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King County Prosecutor  
Appellate Unit

NO. 64458-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

CAREY J. HICKMAN,

Appellant.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jeffrey Ramsdell, Judge

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BRIEF OF APPELLANT

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ANDREW P. ZINNER  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Admission of testimony constituting an improper opinion on guilt violated the appellant's constitutional right to a fair trial before an impartial jury.

2. Trial counsel's failure to object to improper opinion testimony violated the appellant's constitutional right to effective representation.

3. The trial court exceeded its statutory sentencing authority by ordering the appellant to participate in a "drug/alcohol" evaluation and treatment as a condition of community custody.

Issues Pertaining to Assignments of Error

1. An emergency room doctor testified that assault was second only to automobile collisions as the cause of the type of facial fractures sustained by the alleged victim. The doctor also testified there was only a six percent chance the injuries were uncommonly caused, including by falling. Where the charge was first degree assault, there was no car accident, and the defense theory was that the alleged victim fell and caused the fractures, was the doctor's testimony an improper opinion on guilt?

2. Was trial counsel ineffective for failing to object to the doctor's testimony?

3. There was no evidence drugs or alcohol played a role in the commission of the offense. Did the trial court therefore exceed its statutory sentencing authority by ordering the appellant to participate in a drug/alcohol evaluation and treatment as a condition of community custody?

B. STATEMENT OF THE CASE

Two residents of a Seattle apartment building called 911 after hearing loud noises, a loud and angry voice, threats, and sounds of flesh hitting flesh, emanating from the apartment above theirs. 8RP 80-88, 96-100.<sup>1</sup> Police officers arrived and went to the second floor, where they heard one loud, angry voice coming from 69-year-old Thomas Vinson's apartment. 6RP 28-31, 114-16, 190, 7RP 77-78, 8RP 25-28. When the officers knocked on Vinson's door, Carey J. Hickman opened it a crack, then quickly slammed it shut and locked it. 6RP 31-33, 116-19, 8RP 28-31.

The officers forced their way inside the apartment, subdued Hickman near the doorway, and tended to Vinson, who was slumped in

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<sup>1</sup> This brief refers to the 10-volume verbatim report of proceedings as follows: 1RP – 7/17/09; 2RP -- 9/14/09; 3RP -- 9/15/09; 4RP -- 9/16/09; 5RP – 9/17/09; 6RP – 9/21-22/09; 7RP – 9/23/09; 8RP – 9/24/09; 9RP – 9/28-29/09; 10RP – 10/29/09.

front of a couch. 6RP 36-42, 120-24, 8RP 31-34. Vinson bled from the nose and mouth and his face was swollen. 6RP 40-41, 123-25. He was conscious but nonresponsive and made gasping and gurgling sounds, so one of the officers called for fire department assistance. 6RP 42, 44-45, 125-26.

When firefighters arrived, they repositioned Vinson's head to make sure he was breathing. 6RP 155-60. He was conscious and could speak but did not make sense. 9RP 25-31. After evaluating Vinson's condition, the fire personnel called for paramedics. 6RP 160-62.

After their arrival, the paramedics "intubated" Vinson, meaning they ran a tube down his air pipe so they could mechanically "breathe" for him. 6RP 197-98, 7RP 118-20, 8RP 66-67. The procedure was complicated by the presence of blood in Vinson's airway. 7RP 121-22, 8RP 77. The paramedics transported Vinson to the Harborview Medical Center emergency room, where Dr. Carlbom treated him. 7RP 5-8, 8RP 76.

Vinson had a blood alcohol level of .16 when he arrived at the hospital. 7RP 24-25. He had fractures around his eye, called an "orbital blowout," and in his nose. 7RP 14-16, 29. The nasal fracture likely caused blood to drain into the airway and make intubation more difficult.

7RP 14-17, 65. There were also scratches on Vinson's neck and face and bruising on his shoulder and armpit. 7RP 23.

Dr. Carlbom estimated he treated 1,000 patients per year with broken bones. He said automobile collisions most commonly cause orbital blowouts, followed by "assault." 7RP 30. Falling, in contrast, was an uncommon cause of such injury. Dr. Carlbom explained, "If you review the literature, it happens uncommonly maybe six percent of the time in several large case series. I've actually never seen it from a fall myself." 7RP 30. He also said, "[T]he orbital blowout fracture, the multiple contusions around his body would be unusual to be seen with a fall." 7RP 30. Vinson's injuries were "consistent with an assault." 7RP 31.

