

07261-4

07261-4

NO. 67261-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH FISHER,

Appellant.

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

The Honorable Dave Needy, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGER
Attorney for Appellant

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

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2011 OCT 31 PM 4:22

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	5
1. FISHER’S TRIAL WAS TAINTED BY IMPROPER OPINION TESTIMONY THAT HIS OWN WIFE BELIEVED HE WAS GUILTY.....	5
a. <u>Fisher’s Wife’s Comments Were Improper Opinion Testimony.</u>	6
b. <u>Admission of Fisher’s Wife’s Opinion on Guilt Was Manifest Constitutional Error.</u>	7
c. <u>It Is Immaterial that Fisher Recounted His Wife’s Comments to the Detective.</u>	9
2. COUNSEL WAS INEFFECTIVE IN FAILING TO LODGE A PROPER OBJECTION TO THIS HIGHLY PREJUDICIAL OPINION TESTIMONY.....	10
3. THE COURT ERRED IN REQUIRING FISHER TO PAY COSTS OF K.O.’S MEDICAL TREATMENT AND COUNSELING AS A CONDITION OF COMMUNITY CUSTODY.....	12
D. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).....	5
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	10
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	12
<u>State v. Hudson</u> 150 Wn. App. 646, 208 P.3d 1236 (2009).....	5
<u>State v. Jerrels</u> 83 Wn. App. 503, 925 P.2d 209 (1996).....	8, 11
<u>State v. Johnson</u> 152 Wn. App. 924, 219 P.3d 958 (2009).....	5, 6, 7, 11
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	12
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	5, 7, 8, 9, 11
<u>State v. Perez-Valdez</u> __ Wn.2d __, __ P.3d __, WL 4837260 (No. 84003-2, Oct. 13, 2011)....	11
<u>State v. Phelps</u> 113 Wn. App. 347, 57 P.3d 624 (2002).....	12
<u>State v. Thamert</u> 45 Wn. App. 143, 723 P.2d 1204 (1986).....	9
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	10

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 10, 11

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5..... 10

ER 403 6

ER 404 10

RCW 9.94A.507 12

RCW 9.94A.701 13

RCW 9.94A.703 12, 13

RCW 9.94A.704 12

RCW 9.94A.750 14

RCW 9A.36.120 12

Wash. Const. art. I, § 21 5

Wash. Const. art. I, § 22 5

A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial when the State presented his wife's out-of-court statements indicating she believed he was guilty.

2. Appellant was denied his right to effective assistance of counsel when his attorney failed to object to improper opinion testimony.

3. The court erred in requiring appellant to pay counseling costs for the complaining witness.

Issues Pertaining to Assignments of Error

1. It invades the province of the jury for a witness to opine as to the guilt or innocence of the defendant. The detective testified appellant told him that upon learning of the complaining witness's accusation, his wife called him a "piece of shit" and a "fucking pedophile." On cross-examination, the State elicited the same information from appellant himself. Is reversal required because this improper comment on appellant's guilt unfairly prejudiced the jury?

2. Counsel is ineffective when there is deficient performance and a reasonable probability the error affected the outcome. Was appellant prejudiced by his attorney's failure to lodge a proper objection to his wife's out-of-court opinion on guilt?

3. Did the court exceed its statutory sentencing authority when it required appellant to pay the cost of crime-related counseling and medical treatment for the complaining witness?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Skagit County prosecutor charged appellant Keith Fisher with one count of third-degree child molestation. CP 1. A jury found him guilty, and the court imposed a standard range sentence. CP 33, 44, 46. Notice of appeal was timely filed. CP 57.

2. Substantive Facts

On January 8, 2010, Fisher's step-daughter Keana had a friend over to spend the night. RP 198-99. 14-year-old K.O. was well known to the family because she and Keana had been friends in the sixth grade. RP 101-02, 198-99. The friends had fallen out of touch since then but had recently reconnected. RP 101-02.

Early the next morning, Fisher checked on the children and noticed his step-daughter was looking tired and trying to sleep, while her friend, K.O. was sitting up with the light on. RP 294-95. He told K.O. she should either go to sleep or go to the living room and watch television so Keana could sleep. RP 296.

