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Court of Appeals
Division I
State of Washington

NO. 73914-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID SYKES,

Appellant.

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

The Honorable Carol Schapira, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to propose a modified “no duty to retreat” instruction where the appellant raised self-defense to rebut a third degree assault charge involving a law enforcement officer.

2. The officer’s testimony that the “force review board” approved of his use of force against the appellant constituted an improper opinion on the appellant’s guilt.

3. Counsel was ineffective for failing to object on the appropriate legal grounds to the officer’s improper opinion testimony.

Issues Pertaining to Assignments of Error

1. The appellant raised a claim of “defense of self” to rebut a charge of assaulting a law enforcement officer. For force to be permitted against an officer, however, an accused must show that he is actually about to be seriously injured. On another charge involving a civilian complainant, as to which the appellant also claimed self-defense, the court instructed the jury that the appellant had no duty to retreat. The “no duty to retreat” instruction incorporates a “reasonable belief” standard. The court therefore refused to give an unmodified “no duty to retreat” instruction as to the officer-related charge.

Was defense counsel ineffective for failing to propose a modified “no duty to retreat” instruction incorporating the correct self-defense standard as to the assault charge involving the officer?

2. The appellant did not deny striking the officer, but raised a self-defense claim, and the jury was so instructed. The officer-complainant testified that his use of force toward the appellant had been approved by the “force review board.”

Where the officer’s testimony offered an opinion that the appellant’s actions were not justified and that the appellant was, therefore, guilty as charged, is reversal of the appellant’s assault conviction required?

3. Was defense counsel ineffective for failing to object to the officer’s unconstitutional opinion testimony on the proper legal grounds?

B. STATEMENT OF THE CASE¹

1. Charges, verdicts, and sentence

The State charged David Sykes with two counts of third degree assault, under two different subsections of the pertinent statute, based on two related incidents occurring in downtown Seattle the morning of January 24, 2015. CP 1-5, 30-31; see RCW 9A.36.031(1)(f) (“with

¹ This brief refers to the consecutively paginated verbatim reports as follows: 1RP – 7/30/15; 2RP – 8/3/15; 3RP – 8/4/15; 4RP – 8/5/15; 5RP – 8/7/15; 6RP – 8/20/15; 7RP – 8/3/15 (supplemental transcript); and 8RP – 8/7/15 (supplemental transcript).

criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering”); RCW 9A.36.031(g) (“assaults a law enforcement officer”). The complainant as to count 1 was a Seattle police officer who responded to the incident that formed the basis for count 2. CP 4.

A jury convicted Sykes of third degree assault as to the police officer. CP 48. As for count 2, the jury deadlocked on the charged crime as well as fourth degree assault, a lesser degree offense. CP 49-50, 79-81.

The court ultimately dismissed count 2. CP 83. It sentenced Sykes to an exceptional sentence downward on count 1. CP 83; 6RP 477-48.

Sykes timely appeals. CP 92.

2. Trial testimony

Officer Brian Patenaude, the count 1 complainant, was dispatched to Third Avenue and Marion Street shortly before 9:00 a.m. 3RP 156. A man had called 9-1-1 after fighting with second man. 3RP 161; 4RP 287, 297.

Patenaude saw an individual with blood on his face near the northeast corner of the intersection. 3RP 161. Patenaude later confirmed that that man was Jarrid McAuliff, the 9-1-1 caller. 3RP 162. The other man, Sykes, was standing on the southeast corner, shouting and pacing back and forth. 3RP 157, 162.

According to Patenaude, Sykes was known to frequent the intersection. Based on the description from dispatch, Patenaude believed Sykes was the other individual involved in the altercation. 3RP 158-59.

Patenaude and his partner initially decided to wait for backup before approaching Sykes. 3RP 159, 233. But Patenaude decided to intervene after it appeared that Sykes was heading toward McAuliff. 3RP 162.

Patenaude approached Sykes from the side, said “stop right there,” and placed Sykes in an “escort” hold. 3RP 163; see also Ex. 3 (video, without audio, of incident from interior of 7-Eleven store near southeast corner of the intersection). According to Patenaude, an escort hold entails using one hand to grab an individual’s arm above the elbow, and using the other hand to grab the individual’s wrist. 3RP 163. While Patenaude denied pushing Sykes, the video shows Sykes move as if he was pushed. 3RP 202, 224.

