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Court of Appeals
Division I
State of Washington

NO. 72934-9-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

WILLIAM RODGERS,
Appellant.

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

The Honorable John M. Meyer, Judge

RESPONDENT’S BRIEF

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I. SUMMARY OF ARGUMENT

William Rodgers killed his wife. He first claimed to officers, family and friends she had fallen down the stairs. The autopsy showed his wife was strangled. By trial, Rodgers admitted to experts that what he first told others was false. Rodgers called an expert to testify that he did not intentionally kill his wife and was in a dissociative state caused by PTSD.

On appeal, Rodgers contends his family members and friends gave opinions when questioning his denials, resulting in improper evidence of guilt and his attorneys were ineffective by failing to object to the evidence.

The statements questioning Rodgers' denials were not opinions of guilt. They were offered to show Rodgers' responses. And the ultimate issue was not the truth of Rodgers' initial denials, but Rodgers' mental state at the time of the strangulation.

Therefore, there was no error and the defendant's conviction for murder in the first degree must be affirmed.

II. ISSUES

1. Were the statements of family members questioning the defendant's denials of his actions improperly admitted as opinions as to the defendant's guilt?
2. Where the defendant did not object to the witness statements below, can the defendant establish a manifest error affecting a

constitutional right such that he should be permitted to raise the claim for the first time on appeal?

3. Where the defendant's theory was the defendant killed his wife while in a dissociative state and lied to cover up the death and delay arrest, do the questions of the witnesses regarding the lies address the mental state of the defendant at the time of claimed dissociative state?
4. Where the issue for the jury was not the truth of the defendant's initial story but the mental state of the defendant at the time of his strangulation of his wife, has the defendant established ineffective assistance of counsel by failing to object to the witness statement questioning the story?
5. Is any error in admission of the statements questioning the defendant's story, harmless beyond a reasonable doubt that the defendant's story was later acknowledged to be false and the case turned on the testimony of the experts as to the defendant's mental state at the time of the strangulation?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On July 3, 2012, William Rodgers was charged with Murder in the Second Degree of his wife, Sherri, alleged to have occurred on May 28,

2012. CP 209, 3, 11. Rodgers claimed his wife had fallen down a staircase. CP 3-4. The autopsy revealed Sherri had defense wounds on her forearms and hands and had been strangled. CP 11.

A subsequent search of the defendant's computer showed internet search the days prior to the death which included "how to break a neck" and "how dangerous it is to fall down stairs." CP ____, (Supplemental Designation of Clerk's Papers pending, Sub No. 28 at pages 3-4, State's Motion to Amend Information filed September 21, 2012.)

On September 12, 2012, the information was amended to Premeditated Murder in the First Degree. CP 14-5.

On October 13, 2014, the case proceeded to trial. 10/13/14 RP 3¹.

On October 31, 2014, the jury returned a guilty verdict as charged with Premeditated Murder in the First Degree. CP 354.

On January 5, 2015, Rodgers was sentenced to the top of the range of 320 months. 1/5/15 RP 159, CP 196.

On January 6, 2015, Rodgers timely filed a notice of appeal. CP 257.

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case with references of both parties are listed in Appendix A.

2. Summary of Trial Testimony

i. Evidence in State's Case.

On May 28, 2012, at about 8:53 a.m. William Rodgers called 911 to report his wife had fallen down the stairs at their house and was not responsive. 10/23/14 RP 83-4, CP __, (Exhibit 211, Supplemental Designation of Clerk's Papers pending), 10/27/14 RP 48.

Rodgers also called his friend Tim Livingston just before 9:00 a.m. telling him Sheri had fallen and was not responsive. 7/30/14 RP 23.² Livingston lived nearby and went to the house arriving within minutes. 7/30/14 RP 24, 33.

Livingston found Sheri Rodgers lying at a 45-degree angle with her head up on the third or fourth step from the bottom of the stairs with her feet pointed down. 7/30/14 RP 29, 65, 72-3, CP __, (Exhibit 4, Supplemental Designation of Clerk's Papers pending). Sheri was pale and Livingston saw bruising evident on the left side of her neck. 7/30/14 RP 40. Sheri was not breathing and Rodgers was not performing CPR. 7/30/14 RP 32-4, 66.

Sheri's glasses were on the stairs 7/30/14 RP 28-9. There was a pink Scuba tank at the bottom of the stairs. 7/30/14 RP 35, 67, 10/22/14

² Livingston testified in advance of trial at a deposition. Appendix B provides a table of witness testimony indicating on which day and at which page, the witness testified.

RP 149. There was a pink mark on the stairwell wall and an irregular shaped hole in the wall near the fourth step from the bottom. 7/30/14 RP 27, 10/24/14 RP 128. Livingston did not perform CPR despite being trained because he heard sirens coming. 7/30/14 RP 34, 41

Rodgers had fresh scratches on his face and head. 7/30/14 RP 38-40, 10/16/14 RP 28-36 CP ___, (Exhibits 11-16, 123-39, Supplemental Designation of Clerk's papers pending). Rodgers claimed to Livingston that the family dog had scratched him. 7/30/14 RP 40.

Rodgers claimed to Livingston they were moving something up to the upper floors and he had gone to the bathroom and gotten some nuts. 7/30/14 RP 34. He said that they watched some television, messed around a little bit and when he came back around the corner, "Sheri was laying face down at the bottom of the stairs with her head at the bottom of the stairs and her feet facing up the stairs." 7/30/14 RP 34.

Rodgers continued making a series of statements to friends and family telling them Sheri died from a fall down the stairs.

Rodgers was taken to the police station for an interview. 10/16/14 RP 13-14, 23. The CD of the interview was admitted and played for the jury 10/16/14 RP 23-5. CP ___, (Exhibit 195, Supplemental Designation of Clerk's papers pending).

During the interview, Rodgers got a phone call from his daughter

Natasha. Natasha testified she had received a text from her father at about 7:00 a.m. describing what he was going to be doing that day. 10/16/14 RP 114. She described that he had then missed a call from her father around 10:00 a.m. and called him back. 10/16/14 RP 112. Rodgers answered and told Natasha that her mother was never coming home again. 10/16/14 RP 112. He went onto say that she had an accident. 10/16/14 RP 112. Natasha questioned Rodgers about whether they had been fighting because she was aware her mother had been miserable in the relationship for months. 10/16/14 RP 112-3. Rodgers said that she had fallen down the stairs, and that they had not been fighting. 10/16/14 RP 113. Rodgers urged Natasha to come home from Idaho quickly. 10/16/14 RP 114.

Natasha got a flight out that day and was picked up by friends and taken straight to the house. 10/16/14 RP 115. When she arrived, her father came out for a hug, and the first thing Natasha noticed were the scratches on his face. 10/16/14 RP 116. Natasha stopped him first and asked him about the scratches. 10/16/14 RP 116. Rodgers said “Oh, it was the dog, Savannah, she scratched me.” 10/16/14 RP 116. Rodgers proceeded to pull her in for a hug. 10/16/14 RP 116.

Natasha described his observations of the scratches stating:

- Q. What concerned you about the scratches? What did you think?
- A. He said it was the dog. And honest to God my gut

feeling was when I saw his face and saw his arms, the three marks from his eyes to his hairline were my mom's fingers. I mean there's no way that a dog could have extended his fingers in the paws. Because they were all separate, and they were all defined. And my mom had manicured nails, and she did them herself. She did them all the time. ...

