No. 46016-5-II

Pierce County #13-1-04245-4

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

STATE OF WASHINGTON,

Respondent,

v.

RICARDO RAMIREZ DIAZ,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Stephanie A. Arend, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

FEDERAL AND OTHER STATE CASELAW

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. ASSIGNMENTS OF ERROR

1. There was improper comment on appellant Ricardo Ramirez Diaz' exercise of his Fifth Amendment and Article I, § 9, rights to be free from self-incrimination and the prosecution cannot meet the heavy burden of proving the constitutional errors harmless.

2. Improper opinion testimony deprived Ramirez Diaz of his state and federal due process rights to a fair trial and to trial by jury.

3. Mr. Ramirez Diaz was deprived of his Article 1, § 22, and Sixth Amendment rights to effective assistance of counsel.

4. Mr. Ramirez Diaz was deprived of his CrR 3.1 rights to counsel and his subsequent refusal to take a breath test should have been suppressed.

5. Mr. Ramirez Diaz assigns error to the trial court's oral findings and conclusions regarding the refusal to take the breath test and to the trial court's failure to enter written findings and conclusions in support of its ruling.

6. The cumulative effect of the errors deprived Ramirez Diaz of his due process rights to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. After he was taken into custody, appellant was questioned by several different officers. At trial, three of those officers commented on Ramirez Diaz' failure to answer questions during those interrogations, implying a negative inference from that silence.

   Is reversal required because the prosecution cannot meet its heavy burden of proving these constitutional errors harmless even though the third witness' testimony was ultimately stricken, because there was not overwhelming untainted evidence and the comments went directly to the crucial question of whether the jury should believe that appellant was the driver of a car and thus guilty of a crime?

2. At trial, officers gave their opinions that Ramirez Diaz was the driver of the car, the only real issue at trial. Is reversal required because this improper opinion testimony about guilt violated Ramirez Diaz' rights to a fair trial and trial by jury?

Further, was counsel prejudicially ineffective in failing to properly address this serious, prejudicial evidence, which likely swayed the jury to convict?

3. Ramirez Diaz was originally charged with malicious mischief and felony driving under the influence of intoxicants ("DUI"). The malicious mischief was for damage to a home which occurred just before the defendant was arrested nearby, allegedly having crashed a car based on driving while intoxicated.

   Before trial, the prosecutor admitted the state did not have sufficient evidence to proceed with the malicious mischief charge, and that he was planning to file an amended information deleting that charge.

   Counsel did not move to exclude any of the evidence about the malicious mischief even after it was no longer at issue. At trial, officers repeatedly testified about the allegations from the incident at the home, describing damage they had seen to the house, attributing that damage to Ramirez Diaz, indicating a concern that he might be dangerous as a result of what they knew about that incident, describing the conclusion an officer had made that Ramirez Diaz had committed the crime and the facts of his arrest for that crime. The malicious mischief incident was also repeatedly described as involving "domestic violence."

   Was counsel prejudicially ineffective in failing to move to exclude, attempt to limit or object to the prejudicial evidence of the unproven crime and the extremely irrelevant, highly prejudicial "domestic violence" testimony?

4. Did the trial court err in failing to suppress a refusal to take a breath test when that refusal was made after the police violated Ramirez Diaz' CrR 3.1 rights to counsel?

5. Does the cumulative error compel reversal even if each individual error might not because all of the errors went directly to the crucial issue in the case and the untainted evidence of guilt was far from overwhelming?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Ricardo Ramirez Diaz was charged by amended

information in Pierce County Superior court with felony driving under the influence of intoxicants. CP 43; RCW 46.61.502(1) and (6). Trial was held before the Honorable Judge Stephanie Arend on February 10, 11, 12 and 13, 2014, after which the jury found Mr. Ramirez Diaz guilty as charged. CP 64.

On March 14, 2014, Judge Arend imposed a standard-range sentence. CP 77-78. Ramirez Diaz appealed and this pleading follows. See CP 88-89.

2. Testimony at trial

On November 4, 2013, just after midnight, there was a one-car accident along a road in Pierce County which had so many similar accidents that neighbors had a routine for what to do when one occurred. RP 173-74, 232-36, 263-67. Two of those neighbors, Gary Allen and John Fowler, said their power went out or flickered on and off that night and Allen said that usually meant the nearby power pole had been hit. RP 235-36, 263-67.

Both men went out to see what had happened and saw a car which was still running, had its emergency flashers on and had a front end which was "pretty much gone." RP 238, 258-63. Allen was concerned that the car might be "hot " because it had hit a power pole so he did not touch it. RP 239. Instead, he shined his flashlight into the car and saw there was no one there. RP 239. Fowler thought the car had a broken driver's side window and that one of the air bags had deployed, although he could not recall which one. RP 269. The car had hit a barbed wire fence and had caused obvious damage to several trees. RP 258-59.

When asked his "immediate concern," Allen said he "had other hit and runs out there where people had taken off" so he wanted to try to find the driver "and try to get him stopped." RP 239. Nobody was around, however, so Allen ran back to the house and told his wife to tell police that "we have no driver." RP 240. Allen then drove his wife's car down the road about a half mile each way, seeing no one. RP 240-41.

Fowler arrived as Allen was driving away. RP 268. He saw a girl standing next to a stopped car, talking on a cell phone. RP 268. The girl said she was a nurse or something and had stopped to try to help. RP 242-43.

When Allen returned to the scene, he was "confident" that the person involved must still be around, so he and Fowler started looking again, headed different directions. RP 243-44, 269-71. Fowler had gone about 75 feet down the road when he heard something, played his flashlight down a fairly steep bank and saw a man on the ground, face down. RP 271-72. The man was lying on his chest but was moving. RP 272. Fowler asked what the man was doing down there and the man said something about having stopped because he had seen that someone had hit the pole. RP 272. Fowler opined that the man "appeared to me to be the driver or somebody from the car." RP 272-73.

Allen responded to Fowler's holler upon finding the man and said the slope was "pretty steep" with brush and "stuff" in it and about a 15 foot drop. RP 245. As Allen arrived, the man was crawling up the bank, which Allen conceded was so steep and difficult that no one could have walked up it. RP 246-47. Instead, no matter their condition, they would

need to crawl. RP 246-47. Allen also said that no one could have walked down and they would instead have to have slid down the embankment. RP 246-47.

Neither Fowler nor Allen had any idea if the man had slipped and fallen down the slope or how he got there. RP 260-61, 281-82. The man who was down that steep embankment was later identified as Ricardo Ramirez Diaz. RP 273.

When Ramirez Diaz made it up to the side of the road the girl who had used her cell phone came over "very concerned" that Ramirez Diaz was hurt, as he seemed "really unstable." RP 274-75. Fowler said Ramirez Diaz' clothes were "torn up" and he seemed unbalanced although he was not "staggering." RP 275.

It was a very cold night, probably below 30 degrees. RP 278. Fowler noticed that one of Ramirez Diaz' shoes was missing. RP 275. Ramirez Diaz complained that his foot was hurting and Fowler said, "it's probably because your shoe is off, and it's so cold." RP 275.

Allen did not notice any blood but Fowler saw some small scratches or nicks on Ramirez Diaz' face and chest, although not a "large amount of blood." RP 250, 276, 281. Fowler did not see any bruising on Ramirez Diaz' face or a bloody nose but admitted it was dark and he was looking by flashlight and his headlight. RP 282.

Both Allen and Fowler gave their opinion that Ramirez Diaz appeared "inebriated," saying he was "staggering and all over the place," having trouble standing and having trouble talking. RP 248, 276-77. Fowler said Ramirez Diaz was saying things which did not make sense.

RP 276-77. According to Fowler, he asked Ramirez Diaz questions trying to figure out if there was anyone else in the car but Ramirez Diaz instead just kept saying he wanted to go home and to "protect the native." RP 285-86. Although Fowler said that Ramirez Diaz did not say anything about anyone else being in the car, he admitted Ramirez Diaz did not actually respond to the question. RP 284-86.

Fowler admitted that, once they found Ramirez Diaz, they stopped looking around for anyone else who might have been in the car. RP 284. Allen said Ramirez Diaz was not "necessarily cooperating" with him because Allen kept trying to ask things he wanted to tell police and was not getting answers. RP 261-62.

Pierce County Sheriff's Deputy Shane Masko was one of the officers who ultimately responded to the accident scene. RP 175-78. Prior to that, however, he was in the area responding to a call for "some kind of disturbance" at a home nearby, for which the suspect was said to have left the scene. RP 175-76. After he went to that home, Masko said, he had a "legal basis" to contact Ramirez Diaz, based on "some damage to the property" which the officer thought had occurred when a vacuum cleaner was thrown into the bathroom door at that home, breaking both. RP 182-83.