Once in the living room, Fisher testified, K.O. was crying and upset. RP 299, 302. They sat on the couch together, and she laid her head down on a pillow that rested between them, leaning partially against Fisher's hip. RP 301. He tried to comfort K.O, stroking her head a couple of times. RP 302-03. He denied any other contact between them. RP 315. When both became uncomfortable with the situation, he moved to the floor. RP 303.

A short time later, Fisher went to the kitchen to make breakfast for the family. RP 306. While he was doing so, Keana went past him into the bedroom he shared with his wife Elisa Hughley. RP 307. A few minutes later, Hughley and Keana joined K.O. in the bathroom where she had locked herself. RP 204. Fisher became aware he was being accused of inappropriately touching K.O., so he called 911. RP 311. Fisher voluntarily went to the police station and gave his version of events to the detective. RP 145-47.

K.O. testified Fisher told her to go out to the living room that morning, put a pillow on his lap between them, and told her to lay on it. RP 39. While she lay there, he rubbed his fingers through her hair. RP 40. She testified she became uncomfortable and told him she had a headache. RP 40. She went to the bathroom with the ibuprofen Fisher brought her and flushed it down the toilet because she feared he was drugging her. RP 41. After about two minutes she returned to the living room couch. RP 41, 94. She

testified Fisher then sat on her lap facing her with his legs around and tried to kiss her. RP 42. She claimed he rubbed her back and legs, then put his hand on her breast, over her bra but under her shirt, and reached his hand inside her pajama pants rubbing the front of her groin area. RP 43-46.

She claimed Fisher told her she deserved pleasure, asked her if she liked sex, and told them that they could date because he was only 26 and no one had to know. RP 46-47. She testified when she got up and tried to leave the room, Fisher stood in front of her and that, when she grabbed the phone, he took it away from her, telling her it was too early to call anyone. RP 47-48.

When Fisher went to make breakfast, she locked herself in the bathroom, and then went to Keana's room to pack her things so she could leave. RP 48-49. When Keana woke up, K.O. told her what had happened, and Keana went to wake up Hughley. RP 49.

K.O. testified Hughely was angry and screamed at Fisher. RP 50. Detective Shackleton testified that, when he interviewed Fisher, Fisher told him that, after hearing K.O.'s accusations, Hughley called him a "piece of shit" and a "fucking pedophile." RP 169. The court overruled the defense's hearsay objection, finding Hughley's comments were an excited utterance. RP 169. When Fisher testified, the State elicited his wife's comments again on cross-examination. RP 321-22. Later that day, K.O.'s sister

accompanied her to pick up the rest of her things from the Fisher home. RP 334. Both Hughley and K.O.'s sister testified Hughley apologized to her. RP 217, 335. The court overruled counsel's objection that K.O.'s sister's testimony was beyond the scope of rebuttal. RP 334.

C. ARGUMENT

1. FISHER'S TRIAL WAS TAINTED BY IMPROPER OPINION TESTIMONY THAT HIS OWN WIFE BELIEVED HE WAS GUILTY.

Expressions of personal belief as to guilt are "clearly inappropriate" testimony in criminal trials. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Opinion testimony intrudes on the jury's role as factfinder, which is to be held inviolate under Washington's constitution. Wash. Const. art. I, §§ 21, 22; Montgomery, 163 Wn.2d at 590; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

To determine whether an opinion is improper, courts consider (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009) (citing State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009)). An explicit or nearly explicit opinion on credibility or guilt is manifest constitutional error that may be raised for the first time on appeal. Montgomery, 163 Wn.2d at 595. Here, Fisher's right to a fair trial was

compromised beyond repair when the jury heard, on two separate occasions, that Fisher's wife reacted to K.O.'s accusations by apologizing to K.O.'s sister and calling Fisher a "piece of shit" and a "fucking pedophile."

a. Fisher's Wife's Comments Were Improper Opinion Testimony.

Division Two of this Court reversed a conviction for child molestation in Johnson under virtually the same circumstances. Johnson, 152 Wn. App. at 927. That case involved out-of-court statements attributed to Johnson's spouse indicating she believed the victim's allegations. Id. at 931. The victim, her mother, and her stepfather all related an incident in which Johnson's wife confronted the victim, T.W., about the accusations and demanded she prove it was true. According to the witnesses, when T.W. recounted details of Johnson's intimate anatomy and sexual habits, his wife burst into tears, acknowledged it must be true, and hours later attempted suicide by overdose. Id. at 932-33.

