

NO. 34674-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA AMIR FARKAS,

Appellant.

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

The Honorable Brian Tollefson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. A police officer was permitted to express an inadmissible opinion about Mr. Farkas' guilt.

2. Mr. Farkas was denied the effective assistance of counsel when his trial attorney failed to object to a police officer's testimonial opinion about his guilt.

3. The state failed to prove the value of a damaged mirror exceeded \$50, an essential element of the crime of malicious mischief in the third degree.

4. The state failed to prove the essential element of assault in the fourth degree assault charge.

5. The state failed to prove the essential element of violation of a no contact order.

Issues Pertaining to Assignments of Error

1. Was Mr. Farkas denied the effective assistance of counsel when his trial attorney failed to move to strike an allegation that Ms. Denning was the victim of several crimes when the state had not established the commission of any crimes?

2. Did the police officer express an impermissible opinion about Mr. Farkas' guilt when she testified that Ms Denning was the victim of crimes the state had not proven, thus inferring that the crimes had been committed by Mr. Farkas?

3. Were Mr. Farkas' due process rights violated when the state failed to prove an essential element of the crime of malicious in the third degree?

4. Were Mr. Farkas' due process rights violated when the state failed to prove an essential element of the crime of assault in the fourth degree?

5. Were Mr. Farkas' due process rights violated when the state failed to prove an essential element of the crime of violation of a no contact order?

B. STATEMENT OF THE CASE

1. Procedural Facts

By information filed in Pierce County Superior Court on October 4, 2005, the State of Washington charged appellant Joshua Amir Farkas with one count of domestic violence court order violation contrary to RCW 26.50.110(5), one count of assault in the fourth degree contrary to RCW 9A.36.041(1),(2), and one count of malicious mischief in the third degree contrary to RCW 9A.48.090(1)(a),(2)(a). CP 1-3.¹ A jury convicted Mr. Farkas as charged, and the court sentenced him within the standard range. CP 6-11. This timely appeal follows. CP 28-39.

2. Substantive Facts

¹ CP refers to the clerk's papers designated from Pierce County Superior Court Cause Number 05-1-04866-4.

Mr. Farkas did not testify at trial, but his counsel argued that the state had failed to prove its case beyond a reasonable doubt. RP² 205-208. The state's witnesses testified as follows.

Officer Ingeborg Carey of the Pierce County Sheriff's department testified that she has worked as a police officer for nine years. RP 44. She also testified that she has been assigned to the Spanaway area for most of that time. RP 44-45. Carey testified that she responded to a 911 call made at 8:07PM on September 22, 2005. RP 45. She testified that the caller was the "victim" of the alleged crimes, even though there was no proof that any crimes had been committed or that she was the victim, just an allegation made via the 911 call. Id. Carey arrived at 20313 13th Ave. E in Spanaway some time near 8:30 PM. RP 55. When she arrived minutes after the call, the 911 caller, Zulieka Denning was calm. RP 54. Carey did not observe an altercation of any sort. RP 52-53. She was shown a piece of furniture on its side with an attached broken mirror which she photographed. RP 47. Ms. Denning did not have any readily apparent injuries, but Ms. Denning showed her a small cut on the inside of her lip which she said Mr. Farkas caused by slapping her. RP 49.

Officer Jason Tate of the Pierce County Sheriff's Department contacted Ms. Denning on September 28, 2005. Ms. Denning provided a written statement at that time. RP 67-68. Tate also contacted Marquita

² "RP" denotes the verbatim report of proceedings held March 2, 2006.

Sanders who was also present at the house during the alleged altercation. Ms. Sanders also provided a written statement in mid-October 2005. RP 69.

Marquita Sanders testified that she was helping Ms. Denning move on September 22, 2005. RP 84. She testified that she saw Mr. Farkas on the date of the move and he told Ms. Denning and herself not to move any furniture out of the house. RP 87. She also testified that while she was outside she heard a noise from inside that sounded like a slap. She did not witness an altercation but when she went to the room where the Ms. Denning and Mr. Farkas were located, they were breathing hard and standing on opposite sides of the room. RP 88-89. She testified that Ms. Denning was holding her mouth. RP 89-90.

She further testified that she and Ms. Denning were leaving the house and they heard a noise that sounded like something breaking. On investigation Ms. Sanders testified that she saw a piece of Ms. Denning's furniture on its side with a broken mirror. RP 92-95. Ms. Sanders did not see a physical altercation and did not see Mr. Farkas break anything. RP 103, 108.