Patenaude felt Sykes’s arm become tense. Sykes told Patenaude, “Get out of my way. I’m going to beat his . . . ass.” 3RP 164. Sykes then yanked his arm from Patenaude’s grip and attempted to move away from the officer. 3RP 164, 218. Patenaude yelled, “Don’t shrug me off,” or something similar. 3RP 164, 174; Ex. 12 (patrol car video recording of

incident, including audio). Attempting to intimidate Sykes into compliance, Patenaude also yelled at Sykes to “walk.” 3RP 166; 4RP 330.

Sykes turned to face Patenaude and said, “Don’t push me, man.” 3RP 164, 175, 210, 240. Again attempting to present himself as the “alpha,” Patenaude took a step toward Sykes. 3RP 215. As Patenaude did so, he placed a hand over his gun to prevent it from being grabbed. 3RP 167, 213-14.

Sykes, however, punched Patenaude in face. 3RP 167-68. Patenaude “saw stars” briefly, but then punched Sykes.² 3RP 167. The two began to fight. Patenaude ended up retreating because Sykes was larger and stronger than him. 3RP 175-76, 215.

Patenaude’s partner and another officer began striking Sykes with their batons. The blows, however, appeared to have little effect. 3RP 177, 179. Patenaude’s partner radioed for assistance. 3RP 177-78, 238. Sykes eventually fell to the ground, but he pulled Patenaude down with him. Sykes landed on top of Patenaude and continued to strike him. 3RP 178, 184. Sykes was finally subdued after two additional officers arrived. 3RP 169, 258.

² Patenaude testified that police rules regarding the use of force permitted him to fight back and even “one-up” an assailant, *i.e.*, to respond with a higher level of force. 3RP 187. Patenaude acknowledged, however, that deadly force would not have been appropriate in the altercation with Sykes. 3RP 187-88.

Patenaude suffered a black eye as well as elbow and knuckle abrasions. 3RP 188-91, 240; Exs. 5, 6, 7, and 8. Among other injuries, Sykes suffered a bloody ear. Exs. 10 and 11 (photos of Sykes's injuries). Sykes received medical treatment at the scene and, like Patenaude, was later taken to Harborview for his injuries. 3RP 192-93, 221.

Sykes was interviewed at the scene by a police sergeant investigating the officers' use of force. 3RP 195. In the interview, Sykes complains that Patenaude pushed him and then swung first. 3RP 196. Although Sykes did not testify, a video of the interview was admitted over the State's objection. Ex. 2; 7RP 488-96 (State's initial objection). In the video, Sykes also explains that he hit McAuliff because McAuliff threw hot coffee at him. 3RP 198.³

On cross-examination, Patenaude emphasized that it was unusual for him to use *any* force toward an arrestee. As of August of 2015, he had been involved in only three such incidents for the calendar year, including the incident involving Sykes. 3RP 216-17.

On redirect, Patenaude testified that police officers continued to use force against Sykes only because Sykes refused to surrender. 3RP 255. Patenaude elaborated:

³ See also 3RP 252, 257 (bystander's testimony that McAuliff indeed threw hot coffee at Sykes). Testimony differed, however, as to whether McAuliff was punched before he threw the coffee. E.g. 4RP 295.

[E]very one of our videos and all of our [uses of force] are put under extrem[e] scrutiny through what we call a force review board. And they review each strike, each command given, et cetera *This one's made it through the force review board without a single critique.*

3RP 225-26 (emphasis added). Defense counsel objected on relevance grounds. 3RP 226. Without elaborating on the reason for its ruling, the trial court allowed the “answer to stand.” 3RP 226.

3. Discussion of jury instructions

The court gave a standard “defense of self” instruction as to count 2, the charge involving civilian McAuliff. CP 71 (instruction 15); WPIC 17.02.⁴ Instruction 15 also informed jurors that Sykes was entitled to “act on appearances” in defending himself; he did not have to be in actual danger of injury. CP 71; WPIC 17.05. As to the McAuliff charge, the court also instructed jurors that Sykes was permitted to stand his ground upon attack by the complainant, and had no duty to retreat. CP 71; WPIC 17.05.