A few hours after arriving, Vinson moved to the intensive care unit (ICU) because he was not awake enough to be extubated. 7RP 27-29, 44, 53-54. Dr. Heather Evans testified that even after he was taken off the ventilator, Vinson could not talk and was agitated and delirious. 7RP 60, 74. A CT scan revealed evidence consistent with cerebrovascular disease, which is a narrowing of the blood vessels to the brain that can cause atrophy. This preexisting condition, which can cause strokes, could have contributed to Vinson's mental status. 7RP 60-61, 72, 9RP 67-69.

Another possible contributor could have been alcohol withdrawal because Vinson had a history of alcohol dependence. 7RP 62, 71. Harborview records indicated Vinson was admitted two other times when he was legally intoxicated. 9RP 52, 70.

Vinson was transferred from the ICU to the general ward five days after arriving. 7RP 63-64. He still could not care for himself, and was confused and disoriented. 9RP 49. Vinson remained in the hospital for 20 days, which was considerably longer than usual given his relatively minor injuries. 7RP 63-64, 74-75, 9RP 59. Even then, Vinson was discharged to a nursing home rather than back to his apartment. 9RP 59-60.

During his hospital stay, Vinson underwent neuropsychiatric testing and a cognitive evaluation. A consulting psychiatrist could not definitively identify a cause for Vinson's mental state. 9RP 50, 63-64. Several factors were in play: Vinson was elderly, he may have had an underlying dementia, he sustained a head injury, and he was a chronic alcohol user. 9RP 57-58.

Vinson testified he usually drank up to four alcohol drinks three or four times a week. He was a regular customer of the Madison Pub, which was within a mile of his apartment. 7RP 83-84, 8RP 8-9, 16-17. Two pub employees testified they saw Vinson and Hickman drinking together at the

bar a few times. 8RP 11-13, 19-21. Similarly, Vinson's apartment manager testified she saw Hickman around the building and once saw him inside Vinson's apartment. 9RP 12-14, 16-17. Vinson told her Hickman was going to care for him because he had trouble walking. 9RP 20.

Vinson testified he could not understand why these people said he had been with Hickman because it was not true. 7RP 95-96. He identified Hickman as one of three or four young men who followed him home from the pub one night, forced their way into his apartment as he opened the door, and beat him. 7RP 85-92. Vinson had never seen Hickman before or at any time between the incident and trial. 7RP 93, 95, 106, 111-12. He remembered being struck in the head, and the next thing he recalled was being in the hospital. 7RP 91-92, 98, 107.

Vinson walked slowly because he had arthritis in his hip. 7RP 101. He also had an ongoing problem with his balance and equilibrium. 7RP 115. There were times he lost his balance and fell to the ground. It was possible he had fallen against walls in his apartment. 7RP 102, 113. He fell in his bedroom two days before testifying and bumped his head on the window casing. 7RP 102-03, 114-16. He also knocked into a glass table in his living room on occasion. 7RP 101-02, 112-13. Vinson also fell and broke his shoulder on an icy street about two-and-one-half years

before trial. 7RP 103-04. He spoke with his regular doctor about balance problems he had at the time. 7RP 104-05.

The state charged Hickman with first degree assault, which required it to prove intent to commit great bodily harm and infliction of great bodily harm. CP 13. The trial court also instructed jurors as to the lesser offense of second degree assault, which required proof of substantial bodily harm. CP 52-56.

Among other ways to prove infliction of great bodily harm, the prosecutor noted during closing argument, is causing an injury that creates the probability of death. 9RP 91. The prosecutor argued that but for the life-saving measures employed by paramedics and hospital staff, primarily intubation, Vinson would have probably died from injuries Hickman intentionally inflicted. 9RP 92-95.

Defense counsel implied Vinson sustained his injuries by falling. 9RP 121-22. Counsel contended a large pool of blood in front of the couch and more blood on the other end of the couch from where Vinson was slumped came from a different injury that Hickman did not inflict. 9RP 108-09, 117-20. Counsel pointed out evidence that Vinson had scratches on his forehead, chest, and neck, yet there was no damage to Hickman's hands and no flesh under his fingernails. 9RP 111-12. Further,

Vinson had no defensive wounds, did not cry out for help, and did not scream out in pain. 9RP 112. Responding to the state's theory regarding great bodily harm, counsel emphasized that Vinson was conscious and breathing on his own while inside the apartment. 9RP 109-13.

