

NO. 64253-7-1

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

REC'D
MAY 17 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

GLENN SIMMONS,

Appellant.

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

The Honorable Christopher Washington, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Glenn Simmons was denied a fair trial when a police detective testified he believed Simmons was responsible for the alleged offenses.

2. Simmons was denied a fair trial when the detective gave an opinion on the credibility of a state witness.

3. Simmons received ineffective assistance of counsel.

4. Confusing and potentially misleading jury instructions violated Simmons' constitutional right to due process of law.

Issues Pertaining to Assignments of Error

1. Opinions on guilt violate the constitutional right to have factual issues decided by the jury. Did the detective give an improper opinion on guilt by testifying he believed Simmons was responsible for the crimes and that an eyewitness' identification of a different individual was "not successful" and was not "evidence?"

2. Opinions on the veracity of a witness also violate the constitutional right to have factual issues decided by the jury. Did the detective give an improper opinion by testifying an eyewitness was "quite an incredibly good witness" who "had a really good recollection?"

3. Did Simmons receive ineffective assistance of counsel by his counsel's failure to object to inadmissible and prejudicial evidence?

4. Did confusing and potentially misleading jury instructions permit the jury to convict Simmons of residential burglary based on a finding he was on the alleged victim's "real property" as opposed to her "dwelling" as required by RCW 9A.52.025?

B. STATEMENT OF THE CASE

Following trial in King County Superior Court, a jury convicted Glenn Simmons of one count of residential burglary, one count of second-degree theft, and one count of malicious mischief. CP 76-83. Simmons appeals. CP 93-101.

1. Underlying Facts

The charges were premised on an alleged burglary at the North Seattle home of Sarah Rigel on March 11, 2009. Report of Proceedings (RP) 65-68. No witness saw Simmons or anyone else inside the house. See RP 67-69, 157. Although a rock was thrown through the window next to the front door, no witness saw Simmons throw the rock. RP 65-68. Police were unable to obtain any fingerprints from the rock, the window, the doorjamb, or the items

allegedly taken from the house. RP 69, 358-61. There was no forensic evidence suggesting that Simmons was the individual who broke the window, entered the house, or carried the items out of the house. See RP 358-61.

Ryan Mason and a co-worker arrived at Rigel's house that morning to work on her lawn. RP 120-124. When Mason arrived, he heard Rigel's burglar alarm and saw the broken window. RP 124. As he walked to his car to tell his co-worker about the situation, he saw a neighbor yelling and gesturing toward the side of the house. RP 124-25. Mason went to the side of the house and saw a man exiting through a gate in Rigel's backyard, carrying a bag and a computer. RP 124-30. When Mason yelled for the man to stop, the man dropped what he was carrying and ran. RP 132-34. In court, Mason identified Simmons as the man he saw. RP 131.

Susan Derge and her husband Richard Ehle, who live in the neighborhood, each gave differing accounts of seeing a man in their yard that morning. RP 88-109. Derge claimed she looked through a window and saw a "young man" in a red sweatshirt and red sweatpants walking across her front yard. RP 88. She recalled the time as being around 9:30 a.m. RP 279. She described him as

being in his late teens to early 20s, with black hair in a long crew cut. RP 91. She did not see his face. RP 91. Shortly thereafter, she reportedly saw him again without the red sweatshirt, wearing a white t-shirt. RP 91. In court, the state did not ask if Simmons was the man she saw.

Ehle testified he was having breakfast on March 11, when his wife saw someone in their yard. RP 97-99. Ehle went outside and walked down the driveway, where he found a man resting under a tree. RP 99-101. When Ehle confronted the man, he ran or walked down the driveway, jumped the fence, and continued into a neighbor's yard. RP 99, 101. Ehle asked the man what he was doing, but the man said only that he was "moving through," and continued in an eastward direction until he was out of sight. RP 100. Ehle saw his face for about three seconds, and noticed his red sweatshirt and sweatpants. RP 101. Ehle testified that at some point, he also saw the man without his red sweatshirt, wearing a white t-shirt. RP 101. He described the man as being in his early 20s, and "non-white." RP 101. Ehle told Derge he thought the man was "Asian." RP 95, 107.

