

NO. 73903-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RODNEY WILLIS,

Appellant.

FILED
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Court of Appeals
Division I
State of Washington

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

The Honorable Dean S. Lum, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial when the lead case detective repeatedly expressed her opinion that he was guilty.

2. Defense counsel was ineffective and denied appellant a fair trial by failing to object to the improper opinions on guilt.

3. The trial court erred when it denied appellant's motion for new trial based on the lead detective's improper opinions on appellant's veracity, which she expressed to jurors through her facial gestures during appellant's testimony.

4. The trial court erred when it entered the following findings and conclusions supporting its denial of appellant's motion for new trial:

a. The court's oral and written findings that it is not clear whether jurors saw the detective's demeanor and facial expressions while she was testifying or whether they saw them while she was seated with prosecutors at counsel table. 17RP 31; CP 188.

b. The court's oral and written conclusions that the detective's disbelief and disapproval of appellant's trial testimony – expressed through her facial gestures – did not constitute "evidence" under CrR 7.5(a)(1) and the court's related finding that there is no indication jurors treated it as such. 17RP 39-41; CP 190.

c. The court's oral and written findings that, even if the detective's facial gestures are evidence that jurors considered, these opinions were "essentially indistinguishable" from other properly admitted

evidence. 17RP 41-43; CP 191.

- d. The court's oral and written conclusions that any error was harmless beyond a reasonable doubt. 17RP 43-44; CP 191.
- e. The court's oral and written findings that there is no legal authority or factual support for appellant's arguments that he should receive a new trial under CrR 7.5(a)(5) and (a)(8). 17RP 44-45; CP 191.

5. To the extent defense counsel failed to sufficiently litigate the motion for new trial under CrR 7.5(a)(5) and (a)(8), counsel was ineffective.

6. Assuming the current record is insufficient to warrant a new trial, the trial court erred when it refused to allow jurors to be contacted and questioned to determine the extent to which they witnessed the detective express her opinions through facial gestures.

- 7. Cumulative trial error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Witnesses must never offer an opinion, even by inference, as to a defendant's guilt. The primary disputed issue at trial was whether, on the one hand, appellant intended to rob the victim and killed him during the course of an attempted robbery or, on the other hand, appellant had no intent to rob the victim and accidentally killing him while lawfully attempting to defend his sister

and himself. The lead police detective in the case testified, "I do believe he intended to rob" the victim and, later, "I do believe that he committed this murder." Did this improper testimony deny appellant his constitutional right to a fair and impartial trial?

2. Defense counsel failed to object to the lead detective's opinions that appellant was guilty. Did this failure deny appellant his constitutional right to effective representation?

3. Appellant testified at trial in his own defense. During his testimony, the lead detective sat with prosecutors and made obvious and noticeable facial expressions, which signaled to jurors she did not believe what appellant was saying on the stand. Did the trial judge err under CrR 7.5(a) when he denied a defense motion for new trial based on these improper expressions of the detective's opinion that appellant was lying?

4. In denying the motion for new trial, the court entered several findings of fact and conclusions of law not supported by the evidence or legal precedent. Are these findings and conclusions erroneous?

5. To the extent defense counsel failed to properly support the motion for new trial with citations to relevant legal precedent and sufficient factual argument, was counsel ineffective?

6. To the extent the record is not currently sufficient to evaluate the impact of the detective's improper facial gestures on the outcome of trial, should the matter be remanded so that jurors can be contacted and the record made complete regarding what they witnessed?

7. Assuming the lead detective's improper opinions on appellant's guilt, by themselves, or the lead detective's improper opinions on appellant's veracity while on the stand, by themselves, do not warrant a new trial, does their combined impact warrant this result?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Rodney Willis with Murder in the First Degree in connection with the September 7, 2012 death of Herman Tucker. CP 1. Willis was charged under a theory of felony murder – that he killed Tucker while committing or attempting to commit Robbery in the First or Second Degree. CP 1. The charge included a firearm sentencing enhancement. CP 2.

Willis's defense was excusable homicide (during the course of protecting himself and his sister, Tucker was accidentally killed). 16RP 1137-1150; CP 69-79. Jurors convicted Willis and found the firearm

enhancement proved. CP 84-85. After denying a defense motion for new trial, the Honorable Dean Lum sentenced Willis to 420 months in prison. CP 160, 187-192. Willis timely filed his Notice of Appeal. CP 166-167.

2. Substantive Facts

By September of 2012, 47-year-old Herman Tucker – who liked to be called “Downtown” – had established a personal and inappropriate relationship with 15-year-old Earnetra Turner. 9RP¹ 8, 13-14; exhibit 5HH. Tucker would provide Turner with free marijuana and, in exchange, he let it be known that he eventually expected her to have sex with him. 9RP 15-19. Turner repeatedly refused, however, frustrating and angering Tucker. 9RP 19-21.

Tucker had a history of spending time with teenage girls and was a reliable source of “free” marijuana for them. 15RP 778-779. He also was a self-described pimp. 9RP 19. And Turner’s family feared she was engaging in prostitution activities. 13RP 117, 167, 260-262.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 5/4/15; 2RP – 5/5/15; 3RP – 5/6/15; 4RP – 5/7/15; 5RP – 5/11/15; 6RP – 5/12/15; 7RP – 5/13/15; 8RP – 5/14/15; 9RP – 5/18/15; 10RP – 5/19/15; 11RP – 5/28/15; 12RP – 6/1/15; 13RP – 6/2/15; 14RP – 6/3/15; 15RP – 6/4 and 6/8/15; 16RP – 6/9 and 6/10/15; 17RP – 7/1/15; 18RP – 8/21/15.

Turner has two older brothers who are twins: Robert and Rodney Willis. 9RP 9-11. In 2012, Robert and Rodney were 19 years old. 13RP 239. Robert had a closer relationship with Turner and tried to rein in their little sister's reckless behavior – which included getting in fights at school and selling drugs – and he urged her to stay away from Tucker. 13RP 163-66, 171, 247, 257-260.