Ms. Sanders testified inconsistent with her October statement to the police. She testified that she was at the house when Mr. Farkas arrived, but later told the police on October 17, 2005 that Mr. Farkas was at the house before she and Ms. Denning arrived. RP 101.

Ms. Denning called 911 because she was upset and jealous that Mr. Farkas her former boyfriend and father of her child wanted to have a relationship with Ms. Sanders. RP 119, 143. She decided to lie and make up

the incident before calling 911. RP 134. Ms. Denning decided to testify to clear her conscience because she did not want Mr. Farkas to go to jail for her jealous lies. RP 120, 136. Ms. Denning told the 911 operator that Mr. Farkas slapped her and broke a mirror. Ms. Denning has had some involvement with the police and has several juvenile and adult convictions for matters involving honesty. RP 141.

Ms. Denning informed her friend Ms. Sanders of her plan to call 911. RP 128. She told police that Mr. Farkas slapped her which causes a small cut on the inside of her lip, but she actually got the cut when her two year old bumped her head into Ms. Denning. RP 139-40. She also admitted that she tipped over the dresser while trying to move it and the mirror broke. She left it on the floor because Charles her aunt's boyfriend was helping her move and it did not need to be picked up for him to move it. RP 137, 155. She testified truthfully that on September 22, 2005, Mr. Farkas was never at the house.

Ms. Denning's aunt and her boyfriend Charles were at the house when the police arrived. They had been helping move furniture, but the police did not interview them. RP 128-29. Ms. Denning is not interested in Mr. Farkas or his future but did not want to have the 911 call lie on her conscience. RP 147-49.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TESTIMONIAL OPINION ABOUT MR. FARKAS' GUILT.

Defense counsel should have objected to the testimonial opinion about Mr. Farkas' guilt, and counsel's failure to do so constituted ineffective assistance. Defense counsel was ineffective for failing to object to Officer Carey's testimony that Ms. Denning was the victim of crimes committed by Mr. Farkas, because this invaded the province of the jury by offering opinion testimony regarding guilt. There was no apparent strategic advantage to be gained by permitting the police officer to express her opinion about Mr. Farkas' guilt, especially considering the unfair prejudicial impact. The lack of any objection in this circumstance constitutes deficient performance by defense counsel. Counsel's deficient performance rose to the level of constitutionally ineffective assistance because of the resulting prejudice to the defendant.

a. The Test For Ineffective Assistance of Counsel.

The Washington Supreme Court recently summarized the law regarding a defendant's right to the effective assistance of counsel:

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). In

Strickland [v. Washington, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052, 2063-64 (1984)], the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this assessment, the appellate court will presume the defendant was properly represented. Deficient performance is not shown by matters that go to trial strategy or tactics.

Second, the defendant must show prejudice -- "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. If either part of the test is not satisfied, the inquiry need go no further.

State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (citations omitted).

In State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), review denied, 150 Wn2d 1024, 81 P.3d120(2003), the Court addressed the issue of ineffective assistance of counsel for failure to request an intoxication jury instruction to refute the defendant's ability to form the element of intent. Kruger, 116 Wn. App. at 694. The Court held that Kruger was entitled to the instruction because there was substantial evidence of intoxication that could have impaired the defendant's ability to formulate intent. Moreover Kruger was prejudiced by the omission because the defense theory of the case focused on the defendant's intent and there was a reasonable probability that the outcome of the trial would have differed with the instruction. Kruger, 116 Wn. App. at 694-95.

In the instant case, the evidence against Mr. Farkas was purely circumstantial. When Officer Carey testified that Ms. Denning was the "victim", she informed the jury, as a representative of the state that Mr. Farkas caused Ms. Denning to be the victim by committing the charged crimes. If counsel had moved in limine to exclude reference to Ms. Denning as the victim or objected to this testimony, there is a reasonable probability that the outcome would have differed. Moreover, counsel could have protected Mr. Farkas constitutional right to have the jury decide the facts. Kruger, 116 Wn. App. at 694-95.

b. Defense Counsel's Performance Was Deficient.