Q. So she was meticulous about her nails?

A. Yes. So when I saw the scratches, the very first thought was it was fingernails. But he swore up and down to me for 48 hours that it was the dog.

Q. Every time it came up?

A. Yes.

10/16/14 RP 116-7. Natasha was with her grandmother, when she took out \$15,000 in cash to give to Rodgers for the funeral. 10/16/14 RP 121-2.

A few days after Sheri's death, Rodgers acted out what occurred to Natasha. 10/16/14 RP 125. He told her that he may be arrested and he never hurt Sheri. 10/16/14 RP 125. He went on to tell Natasha that she did not have to say anything to the police. 10/16/14 RP 125. He went on to say they were not fighting but were rough housing and he was being playful. 10/16/14 RP 125. He acted out how the dog was jumping up on him and that's how he got scratched. 10/16/14 RP 125. He described that he was tugging at Sheri's bathrobe, trying to be playful and flirtatious, but she pushed him away. 10/16/14 RP 126. Natasha described that Rodgers said Sheri put her hand on his face and told him he was bleeding. 10/16/14 RP 126. Sheri told Rodgers stop, stop and was pulling away. 10/16/14 RP 126. Rodgers mentioned no violence. 10/16/14 RP 126.

Rodgers then said Sheri needed to move her scuba gear upstairs and that he offered to help but Sheri refused. 10/16/14 RP 126-7. He said he went downstairs to get the scuba stuff, but when he returned “everything was done.” 10/16/14 RP 127.

Rodgers also called his son Nicholas who was in the Army and stationed in Korea at the time. 10/16/14 RP 56. When Nicholas was able to call home, all that Rodgers would say was that Nicholas needed to get home and that his mother had been in an accident. 10/16/14 RP 56-7. Rodgers would not say anything else. 10/16/14 RP 57.

The night before the phone call, Nicholas had gotten a phone call from Sheri saying that Sheri had a good day and had fun that night. 10/16/14 RP 58. Sheri put Rodgers on the phone and Rodgers proceeded to tell Nicholas what he had planned the next day. 10/16/14 RP 59.

Nicholas described that Sheri kept the scuba gear on the ground floor in the garage and never put them upstairs. 10/16/14 RP 60-1.

Rodgers’ son, Jeremiah, was on an Alaskan cruise when he got a call from Natasha and Rodgers. 10/20/14 RP 39. Rodgers told Jeremiah there had been an accident, but did not go further. 10/20/14 RP 39. Natasha then blurted out that Sheri was dead. 10/20/14 RP 39. The phone call did not last much longer, and Jeremiah did not talk to Rodgers until the next day. 10/20/14 RP 39-40. Jeremiah asked Rodgers what the cause

of death was. 10/20/14 RP 41. Rodgers said Sheri was carrying dive tanks up stairs and “the next thing I know she’s at the bottom. I was doing CPR. It happened so fast.” 10/20/14 RP 41. Rodgers did not say anything else. 10/20/14 RP 41.

The funeral director who arranged Sheri’s disposition met and spoke with Rodgers a few days after the death. 10/20/14 RP 148-9. The director noted Rodger had fresh scratches on his face and head. 10/20/14 RP 150-1. Rodgers expressed the desire to cremate Sheri’s remains. 10/20/14 RP 150. He did not ask for any other services. 10/20/14 RP 150. Rodgers asked about the possibility of a viewing so his two sons could see her. 10/20/14 RP 151. The funeral director had to determine whether the body was “viewable.” 10/20/14 RP 151. The embalmer suggested the body not be viewed, so the director looked at Sheri himself. 10/20/14 RP 152-3. The director observed bruising on the head, eyes and cheeks. 10/20/14 RP 153. The director told Rodgers viewing would not be a good idea. 10/20/14 RP 153. Rodgers questioned why Sheri did not appear black and blue at home. 10/20/14 RP 153. Rodgers also questioned about whether there was a mark on Sheri’s neck. 10/20/14 RP 154. As a result, the director went back and looked at her neck and observed what appeared to be a handprint. 10/20/14 RP 155. The director shared the information with police. 10/20/14 RP 155-6.

Rodger's good friend William Waters testified that he went to the house the day of Sheri's death. 10/20/14 RP 158, 162. Waters described that Rodgers was "badly scratched." 10/20/14 RP 176. Rodgers told Waters that he "got these scratches pruning some trees." 10/20/14 RP 177. And "the other explanation was the dog had kind of been jumping up on him." 10/20/14 RP 177. Later Rodgers told Waters what had happened saying, that he went to the bathroom and grabbed something to eat, and when he went outside, Sheri was laying at the bottom of the stairs. 10/20/14 RP 178. Waters did not question him further. 10/20/14 RP 178,

The year before, Rodgers had confided in Waters about an affair he was having with Meighan Nichols. 10/20/14 RP 163-4. Waters testified about his observations of the relationship. 10/20/14 RP 164-175. Rodgers even asked Waters to get a cell phone for Nichols to use on Waters' plan. 10/20/14 RP 170.

Rodgers' close friend Brian May testified. 10/22/14 RP 47, 49. In the year prior to Sheri's death, May's relationship with Rodgers changed. 10/22/14 RP 50. Rodgers had been having an affair and Rodgers was always talking about how he had been abused as a child. 10/22/14 RP 50-1. May testified Rodgers claimed Meighan Nichols was his soul mate and was deeply in love. 10/22/14 RP 52. May said that in the spring of 2012, Rodgers was in a full blown relationship with Nichols and making no

attempt to save his marriage. 10/22/14 RP 57.

May lived close to Rodgers and went over to the house about 9:00 a.m. when he found out Sheri had died. 10/22/14 RP 61. May saw there was a sheet over Sheri. 10/22/14 RP 61. May described that Rodgers was “a bloody mess. There was blood all over his head, neck and arm.” 10/22/14 RP 61. Rodgers hugged May. 10/22/14 RP 62. May thought it was Sheri’s blood before realizing that the wounds were from scratches on Rodgers that had stopped bleeding. 10/22/14 RP 62. The scratches had been bleeding profusely at first. 10/22/14 RP 62. It was not until later in the day that May saw Rodgers scratching or rubbing gravel into his head. 10/22/14 RP 62. That occurred after they had been to the police station and come back and when the coroner was on the scene. 10/22/14 RP 62.

Rodgers told May he had received the scratches from roughhousing with the dog and blew it off as unimportant. 10/22/14 RP 63. When asked what happened, May heard Rodgers say that Sheri had fallen down the stairs after they were moving things, that Rodgers was downstairs, and when he came back to the stairs Sheri was there and had fallen. 10/22/14 RP 63. May was present when Rodgers was arrested and Rodgers had no visible reaction at all. 10/22/14 RP 65-6.

Mark Thompson was another friend of Rodgers of about twenty years. 10/21/14 RP 101-2. Rodgers approached Thompson in June or July

of 2011, about Thompson getting a cell phone for Rodgers' lady friend so Rodgers' wife would not find out about it. 10/21/14 RP 104. Thompson arranged for the phone. 10/21/14 RP 105. Thompson also became aware in the summer of 2011 of Rodgers' claims of sexual abuse as a child. 10/21/14 RP 105-6.