In August 2012, Robert was about to begin serving a prison sentence and would no longer be around to look after his sister. 13RP 261. Robert told Rodney about Tucker, including his suspicions that Tucker had been beating Turner and that Tucker's ultimate goal was to become her pimp, and Robert stressed the importance of keeping Tucker away from their little sister. 13RP 166-170. 262-263.

Tucker did not stay away from Turner, however. On the evening of September 6, 2012, Turner contacted Tucker by phone, indicating she wanted to see him. 9RP 22-23. Tucker picked up Turner in Renton at around midnight, and the two smoked marijuana together in Tucker's truck. 9RP 36-37. Tucker told Turner he was going to take her to his home in Federal Way, but Turner made it clear she did not want to go there with him. 9RP 39. After making a few stops, including one in which Tucker bought alcohol for Turner,

Tucker decided to take Turner to a motel. 9RP 41-44. Tucker drove to a Motel 6 in SeaTac and was assigned room 224. 8RP 30, 34-36.

Inside room 224, the two smoked more marijuana before Tucker stripped down to his boxers and suggested Turner join him in bed. 9RP 46-50. When she declined, Tucker yelled at her, accused her of playing games, and stormed out with the room key. 9RP 50-51. Turner reached Tucker by phone, and he said he would be back in the morning to pick her up. 9RP 53. Left stranded at the motel, Turner tried unsuccessfully to reach someone who could pick her up before finally reaching her brother, Rodney. 9RP 53.

Rodney was with Qiantre Taylor (a close friend), Kavahn Matthews-Smith (another friend and Taylor's cousin), and Amanda Gibson (Taylor's girlfriend). 10RP 203; 13RP 252-255, 274. All four eventually arrived at the Motel 6 in Gibson's BMW. 9RP 57-58; 13RP 273-275, 292-293. Tucker got in to the BMW and all five drove to a nearby trailer park so that Gibson could meet with someone there. 9RP 58-60, 67-71. The group then headed back to the Motel 6. 9RP 72-73. Upon their return to the motel, Gibson stayed in her car while the others headed up to the room. 9RP 74. Turner had left the door to room 224 ajar using the interior lock mechanism. 9RP 53-54.

Although much of what happened on September 6 and 7, 2012 would later be disputed, one undisputed fact is that Herman Tucker returned to room 224, resulting in a physical confrontation with Rodney Willis. 7RP 138-142; 13RP 304-309. Willis was armed with a handgun and, during this confrontation, fired a single shot, which struck Tucker in the left hand and right chest, entering near the armpit, and penetrating Tucker's lungs and aorta. 7RP 142-143; 11RP 420-423, 426-427, 431-432; 13RP 309-314. Tucker fled from the room, ran a short distance, and collapsed on an outside breezeway, where he died. 7RP 60-61, 144-146; 9RP 92; 13RP 313; 14RP 591. Willis and those with him quickly obscured their faces using their own clothing or towels from the room, exited room 224, ran down the breezeway, and quickly left the motel in Gibson's car. 7RP 146-148; 8RP 47-56, 70-76; 9RP 92-95; 10RP 253-256.

Police were called and, upon arriving on scene, directed to Tucker's body on the motel breezeway. 7RP 60-61; 8RP 38, 115; exhibit 6. Among the items found in room 224 were an open jar of petroleum jelly, a pair of pants belonging to Tucker (still containing his wallet and cash), Tucker's cell phone and car keys, a second cell phone that Turner had been using that evening (left sitting atop a nightstand between the two beds), and an overturned chair. 7RP 59,

79-80, 91-92, 98-99; 9RP 32, 174-180; 11RP 541-548; exhibit 5.

After seeing a story on the news about Tucker's death, Kavahn Matthews-Smith turned himself in to authorities. 10RP 274. Willis and Gibson were located together in Ellensburg on September 16, 2012 after Gibson was stopped for speeding. 7RP 16-29. Initially, Willis – who had an outstanding warrant on an unrelated matter – provided his brother's name to police before admitting his identity. He was then arrested on that warrant. 7RP 30-32.

When interviewed by King County Detectives regarding the shooting, Willis lied, denied any knowledge of the circumstances of Tucker's death, and made up a story about what he had done and who he was with the evening before and morning of the shooting. Exhibits 55, 77.² Initially, Willis even denied having a sister named Earnetra Turner. Exhibit 77, at 14-16, 21. Throughout the interview, detectives made it clear they did not believe him. See exhibit 55, at 54-64, 69-74; exhibit 77, at 18-23, 39, 49-51. Willis was not the only one who lied during the interview, however.

² Exhibit 55 is a transcript of a redacted version of the entire interview provided to jurors while they listened to exhibit 52, a redacted recording of the interview. 12RP 13-16. Exhibit 77 is a less redacted portion of this same interview provided to jurors while they listened to exhibit 76, a recording of this version of the interview, following a ruling that the defense had opened the door to the more complete version. 15RP 763, 785-821; 16RP 963-965.

Detectives also lied about evidence they claimed to have regarding Willis's involvement. 12RP 17-18.

As previously noted, the events leading up to Tucker's death at the Motel 6 were contested at trial. Neither Amanda Gibson nor Qiantre Taylor testified or otherwise provided evidence used at trial. But Rodney Willis, Kavahn Matthews-Smith, and Earnetra Turner all took the stand.

Willis explained how his sister had been getting in trouble prior to September 2012 and his brother Robert's efforts to make sure Willis kept her away from Tucker while Robert was in prison. 13RP 257-263. On September 6, 2012, Willis and his sister had been in contact on and off throughout the day. 13RP 267-270. That night, she started calling Willis and asking to be picked up. 13RP 270. But Willis explained that he was not driving and she would have to wait. 13RP 271. By the time he and the others left their location in Gibson's car, Turner was no longer at the same location. 13RP 271-277. Nor could they find her at a second location. 13RP 278-279.

Eventually, Turner texted and indicated she was at the Motel 6. 13RP 280. The group drove to several Motel 6 locations before finding the correct one. 13RP 284-285. After picking up Turner,

Gibson drove the group to the nearby trailer park, where Willis noticed that his sister had scratches on her neck. 13RP 292-294, 299. He also noticed she was only wearing a bra under her jacket. 13RP 299. Turner would not say who she had been with at the motel, but she did indicate it was an older man and suggested he either wanted to have sex with her or have her work as a prostitute. 13RP 296. Willis was very upset. 13RP 296-300. The group then returned to the motel to retrieve Turner's clothing from room 224. 13RP 300-301.