The jury found Hickman guilty of first degree assault. CP 60. The trial court imposed a 123-month standard range sentence and 24 months to 36 months community custody, with a condition Hickman participate in a drug/alcohol evaluation and treatment. CP 63-70.

C. ARGUMENT

1. DR. CARLBOM'S TESTIMONY ABOUT THE CAUSE OF VINSON'S FACIAL FRACTURES WAS AN IMPROPER OPINION ON HICKMAN'S GUILT.

Dr. Carlbom testified the second most common cause of Vinson's facial fractures was "assault." He said only about six percent of such fractures result from uncommon means, such as falling. When considering Dr. Carlbom's impressive position, the charge of assault, the defense theory that Vinson fell, and evidence to support the theory, the medical testimony was an improper opinion on Hickman's guilt. He is entitled to a new trial.

a. *Dr. Carlbom went too far.*

An expert's opinion as to the accused's guilt, either directly or by inference, is "clearly inappropriate." State v. Montgomery, 163 Wn.2d 577, 591, 594, 183 P.3d 267 (2008). An impermissible opinion on guilt "may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). This court reviews a decision to admit expert testimony for abuse of discretion. State v. Ciskie, 110 Wn.2d 263, 280, 751 P.2d 1165 (1988).

Whether testimony constitutes an impermissible opinion about the accused's guilt depends on the facts in each case. State v. Baird, 83 Wn. App. 477, 485, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997). Among other factors, courts should consider the type of witness involved, the specific nature of the testimony, the charge, the defense, and the other evidence. Kirkman, 159 Wn.2d at 928. Medical experts generally may give their opinions on the cause of injuries; they cannot, however, testify the accused committed the charged crime. State v. Hudson, 150 Wn. App. 646, 655, 208 P.3d 1236 (2009).

While easy to articulate, this rule has proven difficult to apply. See Montgomery, 163 Wn.2d at 589 (citing a line of cases decide during the decade, the Court stated, "In this case, we are yet again asked to decide how far the State's witnesses may go in expressing opinions.").

Hudson, a sexual assault case, is particularly helpful in this regard. The issue was whether an acknowledged sexual encounter was consensual. Two sexual assault nurses testified the injuries sustained by the complainant were caused by nonconsensual sex. Hudson, 150 Wn. App. at 654. The court found this improper. Analogizing to a "rape trauma syndrome" case, the court found the nurses testified in essence that the injuries were caused by rape.<sup>2</sup> And because the complainant had no sexual encounters other than with Hudson, the opinions amounted to statements that he was guilty of rape. Hudson, 150 Wn. App. at 653.

Of particular import to Hickman's case is Hudson's analysis and distinction of State v. Jones, 59 Wn. App. 744, 801 P.2d 263 (1990), review denied, 116 Wn.2d 1021 (1991). In that case, the accused charged with the manslaughter of a baby claimed he accidentally fractured the

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<sup>2</sup> Hudson discussed State v. Black, 109 Wn.2d 336, 349-50, 745 P.2d 12 (1987), where the court held an expert's testimony the victim suffered from "rape trauma syndrome" was an inadmissible opinion on guilt.

baby's skull. Jones, 59 Wn. App. at 746. Doctors testified the baby died from "a non-accidental blunt injury" that was "sustained by some sort of inflicted manner, whether it be an object, including a hand or a fist." Jones, 59 Wn. App. at 747-48. The court concluded the testimony was not an improper opinion on guilt, reasoning that "the doctors did not opine that Jones committed the offense; therefore, the jury was still left to decide whether Jones actually inflicted the injury." Jones, 59 Wn. App. at 751.

The Hudson court distinguished Jones on the ground the doctors in that case "stopped one step short of what the State elicited here." Hudson, 150 Wn. App. at 654. In Jones the experts said only that the injuries were most likely not caused by accident. In contrast, the nurses "did not limit their testimony to whether the victim's injuries were caused by blunt force; they testified that the sexual encounter was not consensual-the essence of the rape charge and the only disputed issue." Hudson, 150 Wn. App. at 654.