Masko never saw Ramirez Diaz at the residence himself. RP 194. Neither did deputy Shane Pecheos, who also responded to the call to the house. RP 204. Pecheos repeatedly described the incident at the house as a

"domestic violence call." RP 204, 205, 206.[1] Pecheos interacted with some people in a car near the house and then heard about the collision down the road. RP 213. Masko also heard about the collision and sent Pecheos there, ultimately telling Pecheos and other officers at the accident site to detain Ramirez Diaz until Masko arrived. RP 184-85, 299.

Buddy Mahlum, then with the Pierce County Sheriff's Department, also responded to the "disturbance" at the home but ended up getting diverted to the accident site. RP 288-92. He was told the car involved had two registered owners, "Ricardo Ramirez and Johnelle Ramirez." RP 296, 440-41. Mahlum arrived about the same time as Pecheos. RP 297-98. Mahlum approached the vehicle and saw that it was still running, had the keys in the ignition and had a shoe on the floorboard. RP 297-98.

The front part of the passenger side of the car was significantly damaged and there was a tree resting against the car. RP 305. In a photo taken at the scene, Mahlum pointed to the air bag which was deployed on the driver's side. RP 306, 311. Mahlum opined that, in this type of car, if the passenger seat had someone in it the air bag on that side would "deploy" based on the weight of that person sitting in the seat. RP 307. Nothing on the passenger side indicated an air bag deployment, according to the officer. RP 313. Outside the passenger side was a holly bush or some sort of plant with sharp edges and some broken off branches. RP 320-21.

Mahlum also pointed to a shoe resting on the driver's side

[1]The impropriety of this testimony and counsel's ineffectiveness in relation to it is discussed in detail, *infra*.

floorboard of the car, which he said matched the shoe Ramirez Diaz was missing. RP 308-309. The officer admitted, however, that he did not move the shoe or manipulate it in any way. RP 330. The shoe was facing towards the seat, not towards the brake or gas pedal and it was on the front left side of the seat, next to the door. RP 332. It was the right hand shoe on the left hand side pointed back towards the seat. RP 332-33. The shoelaces on the shoe were still tied. RP 332-33.

When Pecheos arrived, Ramirez Diaz was standing outside a grey Tahoe which had collided with a power pole. RP 213. Ramirez Diaz had a bloody face and seemed a disoriented. RP 213, 215. Pecheos also said that Ramirez Diaz had what looked like a rash along his collar area "consistent with a seat belt injury during a collision." RP 215. The officer opined that, based upon seeing previous injuries on people, he could tell "which side of the vehicle he was sitting on based off of where that mark was at," and that it "would be the driver's side based on [it] being on the left side shoulder area." RP 215. The air bags in the car had deployed and Pecheos thought that would "cause an impact to the face." RP 216.

Mahlum saw some "blood spatter" on the right side of Ramirez Diaz' cheek and opined that this was relevant to "[a]ir bag deployment." RP 309-10. Mahlum said he had seen "this type or mark or injury on other people" when he conducted investigations following an air bag deployment. RP 309-310.

Mahlum also said he noticed some "redness" on Ramirez-Diaz' chest, next to a tattoo, which Mahlum said "could have been caused by the collision of the impact." RP 311. He also declared that the marking on

Ramirez Diaz "line[d] up with somebody sitting in a driver's seat where that marking is at[.]" RP 310-11.

Based on Ramirez Diaz' demeanor at the collision site, the officers decided to investigate whether he was "under the influence." RP 217. As a result of Masko's request, the officers handcuffed Ramirez Diaz and put him in the back of Pacheos' patrol car. RP 299-300, 319.

After they took Ramirez Diaz into custody, the officers did not walk up and down the road looking for any other injured parties. RP 334. They did not conduct any similar search. RP 334. Mahlum also admitted he did not go around the car to open the doors or see if they were functioning properly or could be opened. RP 335. Mahlum said it was possible that whoever was seated in the front seat could have climbed out the window as well as opened the door. RP 344. He admitted that it need not have been the driver who did so. RP 346-47.

The CAD report on the incident initially indicated that the vehicle involved was a van. RP 338. That report also indicated, at one point, "[d]river and passenger fled on foot. No description of direction of travel." RP 337-38.

State Patrol Trooper Brett Robertson met the officer who transported Ramirez Diaz to a nearby police station and said when he opened the door to the car in which Ramirez Diaz was sitting, he smelled alcohol. RP 411-12. The trooper performed some field sobriety tests on Ramirez Diaz, concluding he had "[h]igh signs of intoxication." RP 420. The officer then placed Ramirez Diaz under arrest and took him into the police station to do a "DUI arrest packet." RP 422-23. The officer testified

that he read Ramirez Diaz his rights and the "Implied Consent Warnings" and that Ramirez Diaz refused to perform the test, so his blood was drawn pursuant to a search warrant. RP 423-24. The results which came back from the toxicology lab were that the blood alcohol content was .26, above the legal limit of .08. RP 424-25.

Roberston said Ramirez Diaz had some blood coming from his nose that was sort of dried up a little. RP 412-13. There was also swelling around his nose and facial area. RP 413.

Robertson testified that as part of his training as a trooper he was taught how to "recognize certain signs or observations on a person's body related to a vehicle collision." RP 406. He then said one of the things he would look for to see if someone was driving was a "seat belt mark," which would show where the seat belt came across. RP 406-407. According to the trooper, f someone was on the left side of the vehicle the seat belt would come across the left shoulder,but if they were on the right side the belt would come across the right shoulder. RP 407. The officer had seen such marks about ten times and thought they were "pretty distinct, recognizable." RP 407-408. The officer also thought there would be some markings on someone's face if an air bag went off into them. RP 308.

On Ramirez Diaz, the trooper said he could "see a mark over his left shoulder." RP 411. In fact, the officer described the area, touching his chest and saying specifically that the side of the body he saw the injuries on was "[t]he left side which would be seat belt coming across the left, if you're on the left side of the vehicle." RP 414. The officer also said the mark was there until Ramirez Diaz was released. RP 414. The prosecutor

then asked, "based off your training and experience, what was your conclusion as to what caused that mark on the left side of [Ramirez Diaz'] chest?" RP 414. The officer said, "[s]eat belt." RP 414. He later confirmed that he had seen the marks on the left side of the body and it was consistent with someone sitting in the driver's seat. RP 440.

The only photo taken of Ramirez Diaz that night showed that the marks on his chest were not from left to right going downward but from right to left. RP 509-512.

According to the trooper, Ramirez Diaz was "very rude, belligerent" after he was taken into custody and arrested, screaming and reportedly making an obscene comment to a trooper. RP 428-29. Robertson admitted, however, that Ramirez Diaz was not belligerent or rude until after he was arrested an placed in handcuffs. RP 433-34.

D. ARGUMENT

1. IMPROPERLY COMMENT ON RAMIREZ DIAZ' EXERCISE OF HIS ARTICLE 1, SECTION 9 AND FIFTH AMENDMENT RIGHTS VIOLATED THOSE RIGHTS AND DUE PROCESS AND THE PROSECUTION CANNOT SHOW THE CONSTITUTIONAL ERRORS HARMLESS BEYOND A REASONABLE DOUBT

Both the state and federal constitutions guarantee the accused the right to be free from self-incrimination. See State v. Clark, 143 Wn.2d 731, 756, 24 P.3d 1006, cert. denied sub nom Clark v. Washington, 534 U.S. 1000 (2001). As part of those rights, the government is prohibited from using a defendant's post-arrest silence against him in a criminal case. See State v. Burke, 163 Wn.2d 204, 214, 217, 181 P.3d 1 (2008). While mere reference to a defendant's post-arrest silence is not necessarily a violation,

any effort to draw a negative inference from the defendant's silence or use that silence as evidence of guilt will violate not only the defendant's rights to be free-from self-incrimination but also due process, by chilling the exercise of the rights. See Burke, 163 Wn.2d at 217.

In this case, there was testimony about Ramirez Diaz' exercise of his right to remain silence which impugned the exercise of that right. Reversal is required for the constitutional errors, because the prosecution cannot meet its heavy burden of proving them harmless beyond a reasonable doubt.

a. Relevant facts

At trial, when asked his observations of Ramirez Diaz, Deputy Masko testified that he had the officers at the accident scene detain Ramirez Diaz so Masko could interrogate him about the incident at the home. RP 187. Pecheos testified about arresting Ramirez Diaz at Masko's behest, putting him in handcuffs and securing him in the back of a police car to await Masko's arrival at the accident scene. RP 188, 194-95. Masko testified that, when he arrived and opened the car door he smelled intoxicants, then started asking questions. RP 187. Deputy Masko went on:

> He was very hard to speak to. I asked him for - - I needed his basic information, his full name and his date of birth for my report, and **he didn't want to talk to me about anything.**

RP 187 (emphasis added).

