No. 46616-3-II

Pierce County #14-1-01830-6

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

STATE OF WASHINGTON,

Respondent,

v.

JESSIE D. BRITAIN,

Appellant.

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

The Honorable John A. McCarthy, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR. 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. 1

C. STATEMENT OF THE CASE. 4

1. Procedural Facts. 4

2. Testimony at trial. 4

D. ARGUMENT. 10

REVERSAL IS REQUIRED BECAUSE MR. BRITAIN WAS CONVICTED AFTER A TRIAL PLAGUED WITH ERROR DIRECTLY IMPACTING THE FAIRNESS OF THE PROCEEDING AND APPELLANT'S CONSTITUTIONAL RIGHTS WERE REPEATEDLY VIOLATED, INCLUDING BY THE ACTIONS OF HIS OWN ATTORNEY. 10

a. Ineffectiveness and prosecutorial misconduct relating to explicit or near-explicit comments on Mr. Britain's guilt. 12

b. Ineffectiveness and prosecutorial misconduct in repeatedly misstating the crucial, relevant law regarding the proof for the sentencing enhancement 25

c. Ineffectiveness in allowing and even eliciting highly improper, prejudicial ER 404(b) evidence to go to the jury and in eliciting a negative comment on her client's exercise of his constitutional rights. 31

d. Reversal is required. 39

E. CONCLUSION. 43

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987). 13

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990). 39

State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976). 40

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). 25

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001).. . . . . 13, 14, 15, 18

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020 (1986). 39

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996). 10

State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). 12

State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984). 31, 37

State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002).. . . . . 36, 37

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007).. . . 13, 14, 18, 21, 24

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995).. . . . . 12, 13

State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).. 37

State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968). 31

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2005). 13, 24

State v. Moses, 109 Wn. App. 718, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006). 39

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 331 (1994). 30

State v. Pryor, 67 Wash. 216, 121 P. 56 (1912).. 10

State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984). 36

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). 39

State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001). 40

WASHINGTON COURT OF APPEALS

State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005). 30, 31

State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985), disapproved in part and on other grounds by, Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993)... 14

State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).. 12

State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003). 13

State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999). 20

State v. Herzog, 73 Wn. App. 34, 867 P.2d 648 (1994). 37

State v. Jones, 117 Wn. App. 89, 68 P.3d 1153 (2003). 24

State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). 13

State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978). 22

State v. Ridgley, 141 Wn. App. 771, 174 P.3d 105 (2007).. 29

State v. Suarez-Bravo, 72 Wn. App. 359, 864 P.2d 426 (1994). 12

State v. Venegas, 155 Wn. App. 507, 228 P.2d 813, review denied, 170 Wn.2d 1003 (2010). 41, 42

State v. Webbe, 122 Wn. App. 683, 94 P.3d 994 (2004).. 10

State v. Young, 158 Wn. App. 707, 243 P.3d 172 (2010).. 19

FEDERAL AND OTHER STATE CASELAW

Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed 168 (1948). 37

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). 11

Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). 36

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). 10

Wheat v. United States, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). 10

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Art. I, § 21. . . . . 1, 12, 30

Art. 1, § 22. . . . . 1, 10

Art. 1, § 9. . . . . 1, 11

ER 404(b). 1, 3, 11, 32, 36

Fifth Amendment. 1, 11

RAP 2.5. 24

RCW 46.20.342(1)(a). 4

RCW 46.61.024(1). 4, 18

RCW 9.94A.834. . . . . 1, 4, 18, 19, 26

RCW 9A.32.050(1)(b). 4

See Laws of 2008 c. 219 § 2. 26

Sixth Amendment. 1, 10, 12, 30

A. ASSIGNMENTS OF ERROR

1. Appellant Jessie Britain was deprived of his Article 1, § 22, and Sixth Amendment rights to effective assistance of counsel by counsel's repeated failures and unprofessional errors throughout the entire trial.

2. Mr. Britain's rights to a fair trial before an impartial jury were violated when improper opinion testimony was admitted and the prosecution cannot meet its heavy burden of proving the constitutional error "harmless."

3. The prosecutor committed flagrant, serious, ill-intentioned and prejudicial misconduct in eliciting improper opinion testimony and repeatedly misstating the law regarding what was required for him to establish the "endangerment" sentencing enhancement of RCW 9.94A.834(1).

4. Mr. Britain's rights to a unanimous jury under Article I, § 21, and the Sixth Amendment, were violated.

5. The trial court abused its discretion in admitting improper, irrelevant and highly prejudicial evidence of completely unrelated warrants under ER 404(b).

6. Improper, irrelevant and highly prejudicial ER 404(b) evidence of disposed counts was admitted.

7. Britain's Article 1, § 9, Fifth Amendment and due process rights were violated when an officer made a comment on Britain's exercise of his right to remain silent.

8. The cumulative effect of the errors deprived Mr. Britain of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Britain was charged with "attempting to elude," which required proof that Britain was trying to "elude" a pursuing police officer who had properly signaled him to stop. Britain was also accused of a sentencing enhancement which required proof that a person other than himself or the pursuing officer was "endangered" during the "eluding."

   At trial, officers repeatedly testified as to their opinions of whether the way Britain was driving showed his intent was to "elude" them. An officer also told the jury his opinion that others had been "endangered" by the way Britain was driving.

a. Were these comments improper explicit or near-explicit comments on Britain's guilt, where they used the specific language of the very conclusions the jury was tasked with making and clearly conveyed to jurors the officers' opinion on whether Britain had committed the charged crime and enhancement?

b. Where improper opinion testimony is given, prejudice is presumed and reversal is required even absent an objection by counsel because such testimony violates the defendant's constitutional rights to fair trial by an impartial jury. Can the prosecution meet its heavy burden of proving the constitutional error "harmless" where the untainted evidence of guilt is not so "overwhelming" that every reasonable juror would necessarily have convicted, even absent the error?

c. Was counsel prejudicially ineffective in failing to object to improper opinion testimony or at least trying to mitigate the corrosive effect of that testimony on her client's rights?

d. Was counsel further prejudicially ineffective in "opening the door" to repeated improper opinion testimony as to her client's guilt?