The day before Sheri's death, Thompson had been playing an online game with Rodgers when Rodgers dropped off. 10/21/14 RP 107. Thompson could not get ahold of Rodgers and got a cryptic message back the next day telling Thompson that things were bad there and he needed to call Livingston. 10/21/14 RP 107. Thompson also went to the house. 10/21/14 RP 108. Thompson noted the scratches on Rodgers. 10/21/14 RP 108. Thompson overheard Rodgers saying Sheri fell down the stairs and that the scratches were caused when he was wrestling with the dog. 10/21/14 RP 109. Thompson described Rodgers looked like he was in a little bit of shock, bouncing around a lot, couldn't sit still, broke down a few times and got upset. 10/21/14 RP 110. But when asked if Rodgers was acting strange, Thompson said "Well, at one point he stared at me, gave me this look that made me doubt what had happened." 10/21/14 RP 110. Thompson described the look caused him to think. "It was just, I don't know how to describe it. It was a look of I knew in my head what did you do, Bill?" 10/21/14 RP 110.

A neighbor, who went to her window after she heard sirens, heard a loud wail and a sob and someone state "I didn't mean to hurt her." 10/22/14 RP 142.

The physical evidence supported strangulation as opposed to an accidental fall down the stairs.

Sheri's autopsy revealed she died of strangulation. 10/24/14 RP 87, 120-1, 123-5. She had marks on her left front neck and a fractured larynx. 10/24/14 RP 91, 106-7, 113, 115-8. There was petechia evident in Sheri's upper right eye. 10/24/14 RP 127, 147-8. Sheri had injuries to her right hand, wrist and forearm consistent with defensive wounds 10/23/14 RP 99-104, 124, 138. Swabs were taken from under Sheri's fingernails, with one wet swab and one dry swab used for all of the fingernails on each hand. 10/23/14 RP 46-9. DNA testing of the fingertip swabs on the right hand revealed a DNA profile that matched Rodgers. 10/23/14 RP 58-9, 10/24/14 RP 123, 130. Although male DNA was on on the swab from the left hand, due to the amount of female DNA, testing was not completed. 10/23/14 RP 57-8.

The pathologist testified the injuries to Sheri's neck were inconsistent with what someone would receive by falling down stairs. 10/24/14 RP 92, 116-7, 133. He also testified any injuries received from falling down the stairs would not have been deadly. 10/24/14 RP 87, 91-3,

97-8, 124. Positional asphyxiation was ruled out as the cause of death.
10/24/14 RP 125-6.

In addition to the scratches on his head, Rodgers also had scratches on his arms. 10/16/14 RP 36-42, CP ___, (Exhibits 107-122, Supplemental Designation of Clerk's papers pending).

Nail clippings from Rodger's dog taken three days after the incident revealed no blood. 10/23/13 RP 59-60, 73-4, 82.

The law enforcement investigation examined Rodgers' computer use and relationships.

On the day of the incident, Ely had observed a laptop in the kitchen. 10/22/14 RP 168. Upon service of a search warrant after Rodger's arrest, Ely found the laptop in a dresser drawer in the master bedroom. 10/20/14 RP 71-2, 10/22/14 RP 167-8, 10/27/14 RP 20. The laptop's name was "Bill PC" and the software was registered to "Bill." 10/27/14 RP 28.

Information was obtained from the "session store" on the laptop itself which is a file that is created that allows a computer to restore to that same point and has associated times and dates. 10/27/14 RP 27. Also, search history records obtained from Google.com, had login and logout records for Rodgers e-mail account at RBpfectlife@gmail.com. 10/27/14 RP 29. CP ___, (Exhibit 203, Supplemental Designation of Clerk's Papers

pending).

The laptop had e-mails to Nichols. 10/27/14 RP 22. The time stamps on the e-mails to Nichols at MNperfectlive@google.com matched the time stamps when Rodgers' username, RBperfectlife@google.com, had been logged in. 10/27/14 RP 28-9, 110. On May 28, 2012, at 7:43 a.m. an e-mail with the subject of "Good morning" was sent from RBperfectlife@google.com to MNperfectlive@google.com. 10/27/14 RP 29.

Since session store artifacts are based upon past activity, the records showed that beginning on May 5, 2012, a session was opened during which a website was accessed that included "25 methods for killing with your bare hands." 10/27/14 RP 37. Activity at the website also showed access to a page including "ten ways to commit the perfect crime." 10/27/14 RP 40-1.

Between May 20, 2012, and May 27, 2012, a session was left open and internet searches included "it is really possible to break someone's neck by twisting it with my bare hands like in the movies," "25 methods for killing with your bare hands," and "how dangerous is it to fall down stairs." 10/27/14 RP 39-40, 43-7, 84. As a result of the searches, a hyperlink was created for top ten tips to commit the perfect crime. 10/27/14 RP 41. The search times were consistent with log in times for

RBperfectlife@google.com beginning May 27, 2012, at 7:50 a.m. and the logout time on May 27, 2012, at 1:39 p.m. 10/27/14 RP 38-43, 45-47. An additional log shows on times from 4:34 p.m. to 4:37 p.m., 5:18 p.m. for a minute, and 10:57 p.m. to 5:11 a.m. on May 28, 2012. 10/27/14 RP 47. At 10:57 p.m. on May 27, 2012, an e-mail was sent to Nichols. 10/27/14 RP 48. At 7:41, a.m. on May, 28, 2012, Rodgers wrote a good morning e-mail to Nichols and logged out at 7:43 p.m. 10/27/14 RP 48.

On May 28, 2012, at about 8:53 a.m. Rodgers placed the 911 call reporting Sheri Rodgers had fallen down the stairs. 10/27/14 RP 48.

In addition to the relationship Rodgers was pursuing with Nichols, Rodgers sought to have his wife pursue a relationship.

Meighan Nichols acknowledged she was having an affair with Rodgers which became sexual in June of 2011. 10/21/14 RP 123, 128. The emotional and physical relationship continued up to the time of Sheri Rodgers' death. 10/21/14 RP 135. After Sheri's death, Nichols asked Livingston to retrieve personal notes that Rodgers kept in a folder at Rodgers' classroom. 10/21/14 RP 138-9. Livingston retrieved the correspondence between Rodgers and Nichols which were admitted. 7/30/14 RP 41-2, 10/21/14 RP 139-151, 10/22/14 RP 13-17, CP __, (Exhibits 2A- 2H, 2K-2LL, Supplemental Designation of Clerk's Papers pending). In addition, numerous e-mails between Rodgers and Nichols

obtained from Rodgers' computer were admitted. CP __, (Exhibit 205, 247, Supplemental Designation of Clerk's Papers pending). Nichols said Rodgers was avoiding being intimate with his wife. 10/22/14 RP 18.

William West met Sheri and William Rodgers through an ad posted on Craig's list looking for a sexual relationship in 2011. 10/21/14 RP 22. West described that there were shared relations with Sheri on the first occasion. 10/21/14 RP 23-4. On the second occasion, West just held Sheri's hand while Rodgers was being forceful with her. 10/21/14 RP 24. As a result of Rodgers' actions West did not want to meet with both of them again. 10/21/14 RP 25. After that point, Rodgers sent e-mails to West encouraging West "to be her boyfriend, be nice to her, give her things, stuff like that." 10/21/14 RP 25. Rodgers liked the idea of West being Sheri's boyfriend. 10/21/14 RP 25. West continued to correspond with and meet with Sheri. 10/21/14 RP 26. Sexual relations occurred every couple of weeks. 10/21/14 RP 26. Sheri acted like she wanted to be out of the relationship with Rodgers. 10/21/14 RP 27. West corresponded with Sheri Memorial Day weekend by text messaging. 10/21/14 RP 29.