The court concluded this type of testimony "sheds little or no light on any witness's credibility or on evidence properly before the jury." Id. at 933. On the contrary, it served only to tell the jury what Johnson's wife believed about the accusations. Id. The court concluded this was "clearly more prejudicial than probative under ER 403." Id. at 934. The court held the error in admitting this testimony violated Johnson's right to a fair trial. Id.

Fisher's case also involves out-of-court statements by the accused person's wife indicating she believed the accusations. Instead of defending him, as might be expected, Fisher's wife called him a "piece of shit" and a "fucking pedophile." RP 169, 321-22. She also clearly indicated her opinion he was guilty when she apologized to K.O.'s sister later that day. RP 217, 335. Each of these damaging statements came before the jury twice. RP 169, 217, 321-22, 335. Fisher's right to a fair trial was violated because his wife's opinion on his guilt had no probative value regarding any issue properly before the jury and served only to prejudice the jury against him. His conviction should be reversed. See Johnson, 152 Wn. App. at 927.

b. Admission of Fisher's Wife's Opinion on Guilt Was Manifest Constitutional Error.

Although this issue is raised for the first time on appeal, this Court should reach the issue and reverse because this was manifest constitutional error. See id. at 934. Improper opinion testimony is constitutional error because it violates the right to trial by a fair and impartial jury. Id. Constitutional error is manifest when it causes actual prejudice or has practical and identifiable consequences. Montgomery, 163 Wn.2d at 595. The opinion testimony in this caused such prejudice and affected the jury because the instructions were insufficient to correct the error, the verdict

rested on credibility, and Fisher's wife's opinion was inherently likely to affect the jury regardless of instruction.

In Montgomery, the court concluded there was no manifest constitutional error in large part because the jury was properly instructed, including an instruction that the jury was not bound by expert opinion. 163 Wn.2d at 595-96. Here, the jury was properly instructed that it is the sole judge of witness credibility. CP 22. But it was also instructed to consider all the admitted evidence, including testimony. CP 21-22. Nothing in the instructions told the jury it could not consider Fisher's wife's opinion as evidence of guilt. Nothing instructed the jury it could or should disregard the assessment of the defendant's own wife.

Even if it had been instructed to do so, it is unlikely the jury would be able to follow that instruction. See State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996) ("A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so."). This was not just any witness. This was his own wife.

Moreover, this was not a case like Montgomery where there was substantial physical evidence indicating guilt. 163 Wn.2d at 586-87. In Montgomery, the only disputed issue was whether Montgomery possessed the pseudoephedrine with intent to manufacture methamphetamine. Id. at 594. The court concluded there was sufficient circumstantial evidence of

intent in that he also purchased, on the same day, two other distinctive ingredients of methamphetamine. Id. at 586-87. Here, there was no physical evidence and no circumstantial evidence. There was only Fisher's word against K.O.'s.

The Montgomery court declared, "[I]f there were evidence that these improper opinions influenced the jury's verdict, we would not hesitate to find actual prejudice and manifest constitutional error regardless of the failure to object or the likelihood that an objection would have been sustained." Id. at 596 n.9. Given the intimate nature of the spousal relationship, the lack of instruction regarding opinion testimony and the centrality of credibility in this case, this Court should conclude this error affected the jury's verdict, find manifest constitutional error, and reverse.

c. It Is Immaterial that Fisher Recounted His Wife's Comments to the Detective.

The State may argue some of these statements came from Fisher's own statement to the police, which was admissible, and the court ruled his wife's comments met the hearsay exception for excited utterances. But that analysis only removes objections based on hearsay rules or voluntariness. State v. Thamert, 45 Wn. App. 143, 149-51, 723 P.2d 1204 (1986). Merely because testimony does not violate hearsay rules does not mean it meets other requirements for admissibility. Id. For example, in Thamert, part of

the defendant's confession, which had been found admissible after a CrR 3.5 hearing, was not properly admitted under ER 404(b) because it referenced a prior conviction. 45 Wn. App. at 149-51. Like evidence of prior bad acts, third party opinions on guilt are inadmissible regardless of whether they are voluntary or violate hearsay rules.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO LODGE A PROPER OBJECTION TO THIS HIGHLY PREJUDICIAL OPINION TESTIMONY.

