

73313-3

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Division I  
State of Washington

NO. 73313-3-I

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

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STATE OF WASHINGTON,

Respondent,

v.

RANDALL FOLTYNIEWICZ,

Appellant.

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

The Honorable Chad Allred, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The limiting instruction contained an impermissible comment on the evidence in violation of article 4, § 16 of the Washington Constitution. CP 279.

2. Appellant's constitutional right to effective assistance of counsel was violated when counsel opened the door to inadmissible and unfairly prejudicial evidence.

3. Cumulative trial error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. The Washington Constitution forbids judicial comments on the evidence. A trial judge violates this prohibition by making a comment suggesting his or her opinion of the evidence. In this case, jury instructions addressing evidence admitted under ER 404(b) assumed the truth of the State's argument that the prior misconduct evidence showed appellant's wife was placed in reasonable fear. Does this comment on the evidence warrant a new trial?

2. The court and prosecutor agreed appellant's wife's allegations that he abused their son were duplicative and unfairly prejudicial. Yet defense counsel inquired about these allegations on cross-examination, opening the door to further exploration. Was counsel constitutionally ineffective in opening the door to this damaging and

prejudicial evidence of appellant's physical assault of his own young child?

3. Does the combined effect of these errors warrant reversal for cumulative error?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Randall Foltyniewicz with felony harassment and violation of a court order, alleged the offenses were committed against a family or household member, and alleged the offenses were part of an ongoing pattern of abuse. CP 29-30. The jury could not agree whether there was a pattern of ongoing abuse, but found Foltyniewicz guilty on the underlying charges and found both counts were committed against a family or household member. CP 258-62.

The Court imposed a first time offender waiver on the felony charge. CP 297. Foltyniewicz was sentenced to 90 days in jail and 12 months of community custody. CP 297. As a condition of community custody, the court required him to obtain a mental health evaluation and follow any treatment recommendations. CP 298.

On the misdemeanor, the Court imposed a suspended sentence of 364 days on condition of serving 45 days in jail and 24 months of probation. CP 302-03. The mental health evaluation and treatment was also made a

condition of his misdemeanor probation. CP 304. The court ordered the misdemeanor sentence to run consecutively to the felony sentence. CP 302-03. Notice of appeal was timely filed. CP 306.

2. Substantive Facts

Foltyniewicz met his wife when they were both in middle school. 6RP<sup>1</sup> 151-52. They began dating in 2005, had a son in 2007, and married in 2008. 6RP 151-52. After knowing Foltyniewicz for 24 years, she was well aware of his dark sense of humor. 7RP 154. He was well aware of her struggles with alcoholism. 7RP 17. In 2009, the couple divorced, but they remarried in 2012. 6RP 150-51. At the time of the charged incident, he was supporting the family while his wife attended classes at the Art Institute of Seattle. 6RP 150; 7RP 83-84, 90, 129. She was also having an affair. 7RP 23-24, 126.

a. October 2014

Tiffany Foltyniewicz testified that her relationship with her husband began “getting weird” in October 2014 when he found out about her affair. 7RP 22-23. Mrs. Foltyniewicz claimed he discovered the affair by breaking into her Facebook account. 7RP 24. He confronted her and demanded she stop seeing the other man. 7RP 25. She refused. 7RP 25.

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<sup>1</sup> There are 10 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Jan. 12, 2015; 2RP – Jan. 29, 2015; 3RP – Feb. 13, 2015; 4RP – Feb. 24, 2015; 5RP – Feb. 25, 2015; 6RP – Mar. 2, 2015; 7RP – Mar. 3, 2015; 8RP – Mar. 4, 2015; 9RP – Mar. 5, 2015; 10RP – Mar. 27, 2015.

She testified Foltyniewicz' responses ran the gamut from sending songs and photographs to getting angry and generally trying to get her attention. 7RP 25. She had already decided, however, that she wanted nothing more to do with him. 7RP 25-26. Despite this decision, the couple continued to live together, sent text messages professing their love, and on November 6, went out to dinner together for their son's birthday. 7RP 25-26.

b. November 6, 2014

Mrs. Foltyniewicz testified dinner went fine, but Foltyniewicz was acting "spacey" and rocking back and forth in his chair. 7RP 27. After they got home, he sent "friend" requests on Facebook, a social networking website, both to her and to her new love interest. 7RP 27. He repeatedly insisted she accept the request because the only gift he could afford to give her for her birthday was on Facebook. 7RP 27. She refused, believing it was some sort of trick. 7RP 27.