2. To meet its burden of proving the "eluding" offense, the prosecution had to prove that Mr. Britain drove in a "reckless" manner, defined as "without regard for the consequences." In addition, to prove the sentencing enhancement, the prosecution was required to "prove beyond a reasonable doubt that the accused committed the crime while endangering one or more" others, and the jury is required to enter a special verdict "as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered" during the eluding.

a. Did the prosecutor commit flagrant, prejudicial and ill-intentioned misconduct and misstate the law in repeatedly telling the jury that it need not find that anyone was *actually* endangered in order to find the sentencing enhancement had been proved and instead only needed to find that someone *could have* been endangered, if they had been around at the time?

b. Was counsel again prejudicially ineffective in failing

to object and even attempt to mitigate the harm to her client even though the misstatements of the prosecutor likely led the jury to impose a sentencing enhancement which was unsupported by the evidence?

c. Where the jury is not given a "unanimity" instruction for the special verdict and the prosecutor argued several improper grounds for the jury to rely on in finding guilt for that verdict, is the defendant's right to jury unanimity violated and is reversal required?

3. At trial, over defense objection, the prosecution was allowed to admit evidence under ER 404(b) that Mr. Britain had unrelated outstanding arrest warrants.

a. Did the trial court abuse its discretion in allowing the prosecution to introduce this highly prejudicial evidence to prove "motive"even though "motive" was not an essential part of the prosecution's case and the prosecution failed to prove the evidence was relevant to "motive?"

b. At trial, counsel asked the arresting officer about whether Mr. Britain had said anything to that officer indicating that Britain had known of the outstanding warrants. The officer then commented that Britain had "refused" to answer any of the officers' questions after his arrest.

Was counsel prejudicially ineffective in failing to be aware that her client had invoked his rights and in further eliciting highly prejudicial comment implying a negative inference from her client's exercise of those rights?

4. Prior to trial, Mr. Britain entered pleas to two of three of the originally charged counts, in order to prevent the jury from knowing about any crimes other than the "eluding." Although counsel repeatedly said she had reviewed the instructions, she somehow failed to notice that they still referred to the disposed-of counts. Was counsel prejudicially ineffective, yet again, in failing to take minimal steps on behalf of her client?

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 Jessie D. Britain was charged by amended information in Pierce County with attempting to elude a pursuing police vehicle, also charged with an "eluding" enhancement (count I); unlawful possession of a controlled substance (methamphetamine) (count II); and driving while license suspended or revoked in the first-degree (count III). CP 4-5; RCW 9.94A. 533(11); RCW 9.94A.834; RCW 46.20.342(1)(a); RCW 46.61.024(1); RCW 69.50.4013.

On August 4, 2014, Mr. Britain entered guilty pleas to counts II and III. RP 5-7; CP 78-88. Jury trial was then held before the Honorable Judge John A. McCarthy solely on the attempting to elude and enhancement, on August 4 and 5, 2014. RP 8-20.[1] Britain was convicted of both. CP 110-11. On August 29, 2014, Judge McCarthy imposed a DOSA sentence. See SRP 1-14; CP 115-30. Britain appealed and this pleading follows. See CP 136.

2. Testimony at trial

Pierce County Sheriff's Department Deputy Chad Helligso was on duty during the "graveyard" shift on May 10, 2014, riding with his partner, Deputy Chris Olson, in a marked patrol vehicle. RP 19-24. It was about 4 in the morning when a passenger truck drove by them, heading the other

[1]The verbatim report of proceedings consists of two volumes. One contains the proceedings of August 4 and 5, 2014. It will be referred to as "RP." The volume containing the sentencing proceedings of August 29, 2014, will be referred to as "SRP."

way on the street they were on, which was 96th. RP 19-24, 26, 75-78.

Helligso looked behind him as the truck passed and noticed that the brake light on the driver's side was "out." RP 26. The driver was apparently using the brake as he drove, because Helligso could see that one light did not ignite. RP 44.

Deputy Helligso then told his partner about this "minor infraction that we can attempt to initiate a traffic stop based on." RP 27, 31, 81.

Olson swung the police car into a "u-turn," intending to follow the truck. RP 27, 31, 81. Both officers said the truck then "accelerated" away, so the officers had to try to catch up. RP 31, 81. According to Helligso, the police car was going 50 miles per hour at one point trying to catch up the few blocks distance but the truck was still pulling away. RP 31. The posted speed limit was probably 35. RP 31, 82.

After a few moments, however, the officers closed the distance and were behind the truck. RP 31-32. The truck then turned right on to another street, Patterson. RP 31-32. Helligso said the truck took the turn a "little too fast" and the truck "went off onto the oncoming lane and hit a curb." RP 32-33. More specifically, he said, the left front tire of the truck struck the east curb on Patterson. RP 33.

In contrast, Deputy Olson said that the truck was only going about 20 miles per hour when it turned the corner, not really that fast. RP 95. Olson also said that it appeared the driver had just overshot the turn. RP 96.

Helligso could not say if the truck had power steering or not. RP 45-46, 97.

The truck drove down the middle of Patterson. RP 32-33, 46-47, 81-87. Deputy Helligso opined that it was the "norm" for people to drive on one side of the road, not down the middle. RP 32-32. But both he and Deputy Olson admitted that Patterson had no painted line down the middle dividing it into sides. RP 32-33, 46-47, 81-87. Helligso also conceded that, in fact, "some people" drive down the middle of this type of road, which has parking on both sides of the street, when there are no oncoming cars. RP 47. He also agreed that, because there is no painted line dividing it into lanes, there is really only one lane on Patterson. RP 48.

When asked how close the truck came to any of the cars parked on the side of the road on Patterson, Helligso really could not say. RP 49. The deputy testified at trial, however, that he would have put something in his report if he had been "alarmed" by it, and nothing like that was in his report. RP 49-50.

The area in which this happened had " a bit of crime" and Deputy Helligso conceded Britain could have initially believed they were answering a call in the area rather than following him. RP 50.

The officers had illuminated their lights by that time and, when they followed the truck in the turn onto Patterson, had turned on the siren, as well. RP 33. Both officers estimated that the truck was going between 50 and 60 miles an hour down Patterson. RP 34, 95. Deputy Helligso admitted, however, that there was no radar device on the patrol car and, while he would "usually" estimate speed a particular way, he had made no indication in his police report of how he was coming up with his estimation. RP 43-44, 53-54.

The truck went only a short distance, maybe a few blocks, before turning onto another street, 100th. RP 35. On cross-examination, the officer admitted that, when the truck turned on 100th, it was not going 55 miles per hour but instead was slower. RP 48. For his part, Deputy Olson said the truck turned the corner "pretty slow" when it went onto 100th. RP 36, 84.

Although Deputy Helligso made no mention of it, Deputy Olson said that, at this point, Olson had tried a maneuver where he uses his patrol vehicle to give a "little bump" and cause the other vehicle to stall. RP 83. As the truck was slowing down, Olson said, he went to position the front end of the police car towards the rear quarter panel of the other car. RP 83. According to Olson, at that point, the driver was kind of "fishtailing." RP 83.