According to Willis, while he, Qiantre Taylor, Kavahn Matthews-Smith, and Earnetra Turner were in the room, they heard a loud knock on the door. Believing it could be the police, and because Willis was carrying a firearm³ and had an outstanding warrant, he hid in the bathroom. 13RP 304. So did Taylor, who was also carrying a gun, and Matthews-Smith. 13RP 304-05, 311. When Turner tried to join them, Willis asked her to answer the door and, if it was the police, convince them to leave. 13RP 305.

³ Willis had witnessed significant violence as a child and young man, was diagnosed by psychiatrist Dr. Mark McClung as suffering the effects of PTSD, and felt a need to carry the gun for safety. 15RP 836-861.

Willis testified that Turner answered the door and he could see from a mirror near the bathroom that a very large man entered the room. 13RP 305-306. The man began to unzip his sister's jacket and said, "I just want to do what I came to do." 13RP 306. Willis walked out of the bathroom, pushed his sister out of the way, and confronted the man, whom he now recognized as Tucker from seeing him in the neighborhood. 13RP 306-307. Willis was well aware of Tucker's advanced skills in the martial arts and, in addition to what Robert told him, had heard that Tucker was a child molester and rapist. 14RP 584-587. At 6 feet and 268 lbs, Tucker also was much larger than he was and more mature; Willis was scared. 11RP 471; 14RP 587.

According to Willis, when he asked Tucker what he was doing, Tucker replied, "This is my bitch" and threatened Willis. 13RP 307. Willis responded that he was leaving with his sister, but as he attempted to walk past Tucker, Tucker punched him. 13RP 308. Willis hit back, and Tucker threw him in between the beds, causing the gun to slip from Willis's pocket and fall on the floor. 13RP 310. Willis picked up the gun and the two struggled for control of the weapon. 13RP 310-312. Tucker pulled the hammer back on the gun, cocking it, and tried to turn it toward Willis. 13RP 310-311.

Tucker was able to knock Willis backward with a blow to his forehead and, when Willis hit the ground, the gun accidentally discharged. 13RP 312-313; 14RP 631-634.

By the time of trial, both Earnetra Turner and Kavahn Matthews-Smith had secured extremely favorable deals with prosecutors in exchange for testimony against Willis.

Turner had a reputation for lying. 13RP 156, 218. And although she had been facing the prospect of 25 years in prison, she was permitted to plead guilty to Attempted Robbery in the First Degree and received a comparatively lenient sentence of 87 months.

9RP 9. According to Turner, she spoke to Willis on the evening of September 6, the two discussed smoking marijuana and, during that discussion, she mentioned that she sometimes smoked with Tucker.

9RP 29-30. Willis asked her if Tucker wore any jewelry or had any money and Tucker indicated that he did. Willis did not indicate why he wanted to know. 9RP 31. It was after this conversation with her brother that Turner contacted Tucker and arranged to see him that night. 9RP 31-33.

According to Turner, after Tucker abandoned her at the Motel 6 and Willis and the others picked her up in Amanda Gibson's car, everyone in the car asked her where Tucker was and encouraged

her to convince him to return to the motel. 9RP 57-61. According to Turner, she declined. 9RP 62. The others became angry and pressured her to text Tucker and tell him she'd have sex with him. 9RP 62-72.

On the way to the nearby trailer park, Turner saw that both Willis and Qiantre Taylor had guns. 9RP 64-67, 69-70. Just before the group left the trailer park, Gibson posed as Turner and texted Tucker, telling him she wanted to have sex with him. 9RP 72-73. She convinced Tucker to return to the motel, and the group then headed back to that location. 9RP 73-74. Once there, the plan was that Turner would wait on the bed for Tucker and, upon his arrival, the three men would emerge from the bathroom, surprise him, and take his personal property, including his truck. 9RP 76-78.

According to Turner, when she opened the motel room door for Tucker, the three men emerged from the bathroom with their faces covered. 9RP 79, 82-85. Willis and Qiantre Taylor had their guns drawn and Willis told Tucker to give him "all of the stuff." 9RP 84-85, 88. Instead, Tucker screamed and charged at the men. 9RP 84, 88-89. Tucker initially tussled with all three men, but then struggled only with Willis. 9RP 89. Tucker was grabbing for the hand in which Willis was holding the gun. 9RP 90. The two ended

up in a corner near the door, Turner heard the gun fire, and Tucker ran out of the room. Turner and the others also quickly exited the room and left in Gibson's car. 9RP 90-95.

Kavahn Matthews-Smith similarly avoided a charge of Murder in the First Degree by testifying for the prosecution. He was permitted to plead guilty to Robbery in the Second Degree and merely faced a sentence of 6 to 12 months. 10RP 203-204. According to Matthews-Smith, while riding in Gibson's BMW on September 6, 2012, Willis was looking at his phone and announced to the others that his sister "had to move," which he interpreted to mean a crime involving money. 10RP 212-216. The target was "some old dude" who drove a white truck, and the group began looking for a Motel 6. 10RP 218-221. They eventually found the correct motel and picked up Turner there. 10RP 222-224.

According to Matthews-Smith, Willis was being hostile toward his sister and pressured her to text the target, but Turner was reluctant. 10RP 224-228. She and Amanda Gibson did both send texts, however. 10RP 226. The group then drove back to the motel, where everyone went to room 224 except Gibson. 10RP 230-234. When they heard someone at the door, all three men ran into the bathroom, where Willis and Qiantre Taylor covered their faces and

put on gloves. Both also had handguns. 10RP 239-246. Once Tucker had entered the room, Willis and Taylor confronted him and Willis may have said, "what's up now, nigger?" 10RP 247-249. According to Matthews-Smith, Tucker yelled "no" in a fearful way. 10RP 249. Matthews-Smith then heard a gunshot as he exited the bathroom. 10RP 249-250. He saw Tucker running away, and everyone in the room then ran back to Gibson's car. 10RP 250-255. Matthews-Smith testified that Willis threw the gloves he and Taylor had worn out the window of the car on the way back to Seattle and, when Mathews-Smith asked Willis why he had tried to rob Tucker, Willis mentioned "\$20,000." 10RP 268-270.