The court, however, gave a heightened self-defense instruction as to the charge involving Officer Patenaude. CP 70 (instruction 14, instructing jury that use of force was “only lawful when used by a person who is *actually about to be seriously injured*” (emphasis added)); see

⁴ 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.02, at 253-56 (3d ed. 2008).

State v. Ross, 71 Wn. App. 837, 863 P.2d 102 (1993) (setting forth standard for self-defense against law enforcement officer). Over defense objection, the court refused to give the related “act on appearances” and “no duty to retreat” instructions, which counsel had also proposed as to the Patenaude count. 3RP 275-78; 4RP 349-52, 359; see CP 42, 46 (proposed instructions).

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A MODIFIED “NO DUTY TO RETREAT” INSTRUCTION AS TO THE CHARGE INVOLVING THE POLICE OFFICER.

By failing to propose a modified “no duty to retreat” instruction that incorporated the proper self-defense standard under Ross, 71 Wn. App. 837, defense counsel provided Sykes ineffective assistance. Sykes was entitled to such an instruction, and the court was likely to give it. Counsel’s deficient performance prejudiced Sykes. The jury was given such an instruction as to count 2. In light of this, the lack of such an instruction as to count 1 suggested that Sykes was *not* permitted to stand his ground during the confrontation with the police officer. Because it is reasonably likely that the lack of such an instruction affected the jury’s verdict on the officer-related count, reversal is required.

“Jury instructions must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard ‘manifestly apparent to the average juror.’” State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (quoting State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)).

It has long been the law in Washington that a person bears no duty to retreat where he is assaulted in any place where he has a right to be. Allery, 101 Wn.2d at 598. An accused person is entitled to a “no duty to retreat” instruction whenever there is sufficient evidence in the record to support it. Id. (citing State v. King, 92 Wn.2d 541, 599 P.2d 522 (1979)).

The federal and state constitutions guarantee the right to effective representation in a criminal prosecution. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). An accused receives ineffective assistance when (1) counsel’s performance is deficient, and (2) there is a reasonable probability the deficient representation prejudiced him. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94). This is a separate question from whether there was

sufficient evidence to convict. State v. Jury, 19 Wn. App. 256, 268, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

A claim of ineffective assistance of counsel presents a mixed question of fact and law that this Court reviews de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Counsel's failure to propose a modified version of WPIC 17.05 to accompany the count 1 self-defense instruction was ineffective. See State v. Kylo, 166 Wn.2d 856, 868-69, 215 P.3d 177 (2009) (failure to research and apply relevant law cannot be considered reasonable tactics). Although the general-use "no duty to retreat" pattern instruction contains an improper "reasonable grounds" standard, it would have been a simple matter to replace it with appropriate language.

For example, defense counsel proposed an instruction as to count 1 incorporating the language from WPIC 17.05. The proposed instruction states:

It is lawful for a person who is in a place where that person has a right to be *and who has reasonable grounds for believing that he or she is being attacked* to stand his/her ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 46 (emphasis added). But the italicized language represents an incorrect statement of the law as to the charge involving Patenaude. Thus, it is not surprising the court rejected the proposed instruction.

But the italicized language could easily have been replaced so that the instruction instead read as follows:

It is lawful for a person who is in a place where that person has a right to be and *who is actually about to be seriously injured* to defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

Such an instruction correctly states the law. Allery, 101 Wn.2d at 598; Ross, 71 Wn. App. 837. As stated above, the court was likely to give such an instruction, given that it was skeptical of the State's claim that the "no duty to retreat" instruction was wholly inapplicable as to count 1. 3RP 275-78. After all, running from a police officer would present its own hazards.

The next question is whether the deficient representation prejudiced Sykes. It did. State v. Williams illustrates the need for such an instruction. 81 Wn. App. 738, 916 P.2d 445 (1996), review denied, 140 Wn.2d 1001 (2000). In that case, this Court clarified under which circumstances a "no duty to retreat" instruction is required.