Montgomery is similar to Hudson. The accused was charged with possession of pseudoephedrine with intent to manufacture methamphetamine. Montgomery, 163 Wn.2d at 583. One detective testified the accused bought ingredients to manufacture

methamphetamine. Id., 163 Wn.2d at 588. Another detective said the "items were purchased for manufacturing." Id. A forensic scientist testified the items purchased "lead me toward this pseudoephedrine is possessed with intent." Id. The court held the testimony constituted improper opinions on guilt because (1) it went to intent, which was the only disputed element; (2) the testimony was direct rather than by inference; and (3) the detectives' testimony carried a particular "aura of reliability." Montgomery, 163 Wn.2d at 595 (quoting State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)).

In contrast, in State v. Mason a coroner testified the volume of blood loss he observed and the fact the alleged victim was missing caused him to issue a presumptive death certificate. Mason, 160 Wn.2d 910, 932, 162 P.3d 396 (2007), cert. denied, 553 U.S. 1035 (2008). The Court rejected a defense claim the expert's opinion went to an ultimate factual issue and element of the offense, concluding the coroner "did not testify that Mason was guilty of murder; he simply opined that Santoso had sustained life-threatening wounds." Mason, 160 Wn.2d at 932.

Along similar lines is State v. Toennis, a murder case involving a 4-year-old victim. Toennis, 52 Wn. App. 176, 758 P.2d 539, review denied, 111 Wn.2d 1026 (1988). A pathologist testified the victim was a

battered child who sustained repeated physical injuries over a long time period. The expert said multiple blunt force blows to the head caused the fatal injury. Toennis, 52 Wn. App. at 180. The accused denied repeatedly striking the child over time, but admitted that on the day the child died, he had lost his temper and hit him. He also admitted the child hit the washtub, but was not sure how. Toennis, 52 Wn. App. at 181-82. Toennis contended the expert's testimony was an opinion on guilt, which the court rejected. The court found jurors "must still decide whether the particular injury in question was caused by the defendant." Toennis, 52 Wn. App. at 185.

In Hickman's case, Dr. Carlbom left nothing for the jury to decide. As in Hudson and Montgomery, the doctor used the exact terminology of the charge by stating "assault" was the common cause of orbital blowouts. He did not merely say, for example, that the injury is caused by blunt force trauma, or by high velocity impact, or by striking a hard object, but not by falling.<sup>3</sup> Instead, he went one step further, telling jurors "assault" was a typical cause of Vinson's facial fractures. This distinguishes

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<sup>3</sup> For example, Dr. Carlbom testified during cross examination the fractures are "commonly force directed from the front," or by direct impact to the cheekbone. 7RP 37.

Hickman's case from Jones, where the experts said only the injuries were not likely accidental.

Vinson's facial fractures were the particular injuries that caused the life-threatening bleeding into Vinson's airway. 7RP 14-17, 66. There was no dispute Hickman was the only other person in the apartment at the pertinent time. And Hickman's defense theory was that Vinson fell. Under these circumstances, Dr. Carlbom directly, or at least by inference, testified Hickman assaulted Vinson. Coming from an emergency room doctor with a wealth of experience treating broken bones, the testimony was an improper opinion on Hickman's guilt. See Soto v. Gaytan, 313 Ill.App.3d 137, 147, 728 N.E.2d 1126, 1133, 245 Ill.Dec. 769, 776 (Ill. App. Ct. 2000) ("It is in recognizing the aura of reliability that medical opinion testimony conveys to the jury that the courts have fashioned rules to ensure that the aura of reliability is not merely an illusion but does, in fact, exist."). The trial court abused its discretion by permitting the testimony.

*b. Hickman did not waive this argument.*

Hickman did not object to Dr. Carlbom's testimony. He may raise the issue, however, for the first time on appeal because it's admission was manifest error affecting his Sixth Amendment and article I, section 21

right to have a unanimous, impartial jury decide the issue of guilt. RAP 2.5(a)(3); State v. King, 167 Wn.2d 324, 332, 219 P.3d 642 (2009); State v. Elmore, 154 Wn. App. 885, 897, 228 P.3d 760 (2010); see State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958 (2009) (opinion testimony about the defendant's guilt invades his constitutional right to a fair trial and an impartial jury).

"Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. Kirkman, 159 Wn.2d at 935. More specifically, the witness must have made a "nearly explicit statement" that the witness believed the accused was guilty. Kirkman, 159 Wn.2d at 936.

In Elmore and Kirkman, the court held the accused waived the challenge to admissibility of expert testimony because (1) the failure to object appeared to be tactical since portions of the testimony were favorable to the defense; and (2) the trial courts instructed jurors they were not bound by expert witness opinions, but rather to assess for themselves the credibility and weight to be given such evidence. Elmore, 154 Wn. App. at 898-99; Kirkman, 159 Wn.2d at 937.