Rodgers told Nichols that he was not upset by the relationship that William West was having with Sheri Rodgers. 10/21/14 RP 136.

ii. Defense witnesses called.

William Rodgers did not testify.

Rodgers called his doctor, Roger Estep, who saw Rodgers for fourteen years. 10/28/14 RP 3-5. Estep said his treatment of Rodgers was normal until a physical on August 16, 2011, when Rodgers appeared to be in emotion turmoil and described a number of incidents occurring in his life. 10/28/14 RP 5-6. Rodgers had no mental health issue of note for thirteen years until the reports made in 2011. 10/28/14 RP 17-18. Rodgers spoke of an incident in the military as a sniper in El Slavador and sexual abuse by his father from ages seven to fourteen. 10/28/14 RP.8. Estep prescribed medication and referred Rodgers to a counselor. 10/28/14 RP 9-10. Rodgers also described suicidal episodes. 10/28/14 RP 10. Prior to September of 2011, Estep had never observed any evidence of cutting on Rodgers. 10/28/14 RP 23.

Prior to 2011, Rodgers had permitted release of medical information from his files to his wife and son. 10/28/14 RP 20-1. In October 2011, Rodgers changed the release to only allow information to be shared with Meighan Nichols. 10/28/14 RP 21.

Rodgers called friend Darin Gallagher, who testified that in 2011, Rodgers told him about childhood sexual abuse. 10/27/14 RP 111, 114. But in the year before Sheri's death, Gallagher saw less of Rodgers than in the 18 or 19 years before. 10/27/14 RP 123. Gallagher said that Rodgers

was a survivalist prepper. 10/27/14 RP 116. Gallagher said that in the summer of 2011, Sheri and Rodgers were using separate bedrooms. 10/27/14 RP 117. Rodgers described it as if they were dating again. 10/27/14 RP 117.

Leanne Haywood, Rodger's counselor beginning October, 6, 2011, testified as to her counseling of Rodgers. 10/27/14 RP 125, 130. Haywood had 22 sessions with Rodgers. 10/27/14 RP 131. 2 were attended with Meighan Nichols, 1 was attended with Tim Livingston, and the other 19 sessions were private. 10/27/14 RP 131. The sources of Rodgers' issues were from self-reported military service issues and childhood sexual abuse claims. 10/27/14 RP 132. Haywood's opinion was that Rodgers had PTSD. 10/27/14 RP 136. Haywood said that on February 7, 2012, Rodgers appeared with injuries on his arms and chest and claimed he tripped on his dog going down the stairs and fell head first. 10/27/14 RP 140. At Rodgers' session on May 22, 2012, Rodgers was in tears the whole time. 10/27/14 RP 143.

Defense retained and called Leslie Trout, who had a background in information technology and internet security. 10/28/14 RP 29-30. Trout was asked to look at Rodgers hard drives on a laptop and desktop to look for evidence of Google searches and map information and to review internet history provided by Google. 10/28/14 RP 32-3. Trout found

evidence in searches of “how to break an N” caused search results which was completed to “how to break a Neck” which was then clicked on. 10/28/14 RP 38, 65. Trout also found artifacts showing parts of a search involving “falling down stairs, S-T-A-R-I-S, plus how dangerous, D-A-N-G-E-R-U-S.” 10/28/14 RP 38. As a result, the search was completed to how dangerous is it to fall down stairs. 10/28/14 RP 67. This search presented links to sites including 25 methods for killing with your bare hands. 10/28/14 RP 40. Trout contended there was not enough evidence on the computer to show what the person was actually searching for or whether links to pages were clicked on and viewed. 10/28/14 RP 47.

Rodgers retained psychologist Delton Young to evaluate him. 10/24/14 RP 8, 12-3. Young first evaluated Rodgers in May of 2014. 10/24/14 RP 34. Young met with Rodgers over three days for a total of about five hours. 10/27/14 RP 35.

Young testified Rodgers claimed to be a sniper in the military and that had shot someone in El Salvador and was confronted by a relative of the person he shot. 10/27/14 RP 21.

Young opined that Rodgers had PTSD and that “[H]e describes that her death came about as dissociative flashback” and believed he was fighting off his father. 10/27/14 RP 41, 43. 47. Young went on to provide the description provided by Rodgers.

He described somewhere around 8:30 in the morning he and Sheri were upstairs in his -- near his room or where he had been sleeping most of the time. Their dog Savannah was with them. He was roughhousing with the dog. He describes trying to get Sheri by pulling on her robe to come join in the play and maybe have sex. She was resisting that. She had an appointment to go to soon thereafter.

He described that the dog scratched him because the dog gets rough, I guess. He described that at some point the dog jumped on Sheri and, he believes, scratched her, possibly in a place where she had a tattoo, he described, not too long before, which probable caused pain.

He described that she whirled around and slapped him quite hard on the face. He stated that was entirely out of character for her. She wasn't a violent person. However, in his account, it triggered the feeling and sense that he had at that moment that he was back being brutalized by his father. In other words, he described a dissociative flashback where he feels like he's back in the situation of being dominated and brutalized by his father.

He at that point believes he's fighting against his father, fighting for his life perhaps. He describes at some point things went dark and quiet. He describes at some point it was as if he came out of a fog, and he saw Sheri down the stairs not moving.

He describes he has no memory about what he actually did to Sheri. Although, of course, the medical examiner can give us a pretty good idea. He describes then checking on her, calling his friend Tim Livingston, who, I believe, lived quite nearby and came over quickly and another friend who came over again shortly thereafter.

Mr. Rodgers' account of that incident does fit with what we would expect in a severe violent dissociative flashback. In other words, it's plausible and could well be the case.

10/27/14 RP 43-4. Young provided Rodgers' explanation for why he admitted to making up a story to police. 10/27/14 RP 44-5.

When asked by Young why he made up the story, Rodgers told Young he made up the story to buy time. 10/27/14 RP 45.

Mr. Rodgers explained to me that he knew at that time that he was responsible for Sheri's death. He knew he had killed her. Being well educated, having military training, he knew perfectly well that the story about how she fell down the stairs and died that that wasn't going to hold up. He knew perfectly well the medical examiner would sort out the real cause of death pretty quickly. He knew he would be arrested before long. He explained to me that he just didn't want to go to jail right away. If he had told the police the true story they certainly would have arrested him. So he made up this story so that he could stay out of jail for a day, or two, or three, or whatever time it would take for the examiner to determine the real cause of death.

He explained that his children -- he wanted for his children to get home. I believe one of his children, I believe, was overseas. One was, I believe, in Idaho. I can't remember where the third one was. But he wanted his kids to get home before he was arrested. He stated also that his plan was to stay out of jail, get his kids home, and commit suicide.

10/24/14 RP 45-6.

On cross-examination, Young acknowledged that Rodgers history including claims regarding the incident in the military, dangerous activity and sexual abuse claims were self-reported. 10/24/14 RP 59. Young claimed Rodgers denied doing internet searches resulting in things like how to kill someone with your hands. 10/24/14 RP 61. Young believed Rodgers' explanation of why he made a false story to police was plausible. 10/24/14 RP 63.

iii. State's rebuttal evidence.

In rebuttal to Dr. Young called by the defense, the State called Dr. Mark McClung. 10/29/14 RP 10. McClung is a psychiatrist who was retained by the State and evaluated Rodgers, interviewing him on September 24, 2015, for a little more than five hours. 10/29/14 RP 18. In addition to reviewing discovery materials, McClung also interviewed Meighan Nichols and Leanne Haywood. 10/29/14 RP 19.

