

71927-1

71927-1

COURT OF APPEALS NO. 71927-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KYRON BRISBON,

Appellant.

REC'D  
SEP 26 2014  
King County Prosecutor  
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR KING COUNTY

The Honorable HELEN HALPERT, Judge,

OPENING BRIEF OF APPELLANT

2014 SEP 26 PM 3:53  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

DANA M. NELSON  
Attorney for Appellant

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

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
C. <u>ARGUMENT</u> .....	8
1. BRISBON'S TRIAL WAS RENDERED UNFAIR WHEN THE COURT ADMITTED THE EXHIBIT DECLARING DANA PARKS BELIEVED HE WAS GUILTY. ....	8
2. COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO REDACT EXHIBIT 5 OR FOR A MISTRIAL ONCE ITS IMPROPER CONTENTS WERE REVEALED TO THE JURY. ....	13
D. <u>CONCLUSION</u> .....	16

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	13
<u>State v. Escalona</u> 49 Wn. App. 251, 742 P.2d 190 (1987) .....	15
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).....	8
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987).....	8
<u>State v. Hudson</u> 150 Wn. App. 646, 208 P.3d 1236 (2009) .....	9
<u>State v. Johnson</u> 152 Wn. App. 924, 219 P.3d 958 (2009).....	9, 11-12, 14
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007) .....	9, 11
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	8-9, 11, 14
<u>State v. Post</u> 118 Wn.2d 596, 826 P.2d 172 (1992) .....	15
<u>State v. Powell</u> 62 Wn. App. 914, 816 P.2d 86 (1991), <u>reversed denied</u> , 118 Wn.2d 1013 (1992) .....	15
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	13-14

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) ..... 13-14

RULES, STATUTES AND OTHER AUTHORITIES

Wash. Const. art I, §§ 21, 22 ..... 8

A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial in the state's case against him for first degree theft, when the court admitted un-redacted exhibit 5,<sup>1</sup> in which the state's key witness stated she believed appellant was guilty of "check fraud."

2. Appellant was denied his right to effective assistance of counsel when his attorney failed to move to redact this improper opinion from exhibit 5.

3. Appellant was denied his right to effective assistance of counsel when the improper opinion was brought to the jury's attention and defense counsel failed to move for a mistrial.

Issues Pertaining to Assignments of Error

1. Opinion testimony on guilt invades the province of the jury and violates the constitutional right to a jury trial. The court admitted the state's exhibit 5, a chart prepared by the bank fraud investigator in which she labeled the bank's type of loss as "check fraud." Was appellant's right to a fair trial violated by this improper opinion on guilt?

---

<sup>1</sup> A redacted version of exhibit 5 was admitted upon discovery of the improper opinion, and the un-redacted version was admitted as exhibit 13, for purposes of making a record. RP 200, 207.

2. Counsel is ineffective when there is deficient performance and a reasonable probability the error affected the outcome. In advance of trial, defense counsel objected to the chart on grounds it was not a business record and constituted a summary of what the bank investigator believed occurred. The court ruled the chart was admissible as illustrative of the bank investigator's testimony, but ordered the state to strike the portion of the chart in which the investigator referenced the date and time "of the *crime*."

a. Was appellant prejudiced by his attorney's failure to move to redact the portion of the chart in which the examiner also referenced the bank's type of loss as "check fraud?"

b. Was appellant prejudiced by his attorney's failure to move for a mistrial once it became known to the jury the bank investigator believed appellant was guilty of check fraud?

B. STATEMENT OF THE CASE<sup>2</sup>

Appellant Kyron Brisbon is appealing from a conviction for first degree theft, following a jury trial in King County Superior Court in April 2014. CP 51, 67-75. The state alleged that between May 29, 2010 and June 28, 2010, Brisbon wrote 5 checks drawn on one Bank of America account and deposited them into a separate Bank

of America account, both owned by Brisbon. CP 1-5; Ex 5. Ultimately, the checks were returned for insufficient funds (NSF). RP 233, 238-39. Following each deposit, however, Brisbon withdrew money on the second account, allegedly resulting in losses to the bank of more than \$5,000.00. CP 1-5; RP 259-264, 290, 305.