When investigating police showed Ehle a photographic montage including Simmons' photograph, Ehle picked a different

individual. RP 105-106, 344-45. In court, the state did not ask if Simmons was the man Ehle saw. RP 103.

Valerie Bunn, another neighbor, also was home that morning and claimed she saw a man in her neighbor's yard. RP 201. After trying to call her neighbors, she eventually left her house on foot to find them. RP 202. She found a different lawn care team in a neighbor's yard, and they accompanied her to confront the man. RP 203-07. When Bunn asked the man what he was doing, he said he was waiting for someone. RP 207. Bunn went back to her house, but called 911 when she saw the man again. RP 211-14. She described the man as about 5'8" with very dark hair, wearing a white t-shirt and red track pants. RP 208, 215-16. She noticed tattoos on his arms and wrists. RP 216. Bunn identified Simmons in court as the man she saw.¹ RP 218.

Rigel returned to her house after the alarm company called her at around 9:30 that morning. RP 279, 280-82. Seattle police officer Walter Bruce was the first officer to arrive at the house. He spoke with the yard crew, and went through the house with Rigel,

¹ During trial, Bunn saw Simmons being escorted into the courtroom in handcuffs on at least five occasions. RP 158-160, 167, 223. Because of this fact, the trial court ruled that Bunn would not be allowed to identify Simmons in court. RP 160. However, following an objection by the state, the court reconsidered its ruling, and allowed Bunn to identify Simmons in court. RP 180-81.

who identified the items the alleged burglar dropped as her own.² RP 65-68. Rigel believed everything had been recovered, although she claimed the laptop was damaged. RP 68-69.

Bruce testified that while he was there investigating, he saw a car across the street from Rigel's house, parked in a "no parking" zone, with the keys left in the ignition. RP 70. He also saw a red jacket in the car. RP 71. He had the car impounded. RP 73. No witness actually saw Simmons or anyone else inside the car while it was in front of the house. RP 70-73.

Simmons stipulated he was driving the car on an earlier date, March 3, 2009. RP 11, 272-73; CP 59. On April 6, 2010, when police arrested Simmons, he was sitting next to the car. RP 185-87. However, evidence – including certified copies of the car's registration documents – indicated the vehicle's ownership and control changed frequently, and many individuals, other than Simmons, could have had access to the car. RP 272; Tr. Ex. 9, 57-59.

Tow company employee Sherri Sobotor testified the same car was being held in the tow yard where she worked earlier on the

² The defense stipulated to the value of the items allegedly removed from the house. RP 25; CP 60. Rigel testified to the costs of repairing the damaged window. RP 280.

morning of March 11, 2009. RP 251-54. She testified that a man in a red jogging suit and a multi-colored woven hat came to the tow yard when it opened that morning. RP 251, 267. The man repaired a flat tire on the car, signed to have the car released, and left at approximately 9:30 a.m. RP 257. RP 257-59, 269. To release the car, Sobotor accepted an expired passport as proof of the man's identity, which she photocopied. RP 259-62, 265-66.

At trial, Sobotor did not identify Simmons in court as the man she saw that morning. See RP 252-58. However, the trial court admitted the photocopy Sobotor made of the expired passport, which appeared to contain Simmons' name, photograph, and signature. RP 259-60; Tr. Ex. 62. The trial court also admitted a certified copy of Simmons' driver's license. RP 271; Tr. Ex. 48. The trial court also admitted the paperwork the man signed to release the car, which included a signature. RP 260-262, 271. The trial court allowed the prosecution to admit the exhibits showing the signatures and to argue that the signatures were the same. RP 57-59, 271. However, the trial court prohibited the prosecution from introducing testimony from any witness that the signatures matched. RP 57-59.