She claimed he got angry, grabbed the chair she was sitting in, and hit her in the chest. 7RP 28. Although she purported to believe he was dangerous and she needed to call the police, she did not do so. 7RP 28-29. She reasoned that, because the blow left no mark, the police would not believe her. 7RP 29.

Instead of calling 911, she simply told Foltyniewicz he is not allowed to hit her, whereupon, she claimed, he became nervous and asked repeatedly whether she or her new boyfriend would be calling the police. 7RP 29-31. She claimed she did not fall asleep that night as Foltyniewicz paced, stood over her, and got in and out of their bed at least four times. 7RP 32-33.

c. November 7-8, 2014

The next morning, November 7, Foltyniewicz stayed home from work and drove his son to school. 7RP 33-34. He was away longer than usual and when he returned, his wife had gone out for a run. 7RP 34-35. He sent a text message inviting her to talk over lunch. 7RP 34-35.

At lunch, Mrs. Foltyniewicz claimed, her husband wanted to go to the hospital but did not say why. 7RP 35. She readily agreed because she wanted help. 7RP 35. The couple waited for their son to get home from school and then went to the hospital in Enumclaw together. 7RP 36.

Once at the hospital, Mrs. Foltyniewicz claimed Foltyniewicz refused to cooperate. 7RP 36-37. For example, he refused to sign in, and she refused to do so for him. 7RP 36-37. Nevertheless, Dr. Slane, who took over from the doctor who did the initial intake, believed he was voluntarily seeking mental health treatment. 7RP 187.

The family waited six hours for a psychiatrist to come to evaluate Foltyniewicz. 7RP 38. Over the course of that time, Mrs. Foltyniewicz told

the hospital staff of her concerns and described a history of domestic abuse by her husband. 7RP 37. Meanwhile Foltyniewicz became more and more impatient. 7RP 40. He was agitated, refused medication, and several times typed on his cell phone and then showed the screen to hospital staff. 7RP 38.

Twice, he tried to leave because it was taking too long. 7RP 187-90. The first time, Dr. Slane was able to persuade him to continue waiting. 7RP 188-89. The second time, she asked him not to leave and told him it was not safe. 7RP 190. She told him if he left, she would call 911. 7RP 190. He told her he did not care and walked out. 7RP 190. She testified Foltyniewicz was well within his rights to leave, and she had seen nothing suggesting he might be a danger to his wife or child. 7RP 207-08. She called 911 out of concern for Foltyniewicz' well being. 7RP 209.

Mrs. Foltyniewicz testified that, when her husband walked out of the hospital, she was both heartbroken and terrified because he was so dangerous. 7RP 40. She told police he was probably going home, but he could not do so in their car; she had driven him to the hospital and still had the keys. 7RP 41, 95-96.

Officer Gary Horejsi was dispatched to the hospital around 9 p.m. 6RP 44-45. When he arrived, he found the staff appeared nervous and edgy, and Mrs. Foltyniewicz the same but a bit more so. 6RP 46-47. He claimed

the entire time he was there, she stayed within five feet of him at all times.  
6RP 47.

Around 9:40 or 9:45, Horejsi received word that Foltyniewicz had called wanting to talk to him. 7RP 49. He returned the call from his patrol car for privacy. 6RP 50, 54. Foltyniewicz told Horejsi he was having marital issues with his wife, the emergency room was taking too long, and he wanted to speak to a social worker. 7RP 51. Horejsi asked Foltyniewicz to come back to the hospital so he could talk to a social worker. 7RP 54-55. Foltyniewicz refused unless Horejsi granted two conditions: first, that both the Enumclaw Police Department and his wife accept his "friend" request on Facebook, and second, that Horejsi bring his wife back to the home so the couple could have a cigarette and Foltyniewicz could confess to the most outrageous crime Enumclaw had ever seen. 6RP 57. When Horejsi asked what crime, Foltyniewicz told him he would only reveal that after police and media arrived. 6RP 59. Horejsi testified Foltyniewicz sounded stern, not joking, and when he tried to get more information, Foltyniewicz hung up. 6RP 57-58.