McClung had doubts about the reliability of Rodgers' self-reports. 10/29/14 RP 24, 47. McClung noted Rodgers pattern of deception and lying surrounding his affair. 10/29/14 RP 29-30, 47. McClung noted incidents had feigned injury and staged falling down stairs to avoid being with Sheri. 10/29/14 RP 30-1.

McClung described that Rodgers had the criteria for having PTSD. 10/29/14 RP 22. McClung described that he believed Rodgers' relationship with Meighan Nichols was of great importance to Rodgers' mental state at the time of Sheri's death. 10/29/14 RP 25. The e-mails between Rodgers and Nichols showed a volume and frequency consistent with an obsessive and intense affair. 10/29/14 RP 31. McClung noted that that just before Sheri's death, Rodgers had placed a phone call to Nichols which was picked up by her husband, and there were statements to several people that Sheri was planning to talk to Rodgers that weekend about

ending the marriage. 10/29/14 RP 33-4.

McClung noted that in e-mail exchanges with Nichols two days before Sheri's death, Rodgers claimed to no longer have a sexual interest in Sheri. 10/29/14 RP 44. That assertion was inconsistent with claims at the time of Sheri's death that he was trying to be sexually playful with Sheri before her death. 10/29/14 RP 48. McClung noted a number of other inconsistencies in Rodgers claims including the story regarding falling down stairs, claims of a plan to commit suicide, but still seeking \$15,000 in cash from Sheri's mother, Sheri taking a sleeping pill 10/29/14 RP 47-50. McClung saw no spontaneous expression of sadness, loss or grief during the entire time he spent with Rodgers. 10/29/14 RP 53.

And contrary to the interview with Dr. Young who claimed Rodgers said he had no recall of details of the assault, Rodgers told McClung that he recalled being crouching in a defensive position with his forearm across his face and exploding upward. 10/29/14 RP 50. The recall would not fit with a severe dissociative state which is often associated with amnesia. 10/29/14 RP 50-1. Had sexual activity with other males or slapping been a trigger, McClung would have expected a flashback to have more likely to have occurred during a male sexual encounter or slap fights both of which Rodgers was known to do. 10/29/14 RP 58-60

McClung opined to a reasonable medical certainty that more likely

than not, Rodgers' mental disorder did not interfere with his ability to know the identity of who he was attacking. 10/29/14 RP 63. He also opined that his mental disorder did not render him incapable of forming intent for a crime. 10/29/14 RP 64.

The State also recalled Brian Waters, who testified that contrary to Rodgers's claims, Rodgers said he had not been a sniper or in special forces in the military. 10/29/14 RP 18. Rodgers told Waters he had been of a forward observer who would go ahead of infantry and artillery and determine which targets to hit. 10/29/14 RP 8.

iv. Motion to Exclude Natasha Rodgers Question of Father Regarding Fighting.

There was a pretrial motion made to exclude a question from Natasha Rodgers of "were you fighting" while on a phone call with Rodgers. 10/13/15 RP 33. The call between Natasha and her father was recorded because Rodgers was in a recorded interview when the call came. CP 35. The following conversation occurred:

Female: Dad, what's wrong.
Bill: Mom had an accident today baby.
Female: Dad, what happened?
Bill: I don't know exactly. She, I don't know, we were loading up some gear and she just ended up at the bottom of the stairs. We were rough housing with Savannah, I don't know what happened.
Female: Dad, what happened?
Bill: (crying) She, she fell down the stairs baby. (crying)
Female: What? Were you guys, were you guys fighting?

Bill: No, no. (crying) Just your mom has the, the, the
dive hear [gear] in the hallway, in the closet up
there. (crying). Are you...

Female: Is she okay?

Bill: No, she's not. (crying)

Female: (crying) What's wrong with her?

Ely: You need to tell her. You need to tell her.

Bill: (crying)

Female: Dad (inaudible)

Bill: (crying)

Female: (inaudible) talk to me. You're scaring me. Was it,
was it you?

Bill: No, she just, I'm at the police station. She's not
coming home baby. I'm sorry.

Female: So what do you mean she's not coming home?

Bill: (crying) (inaudible) I love you honey.

Female: Dad I'm scared. Are you (inaudible).

Bill: I know, I know, she had an accident. She fell down
the stairs. Or tripped or something. I don't know.

Female: So what are you telling me?

Bill: (crying) Your mommy's dead. (crying)

Female: No dad. (crying)

Bill: I know baby.

Female: (crying)

Bill: (crying) I'm sorry.

CP 35-7. Later in the call, Natasha again questioned Rodgers.

Female: Dad I'll come home, I'll come home.

Bill: I know. I don't know what to do. It's so confusing

Female: I know dad. Were, well if you guy's weren't
fighting, what happened?

Bill: Oh we were just, we talked to Nick last night, we
went to dinner with the Dunnoms, and everything
was fine. And Natasha I gotta, I've.....

CP 37.

The Court reserved ruling to a later time. 10/13/14 RP 34. When
the matter was brought back before the court, Rodgers first contended the

statement was more prejudicial than probative under ER 403. 10/16/14 RP 4. Defense then indicated they were objecting as hearsay as well as under ER 403. 10/16/14 RP 7-8. Defense indicated concern that questioning regarding fighting would imply a history of domestic violence. 10/16/14 RP 8. The Court noted that fighting had a lot of meanings, and weighed that unfair prejudice did not outweigh the probative value. 10/16/14 RP 10-11. Defense went on to withdraw the objection based upon hearsay once the trial court noted that the question was not made for the truth of the matter asserted. 10/16/14 RP 12.

IV. ARGUMENT

1. The witness questioning the defendant's about his version of the events, which was later conceded was false, were not admitted as expressions of guilt.

Rodgers brief concludes rather quickly that the statements of the witnesses were opinions as to guilt or veracity. Examining the statements made and issues in the case, the undisputed fact that Rodgers initially claimed his wife fell down the stairs and the subsequent undisputed evidence that he did in fact strangle his wife but claimed he did so without the intent to kill her, reveals that in context the witness questioning of the defendant were not expressions as to guilt or veracity.

i. Case law provides that whether a witness has made opinions as to guilt or veracity depends on the witness, testimony, charges, defenses and other evidence.

Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)); see also ER 608 cmt. (noting that "[t]he drafters of the Washington rule felt that impeachment by use of opinion is too prejudicial and on a practical level is not easily subject to testing by cross examination or contradiction"). **In determining whether statements are in fact impermissible opinion testimony, the court will generally consider the circumstances of the case, including the following factors:**

- (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."

Heatley, 70 Wn. App. at 579.

State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (bold emphasis added).

When the questioning of a defendant includes assertions to the defendant the statements are false, the assertions are not made for the purpose of providing the opinion of the witness as to guilt. False information given to others is considered admissible as evidence relevant to defendant's consciousness of guilt. *State v. Clark*, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001), *citing*, *State v. Allen*, 57 Wn. App. 134, 143, 788

P.2d 1084 (1990).

In *Demery*, officers asserted to the defendant that he was lying during the course of questioning.

As we have recognized, it is the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses. See *State v. Whelchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990). Because the trial court concluded that the responses made by the defendant were relevant in regard to the defendant's credibility as a witness, we conclude that the jury was entitled to assess the reasonableness of the defendant's responses to the officers' assertions that he was lying.

State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001).