Hickman's case is distinguishable because factor (1) does not exist. Here there was nothing remotely favorable about Dr. Carlbom's testimony that "assault" is second only to automobile crashes as the cause of orbital

blowout fractures, or that there was less than a one in ten chance Vinson sustained the injuries from falling. This is especially so given Hickman's theory Vinson fell and injured himself, just as he had to a lesser extent only two days before he testified. It is not apparent from the record that Hickman chose not to object for strategic reasons.

Furthermore, in Kirkman the witnesses did not explicitly state they either believed the complainant or believed the accused was guilty. The doctor who examined the alleged child victim in a rape case merely testified that nothing about the examination made him doubt what the child said, and that the child provided a clear, detailed, consistent version of sexual touching. Kirkman, 159 Wn.2d at 929. The court held the doctor "did not come close to testifying that Kirkman was guilty or that he believed A.D.'s account." Kirkman, 159 Wn.2d at 930. The court found the doctor's testimony neither corroborated nor undercut A.D.'s account and that a witness can "'clearly and consistently' provide an account that is false." Id.

A police officer testified A.D. was able to distinguish between the truth and a lie and expressly promised to tell him the truth. Kirkman, 159 Wn.2d at 930. The court concluded the officer did not testify that he believed A.D.'s statement or that she was telling the truth at trial. Instead,

the officer merely offered "an account of the interview protocol he used to obtain A.D.'s statement." Kirkman, 159 Wn.2d at 931.

Dr. Carlbom, in contrast, explicitly testified "assault" – the offense charged -- was a primary cause of Vinson's injury and that falling was not. A reasonable juror could easily deduce that if assault is second only to automobile collisions as the cause of orbital blowouts, and there was no auto accident at issue here, then assault caused the fractures. Although the doctor did not declare that "Hickman assaulted Vinson and broke his face," neither Hudson nor Montgomery requires such specificity.

The officer in Elmore was more direct, stating there were points during an interview when the accused was evasive and being untruthful, which caused the officer to tell her he believed she participated in the crime, based on an identification by an eyewitness. Elmore, 154 Wn. App. at 895. But the court concluded the appellant could not show actual prejudice because the officer also testified the identification he had initially relied on turned out to be wrong. Elmore, 154 Wn.2d at 898-99.

In contrast, Dr. Carlbom's testimony was more explicit regarding guilt than was the officer's regarding credibility. A reasonable juror is likely to know that police officers cannot conclusively determine fact from fiction. Furthermore, the officer testified about unsworn statements

made in a pretrial interview, not sworn testimony in court. Nor, of course, was there anything presented by Dr. Carlbom or any other witness to clearly indicate the falsity of the doctor's logic. In fact, Dr. Carlbom testified he reviewed the "literature," which indicated orbital blowouts occur uncommonly, such as from falling, only six percent of the time. What this portion of the testimony reveals is that not only did Dr. Carlbom rule out falling as the cause of Vinson's facial fractures, but so did his learned colleagues.

For these reasons, admission of Dr. Carlbom's opinion on guilt was a "manifest" error. Moreover, Hickman shows actual prejudice. "Assault" was the actual charge. Dr. Carlbom identified this offense by name as the cause of Vinson's injuries. Falling – Hickman's theory -- was explicitly, statistically ruled out by Dr. Carlbom as the cause of the fractures.

A medical doctor's testimony about matters within his practice area carries a special aura of reliability and truth. While the trial court instructed jurors they were not "required to accept" an expert's testimony, the same instruction told jurors to consider the "education, training, experience, knowledge, and ability of the witness." CP 46 (instruction 6). Such consideration would lead to a conclusion that Dr. Carlbom was an

impressive witness, one whose opinion should be given great weight. The doctor said he graduated from University of Washington medical school in 1997, spent his practicing career at the Harborview emergency room, and saw about 1,000 patients a year with broken bones. 7RP 6-7, 29.

In addition, there was evidence to support Hickman's theory, including Vinson's admissions that he fell and bumped his head only two days before he testified, that he had fallen other times, that he had a longstanding problem with his equilibrium, and that he was a long-time, active hard alcohol drinker. 7RP 101-05, 110, 115. Vinson presented with a blood alcohol level of .16 and had been intoxicated in two earlier visits to Harborview. 9RP 24-25, 70-71. He also used a sedative that accentuated the intoxicating effect of liquor. 7RP 108-09; 9RP 71-72.