After this phone call, Horejsi returned to the hospital and encountered Mrs. Foltyniewicz who was talking on her phone. 6RP 59. She whispered to him that it was Foltyniewicz and, without revealing this to Foltyniewicz, turned on the speakerphone feature so that Horejsi could hear

their private conversation. 6RP 59-61; 7RP 99. Horejsi and Mrs. Foltyniewicz testified Foltyniewicz then told his wife Horejsi would bring her home so they could have a cigarette and he could confess to a crime and that the police should have guns drawn and a sniper ready. 6RP 61-62; 7RP 43. Mrs. Foltyniewicz testified he also said he wanted to confess to two serious crimes and wanted news cameras present so he could put Enumclaw on the map. 7RP 43.

Horejsi then escorted Mrs. Foltyniewicz and the couple's son to a hotel for the night. 6RP 62-63. Mrs. Foltyniewicz testified her husband continued to call and send text messages. 7RP 43-44. She asked him what crimes he was talking about and whether he had a gun. 7RP 44. She claimed he responded with a scary laugh and said, "Where would I get a gun?" 7RP 44. She told him he was frightening her and, after a few more messages, she stopped responding. 7RP 45. She did not recall any light-hearted or joking conversations with her husband that day. 7RP 41.

Around 12:30 a.m., Horejsi called Foltyniewicz again. 6RP 64. He asked Foltyniewicz what crime he was talking about, and Foltyniewicz told him "attempted murder." 6RP 65. When Horejsi asked whom he wanted to murder, Foltyniewicz told him it was a surprise. 6RP 65. Then Foltyniewicz asked Horejsi if police were required to respond if he called 911. 6RP 66. When Horejsi asked why he would ask that, Foltyniewicz said, "If that's the

only way I can get you to be here when my wife's here." 6RP 66. Then he hung up. 6RP 66.

About four hours after he left the hospital, Foltyniewicz returned looking for his family. 7RP 195, 211. Dr. Slane had the secretary call 911. 7RP 196-97. Horejsi responded back the to hospital around 1:20 or 1:30 a.m. 6RP 67-68. He called for backup and walked in with three other law enforcement officers. 6RP 68-69; 7RP 214; 8RP 21.

Foltyniewicz was sitting in the lobby; Horejsi frisked him, then asked about the earlier phone calls. 6RP 71. Horejsi asked about the attempted murder comment, and Foltyniewicz indicated it was about his wife. 6RP 72. Horejsi claimed Foltyniewicz said he was going to confess to murdering his wife, wanted police and media there, and would probably get the death penalty. 6RP 76-77. Horejsi claimed Foltyniewicz was not smiling or laughing as he made these statements. 6RP 70, 72.

But two of the other law enforcement officers testified Foltyniewicz told them he was only joking. 7RP 219; 8RP 24-25. Washington State Patrol Trooper Raymond Seaburg testified Foltyniewicz said that he and his wife joke about killing one another all the time. 7RP 219. Officer Erik Vance also testified that, when he asked Foltyniewicz why law enforcement was present, Foltyniewicz told him, "I was just joking." 8RP 24-25.

Horejsi then detained Foltyniewicz for involuntary mental health commitment. 6RP 77-79. Despite the alleged threat, Horejsi testified he took no steps to warn Mrs. Foltyniewicz for four days. 6RP 106-07, 109, 146-47.

d. November 12, 2014

On November 12, 2014, pursuant to a subpoena, Horejsi arrived at Harborview Medical Center for the involuntary commitment hearing. 6RP 80. Before he got to the hearing, however, he encountered both prosecutors and Mrs. Foltyniewicz. 6RP 80-82.

He told Mrs. Foltyniewicz about the conversation in which her husband threatened to murder her. 6RP 80-81, 109; 7RP 60. She claimed she believed the threat was real and her husband was capable of doing that. 7RP 61. However, when she spoke to Detective Bryan one day earlier, she told him she was not concerned that Foltyniewicz would commit a crime against her; she was only concerned that he might confess some crime he had committed in the past. 7RP 104. Nevertheless, Bryan opined she seemed scared, so scared, in fact, that she believed Foltyniewicz should be charged with attempted murder. 8RP 36, 53, 66-67.

Over defense objection to speculation, Horejsi was also asked about Mrs. Foltyniewicz's reaction to this news. 6RP 81. He testified, "She again became very nervous and afraid." 6RP 81. After speaking with Mrs.