Matthews-Smith claimed he did not see any of the texts that were sent while in Gibson's car and did not hear any phone calls. 10RP 230, 282-283. Contrary to Turner's version, he claimed that, when the group went back to the motel, he believed they were there merely to retrieve what Turner left in the room. Nobody was talking about a robbery. 10RP 235, 282, 287-289, 298. He never saw Turner in her bra and everyone seemed genuinely surprised when they heard a knock on the door. 10RP 290-292. Moreover, he did not hear Willis say anything to Tucker about giving him his "stuff." 10RP 292-293.

The prosecution introduced evidence of text messages – involving phones used by Tucker, Turner, and Willis – during the hours leading up to the shooting. Exhibits 30-34.

Analysis of messages between Tucker's phone and the phone Turner used show a dialogue beginning at about 8:45 p.m. on September 6, 2012, when Turner first contacted Tucker and then arranged to see him later that evening. 10RP 309-314, 317-321, 324-329; exhibit 32 at D-G. The texts continue as Tucker picks up Turner after midnight and then leaves her at the motel. 10RP 329-331; exhibit 32 at H-J. Subsequently, there are several more from Turner's phone to Tucker convincing him to return to the motel for sex. 10RP 331-335; exhibit 32 at J-M. The final message is from Tucker to Turner upon his arrival back at the motel at 2:58 a.m. and says, "I'm outside let me see ur naked." 10RP 335; exhibit 32 at M. It was impossible to determine the identity of the individual using Turner's phone at the time each message was sent. 10RP 336-337.

Analysis of messages between the phone Turner used and Willis's phone during the same period shows Turner providing updates on her whereabouts while she was with Tucker and Willis's attempts to find her. 10RP 354-360; exhibit 34 at E-L. There are two texts from Willis's phone asking whether Tucker had money and

jewelry. 10RP 358; exhibit 34 at J. Moreover, someone called Tucker, using Willis's phone, at 2:30 a.m., a call that lasted 5 minutes and 23 seconds. 10RP 333-334. As with the messages sent from Turner's phone, it was not possible to identify which individual was using Willis's phone when any particular message was sent or received. 10RP 365.

Willis denied any involvement with the texts from his phone inquiring about Tucker's money and jewelry and denied involvement with the messages from Turner's phone to Tucker indicating that she wanted to have sex with him back at the motel. 13RP 290-291; 14RP 587-588. Willis testified that Amanda Gibson had borrowed his phone and was using it in the car, inquiring about what kind of vehicle Tucker drove, mentioning that Tucker had "\$20k" and excitedly talking about robbing him. 13RP 291; 14RP 588-590. But Willis had made it clear that he had no interest in a robbery. 14RP 590. And while he and Turner argued after Turner was picked up at the motel, they did so about the dangerous position she had placed herself in; Willis denied pressuring her to return to the motel to meet with Tucker. When they did return, it was only to retrieve belongings she had left in the room. 13RP 298-300.

At the close of evidence, prosecutors argued that Willis had enlisted the help of those with him to rob Tucker at the Motel 6. And because he killed Tucker during an attempt to rob him, he was guilty of Murder in the First Degree. 16RP 1032-1114.

The defense argued that jurors should not believe Earnetra Turner or Kavahn Matthews-Smith, both of whom had made favorable deals with prosecutors, had every incentive to blame Willis for what happened, and did not provide matching versions of events. 16RP 1122-1134. Moreover, it was impossible to know who sent the messages from Willis's phone suggesting a planned robbery, but Amanda Gibson had used that phone and expressed interest in a robbery. 16RP 1130-1132. The defense argued that Willis was simply defending his sister from Tucker when he attempted to leave room 224 with her and then defending himself from Tucker when his gun accidentally discharged. Therefore, jurors should acquit him under the doctrine of excusable homicide. 16RP 1137-1150.

C. ARGUMENT

1. THE LEAD DETECTIVE ASSIGNED TO APPELLANT'S CASE EXPRESSED IMPROPER OPINIONS ON APPELLANT'S GUILT, THEREBY DENYING HIM A FAIR TRIAL.

During cross-examination of the lead investigator in this case – King County Sheriff's Detective Christina Bartlett – defense counsel explored the fact that, during her interrogation of Willis following his arrest in Ellensburg, Bartlett told Willis that whether he went to the motel to kill Tucker or merely with the intent to rob him was an important distinction. 11RP 528, 532; 12RP 44-45.

Defense counsel noted, and Detective Bartlett conceded, that during the interrogation, she gave the false impression that an intended robbery resulting in death was less serious than an intended killing resulting in death. In truth, Willis would face a murder charge under either scenario. 12RP 46-47. Using a transcript of the interrogation, defense counsel continued:

Q: Let's go back to the page, where we were, 16, then. So you tell him, "I don't think you planned a murder, but I think this was a lick."⁴ In fact, I counted, and I think you tell him about 12 times that you don't think he intended to murder anybody, but you do believe that he intended to rob somebody?

⁴ Detective Bartlett testified a "lick" is a robbery. 12RP 17.

A: I do believe that he intended to rob Herman Tucker.

12RP 47 (emphasis added).

Detective Bartlett's unresponsive answer was not the only time she provided her current opinion on Willis's guilt in response to a question focused on what happened at the time of the interview.

The State recalled Detective Bartlett in its rebuttal case. On cross-examination, defense counsel focused on the fact that, during the interrogation, both sides were being deceptive; Bartlett was misleading Willis and Willis was responding in kind. 16RP 980-982. In response, Bartlett claimed that she had given Willis every opportunity to explain that he had been trying to protect his sister, which led to the following exchange:

Q: Okay. Well, let's see. You said you gave him every opportunity. But, in fact, there were eight times, and we can go through there, that you absolutely told him I don't believe you, and I think you did this for sure. Starting with number one on page 18.

A: I do believe that he committed this murder.

Q: Okay. And you –

A: That's not a lie.