Alternatively, if this Court concludes this issue was not preserved, Fisher was denied his right to effective assistance of counsel. A conviction should be reversed for ineffective assistance of counsel when counsel's performance was deficient and there is a reasonable probability the error affected the outcome. Strickland v. Washington, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

The failure to object to this clearly improper and highly prejudicial opinion on guilt was unreasonably deficient. Legitimate trial strategy or tactics may constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). But there is no possible strategic reason for permitting clearly improper opinion testimony that Fisher's own wife believed the accusations against him. Counsel did object to the testimony that Fisher's wife called him a pedophile, but only on the basis of hearsay,

which the court overruled, finding the comments amounted to an excited utterance. RP 169. She objected to the apology evidence, but again only on the grounds that it exceeded the scope of rebuttal. RP 334.

A motion in limine to exclude this improper opinion testimony would likely have been granted under Montgomery and Johnson, discussed above. And the opinion was likely to influence the jury because of the nature of the intimate relationship. See Johnson, 152 Wn. App. at 934; Jerrels, 83 Wn. App. at 508. Moreover, when a case hinges on credibility, improper opinions are an even more serious error. See State v. Perez-Valdez, ____ Wn.2d ____, ____ P.3d ____, WL 4837260 at *5 (No. 84003-2, filed Oct. 13, 2011) (witness opinion on victim's credibility was "serious" irregularity because case hinged on credibility). This case involved no physical evidence and no witnesses beyond the complaining witness and Fisher himself. The entire case rested on credibility. Fisher's conviction should be reversed because counsel's failure to object was objectively unreasonable and undermines confidence in the outcome of the trial. See Strickland, 466 U.S. at 669.

3. THE COURT ERRED IN REQUIRING FISHER TO PAY COSTS OF K.O.'S MEDICAL TREATMENT AND COUNSELING AS A CONDITION OF COMMUNITY CUSTODY.

Sentencing courts may impose only those sentences the Legislature has authorized by statute. State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002). When a sentencing court exceeds its statutory authority, its action is void. Id. Unauthorized conditions of a sentence may be challenged for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

RCW 9.94A.703 describes the community custody conditions that may be imposed. Mandatory conditions include:

(a) Require the offender to inform the department of court-ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

(c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;

(d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

RCW 9.94A.701. Other conditions may be waived by the court:

- (a) Report to and be available for contact with the assigned community corrections officer as directed;
- (b) Work at department-approved education, employment, or community restitution, or any combination thereof;
- (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;
- (d) Pay supervision fees as determined by the department; and
- (e) Obtain prior approval of the department for the offender's residence location and living arrangements

RCW 9.94A.703. The statute also provides for discretionary conditions the court may impose:

- (a) Remain within, or outside of, a specified geographical boundary;
- (b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;
- (c) Participate in crime-related treatment or counseling services;
- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
- (e) Refrain from consuming alcohol; or
- (f) Comply with any crime-related prohibitions.

RCW 9.94A.703. Finally, the statute provides for special conditions relating to domestic violence and drug or alcohol related offenses. RCW

9.94A.703(4). None of the conditions permitted or required by the statute authorizes the court to impose restitution without a hearing as a condition of community custody. Restitution may be imposed under RCW 9.94A.750. However, there was no restitution hearing in this case, and no amount was determined by the court as would be required under the restitution statute. RCW 9.94A.750. The condition of community custody requiring him to pay for K.O.'s medical treatment and counseling should be vacated as unauthorized by law.

D. CONCLUSION

Fisher requests this Court reverse his conviction because the jury was tainted by improper opinion evidence that his own wife believed he was guilty and vacate the condition of his community custody requiring him to pay for K.O.'s treatment.

DATED this 31st day of October, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


JENNIFER J. SWEIGERT

WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67261-4-I
)	
KEITH FISHER,)	
)	
Appellant.)	

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 31ST DAY OF OCTOBER 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] RICHARD WEYRICH
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273

- [X] KEITH FISHER
SKAGIT COUNTY JAIL
600 S. 3RD ST.
MOUNT VERNON, WA 98273

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2011.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 31 PM 4:25