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NO. 65923-5-I

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

2011 JAN 24 10:13:30  
COURT OF APPEALS  
DIVISION ONE

REC'D  
JAN 24 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN LEWIS,

Appellant.

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

The Honorable Susan Craighead, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER  
Attorney for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The appellant was denied a fair trial when a detective who interviewed him gave his opinion of the appellant's credibility.

2. Defense counsel was ineffective for failing to object to the detective's prejudicial opinion testimony.

Issues Pertaining to Assignments of Error

1. Was the detective's testimony that the appellant was cooperative but generally "hesitant to provide a truthful answer" an opinion on the appellant's credibility and thus, his guilt?

2. Was defense counsel prejudicially ineffective for failing to object to such testimony?

B. STATEMENT OF THE CASE

1. Charges, verdicts, and sentence

The State charged Stephen Lewis with two counts of second degree identity theft (counts 1 and 4), first degree theft (count 2), and first degree identity theft (count 3). The complainants as to each charge were Kathy Ting (count 1), Target (count 2), Heather Boll (count 3), and Karen Stanley (count 4). CP 1-10, 17-19.

The jury acquitted Lewis on count 1 but found him guilty of the remaining counts. CP 20-23. The court sentenced Lewis within the standard range. CP 71-80.

2. Testimony, opinion testimony, and arguments

On February 18, 2008, Ting's car was broken into and her purse stolen during a visit to Newcastle Beach Park in Bellevue. RP 101-02. Later that day, someone used her credit cards to buy \$1,200 worth of gift cards at the nearby Target store in Factoria. RP 191-95.

On February 29, Boll's and Stanley's cars were broken into and their purses stolen at Kelsey Creek Park in Bellevue. RP 115-16, 152-54. Later that day, someone used Boll's credit card to buy \$2,400 worth of gift cards at the same Target store. RP 196-99. Stanley's debit card was used to buy an \$800 gift card. RP 199. Shortly thereafter, gift cards purchased with Boll's card were used to buy merchandise at the Target store near Southcenter Mall. RP 201-02; Exs. 20-21.

Shawn Dulac, the head of "assets protection" at the Factoria Target, testified about the transaction records for the purchases of the gift cards and presented still photos captured from surveillance video of the transactions. RP 192-203. The State played the video of each transaction for the jury. RP 203-09. Ex. 24. A man in a red top and red cap appears in the February 18 video and photos. Exs. 1, 2. A man in a dark-colored cap and dark blue or black top appears in the February 29 video and photos. Exs. 5, 7, 13, 15, 17. A man similar in appearance is visible in photos culled

from the surveillance video of the February 29 Southcenter transactions. RP 201-02; Exs. 20-21.

Detective Richard Newell interviewed Lewis after his arrest on suspicion of committing the above crimes. RP 229. Lewis denied involvement in the car prowls. RP 238. He also denied he was the man appearing in the February 18 photos; instead, the man was Reginald Jones, an acquaintance. RP 238-39. Lewis acknowledged he was the man in photos from the February 29 gift card purchases. RP 240, 247.

According to Newell, Lewis also acknowledged he bought a television at a Target in Renton with a gift card, but denied obtaining the gift card with stolen credit cards. RP 241, 256. Instead, he purchased the gift card at half of face value from an acquaintance. RP 242. Lewis was uncertain whether the gift card was stolen because he “didn’t ask questions,” but he reiterated that he did not use the women’s stolen credit cards to purchase any gift cards. RP 242.

Police found six gift cards, including three Target gift cards, in Lewis’s wallet at the time of his arrest. RP 132-34. Police also seized a cap similar to the one appearing in the February 29 video stills. RP 135.

Detective Newell testified Lewis was largely cooperative with the arrest process and interview. Asked if Lewis ever appeared hesitant or reluctant to talk, Newell replied, “Only when providing answers. [Lewis]

seemed hesitant to provide a truthful answer, in my opinion, but he didn't appear to be otherwise hesitant or refuse[] to answer my questions." RP 243. Defense counsel did not object.