2. References to Prior Criminal History

In investigating the alleged burglary, Seattle police detective Dain Jones used a photo montage with witnesses to attempt to identify the suspect. RP 93-95, 105-06, 138-41, 223-25. He showed one montage to Ehle, who identified someone other than Simmons, although his picture was included in the montage. RP 93-94, 105-106, 342. When he showed the same montage to Mason, he identified Simmons as the man he saw. RP 138-41, 353-54. Bunn was shown a different montage, but she also identified Simmons as the man she saw. RP 223-26, 339.

The master copies of both montages were shown to the jury, and defense counsel did not object to their admission, even though the photographs were booking photographs from prior arrests. Tr. Ex. 45, 46; RP 337, 353. This fact was not lost on the trial court, when it noted:

I guess they would assume that everyone wearing red, they appear to be booking photos. I mean, I – and depending on how sophisticated the jury is, but that would be a possible assumption on their part.

RP 24.

Although the trial court observed such an assumption would not be prejudicial if there was evidence Simmons was arrested in

this case prior to the montage being circulated, this was not the case. RP 24-25. The state acknowledged “the evidence would probably come out that the montages were shown the – before the day of his arrest on this case.” RP 25. Nevertheless, defense counsel did not request any remedy, such as using black and white images to hide the distinctive red color of the jail clothes, or editing the photos to remove the distinctive jail clothes from the images. See RP 25-26.

When describing his use of two different booking photographs, in which Simmons had two different haircuts, detective Jones revealed that Simmons had been previously arrested. RP 338-39, 349. In fact, Jones expressly referred to one of the photographs as being “a 2008 photo.” RP 338-39.

In the same vein, officer Richards testified that he was told that Simmons was in custody, and was “a possible suspect in some burglaries.” RP 191 (emphasis added). Again, defense counsel did not object. RP 191.

3. Opinions Regarding Witness Credibility

Detective Jones testified about Bunn’s identification of Simmons, and asserted she was “quite an incredibly good witness.”

RP 333-34. First he described her demeanor while she viewed the photo montage and selected Simmons' photograph:

I thought she was remarkably detailed in her recollection, in things she remembered. At first when I showed her the montage, you know, I presented it to her, she was silent. I mean, not a word, she didn't move, she just sat there and stared at it emotionless and quiet for I don't know how many seconds or whatever. At that point I started to think, oh well, she's not going to recall anything. And then she just jabbed her finger at one of the photos and said ["] that's the one ["] or something to that effect [. . .].

RP 333.

Detective Jones also explained what Bunn's demeanor signified to him, and stated his positive opinion of her recollection and quality as a witness:

[It] . . . kind of surprised me how confident she was because I was all ready to think that maybe she was having trouble or something. But just – it seemed like she had just such a good recollection of who she was thinking of. Obviously the time she spent looking at it she was probably just evaluating everybody in the photos, and then she just jabbed out her particular selection. That and the recollection she had of these tattoos, which the presence of mind to even see those, let alone recall them to the – with that much detail where I could later see that this person does have tattoos on both arms and just like described was rather startling to me. ***I found her to be quite an incredibly good witness.***

(Emphasis added.) RP 333-34.

The prosecutor asked whether Jones was “comparing with [his] experience with other witnesses.” RP 334. Jones answered affirmatively, indicating Bunn’s ability to recall details was particularly good:

Yeah. And, frankly, with myself. I have to admit I’m not that terribly great at remembering little details like that. But, yeah, with other witnesses. And it’s not a fault, its just other people focus on different things. Some people can stare at somebody, and again that might be me, can stare at somebody for a while and later on they might not be able to recall anything really distinctive about them. **So, she focused on this person or something because she really had a really good recollection.**

(Emphasis added.) RP 334. Defense counsel did not object. See RP 333-34.