At a pretrial hearing, defense counsel objected to the admission of a chart prepared by Dana Parks, the bank's fraud investigator. RP 54. Defense counsel argued the chart was not a business record but prepared in anticipation of trial as "sort of an opinion and her own summary of the evidence." RP 54. The prosecutor clarified he sought to admit the chart solely as illustrative of Park's testimony. RP 54. The court ruled the chart would be admitted for illustrative purposes, but directed the state to "strike out the word date and time *of the crime*." RP 55 (emphasis added).

Seattle detective Stacy Litsjo testified she received a report from Bank of America about Brisbon in October 2010. RP 114, 116. Due to her busy caseload, however, Litsjo did not investigate the complaint until November 28, 2012. RP 117. The bank

---

<sup>2</sup> The verbatim report of proceedings is referred to as "RP" and contained in three

provided the police with records, still photos from an automated teller machine (ATM) and a statement prepared by Parks. RP 118.

Litsjo testified that on November 28, 2012, she telephoned the number given by the bank as Brisbon's. RP 119. When a man answered, Litsjo asked for Brisbon. RP 121. The man asked who was calling, and Litsjo said the Seattle police fraud department. Litsjo testified she explained the police had received a report from Bank of America alleging Brisbon deposited bad checks and made ATM withdrawals immediately thereafter, resulting in loss to the bank. RP 122.

According to Litsjo, the man said she had the wrong person. RP 122. When Litsjo indicated she had still photos from the ATM, Brisbon explained there had been a misunderstanding, and he was working to resolve it with the bank. RP 123. Originally, the bank was supposed to send him some paperwork but before it arrived, Brisbon left the state. RP 123. Brisbon had gone to Canada and Texas. RP 123. Brisbon said he mistakenly wrote checks from the wrong checkbook, but would stop by the bank to clear it up. RP 125.

Parks testified that whenever a check is returned NSF, the bank charges a fee of \$35.00 and mails a letter to the account holder to apprise him or her of the returned check and fee. RP 175, 179, 184. The letter is computer generated and is sent automatically. RP 180.

Parks testified there different ways a person can commit check fraud. RP 182. For instance, a person can deposit "worthless checks" and withdraw funds immediately thereafter. RP 182-83. As Parks explained:

The bank gives you immediate credit for the majority of deposits that go into – that come into the bank, and you're able to withdraw those funds even though the money hasn't been collected by the – from the account the check is drawn on. And then when the check is returned, if you've withdrawn all the money, then there's no money and an overdraft occurs.

RP 183. It may take 2-10 days for the bank to discover a deposited check is not backed by sufficient funds. RP 183.

Parks testified she was asked to investigate Brisbon's bank activity in June 2010. RP 191; Ex 5. She testified there were five checks she investigated, each written on an account ending in "1242," and each deposited into an account ending in "0053," both held by Brisbon. RP 194, 197, 214-17. Parks testified exhibit 5

documented the checks written on the "1242" account and the dollar amounts of those checks. RP 195. As indicated pretrial, the court admitted the chart as an illustrative exhibit. RP 195-96.

Before discussing the precise checks, the prosecutor put exhibit 5 "up on the Elmo here, this document reader." RP 196.

Parks testified the chart reflected the name of the account holder as Kyrn Brisbon. RP 197. RP 198. The first check was made out to Kyrn Brisbon in the amount of \$950.00 and deposited on May 29, 2010, at an ATM at 2301 South Jackson Street in Seattle. RP 198.

At this point, the court interrupted to give the following admonishment:

THE COURT: You know, I'm going to ask the jury – and we'll write this out – not to consider the type of loss as check fraud. It will be the jurors' not anybody else's opinion as to whether any crime occurred. And I'm sorry that I hadn't noticed that. But the jury absolutely is not to consider that. It will be your decision after hearing all of the evidence whether a crime of any crime [sic] occurred, and we can cover that up right now with a piece of paper or we can get some -- . . . [.]

The court and parties thereafter covered the "Check Fraud" statement on exhibit 5 with whiteout. RP 200. An un-redacted version of exhibit 5 was made part of the record as exhibit 13.