In closing, the prosecutor acknowledged the photos and surveillance video did not provide good views of the customer's face, but other evidence – including Lewis's possession of multiple gift cards – provided sufficient evidence to convict. RP 286-89. The prosecutor also urged the jury to convict on counts 2-4 because Lewis admitted appearing in the February 29 Factoria video stills. RP 287.

Defense counsel argued that possession of multiple gift cards was not unusual and pointed out the State had not linked the gift cards found on Lewis to the gift cards purchased on February 18 and 29.<sup>1</sup> RP 290-91. Counsel also contended the State had not proven the hat worn by the customer in the February 29 photographs was the same hat Lewis wore when arrested. RP 293. Counsel also argued Newell was mistaken about which photographs Lewis acknowledged appearing in, but there was no way to prove it because Newell forgot to audiotape the interview. RP 294; see also

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<sup>1</sup> The State conceded in rebuttal that the gift cards found on Lewis's person were not the same ones purchased during the transactions at issue. RP 297.

RP 256-57 (Newell's testimony acknowledging he failed to record the interview).<sup>2</sup>

C. ARGUMENT

DETECTIVE NEWELL'S OPINION TESTIMONY DENIED  
LEWIS A FAIR TRIAL.

1. Admission of the opinion testimony was manifest constitutional error that Lewis may raise for the first time on appeal.

The jury's fact-finding role is essential to the constitutional right to trial by a jury of one's peers. Wash. Const. art. I, §§ 21, 22; 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. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991); State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985).

Moreover, experts are no more qualified to render such opinions than jurors. State v. Walters, 120 Idaho 46, 55, 813 P.2d 857, 866 (1990)

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<sup>2</sup> At sentencing, Lewis insisted that, contrary to Newell's testimony, he only identified himself in a photo that was never presented to the jury. RP 339-40.

(citing State v. Rimmasch, 775 P.2d 388 (Utah 1989)); see State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) ("The expert testimony of an otherwise qualified witness is not admissible if the issue at hand lies outside the witness's area of expertise"); Montgomery, 163 Wn.2d at 595 (police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not whether there is guilt beyond a reasonable doubt).

Detective Newell's opinion testimony in Lewis's case was similar to that offered in State v. Saunders, where a police officer testified Saunders's answers to questions "weren't always truthful." 120 Wn. App. 800, 812, 86 P.3d 232 (2004). To determine whether the officer offered an improper opinion, the Saunders court considered the totality of the circumstances including (1) the type of witness, (2) the 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. Saunders, 120 Wn. App. at 812-13 (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

In concluding the testimony was an improper opinion, the Court noted police witnesses have an "aura of reliability," the testimony dealt directly with the defendant's credibility, and the charges were serious. Saunders, 120 Wn. App. at 813.

Lewis's case is similar. Detective Newell's opinion testimony went directly to Lewis's credibility, thereby undercutting his defense of general denial. Furthermore, the charges were serious: Lewis faced a lengthy sentence – up to 7 years – on the first degree identity theft charge. As in Saunders, therefore, Newell's testimony was an impermissible opinion on credibility.

Improper opinion testimony may be manifest constitutional error if it is, as here, “an explicit or nearly explicit” opinion on the defendant's guilt. State v. King, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007)); RAP 2.5(a).

Manifest constitutional error occurs when the error causes actual prejudice or has “practical and identifiable consequences.” Montgomery, 163 Wn.2d at 595. The Montgomery court, while declining to reverse, noted it “would not hesitate to find actual prejudice and manifest constitutional error” if there were indications the opinions influenced the jury's verdict. Id. at 596 n.9.

In Montgomery, the defendant was charged with possession of pseudoephedrine with intent to manufacture methamphetamine. Id. at 583. A detective testified he “felt very strongly” that Montgomery and a companion were buying ingredients to manufacture methamphetamine.

Defense counsel later cross-examined the detective, asking, “[T]his is an assumption on your part that this is intent, correct?” Id. at 587-88. Another detective testified that based on his training and experience the items were purchased for manufacturing. Id. at 588. A forensic chemist testified the combined purchases of Montgomery and his companion “are all what lead me toward [the conclusion that] this pseudoephedrine is possessed with intent.” On cross-examination, however, the chemist conceded he would not be able to come to a conclusion based on Montgomery's purchases alone and agreed when defense counsel asked, “this is an assumption on your part that this is intent, correct?” Id. at 588-89.