In the instant case, defense counsel should have taken steps to preclude Carey from testifying that Ms. Denning was a victim to a crime because the officer's allegation was a violation of Rule of Evidence 701 which governs the admissibility of opinion testimony by lay witnesses. It requires lay opinion be limited to that which is "rationally based on the perception of the witness and [is] helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." ER 701. It has been interpreted to prohibit a witness from offering testimony in the form of an opinion regarding the guilt . . . of the defendant "because it "invad[es] the exclusive province of the [jury]." ' ' " State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (alterations in original) (citations omitted). The

testimony in the instant violated ER 701 and Mr. Farkas' right to a jury trial. If counsel was surprised by the testimony, counsel should have objected when Carey made the allegation, moved to strike, and moved for a mistrial, or alternatively, requested a curative instruction. Counsel's performance was deficient because he failed to do any of these things.

c. Defense Counsel's Deficient Performance
Was Unfairly Prejudicial

In the instant case, there were no tactical reasons for failing to object the opinion testimony of Carey. "An opinion as to the defendant's guilt is [always] an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), citing, State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967), overruled on other grounds by, City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), review denied, 123 Wn2d 1011, 869 P.2d 1085 (1994). "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) (emphasis added). Admission of "impermissible opinion testimony regarding the defendant's guilt may be reversible error because admitting such evidence 'violates [the defendant's] constitutional right to a jury trial, including the

independent determination of the facts by the jury." Demery, 144 Wn.2d at 759, quoting, Carlin, 40 Wn. App. at 701, citing, Dubria v. Smith, 224 F.3d 995, 1001-02 (9th Cir. 2000), cert. denied, 531 U.S. 1148, 148 L. Ed. 2d 963, 121 S. Ct. 1089 (2001).

Counsel's deficient performance was unfairly prejudicial because it denied Mr. Farkas important constitutional rights: specifically, the right to have the jury decide the facts. Moreover, considering that the only eyewitness to the case was Ms. Denning and she stated that no crimes occurred, it is reasonably possible that the jury would have had a reasonable doubt in this case but for Carey's opinion testimony. Consequently, defense counsel's failure to object constituted ineffective assistance of counsel.

d. Conclusion

In sum, Mr. Farkas was denied the effective assistance of counsel because he was unfairly prejudiced by his counsel's failure to move to strike opinion testimony regarding his guilt. Consequently, his conviction must be reversed and his case remanded for a new, fair trial in which his constitutional right to effective assistance of counsel will be honored.

2. MR. FARKAS' RIGHT TO A JURY TRIAL WAS VIOLATED WHEN A PROSECUTION WITNESS EXPRESSED HER OPINION ABOUT MR. FARKAS' GUILT.

a. Improper Testimony

Mr. Farkas' constitutional right to a jury trial was violated because Officer Carey improperly expressed her opinion as to Mr. Farkas' guilt, which denied him the right to a fair trial and invaded the province of the jury. See RP 45-46. The general rule in this State is that "[n]o witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d at 348. (emphasis added) (citing State v. Garrison, 71 Wn.2d at 315. See also Seattle v. Heatley, 70 Wn. App. at 577. Testimony does not constitute an opinion as to guilt if it is "not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence." Heatley, 70 Wn. App. at 578.

Opinion testimony must be based on knowledge. ER 701; ER 702; State v. Kunze, 97 Wn. App. 832, 850, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 404 (2000); Riccobono v. Pierce County, 92 Wn. App. 254, 268, 966 P.2d 327 (1998). Proper lay opinion must be based on personal knowledge. ER 701; Kunze, 97 Wn. App. at 850; State v. Carlson, 80 Wn. App. 116, 124, 906 P.2d 999 (1995); Advisory Committee's Note to FED. R. EVID. 701, 56 F.R.D. 183, 281. Proper expert opinion must be based on scientific, technical, or specialized knowledge ER 702; Kunze, 97 Wn. App. at 850; Carlson, 80 Wn. App. at 124.

Rule of Evidence 701 governs the admissibility of opinion testimony by lay witnesses. It requires lay opinion be limited to that which is "rationally based on the perception of the witness and [is] helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." ER 701. As recently as 2001 the Supreme Court reiterated that, "no witness may offer testimony in the form of an opinion regarding the guilt . . . of the defendant; such testimony is unfairly prejudicial to the defendant 'because it "invad[es] the exclusive province of the [jury]." ' " State v. Demery, 144 Wn.2d at 759, quoting, City of Seattle v. Heatley, 70 Wn. App. at 577, quoting, State v. Black, 109 Wn.2d at 348.