Detective Jones contrasted his assessment of Bunn’s ability to recall to his assessment of Ehle’s ability to recall, who did not identify Simmons as the man he saw:

[H]e was kind of bouncing back and forth between choices of different guys, and he wasn’t sure at all even when he finally did choose one. He even told me that, you know, he’s less than 50 percent sure, **which means more likely than not he even knows he’s choosing the wrong one**, so.

(Emphasis added.) RP 344.

Jones explained the identification was not “successful,” and was not treated as “evidence” by the police:

Standard policy for me, and I believe most of the other detectives, actually I think it's been official now, is that for a montage identification where it's not, quote, "successful" or it's not part of the person who's going to be -- wind up being charged it's not considered really, quote, "evidence." I mean, everything is evidence but that's not specifically something that's considered evidence to be put into evidence.

RP 344.

The prosecutor even asked Jones to clarify the sense in which the identification was not successful:

And let me just clarify, when you say "not successful," was that because he wasn't sure or because he picked the, quote, unquote, "wrong person?"

RP 344. The detective answered by explaining that he meant that Ehle identified the, quote, unquote, "wrong person."

Well, in this case, both. If he'd have been unsure and I didn't otherwise have a suspect identified or at least enough to file a case, then the case would have been inactivated anyway. So, yeah, unsuccessful in kind of both regards.

RP 344. Again, defense counsel did not object. See RP 344-45.

Detective Jones testified he believed Simmons was responsible for the crimes. RP 352. He explained that in presenting the montage to Mason, he could have sought to facilitate a "correct identification" by using an updated photograph

of Simmons with his hairstyle similar to the time he was allegedly seen. RP 352. However, he showed Mason a picture with a “slightly different hairstyle which might make it harder for [him] to [. . .] choose the right person.” RP 352. The prosecutor asked the detective to clarify whether by “the right person” he meant “[t]he person you were looking for?” RP 352. Jones answered: **“Yeah. The person I believed was responsible.”** RP 352 (emphasis added).

C. ARGUMENT

1. THE DETECTIVE’S TESTIMONY THAT HE BELIEVED SIMMONS WAS RESPONSIBLE FOR THE CRIMES AND RULED OUT EHLE’S SELECTION OF A DIFFERENT SUSPECT FROM A MONTAGE VIOLATED SIMMONS’ RIGHT TO A FAIR TRIAL.

The jury’s fact-finding role is essential to the constitutional right to trial by jury. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989); U.S. Const. amend. VI; Const. art. I, §§ 21, 22. This right is to be held “inviolable” under Washington’s constitution. Const. art. I, §§ 21, 22. Accordingly, in general, 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 invades the exclusive province of the jury.

State v. King, 167 Wn.2d 324, 219 P.3d 642 (2009) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). 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).

By testifying he had ruled out another suspect and believed Simmons was “responsible” for the offenses, detective Jones gave an improper opinion that Simmons was guilty. In determining whether testimony amounts to an improper opinion on guilt, the courts consider the totality of the circumstances including 1) the type of witness, 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. Demery, 144 Wn.2d at 759. Each of these factors indicates detective Jones’ testimony was improper in this case.

Under the first factor, the negative impact of Jones’ improper opinion testimony is magnified by the fact he is a police detective. Courts have repeatedly noted that opinions are particularly dangerous when backed by the prestige of law enforcement officers. Montgomery, 163 Wn.2d at 595; State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (citing Demery, 144 Wn.2d at 759). Detective Jones, an experienced law enforcement officer,

carried the “aura of reliability” that his profession and experience entailed. See Montgomery, 163 Wn.2d at 595 (citing Demery, 144 Wn.2d at 765).

Under the second factor, the subject matter of the detective’s testimony was improper. It usurped the jury’s function by stating the detective’s personal belief that Simmons was responsible for the offenses and ruling out Ehle’s identification of an individual besides Simmons as a potential suspect. This testimony invited the jury to abdicate its responsibility to determine credibility and guilt or innocence, and to rely instead on the trained officer’s opinions. Thus, the jury would no longer need to evaluate the discrepancies in Ehle’s and Derge’s testimony, or assess the other evidence, because a detective with his “aura of reliability” had already solved the problem for them by determining who was “responsible” for the crimes.