Foltyniewicz, Horejsi was told there was no longer any mental health concern and determined he had probable cause to arrest Foltyniewicz. 6RP 82-83, 114-16. On redirect, the prosecutor asked what he considered in determining probable cause. 6RP 132. Horejsi told the jury, “Mostly that she was in fear and that she thought that the – that she was in danger and that he had the possibility of carrying that danger or that threat out.” 6RP 132.

e. January 22, 2015

Mrs. Foltyniewicz spoke to an advocate, and a no-contact order was entered that prohibited Foltyniewicz from coming within 1,000 feet of her, her work, or her home; the order also prohibited any indirect contact including mailing items to her residence. 7RP 50-55; 8RP 100, 102; Ex. 1. On January 22, 2015, while Foltyniewicz was in jail, a letter arrived at their home. 7RP 54; 8RP 83; Ex. 2. The return address was his name and the address of the King County Correctional Facility. 7RP 55. It was addressed to Randall Foltyniewicz and was marked “confidential” and “personal.” 7RP 156. Nevertheless, Mrs. Foltyniewicz opened it because the writing on the envelope mentioned legal documents pertaining to their marriage, which, she claimed, he had hidden from her in the past. 7RP 56-57.

Mrs. Foltyniewicz was not mentioned by name in the contents of the envelope. 7RP 158. Nor was there any marriage certificate; there were lists of songs, lists of Foltyniewicz’s former girlfriends, bible quotes, a list of

Mrs. Foltyniewicz's friends that he was going to "fuck" and "love every minute of it." 7RP 57. There were also quotes from Mrs. Foltyniewicz's statement to police with what appeared to be her husband's reactions to it. 7RP 58. She felt the letter was threatening and directed at her. 7RP 161-63. The officer who responded to her 911 call testified she seemed frightened. 8RP 85-86.

f. Evidence of Past Incidents

To establish whether Mrs. Foltyniewicz's fear was reasonable and whether there was an ongoing pattern of abuse as charged in the aggravator, the State was permitted to present evidence of prior misconduct under ER 404(b) dating back to 2006. 4RP 73-74. Mrs. Foltyniewicz testified that, one day in 2006, when she came home from a party and walked into the bedroom, her husband came out of the closet behind her, put a bag over her head, and shoved her face into the mattress until she started to panic and feared she would die because she could not breathe. 6RP 153-55.

In December 2011, she claimed, he accused her, out of the blue, of drinking alcohol, threw a bottle at her head, pulled her down, and smashed her head into the carpet. 6RP 160-62. When she reached for her phone, he pushed her against a wall and took it, telling her, "You know I could kill you right now," before going back to his office. 6RP 163. When he called her into the office, she claimed he greeted her with a gun in hand, told her "we

have a problem,” asked how the problem should be fixed, and then pointed the gun at her. 6RP 162-65. She claimed she thought of heading for the door but worried he would shoot her in the back if she turned around. 6RP 166.

The situation calmed a bit when his younger sister, who was staying with them at the time, returned home. 6RP 166. Mrs. Foltyniewicz claimed she told her sister-in-law she was afraid she would be killed. 6RP 166. Foltyniewicz then invited her to go for a drive so the couple could talk. 6RP 166. She refused to go if he had a gun, and he told her he did not. 6RP 167. During the drive, he played loud music and did not talk much; she claimed she was afraid he would either abandon her or attack her in some isolated place. 6RP 167. After they returned home, she claimed she was awake the entire night and the next morning found his gun in the truck. 6RP 168.

In 2012, Mrs. Foltyniewicz told the jury, her husband pushed her down and held her on the granite floor in the kitchen a couple of times. 7RP 14. On one of the occasions, she feared she would die because his knee was on her head and she was not sure how much pressure the human skull could take. 7RP 14. Before pushing her to the ground, he became angry about alcohol, sprayed it in her eyes, and poured the bottle over her head. 7RP 16-17. She called the police, but could tell they did not believe her because she smelled so strongly of alcohol. 7RP 17. She claimed this was a couple of

weeks into her sobriety and Foltyniewicz bought the alcohol in an attempt to sabotage her and then became angry when she drank some of it. 7RP 17-18.