The testimony in the instant case violated Mr. Farkas right to a jury trial because it denied him the right to have the jury determine whether the facts constituted the crimes charged. By stating that Ms. Denning was the “victim”, officer Carey told the jury that Mr. Farkas was guilty of committing the crimes. This impermissibly invaded the province of the jury and Mr. Farkas’ right to have the jury determine the facts of his case.

In Warren v. Hart, 71 Wn.2d 512, 514, 429 P.2d 873 (1967), the Supreme Court “noted that evidence regarding the issuance or nonissuance of a citation by a police officer would be inadmissible as opinion evidence.” State v. Demery, 144 Wn.2d at 760. The Court held that “such evidence would constitute indirect opinion evidence, subject to the evidentiary prohibition. “ Demery, 144 Wn.2d at 760-761, citing, Warren, 71 Wn.2d at 514; and Kostelecky v. NL Acme Tool/NL Indus., Inc., 837 F.2d 828, 830-31 (8th Cir. 1988) (asserting that an accident report, which contained a statement that the accident had been caused by the defendant's conduct, should not have been admitted into evidence because it constituted impermissible opinion evidence).

In State v. Dolan, 118 Wn. App. 323; 73 P.3d 1011 (2003) the evidence showed that both Dolan and his soon to be ex-wife had access to the complainant at pertinent times. Two state witnesses: a social worker

and a police officer testified that the injuries did not come from the soon to be ex-wife. The Court of Appeals held that this was reversible error because “it was up to the jury, not a witness, to opine on the significance of that fact.” State v. Dolan, 118 Wn. App. at 328-329.

In the instant case, Carey expressed her opinion that Mr. Farkas was guilty of the crimes charged when she indicated that Ms. Denning was the victim. RP 46. In response to a question from the prosecutor regarding whether she contacted anyone on the date of the incident, Officer Carey responded that, “she [Ms. Denning] was the victim”. RP 46. By direct statement and inference, the foregoing testimony amounted to a direct comment about Mr. Farkas' guilt by telling the jury that Ms. Denning was in fact the victim of a crime without allowing the jury to determine whether or not a crime had been committed. As in Warren and Dolan, the opinion testimony invaded the province of the jury to decide the significant fact of guilt or innocence. Black, supra. This was reversible error. State v. Dolan, 118 Wn. App. at 328-329.

b. The Error May Be Raised For The First Time On Appeal.

Although defense counsel failed to object to the foregoing testimony, the issue may be raised for the first time on appeal because a testimonial opinion as to guilt violates a defendant's constitutional right to trial by jury,

including the independent determination of the facts by the jury. State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), State v. Wilber, 55 Wn. App. 294, 297, 777 P.2d 36 (1989) review denied, 124 Wn.2d 1018 (1994); State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985); RAP .5(a)(3). Because improper opinion testimony violates the constitutional right to a trial by jury, it may be raised for the first time on appeal. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).³

Furthermore, "[a]n opinion as to the guilt of the defendant is particularly prejudicial and improper where it is expressed by a government official, such as a sheriff or a police officer." State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992). Because the witness who expressed an opinion as to Mr. Farkas' guilt was an experienced police officer, Mr. Farkas has made a plausible showing that the expression of the officer's opinion as to his guilt had "practical and identifiable consequences" in his trial. See Heatley, 70 Wn. App. at 644-45. Therefore, the error is "manifest" constitutional error which may be raised for the first time on appeal.

³ RAP 2.5(a)(3) provides in pertinent part that "a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right."

c. The Conviction Must Be Reversed

This Court should reverse Mr. Farkas' conviction because the police officer's expression of her opinion as to Mr. Farkas' guilt reasonably could have influenced the jury's verdict. The officer's expression of her opinion as to Mr. Farkas' guilt was constitutional error, Jones, 71 Wn. App. at 813, which is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Guloy, 104 Wash.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 determining whether constitutional error is harmless, Washington courts use the "overwhelming untainted evidence test," under which appellate courts look only to the untainted evidence to decide if it is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wash.2d at 426, 705 P.2d 1182; State v. McDaniel, 83 Wn. App. 179, 187-88, 920 P.2d 1218 (1996).

