN REID, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S REPLY BRIEF

Dan B. Johnson
Law Office of Dan B. Johnson, P. S.
4407 N. Division Street, Suite 601
Spokane, WA 99207
(509) 483-5311

INDEX

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

I. ARGUMENT

A- ERRORS OF MANIFEST CONSTITUTIONAL PROPORTIONS OCCURRED IN THIS CASE, AS A RESULT OF OPINION EVIDENCE AS TO CREDIBILITY AND GUILT GIVEN BY DETECTIVE ESTES, AND THE DEFENDANT'S THEN WIFE, AND MOTHER OF THE ALLEGED VICTIMS, TINA WOODRASKA. THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

TINA WOODRASKA

Witness Woodraska, in response to a question as to an inference that she wanted to restrict visitation with the Defendant, stated: "Well, I don't want him to hurt them- I mean, he's physically abusive. And as far as I know, he sexually abused them. I know for sure. I don't want them to get hurt...." RP 209.

The State basically adopts the position that the case was so overwhelming that this opinion testimony meant nothing to the outcome, and that the testimony was ambiguous. When the statement is analyzed, however, it is abundantly clear what her opinion was and it was an explicit statement of guilt. She stated, in pertinent part: "...And as far as I know, he sexually abused them, I know for sure..." (emphasis supplied- RP 209). This dramatic testimony, by their Mother, certainly would have affected the jury when considering the statements by the two children.

It is clear that this testimony raised a manifest constitutional error, but it may still be subject to harmless error analysis. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Washington has adopted the "overwhelming untainted evidence" approach to the harmless error analysis. In *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied,* 475 U.S. 1020 (1986), the Court held:

> "Under the 'overwhelming untainted evidence' test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* A finding of harmless error requires proof beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error."

This case was not overwhelming. There was no physical evidence in support of the allegations. A.R. gave no testimony at trial that provided any evidence of guilt, in fact, she denied that she had ever been touched improperly. Her pre-trial statement was not clear and there was evidence that her Mother had coached her with respect to the Defendant being a "bad man" because he touched A.R. Karen Winston never asked the child whether the touching could have been simple changing of diapers. In addition, the fact that the child was only 2 or 3 years old at the time she claimed to remember being molested is suspect.

The testimony by Woodraska, and her brother, Eric O'leary, also was vague. Neither one claimed to have actually seen any improper

touching of the child, and neither took any sustained action afterwards to push the matter to an investigation stage at that time. There was a suggestion that Ms. Woodraska used the criminal process to gain an advantage with respect to visitation by the Defendant.

With respect to the testimony of A.E., the allegations were brought out when the Defendant volunteered the information to the police during the investigation. The Defendant clearly testified that the driving force of the contact was A.E. and that A.E. was "giggling" when he touched the Defendant's penis. The Defendant immediately put a stop to the contact. This was clearly a credibility contest as to which version was to be believed and the Mother's statement of guilt clearly had an effect on the credibility determination with respect to her son, as against the Defendant.

The Defendant contends that the improper testimony of his ex-wife was a manifest constitutional error and, by itself, is sufficient to require a new trial. Whether the Court failed to take notice of the error taking place, or whether the defense counsel failed to object, the manifest constitutional error took place and can be reviewed. This error cannot be deemed harmless beyond a reasonable doubt. However, additional error took place.

BENJAMIN ESTES

"Red Flag" is defined by the Merriam Webster Online dictionary as: "..a warning sign; a sign that there is a problem that should be noticed or dealt with." The full definition also provides that it is: "..a warning signal; something that attracts usually irritated attention."

At Dictionary.com, the term is defined as: "a danger signal; something that provokes an angry or hostile reaction."

The State contends that the use of the term "Red Flag" by the Detective was ambiguous, however, a closer reading of the testimony belies this allegation. The State claims that the essence of the argument is that any testimony that mentions inconsistencies between the Defendant's statements and other witness' testimony is improper. Actually, the essence of the argument is that the Detective repeatedly provided comments on the credibility of the Defendant because, on several occasions, he commented on the Defendant's version, using the term "Red Flag" among other statements. The Defendant contends that the statements by the Detective were actually prejudicial and were an "explicit or almost explicit" opinion on the Defendant's guilt or the victim's veracity. See, *State v. Kirkman,* 159 Wn.2d 918, 936, 155 P.3d 125 (2007). This constitutional error caused actual prejudice since this case

was so dependent on credibility of the Defendant as opposed to the witnesses for the State.

In summary, the Detective, at RP pages 298 and 299, in responding to a question about the defendant's response to allegations made by Woodraska and O'Leary about looking closely at his daughter, stated:

> "**A.** He answered questions. He volunteered a lot of things. Early on in the interview I noticed a lot of real inconsistencies from what he told me as to what Tina told me, inconsistencies as opposed to what Eric O'Leary told me and what he told me. The crux of the case as far as the touching and what not was totally different, but there was -- **there was areas that there was so many inconsistencies about issues that were kind of nebulous issues that don't really matter is kind of a red flag to a detective that somebody is not telling the truth, and if somebody is either fabricating, exaggerating, minimizing or lying, it's really hard to continue to lie and do that about little things. And a lot of times to bolster the crux of the accusation, they will exaggerate or minimize or change things surrounding that that doesn't matter. (emphasis supplied).**

The Prosecutor, obviously realizing that the Detective was giving improper opinion testimony, stated:

> "**Q.** All right. Thank you. And I understand the interview is a search for the truth, and I want to be clear on what my question means. I'm sure not asking you to offer an opinion as to whether somebody is telling the truth or not, okay?
> **A.** Okay." RP 299.