A little later, Deputy Pecheos testified that, after Ramirez Diaz had been detained and when police started asking him questions, Ramirez Diaz "[w]asn't extremely cooperative with us while we asked him some

questions." RP 213.

Then, during direct examination of Trooper Robertson, the prosecutor asked about the steps of the DUI investigation and the officer said he had asked Ramirez Diaz "what happened, how much did he have to drink tonight." RP 417. The officer then testified that Ramirez Diaz was "unwilling to, you know, even - -" but counsel's objection was sustained and the answer stricken. RP 416-17.

b. These comments were improper comments on Ramirez Diaz' constitutionally protected right against self-incrimination and the constitutional error is not harmless beyond a reasonable doubt

These comments of the officers amounted to improper, unconstitutional comments on Ramirez Diaz' exercise of his state and federal constitutional rights to be free from self-incrimination. Both the state and federal constitutions guarantee those rights. See State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9.[2] Put another way, a defendant has a constitutional right to remain silent in the face of accusation. See State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

As a result, the Supreme Court has held, it is completely improper, impermissible, and misconduct for the government to even suggest that a negative inference be drawn from exercise the right to remain silent. Easter, 130 Wn.2d at 243. Indeed, it is not just a violation of the right

[2]The Fifth Amendment, made applicable to the states through the 14th Amendment, provides in relevant part, no person "shall be compelled in any criminal case to be a witness against himself." Article I, § 9 provides, in relevant part, "[n]o person shall be compelled in any criminal case to give evidence against himself."

against self-incrimination; it is a violation of the right to due process. State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002); Doyle, 426 U.S. at 619; State v. Fricks, 91 Wn.2d 391, 395, 588 P.2d 1328 (1979). Further, a police witness "may not comment on the silence of a defendant so as to infer guilt from a refusal to answer questions." Romero, 113 Wn. App. at 787; see also, State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996) (noting the impropriety of testimony about a defendant's refusal to speak to police).

In Easter, our highest Court declared, "[a]n accused's right to remain silent and to decline to assist the State in the preparation of its criminal case may not be eroded by permitting the State in its case in chief to call the attention of the trier of fact to the accused's pre-arrest silence to imply guilt." 130 Wn.2d at 243. Recently, in Salinas v. Texas, 570 U.S. __, 133 S. Ct. 2174, 186 L. Ed 2d 376 (2013), the U.S. Supreme Court addressed the question of pre-arrest silence when the defendant is not in custody or subject to custodial interrogation. 133 S. Ct. at 2177-78. The Salinas Court held that, in such situations, it is proper to comment on a defendant's silence unless he has invoked his rights. 570 U.S. at 2178.

The Salinas Court made it clear, however, that this requirement of invocation does *not* apply when the defendant is being subjected to custodial interrogation, because such interrogation is inherently coercive. 133 S. Ct. at 2179-80. And this Court has so noted. State v. Pinson, __ Wn. App. __, 333 P.3d 528 (September 3, 2014) (Salinas does not apply to custodial interrogation).

Thus, Salinas does not apply where, as here, the officers were

commenting on the defendant's "failure" to speak or cooperate after he was in police custody. Both Mahlum and Pecheos were originally dispatched to the home but diverted to the accident and knew that the registered owners of the vehicle involved included Ramirez Diaz. RP 289-94. They had also both been tasked with taking custody of Ramirez Diaz at Masko's behest, because of Masko's belief that Ramirez Diaz had committed the crime of malicious mischief at the home. RP 289-99, 213, 216. Pecheos' testimony was about how Ramirez Diaz acted after the officers had detained him, i.e., he "[w]asn't extremely cooperative with us while we asked him some questions." RP 213. Ramirez Diaz was already placed in handcuffs at the time. RP 225.

Masko arrived *after* that, when Ramirez Diaz had been secured in the back of the police car, still in handcuffs. RP 188, 194-95. Ramirez Diaz was being subjected to custodial interrogation by Masko and that was what the officer was describing when he told the jury that Ramirez Diaz was "very hard to speak to" and that the officer had asked him questions including his "basic information" but the officer believed that Ramirez Diaz "didn't want to talk to me about anything." RP 187.

Trooper Robertson's interaction with Ramirez Diaz occurred even later in the process than that of Masko. RP 416-17. Not only had Ramirez Diaz been detained, handcuffed, put in a police car, taken out of the car in handcuffs and interrogated by Masko, Ramirez Diaz had also been transported to the police station by the time the trooper asked Ramirez Diaz what had happened and how much he had to drink that night. RP 416-17. Yet the officer tried to tell the jury that, in response to those questions,

Ramirez Diaz was "unwilling to, you know. . . " While cut off by counsel's sustained objection and stricken, Robertson's effort to comment on Ramirez Diaz' failure to speak when subjected to custodial interrogation by police marked the *third time* an officer had made such an effort in the case. See RP 416-17.

All of this testimony amounted to improper comments on Ramirez Diaz' exercise of his rights. Ramirez Diaz had an absolute right *not* to answer police questions while in custody, unless and until he was advised of his rights and validly waived them. See State v. Holmes, 122 Wn. App. 438, 445-46, 93 P.3d 212 (2004). His declining to answer questions asked during custodial interrogation by first Pecheos, next Masko and then Robertson was constitutionally protected behavior. This is not a new or unsettled concept of law. See, e.g., Easter,130 Wn.2d at 233-34 (pre-arrest "evasiveness" described by officer as evidence Easter was a "smart drunk" was improper as it "characteriz[ed] Easter's silence as evasive and evidence of his guilt"); State v. Keene, 86 Wn. App. 589, 592, 938 P.2d 839 (1997).

Romero, supra, is instructive. In that case, the defendant was arrested and charged with first-degree unlawful possession of a firearm in an incident where there was a report of shots fired at a mobile home park in the middle of the night. 113 Wn. App. at 783. An officer using a flashlight responded and saw Romero coming around the front of a mobile home holding his right hand behind his body. Id. When the officer demanded that Romero show his hands, Romero refused and would not step away from the mobile home, instead running around it and later being found inside. 113 Wn. App. at 783.

At trial, a sergeant testified that, when the mobile home in which Romero was found was searched, "they did not respond to our questions." 113 Wn. App. at 785. The officer also testified that, when Mr. Romero was arrested, he was put in a holding cell and was "somewhat uncooperative." 113 Wn. App. at 785. In addition, the officer was allowed to testify that, when Mr. Romero was read his rights, "he chose not to waive, would not talk to" police. 113 Wn. App. at 785.

In finding the testimony to be a violation of the right against self-incrimination, the Romero Court discussed the long line of cases where the courts made it clear that an officer's comments on the defendant's decision not to talk to police or answer questions was such a violation. 113 Wn. App. at 785-89. Indeed, the Romero Court noted, the testimony was improper even in cases where the prosecutor did not "harp" on an officer's testimony about silence and the question and answer were limited. Id. The Court noted that the evidence was "injected into the trial for no discernible purpose other than to inform the jury that the defendant refused to talk to police without a lawyer." Id., citing, State v. Curtis, 110 Wn. App. 6, 9, 37 Wn.2d 1274 (2002).

Indeed, the Court found that the officer had been trying to cause the prejudice that had occurred. Even though the testimony was "unresponsive and volunteered," the Court concluded, it was "clearly purposeful" by the officer and was "an attempt by the sergeant to prejudice the defense." Romero, 113 Wn. App. at 793.

Here, the testimony came from not one but three separate officers, all of whom worked for the same police agency- Pierce County Sheriff's

Department. Every one of them knew that Ramirez Diaz was in custody at the time he declined to answer their questions. And each of them made comments designed to ensure that the jury drew a negative impression from Ramirez Diaz' "failure" to answer police questions, even though he had a constitutional right to so "fail."

Reversal is required. Where, as here, testimony is admitted drawing a negative inference regarding the exercise of a right the prosecution bears a very heavy burden in trying to prove those constitutional errors harmless. Easter, 130 Wn.2d at 242. It can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it "necessarily" leads to a finding of guilt. 104 Wn.2d at 425.

The prosecution cannot meet that burden here. Again, Romero, supra, is instructive. In that case, in addition to the evidence that Mr. Romero ran from the officers and was seen in the area of the crime just after the shooting, officers also found a shotgun inside the mobile home where Mr. Romero was hiding and shell casings on the ground next to the mobile home's front porch. Romero, 113 Wn. App. at 783. Descriptions of the shooter seemed to point to Mr. Romero and an eyewitness who had seen the shooter actually picked out Romero as the person seen. 113 Wn. App. at 784. Although the witness was "one hundred percent" positive the shooter was Mr. Romero, the witness remembered seeing that man wearing a slightly different colored shirt (blue vs. grey but both "checked." 113

Wn. App. at 784. And although another man, wearing a blue-checked shirt, was also with Mr. Romero that night, when shown the shirt Mr. Romero was wearing the eyewitness identified it as the one the shooter had worn. 113 Wn. App. at 784.