Q: And no matter what he told you from page 18 all the way up to the last page you told him I don't believe you. Absolutely don't believe that I think

maybe you didn't murder him, but I think you went there to do a lick, and I don't believe otherwise, isn't that true?

A: I said that I believe that you went there to rob him. I had the text messages and I believed it.

16RP 982-983 (emphasis added).

This Court should find that Detective Bartlett – by testifying that she believed Willis intended to rob Tucker and, further, that she believed Willis committed murder – provided improper opinions on Willis's guilt, thereby denying him a fair trial.

"No 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). This prohibition stems from the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution, which guarantee the right to a fair trial before an impartial trier of fact. A witness's opinion as to the defendant's guilt, even by mere inference, violates this right by invading the province of the jury. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Thompson, 90 Wn. App. 41, 46, 950 P.2d 977, review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998).

In determining whether testimony is impermissible, trial courts consider the circumstances of the case, including the following factors: “(1) ‘the type of witness involved,’ (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense, and’ (5) ‘the other evidence before the trier of fact.’” State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (quoting Demery, 144 Wn.2d at 759).

Here, the witness was a law enforcement officer (the lead case detective), meaning her testimony carried an “aura of reliability” with jurors. Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765). The nature of the testimony was that Detective Bartlett believed Willis intended to rob Tucker when he went to the motel and she believed that he was guilty of felony murder. These improper opinions were critical because Willis’s intent was very much in dispute at trial. The improper opinions went to the core issue in the case – whether Tucker’s death was an accidental consequence of Willis’s lawful attempt to protect his sister or, instead, whether Willis was guilty of murder because he intended to rob Tucker and killed him during an attempt to do so. As the State itself recognized during its closing argument, this was the main issue for jurors to decide. See 16RP 1040 (“What’s at issue is this

question, whether or not the defendant intended to commit the crime of robbery in the first or second degree when all of this took place. All right. That's the question. That's what we are going to spend most of the time talking about because that's really the issue.”).

As a constitutional error, the State bears the burden of demonstrating that the improper opinions on Willis's guilt – presumed prejudicial – were harmless beyond a reasonable doubt. Quaale, 340 P.3d at 218; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). In a case where Willis consistently denied any involvement in a planned robbery, and the State's two main witnesses cut extremely favorable deals in exchange for their inconsistent testimony against Willis, the State cannot make this showing.

In response, the State will likely note the absence of a defense objection to Detective Bartlett's opinions on guilt. The issue is still properly raised, however, under RAP 2.5(a)(3) because it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3) requires some “plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125

(2007) (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1990)). In the context of improper opinions, this requires “an explicit or almost explicit witness statement on an ultimate issue of fact.” Id. at 936 (citing WWJ Corp., 138 Wn.2d at 603).

As discussed above, Detective Bartlett offered explicit statements on ultimate and disputed issues of fact – whether Willis intended to rob Tucker and whether Willis was guilty of felony murder. Given Willis’s denials and the incentives for the State’s primary witnesses to wrongfully incriminate him, a plausible showing has been made that the improper opinions impacted the jury’s verdict at trial.

The Supreme Court has sometimes declined to find opinion testimony manifestly prejudicial because it presumed jurors followed instructions telling them they were the sole judges of credibility and not bound by an expert’s opinion. See Montgomery, 163 Wn.2d at 595-596; Kirkman, 159 Wn.2d at 937. Willis’s jury received similar instructions. See CP 44-45, 50. But these instructions did not prohibit jurors from adopting Detective Bartlett’s improper opinions. They merely explained that jurors were not required to accept them. No two cases are identical when assessing the impact of improper opinions on guilt, and Bartlett’s

opinions would have been critical at Willis's trial given the disparate evidence of his intentions and the critical importance of this issue to the jury's verdict.

Alternatively, were this Court to find the issue does not satisfy RAP 2.5(a)(3), it should address the issue under the rubric of ineffective assistance of counsel.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575,

578, 958 P.2d 364 (1998). All three requirements are met.

There could be no legitimate tactic behind counsel's failure to object to Detective Bartlett's opinions that Willis was guilty; an objection would have kept the evidence out; and it is probable the outcome would have differed given the disputed evidence below. Detective Bartlett's improper opinions on guilt require a new trial.

2. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR NEW TRIAL.

Immediately following the guilty verdict, members of the defense and prosecution teams, including Detective Bartlett, spoke with jurors. CP 93. In a motion for new trial, defense attorneys Theresa Griffin and Christopher Carney, along with defense investigator Karen Zytaniak, explained what jurors revealed during this conversation. CP 93-98.

According to Griffin, several jurors indicated that Detective Bartlett "has more facial expressions than anyone they had ever seen." CP 93. Her expressions while sitting with prosecutors at counsel table caught jurors' attention throughout trial and they told her she should not play poker because it was easy to read her thoughts. CP 93. All jurors agreed with these assessments and laughed when Bartlett acted surprised at the revelation. CP 93. Two

jurors told Bartlett that they perceived she was trying to tell them not to believe Willis while he was on the stand. CP 93. Carney provided a consistent declaration, indicating that “jurors agreed that Detective Bartlett’s facial expressions were very noticeable to them during the testimony of Mr. Willis.” CP 96. According to Carney, when one juror said, “it was like you were trying to tell us not to believe him,” all of the other jurors agreed. CP 96. Similarly, Zytzniak indicated that all jurors noticed the detective’s very expressive face and several wondered whether she had been intentionally trying to communicate with them. CP 97.

In the motion for new trial, the defense argued that Detective Bartlett’s facial expressions communicated her opinion that Willis was not being truthful on the stand, this improper and unsworn opinion evidence violated Willis’s constitutional rights – including his right to confront and cross-examine the witnesses against him – and denied him a fair trial. CP 87-90. The defense also requested access to jurors to more fully explore what they had witnessed and to ensure a sufficient record. CP 90-91.

Although not contesting what jurors revealed, the State argued against a new trial and against any further discussions with jury members about what they had witnessed in court. CP 193-226.