Deputy Olson admitted that he conducted probably 40 traffic stops like this a week and had, consistently, between the incident and trial in this case. RP 94-95. He took no notes of his own but was instead relying on the police report written by Deputy Helligso to refresh his memory. RP 94-95.

Nothing in Helligso's report said anything about the truck "fishtailing" at any point during the very brief incident. RP 95.

Olson said that he had tried to do the "bump" as the truck was approaching 100th and, when he pulled the police car back a little bit, he thought he saw a head peek up in the back of the truck. RP 84. According to the officer, that made him think there might be a passenger inside, so he aborted performing the stopping maneuver for fear of potentially hurting

that person. RP 84.

The truck turned the corner "pretty slow" at 100th, then "really slowed down" and was maybe going five miles an hour shortly after the turn. RP 36, 84. At that point, at about the third house on the street, the driver jumped out of the truck, which the officers said was still moving, albeit slowly. RP 36, 51. The truck ended up doing a "slow roll" into a mailbox, without causing damage. RP 87.

Olson stopped the patrol car and both he and Helligso jumped out. RP 37-38, 85. A brief foot chase ensued and a man named Jessie Britain, whom Hellisgo and Olson said was the man they pursued, was ultimately arrested.

The house outside of which the truck had stopped turned out to be the address on Britain's license. RP 50-51. Deputy Olson thought Britain ended up parked in front of the house where he was living at the time. RP 98. Helligso volunteered, however, that Britain was "listed as transient." RP 50-51.

After arresting Britain, the officers suddenly heard a rattling noise coming from the truck. RP 39-40, 88. Helligso said Olson ran over to the truck and then started shouting out verbal commands to someone Helligso could not see. RP 39-40, 88. It turned out that a man was trying to get out a side window which held up a back canopy section of the truck. RP 41. That person, later identified as Ronnie Prim, was arrested when it was discovered that he had an outstanding warrant. RP 40, 88.

Prim did not seem shaken up or angry. RP 98. Instead, he seemed "pretty calm" for having been in what the officers described as a fast car

chase. RP 98.

Prim himself testified that he had gotten a ride with Britain and was in the back of the cab, under the canopy, with no seatbelt on during the very short incident. RP 148-49. Prim though Britain was driving "just a little fast" but did not perceive that Britain was "fishtailing all over the road" as was claimed. RP 107.

Indeed, when asked if he had "any concern" for his safety during the incident, Prim said, "no." RP 108. He also never told the officers anything about having been scared by Britain's driving or afraid for his safety. RP 108.

During the brief incident, Prim said, he never heard any sirens and had not looked out the back window of the truck or canopy. RP 108. He was clear, however, that he did not think Britain was "swerving all over the road." RP 108.

Deputy Helligso, who read Prim his rights, conceded that Prim did not "appear scared," did not appear "concerned for his safety" and never said anything about anything like that when he was talking to police. RP 52-53.

A little later, Deputy Helligso searched the inside of the truck. RP 45-46. He could not recall if the driver's side door was left hanging open, although Olson thought it was. RP 45-46, 97. Helligso admitted that he did not notice whether Britain had the truck in "park." RP 45-46, 97.

The entire incident occurred over less than a mile, probably less than half a mile and lasted maybe a minute or two. RP 55.

D. ARGUMENT

REVERSAL IS REQUIRED BECAUSE MR. BRITAIN WAS CONVICTED AFTER A TRIAL PLAGUED WITH ERROR DIRECTLY IMPACTING THE FAIRNESS OF THE PROCEEDING AND APPELLANT'S CONSTITUTIONAL RIGHTS WERE REPEATEDLY VIOLATED, INCLUDING BY THE ACTIONS OF HIS OWN ATTORNEY

Both the state and federal constitutions guarantee the right to effective assistance of counsel in a criminal case. See 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. The purpose of the right to counsel is to ensure that the accused do not stand alone against the great weight of resources of the state. As the Supreme Court stated in Strickland, the right to counsel "plays a crucial role in the adversarial system," because "access to counsel's skill and knowledge is necessary" in order to ensure defendants have the "ample opportunity to meet the case of the prosecution" to which they are constitutionally entitled. 466 U.S. at 685.

In addition, counsel has an important role to play in balancing the scales of our adversarial system and thus ensuring the due process right to a fair trial. See Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Only a fair trial is a constitutional trial, and when counsel fails to perform her adversarial function, the defendant's due process rights are at risk. See State v. Pryor, 67 Wash. 216, 121 P. 56 (1912); State v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004).

Despite the brevity of the trial, this case was riddled with erros below. Some of those errors were the result of the prosecutor's misconduct or the trial court's erroneous rulings. But overarching the entire proceeding was counsel's repeated unprofessional failures, which were so significant that Mr. Britain was not only deprived of his constitutionally protected rights to effective assistance of counsel but also his due process rights to a fair trial. Further, counsel's repeated and frankly unfathomable mistakes ensured that the jury repeatedly heard the opinions of officers on her client's guilt, allowed an officer to draw a negative inference from and comment on her client's exercise of his Miranda[2] rights, and ensured the jury was given the wrong standard for determining guilt for the enhancement. In addition to violating Mr. Britain's rights to effective assistance and to a fundamentally fair proceeding, counsel's ineffectiveness also resulted in serious violations of her client's fundamental rights under the Fifth Amendment and Article I, § 9 and other fundamental rights, as well.

As a result, reversal is required, because counsel was not only prejudicially ineffective in her representation of Mr. Britain, her failures and unprofessional errors permeated the entire proceeding, depriving Mr. Britain of a fundamentally fair trial. Together with those failures, the prosecutor's repeated acts of misconduct and the admission of improper, highly prejudicial ER 404(b) evidence, there is simply no way which Mr. Britain received a fair trial and reversal is required.

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[2]Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

a. Ineffectiveness and prosecutorial misconduct relating to explicit or near-explicit comments on Mr. Britain's guilt

Prosecutors are quasi-judicial officers who have a special duty "to act . . . impartially in the interests of justice." See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969). Indeed, unlike other attorneys, prosecutors are given a special public trust and thus are required to refrain from acting as a "heated partisan" trying to win conviction at any cost. State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

A prosecutor also has a duty to see that an accused receives a fair trial and to pursue a verdict "free of prejudice and based on reason." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). When a prosecutor commits misconduct, not only does he violate his duties to act in the interests of justice but further his conduct may deprive the defendant of his due process rights to a fair trial. Suarez-Bravo, 72 Wn. App. at 367.

In this case, the prosecutor committed repeated acts of flagrant, ill-intentioned and prejudicial misconduct by eliciting improper opinion testimony from officers in violation of Mr. Britain's rights to trial by jury. And counsel's utter ineffectiveness actually increased the amount of improper opinion testimony elicited against her client.