In reversing based on the officer's testimony that Mr. Romero had not cooperated with or spoken to police, the Romero Court first noted that the prosecution had not exploited the comment in closing and had not even "purposefully elicited" the officer's "unresponsive" answer. 113 Wn. App. at 793. Nevertheless, the Court could not "say that prejudice did not likely result due to the undercutting effect on Mr. Romero's defense." 113 Wn. App. at 794. Although there was significant evidence that Mr. Romero was guilty, that was not sufficient to amount to "overwhelming" evidence of guilt in order to find the constitutional error harmless. 113 Wn. App. at 795-96. Indeed, the Court held, because the evidence was disputed, the jury was "[p]resented with a credibility contest," and "could have been swayed" by the sergeant's comment, "which insinuated that Mr. Romero was hiding his guilt." 113 Wn. App. at 795-96; see also, Keene, 86 Wn. App. at 594-95 (despite strong evidence of guilt, because there was also conflicting evidence, the evidence was not "so overwhelming" that it "necessarily" leads to a finding of guilt).

Similarly, here, while there was evidence a juror could rely on in concluding that Ramirez Diaz was guilty there was also conflicting evidence at trial. There was no issue about intoxication - the sole issue below was whether Ramirez Diaz was the driver. No one saw him driving, no one testified about seeing him get into the car behind the wheel and no

one saw who was driving when the car crashed. Once Ramirez Diaz was found there was no further effort to seek other potential occupants of the car on that dark, cold night.

Further, the injuries on Ramirez Diaz' face could have been consistent with an airbag going off or with scratches from bushes. The shoe which was found in the car was facing the wrong way, which could indicate a person climbing over the driver's seat from the passenger seat. The officers admitted that a passenger could have also climbed out the open driver's side window. And although the driver's side airbag had inflated, there was no evidence to establish that this particular year and model car also had a passenger side airbag.

Not only that, the "smoking gun" testimony about the "seat belt" injury which was supposed to show that Ramirez Diaz was a driver was completely defused when it came to light that the photo of Ramirez Diaz taken that night showed injuries consistent with being a *passenger*, not the driver. RP 509-12.

The untainted evidence in this case was not so overwhelming that it necessarily led to a finding of guilt.

It is important to note that the test for constitutional harmless error is *not* the same as the test for sufficiency of the evidence. Romero, supra, proves this point. In that case, the appellant raised not only a claim regarding the comment on his rights but also argued that the evidence was insufficient to support that conviction. 113 Wn. App. at 797-98. Applying the much more forgiving standard of review for insufficiency claims, the Romero Court held the evidence sufficient to meet that challenge, taking

the evidence in the light most favorable to the state. 113 Wn. App. at 797-98. But the same evidence which was sufficient to support a conviction when taken in the light most favorable to the state on appeal was insufficient to support that same conviction when the standard applied was constitutional harmless error.

Put another way, the standard applied to a challenge to the sufficiency of the evidence requires this Court to affirm if, taking the evidence in the light most favorable to the state, *any* reasonable juror could have convicted. See Romero, 113 Wn. App. at 797-98. In stark contrast, the standard applied when there is constitutional error requires this Court to *reverse* unless that prosecution proves, beyond a reasonable doubt, that *every* reasonable juror would *necessarily* have convicted based on the overwhelming, untainted evidence, even absent the error. See id.; Guloy, 104 Wn.2d at 426. Further, in deciding if the prosecution has met that high standard, this Court must assume that the damaging potential of the improperly admitted evidence was "fully realized." See State v. Moses, 109 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006).

The Romero decision serves to highlight the differences between the amount of proof of guilt required to be sufficient to support a conviction on review and the amount required to be "overwhelming evidence" which renders a constitutional error harmless. 113 Wn. App. at 797-98. This Court should not be swayed by any attempts of the prosecution to claim the repeated violations of Mr. Ramirez Diaz' rights here "harmless," and should reverse.

2. IMPROPER OPINION TESTIMONY AND OTHER PREJUDICIAL EVIDENCE WAS ADMITTED AGAINST RAMIREZ DIAZ, THE ERRORS WERE NOT HARMLESS, THE PROSECUTOR COMMITTED MISCONDUCT AND COUNSEL WAS INEFFECTIVE

In addition to the improper comments on Ramirez Diaz' rights to be free from self-incrimination, Ramirez Diaz' rights to a fair trial were also violated by the repeated admission of opinion testimony on Ramirez Diaz' guilt, which also violated his rights to trial by jury. Further, the prosecution elicited irrelevant, highly prejudicial "propensity" evidence which invited the jury to decide the case on an improper basis. Unfortunately for Ramirez Diaz, these errors were exacerbated by counsel's unprofessional failures in relation to both the opinion testimony and propensity evidence.

a. Improper opinion testimony

Both the state and federal constitutions guarantee the right to trial by jury. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Sixth. Amend.; Art. I, § 21. Included in this right is the right to have the jury serve as the "sole judge" of the evidence, the weight of the testimony and the credibility of witnesses. Lane, 125 Wn.2d at 838. As a result, it is improper to admit evidence about a witness' opinion about the guilt, credibility or veracity of the defendant. See, e.g., State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005).

Here, such improper opinion testimony was admitted several times at trial.

i. Relevant facts

Before trial, counsel filed a two-page motion arguing that none of the state's witnesses had personal knowledge that Ramirez Diaz was the

driver and thus they should be precluded from describing him as such. CP 16-17. In the hearing on the motion, counsel noted that, in the officers' narratives and in interviews with witnesses, people referred to Ramirez Diaz as the "driver," even though none of them had personal knowledge of that "fact." RP 20. Counsel also noted that the issue of whether Ramirez Diaz was the driver went to the "ultimate issue" - indeed, the only issue in the case. RP 21.

The prosecutor agreed to tell his witnesses to refer to the defendant by his name or as "the defendant." RP 21. The prosecutor also said, however, that at least two of his witnesses "would indicate, based off their training and experience, that he was the driver." RP 21. Counsel did not further argue on the issue. RP 21.

At trial, Fowler opined that the man "appeared to me to be the driver or somebody from the car." RP 272-73. Also without defense objection, Deputy Pecheos declared the vehicle as "described as being driven by Mr. Ramirez [Diaz]." RP 213. A little later, the prosecutor asked Deputy Mahlum

> Based off of what you observed with regards to, I guess, the shoe, the air bag, the seat belt, **what was your conclusion**, based off the information that you had at that time, after taking the pictures, after seeing the whole scene with regards to the collision site **of who the driver was**?

RP 340 (emphasis added). The officer answered, "**I felt it was Mr. Ricardo,"** referring to Ramirez Diaz. RP 340 (emphasis added). Counsel did not object. RP 340.

It was only a few moments later, when the prosecutor again returned to the question, that counsel objected when the prosecutor asked, "based off

all the information that you had on scene, your observations of the defendant, **what was your conclusion as to who the driver was in the vehicle?**" RP 341 (emphasis added). When counsel objected, "[t]his has been asked and answered" and the court sustained the objection the prosecutor then declared, "I believe you did answer that question." RP 341.

In closing argument, the prosecutor told the jurors that the "simple patrol officers" had documented "everything that was obvious to them that led them to the conclusion that Defendant was driving the vehicle." RP 483.

ii. The evidence was improper opinion testimony in violation of Ramirez Diaz' rights to trial by jury and the prosecutor committed misconduct

These comments were improper opinion testimony, in violation of Ramirez Diaz' rights to a fair trial before an impartial jury which has made an independent evaluation of the facts. See State v. Wilber, 55 Wn. App. 294, 297, 777 P.2d 36 (1989); State v. Demery, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001). Impermissible opinion testimony is reversible error because it "violates the defendant's rights to a jury trial," a constitutional right. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). As a result, the prosecution bears the burden of proving the admission of the evidence constitutionally harmless, beyond a reasonable doubt. See Guloy, 104 Wn.2d at 426.

Further, the issue is properly raised for the first time on appeal because, where a witness makes an explicit or almost explicit comment on guilt or credibility, that is a manifest error affecting a constitutional right.

Kirkman, 159 Wn.2d at 936-38. To determine if such comment has occurred, this Court looks at several factors in light of the circumstances of the case: 1) the type of witness involved, 2) the nature of the testimony, 3) the nature of the charges, 4) the nature of the defense and 5) the other evidence before the trier of fact. See Demery, 144 Wn.2d at 759.