In *State v. Curtiss* a detective recounted police statements made to the defendant about her veracity and guilt during questioning. *State v. Curtiss*, 161 Wn. App. 673, 697-98, 250 P.3d 496, rev. denied, 172 Wn.2d 1012 (2011). Such questioning shows police tactics as opposed to expressions of belief. *State v. Curtiss*, 161 Wn. App. at 697. In addition, improper opinion testimony is not reversible error where the trial court properly instructed the jury that it was the sole judge of witness credibility and no evidence indicated the jury was unfairly influenced, thus indicating no unfair prejudice resulted. *State v. Curtiss*, 161 Wn. App. at 697-8, see also *State v. Haq*, 166 Wn. App. 221, 266-67, 268 P.3d 997, rev. denied, 174 Wn.2d 1004 (2012), (finding no manifest error where defendant failed to object below, the testimony was not an explicit or nearly explicit

opinion on his guilt, and the testimony was not so prejudicial in the context of the entire trial as to create practical or identifiable consequences).

Witness testimony in the present case focused on the defendant's initial assertions that an accident occurred.

ii. The witness questioning of Rodgers' claims that his wife fell down the stairs were not offered opinions of guilt.

Applying the five factors from *Demery/Heatly* to the present case, shows the witnesses testimony were not offered as opinions of guilt.

All of the witnesses were civilians as opposed to experts or officers whose positions give them an air or credibility. The nature of the testimony was descriptive as to the witness observations and the defendant's actions and statements as opposed to flat-out statements as to guilt or veracity. The charges here was murder which would cause any witness to question the last person seen with the victim. The defense here ended up conceding the false statements and asserted a dissociative state. And the other evidence before the trial court caused the jury to have to decide guilt or innocence based upon the competing expert opinions as opposed to the testimony of the witness as to the defendant's denials.

The individual areas need to be evaluated individually.

I. The trial court did not abuse its discretion since Natasha Rodgers' reference to fighting was a question posed to the defendant in a conversation and provided context for the defendant's later statements.

A decision involving the admission of evidence lies within the sound discretion of the trial court and will not be reversed unless abuse of discretion can be shown. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)

There was a pretrial motion to exclude a question from Natasha Rodgers of "were you fighting" while on a phone call with Rodgers. 10/13/15 RP 33. The Court reserved ruling at first. 10/13/14 RP 34. When the matter was brought back up, Rodgers first contended the statement was more prejudicial than a probative under ER 403. 10/16/14 RP 4. Defense then indicated they were objecting as hearsay as well as under ER 403. 10/16/14 RP 7-8. Defense indicated concern that questioning regarding fighting would imply a history of domestic violence. 10/16/14 RP 8. The Court noted that fighting had a lot of meanings, and that the trial court could not weigh that unfair prejudice did not outweigh the probative value. 10/16/14 RP 10-11. Defense went on to withdraw the objection based upon hearsay once the trial court noted the question was not made for the

truth of the matter asserted. 10/16/14 RP 12.

At trial Natasha testified about questioning her father about fighting in the context of the conversation involving her father's assertion that Sheri died on accident and as part of explaining her father's opinions about violence and the relationship between the two.

Q. How did you find out your mother had passed away?

A. I was out at my boyfriend's mom's house with his family for Memorial weekend. We camped out there. I was driving back into town. And I had a missed call from my dad around 10:00-ish. So when I was driving back into town, I don't know, 15 minutes later or so he texted me and said call asap. I thought that's a little bizarre. He hasn't been so urgent in such a long time. So I called him, and I was a minute and a half away from my apartment. I said: Hey, dad, what's going on? He said: Natasha, are you sitting down? I'm driving back to the apartment. I'll be there in a second. What's going on? It's how he told me. Natasha, your mom is never coming home again. What are you talking about? She had an accident. She's never coming home again. I don't think I necessarily utterly believed him for a moment in time. I was just what kind of a phone call is this?

Q. So what did he say?

A. Well, I don't quite remember if I started crying. But the very, very, very first thought that came into my gut and out of my mouth was: Were you guys fighting?

Q. Why was that?

A. Because of how like sad and miserable my mom had been for the past prior months, and that's just how their relationship had been. Not only did dad disconnect himself from our family and my life, but my mom was so utterly not the same. So, yeah,

yeah, were they fighting?

Q. When you say fighting do you mean physically fighting like punching each other, or what type of fighting are you talking about?

A. No, I would say growing up dad always preached, especially in my case as the baby girl and the only daughter, he always preached that a man never lays a hand on a woman. You know, for my sake, not ever being in a relationship with violence, and my brothers and I never fought, we didn't grow up in domestic violence.

Q. You never knew your parents to have domestic violence issues?

A. No, we never saw anything like that. Again, he always preached our whole entire lives that a man doesn't hit a woman and all this stuff. So when I say fighting it wasn't like that, but they'd gotten in screaming matches. All relationships get in heated arguments and voices are raised and things like that. But no, I immediately just thought that they were fighting verbally. And when he had told me that she fell down the stairs -- and if they were fighting like I literally thought that he could have just pushed her down the stairs. Why would she slip?

Q. What did you do after that conversation?

A. Dad was saying I needed to get home. I needed to figure out -- you know, could Jessie drive me home? Could I fly home? I just needed to get home. I said I'll figure it out, since this is around like 11:00 in the morning.

10/16/14 RP 112-4. Natasha went on to describe seeing Rodgers in person and questioning Rodgers about the scratches on his head being from the dog. 10/16/14 RP 116. A few days after Sheri's death, Rodgers told Natasha that he may be arrested and he never hurt Sheri. 10/16/14 RP 125.

Q. So did he demonstrate something to you?

A. He acted out his whole scenario with how mom,

you know, how they were -- they weren't fighting. They were rough housing. He was being playful. So he got up. He was acting out in front of me what Savannah the dog was doing, how the dog was jumping up on him, and that's how he got scratched, how he was tugging at my mom's bathrobe, trying to be playful and flirtatious, and she was pushing him away. At one point he put his thumb on my mouth. He had a scratch. He said: I didn't even realize I had been bleeding from the dog scratching my face because we were just playing. But then your mom put her hand on my face and she said: Stop, you are bleeding. You are bleeding. You know, I was trying to play with her. So I mean I felt afterwards during that whole entire thing why is he playing this out for me? I just felt so -- this isn't normal.

10/16/14 RP 126.

Natasha's question of her father regarding whether they had been fighting was not an expression by Natasha of her opinion as to the guilt, they were offered to provide Rodgers responses. Thus, it was no different from an officer asserting to a defendant that the defendant was lying or was guilty during questioning because it was offered to provide the defendant's response. *State v. Demery*, 144 Wn.2d at 762, *State v. Curtiss*, 161 Wn. App. at 697-98

II. Nicholas Rodgers descriptions of his father's refusal to describe the incident and the unusual phone call the day before were not expressions of guilt.

There was no objection made to the testimony of Nicholas Rodgers

about his conversations with his father immediately before and after the death. But similarly to Natasha's assertions, Nicholas gave his impressions of his father's statements when he was asserting an accident.