Williams involved an appeal, by co-defendant brothers Charles and Nalen Williams, of convictions for felony murder. Id. at 739. Charles testified that while he was standing in the street, the decedent, Joseph Wade, threatened him with a knife. Charles responded by grabbing a shovel, advancing on Wade, and then backing away. Nalen arrived on the

scene and took the shovel. Charles left and grabbed a pitchfork. When he returned, Nalen was trying to disarm Wade by knocking the knife from his hands. Charles testified that Nalen killed Wade when he hit him in the back of the head with the shovel. Nalen claimed that Charles had inflicted the lethal blow with the pitchfork. Id. at 740.

The trial court instructed the jury that self-defense is justified only when the force used “is not more than necessary.” Id. at 741. The court also instructed the jury that force was “necessary” only where no “reasonably effective alternative to the use of force appeared to exist and that the amount of force was reasonable to effect the lawful purpose intended” Id. But the trial court denied the defendants’ request for a “no duty to retreat” instruction. Id.

This Court reversed. In doing so, this Court repeated the long-standing rule that “[f]light, however reasonable an alternative to violence, is not required” in Washington. Id. at 743-44. This Court recognized that the failure to instruct the jury that there was no duty to retreat raised the possibility that the jury had rejected the Williams’ claims on improper grounds. Without the “no duty to retreat” instruction, a reasonable juror could have believed the testimony of Charles, or Nalen, or both, but could have erroneously concluded that the brothers used more force than was necessary simply because they did not retreat. Id. at 744.

Unlike in Williams, the self-defense instruction relating to Officer Patenaude did not explicitly include a requirement that any use of force be not more than was necessary.⁵ But here, confusion was likely to have resulted from the presence of the “no duty to retreat” rule in another instruction. The court provided an instruction as to the civilian, McAuliff, notifying jurors that Sykes was entitled to stand his ground and had no duty to retreat during his confrontation with McAuliff. The absence of such an instruction as to Patenaude would have led jurors to believe that Sykes was required to retreat rather than fight. The jury noticed the instructions as to each count were different and inquired whether the “reasonable person” standard applied to the charge involving Patenaude. CP 51. The jury would have also noticed the lack of “no duty to retreat” instruction, and was likely to have attributed significance to its absence.

In summary, where, as here, jury instructions may lead a jury to believe that retreat is an alternative to the use of force, it is crucial that the “no duty to retreat” instruction be given. Williams, 81 Wn. App. at 744. A reasonable juror could easily have found that Sykes was otherwise entitled to defend himself, but failed to avail himself of an opportunity to retreat. Sykes has shown prejudice because, under the circumstances, it is

⁵ Instruction 14, regarding use of force as to a police officer, does not refer to the requirement that the force be not be more than necessary. CP 70. However, instruction 15, the general self-defense instruction, does include that requirement, and it also defines “necessary.” CP 71-72.

reasonably likely the jury—the same jury that deadlocked as to the McAuliff count—would have reached a different result had it been properly instructed. See Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (test for “reasonable probability” of prejudice is whether it is reasonably probable that, without the error, at least one juror would have reached a different result).

Because counsel’s failure to propose a modified “no duty to retreat” instruction was deficient and prejudicial, reversal is required.

2. THE OFFICER’S TESTIMONY ABOUT THE FORCE REVIEW BOARD’S APPROVAL OF HIS ACTIONS IN THIS CASE CONSTITUTED AN IMPROPER OPINION ON GUILT.

Over a relevance objection, Patenaude testified that his use of force toward Sykes had been approved by the “force review board.” Sykes did not deny striking Patenaude but raised a self-defense claim, and the jury was so instructed.⁶ Yet Patenaude’s testimony suggested that a group of law enforcement experts had determined that Patenaude’s actions were justified, and that, as a result, Sykes’s actions were not. The testimony was, therefore, an unconstitutional opinion on Sykes’s guilt. For this reason too, reversal is required.

⁶ The State may not, at this point, claim that the self-defense instruction was unwarranted. See, e.g., State v. Bolar, 118 Wn. App. 490, 509, 78 P.3d 1012 (2003) (State cannot challenge giving of instructions where State chose not to cross-appeal).