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 what weight and credibility to give to

evidence and testimony. Lane, 125 Wn.2d at 838. As a result, a witness may not give his opinion at trial about the defendant's guilt, veracity or credibility. See, State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005). Nor may he give his opinion about the veracity or credibility of other witnesses. See State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Opinion testimony is testimony "based on one's own belief or idea, rather than on direct knowledge of the facts at issue." State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). In general, the testimony of a witness giving his opinion "on an ultimate fact" is not necessarily improper. See ER 704; Kirkman, 159 Wn.2d at 332.

However, "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). In addition to guilt, a witness is also prohibited from testifying as to the veracity or credibility of the defendant or any other witness, either by direct or "inferential" statement. See State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). If such improper opinion testimony occurs, it violates the defendant's rights to trial by jury and invade's the jury's fact-finding province. See State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

Thus, in Black, supra, the Supreme Court found there was improper opinion testimony when an expert in a rape case testified that the victim suffered from "rape trauma syndrome." 109 Wn.2d at 349. And it was improper opinion testimony when an officer testified that a tracking dog

followed the defendant's "fresh guilt scent." See State v. Carlin, 40 Wn. App. 698, 700, 700 P.2d 323 (1985), disapproved in part and on other grounds by, Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993).

In Kirkman, supra, the Supreme Court held that improper opinion testimony on an "ultimate fact" is not automatically reviewable on appeal if counsel did not object below. 159 Wn.2d at 937. If counsel objects, a reviewing court will examine even improper opinions based on inferences of guilt. See id. But where, as here, counsel sat mute, in order to raise an improper opinion for the first time on appeal, there must be "manifest constitutional error," which required "an explicit or almost explicit statement" by the witness as to the defendant's guilt, veracity or credibility or the veracity or credibility of a witness. 159 Wn.2d at 937.

That requirement is more than amply met here, because all of the comments were explicit or almost explicit statements of the officers' opinions of Mr. Britain's guilt, veracity and credibility. Further, even if the comments had not met the "explicit or almost explicit" standard, reversal would be required based on counsel's utter ineffectiveness in relation to the improper opinion testimony.

The first task of the Court is thus to determine if the testimony amounts to an explicit or nearly explicit opinion on the defendant's guilt, veracity or credibility or the veracity or credibility of a witness. To make that determination, 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 those factors here leads to the inescapable conclusion that the comments which occurred below were explicit or almost explicit comments on Mr. Britain's guilt. Further, some of the comments were *directly invited* by counsel unprofessional conduct.

Pretrial, counsel filed a motion asking the trial court to order the prosecution's witnesses to refrain from engaging in improper opinion testimony. CP 11-14. At trial, however, when Deputy Helligso was on the stand, the prosecutor asked for the officer's opinion about whether Prim was "endangered" by Britain's driving:

> Q: And based off of what you observed of Mr. Britain's driving, did you have any concerns in retrospect about any possible harm that could have been caused to Mr. Prim based off of Mr. Britain's driving?
>
> A: Yes. There was no seat whatsoever back there. The back end of the truck had a lot of garbage type stuff in it and there was no seatbelt in the back of the truck.
>
> Q: And was there anything, specifically during your search, you testified to several instances where you had safety concerns, specific instances during the pursuit **that possibly could have endangered Mr. Prim as a passenger?**
>
> **A: Yes.**
>
> Q: And what were those?
>
> A: The high-speed turns, could have been ejected out the side windows. The quick acceleration could have caused him to roll towards the back and come out the back end.

RP 41 (emphasis added). Counsel did not object. RP 41.

Then, just after starting cross-examination, counsel began trying to impeach the officer about what he said in his report, going at length into why reports are written and establishing that prosecutors get police reports

and officers often "make recommendations" about criminal charges. RP 43. The following exchange then occurred:

> Q: And you often make recommendations as to what the criminal charges should be, right, correct?
>
> A: We initially charge them.
>
> Q: You initially charge them?
>
> A: Yes.
>
> Q: **And you initially charged Mr. Britain with reckless driving?**
>
> **A: No**.

RP 43 (emphasis added). Counsel immediately moved on to a different topic. RP 43.

The first thing the prosecutor did on redirect examination was to refer the officer to his police report, which was being used at trial as Plaintiff's Exhibit 1. RP 55. The following exchange then occurred:

> Q: First of all, do you still have Plaintiff's Exhibit 1 in front of you?
>
> A: I do.
>
> Q: That's a copy of your report?
>
> A: Yes.
>
> Q: **Right off the bat counsel is asking what you referred for charging for Mr. Britain.** Do you see page 1 of Plaintiff's Exhibit 1?
>
> A: Page 1?
>
> Q: Yes.
>
> A: Yes.
>
> Q: Can you see the subject line?

A: No.

Q: Okay. Top part, right beneath the header. It says "PDA, home land security, subject?"

[A]: Oh, yes.

[Q]: **What's the first phrase that's following "subject."**

A: Eluding police.

Q: Okay. So in response to counsel's question, nothing about reckless?

A: Correct.

Q: When you have eluding police in there, what crime does that refer to?

A: Felony elude.

RP 56 (emphasis added).

A few minutes later, during direct examination of Deputy Olson, the prosecutor specifically asked the officer what "conditions that might trigger something that starts out perhaps as a stop for a traffic infraction into a pursuit, **for somebody eluding you?**" RP 77 (emphasis added). Olson responded by referring to the facts Helligso had set forth about this case: "[w]hen you activate your overhead lights and the vehicle doesn't stop and then you activate your siren and the vehicle continues to go straightforward and not stop." RP 77. A moment later, the deputy testified that, at the beginning of the incident, he had told Helligso, "I think this guy's going to take off running from us" during the search. RP 81.

And then, in rebuttal closing argument, the prosecutor pointed out that both officers "commented on the safety concerns they had for Mr. Britain's driving behavior" RP 138.

Taking this testimony in light of the Demery elements, it was all explicit or near-explicit opinion on Britain's guilt. First, all of the testimony came from police officers. It is well-settled that the improper opinion testimony of a law enforcement officer is likely to be especially prejudicial, because an officer is well-respected just by virtue of their position in the community and such testimony can have "a special aura of reliability" that holds strong sway with the jury. See, Kirkman, 159 Wn.2d at 928.