Q. When did you find out that your mother had passed away?

A. So I was with my unit in Korea. It was Memorial Day weekend. I received a Red Cross message. And the only thing it said is that I needed to get in touch with my family at home. I had no information. I finally called home. And I talked to my dad. And I knew immediately that – I said: Dad what happened? And he said: You just need to get home. So in my heart the way that he told me –

Q. Hold on. He told you you needed to get home?

A. Right.

Q. Did you ask him anything further?

A. I was thinking about what was going on at home. I said: What happened?

Q. Did he respond to that?

A. No. He just said: You need to get home. Your mother has been in an accident. The way that he told me I knew in my gut, I wanted to say: Dad, what did you do? Because of his tone, I knew if it truly was a car accident, a spare of the moment thing, I believe he would lay it all out there for me. He wouldn't mask it in some way or form.

Q. But he didn't tell you exactly what happened?

A. No, and he wouldn't tell me. He just said you just need to get home.

Q. So you did get home?

A. Yes, the military helped me get home immediately. From Korea it took some time, but I eventually got home.

Q. Were you able to talk to your father when you got home?

A. No. When I was able to get to the house and get to the family. It didn't matter. It was approximately 2 or 3 hours of him being arrested; so I showed up

just after the fact. And so I stopped by, and I asked them: Okay, I know I need to figure this all out for myself, but what is going on? They told me everything that they could. And then I walked up to the house, and that's where I met the detective.

Q. So how were you feeling at that point? Did you still have a lot of questions that you wanted answered?

A. Yes. Again, over the phone no matter how many times I asked, like, tell me what's going on. I knew by the way he was telling me, and the voice that he was using that he was not saying things for a reason. It felt very strange.

Q. That's back at the original phone call?

A. Right. And I knew I just needed to come home and find out for myself.

Q. Had you spoken with him the night before?

A. Yes.

Q. What was that about?

A. Another thing that was really strange. So coincidentally the night before, throughout my entire career, I would check in frequently, like on a weekly basis. My mom was my best friend. She knew everything about my life. We kept up with each other all the time. I called the night before. Due to the time difference it was late for them, but they were just getting home from having a social night, playing board games with other friends.

Q. What was the conversation about?

A. At first things with my mom were completely normal. She said okay we actually had fun tonight, and we had a good day actually. I was like that's great. Then she said: Okay. Well, do you want to talk to your dad? Yeah, of course.

Q. What did your dad say?

A. It made me feel weird, but he laid out the entire next day to me. Oh, you know what we just prepaid for our new barbecue, and I'm going to pick it up tomorrow. I'm going to make a meal for your mother. And it's going to be a really nice Sunday.

Q. Let me stop you there. You said it was weird. What about that was weird to you?

- A. It was the way he was telling me his schedule. That wasn't something that he did all the time. Like I said, our relationship was kind of strange throughout the whole year. This was out of the blue. It felt weird. At the same time I was thinking, okay, alright, alright. It made me feel weird. But after the fact, it still makes me feel weird. Because to me inside my heart it makes me feel like there was an agenda there ultimately; that he was trying to pick his alibi or something like that. That's just how it made me feel.

10/16/14 RP 56-60.

Nicholas's description of his phone call with his father the night before and his father's subsequent refusal to give explanations to Nicholas were not expressions of guilt but explanations of the circumstances of both phone calls.

III. Mark Thompson's description of the defendant's stare and facial expression was not offered as an opinion as to guilt.

Mark Thompson testified that Rodgers was acting in a little bit of shock, could not sit still and got upset. 10/21/14 RP 5.

- Q. Did you notice anything strange about how he was acting at any point?
- A. Well, at one point he stared at me, gave me this look that made me doubt what had happened.
- Q. Why do you say that?
- A. It was just, I don't know how to describe it. It was a look of I knew in my head what did you do, Bill?
- Q. That was what you thought?
- A. That's what I thought.

10/21/14 RP 110. Defense objected as speculation. The objection was

overruled. 10/21/14 RP 110.

Thompson's statement was offered as a description by Thompson of the look that Rodgers gave to him as opposed to an expression of the witnesses' opinion as to guilt. The trial court did not abuse its discretion in overruling the subsequent objection.

IV. Meghan Nichols questioning of the defendant was not an expression of guilt.

Meighan Nichols questioning of Rodgers' explanation was also offered for Rodgers' response.

- Q.** What was that conversation about?
- A.** I don't remember the whole conversation. But I just remember saying: Are you okay? How did this happen? What happened? And he said that he was rough housing with the dog. And he went downstairs and Sheri was putting away her scuba tank. And that I don't recall if he said he heard her fall or just saw her at the bottom of the stairs.
- Q.** You don't recall if he said --
- A.** I don't recall if he said he heard her or if he found her at the bottom of the stairs.
- Q.** And what was his -- was he emotional when you were talking?
- A.** Yes.
- Q.** What did he sound like?
- A.** He sounded sad.
- Q.** Did you talk about anything else?
- A.** I said I asked him about the dog, and he said that he had gotten scratched. And I said: Bill, are you sure that's what happened? And he said: Yes, that Sheri was upset that he was rough housing with the dog.
- Q.** Why did you ask if he was sure that was what had happened?
- A.** I don't know.

- Q. You said Sheri was upset with the dog?
- A. Sheri was upset with how he was rough housing with the dog.
- Q. He didn't mention anything else other than rough housing with the dog?
- A. No.
- Q. Did he say why Sheri was upset?
- A. No. He said he was playing too rough with the dog, and she was upset about it.
- Q. Had you known Mr. Rodgers to rough house with his dog?
- A. I wouldn't say rough house, but, I don't know, he was playful with the dog. He had a good relationship with his dog.
- Q. Did you see him interact with the dog?
- A. Uh-huh.
- Q. When you were at their house or other times?
- A. Yes, at the house, yes.
- Q. And did you ever know Mr. Rodgers to have injuries on him?
- A. Yes.
- Q. Were they dog-related injuries?
- A. No.

10/21/14 RP 158-9 (bold emphasis added).

Nichols testimony questioning Rodgers was not offered for Nichols opinion but for the strength of assertion by Rodgers statement “yes” and other explanation made by Rodgers thereafter when confronted.

iii. Where the defendant failed to raise this issue timely below, he is precluded from arguing the error for the first time on appeal.

Rodgers did not object to the statements of Nicholas Rodgers or Meighan Nichols. His later objections made did not ask that the testimony be stricken and instead asked that any further witnesses be instructed “to

hold off on any gut feels unless they can lay a better foundation for where that's relevant." 10/22/14 RP 87.

Thus, Nicholas and Nichols testimony cannot be the basis for reversal unless the court permits the error to be raised under RAP 2.5(a)(3) as a manifest error affecting a constitutional right.

Instructive on this issue are the cases of *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008) and *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), cited by Rodgers.

In *Montgomery*, a detective and a chemist, opined about Montgomery's guilt and specifically testified that Montgomery met the crime's intent requirement was found to be clearly improper opinion evidence. *Montgomery*, 163 Wn.2d at 587-9. However, the court held the defendant failed to establish the necessary prejudice because the jury was properly instructed on credibility and had failed to raise the issue below.

In *Kirkman*, in two consolidated cases, the detective involved testified about the child interview protocol where children make a promise to tell the truth and a doctor testified that one child's statements were "clear and consistent" and the other "had good language skills for her age, she spoke clearly" and the child's statements were not inconsistent with the physical findings. *State v. Kirkman*, 159 Wn.2d at 920, 932.

In *Kirkman*, this court concluded there was no prejudice in large

part because, the jury was properly instructed that jurors “are the sole judges of the credibility of witnesses,” and that jurors “are not bound” by expert witness opinions. *Id.* (quoting clerk's papers).