In an oral ruling, Judge Lum denied the defense motion, finding no evidence that jurors considered Detective Bartlett's facial expressions, no evidence the expressions affected jurors' assessment of Willis's credibility, and that her expressions were indistinguishable from properly admitted evidence demonstrating Bartlett did not believe Willis to be credible. 17RP 39-42. Judge Lum concluded that any error was harmless beyond a reasonable doubt and denied access to jurors for additional interviews. 17RP 43-45. He then entered a consistent written decision. CP 187-192.

- a. The Motion For New Trial Should Have Been Granted.

CrR 7.5 provides:

(a) Grounds for New Trial. The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;

.....

- (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

.....

- (8) That substantial justice has not been done.

CrR 7.5(a)(1), (5), (8).

A trial court's decision on a motion for new trial is reviewed for abuse of discretion. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). The court's findings of fact are reviewed for substantial evidence and the court's legal conclusions are reviewed de novo. McKoy v. Kent Nursery, Inc., 163 Wn. App. 744, 758, 260 P.3d 967 (2011), review denied, 173 Wn.2d 1029, 274 P.3d 1039 (2012).

Judge Lum primarily considered whether Detective Bartlett's visual expressions of disbelief fell under CrR 7.5(a)(1), which pertains to jurors' consideration of evidence not admitted by the court. CP 190-191. Judge Lum's decision denying relief under this rule, and under CrR 7.5(a)(5) and (a)(8), cannot be sustained.

In determining a motion for new trial, the parties and court may not inquire into information that inheres in the verdict, i.e., jurors' mental processes or motives in reaching a verdict or the weight jurors may have given to particular evidence. State v. Jackman, 113 Wn.2d 772, 777-778, 783 P.2d 580 (1989). Still, despite reluctance to explore how a jury arrived at its verdict, proof that jurors considered extrinsic evidence can be grounds for a new trial. State

v. Balisok, 123 Wn.2d 114, 117-118, 866 P.2d 631 (1994). Extrinsic evidence includes “information that is *outside all the evidence admitted at trial, either orally or by document.*” *Id.* at 118 (quoting Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014, 807 P.2d 883 (1991)). Such evidence improperly denies an opportunity for objection, cross examination, explanation, or rebuttal. *Id.*

Consideration of extrinsic evidence justifies a new trial where it materially affects a substantial right. Pete, 152 Wn.2d at 552. “[C]onsideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a *reasonable ground to believe that the defendant may have been prejudiced.*” *Id.* at 555 n.4. (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967) (emphasis added)). To avoid consideration of evidence that inheres in the verdict, this inquiry requires an objective determination of whether the extrinsic information could have affected the jury’s verdict. Richards, 59 Wn. App. at 173. Willis satisfies these standards.

The Supreme Court of Washington has warned of the perils associated with jurors’ consideration of “demeanor evidence” that is “outside the scope of admitted exhibits and the testimony of

witnesses.” State v. Barry, 183 Wn.2d 297, 305 n.4, 352 P.3d 161 (2015). And whatever the precise parameters limiting consideration of such evidence, it is not difficult to conclude that a police detective’s opinion on the defendant’s veracity – clearly expressed as she sits with the prosecution team – is not properly considered by jurors.

Witnesses are forbidden from expressing their opinions on a defendant’s veracity because, like improper opinions on guilt, these opinions invade the exclusive province of jurors to independently determine the facts and thereby violate a defendant’s constitutional right to trial by jury. Montgomery, 163 Wn.2d at 591; Demery, 144 Wn.2d at 759. There is no authority for the proposition that it is okay for a lead case detective to express her opinion on the defendant’s credibility through physical manifestations of disdain, disgust, and/or disbelief. Since opinions on the defendant’s veracity are not permitted on the stand, they certainly are not permitted from counsel table.

Not only did Detective Bartlett’s expressed opinions from counsel’s table improperly invade the jury’s role to decide issues of credibility – thereby violating Willis’s constitutional right to trial by jury – her opinion also violated Willis’s rights to due process and to

confront the witnesses and evidence against him. Both the state and federal constitutions guarantee the right to confront adverse witnesses. U.S. Const. Amends. 6 and 14; Const. art. I, §§ 3 and 22 (amend. 10); Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Monson, 113 Wn.2d 833, 840, 784 P.2d 485 (1989); State v. Hudlow, 99 Wash.2d 1, 14-15, 659 P.2d 514 (1983). Key to this right is the opportunity for cross-examination. Monson, 113 Wn.2d at 840. Indeed, “[t]he rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Yet, Willis was denied these rights when Bartlett made her opinion known to jurors without the defense’s knowledge, much less an opportunity to object or to confront and challenge that opinion under cross-examination.

Not only were Detective Bartlett’s improper expressions of disbelief improper “evidence” under CrR 7.5(a)(1), her expressions of disbelief also fell under CrR 7.5(a)(5), since a trial “irregularity” may include the jury seeing or hearing that which it should not. See, e.g., State v. Perez-Valdez, 172 Wn.2d 808, 817-819, 265 P.3d 853 (2011) (witness’s opinion that victims of sexual abuse had told the

truth); State v. Bourgeois, 133 Wn.2d 389, 408-09, 945 P.2d 1120 (1997) (spectator misconduct – glaring and gestures – observed by jurors); State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (outburst from defendant's mother directed at judge and jury); State v. Mak, 105 Wn.2d 692, 700-701, 718 P.2d 407 (improper question by prosecutor), cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); State v. Escalona, 49 Wn. App. 251, 253-54, 742 P.2d 190 (1987) (witness's unresponsive answer revealing that defendant had a "record" and previously stabbed someone).

Moreover, since this improper evidence and trial irregularity resulted in violations of Willis's constitutional rights to trial by jury, due process, and confrontation, it is also true that "substantial justice has not been done" under CrR 7.5(a)(8). There is little in the way of published case law on this rule. But a discussion of a predecessor rule makes it clear that a violation of "substantial justice" includes jurors' consideration of something that should not have been considered. In State v. Williams, 27 Wn. App. 430, 618 P.2d 110 (1980), aff'd, 96 Wn.2d 215, 634 P.2d 868 (1981), the court described the term in the context of former CrR 7.6(d) thusly:

“We can foresee and understand occasions when a trial judge may say, ‘The jury verdict is supported by sufficient evidence, but X and Y extra-record factors, singly or in combination, caused the jury to give far too much consideration to that evidence, which resulted in an unfair trial, and consequently a new trial must be granted because substantial justice has not been done.’ . . .”