Second, the nature of the testimony supports the finding that this was improper opinion testimony, especially in light of the charges. Mr. Britain was charged with attempting to elude a pursuing police vehicle under RCW 46.61.024, which provides, in relevant part:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1). In addition, the prosecution alleged an "endangerment" sentencing enhancement under RCW 9.94A.834(1), which allows such a filing in an attempting to elude case "when sufficient admissible evidence exists, to show that one or more persons other than the defendant or in the pursuing law enforcement officer were threatened with physical injury or harm by the actions of the person committing the crime of attempting to elude a police vehicle." To prove that enhancement, the prosecution also had to get the jury to make a specific finding that someone

was "endangered," as set forth in the statute:

> (2) In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime **while endangering** one or more persons other than the defendant or pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or pursuing law enforcement officer **were endangered** at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer **were endangered during the commission of the crime.**

RCW 9.94A.834(2) (emphasis added).

The nature of the testimony in this case is that it went directly, clearly and unequivocally to essential parts of the prosecution's case, even using the language of what the prosecution had to prove. When the prosecutor asked the deputy his opinion on whether the driving Britain was doing "endangered" someone, that was clearly asking for an explicit opinion on whether Britain had, in fact, endangered someone and thus was guilty, for the special verdict. See RP 41. But it is the prosecution's duty to prove that verdict, beyond a reasonable doubt. See State v. Young, 158 Wn. App. 707, 243 P.3d 172 (2010).

Similarly, when the prosecutor asked the deputy his opinion about when a normal stop turns into an "eluding," then elicited testimony which, coincidentally, tracked the alleged behavior of Mr. Britain in this case, that was a near-explicit comment on Britain's guilt. Deputy Helligso had testified that the officers had turned on their lights, Britain had not stopped, they had then turned on the siren as they had turned onto Patterson after which Britain had driven straight down the middle of the road for several

blocks without stopping. RP 33-34. No reasonable juror could have failed to miss the clear opinion from Olson, a few minutes later, when the prosecutor asked him what facts would turn something from "a stop for a traffic infraction into a pursuit, **for somebody eluding you,"** and Olson cited the facts of this case: "[w]hen you activate your overhead lights and the vehicle doesn't stop and then you activate your siren and the vehicle continues to go straightforward and not stop." RP 77.

State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999), is instructive. In that case, the prosecutor asked an officer, "[j]ust based on your training and experience, do you have an opinion as to what the defendant's driving pattern exhibited to you?" 93 Wn. App. at 458. The officer answered, "[i]t exhibited to me that the person driving that vehicle was attempting to get away from me and knew I was back there and refusing to stop." Id.

This Court held that the officer's testimony was not proper expert opinion, because "[t]he record here does not indicate that the trooper was qualified to testify as an expert on the driver's state of mind." 93 Wn. App. at 462. Instead, the Court said, "a lay jury, relying upon its common experience and without the aid of an expert, is capable of deciding whether a driver was attempting to elude." Id. The comments here on whether Britain was "eluding" clearly amounted to the officers' improper opinions on Britain's guilt.

Further, many of the comments or questions in this case parroted the relevant legal standard which the prosecution had to prove. Such comments are much more troubling and likely to be highly prejudicial.

See, e.g., Kirkman, 159 Wn.2d at 595.

Here, in direct examination of Deputy Helligso, the prosecutor specifically asked not just about "possible harm" to Prim but also for the officer's opinion about whether anything Britain did while driving "possibly could have **endangered** Mr. Prim as a passenger" - essentially the very language of the finding the jury would be asked to make. And he would later argue that he had met his burden of proving the enhancement even if there was no *actual* endangerment but just the *possibility* it might occur. See RP 120, 138.

But the bulk of the improper comments were not elicited by the prosecutor in a vacuum. Instead, after failing to object to the prosecutor's improper effort to elicit the first deputy's opinion about whether anyone was "endangered" by the eluding, counsel herself then inexplicably and unprofessionally *invited* more improper opinion evidence against her client.

First, counsel mistakenly tried to cross-examine the officer with her apparent belief that he had first arrested Mr. Britain for reckless driving, rather than eluding - even though the police report clearly established that the arrest was for "eluding." See RP 43, 56. After that, the prosecutor walked through the door counsel had flung wide open - again and again. Once he had focused the jury on the physical police report, Exhibit 1 at the trial, the prosecutor was then able to ask - repeatedly - for the officer to *read directly from that very police report* parts where he had indicated his belief that Britain had committed "eluding" i.e., 1) that on the "subject" line of the police report, the deputy had written "[e]luding police;" 2) that the police report did not include anything about "reckless," so that counsel's

implication was wrong, 3) and that "[e]luding police" in his police report referred to the crime of "felony elude." RP 56.

Thus, the prosecutor cemented in the jury's mind the deputy's explicit or, at best, near-explicit opinion that Britain was guilty of "eluding." And it was counsel's unprofessional failure to apparently prepare sufficiently to be aware of the contents of the police report and what her client had been arrested for which allowed this testimony into evidence. But as this Court has made clear, more than forty years ago, counsel has a duty to conduct reasonable investigation into matters of defense and to prepare adequately to represent her client at trial. See State v. Jury, 19 Wn. App. 256, 576 P.2d 1302 (1978). In fact, the usual "presumption of effectiveness" is overcome if it is shown that "counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available," and further, if counsel "failed to allow himself enough time for reflection and preparation for trial." 19 Wn. App. at 263.

Notably, this repeated declaration of the officer's opinion and decision to "charge" "eluding police" had the additional impact of letting the jury know that the prosecution *agreed* with the officer, because it was an "eluding" charge the prosecution was pursuing at trial. RP 56.

It was only a few minutes later, during direct examination of Deputy Olson, that the prosecutor specifically asked him to give his opinion on what kinds of driving showed "somebody **eluding**" the officer. RP 77 (emphasis added).

Perhaps not surprisingly, the "example" Olson then gave

dovetailed exactly with the specific facts Helligso had set forth about this case: "[w]hen you activate your overhead lights and the vehicle doesn't stop and then you activate your siren and the vehicle continues to go straightforward and not stop." RP 77.

Thus, given the nature of the charges and the testimony which occurred, the officers gave explicit or near-explicit testimony on Mr. Britain's guilt.

Finally, looking at the other evidence in front of the jury again shows that this testimony was improper opinion testimony. The entire incident was only a few blocks and the time it lasted very short. There were serious holes in the prosecution's versions of event, such as why, if Britain was going at such a high rate of speed over just a few blocks and then slowed down suddenly from 55 to take a turn, there was no sound of his tires squealing and no skid marks on the road. Or whether Britain was really driving "improperly" when he went down Patterson in the middle of the road as the officers implied, even though Patterson did not have a dividing line down it and one officer admitted that people would sometimes drive down the middle, as Britain did. Deputy Helligso admitted that Britain's driving was not so close to other cars while he was driving down Patterson that there was concern for the cars on the side of the road. One of the deputies admitted that, at first, Britain might have thought they were going to a nearby crime, not chasing him. And the deputies had different views on whether he took the turn too wide or was going too fast and hit the curb. Britain could well have been going home.