Looking at all those factors, here, both the testimony from the officers and the testimony from Fowler were clearly explicit or almost explicit comments on guilt. First, while the comments of Fowler came from a lay person, the other comments came from officers. It is well-settled that the opinion of a law enforcement officer is likely to be especially prejudicial, because it can have "a special aura of reliability" that holds strong sway with the jury. See, Kirkman, 159 Wn.2d at 928. The nature of the testimony was Fowler opining that Ramirez Diaz was associated with the car or the driver, an officer saying that Ramirez Diaz had been described by witnesses as the driver and Deputy Mahlum's conclusion that he "felt" Ramirez Diaz was the driver. RP 340-41.

Further, all of that testimony went directly to the one question in the case - whether the prosecution had proven that Ramirez Diaz was the driver - and thus guilty of driving while intoxicated as charged.

Finally, the other evidence before the trier of fact makes it clear that the testimony was improper opinion, especially that of Mahlum. The only issue at trial was whether Ramirez Diaz was the driver. There were no witnesses with personal knowledge, i.e., who saw him drive. But Pecheos said that Ramirez Diaz was the driver and implied there were witnesses establishing that, even though there were not. RP 213. Fowler opined that

Ramirez Diaz appeared to be associated with the car or actually its driver. And most egregious, Deputy Mahlum was asked his "conclusion" of who had been driving the car - i.e., whether Ramirez Diaz was driving the car and thus guilty - and then told the jury his personal opinion i.e., that he "felt" it was Ramirez Diaz. RP 340. Our highest court has recognized that such language is clear evidence to the jury that the officer is giving his personal belief or opinion. Montgomery, 163 Wn.2d at 594. Indeed, the Court declared it "very troubling" that a witness would actually testify "I believe" or "I felt" as that language is so obviously an indication of an improper opinion. Id.

The prosecutor not only elicited the testimony, he then relied on those opinions in closing argument, referring the jury to how the "simple patrol officers" documented "everything that was obvious to them that led them to the conclusion that Defendant was driving the vehicle." RP 483. The prosecutor also told the jurors that the deputies and troopers "were candid in stating to you what they knew and didn't know," thus further bolstering the officers' opinions. RP 480. The prosecutor's acts in eliciting and relying on this evidence were misconduct. See, e.g., State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003); see also, Montgomery, 163 Wn.2d at 590 (noting the duties of both parties to avoid eliciting such improper opinion).

Reversal would be required even if the prosecutor had not elicited the improper opinion testimony, because the admission of the improper opinion testimony is constitutional error which is presumed prejudicial and the prosecution cannot meet the heavy burden of proving "harmless."

Impermissible opinion testimony is reversible error because it "violates the defendant's rights to a jury trial," a constitutional right. Kirkman, 159 Wn.2d at 927. As a result, the prosecution bears the burden of proving the admission of the evidence harmless, beyond a reasonable doubt. Guloy, 104 Wn.2d at 426.

The prosecution cannot meet that heavy burden here. Constitutional error such as that which occurred here is presumed prejudicial and reversal is required unless the prosecution can show that the overwhelming untainted evidence was so strong that *every* rational trier of fact would "necessarily" have found the defendant guilty, absent the error. Guloy, 104 Wn.2d at 426. Further, the Court will assume that the damaging potential of the improperly admitted evidence was "fully realized" in doing this analysis. See Moses, 109 Wn. App. at 732.

There was not overwhelming untainted evidence supporting a finding of guilt here. The only issue at trial was whether the prosecution could prove that Ramirez Diaz was the driver. There were no witnesses who saw him driving, or getting into the car or getting out of the car after it crashed. It was a dark night, the power was out and officers did not search for anyone else once Ramirez Diaz was found. The injuries on Ramirez Diaz' face could have been consistent with an airbag going off or with scratches from bushes. The shoe which was found in the car was facing the wrong way, not as if it came right off of the foot of someone sitting in the driver's seat. And the "smoking gun" "seat belt" injury testimony was rebutted by the photo which showed injuries consistent with being a *passenger*, not the driver. RP 509-12.

Even if this evidence might be adequate to satisfy the extremely forgiving, deferential review for sufficiency of the evidence, it does not satisfy the requirements of proving constitutional harmless error. While *some* reasonable trier of fact *could have* found the defendant guilty based on the untainted evidence, the evidence of guilt is not so overwhelming that it can establish, beyond a reasonable doubt, that *every single, conceivable* jury would have convicted, absent the evidence, as required to meet that standard. See State v. Evans, 96 Wn.2d 1, 7, 633 P.3d 83 (1981). The prosecution cannot establish the improper opinion testimony as constitutionally harmless, and reversal is thus required.

iii. Counsel was ineffective

Because the prosecution cannot meet the heavy burden of proving the constitutional errors harmless, reversal is already required. But reversal is also required because of counsel's ineffectiveness. Under both the state and federal constitutions, the accused in a criminal case is entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. Further, a defendant can be deprived of the due process guarantee of a fair trial when counsel fails to live up to minimum standards, because counsel serves the important function of balancing against the weight of the state and taking steps to ensure the trial is "fair." See State v. Pryor, 67 Wash. 216, 121 P. 56 (1912); State v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004).

Counsel is ineffective when, even with a strong presumption of effectiveness, counsel's performance fell below an objective standard of reasonableness and those failures prejudiced his client. See State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). That standard is met when there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. This does not require proof that, absent counsel's error, the defendant would not have been convicted. See State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Instead, it requires only proof of a probability "sufficient to undermine confidence in the outcome." Id.

Both of the requirements of Strickland are met here. First, counsel's failure to properly address the improper opinion testimony falls well below an objective standard of reasonableness. It is obvious that counsel was concerned about the impact of having jurors hear a witness describe Ramirez Diaz as the driver - he moved to prevent that from happening. See CP 16-17. But he should also have objected or sought to clarify what the prosecutor meant when he declared some of his witnesses would testify that, based on their "training and experience," Ramirez-Diaz was the driver. See RP 21. An officer's belief that the evidence shows that someone was driving a car - and thus is guilty of a driving offense - is not "expert testimony" - it is improper opinion. See ER 702 (expert testimony is appropriate to provide explanation to the jury of "scientific, technical or other specialized knowledge" not within the normal understanding of the average person); see, Montgomery, 163 Wn.2d at 590. The same is true of the opinion of the neighbor.

Indeed, the prosecutor's closing argument proves that the determination of whether the evidence showed that Ramirez Diaz was the driver was not something which required an expert's "explanation." In that argument, the prosecutor repeatedly told the jury they could and should decide whether Ramirez Diaz was the driver based on their "common sense." See RP 532.[3]

The officers' opinions that Ramirez Diaz was the driver were improper opinion testimony, as was the opinion of the neighbor, Fowler. The prosecutor telegraphed the intent to elicit such testimony, though, by saying that some of his witnesses would testify based on their "training and experience" that Ramirez Diaz was the driver. But counsel did not follow up. And the prosecutor then was allowed to repeatedly admit improper opinion testimony from two different officers and one lay witness on the only issue in the case -whether Ramirez Diaz was the driver. Counsel did not object to the obviously improper evidence until the prosecutor tried to elicit it *again*.

Counsel's performance clearly fell below an objective standard of reasonableness. Counsel must "make a full and complete investigation" of both the facts and the law in order to "prepare adequately and efficiently to present any defense." State v. Burri, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976). It is true that deciding not to object may be a tactical decision when the objection may improperly emphasize the testimony you wish had not occurred. But failure to object to improper testimony critical to the

[3]The impropriety of this argument is discussed in the prosecutorial misconduct argument, *infra*.

prosecution's case against a client may nevertheless amount to ineffective assistance of counsel. See, e.g., State v. Hendrickson, 138 Wn. App. 827, 831-33, 158 P.2d 1257 (2007), affirmed, 165 Wn.2d 474, 198 P.3d 1029, cert. denied, 557 U.S. 940 (2009). Here it was obviously clear that improper opinion testimony was likely, as counsel moved to exclude improper opinion that Ramirez Diaz was the driver in the first place. Counsel's failure to then follow up when the prosecutor telegraphed his intention to elicit opinion and his failure to then object make no tactical or strategic sense.