Williams, 27 Wn. App. at 448 n.10 (quoting Knecht v. Marzano, 65 Wn.2d 290, 296, 396 P.2d 782 (1964)). Detective Bartlett’s improper opinions on Willis’s trial testimony is that “extra-record factor” that results in an unfair trial.

In denying the defense motion for new trial, Judge Lum made several factual and legal errors.

First, Judge Lum found that it was “not entirely clear” whether jurors saw Detective Bartlett’s facial expressions while she was seated at counsel table listening to testimony or whether jurors saw the expressions during Bartlett’s own testimony on the stand. CP 188; 17RP 31.

But the declarations submitted by both defense attorneys make it clear jurors were addressing Bartlett’s expressions “while she sat at the prosecuting attorneys table” and, specifically, “during the testimony of Mr. Willis.” See CP 93, 96. At least two jurors indicated Bartlett was trying to tell them not to believe Willis while

Willis was on the stand. CP 93. Indeed, even the declarations from Bartlett and prosecutors made it clear jurors were discussing Bartlett's expressions off the stand. See CP 220, 223, 225 (addressing jurors' comments regarding Bartlett's expressions "in response to testimony"). While Judge Lum assumed for the sake of argument that Bartlett made her opinions known from counsel table, CP 188; 17RP 31-32, no such assumption was necessary. It happened.

Second, Judge Lum found that Detective Bartlett's facial expressions were not extrinsic "evidence" under CrR 7.5(a)(1) and found no indication jurors considered her expressions as such. CP 190. Although these findings are not explained in Judge Lum's written decision, his oral ruling focuses on the jury instructions defining what is considered evidence, and Judge Lum relied on the premise that jurors are presumed to follow these instructions. 17RP 40.

Jury instruction 1 explained, "The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching

your verdict.” CP 43. But given that Detective Bartlett was a trial witness who provided testimony, it is not at all apparent that jurors would have known they could not continue to consider her demeanor and body language as she sat at counsel table. Indeed, the only instruction prohibiting consideration of opinions conveyed through demeanor is that pertaining to judicial comments on the evidence. See CP 45 (“It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence” and “you must disregard this entirely”). There was no similar instruction pertaining to trial witnesses.

In any event, even if jurors somehow interpreted the jury instructions to exclude Detective Bartlett’s improper opinions on Willis’s credibility from the definition of “evidence” for purposes of CrR 7.5(a)(1), her opinions on his credibility still would be considered a trial “irregularity” under CrR 7.5(a)(5) or an “extra-record factor” that violated “substantial justice” under CrR 7.5(a)(8). A finding that those opinions were not technically “evidence,” if upheld, would simply move the analysis from subsection (a)(1) of the rule to the two other applicable subsections.

Next, Judge Lum found that even if jurors considered Bartlett's opinions from counsel table, "any information conveyed by Detective Bartlett's facial expressions was essentially indistinguishable from the information and evidence that was properly presented to the jury during Bartlett's trial testimony or the playing of Bartlett's interview of the defendant." CP 191. The problem with this finding is that it incorrectly equates Bartlett's opinion that Willis lied during his interview in Ellensburg with Bartlett's opinion from counsel table that Willis was lying while on the stand.

Willis admitted the obvious – that he lied during the Ellensburg interview. That Detective Bartlett repeatedly accused him of lying during the interview itself [see exhibit 55, at 54-64, 69-74; exhibit 77, at 18-23, 39, 49-51] and that many of her statements of disbelief made during that interview or about that interview were the subject of cross-examination at trial [see 12RP 44-51; 16RP 971-972, 980-983], did little to damage the defense case. Everyone knew what Willis said during the interview (and some of what detectives said) was a lie. Willis admitted that he had lied in Ellensburg because he did not trust detectives, he wanted to find out what they knew, and he feared that any admission of

involvement might risk the safety of his family. 14RP 616-617, 628-629, 636-641.

At trial, however, Willis took the stand, swore to tell the truth, and – completely contrary to what he said during the interview – admitted he was at the motel, but claimed he only acted in defense of his sister and himself. Bartlett's unmistakable opinion, expressed from counsel table, that Willis was *lying on the stand* is quite different from her opinion on the uncontested fact that Willis had lied to her in Ellensburg. The jury's verdict turned on whether they believed Willis's sworn trial testimony and not on whether they believed his admittedly unbelievable interview with detectives.

Judge Lum equated the situation at Willis's trial with what occurred in Perez-Valdez. 17RP 41. The circumstances are quite different, however. In Perez-Valdez, a CPS investigator who had interviewed two children accusing their father of sexual abuse testified on cross-examination that the girls were telling her the truth about what had happened. Perez-Valdez, 172 Wn.2d at 812-813. A defense objection was sustained and jurors were expressly instructed to disregard the investigator's statement. *Id.* at 818. In affirming the trial court's denial of a motion for mistrial, the Supreme Court noted, among other things, that the investigator's

testimony was “essentially cumulative” of the rest of her testimony, since the outcome of her investigation was removal of the girls from their home, which obviously indicated she believed whatever they had told her. Id.

Unlike Perez-Valdez, where the opinion on veracity merely duplicated what jurors already knew (the investigator believed what the victims had told her), Detective Bartlett’s opinion that Willis had lied during their interview (which no one contested at trial) was not the same as her opinion that Willis was now lying on the stand as she listened, along with jurors, for the very first time to his explanation of events at the motel.

Judge Lum also found that any violation of Willis’s constitutional rights was harmless beyond a reasonable doubt. CP 191. This also is incorrect. This conclusion is the product of Judge Lum’s failure to distinguish between Bartlett’s opinion on Willis’s credibility during the interview and her opinion on his credibility at trial. It also fails to properly appreciate the weight jurors give to the opinions of law enforcement officers and their “aura of reliability.” Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765). And it fails to appreciate that the improper opinions undermined the core defense claim – that Tucker’s death was an

accidental consequence of Willis's lawful attempt to protect his sister and then himself.