Washington courts have repeatedly recognized that testimonial opinions about a defendant's guilt are unfairly prejudicial and hence inadmissible because they violate the defendant's right to a fair and impartial trial by invading the exclusive province of the finder of fact. Heatley, 70 Wn. App. at 573; Carlin, 40 Wn. App. at 701; Sanders, 66 Wn. App. at 387. As already discussed, the opinion as to guilt testimony here was "particu-

larly prejudicial and improper" because it came from a police officer who took the time to inform the jury about her many years of service as a police officer in this particular area in Spanaway. See Sanders, 66 Wn. App. at 387; RP 44-45.

In State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973), the Court of Appeals reversed a double murder conviction because indirect opinion testimony about the defendant's guilt could have been a factor in the jury's verdict. Haga, 8 Wn. App. at 489-92. Haga was convicted of the first-degree murders of his wife and infant daughter based on evidence that was entirely circumstantial. At trial, an ambulance driver testified that Haga showed no signs of grief at the deaths of his wife and daughter. The driver also stated that, based on his experience as a deputy coroner, the defendant's reaction was unusually "calm and cool." Haga, 8 Wn. App. at 490.

The Court in Haga court held that the ambulance driver's testimony was wrongfully admitted because it implied "his opinion that the defendant was guilty, an intrusion into the function of the jury. . . ." Haga, 8 Wn. App. at 492. The appellate court reversed Haga's conviction because this testimony could have been a contributing factor in the jury's verdict. Id. As in Haga, the evidence against Mr. Farkas was circumstantial. The

complainant testified that she lied to the police because she was jealous and wanted to get him into trouble. There were no eyewitnesses. Thus the testimony was purely circumstantial and problematic for the reasons appellant has previously argued. See § C.1.c., supra.

In sum, the jury reasonably could have had a question about whether or not a crime was ever committed. Ms. Denning said she lied to the police and Ms. Sanders could only testify to hearing what sounded like a scuffle. She did not witness an assault or see anyone damage a mirror. The jury's resolution of these questions likely was influenced by Carey's reassurance that Ms Denning was in fact the victim of the crimes charged. RP 46. Consequently, the opinion testimony about Mr. Farkas' guilt was not harmless beyond a reasonable doubt, and his conviction must be reversed.

3. THE STATE FAILED TO PROVE AN
ESSENTIAL ELEMENT OF THE CRIME
OF MALICIOUS MISCHIEF IN THE
THIRD DEGREE, SPECIFICALLY THAT
MR. FARKAS' CAUSED MORE THAN
\$50 DAMAGE TO PROPERTY

Mr. Farkas was charged with malicious mischief in the third degree by causing "physical damage to the property of another." CP 10-12.

The standard of review for a sufficiency of the evidence claim is whether, after viewing evidence in the light most favorable to the State,

any rational trier of fact could have found essential elements of crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201.

A reviewing court will reverse a conviction for insufficient evidence where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. Smith, 155 Wn.2d at 501; Salinas, 119 Wn.2d at 201. The reviewing court "may infer criminal intent from conduct, and circumstantial evidence as well as direct evidence carries equal weight." State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). Credibility determinations are for the trier of fact and are not subject to review. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029, 133 P.3d 474 (1996); State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A challenge to the sufficiency of the evidence is reviewed in the light most favorable to the State. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). The essential elements of the crime of malicious mischief

in the third degree are: (1) knowingly and maliciously; (2) causing physical damage to the property of another and (3) the damage or diminution of property value exceeds \$50 but is less than \$250. RCW 9A.48.090(1)(a); State v. Gilbert, 79 Wn. App. 383, 385, 902 P.2d 182 (1995).

The state did not present any evidence of the cost of repair to the mirror or of the amount of any diminution in value. Absent such evidence, a rational trier of fact could not have found beyond a reasonable doubt, that the value of the damage or the diminution of value exceeded \$50. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). While the Court of Appeals may require remand of imposition of the lesser offense of misdemeanor malicious mischief, it may only do so if there is sufficient evidence to support the lesser offense. State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996).

When reviewing the evidence in the light most favorable to the state, a rational trier of fact could not have found the essential element of value beyond a reasonable doubt. See State v. Green, 94 Wn.2d at 221-22. The evidence was also insufficient to establish that Mr. Farkas knowingly and maliciously caused damage to the property of another. For this reason, this charge should be reversed and dismissed with prejudice.

4. THE STATE FAILED TO PROVE THE
ESSENTIAL ELEMENT OF ASSAULT IN
THE CHARGE OF ASSAULT IN THE
FOURTH DEGREE

The standard of review for determining sufficiency of the evidence is as stated supra § C.3. Mr. Farkas was charged with assault in the fourth degree. RCW § 9A.36.041 Assault in the fourth degree is defined as follows: § 9A.36.041. Assault in the fourth degree

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the fourth degree is a gross misdemeanor.