Notably, in rebuttal closing argument, the prosecutor pointed out

that both officers "commented on the safety concerns they had for Mr. Britain's driving behavior" - thus effectively reminding the jury that one of the officers had specifically given their opinion that others were "endangered." RP 138.

Thus, the opinions of the deputies regarding Britain's guilt for the "eluding" and the opinion regarding whether anyone was "endangered" by Britain's driving were clearly explicit or near-explicit opinions on Britain's guilt for that same crime of "eluding" and the "endangerment" sentencing enhancement.

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). More importantly, because the opinions here meet the threshold "explicit or near-explicit comment" standard, the issue is properly before the Court as a manifest error affecting a constitutional right under RAP 2.5. As the Court noted in Kirkman, that standard is met where there is constitutional error the effect of which is "manifest," i.e., when the error caused actual prejudice or practical and identifiable consequences." 159 Wn.2d at 934-35.

Here, because the comments were improper explicit or near-explicit opinions, from officers of the law, framed in the very language of what the prosecutor had to prove, elicited repeatedly as to the crucial question of whether Britain was "eluding," and the officers' improper opinions were introduced in a case where the evidence of "eluding" was, at best, thin, there can be little doubt that the error in the introduction of that testimony

caused actual prejudice to Mr. Britain.

Where, as here, there is repeated testimony from officers about their opinions on whether a defendant was trying to "elude" them, was engaged in "eluding" and had committed "felony elude," and the prosecution's burden of proof includes a requirement of proving that the defendant was trying to "elude" the relevant pursuing police vehicle, it seems patently obvious that the jury could not have remained unswayed by that extremely persuasive testimony, from officers of the law. The comments were all improper opinion testimony and this Court should so hold. And counsel's ineffectiveness in opening the door to the improper opinion testimony was just her first serious failure of the trial.

b. Ineffectiveness and prosecutorial misconduct in repeatedly misstating the crucial, relevant law regarding the proof for the sentencing enhancement

The prosecutor again committed serious, flagrant and prejudicial misconduct when he repeatedly misstated and minimized his burden of proof for the sentencing enhancement and, in addition, encouraged jurors to impose the enhancement on an improper basis. Further, Mr. Britain's rights to a unanimous jury was implicated. And yet again, counsel unprofessional mistakes caused serious prejudice to her client.

It is serious misconduct for a public prosecutor, with all the weight of his office behind him, to mislead the jury as to the relevant law, especially in a way which deprives a defendant of her full rights. See, e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Here, that is exactly what the prosecutor did in his argument regarding the enhancement.

Under RCW 9.94A.834(1), the prosecutor was permitted to file the "endangerment" special allegation if the case had "sufficient admissible evidence" to show that one or more people other than the driver and pursing officer "were threatened with physical injury or harm by the actions of the person committing the crime" of attempting to elude. This enhancement was added in 2008 after a very public case in which a driver who was eluding caused an accident which killed several people. See Laws of 2008 c. 219 § 2. RCW 9.94A.834(2) sets forth the requirements for what the prosecution has to prove at trial and the fact-finders duty when the special allegation is made:

> In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime **while endangering** one or more persons other than the defendant or pursuing law enforcement officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or pursuing law enforcement officer **were endangered** at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer **were endangered during the commission of the crime.**

RCW 9.94A.834(2) (emphasis added). Thus, the enhancement seeks to address those situations where the acts of the person committing the "eluding" cause actual endangerment, during the crime, to actual people other than the driver and pursuing officer.

But that is *not* the law the prosecutor told the jury they were required to follow. Instead, the prosecutor repeatedly told the jury they did not need to find *actual* endangerment but only the *possibility* that someone *might* have been endangered, even if, under the facts of this case, they were not.

In initial closing argument, the prosecutor seemed to conflate the requirement of proof for the "reckless" element of the "eluding" charge with the "endangerment" enhancement, saying "it's not about the actual harm, because there's a definition about what physical injury is. It's about threatened harm[.]" RP 120-21. And the prosecutor asked the jury to find the endangerment enhancement, initially, based on the theory that Britain "did threaten the safety of at least Ronnie Prim when he operated that motor vehicle in a reckless manner." RP 126. But the prosecutor also relied on Prim's presence as being evidence that Britain was driving in a "reckless manner," "without any regard for the consequences," not only for Prim but also anyone who might have been around or driving nearby. RP 117-21.

In her closing argument, counsel argued that the jury should answer "no" on the special verdict, because Prim testified he was not threatened, did not feel like he was in danger and was not threatened with physical injury or harm. RP 133.

In rebuttal closing argument, the prosecutor again returned to the theory that the jury need not find actual endangerment - and, notably, reminded the jury about the opinions of the officers regarding "endangerment," noting that both officers "commented on the safety concerns they had for Mr. Britain's driving behavior." RP 138. The prosecutor then said that the jury should answer "yes" on the special verdict form, as follows:

> As far as the Special Verdict Form, I submit to you that he did threaten Ronnie Prim, his physical security. If you jump out of a car while it's rolling, you can hurt somebody. Ronnie, he was

> calm then, according to Deputy Olson, and he seemed pretty calm right now. You heard their testimony, **but I submit to you as a general proposition, you jump out of a car while it's moving, you threaten the safety of somebody. Might not have been Ronnie. It could have been somebody in the house, had that car rolled into a house. It's a potential for harm.** Jump out of a moving car, it's dangerous, you are not only possibly going to injure yourself, but it's other people in the county out on the road in their car.

RP 137 (emphasis added). The prosecutor summed up by asking the jury to find Britain guilty of the eluding charge and "to answer yes where it says whether he potentially threatened the harm of another by his operating a motor vehicle the way he did." RP 137.

Thus, the prosecutor misstated the crucial law of what he had to prove in order to prove the sentencing enhancement. Under RCW 9.94A.834, the prosecution had the burden of proving, beyond a reasonable doubt, that there was *actual* endangerment, not just the hypothetical possibility that the driving which occurred *could potentially* have caused harm under different facts.

Further, it is telling that the prosecutor relied on the very same evidence to prove both the "reckless" element of "eluding" and the "endangerment" enhancement. The prosecutor repeatedly said that Britain's having jumped out of the slow-moving vehicle showed he was driving in a reckless manner because that showed Britain was acting "without any regard for the consequences," not only for Ronnie being in that vehicle who might have been hurt but also because there **could** have been someone who was a "victim of that vehicle colliding with something hard." RP 117. And Prim's presence in that car when Britain "took that turn really fast on 96th, despite what Ronnie said," and when he did that he

did it "without regard to the consequences of Ronnie being in the back of that truck" and "without regard to the consequences of somebody possibly approaching the corner," who "could have been turning there," Britain was shown to have been driving "recklessly." RP 119-20. The prosecutor also said that "[j]umping out of the moving vehicle and allowing it to go without a driver" was also "rash and heedless," because there could have possibly been someone coming down the other street and "Ronnie could have possibly been the victim of that vehicle colliding with something hard," even though he was not. RP 120-21.

