

NO. 72934-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM RODGERS,

Appellant.

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FILED  
Apr 19, 2016  
Court of Appeals  
Division I  
State of Washington

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

The Honorable John M. Meyer, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY<sup>1</sup>

IMPROPER WITNESS TESTIMONY ABOUT RODGERS' GUILT DENIED HIM A CONSTITUTIONAL RIGHT TO A FAIR TRIAL

“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), rev. denied, 123 Wn.2d 1011 (1994). An explicit or nearly explicit opinion on credibility or guilt is manifest constitutional error that may be raised for the first time on appeal. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

Rodgers contends, for reasons set forth more fully in the opening brief, that his right to a fair trial was compromised when his children, friend, and love interest expressed opinions as to his guilt. Brief of Appellant (BOA) at 23-24. As shown in the opening brief, this improper opinion testimony necessitates reversal. This result is compelled by State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009). BOA at 26-28.

In response, the State gives only a cursory reference to the holding of Johnson. Brief of Respondent (BOR) at 42, 44. Instead the State relies

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<sup>1</sup> The State's arguments regarding the ineffectiveness of Rodgers' trial counsel have been anticipated and sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

on State v. Curtiss<sup>2</sup> to suggest the improper expressions of guilt were “descriptions of observations” of Rodgers. BOR at 29-30, 34, 37-38, 44. Curtiss is factually distinguishable however. Moreover, contrary to the State’s position, the statements by Natasha, Nicholas, Thompson, and Nichols cannot be construed as anything other than expressions of their personal belief that Rodgers was guilty.

During Curtiss’ trial, a detective testified that during his interrogation of Curtiss he told Curtiss he believed she was involved in the murder for which she had been charged. Curtiss, 161 Wn. App. at 686, 696. On appeal, Curtiss argued the detective’s testimony was improper opinion testimony. Curtiss, 161 Wn. App. at 696. Division Two concluded the detective’s statements were not improper opinion testimony because they were merely “an explanation of interrogation tactics,” and not an expression of personal belief. Curtiss, 161 Wn. App. at 697. Significant to the Court’s determination was the fact the State elicited the detective’s statements only to rebut the defense’s cross-examination. Id.

In contrast to Curtiss, here the statements by Natasha, Nicholas, Thompson, and Nichols were not offered as mere rebuttal evidence. Rather, each witness’s expression of personal belief that Rodgers was

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<sup>2</sup> State v. Curtiss 161 Wn. App. 673, 250 P.3d 496, rev. denied, 172 Wn.2d 1012 (2011).

guilty based on what amounted to a “gut feeling” was offered during the State’s case-in-chief. These statements were also not witness observations, but rather, expressions of personal belief that Rodgers was guilty based on what amounted to a “gut feeling.” Each of the witnesses’ testified about what they felt and believed *internally*, not what they said to Rodgers or what their observations of Rodgers’ responses were to their questions. See e.g. (Natasha: “I literally thought...” 4RP 113-14; Nicholas: “in my heart...” and “I knew in my gut...” and “inside my heart...” 4RP 56-59; Thompson: “I knew in my head...” 6RP 110). These phrases make clear that each witness was expressing an explicit personal opinion. BOA at 26 (citing Montgomery, 163 Wn.2d at 594).

Finally, to the extent Curtiss conflicts with Johnson, Johnson controls here. Like Johnson, here the witnesses offering opinion testimony were not police officers, but close friends and family of Rodgers. As Johnson recognized, this is particularly prejudicial. Johnson, 152 Wn. App. at 933-34; See also 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.”). Rodgers fully discussed in his opening brief why these improper opinions invaded the province of the jury and denied Rodgers his right to a fair trial. BOA at 27-32.

Rodgers' right to a fair trial was compromised when his children, friend, and love interest were called upon to express opinions as to his guilt. Admission of these opinions on guilt, which invaded the province of the jury, was manifest constitutional error that violated Rodgers' right to a fair trial. Reversal of Rodgers' conviction is required.

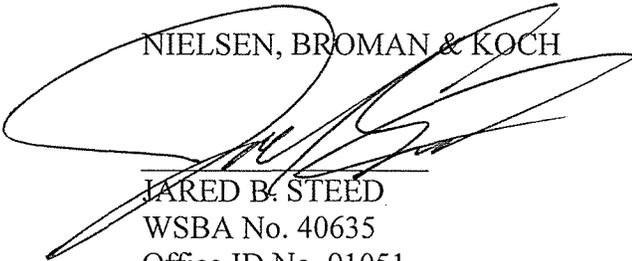
B. CONCLUSION

For the reasons discussed above and in the opening brief, this court should reverse Rodgers' conviction and remand for a new trial.

DATED this 19<sup>th</sup> day of April, 2016.

Respectfully submitted,

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

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| WILLIAM RODGERS,     | ) |                   |
|                      | ) |                   |
| 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 19<sup>TH</sup> DAY OF APIL, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE REPLY BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM RODGERS  
DOC NO. 379032  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 19<sup>TH</sup> DAY OF APIL, 2016.

x Patrick Mayovsky