The opinion testimony in this case was far more explicit than the opinions at issue in Kirkman. In Kirkman, the doctor in a child rape case testified his findings were consistent with a history of abuse. 159 Wn.2d at 923. A detective also testified about the interview protocol in which the child promised to tell the truth. Id. The court concluded these were not explicit or nearly explicit

statements of belief in the child's testimony. Id. at 930-31. By contrast, the detective in this case stated an explicit opinion that Simmons was guilty. This was error.

Furthermore, opinion testimony ruling out other potential suspects, while expressly assigning guilt to the defendant, is particularly troubling. See Dolan, 118 Wn. App. at 328-29. In Dolan, a child was assaulted, and both Dolan and the child's mother had access to the child at the relevant time. Id. at 329. The prosecutor first asked the investigating officer, "was there any indication that [the mother] could have done this when you were investigating the case?" Id. at 328. The officer replied, "I don't think so." Id. at 328. The caseworker then testified, "I didn't feel that the child was at risk with [the] mother, and she wasn't the person in question." Id. at 329. The court held this opinion testimony was improper in part because it was an opinion on Dolan's guilt. Id. The testimony invaded the province of the jury because "it was up to the jury, not a witness, to opine on the significance of that fact." Id. The specific nature of the testimony was highly prejudicial.

Under the third factor, the charges here are particularly serious, particularly the residential burglary and second-degree

theft charges. Residential burglary is a class B felony, while second-degree theft is a class C felony.

Under the fourth and fifth factors, neither Simmons' general denial defense nor the other evidence in the case, mitigated the seriousness of the improper opinion on guilt. The credibility of the eyewitness identifications was a critical issue for the jury, and Ehle's identification of another individual from Jones' montage was significant evidence that Simmons was not the individual the witnesses saw that morning. The jury would be justified in assuming the detective was an expert in investigating crimes and determining who is guilty. Detective Jones' statement of his personal belief that Simmons was guilty was not mitigated by the other evidence, which largely came from lay witnesses. This is especially true where, as here, no forensic evidence linked Simmons to the objects allegedly stolen or the surfaces of the house.

Detective Jones' opinion was improper. It was up to the jury to decide whether Simmons was responsible for the offenses, beyond a reasonable doubt. This court should hold this opinion violated Simmons' right to a fair jury trial.

2. THE DETECTIVE'S TESTIMONY THAT HE FOUND BUNN TO BE "AN INCREDIBLY GOOD WITNESS" WITH A "REALLY GOOD RECOLLECTION" VIOLATED SIMMONS' RIGHT TO A FAIR TRIAL.

In contrast to his negative assessment of Ehle's identification of another individual as the man he saw, Jones was effusive in praising Bunn as "an incredibly good witness" with "a really good recollection" when she identified Simmons. RP 333-34. This impermissible bolstering of a state's witness' testimony by an experienced police officer deprived Simmons of a fair trial.

Generally, no witness, lay or expert, may testify as to his or her opinion about the credibility of a witness. City of Seattle v. Heatley, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993). Appellate courts employ the same Demery factors discussed in the previous section to determine whether witness statements are impermissible opinion testimony, including: (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. 144 Wn.2d at 759.

The first and third factors apply with the same weight to Jones' testimony about Bunn's credibility. The negative impact of Jones' improper opinion testimony is magnified by the fact he is a

police detective, and the class B and C felony charges here are particularly serious. Demery, 144 Wn.2d at 765.