At the pre-trial hearing, the court declared that Mrs. Foltyniewicz's allegations about abuse of their child was "duplicative and unnecessarily prejudicial" in the context of her other testimony. 4RP 56. The prosecutor conceded that was true. 4RP 57. Yet, on cross-examination, defense counsel asked Horejsi whether Mrs. Foltyniewicz had told him her husband was an abusive father. 6RP 96. He agreed that she had. 6RP 96. Counsel then asked whether Horejsi had checked for records with Child Protective Services or spoken with the child. 6RP 96. Horejsi said he had not. 6RP 96. He testified that, when he saw him, the child appeared normal. 6RP 97. The prosecutor noted for the record that Foltyniewicz had opened the door to this topic. 6RP 170-71.

Defense counsel then asked Mrs. Foltyniewicz about bruises she claimed Foltyniewicz had left on their son in 2012. 7RP 75, 89. She claimed to have taken pictures and emailed them to herself to preserve them, but was unable to find them when Detective Bryan asked for them. 7RP 76-77. She accused Foltyniewicz of breaking into her accounts and deleting them. 7RP 77, 129-30. On redirect, the State elicited her description of an incident in which she claimed Foltyniewicz held their son on the bed and was pushing and shaking him harder and harder against the mattress while

the child screamed and cried. 7RP 168. She described this as her “darkest moment ever.” 7RP 168.

Mrs. Foltyniewicz told the jury she stayed with her husband, and remarried him in 2012, to protect their son. 7RP 20-21, 120. She also testified that early on, she had hope, but later came to believe that the man knew had died and been replaced by an “asshole.” 7RP19-21. In their 2009 divorce, the court awarded full custody of the child to Foltyniewicz. 7RP 69-70. Mrs. Foltyniewicz claimed this was because Foltyniewicz hid legal documents from her so that she missed court dates. 7RP 69-70, 174-75. She admitted that, at the time of trial her intent was to leave her marriage and gain full custody of their son so that he would have no further relationship with his father. 7RP 75, 167.

g. Closing Arguments

In closing argument, the prosecutor argued the only question the jury had to answer was whether Mrs. Foltyniewicz believed the threats were real. 9RP 24, 27, 40. She told the jury, “What you’re being asked to decide is based on the facts and the evidence that you’ve received, did Tiffany Foltyniewicz believe it when she heard that threat . . . Did she believe it.” 9RP 27. Defense counsel argued the jury should not simply take Mrs. Foltyniewicz at her word without any corroboration. 9RP 43-44. He argued Horejsi did not take the threat seriously because Foltyniewicz said he was

joking and Horejsi did not bother to tell Mrs. Foltyniewicz about it for several days. 9RP 51-52. He argued there was no violation of the no-contact order because the letter was addressed to Foltyniewicz and Mrs. Foltyniewicz had broken the law by opening her husband's mail. 9RP 58-59. Finally, in rebuttal, the prosecutor reaffirmed that the only question was her fear: "This case is about a threat to kill that he made on November 8, 2015 – or 2014 – and the real, true fear that that instilled in her heart." 9RP 66.

C. ARGUMENT

1. THE TRIAL COURT'S COMMENT ON THE EVIDENCE IN THE JURY INSTRUCTIONS VIOLATED ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION AND DENIED FOLTYNIEWICZ A FAIR TRIAL.

In the instruction intended to limit the jury's consideration of past misconduct under ER 404(b), the court instead advised the jury that it may be considered "for the purpose of showing" that Foltyniewicz' conduct placed his wife in reasonable fear and that the alleged harassment was part of an ongoing pattern of abuse. CP 279. This instruction was an impermissible comment on the evidence because the wording assumes that the evidence, in fact, shows the disputed fact of Mrs. Foltyniewicz's reasonable fear.

Article 4, § 16 of Washington's constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but

shall declare the law.” The purpose of this prohibition “is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court’s opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721; 132 P.3d 1076 (2006). Moreover, this constitutional violation may be raised for the first time on appeal. The failure to object or move for mistrial at the trial level is not a bar to appellate review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

A comment on the evidence in violation of article 4, § 16 is presumed prejudicial, and the State bears the burden to show that no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed);

Levy, 156 Wn.2d at 726 (subject of comment “never challenged in any way by defendant”; harmless).