The role of the jury is to be held “inviolable.” Const. art. I, §§ 21, 22. The jury’s fact-finding role is essential to the constitutional right to trial by a jury of one’s peers. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Therefore, “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). An opinion on guilt, even by mere inference, invades the province of the jury. State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008); State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985).

In general, appellate courts will not consider issues raised for the first time on appeal.⁷ State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a). But a party can raise an error for the first time on appeal if it is a manifest error affecting a constitutional right. Kirkman, 159 Wn.2d at 926; RAP 2.5(a)(3). An accused must show the constitutional error actually affected his rights at trial, thereby demonstrating the error is “manifest.” Kirkman, 159 Wn.2d at 926-27. “Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error.” Id. But, “an explicit or nearly explicit” opinion on the defendant’s

⁷ Defense counsel objected to the testimony on relevance grounds only. See State v. Guloy, 104 Wn. 2d 412, 422, 705 P.2d 1182 (1985) (with obvious exceptions, “[a] party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial”).

guilt or a victim's credibility may constitute manifest error. Id. at 936 (noting, "[r]equiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow"). Such an error, however, is still subject to harmless error analysis. Id. at 927.

In determining whether opinion testimony may be admitted without violating the constitutional rights of the accused, a court must carefully 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. Montgomery, 163 Wn.2d at 591. As for the first and second factors, testimony from a law enforcement officer may be especially problematic because the officer's testimony often carries a "special aura of reliability." State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). The factors notwithstanding, moreover, opinion testimony as to the guilt of the accused is clearly inappropriate in criminal trials. Montgomery, 163 Wn.2d at 591.

The following opinion testimony has been held to be impermissible. A police officer talking about how a police dog tracked a defendant's "guilt scent" was held to be inadmissible opinion testimony. State v. Carlin, 40 Wn. App. 698, 703, 700 P.2d 323 (1985). Similarly, an

ambulance driver's testimony that an accused was "calm and cool" when hearing about his wife's death was inadmissible opinion testimony on guilt. State v. Haga, 8 Wn. App. 481, 490, 507 P.2d 159 (1973). In Black, moreover, a rape counselor's testimony that the complainant suffered from "rape trauma syndrome" was held inadmissible because such testimony would "invade the jury's province of fact-finding and add confusion rather than clarity." 109 Wn.2d at 350 (quoting State v. Saldana, 324 N.W.2d 227, 230 (Minn.1982)). And in State v. Quaale, a driving under the influence case, a trooper's opinion about a driver's impairment, based solely on the results of the horizontal gaze nystagmus (HGN) field test rather than his own observations of the accused, was held to be improper opinion testimony. 182 Wn.2d 191, 201-02, 340 P.3d 213 (2014).

As in the foregoing cases, Patenaude's testimony improperly invaded the province of the jury by offering the opinion of a "review board" that Patenaude's actions were appropriate. Jurors would be likely to attribute both authority and expertise to such an entity. And if Patenaude's actions were appropriate, then Sykes's response was necessarily invalid. As in Black, an opinion purporting to evaluate the behavior of the complainant may be tantamount to an opinion on the guilt of the accused. 109 Wn.2d at 349.

The opinion testimony in this case violated Sykes's his right to have all facts critical to his guilt determined by the jury. It was, moreover, an "explicit or nearly explicit" opinion on Sykes's guilt and therefore manifest constitutional error. Kirkman, 159 Wn.2d at 936.

Of course, manifest constitutional error may still be declared harmless. But such a constitutional error is harmless only if the State establishes, beyond a reasonable doubt, that any reasonable jury would have reached the same result absent the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The State cannot do so here. The opinion testimony improperly bolstered Patenaude's testimony as a whole, and, in particular, his denials that he pushed Sykes. This likely affected the jury's consideration of whether Sykes in fact faced serious injury at Patenaude's hands.

In summary, the admission of the opinion testimony was manifest constitutional error, and the State cannot demonstrate that the error was harmless beyond a reasonable doubt. For this reason as well, reversal is required.

3. COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE UNCONSTITUTIONAL OPINION TESTIMONY ON APPROPRIATE GROUNDS.

As an explicit or nearly explicit opinion on guilt, the foregoing claim may be raised for the first time on appeal. In an abundance of caution, however, Sykes also asserts that counsel's objection, arguably on incorrect grounds, constituted ineffective assistance. See 3RP 226 (objecting to challenged testimony on relevance grounds only).

An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) there is a reasonable probability the deficient representation prejudiced him. Strickland, 466 U.S. at 687. With respect to the deficient performance prong, "[t]here is a strong presumption that defense counsel's conduct is not deficient," but an accused rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Where the accused claims ineffective assistance based on counsel's failure to challenge the admission of evidence, he must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (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).

Here, counsel's performance was deficient. Counsel recognized the testimony was improper but failed to advise the court as to what, precisely, was wrong with it. Counsel objected that the evidence was irrelevant. The evidence, however, *was* arguably relevant. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401; see also State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (even minimally relevant evidence is admissible). The evidence was, arguably, relevant in that it offered an expert's opinion on the altercation. The testimony was problematic for a host of other reasons, however, and the court was likely to have sustained an objection on correct grounds. Saunders, 91 Wn. App. at 578.

As discussed above, moreover, admission of the opinion testimony was prejudicial. It was prejudicial for the same reason it was arguably relevant: It offered an expert's opinion, or the consensus of a group of experts, regarding the altercation between Sykes and Patenaude. The jury was likely to key in on this testimony.

Counsel's failure to object on the appropriate legal grounds was, therefore, both deficient and prejudicial. Reversal is also required on this ground.

4. THIS COURT SHOULD NOT AWARD THE COSTS OF APPEAL.

If Sykes does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 of the Rules of Appellate Procedure. This Court has ample discretion to deny the State's request for costs. For example, 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).

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Here, the trial court made no such finding. Instead, the trial court waived all non-mandatory fees as well as interest. CP 84.

The record establishes any award of appellate costs would be similarly unwarranted. The trial court found Sykes to be indigent and found that he could not contribute anything to the costs of appellate review. Supp. CP __ (sub. no. 63, Order Authorizing Appeal In Forma Pauperis). Indigency is presumed to continue throughout the appeal.

State v. Sinclair, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719 at *7 (Jan. 27, 2016) (citing RAP 15.2(f)). The trial court indicated, moreover, that it believed Sykes suffered from mental illness, and it ordered mental health treatment as a condition of community custody. 6RP 477; CP 90. Finally, Sykes has been incarcerated for all but a few brief months since a 1994 conviction, and there is no indication in the record that he has employment prospects. Supp. CP ___ (sub. no. 57, State's Presentence Report, at 2); see also Supp. CP ___ (sub. no. 64, Declaration of Indigency).

In summary, in the event that Sykes does not substantially prevail on appeal, this Court should not assess appellate costs against him. Provided that this Court believes there is insufficient information in the record to make such a determination, this Court should remand for the trial court to consider the matter.

D. CONCLUSION

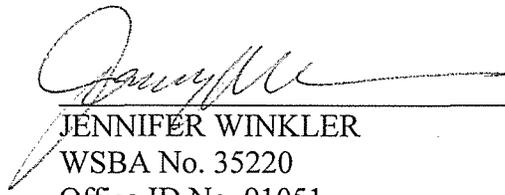
Defense counsel was ineffective for failing to propose a modified “no duty to retreat” instruction as to the charge involving the police officer. Moreover, the officer’s testimony about the force review board’s approval of his use of force against the appellant constituted an unconstitutional opinion on guilt. In addition, counsel was ineffective for failing to object to the improper opinion testimony on the appropriate grounds. For all these reasons, reversal is required.

Finally, this Court should reject any request by the State to order Sykes to pay the costs of his appeal.

DATED this 8TH day of February, 2016.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Appellant,)	
)	
v.)	COA NO. 73914-0-I
)	
DAVID SYKES,)	
)	
Respondent.)	

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 8TH DAY OF FEBRUARY 2016, 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] DAVID SYKES
 DOC NO. 718414
 WASHINGTON STATE PENITENIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF FEBRUARY 2016.

x *Patrick Mayovsky*