Under the second factor, the specific nature of the testimony was highly prejudicial. A comparison of Jones' testimony to testimony at issue in Kirkman is instructive. In that case, an officer testified about the "competency protocol" he gave to a young victim relating to her ability to tell the truth. 159 Wn.2d at 930. The officer in Kirkman testified the victim was able to distinguish between the truth and a lie and expressly promised to tell him the truth. 159 Wn.2d at 930. The Supreme Court held such testimony did not amount to testimony that the officer "believed [the child] or that she was telling the truth," but merely "provide[d] context that enabled the jury to assess the reasonableness of the . . . responses." Kirkman, 159 Wn.2d at 931 (quoting Demery, 144 Wn.2d at 764). Importantly, the Court found that such subject matter "does not carry a 'special aura of reliability'" beyond that conferred upon a witness swearing to tell the truth in front of the jury at trial. 159 Wn.2d at 931.

The testimony at issue in Simmons' case differs substantially. Jones offered his own assessment of Bunn's ability to recall details, and his own opinion that she was "an incredibly

good witness.” This went beyond describing an interview protocol, and provided more than mere “context” for a jury to assess reasonableness. Instead, it invoked detective Jones’ “aura of reliability,” because he drew from his own experiences of interviewing witnesses and his own experiences of observing details, and opined that Bunn was superior to both. This gave her testimony an even higher “aura of reliability” than that usually accorded to police officers, because Jones explained Bunn’s abilities were superior to *his*, and he, as an experienced police detective, is arguably an expert in making such observations. RP 334.

In addition, Jones not only interviewed Bunn during the investigation, but also observed her testify on the witness stand. As the state’s investigator, he was present throughout trial. Thus, his testimony that she was “an incredibly good witness” went beyond the context of the interview, and very likely conveyed to the jury Jones’ impression that she was a good witness during trial, as well as during the interview. Unlike the remarks in Kirkman, Jones’ remarks conveyed “a ‘special aura of reliability’” beyond that conferred upon an ordinary witness swearing to tell the truth in front

of the jury at trial, because Jones arguably praised Bunn's performance as a *witness* after she testified. 159 Wn.2d at 931.

Under the fourth and fifth Demery factors, neither Simmons' defense nor the other evidence in the case mitigated the seriousness of Jones' testimony concerning Bunn's veracity. The veracity of Bunn's identification of Simmons was a central issue for the jury. Furthermore, the jury would be justified in assuming the detective was an expert in evaluating eyewitnesses and trial witnesses, and determining who is credible or truthful. Detective Jones' statement of his personal belief that Bunn was an "incredible witness" with a "really good recollection" was not mitigated by the other evidence.

This Court should hold the testimony was improper vouching, and violated Simmons' right to a fair trial.

3. THE DETECTIVE'S IMPROPER TESTIMONY WAS MANIFEST CONSTITUTIONAL ERROR.

Manifest constitutional error occurs when an error causes actual prejudice or has "practical and identifiable consequences." Montgomery, 163 Wn.2d at 595 (citing Kirkman, 159 Wn.2d at 934-35). While admission of opinion testimony on an ultimate fact, without objection, "is not automatically reviewable as a 'manifest'

constitutional error,” an explicit or nearly explicit opinion on the defendant's guilt can constitute manifest error. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007).

The detective's opinions on Simmons' guilt and Bunn's veracity were manifest constitutional errors with three “practical and identifiable consequences.” First, the opinion testimony undermined Ehle's testimony and montage selection indicating Simmons was not the man he saw. Second, it expressly imparted detective Jones' own belief that Simmons was guilty. Third, it imparted not only an improper “aura of reliability” to Bunn's original statements to Jones implicating Simmons, but also that she performed well as a witness in court. This erroneous testimony is a manifest constitutional error and is properly before this court on appeal.

4. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the

deficient representation must have prejudiced the defendant. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing Strickland v. Washington, 466 U.S. 668, 686, 687, 104 S. Ct. 2052. 80 L. Ed. 2d 674 (1984)).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance. Maurice, 79 Wn. App. at 552. A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Simmons' trial counsel failed to object to: (1) The repeated references to Simmons' criminal history; (2) detective Jones' undermining of Ehle's testimony; (3) Jones' vouching for Bunn's credibility; and (4), Jones' expressing a personal opinion on Simmons' guilt. Taken together, these significant failures cast serious doubt on the integrity of the verdict. There is no reasonable

strategic explanation for allowing the improper evidence to go to the jury in a case, such as this, where conflicting eyewitness accounts and an absence of forensic evidence made the jury's impressions of Simmons, Bunn, and Ehle particularly important factors.

The results of the proceeding would likely have been different absent these errors. None of the state's witnesses observed Simmons in Rigel's house. Mason saw a man briefly outside the house, but his identification of Simmons was based on a limited opportunity to observe him. Ehle and Derge gave differing descriptions of the morning's events, and Ehle even stated he thought the man he saw was "Asian," which Simmons is not. Bunn's testimony indicated that she saw an individual with some superficial similarities to Simmons in her neighborhood that morning, but her testimony did not include events occurring at the scene of the burglary. As discussed in the previous sections, detective Jones' opinion that Simmons was guilty and that Bunn was an "incredibly good witness" was improper, and likely influenced the juror's assessment of Ehle, Bunn, and Simmons.

This Court should hold there is a reasonable probability, sufficient to undermine confidence in the outcome, that there would

have been a different result absent the errors. Strickland, 466 U.S. at 694.

5. CONFUSING AND POTENTIALLY MISLEADING JURY INSTRUCTIONS DEPRIVED SIMMONS OF DUE PROCESS.

Fundamental to the due process of law is that each element of the charged crime is proved by the prosecution beyond a reasonable doubt. State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. Thus, the state must prove every element of an offense beyond a reasonable doubt and jury instructions must not relieve the state of its burden to prove every element. State v. Williams, 162 Wn.2d 177, 186-7, 170 P.3d 30 (2007).

Instructions are proper if, when read as a whole, they are readily understood, not misleading to the ordinary mind, sufficiently clear, and when given, allow counsel to satisfactorily argue his case theory to the jury. State v. Hardy, 44 Wn. App. 477, 480-81, 722 P.2d 872 (1986). Furthermore, our Supreme Court has set forth a high threshold for clarity of jury instructions:

The standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve the ambiguous wording of a statute via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction.

State v. Irons, 101 Wn. App. 544, 550, 4 P.3d 174 (2000). Appellate courts review the adequacy of jury instructions de novo as a question of law. State v. Clausing, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002). A claimed error in giving an instruction may be raised on appeal if the instruction “invades a fundamental right of the accused.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

Simmons was charged with residential burglary, which is defined as follows:

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.52.025. The trial court provided several instructions relevant to this charge.

The jury was instructed that a residential burglary required them to find the proscribed acts occurred inside a “dwelling:”

A person commits the crime of residential burglary when he or she enters or remains unlawfully in a dwelling with intent to commit a crime against a person or property therein.

CP 41 (see WPIC 60.02.01). The trial court's "to-convict" instructions likewise required the jury to find the proscribed acts occurred inside a "dwelling:"

To convict the defendant of the crime of residential burglary, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 11th of March, 2009, the defendant entered or remained unlawfully in a dwelling;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein; and
- (3) That this act occurred in the State of Washington.

CP 42 (see WPIC 60.02.02).

The jury was provided the following definition of "dwelling:"

Dwelling means any building or structure, that is used or ordinarily used by a person for lodging.

CP 45 (see WPIC 2.08).

Significantly, however, the to-convict instruction also required the jury to find the defendant "entered or remained unlawfully." CP 42. Although the charge required the jury to find Simmons entered or remained unlawfully in a dwelling, the trial court instructed the jury regarding the definition of "enters or remains unlawfully in or upon **premises**."

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

(Emphasis added.) CP 43 (see WPIC 65.02).