To prove attempting to elude, the prosecutor was required to prove that Mr. Britain drove in a "reckless manner," defined as "rash or heedless," and "indifferent to the consequences." See State v. Ridgley, 141 Wn. App. 771, 174 P.3d 105 (2007).[3] Here, the fact that the prosecution used the same evidence of "indifference to the consequences" to prove both the essential element of the eluding that the defendant was driving in a "reckless" manner and to prove "endangerment" based on *hypothetical* possible harm cemented the true impropriety of the prosecutor's misstatements of his burden of proof for the sentencing enhancement below.

Once again, counsel sat mute while the prosecutor committed this misconduct. Instead of objecting and correcting the prosecutor's repeated misstatements that only *possible, potential* "endangerment" was all that

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[3]Prior to 2003 revisions, the crime of attempting to elude required proof that the defendant had driven "in a manner indicating a wanton or wilful disregard for the lives or property of others" while attempting to elude. See former RCW 46.61.024 (2002); Laws of 2003, ch. 101, § 1. Thus, cases applying pre-2003 law should be used with caution in determining what is required to prove "eluding."

was required, counsel did nothing. The jury was thus left with a totally improper understanding of the prosecution's burden to prove the enhancement. It is not surprising that, given this argument, the jury found the enhancement proved.

In response, the prosecution may argue that, because one of the theories upon which the prosecutor relied might possibly have been legitimate, the enhancement was properly supported. Any such argument would fail, because of Mr. Britain's constitutional right to jury unanimity. Under Article 1, § 21 and the Sixth Amendment, a defendant is generally entitled to have the jury unanimously conclude that the criminal act for which they are finding the defendant liable. See State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 331 (1994).

State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005), is instructive. In that case, the defendant was charged with, *inter alia*, burglary. First, the Court noted that, if evidence is sufficient to support each means the prosecutor relies on, then it is not necessary for the jury to give "a particularized expression of unanimity" as to what they found constituted the prohibited act. 127 Wn. App. at 136. The court found there was no "unanimity" concern where a defendant is charged with burglary but there is no allegation of unlawful entry and no evidence that such entry occurred, because under those circumstances "no rational juror could rely on the unlawful entry means to establish burglary." Id.

Even so, the prosecutor's argument created the problem in that case. Mr. Allen was alleged to have committed burglaries in three different buildings, all of which were open to the public. Id. In closing argument,

the prosecutor told the jury, repeatedly, that entering a building which is open to the public but doing so with intent to steal automatically meant guilt for burglary. 127 Wn. App. at 137. As the Court of Appeals noted, the prosecutor had essentially urged the jury to convict even if he entered lawfully, so long as he had "nefarious intent" - a misstatement of the law. Because the prosecutor invited the jury to find the defendant guilty of burglary on an impermissible basis, due to a misstatement of law, the Court held, "we cannot be certain that the jury relied solely on the" potentially valid alternative, so reversal was required. 127 Wn. App. at 138.

The prosecutor repeatedly misstated the crucial law on what he had to prove - and the jury had to find - in order to establish the "endangerment" enhancement. And counsel, once again, sat mute while her client's ability to get a fair trial with a jury properly instructed and aware of the correct law, was violated.

c. Ineffectiveness in allowing and even eliciting highly improper, prejudicial ER 404(b) evidence to go to the jury and in eliciting a negative comment on her client's exercise of his constitutional rights

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. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984).

Here, again and again, such improper evidence was admitted. And unfortunately for Mr. Britain, again counsel failed in her basic duties. In fact, counsel's failures ensured that the jury heard the bulk of that evidence and further invited an officer to make a negative comment about Mr. Britain's exercise of his constitutional rights to due process and to be free from self-incrimination under Miranda, supra.

Mr. Britain was originally charged with three counts: the attempting to elude, a methamphetamine possession and a suspended license charge. CP 4-5. Prior to trial, Britain pled guilty to the latter two counts. RP 5-9. Counsel told the court that she had spent "a lot of time" discussing this decision with Mr. Britain and the prosecutor then declared that, in light of the pleas, he would instruct his witnesses "not to mention anything about the methamphetamine or the Driving While License Revoked First Degree." RP 4-10.

A little later, however, the prosecutor raised the claim that Mr. Britain had two outstanding warrants in different cases, as evidence of a "motive for eluding the police." RP 14-15.

In its initial ruling, the trial court first noted that the prosecution had to prove that Mr. Britain "refused to, willfully failed or refused to bring the vehicle to a stop." RP 15. The court said that motive evidence was "admissible even under Evidence Rule 404(b)" not to prove conformity but for purposes such as "proof of motive." RP 15. The court then held that, while the evidence that Britain had two outstanding warrants "does have a prejudicial effect," the evidence was also relevant to "motive" and that the "probative value is a reason for not stopping." RP 15-16. The court then

went on:

> Now I think it's by the fact that there's not going to be evidence as to what the warrants are for, and as I understand it, no discussion of what the offenses that resulted in the warrants or the actions were that resulted in the warrants. I don't know that you want to offer a limiting instruction that tells them that they're to consider it only on the basis of motive. That's kind of a limiting instruction that doesn't do you any good, but it does have probative value that outweighs the prejudicial effect.

RP 16. The court said it would not exclude the evidence "absent any further case law on that issue," and counsel then asked for time to research the issue, which had just been brought up. RP 16-17.

The next day, the prosecutor raised the issue again, this time discussing it as involving "the warrant and other things that the officers observed and seized concurrent with the seizure." RP 65. The prosecutor argued that the warrants and the possession of drugs were relevant because they showed "Jessie's intent to flee from the officers and not get caught" and were part of the "res gestae." RP 66.

Counsel argued that the existence of warrants was irrelevant to why Britain was stopped, the warrants were for separate offenses unconnected to the current matter and there was no indication that Britain was even aware the warrants had issued. RP 68-69. As a result, she pointed out, it was "mere speculation" as to whether or not warrants would even be the "motive" for not immediately pulling over. RP 68-69.

The prosecutor admitted that he did not know about Britain's "knowledge of the warrants." RP 68-69. He argued again, however, that the evidence was "part of the same course of conduct in this case." RP 69.