Counsel's failures prejudiced his client. Given the incredible weight that juries are likely to give improper opinion testimony from an officer, having one declare that he "felt" the evidence showed that Ramirez Diaz was the driver was severely prejudicial to Ramirez Diaz on the only issue at trial - whether he was a driver. The same is true of the opinion of the neighbor, which only reinforced the officers' improper opinions. And the testimony of the officer saying that Ramirez Diaz was the driver based on "witnesses" suggested that there might be other evidence the jury might not actually have heard. There could be no tactical reason for counsel to first make a motion to exclude improper opinion testimony and then fail to follow through on it or object when such improper testimony occurs. Counsel was ineffective and this Court should so hold. That ineffectiveness is an independent reason to support reversal, although reversal is already required based on the officers' improper comments on Ramirez Diaz' failure to answer questioning in custody.

b. Improper "propensity" evidence

Counsel was further ineffective and Mr. Ramirez Diaz' rights to a fair trial further eviscerated by that the introduction of improper, irrelevant "propensity" evidence that Ramirez Diaz was believed guilty of another crime just before the crime for which he was on trial.

While neither the state nor the federal due process clauses guarantee a "perfect trial," at a minimum they require a trial in a criminal case to comport with basic norms of fairness. See State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The right to a fair trial may be violated when evidence is admitted which causes the jury to decide the case based not on the evidence but on improper bases such as emotion or a belief about the defendant's "propensity." See Miles, 73 Wn.2d at 70; State v. KFelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984).

Here, that happened over and over when the prosecution repeatedly elicited testimony from officers not only that there was a prior crime of malicious mischief which officers "determined" had been committed by Ramirez Diaz just before the crime for which he was being tried, but also details about that crime and, most egregious, that the officers believed it to be a "domestic violence" offense.

i. Relevant facts

In the original information, Ramirez Diaz was charged not only with the felony DUI but also with having committed third-degree malicious mischief on the same day, by having "unlawfully, knowingly, and maliciously cause[d] physical damage to a door, the property of another." CP 1-2. Neither charge was alleged to have involved "domestic violence."

CP 1-2.

Before trial, the prosecution noted that it was only going to proceed on the "felony DUI." RP 3-4. The prosecutor was planning to file an Amended Information because he had not been able to get a response from the victim on the malicious mischief and thus could not prove that count. RP 13.

At trial, however, the prosecution repeatedly elicited testimony regarding the facts and allegations of the malicious mischief crime. On direct examination of Deputy Masko, the prosecutor asked him about the investigation he had done at the residence from which the "suspect" - identified as Ramirez Diaz - was said to have fled. RP 179-80. The prosecutor asked what the officer was "able to determine," eliciting, "I was able to determine that a vacuum cleaner was thrown into the bathroom door causing the door to break and the vacuum to break." RP 179-80.

Deputy Pecheos also testified about the evidence regarding the malicious mischief charge the prosecution had dropped at trial. The deputy first testified that he was responding to an incident at the home which "came out as a domestic violence call." RP 204-205. He then repeatedly referred to the "fact" that the officers "were going for a domestic violence call" at the home, that they were investigating Ramirez Diaz for "the domestic violence call" (RP 216), that Ramirez Diaz was arrested for a crime for that call, and that Ramirez Diaz was placed in the back of a patrol car in handcuffs so officers could "determine whether we were going to arrest him on the domestic violence call." (RP 217). Pecheos, who was at the residence for a short time, also declared that he had "observed some of

the damage caused by Mr. Ramirez" there. RP 212-13.

Deputy Pecheos also testified about talking to four people who were so "concerned about what was going on with the incident" (i.e., the malicious mischief) that they had not stayed at the home but had driven over to meet the officers when they arrived. RP 210. The deputy told the people in the car to go back to the house "to make sure that everything was safe" and because officers "still hadn't located" Ramirez Diaz. RP 212.

Pecheos also said that Deputy Masko had "determined that a crime had been committed" at the home and that Ramirez Diaz was the culprit. RP 216-17. And Pecheos declared that the domestic violence call had been determined by officers to be "what we would call malicious mischief during a domestic dispute had occurred where he destroyed property so technically he was under arrest for that." RP 217.

After the prosecution rested, counsel moved to dismiss the malicious mischief charge based on insufficient evidence. RP 442. Counsel recognized that the prosecutor had said he was not pursuing the charge but made the motion anyway. RP 442. The prosecutor noted he had not put on any evidence regarding that offense and had planned to file an amended information. RP 442-43. The court said it did not think that the malicious mischief was presented in the opening statements and noted that all of the parties had been "operating. . . under the assumption that the State was planning to amend the information." RP 444.

ii. The evidence was improper propensity evidence the admission of which deprived Ramirez Diaz of a fair trial

The evidence that Ramirez Diaz was believed to have committed

malicious mischief and damaged property at the residence earlier that night was irrelevant, as was the extremely prejudicial evidence from the officers that the crime involved "domestic violence." Further, that evidence was highly prejudicial, improper "propensity" evidence which invited the jury to decide the case on an improper, emotional basis. And counsel was ineffective in his handling of this highly inflammatory, prejudicial evidence below.

First, the evidence was not relevant. Evidence is only relevant when it makes a fact which is of issue in the case more or less probable. See ER 401, 402. Because the prosecution was not pursuing the malicious mischief charge, the only crime at issue was the felony DUI. Nothing about the malicious mischief, the damage done, the officer's beliefs in Ramirez Diaz' guilt or that it was deemed a "domestic violence" incident was in any way relevant to anything at issue for the felony DUI.

To prove felony DUI, the prosecution had to prove the essential elements of misdemeanor DUI and the additional facts required to elevate that crime to a felony. See RCW 46.6.1.502(6). The essential elements of misdemeanor DUI are that (1) the accused drove a vehicle within the state while either having the prohibited alcohol concentration or being under the influence of any intoxicating liquor or drug or a combination. See State v. Shabel, 95 Wn. App. 469, 474, 976 P.2d 153, review denied, 139 Wn.2d 1006 (1999). To elevate the crime to a felony, the prosecution must prove that the defendant also has certain prior offenses. See RCW 46.61.502(6); State v. Castle, 156 Wn. App. 539, 541, 234 P.3d 260 (2010).

Thus, the prosecution had to prove that Ramirez Diaz drove, that he

did so while intoxicated and that he had the required prior offense or offenses. Nothing about the alleged malicious mischief was relevant to any of those essential facts. The prosecution did not have to prove that prior to driving Ramirez Diaz had committed property damage somewhere. The prosecution did not have to prove that the police believed Ramirez Diaz had committed an uncharged, unproven crime of "malicious mischief" at a nearby home. The prosecution did not have to prove that Ramirez Diaz was believed to have thrown a vacuum cleaner at a door so hard that both broke in order to prove felony DUI. The prosecution did not have to prove a "motive" to drive, or that Ramirez Diaz had been in a prior altercation involving violence, or that people were very concerned about the severity of the incident (so much so that they drove out to meet police), or that police had told those people to return to the home for safety because Ramirez Diaz was not yet in custody any of the "facts" elicited by the prosecution.

Most egregious, the prosecution had absolutely no burden of proving anything regarding "domestic violence," as *no domestic violence incident was charged*. CP 1-2; CP 43. Indeed, even when the malicious mischief was still part of the case there was *no* allegation that it was a "domestic violence" incident. See CP 1-2.

Evidence which is irrelevant must be excluded, especially where it is highly likely to incite the jury to decide guilt based upon an improper basis. See, e.g., State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984).

Here, the trial court made no finding that the evidence was relevant. But this is not the trial court's fault.

It is counsel who failed to move to exclude the evidence regarding

the charge of malicious mischief even though he knew that the prosecution would not be trying to prove that crime. See, e.g. RP 3-4, 13. It is counsel who sat mute, allowing the officers to repeatedly discuss the malicious mischief, the damage at the house, their opinion that Ramirez Diaz was guilty of that unproven crime and that the crime was believed to have been one of "domestic violence." RP 179-80, 204-205, 212-13, 216-17.

Counsel failed to object or in any way prevent the jury from hearing Ramirez Diaz linked to a completely irrelevant violent act - the throwing of a presumably heavy vacuum cleaner against a bathroom door so hard that it broke both. RP 182-83. Counsel said nothing when an officer describing meeting the four people from the car who were so "concerned about what was going on with the incident" (i.e., the malicious mischief) that they had not stayed at the home but had driven over to meet the officers when they arrived. RP 210.

And counsel said nothing when that same officer testified that he told the people in the car to go back to the house "to make sure that everything was safe" and because officers "still hadn't located" Ramirez Diaz. RP 212. That same officer described the incident at the house as involving "domestic violence" no less than 5 times. RP 204-205, 216, 217. But counsel never once objected to this incredibly irrelevant evidence.

Even if counsel thought that some of the evidence of the soon-to-be-dismissed charge of malicious mischief might have been marginally relevant and thus admissible, counsel's failure to move to limit the introduction of the evidence is unfathomable. Assuming *arguendo* that Ramirez Diaz' having been at a nearby residence just before the accident

was somehow relevant, that fact could easily have been established without any of the prejudicial evidence coming in.