Despite the Prosecutor pointing out the improper testimony, neither the Court, nor defense counsel took up the matter, even though it was a manifest constitutional violation.

In response to a question about A.R. and the Defendant's explanation, Detective Estes continued his attack on the Defendant and his use of the term "Red flag" continued:

> **A.** He told me that -- I talked to him about the incident where Tina alleged that she came home unannounced and caught him in the room with A. R. First thing is that the time frame was inconsistent. Mr. Reid said that it was about 2:30 p.m. in the afternoon. He acknowledged that that incident occurred, that there was an incident, but he said it happened around 2:30, which is inconsistent with Tina's explanation that it was midmorning. He said that he knew she was going to be home. He wasn't surprised and that it wasn't unannounced because he knew she was going to be home for lunch at around 2:30. He implied that was her lunch time. **Tina told me that her lunch time was between 1:00 and 1:30, inconsistent. So, the version of her lunch, having been married for some time, was inconsistent. So he told -- so that was kind of a red flag, but, you know, some things -- people remember things different.**
> He went on to say, it was consistent, as she testified, that she walked in the room and said what are you doing. He said the same thing. His version of it was more animated and exaggerated. His version of it was contrary to hers, in that Ryan Reid told me that she walked in the room and yelled and reiterated at least three times, What are you doing, what are you doing, what are you doing? And he told me that he challenged her with that, asking her what she was implying. And -- and he said that he responded to her, his response to her, what he told me verbatim was, I'm changing the fucking diaper. He said that he felt like she was accusing him of some kind of a sexual abuse or sexual misconduct, and he insisted that he was changing A. R.'s diaper is what he told me and

that she made a big fake reaction and overreacted is what he told me.
Now that, that explanation on that interview is inconsistent in that Tina told me she just walked in and said, What are you doing, like she was kind of confused or like a wife would come home and see the husband, saying what are you doing. That was kind of her explanation to me about that inquiry.
And the other inconsistency was that he insisted that his explanation was everything about the diaper. Ms. Woodraska told me there was no mention of a diaper, there was no diaper involved. She told me verbatim that he was, his response was, I'm checking an owie, or implying that there was an injury or something that he was checking on the -- on the daughter. **So whether it was an owie explanation or a diaper explanation was totally contrary, which is a red flag in an interview that, you know, you can't quite quantify those two. That's something that's hard to explain.**

THE COURT: Let's have another question, Counsel.
MR. JOHNSON: Thank you, Your Honor."

RP 299-301. (emphasis supplied).

The Prosecution then turned to the alleged incident involving Eric O'Leary's observations. The questioning and answers continued as follows:

Q. All right, Thank you, sir.
And now we talked about the incident that Tina Woodraska observed and communicated to you and Mr. Ryan Reid's explanation of that. Did he discuss anything about the incident observed by Eric O'Leary?
A. Yes, he did.
Q. And what was his—what were his thoughts on that incident?
A. As far as his interaction with Eric, he denied that that incident ever happened. He did talk about Eric coming to his home, which was inconsistent with what Eric told me, as opposed

to Tina told me about Eric's habit. He kind of went into an elaborate explanation that Eric absolutely never came to their home unannounced. He said he was not welcome in the home. He said that there's only one time Eric ever came into the home unannounced and that he was not a frequent visitor. He said that Eric did not have a key. He said that it was not—it was not an uncommon—it was not common for Eric to walk in unannounced or to walk in and announce himself. He said there was only one time that happened, and it wasn't acceptable. He said he confronted Eric about it. Mr. Reid said there was one time where he was standing in his kitchen, Eric walked in unannounced, and they had an argument about it., and it just wasn't acceptable. **So that was kind of another inconsistency that, you know, there shouldn't be a mistake or misunderstanding on that, in my opinion." RP 303-304.**

Despite Detective Estes making a clear statement of opinion attacking the Defendant's version, there was no objection by defense counsel.

Detective Estes continued his attack on the Defendant's version as compared to the State's version:

"A. He told me that he woke up one morning and A. E. was playing with, he said verbatim, I put in quotations marks, I woke up one morning and A. E. was playing with my penis. He explained the situation, that he slept with A. E. that night, and he said it was because A. E. asked him to sleep with him. He said it was because his mother told him he was gay. He reiterated that it was A. E. who asked him to sleep with him. **And there was kind of an inconsistency in his explanation of that, because he told me it was on a twin bed in A. E.'s bedroom. And I recalled A. E. explaining during his interview that it was on a mattress on the floor, because—and he recalled that specifically because they had just moved into this house, everything was in disarray, there wasn't a bed set up. But Ryan Reid is telling me that they slept in a twin bed in this bedroom. Another kind of inconsistency about this night..."**

RP 318-319. (emphasis supplied).