Finally, Judge Lum found that defense counsel had not "advanced" any legal authority or factual support for arguments that Willis should receive a new trial under CrR 7.5(a)(5) and (a)(8). 17RP 44-45; CP 191. Any missing legal authority and factual support has now been provided in this brief. But to the extent defense counsel, in any manner, waived Willis's arguments under these two rules, counsel was ineffective.⁵

Competent counsel conducts research on the law applicable to the case at hand. Bush v. O'Connor, 58 Wn. App. 138, 148, 791 P.2d 915 (an attorney unquestionably has a duty to investigate the applicable law), review denied, 115 Wn.2d 1020, 802 P.2d 125 (1990); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (reasonable attorney conduct includes a duty to investigate the facts and law), review denied, 90 Wn.2d 1006 (1978); see also Strickland, 466 U.S. at 690-91 ("counsel has a duty to make reasonable investigations").

⁵ In its brief opposing a new trial, the State argued that defense counsel's failure to provide authority or "comprehensible argument" supporting relief under CrR 7.5(a)(5) or (8) warranted denial under these subsections. CP 207-209.

If counsel's failure to more thoroughly argue the motion for new trial under subsections (a)(5) and (a)(8) waived these meritorious arguments, counsel performed deficiently and Willis suffered prejudice.

- b. If The Record Requires Development, This Matter Should Be Remanded So That Jurors Can Be Contacted Regarding Precisely What They Observed And When.

The State argued below, and Judge Lum agreed, that it was unnecessary to contact jurors for more information regarding precisely what they saw as Detective Bartlett made facial expressions from counsel table, ruling that the record was already sufficient and that any additional inquiries would seek information that inhered in the verdict. See CP 189-190, 210; 17RP 29-36.

The court rules anticipate situations where it will become necessary to contact jurors, using information held by the trial court, following the verdict:

(j) Access to Juror Information. Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party pro se, or member of the public, may petition the trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

GR 31(j). In deciding whether good cause has been demonstrated, this Court reviews Judge Lum's decision for an abuse of discretion. State v. Blazina, 174 Wn. App. 906, 909, 301 P.3d 492 (2013), remanded on other grounds, 182 Wn.2d 827, 344 P.3d 680 (2015).

Judge Lum denied access to juror information (and therefore access to jurors themselves) because he believed the record was sufficient to rule on the motion for new trial, since the record already established that jurors saw Detective Bartlett expressing disbelief as Willis testified. But jurors could have revealed at what points during Willis's testimony the detective made her beliefs known and could have described, in detail, Bartlett's facial expressions and demeanor. None of this inhaled in the verdict because it does not involve inquiry into jurors' mental processes, motives, or the weight they gave to particular evidence. See Jackman, 113 Wn.2d at 777-778.

Moreover, Willis was not the only defense witness. The defense called eight additional witnesses. See 13RP 111 (Sylvia Turner – defendant's mother); 13RP 163 (Robert Willis – defendant's brother); 13RP 192 (Karen Zyntiak – defense investigator); 13RP 199 (Tyra Campbell – Earnetra's friend); 13RP 219 (Abrianna Rodriguez – a friend whose phone Earnetra had used); 15RP 765

(Treauna Dorsey – Tucker’s former girlfriend); 15RP 776 (Rebecca Arnold – whom Tucker supplied with marijuana when she was a teen and later dated); 15RP 836 (Dr. Mark McClung – psychiatrist who evaluated Willis). By contacting and interviewing jurors, it could be determined whether Bartlett also exhibited her opinion on the veracity of these and other trial witnesses. See CP 93 (“jurors made reference to Detective Bartlett’s facial expressions, which captured their interest throughout trial.” (emphasis added)). Finding out would not inhere in the verdict, either.

If this Court reverses Willis’s conviction based on the current record, there is no need for additional contact with jurors. If, however, this Court determines the record is not currently sufficient to warrant that result, there is good cause to order that jurors be contacted to determine the full extent of Detective Bartlett’s conduct at counsel table during trial.

3. CUMULATIVE ERROR DENIED WILLIS A FAIR TRIAL.

Cumulative trial error may deprive a defendant of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Assuming this Court concludes that neither

Detective Bartlett's improper opinions that Willis intended robbery and was guilty of murder, by themselves, nor her improper opinions that Willis was lying on the stand, by themselves, warrant a new trial, the combined effect of these errors certainly warrants that result.

Opinions on guilt and opinions on veracity invade the exclusive province of jurors to decide such questions. Demery, 144 Wn.2d at 759. In combination, the improper opinions – expressed by an expert in criminal investigations – eased the State's burden to convince jurors it had proved Willis's guilt while simultaneously impeding Willis's ability to establish reasonable doubt. They worked hand-in-hand to deny Willis his constitutional right to a fair trial.

4. APPEAL COSTS SHOULD NOT BE IMPOSED

Judge Lum properly found Willis to be indigent and unable to contribute anything toward the costs of appellate review. Supp. CP ____ (sub no. 182, Order Authorizing Appeal In Forma Pauperis). Willis's affidavit establishing his indigency indicates that he has no assets whatsoever. Supp. CP ____ (sub no. 181, Motion and Affidavit).

Judge Lum did not order any discretionary legal financial obligations as part of Willis's sentence. See CP 159. Willis's prospects for repaying the costs of litigation in this Court are no better than they were in Superior Court. He is serving a 420-month sentence. Therefore, if he does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. See State v. Sinclair, 192 Wn. App. 380, 389-390, 367 P.3d 612 (2016) (instructing defendants on appeal to make this argument in their opening briefs). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State's request for costs should it seek them.

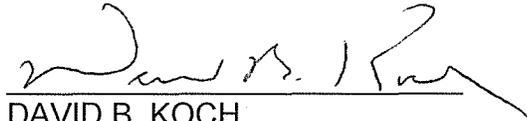
D. CONCLUSION

Improper opinions that Willis was guilty and improper opinions that his trial testimony was not credible denied him a fair trial. To the extent defense counsel waived for appeal any of the issues or arguments surrounding these claims, Willis was denied his constitutional right to effective representation. If the record currently is insufficient to determine whether the motion for new trial should have been granted, this matter should be remanded for additional factual development involving interviews with jurors.

DATED this 8th day of July, 2016.

Respectfully submitted,

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