These circumstances show not only that the error was manifest, but that it also resulted in actual prejudice. Hickman therefore did not waive the argument by failing to object.

The final question is whether the error is harmless. Courts apply the constitutional harmless error test in these circumstances. Hudson, 150 Wn. App. at 656. Constitutional error is presumed prejudicial; the state must prove the absence of prejudice beyond a reasonable doubt. State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). A constitutional error is

harmless if the state convinces a reviewing court beyond a reasonable doubt that any reasonable jury would have found guilt without the error. State v. Thach, 126 Wn. App. 297, 313, 106 P.3d 782, review denied, 155 Wn.2d 1005 (2005). This Court must decide whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

The state cannot make this showing here. Despite the broken bones, contusions, and scratches on Vinson's body, Hickman's hands were not marred. 6RP 69-70, 101; 9RP 111-12. Nor did the officers find any evidence a weapon was used, which could have explained the condition of Hickman's hands. 6RP 134. Vinson was intoxicated and had a history of falling down. Vinson was not otherwise in good health; Dr. Evans testified his hospital stay was disproportionately long for the "fairly minor injuries" he suffered. 7RP 63-64. Importantly, Dr. Carlborn provided the only opinion on Hickman's guilt. Cf., State v. Flores, 164 Wn.2d 1, 19, 186 P.3d 1038 (2008) (holding constitutional error was harmless because "[t]he tainted evidence is merely cumulative of" overwhelming untainted evidence). Further, there were no eyewitnesses and the state presented only circumstantial evidence. These reasons prevent the state from showing the error was harmless beyond a reasonable doubt

To summarize, Dr. Carlbom improperly commented on Hickman's guilt. Although Hickman did not object, he did not waive the issue because the error was manifest and resulted in actual prejudice. Finally, the error was not harmless. This Court should reverse Hickman's first degree assault conviction and remand for retrial.

*c. Alternatively, trial counsel was ineffective for failing to object to the improper opinion testimony.*

If this Court concludes Hickman's failure to object to Dr. Carlbom's opinion testimony was a waiver, this Court should nevertheless reach the merits of the issue because counsel was ineffective. Under this theory, Hickman is also entitled to a new trial.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland,

466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); see State v. Hendrickson, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance), affd., 165 Wn.2d 474, 198 P.3d 1029, cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2873 (2009).

As already discussed, there was no legitimate reason for Hickman's trial counsel not to object to Dr. Carlbom's opinion testimony. The testimony was prejudicial, especially because it allowed jurors to rule out the defense theory that Vinson injured himself by falling down. Hickman derived no benefit from letting the jury hear an impressive, experienced doctor opine the charged crime of assault caused Vinson's facial fractures.

Because the testimony constituted an improper opinion on Hickman's guilt, a timely objection would likely have been sustained. Finally, because the defense theory was viable and there were no eyewitnesses to the incident, the verdict would probably had been different had trial counsel properly objected. For these reasons, Hickman establishes counsel violated his constitutional right to effective representation. For this reason as well, this Court should reverse the conviction and remand for a new trial.

2. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY BY ORDERING A COMMUNITY CUSTODY CONDITION REQUIRING AFFIRMATIVE CONDUCT THAT WAS NOT RELATED TO THE CRIME.

Despite an absence of evidence indicating Hickman was under the influence of either alcohol or drugs, the trial court demanded he participate in a "drug/alcohol evaluation and treatment" as a condition of community

custody. CP 70. The trial court exceeded its sentencing authority because the condition was not crime-related.

A trial court may only impose a sentence authorized by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), review denied, 143 Wn.2d 1003 (2001). An offender has standing to challenge conditions even though he has not been charged with violating them. State v. Riles, 86 Wn. App. 10, 14-15, 936 P.2d 11 (1997), aff'd., 135 Wn.2d 326, 957 P.2d 655 (1988); see also Bahl, 164 Wn.2d at 750-52 (defendant may bring pre-enforcement challenge to vague sentencing condition).

Hickman was convicted of first degree assault, a "serious violent" crime according to RCW 9.94A.030(44)(a)(v), and a crime against a person under RCW 9.94A.411. At the time Hickman committed his crime, offenders of such crimes were sentenced according to former RCW 9.94A.715. That statute authorized a trial court to impose a term of community custody. RCW 9.94A.715(1).