Although the Montgomery court held the testimony amounted to improper opinions on guilt, it found Montgomery suffered no practical consequences or actual prejudice. Id. at 594-96. In Montgomery, cross-examination dulled the impact of the opinions that Montgomery acted with intent by pointing out the witnesses’ testimony was mere speculation. Id. at 588-89. But here was no such cross-examination available to blunt the impact. Indeed, such cross-examination would have been dangerous given Detective Newell’s willingness to offer credibility opinions.

This Court should therefore find this was manifest constitutional error and apply a constitutional harmless error test. King, 167 Wn.2d at

333 n. 2 (reversing on other grounds, but stating that if a claim is truly constitutional, the court should examine the effect the error had on the defendant's trial according to the constitutional harmless error standard).

Constitutional error is presumed prejudicial, and the State bears the burden of proving it was harmless. Saunders, 120 Wn. App. at 813 (citing State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985)). The State cannot meet its burden in Lewis's case. While this case and Saunders are similar in some respects, they diverge at the harmless error analysis. The Court affirmed Saunders's conviction because overwhelming untainted evidence supported the verdict. Saunders, 120 Wn. App. at 813.

Here, however, even the State acknowledged there was no evidence Lewis was involved in the car break-ins and the photos and video alone were inadequate to identify Lewis as the perpetrator. The State therefore cannot demonstrate the testimony that Lewis declined to provide truthful answers (including when denying wrongdoing) was harmless beyond a reasonable doubt.

2. Counsel's failure to object to the detective's opinion testimony violated Lewis's constitutional right to effective representation.

The federal and state constitutions guarantee the right to effective representation. 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) the deficient representation prejudices him. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

More specifically, failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); see also State v. Hendrickson, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance), aff'd, 165 Wn.2d 474, 198 P.3d 1029, cert. denied, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2873, 174 L. Ed. 2d 585 (2009).

Lewis recognizes the decision whether to object may be deemed tactical. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). But to defeat a claim of ineffective assistance of counsel, "tactical" or "strategic" decisions by defense counsel must be reasonable and legitimate. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); Wiggins v. Smith, 539

U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); State v. Pittman, 134 Wn. App. 376, 390, 166 P.3d 720 (2006). Counsel's failure to object was objectively unreasonable: Considering the defense theory, there was no reason to allow Detective Newell to express his opinion that Lewis's statements, including his denial of culpability, were not truthful. See Thomas, 109 Wn.2d at 228 (counsel's failure to take steps consistent with defense theory of the case deemed deficient).

To show prejudice, Lewis need not show counsel's deficient performance more likely than not altered the outcome of the proceeding. Id. at 226. Rather, he need only show a reasonable probability that the outcome would have been different but for the mistake, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." In re Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (quoting Strickland, 466 U.S. 668).

Any objection or motion to strike was likely to have been granted, as the testimony was demonstrably inadmissible opinion evidence. Moreover, the detective's testimony damaged Lewis's defense beyond repair. Defense counsel's failure to shield Lewis from the prejudice of such inadmissible testimony undermined his defense and denied him a fair trial.

D. CONCLUSION

A new trial is required because the detective's opinion testimony resulted in manifest constitutional error that Lewis may raise for the first time on appeal. Alternatively, defense counsel was prejudicially ineffective for failing to object to the improper opinion testimony.

DATED this 24<sup>TH</sup> day of January, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JENNIFER M. WINKLER

WSBA No. 35220

Office ID. 91051

Attorneys for Appellant

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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v.	)	COA NO. 65923-5-1
	)	
STEPHEN LEWIS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 24<sup>TH</sup> DAY OF JANUARY, 2011, 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]   STEPHEN LEWIS  
      DOC NO. 825543  
      WASHINGTON STATE CORRECTIONS CENTER  
      P.O. BOX 900  
      SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 24<sup>TH</sup> DAY OF JANUARY, 2011.

x Patrick Mayovsky

COURT OF APPEALS  
2011 JAN 24 PM 4:28