The State claims that the use of the term "red flag" was only an alert to him that the versions did not seem to make sense. But, this is exactly the problem with the approach that was allowed in this matter. A clear review of the foregoing testimony makes it abundantly clear that when the Detective is using the words "red flag" and "inconsistencies", he is aiming them directly at the Defendant. In the context of the questions and his answers, it is very clear that he is not satisfied with the Defendant's versions and that he believes the State's versions instead.

The problem is not that the versions did not match, the problem is his testimony conveys his opinions on issues of credibility and guilt. It is sophistry on the part of the State to claim otherwise. As stated previously, the evidence in this case is not overwhelming, and the manifest constitutional error with respect to Detective Estes cannot be deemed harmless beyond a reasonable doubt. The error in Detective Estes testimony compounds the error in Tina Woodraska's testimony. They both gave improper opinions as to credibility and guilt of the Defendant.

B. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE DUE TO HIS FAILURES TO TIMELY OBJECT TO SEVERAL AREAS OF INADMISSIBLE EVIDENCE

Should the Court not deem the testimony of witnesses Woodraska and Estes manifest error, Defendant still contends that the failure of trial counsel to object to the evidence, and the other evidence mentioned in his opening Brief, constituted a violation of his constitutional right to effective assistance of counsel.

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance prejudiced him. *State v. McFarland, Supra.* at 334–35. We strongly presume counsel is effective, and the defendant must show no legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland,* 127 Wash.2d at 335–36, 899 P.2d 1251. To demonstrate prejudice, the defendant must show that trial counsel's inadequate performance probably resulted in a different outcome. *McFarland,* 127 Wash.2d at 335, 899 P.2d 1251. Failure to object to improper testimony critical to the State's case may constitute ineffective assistance of counsel. *See State v. Hendrickson,* 138 Wash.App. 827, 831–33, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance), *aff'd,* 165

Wash.2d 474, 198 P.3d 1029, *cert. denied,* 557 U.S. 940, 129 S.Ct. 2873, 174 L.Ed.2d 585 (2009).

In general, no witness may offer opinion testimony regarding the guilt or veracity of the defendant or a witness because it unfairly prejudices the defendant by invading the jury province. *State v. King,* 167 Wash.2d 324, 331, 219 P.3d 642 (2009); *State v. Montgomery,* 163 Wash.2d 577, 591, 183 P.3d 267 (2008). Accordingly, neither a lay nor an expert witness "may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black,* 109 Wash.2d 336, 348, 745 P.2d 12 (1987). A law enforcement officer's opinion testimony may be especially prejudicial because it can have "a special aura of reliability." *Kirkman,* 159 Wash.2d at 928, 155 P.3d 125.

Here, Detective Estes and Tina Woodraska each gave improper opinions as to credibility of witnesses, and the Defendant's guilt. Defense counsel failed to object, move to strike, or ask the trial court for a limiting instruction. There can be no legitimate strategy or trial tactic here for failing to do so. Moreover, Defendant suffered prejudice because the testimony invaded the jury's role as fact finder.

In addition, the other items of evidence, including the child hearsay that was not objected to, and the testimony by Karen Winston with respect to discussing with the mother that she should keep the children away from

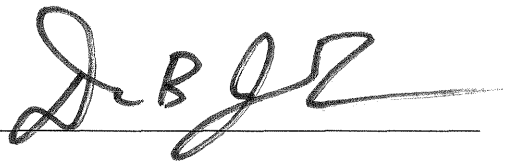
the Defendant were clearly improper and the Court would have sustained an objection, had one been made. The Winston evidence was clearly improper, prejudicial, and not relevant. The remedy is to reverse and remand the convictions.

C. CONCLUSION

The convictions were obtained in violation of the Defendant's constitutional rights and should be reversed.

Respectfully submitted this 2 day of July, 2014.

Law Office of Dan B. Johnson, P. S.

By: 

DAN B. JOHNSON- Attorney
For Appellant- WSBA #11257

CERTIFICATE OF SERVICE

I certify, under penalties of perjury under the laws of the State of Washington, pursuant to RCW 9A.72.085 that on the 2 day of July, 2014, I served a copy of the foregoing APPELLANT'S REPLY BRIEF to the Prosecuting Attorney for Spokane County by personally depositing a copy in the U. S. Mails, First Class, addressed as follows:

Mr. Andrew J. Metts, III
Mr. Mark Erik Lindsey
Spokane County Prosecuting Attorney
1100 W. Mallon Avenue
Spokane, Washington 99260-0270

Further, on the 2 day of July, 2014, I served a copy of APPELLANT'S REPLY BRIEF on the Appellant, Ryan Reid by depositing the same in the U. S. Mails, First Class, postage pre-paid, addressed as follows:

Mr. Ryan Reid
Inmate # 988671
NB 44 L
Airway Heights Corrections Center
P. O. Box 2049
Airway Heights, WA 99001

Dated this 2 day of July, 2014.

DAN B. JOHNSON - Attorney for Appellant
WSBA # 1125