Whether Mrs. Foltyniewicz was actually and reasonably placed in fear for her life by her husband’s words or conduct was the main disputed issue at trial. Defense counsel argued strenuously that her text exchanges with her husband showed she did not take the threat seriously, and Officer Horejsi’s failure to even inform her of it for several days showed that he, presumably a reasonable person, did not take it seriously either. 9RP 51-52, 54. The prosecutor argued the jury was required to convict if it believed Mrs. Foltyniewicz’s testimony that she was, in fact, afraid because of his statements. 9RP 27, 40, 66. The question before the jury with regard to the past incidents was whether it tended to show reasonable fear on Mrs. Foltyniewicz’s part and, if so, whether that tendency outweighed other evidence tending to indicate she was not actually placed in fear or that fear was not reasonable under the circumstances.

But the instruction does not frame the question as a question. It frames the first part of the jury’s inquiry, whether the evidence shows her reasonable fear, as a foregone conclusion. CP 279. By failing to frame the jury question as a question, the court’s comment essentially resolved that question in the State’s favor. In a case with conflicting evidence on this essential element of the offense, the State cannot prove the error was

harmless. The violation of Article 4, § 16 of Washington's constitution requires reversal of Foltyniewicz's conviction.

2. DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN OPENING THE DOOR TO EVIDENCE OF CHILD ABUSE.

The court and prosecutor agreed that evidence of assaults by Foltyniewicz against his son were unnecessarily cumulative and prejudicial under ER 404(b) and ER 403. 4RP 55-57. Nevertheless, defense counsel brought up this issue during cross-examination of Horejsi and Mrs. Foltyniewicz. 6RP 96; 7RP 75, 89. This opened the door to the State eliciting Mrs. Foltyniewicz detailed account of her husband assaulting their child. 7RP 168. Introduction of this extremely damaging evidence of child abuse, that the court had already deemed inadmissible, was deficient performance that prejudiced Foltyniewicz in violation of his constitutional right to a fair trial and effective assistance of counsel.

To ensure a fair trial, every person charged with a crime has the right to counsel for his defense. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "[T]he right to counsel is the right to the effective

assistance of counsel.” Id. at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771, n. 14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). Accused persons are entitled to reasonably competent representation without errors that undermine confidence in the fairness of the trial’s outcome. Strickland, 466 U.S. at 686-87, 694.

When trial counsel’s performance is deficient and the defendant is prejudiced by that deficient performance, the defendant’s right to a fair trial has been violated. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 687). Counsel’s performance is deficient when the representation falls “below an objective standard of reasonableness.” Thomas, 109 Wn.2d at 226; Strickland, 466 U.S. at 687-88. Prejudice results whenever, as a result of counsel’s deficient performance “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Thomas, 109 Wn.2d 226 (quoting Strickland, 466 U.S. at 694). Both criteria are met in this case. No reasonable attorney would have intentionally presented a client as a child abuser, and the emotional power of that evidence is such that confidence in the jury’s verdict is undermined.

a. Counsel Was Unreasonably Deficient in Permitting His Client to Be Portrayed as a Child Abuser.

Counsel's performance is unreasonably deficient when there is no legitimate strategic or tactical explanation for a particular trial decision. State v. Meckelson, 133 Wn. App. 431, 433, 135 P.3d 991 (2006). Here, Opening the door to damaging evidence of other misconduct was unreasonable.

ER 404(b) specifically provides, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show conformity therewith.” However, under the open door doctrine, when one party brings up a topic, the testimony is said to “open the door” to normally inadmissible evidence if used by an opposing party to explain or contradict the initial evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 713-714, 904 P.2d 324 (1995). “[W]hen a party opens up a subject of inquiry on direct or cross- examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.” State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969) (citing State v. Stevens, 69 Wn.2d 906, 421 P.2d 360 (1966)).

Reasonably effective performance would have included awareness of the open door doctrine. There was no valid strategic or tactical reason to

permit evidence that depicted Foltyniewicz as a child abuser. Counsel understood the prejudice to his client that this evidence could cause, because counsel was present for the court's discussion of that evidence pre-trial as "unnecessarily prejudicial." 4RP 56.

The State may argue this was an attempt to attack Mrs. Foltyniewicz's credibility by showing she did not have the claimed photographs to back up her accusations. But counsel could, and did, make that very same attack on her credibility regarding photographs of injuries to herself and other physical evidence from the incidents that were already admitted under ER 404(b). 7RP 78-79, 80, 81; 8RP 56-57. There was no valid strategy to bring up extremely damaging and inadmissible evidence merely in order to extend slightly the same attack on his wife's credibility. Moreover, her credibility on the question of Foltyniewicz's treatment of his child was not at issue.