More confusing still, the court instructed the jury that the term “premises” includes a dwelling, as well as any “real property:”

The term premises includes any building, dwelling, ***or any real property.***

(Emphasis added.) CP 44 (see WPIC 65.01).

For a jury, reading these instructions as a whole – as it must – it would be confusing as to whether it must find “entering or remaining” in a dwelling, as required in the “to convict,” or “entering or remaining” upon premises (including real property), as required in the definition of “entering or remaining unlawfully.” CP 43.

The instructions introduced a number of extraneous legal concepts not applicable to the jury’s resolution of the charge. Although the instructions were consistent with the pattern instructions, they were confusing and potentially misleading. Pattern instructions are not the law. See State v. Goble, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005); see also State v. Beel, 32 Wn. App. 437, 443-44, 648 P.2d 443 (1982). But because the pattern instructions are commonly used, their use should be

considered carefully in each case, and should serve the underlying concern of correctly stating the law in a manner the jury can most readily understand. This did not occur here.

Confusing jury instructions, like those given in Simmons' case, invite a jury to convict without unanimously agreeing that the facts necessary to convict actually occurred. See State v. Stephens, 93 Wn.2d 186, 189-91, 607 P.2d 304 (1980). In Stephens, our Supreme Court's reversed Stephens' conviction based on jury instructions that allowed the jury to find an assault occurred if Stephens assaulted either of two alleged victims, though the acts against both men were charged as a single count. The Stephens Court's reasoning is instructive:

At the very least, the discrepancy between the instructions engenders confusion which is not alleviated by [a unanimity instruction].

[. . .]

[T]he instant case involved one mode of commission under RCW 9A.36.020(1) (c)[. . .]. The instruction, in effect, split the action into two separate crimes [. . .], while the information charged only one.

93 Wn.2d at 190.

The discrepancy in the instructions in Stephens is analogous to the discrepancy of the here. In Stephens, the instructions invited

jurors who believed Stephens assaulted only one of the two victims, and jurors who believed he assaulted only the other of the two victims, to nevertheless agree he committed the charged crime. This is true even though the jurors would not have been truly unanimous as to which act occurred.

In Simmons' case, the confusing jury instructions created the possibility that jurors who were unsure Simmons actually entered Rigel's house, and jurors who believed he did enter the house, would nevertheless agree to convict him of residential burglary. As in Stephens, this would be true even if the jurors were not truly unanimous as to which scenario actually occurred. Thus, as in Stephens, the confusing instruction invited the jury to "split" as to which act actually occurred, and the jury could have convicted Simmons even if some jurors believed he took Rigel's property from her yard, while others concluded he took property from inside her house.

Such confusing and potentially misleading instructions could be easily avoided by editing the instructions to remove reference to extraneous concepts. For example, the definition of "enters or remains unlawfully" from WPIC 65.02 could have been modified to read as follows:

A person enters or remains unlawfully in [a dwelling] when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

This is an accurate statement of the law and avoids introducing the irrelevant aspects of the definition of “premises,” such as “any real property.” Because a “dwelling” was the only legally relevant subcategory of “premises,” the trial court could have done away entirely with the potentially confusing definition of “premises” from WPIC 65.01.

The error was not harmless. The confusing instructions addressed an essential element of the crime and invited a conviction on a finding that Simmons was on Rigel’s “real property” and not in her “dwelling.” Because there was witness testimony that Simmons was in Rigel’s yard, but no witness saw him inside the house, this confusion was potentially highly prejudicial.

D. CONCLUSION

For all these reasons, this Court should reverse Simmons' convictions.

Dated this 17th day of May, 2010.

Respectfully submitted

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

STATE OF WASHINGTON,)

Respondent,)

v.)

GLENN SIMMONS,)

Appellant.)

COA NO. 64253-7-1

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 17TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GLENN SIMMONS
DOC NO. 796255
WASHINGTON CORRECTIONS CENTER
P.O BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF MAY, 2010.

x Patrick Mayovsky

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