When confronted by the court about the agreement to allow the plea

to avoid admitting the evidence of the meth possession to go before the jury, the prosecutor admitted that had been the intent at the time but said he had changed his mind and now wanted to admit it. RP 70-71. The court refused to even consider that request, because of the intent of the parties when the plea had been entered. RP 72.

At that point, the prosecutor told the court he wanted to "readdress then with regard to warrants." RP 71-72. The court then stated that it had given the defense time to research the issue and that nothing new had been presented, then held that the evidence of outstanding warrants was "relevant" as a "motive for fleeing," even though it was prejudicial. RP 73. The court told counsel she could ask on cross-examination of whether the officer knew if the warrants had been "cleared" or "whether he has any knowledge of the defendant being aware of the warrants," but recognized that would "open up" some possible responses counsel might not want. RP 7-74.

Later, at trial, the prosecutor asked Deputy Olson in detail about doing a "records check" on Britain:

> Q: Okay. So, dust settled, you got Mr. Prim in custody. Mr. Britain in custody. Did you do a records check with regards to Mr. Britain?
>
> A: Yes, I did.
>
> Q: And what were the results of that check?
>
> A: He had two outstanding warrants.
>
> Q: Okay, what type of warrants were those? Not the underlying charge, but - -
>
> A: Misdemeanor warrants.

Q: Were they arrest warrants?

A: Yes, they were arrest warrants, correct.

RP 91.

In later trying to establish if Britain was aware of the warrants he had, counsel then asked the deputy the following:

Q: And with regards, you said Mr. Britain had warrants. Do you know if Mr. Britain was aware of those warrants?

A: **He did not answer any questions**, so I don't know.

Q: So, he could have been unaware? It's possible?

A: Anything's possible, yeah.

RP 98 (emphasis added).

Later, although the parties had said they had reviewed the instructions, it came to light that the instructions both given to and read to the jury still reflected the disposed-of counts in part.

THE COURT: Counsel, before I go any further, are there any additional corrections to these?

[PROSECUTOR]: Your Honor - - -

THE COURT: Why don't you approach me at side bar? Just hold up on Instruction No. 6. Towards the end of the instruction, we are going to correct one of the instructions.

Now I am returning to Instruction Number 7.

(The Court continued reading the instructions to the jury.)

THE COURT: The very last form, we've made a correction to that one, so if you would just tear those out of your packets and pass them forward. We will pass out the corrected forms.

> Okay. Everybody have that corrected verdict form? Those are just working copies of the verdict forms. The original verdict Forms are the forms that you are to fill out[.]

RP 115.

Thus, the jury heard not only about unrelated outstanding arrest warrants but further about the other accusations in the case. Further, they heard that Britain had refused to answer officers' questions. But none of that evidence was relevant and all of it was improperly prejudicial. 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).

Further, under ER 404(b), 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 id.

As the U.S. Supreme Court has declared, evidence of other crimes 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).

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, there was simply not such substantial probative value. The prosecution's theory was that Mr. Britain's outstanding warrants was relevant to prove his "motive" for eluding officer. But "motive" is not an element of attempting to elude. See RCW 46.61.024.

More important, even if such evidence might sometimes be relevant to motive, it was not so relevant here. It is axiomatic that a person could not be motivated to run from police by the fact that they had outstanding warrants if there is no evidence that they were *aware* of those warrants.

Not only was the jury told about the irrelevant evidence of warrants (and thus prior or current other crimes, wrongs or bad acts), counsel's unprofessional conduct led to the jury being made aware that there had

been *other charges in this case*.

And most egregious, counsel's obvious failure to be aware of the facts and discovery in her client's case - particularly the police report - allowed the officer to comment on Mr. Britain's choice of electing not to speak to police, despite his constitutional right to such silence. 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.

Here, had counsel been sufficiently familiar with her client's case, she would have known that, when he was arrested, Britain exercised his rights under Miranda. Because of her unprofessional failures, however, counsel invited the officer's comment that Britain had not answered officers' questions after his arrest. Not only that, counsel somehow failed to notice the erroneous jury instructions before they were read, thus leading to the jury hearing about the existence of the other charges.

d. Reversal is required

Under the constitutional harmless error standard, the prosecution bears the burden of proving the admission of the evidence harmless, beyond a reasonable doubt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Constitutional error 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 State v. Moses, 109 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006).

There was not overwhelming untainted evidence supporting a finding of guilt here. The prosecution's case was very thin, as noted *infra*. There was disputed evidence about what happened, how Britain was driving and other crucial facts. Not only that, the entire incident lasted mere minutes.

Most important, however, counsel's repeated unprofessional mistakes and failures compel reversal. Counsel is ineffective when, even with a strong presumption of effectiveness, her performance fell below an objective standard of reasonableness and those failures prejudiced her 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. Id.

But that standard 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 improper opinion testimony; she moved to exclude that testimony prior to trial.

Yet she sat mute while repeated improper opinion testimony came from officers, about her client's guilt. And even worse, she then *elicited* much of that improper opinion testimony. Then later, she elicited testimony commenting on and implying a negative inference from Britain's exercise of his constitutional rights not to give a statement to police or answer their questions after arrest. Then, she clearly failed to properly review the proposed jury instructions, because she did not notice their impropriety until after the jury was given those instructions and they started being read. And she failed to object when the prosecutor fundamentally misstated the requirements for proving the enhancement.

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

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 in the first place.

Counsel's failures prejudiced her client. Given the incredible weight that juries are likely to give improper opinion testimony from an officer, having officers declare that Mr. Britain was driving in a way which met the legal standards for the underlying crime and the enhancement could not be "effective assistance." 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. Nor could there be any tactical reason to be so unprepared that you have not, apparently, read the very police report which formed the entire basis for the case.

Even if the individual errors in this case did not compel reversal, their cumulative effect would, because that effect was to deprive Mr. Britain of his state and federal constitutional rights to a fair trial. 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." See, e.g., State v. Venegas, 155 Wn. App. 507, 520, 228 P.2d 813, review denied, 170 Wn.2d 1003 (2010). 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 Britain's rights to a full, fair trial before an impartial jury. It is Mr. Britain's 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 him of a fair trial.

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. And on remand, it should ensure that new counsel who is appointed - one who will actually prepare, be aware of the evidence and issues in her client's case and act in her client's best interests. Based on the improper opinion testimony, the prosecutorial misconduct or the overarching, repeated, unfathomable and unprofessional failures of counsel and the deprivation of Mr. Britain's rights, reversal is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 20th day of July, 2015.

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. Jessie D. Britain, DOC 722767, Monroe CC, P.O. Box 777, Monroe, WA. 98272.

DATED this 20th day of July, 2015.

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