Assuming for the sake of argument that it might be somewhat relevant that Ramirez Diaz was at a residence nearby before the accident which led to his DUI arrest, the evidence that he was believed to have committed a crime at that home which the prosecution *could not prove* was still inadmissible under ER 404(b). Under that rule, evidence of other crimes, wrongs or acts is not admissible unless the court first not only identifies the purpose for which the evidence will be admitted but also then finds that evidence "materially relevant to that purpose." State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). The reason for these requirements is the highly prejudicial nature of such evidence and the need to limit its admission to those cases where it is determined to be necessary. See 147 Wn.2d at 292. As the U.S. Supreme Court has declared, such evidence has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." See Old Chief v. United States, 519 U.S. 172, 180, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

Here, because counsel failed to move to exclude the evidence or object to any of it coming in at trial, the trial court was never asked to decide that any part of the evidence was relevant to anything the prosecution had to prove. Nor did it examine the other evidence available to determine whether the highly prejudicial evidence of the prior crime was "necessary" to prove any fact which is in issue.

But the blame for these failures rests not with the trial court but with counsel, who *utterly failed* to move to exclude the irrelevant,

prejudicial evidence of the unproven malicious mischief, or the "domestic violence" designation police had given it or their opinion of his guilt. Despite the fact that it is well-settled that "propensity" evidence of prior bad acts is so prejudicial that its admission can deprive the defendant of his right to a fair trial, counsel stayed mute. Not only did he fail to move to exclude the irrelevant, prejudicial evidence, he failed to object or take any steps to try to mitigate the prejudice to his client after the officers repeatedly talked about the damage at the home, their belief that Ramirez Diaz had caused that damage, their belief that he was guilty of the malicious mischief crime and, most egregious, that the crime was believed by police to involve "domestic violence."

Even if counsel assumed that some small amount of evidence about the malicious mischief would be ruled admissible by the trial court, counsel's failure to move to exclude or at least severely limit that evidence was ineffective. See State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1994). The decision whether to exclude or admit evidence under ER 404(b) is ultimately a matter over which the trial court has a great degree of discretion. 71 Wn. App. at 909. Without making the motion, counsel could not have known how the court would rule. Id.

Further, there was no tactical or strategic reason *not* to make the motion. An attorney still has the duty to make the effort to try to exclude harmful evidence even if he assumes he knows how the court might rule. 71 Wn. App. at 909.

Counsel's failure to object to the admission of the evidence was ineffective. It is true that deciding not to object may be a tactical decision

when the objection may improperly emphasize the testimony you wish had not occurred. But failure to object to improper testimony critical to the prosecution's case against a client may nevertheless amount to ineffective assistance of counsel. See, e.g., State v. Hendrickson, 138 Wn. App. 827, 831-33, 158 P.2d 1257 (2007), affirmed, 165 Wn.2d 474, 198 P.3d 1029, cert. denied, 557 U.S. 940 (2009). Even if it could be deemed "tactical" to decide not to object to and draw attention at first, once it was clear that the evidence was going to be introduced over and over by the state, counsel should have objected, or made a motion or at least *tried* to minimize the incredible damage this irrelevant, improper propensity evidence was doing to his client's rights to a fair trial.

And that damage was quite severe. Evidence such as that admitted in the case is improper "propensity" evidence because it essentially tells the jury that the defendant is probably guilty of what he is charged with simply because of his "propensity" or "character," i.e., "who he is." See, e.g., State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648, review denied, 124 Wn.2d 1022 (1994). Further, such evidence has such a strong emotional component that it is unlikely it can be erased from juror's minds. See Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed 168 (1948).

Indeed, the Supreme Court has noted that such evidence is akin to "superglue" in jurors' minds, so likely is it to stick in their memory and cause them to convict the defendant based upon the belief he is a bad person who is "by propensity" a probable perpetrator of the crime. Id.; see also, Kelly, 102 Wn.2d at 199-200. That is why there are such stringent

requirements before such evidence is admissible even when relevant. See Kilgore, 147 Wn.2d at 292; see, State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995) (must not just be "relevant" but in fact have "substantial probative value" to prove a necessary part of the state's case).

Here, the officers did not just tell the jury that Ramirez Diaz had been in some kind of altercation nearby before the accident. They gave descriptions of damage they saw in the house. They described people they spoke to as "victims" of the malicious mischief. They talked about investigating that crime and their opinions that Ramirez Diaz was guilty of it. And over and over, they were told that this crime *which the prosecution did not have the evidence to prove* involved "domestic violence" even though the prosecution itself never charged either crime in this case with that designation.

It has long been recognized that proof of other crimes is especially damaging to a defendant in a criminal case. See State v. King, 75 Wn. App. 889, 905, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995). Here, that damage was especially severe, especially because of the repeated description of the malicious mischief crime as involving "domestic violence." A "domestic violence" designation is so prejudicial that one appellate court has declared there is "no reason to inform the jury" of it even when it is charged. State v. Hagler, 150 Wn. App. 196, 202, 208 P.3d 32, review denied, 167 Wn.2d 1007 (2009). Further, the Legislature has described "domestic violence" as a "serious crime against society." RP 10.99.010.

In fact, the Legislature has noted the serious prejudice such a

designation may cause. In RCW 10.99.010, the Legislature pointed out that societal attitudes towards domestic violence have shifted that there is now a "public perception of the serious consequences of domestic violence to society and to the victims." Jurors are no less part of that public simply because they are sitting in the courtroom. Further, more than 8 years ago our highest court declared that the public was "losing its tolerance for domestic violence." See State v. Cross, 156 Wn.2d 580, 632, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006).

Given the incredible emotional pull of the issues surrounding such violence, it is patently clear that the term "domestic violence" invokes strong feelings and is not neutral or harmless. Instead, declaring that a crime involved "domestic violence" or that a defendant has committed "domestic violence" will invoke strong passions in jurors and invite them to decide to convict the defendant because of who he is believed to be, not what he has actually done.

Even with a strong presumption of effectiveness, counsel's failure to move to exclude or limit the irrelevant, highly prejudicial "propensity" evidence regarding the unproven crime of malicious mischief was ineffective. A "trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." Miles, 73 Wn. 2d at 70. Ramirez Diaz was entitled to be tried for the conduct he was accused of committing without having the jury tainted in their ability to fairly and impartially decide the case based on the evidence. Counsel's unprofessional failures highly prejudiced his client and effectively deprived Ramirez Diaz of the fair trial

to which he was constitutionally entitled. Reversal is required and this Court should so hold.

3. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE OF APPELLANT'S REFUSAL TO TAKE THE BREATH TEST WHEN THAT REFUSAL WAS MADE AFTER HIS REQUEST TO CONSULT WITH COUNSEL WAS NOT HONORED

In addition to the other problems with the trial, the trial court also erred in failing to suppress the evidence that Ramirez Diaz refused to take a breath test, because that refusal occurred only after Ramirez Diaz' rights under CrR 3.1 were violated.

a. Relevant facts

Before trial, the prosecutor moved to admit Ramirez Diaz' refusal to submit to a breath test as evidence against him. CP 11. The prosecutor argued that the refusal was admissible under RCW 46.61.517, the implied consent statute. Id.

At the hearing on that motion and the motion to suppress statements Ramirez Diaz made the night of his arrest, Trooper Brett Robertson testified about taking Ramirez Diaz from Pecheos without reading Ramirez Diaz his rights. RP 358-62. After Ramirez Diaz failed some field sobriety tests, Robertson arrested him and it was only then that the officer read Ramirez Diaz his rights. RP 363. Robertson told Ramirez Diaz he was under arrest for DUI and, after saying he understood his rights, Ramirez Diaz "didn't really talk. . .after that." RP 363-65.

They were right at the police department so Robertson took Ramirez Diaz into the "BAC" room. RP 366-67. Robertson started the "BAC process" for administering a breath test and then tried to read Ramirez Diaz

his rights again. RP 368. Ramirez Diaz continued to interject and said he wanted to speak to a lawyer. RP 368. The officer asked for the lawyer's name "numerous times" and ultimately Ramirez Diaz gave a name, after which the officer asked if Ramirez Diaz for the attorney's phone number. RP 368. Ramirez Diaz did not have it. RP 368. The officer said something about the phone book but it does not appear he got that book for Ramirez Diaz. RP 368. The officer said he asked Ramirez Diaz if he wanted to contact a public attorney but, according to the officer, Ramirez Diaz was "unwilling." RP 368-69.

The officer said he asked Ramirez Diaz again "[d]o you want to talk to an attorney," even though Ramirez Diaz had clearly said that was what he wanted. RP 368. According to the officer, Ramirez Diaz said, "I want a lawyer," so the officer asked, "[d]o you want an attorney?" RP 384. Ramirez Diaz then said, "[w]hat I want to say is I fucked up." RP 385.