In addition to portraying Foltyniewicz as a child abuser, the evidence also helped bolster his wife's explanations about why she stayed with Foltyniewicz and remarried him. The descriptions of Foltyniewicz shaking and hurting his son gave teeth to his wife's assertions that she remained with him to protect her child. This was not a reasonable tactic because it ran directly counter to counsel's strategy of undermining Mrs. Foltyniewicz's credibility.

b. Admission of Such Unfairly Prejudicial Evidence Undermines Confidence in the Jury's Verdict.

Once the defendant establishes counsel's performance was deficient, he is then required to show only a "reasonable probability" counsel's deficient performance prejudiced the outcome of the case. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id. A reasonable probability is one sufficient to undermine the confidence in the outcome. Id. at 694; Thomas, 109 Wn.2d at 226. Unnecessarily permitting the jury to hear evidence of child abuse by the defendant undermines confidence in the fairness of the trial.

The allegations of child abuse were prejudicial because they helped to bolster the State's case and the credibility of Mrs. Foltyniewicz by providing a reasonable explanation of why she remarried her husband in 2012 and remained with him despite her allegations of abuse. Mrs. Foltyniewicz's explanation was that she stayed with her husband to protect her son. 7RP 19, 21. If counsel had not opened the door, her explanation would have had to stop there. Instead, because counsel opened the door by bringing up the subject, she was permitted to bolster that claim by describing alleged mistreatment of the child. 7RP 167-68.

The prejudice was also exacerbated because the jury instructions failed to restrict the jury's consideration of this evidence. A limiting instruction was given regarding Mrs. Foltyniewicz's allegations that her husband "psychologically and physically abused her prior to November 8, 2014." CP 279. The jury was told to consider it only "for the purpose of showing (1) that the words or conduct of Randall Foltyniewicz placed Tiffany Foltyniewicz in reasonable fear . . . and/or (2) that the alleged felony harassment was part of an ongoing pattern of psychological or physical abuse." CP 279. Even assuming this instruction was an effective limitation rather than a comment on the evidence, it makes no mention of her allegations that Foltyniewicz abused their child. The court's oral instruction to the jury at was also no help in this regard. The court told the jury:

You are currently hearing testimony from Mrs. Foltyniewicz – that is, at the end of yesterday and again this morning – about interaction between her and Mr. Foltyniewicz that occurred on dates before the dates of the alleged crimes – that is, prior to November 2014. My later written instructions to you will tell you how you can consider this testimony, but you should know for now that you cannot consider this testimony of prior misconduct for purposes of determining that Mr. Foltyniewicz simply has the character or propensity to commit the crimes charged.

7RP 13. Neither the oral nor the written limiting instruction mentions Mrs. Foltyniewicz's allegations regarding the child or limits the jury's consideration of that evidence in any way.

3. CUMULATIVE ERROR DENIED FOLTYNIEWICZ A FAIR TRIAL.

Cumulative trial error may deprive a defendant of his constitutional right to a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). Assuming this Court concludes that neither the ineffective representation that led to admission of evidence of child abuse nor the judicial comment on the evidence, by itself, warrants reversal of Foltyniewicz's convictions, the combined effect of these errors certainly warrants that result. In combination, these errors eased significantly the State's ability to convince jurors it had proved Foltyniewicz's guilt by bolstering his wife's testimony regarding her fear and the State's argument that fear was objectively reasonable under the circumstances. In combination, they denied Foltyniewicz his constitutional right to a fair trial.

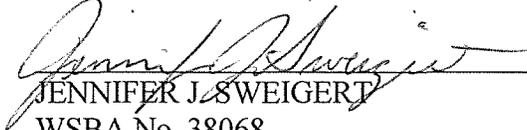
D. CONCLUSION

Ineffective assistance of counsel as well as the judicial comment on the evidence violated Foltyniewicz's constitutional rights and requires reversal of Foltyniewicz's convictions.

DATED this 29<sup>th</sup> day of October, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", is written over a horizontal line.

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73313-3-I
	)	
RANDALL FOLTYNIEWICZ,	)	
	)	
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 29<sup>TH</sup> DAY OF OCTOBER, 2015, 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] RANDALL FOLTYNIEWICZ  
26929 SE 432<sup>ND</sup> ST  
ENUMCLAW, WA 98022

SIGNED IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF OCTOBER, 2015.

X *Patrick Mayovsky*