Parks testified about additional deposits made on: June 1, 2010 (\$950.00); June 20, 2010 (\$6,000.00); June 20, 2010 (\$950.00); and June 28, 2010 (\$8,000.00). Ex 5. Like the first, these checks were made out to Brisbon and deposited at ATMs at the same banking center at 2301 South Jackson Street. RP 199-202. Parks obtained video surveillance from inside the ATM for each transaction. RP 199, 201, 209.

Parks testified each of the five checks was returned NSF. RP 233, 238-239. Parks testified the closing balance for the account ending in "0053" was negative \$6,644.00 due to withdrawals and purchases following the deposits, as well as fees incurred when the deposited checks were returned. RP 241, 256-64, 290, 304. Without the bank's fees, the account was overdrawn by \$5,374.43, when closed. CP 63; RP 305.

Parks testified she did not look into whether the bank and Brisbon communicated after she completed her investigation in September 2010. When asked to look at letters contained in exhibit 15, Parks acknowledged it appeared Brisbon had contact with the fraud department concerning his accounts in December 2012. RP 345-46.

C. ARGUMENT

1. BRISBON'S TRIAL WAS RENDERED UNFAIR WHEN THE COURT ADMITTED THE EXHIBIT DECLARING DANA PARKS BELIEVED HE WAS GUILTY.

The jury's fact-finding role is essential to the constitutional right to a jury trial. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). That role is to be held "inviolable" under Washington's constitution. Const. art. I, §§ 21, 22. 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). 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). 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.

Brisbon's right to a fair trial was compromised by admission of un-redacted exhibit 5. Through this exhibit, bank fraud investigator Dana Parks was allowed to give her opinion Brisbon committed "check fraud." Ex. 13. Admission of this explicit opinion

on guilt, which invaded the province of the jury, was manifest constitutional error that violated his right to a fair trial.

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)).

Dana Parks was an expert witness for the state. CP 46. She worked for the Bank of America as a fraud investigator for the last 30 years. RP 167. Her official title was: "Vice President and Senior Global Financial Crimes Compliance Specialist." RP 167. Jurors would naturally be impressed by her qualifications. See State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (an officer's testimony often carries a special aura of reliability).

The specific nature of the testimony was a direct expression of personal belief such as was decried in Montgomery. 163 Wn.2d at 594 (citing Kirkman, 159 Wn.2d at 936-37) (use of phrases like "we believe," indicates direct or explicit expression of personal belief). Parks' chart did not represent a witness drawing reasonable inferences from her observations. See Montgomery,

163 Wn.2d at 591 (witnesses may offer opinions or inferences based upon rational perceptions that help the jury understand the witness' testimony). For instance, the chart did not recount any NSF letters the bank may have sent or when. Nor did it recount withdrawals made following the deposits. Rather, it simply declared Parks believed Brisbon's deposits amounted to check fraud. Ex. 13. This was a direct opinion on guilt.

The nature of the charges and the defense also show this opinion was improper. The charges were first degree theft, hinging on one question: whether Brisbon inadvertently wrote checks on the wrong checkbook, as he told Litsjo; or whether he knew he was writing bad checks. There was no direct evidence Brisbon knew the checks he deposited had no backing or he had reason to suspect anything fishy until after he heard from Litsjo. In other words, the bank investigator did not produce any actual letters the bank sent Brisbon informing him the checks had been returned NSF.

Defense counsel objected to admission of un-redacted exhibit 5, albeit on somewhat different grounds than asserted here. But assuming this Court finds the objection insufficient to preserve the error, this Court should reach the issue and reverse because

this was manifest constitutional error. See Johnson, 152 Wn. App. at 934. Improper opinion testimony is constitutional error because it violates the right to trial by a fair and impartial jury. Id. The constitutional error is manifest when 1) the opinion is explicit or nearly explicit, and 2) it causes actual prejudice or has practical and identifiable consequences. Montgomery, 163 Wn.2d at 595; Kirkman, 159 Wn.2d at 936-37. Both criteria are met in this case.

As discussed above, the statement in the exhibit “Check Fraud” is a direct and explicit opinion on guilt. Moreover, the opinion testimony in this caused identifiable prejudice because Dana Parks was an expert witness who had worked as a fraud examiner for the bank for over 30 years. Testimony by a witness jurors may see as holding a position of authority is particularly prejudicial. Kirkman, 159 Wn.2d at 928.