At some point, the officer just pointed to the implied consent form again and read the implied consent warnings to Ramirez Diaz. RP 372. The officer admitted that, when the officer read the rights to him again, Ramirez Diaz said, "[l]awyer." RP 371. The officer also admitted that Ramirez Diaz' response to the implied consent form reading was, "[n]o," and "I don't understand." RP 377. The officer then read the same thing to Ramirez Diaz again, saying that Ramirez Diaz kept interrupting him, standing up and sitting down and started spitting on the floor. RP 377-78. The officer then asked if Ramirez Diaz would submit to a breath test but Ramirez Diaz said no. RP 378.

In ruling on both the constitutional issue of suppression of the

statements, the judge noted that the request for an attorney was "clearly and unequivocally stated" and that, at that point, all questioning was supposed to stop. RP 400-401. The court excluded the statements made after that point, save for some spontaneous statements later made at the hospital. RP 400-41.

Regarding the "admission of refusal to submit to a BAC test," the judge ruled the evidence admissible. RP 401. The judge was swayed by the prosecution's argument that suppressing the refusal to take the breath test because the defendant's request for counsel was not honored was not proper because otherwise "any defendant could effectively get around the whole idea of implied consent warnings and the refusal to - - and the consequences that flow from a refusal to submit to a BAC test simply by saying I want to talk to an attorney." RP 401-402.

No written findings of fact or conclusions of law were entered on the court's decision on this point.

At trial, the prosecutor repeatedly elicited testimony that Ramirez Diaz had refused to take the blood test. RP 424, 426-27. In discussing jury instructions, the prosecutor talked about that refusal as evidence of guilt. RP 465-66. In closing argument, the prosecutor argued that the refusal "shored up" the conclusion that Ramirez Diaz was the driver "because he knew what the results were going to be and he knew he was driving." RP 479; see 532-33 (again relying on the refusal).

b. The evidence should have been suppressed and the error is not harmless

The trial court erred in refusing to suppress the breath test, because

the test was gathered in violation of Ramirez Diaz' rule-based right to counsel. Under CrR 3.1(b)(1), "[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody." The right to counsel under this language accrues when the defendant is arrested for DUI and facing the decision whether to take a breath test. See, e.g., Spokane v. Kruger, 116 Wn.2d 135, 803 P.2d 305 (1991); State v. Fitzsimmons, 94 Wn.2d 858, 620 P.2d 999 (1980). Further, under CrR 3.1(c)(2), once a person requests an attorney, the police must act:

> At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

Under the rule, it is not required that the police ensure that the defendant have actual contact with a lawyer. See Bellevue v. Ohlson, 60 Wn. App. 485, 487, 803 P.2d 1346 (1991). They must, however, make reasonable efforts to facilitate such contact, at least by phone. Id. The purpose of the rules is to provide the defendant with a meaningful opportunity to contact a lawyer. State v. Kirkpatrick, 89 Wn. App. 407, 413-14, 948 P.2d 882 (1998).

If the police do not meet the requirements of CrR 3.1, suppression of the evidence which results is required. See Kruger, 116 Wn.2d at 145.

Here, the officer's actions once Mr. Ramirez Diaz clearly asked for a lawyer did not meet the CrR 3.1 requirements. Ohlson, supra, is instructive. In that case, when the defendant asked if he should take the breath test, the officer said he could not give legal advice. Id. The defendant then said he wanted to talk to his attorney. Id. The officer got a

telephone book, searched for and found the phone number of the defendant's attorney and then tried to reach him six times over at least 20 minutes. 60 Wn. App. at 487-88. After that, the officer called three different public defenders in an effort to get someone to talk to the defendant, but was unable to contact any of them. 60 Wn. App. at 487-88. At that point, the officer offered the defendant an opportunity to contact yet another attorney but he did not know any other attorneys to call. 60 Wn. App. at 488. The defendant then took a breath test without the advice of counsel. Id. In affirming the refusal to suppress the breath results, the court of appeals agreed with the lower court that the officer's efforts amounted to "everything reasonably necessary" that he had to do. Ohlson, 60 Wn. App. at 490-91.

Here, Ramirez Diaz was facing the decision whether to take a breath test. He specifically asked for a lawyer. It is undisputed that this request was not honored, and the trial court specifically so held. See CP 400-401. While the officer said he then engaged in questioning to figure out the name and contact information of the lawyer and may have suggested the phone book, that is not the same as providing "access to a telephone number, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer" that is required. See, e.g., State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012) (posting telephone number of public defenders and giving them access to a phone is not sufficient).

In ruling on this issue, the trial court's sole reasoning was that suppressing the refusal to take the breath test because the defendant's

request for counsel was not honored was not proper because otherwise "any defendant could effectively get around the whole idea of implied consent warnings and the refusal to - - and the consequences that flow from a refusal to submit to a BAC test simply by saying I want to talk to an attorney." RP 401-402. But that is not the law. Our Supreme Court has held that the rule-based right to counsel is "essential to the effective preparation of [a] defense against the charge of DUI." State v. Templeton, 148 Wn.2d 193, 212, 59 P.3d 632 (2002). The Court went on:

> This means that while in custody a suspect must be advised of the right to counsel *and provided access to counsel* in order that the suspect may determine whether to submit to the BAC breath test, arrange for alternative testing, and present other exculpatory evidence such as video and disinterested third party witnesses.

148 Wn.2d at 212 (emphasis added). The Court then concluded that suppression is required of the resulting evidence unless the violation of the rights is harmless, such as where no defendant asked for or indicated they would have asked for counsel had they been properly advised.

Here, the violation was not harmless. Mr. Ramirez Diaz clearly asked for counsel. His request was not honored. The officer did not make all reasonable efforts to facilitate the communication to which Ramirez Diaz was entitled as a result of his request. Ramirez Diaz' subsequent refusal to take the breath test was the result of his request to consult counsel on whether to take that test or refuse was violated. Put simply, the deprivation of counsel directly tainted the breath test refusal. And the refusal was used by the prosecutor in closing as evidence on the crucial issue of whether Ramirez Diaz was the driver of the car and thus guilty. The trial court erred in failing to suppress the evidence. This Court should

so hold and should reverse.

4. THE CUMULATIVE EFFECT OF THE ERRORS COMPELS REVERSAL

Even if the individual errors in this case did not compel reversal, their cumulative effect would, because that effect was to deprive Ramirez Diaz of his state and federal constitutional rights to a fair trial. See, e.g., State v. Venegas, 155 Wn. App. 507, 520, 228 P.2d 813, review denied, 170 Wn.2d 1003 (2010). Reversal is required for the combined effect of errors during trial when that effect "effectively denied the defendant her right to a fair trial, even if each error standing alone would be harmless." Id. Thus, in Venegas, this Court reversed based on cumulative error where the trial court improperly excluded evidence relevant to the defense, the prosecutor made two arguments referring to Venegas' presumption of innocence and the trial court admitted improper evidence without balancing its prejudicial effect. Id.

Here, even if this Court does not reverse based on the effect of individual errors, the cumulative effect of the errors compels such reversal. The trial was riddled with errors, all of which directly impacted the sole issue below - the jury's determination of whether the prosecution had proven beyond a reasonable doubt that Mr. Ramirez Diaz was driving. It is Mr. Ramirez Diaz' position that the prosecution cannot meet the heavy burden of proving the constitutional errors harmless beyond a reasonable doubt but in addition, all of the errors, taken together, deprived Ramirez Diaz of a fair trial. First, the jury was told that Ramirez Diaz had not answered officers' questions during custodial interrogation, implying that

silence was evidence of guilt. Next, the jury heard improper opinions about the crucial issue of whether Ramirez Diaz as was the driver, some of it couched as "expert" testimony, from officers. The jury also heard the completely irrelevant, highly prejudicial evidence of the malicious mischief, its "domestic violence" designation, the alleged violence of it, the "safety" issues, etc., all of which corroded the jurors' ability to fairly and impartially decide the DUI. Finally, the court admitted evidence of a refusal to take a breath test but that refusal occurred only after Ramirez Diaz was deprived of his right to the assistance of counsel to make that very decision, and the jury was told about the refusal - and the it was evidence of guilt.

No fair trial could have occurred given these errors. Even if the individual errors alone did not compel reversal, the cumulative effect of the errors does. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 27th day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via this court's portal upload at Pierce County Prosecutor's Office, pcpatcecf@co.pierce.wa.us, and appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: Mr. Ramirez Diaz, DOC 817332, Monroe CC, P.O. Box 777, Monroe, WA. 98272.

DATED this 27th day of October, 2014.

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