Id. Identity and presence at the scene of the crime are elements of assault in the fourth degree which must be proved beyond a reasonable doubt. State v. Thomas, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), 123 Wn.2d 877, 872 P.2d 1097(1994). Identity and presence at the scene of the crime are questions of fact for the jury to determine. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 619 (1974). There is insufficient evidence that on September 22, 2005 Mr. Farkas was present at his shared residence with Ms. Denning, or that if he was present that he committed any crimes. There were no eyewitnesses other than Ms. Denning and she stated that

Mr. Farkas did not come to the house on September 22, 2005. The other witness, Ms. Sanders testified that she was at the house but she never saw Mr. Farkas commit a crime. She heard what she thought was a slapping sound and heard something break, but saw nothing. Even if both witnesses' testimony was believed, a rational jury could not have found the essential elements of assault or if there was an assault that Mr. Farkas' committed the act because a slapping sound does not directly or circumstantially indicate that one person slapped another, much less that Mr. Farkas slapped Ms. Denning. It simply indicates that someone heard what sounded like a slap.

In the instant case, the state identified Mr. Farkas as the person in court but failed to introduce sufficient evidence that he was involved in any criminal activity on September 22, 2005. There was simply an insufficient record to connect Mr. Farkas to any criminal activity. Because a rational trier of fact could not have found the essential element of his presence at the scene of the alleged crime, his conviction for assault in the fourth degree should be reversed and the charges dismissed.

5. THE STATE FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CRIME OF DOMESTIC VIOLENCE VIOLATION OF A COURT ORDER: THAT MR. FARKAS WAS PRESENT WHEN THE ALLEGED CRIME OCCURED.

Mr. Farkas was charged with domestic violence violation of a court order. The standard of review for a sufficiency of the evidence claim is set forth supra at § C. 3. RCW § 26.50.110 domestic violence court order violation is defined as follows:

§ 26.50.110. Violation of order -- Penalties

(1) Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in *RCW 26.52.020*, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under *RCW 10.31.100(2) (a)* or *(b)*, is a gross misdemeanor except as provided in subsections (4) and (5) of this section. Upon conviction, and in addition to any other penalties provided by law, the court may require that the respondent submit to electronic monitoring. The court shall specify who shall provide the electronic monitoring services, and the terms under which the monitoring shall be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the convicted person to pay for electronic monitoring.

Id. As in § C.3, supra describing the lack of evidence in the assault in the fourth degree, the defendant's presence at the scene of the crime charged must be proved beyond a reasonable doubt." State v. Thomas, 70 Wn. App. at 211. Because there is insufficient evidence that Mr. Farkas was present at his shared residence with Ms. Denning on September 22, 2005, a rational trier of fact could not find the essential element of his presence at the scene of the alleged crime beyond a reasonable doubt in the charge of violation of a domestic violence protection order. The state failed to present sufficient evidence that Mr. Farkas violated a domestic violence court order, thus his conviction for violation of a domestic violence court order should be reversed and the charges dismissed.

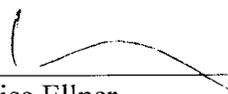
D. CONCLUSION

Mr. Farkas suffered unfair prejudice in his trial when, because of ineffective assistance of counsel, one police officer was permitted to tell the jury by inference that he had committed the crimes charged. The state also failed to prove beyond a reasonable doubt the elements of malicious mischief in the third degree, assault in the fourth degree and violation of a domestic violence court order. For these reasons, the Court of Appeals should reverse his conviction dismiss the charges.

FILED
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COUNTY OF PIERCE
TACOMA, WASHINGTON
JUL 18 2006
BY: [Signature]

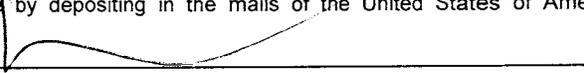
DATED this 17th day of July 2006.

Respectfully submitted,



Lise Ellner
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor 930 Tacoma Ave S. Rm. 946 Tacoma, WA 98492 and Joshua Amir Farkas Pierce County Jail 910 Tacoma Ave S Tacoma, WA 98402 a true copy of the document to which this certificate is affixed, on July 18, 2006. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.



Signature