Division Two of this Court reversed a conviction for child molestation in Johnson because of improper opinion testimony. Johnson, 152 Wn. App. at 927. That case involved out-of-court statements attributed to Johnson’s wife 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 reasoned this testimony "sheds little or no light on any witness's credibility or on evidence properly before the jury and really only tells us what [Johnson's wife] believed." Id. at 933.

The Johnson court held it was manifest constitutional error to admit Johnson's wife's opinion and reversed his conviction despite the lack of objection below. Id. at 933-34. The court noted, "[T]he jury should not have heard collateral testimony that Johnson's wife believed T.W.'s allegations." Id. at 934. The court reasoned that this testimony "served no purpose except to prejudice the jury," and Johnson was thereby denied a fair trial. Id. at 934.

Similarly, the statement in Dana Parks' chart only tells us what she believed. As in Johnson, her belief sheds no light on witness credibility or any other question properly before the jury. The chart served no purpose except to put impermissible opinion before the jury. Therefore, this Court should find manifest constitutional error and reverse. Id.

2. COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO REDACT EXHIBIT 5 OR FOR A MISTRIAL ONCE ITS IMPROPER CONTENTS WERE REVEALED TO THE JURY.

Alternatively, if this Court concludes this issue was not preserved, Brisbon 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 improper opinion evidence showing the bank's fraud examiner believed Brisbon was guilty.

The outcome would likely have been different, had counsel moved to redact the exhibit. First, a motion to exclude this improper opinion would likely have been granted under

Montgomery and Johnson, discussed above. Indeed, the court itself – with no defense motion before it – ordered the state to strike the portion indicating the date and time “of the crime.” It is remarkable defense counsel did not notice the remaining improper opinion in light of this discussion. That the court would have granted a motion to redact is equally clear from the court’s later actions, as the court itself ordered the removal of the words “check fraud” once the improper opinion was noticed during Park’s testimony.

The prejudice prong of the analysis is satisfied when there is a reasonable probability the outcome would have been different but for the attorney’s deficient performance, i.e., “a probability sufficient to undermine confidence in the reliability of the outcome.” Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226. Considering Parks’ opinion Brisbon was guilty in light of her credentials and prestigious title, there is a probability sufficient to undermine confidence in the reliability of the outcome.

In response, the state may argue the court’s curative instruction obviated any prejudice. Any such argument should be rejected. Whether Brisbon committed check fraud was the very decision the jury had been impaneled to decide. Under the

circumstances, the bell could not be unrung. State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). Having failed to move to redact the exhibit, defense counsel should have moved for a mistrial once the improper opinion contained within was obvious.

In order to prevail on a claim that counsel's failure to request a mistrial constituted ineffective assistance of counsel, Brisbon must establish that his counsel's request for a mistrial would have been granted. A mistrial is appropriate where nothing the trial court could have said or done would have remedied the harm done to the defendant. State v. Post, 118 Wash.2d 596, 620, 826 P.2d 172 (1992). That is the case here. See e.g. State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987) (in state's assault prosecution against Escalona for threatening the complainant with a knife, evidence he stabbed someone else in the past required a mistrial, despite court's curative instruction).

As in Escalona, the prejudice here could not be cured by an instruction. A bank official who investigated the matter already decided Brisbon was guilty. The jury necessarily would have been impacted by this official opinion of guilt. The only way to ensure Brisbon's right to a fair trial would have been to grant him a new

one. Defense counsel's failure to make the motion constituted ineffective assistance.

D. CONCLUSION

Brisbon's conviction should be reversed because improper opinion evidence was admitted in violation of his constitutional right to a jury trial.

Dated this 25<sup>th</sup> day of September, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "Dana M. Nelson". The signature is written in a cursive style with a large initial "D".

---

DANA M. NELSON, WSBA 28239  
Office ID No. 91051  
Attorneys for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71927-1-I
	)	
KYRON BRISBON,	)	
	)	
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 26<sup>TH</sup> DAY OF SEPTEMEBR 2014, 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] KYRON BRISBON  
10216 SE 256<sup>TH</sup> STREET  
KENT, WA 98030

**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF SEPTEMEBR 2014.

x Patrick Mayovsky