Under RCW 9.94A.715(2)(a), unless the court waives a condition, the conditions of community custody shall include those set forth in RCW 9.94A.700(4), and may include those provided for in RCW 9.94A.700(5). In addition, a trial court may order participation in rehabilitative programs or to otherwise perform affirmative conduct “reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community . . . .” RCW 9.94A.715(2)(a).

RCW 9.94A.700(5) provides:

- (a) The offender shall remain within, or outside of, a specified geographical boundary;
- (b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) The offender shall participate in crime-related treatment or counseling services;
- (d) The offender shall not consume alcohol; or
- (e) The offender shall comply with any crime-related prohibitions.

One of the conditions the trial court imposed on Hickman was that he undergo a "drug/alcohol evaluation and treatment." CP 70. This condition could not be imposed unless it reasonably related to the circumstances of Hickman's offense. Under State v. Jones,<sup>4</sup> it does not.

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<sup>4</sup> State v. Jones 118 Wn. App. 199, 76 P.3d 258 (2003).

Jones pleaded guilty to first-degree burglary and other crimes. During the plea hearing, Jones's attorney explained Jones was bipolar and not only off of his medication, but also using methamphetamine at the time of his crimes. Counsel contended this combination caused Jones to offend. Jones, 118 Wn. App. at 202. There was no evidence, however, that alcohol played a role in Jones' crimes.

The court sentenced Jones after accepting his pleas. The sentence included community custody, a condition of which was abstinence from alcohol and participation in alcohol counseling. The court made no finding alcohol contributed to Jones's crimes. Jones, 118 Wn. App. at 202-03.

On appeal, the Jones court held the trial court could not require Jones to participate in alcohol counseling given the lack of evidence alcohol contributed to his crimes. Jones, 118 Wn. App. at 207-08.

In reaching this conclusion, the court first observed RCW 9.94A.700(5)(c) authorizes a trial court to order an offender to "participate in crime-related treatment or counseling services." Jones, 118 Wn. App. at 207. The court held because the evidence failed to show alcohol contributed to Jones's offenses or the trial court's alcohol counseling

condition was "crime-related," the trial court erred by ordering Jones to participate in alcohol counseling. Jones, 118 Wn. App. at 207-08.

The Court also acknowledged, however, RCW 9.94A.715(2)(b) permitted a trial court to order an offender to "participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community[.]" Jones, 118 Wn. App. at 208. This condition also applies to Hickman.

The Court held:

If reasonably possible, [RCW 9.94A.715(2)(a)] must be harmonized with RCW 9.94A.700(5)(c), so that no part of either statute is rendered superfluous. . . . If we were to characterize alcohol counseling as "affirmative conduct reasonably related to the offender's risk of reoffending, or the safety of the community," with or without evidence that alcohol had contributed to the offense, we would negate and render superfluous RCW 9.94A.700(5)(c)'s requirement that such counseling be "crime-related." Accordingly, we hold that alcohol counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, only if the evidence shows that alcohol contributed to the offense.

Jones, 118 Wn. App. at 208 (footnote omitted).

The same language analyzed in Jones applies to Hickman's case. Therefore, the Jones analysis should apply here. Just as there was no evidence alcohol contributed to Jones's offenses, there was likewise no evidence either drugs or alcohol contributed to Hickman's criminal

conduct. That portion of the community custody condition requiring Hickman to obtain an drug/alcohol evaluation and participate in treatment is too broad and not reasonably related to the circumstances of the offense. See State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana).

For these reasons, the evaluation and treatment condition should be stricken from Hickman's judgment and sentence. Jones, 118 Wn. App. at 207-08, 212.

D. CONCLUSION

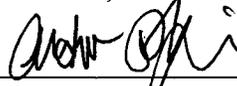
Testimony constituting an opinion on guilt deprived Hickman of his constitutional right to a fair trial before an impartial jury. Counsel also deprived Hickman of his constitutional right to effective representation by failing to object to the opinion testimony. This Court should reverse

Hickman's conviction. Alternatively, the trial court exceeded its statutory sentencing authority by imposing a community custody obligation that was not crime-related. This court should order the condition vacated.

DATED this 29 day of June, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64458-1-I
	)	
CAREY HICKMAN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CAREY HICKMAN  
DOC NO. 335503  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JUNE, 2010.

x *Patrick Mayovsky*