This court holds that testimony of an investigating officer or examining doctor if not objected to at trial does not necessarily give rise to a manifest constitutional error. Manifest error requires an explicit or almost explicit witness statement on an ultimate issue of fact. We reverse the Court of Appeals in both Kirkman and Candia.

State v. Kirkman, 159 Wn.2d 918, 938, 155 P.3d 125 (2007).

Similarly here, the judge instructed the jurors they were the sole judges of the credibility of the witnesses. CP 59. Any error in admission of statements of Nicholas and Nichols were not manifest error for which review should be permitted.

iv. Given Rodgers’ acknowledgement his wife was strangled, and contention he was in a dissociative state, the witness opinions did not address the ultimate issue of the defendant’s state of mind.

One of the five factors in evaluating whether there was an impermissible expression of opinion evidence is the nature of the defense. Here, Rodgers initially asserted a defense of denial by a claim of accident by his statements. The witness questioning of Rodgers focused on the claim that Sheri fell down the stairs and the dog had scratched him.

However, by trial Rodgers’ expert acknowledged that the evidence showed that Sheri was strangled. 10/24/14 RP 44. And the defense expert

even acknowledged that the defendant admitted to him that he lied about claiming that Sheri died by falling down the stairs. 10/24/14 RP 45. Thus, the issue before the jury ended up being the claimed dissociative state of the defendant as opposed to the truth of the claim that Sheri died by falling down the stairs on her own.

v. The other cases cited by Rodgers are so factually different from the present case that they provide little guidance to the issues before this court.

In *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009), in a child sex offense case, the State elicited testimony that the wife of the defendant began freaking out and told the child she was right when the child described a lesion on the defendant's penis and the manner in which the defendant masturbated. The Court of Appeals reversed the conviction because the wife's opinions were collateral, shed little or no light on witness credibility and were the wife's own statements as to the wife's belief of the accusations. *State v. Johnson*, 152 Wn. App. 933-4. Thus, even though not objected to at trial, the errors were found to be manifest and permitted the defendant to raise the claim for the first time on appeal.

In *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) the use of the term "Rape Trauma Syndrome" was held to be an improper assertion by the expert that the victim was telling the truth and was in fact raped. Expert testimony which purports to scientifically prove the alleged victim

of rape is suffering from rape trauma is thus unfairly prejudicial and inadmissible. *State v. Black*, 109 Wn.2d at 349-50.

In *State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999) a trooper testified the defendant was trying to get away from him and knew the trooper was behind him without foundation to establish the opinion. The testimony was held to be an improper lay opinion where defendant's intent to elude a police officer was an element of the crime. *State v. Farr-Lenzini*, 93 Wn. App. at 463.

In *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) in a case involving two counts of Rape of a Child in the First Degree, the child victim's counselor testified that he believed the child was not lying. Because the issue of credibility in a child sexual offense is a crucial issue, the witnesses' testimony effectively told the jury the defendant was guilty and grounds for reversal. *State v. Alexander*, 64 Wn. App. 154.

In *State v. Lahti*, 23 Wn. App. 648, 597 P.2d 937 (1979), a wife was impeached about statements she made indicating she had suspicions of sexual abuse when the daughter's accusations were first raised. Two witnesses were called by the State over objection to impeach the mother's denial. The Court of Appeals found those were improper impeachment of a collateral matter.

In contrast to these cases, the present case did not involve

expressions of guilt or veracity of the defendant, but where questions posed or descriptions of observations of the defendant which touched on the defendant's version of the events, later conceded to be false.

2. Where the defense focus was on the dissociative state as described the expert and the witnesses were describing Rodgers' denials, Rodgers cannot establish ineffective assistance of counsel.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) **defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances;** and (2) **defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.** *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Competency of counsel is determined based upon the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

State v. McFarland, 127 Wn.2d 322, 334-5, 899 P.2d 1251 (1995)

(emphasis added).

Courts engage in a strong presumption counsel's representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); *State v. Blight*, 89 Wn.2d

38, 45-46, 569 P.2d 1129 (1977).

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (emphasis added).

At the outset a claim of ineffective assistance has to establish deficient performance at the outset. As described above, proper admission of the testimony of the witness precludes a finding of deficient performance. But even if there was improper admission of evidence, Rodgers fails to establish prejudice.

The case turned on whether the jury believed Rodgers was in a dissociative state. It was clear from the tenor and content of the testimony of his children, that Rodgers' children did not believe their father's story because they questioned him about it. Although his responses were relevant, Rodgers' counsel ended up countering the position by pointing out that these were the children's opinions and that Rodgers' actions were out of character. Defense also pointed out their bias.

Nicholas acknowledged there was never any domestic violence in the house, that he had never seen his father violent toward anyone and described him as nonviolent. 10/16/14 RP 65-6. Defense counsel also elicited Nicholas' own opinions of his father.

Q. How do you feel about your dad?

A. Right now?

Q. Right now as you are sitting here.

- A. I can't believe everything that is coming from that corner. I can't believe --
- Q. By "that corner" which are you talking about?
- A. I'm talking about the defense table. I can't believe the type of excuses that are coming up to try to defend every single angle to this. It makes me sick.
- Q. And that's really how you see it too, as just an excuse, right?
- A. Yes.
- Q. Have you been talking with the State, the prosecutors, and the police?
- A. To be honest with you, no.
- Q. Then how do you know what excuses the defense is coming up with?
- A. By reading the papers.

10/15/14 RP 67.

- Q. You grew up with your dad. He was an involved dad, wasn't he?
- A. Yes. Well, let me answer your question. For 26 years no, I can't see him being violent. No, I can't see him doing the things he did. But it doesn't change what has happened.
- Q. But you weren't there, right?
- A. No, I wasn't.
- Q. And really you are basing your comments about excuses that's not on your own first-hand knowledge but on what some reporter has written in the newspaper; is that right?
- A. I'm basing it off of what I've seen. I'm basing it off of how I feel about how he's talked to me. I'm basing it off of the tone of voice of how he's told me things. I'm basing it off of things that have happened with my sister, with my brother, with my whole entire family, with everybody that was on the scene. I'm basing it off of facts and science.

10/15/14 RP 68.

Natasha acknowledged he had a great childhood and her parents

raised the kids to be proper, strong and intellectual open thinkers. 10/15/14

RP 129. There was no domestic violence or slapping in the home.

10/15/14 RP 130-1. As with Nicholas defense also elicited her opinions.

I feel like that whole entire day -- in fact, he told me, he opened up to me about his childhood and all of that stuff when he didn't want to talk to me months prior about it. Then he prepped me for when he was going to be arrested and telling me I rubbed rocks on my face. I just felt like he was trying to make sure that he was pulling the daddy card and making sure that I would defend him.

10/15/14 RP 140.

Rodgers' counsel questioned Natasha that her opinion was the scratches on her father were not from a dog. 10/15/14 RP 145. Defense went on to point out that Rodgers preached that a man never lays a hand on a woman and that she had never seen Rodgers punch, kick or slap anyone. 10/15/14 RP 146.

Q. Now, your initial reaction was that you thought that these scratch marks that you saw on your dad had come from your mom?

A. Uh-huh.

Q. That was just based on she's dead. He's got marks on his face so one plus one must equal two, right?

A. I just didn't. I didn't believe that a dog's paw, the fact that every single scratch mark was separated and dug in.

10/15/14 RP 145.

Defense also questioned Jeremiah about his own PTSD diagnosis eliciting that Rodgers was supportive. 10/16/14 59-61. Rodgers counsel

sought to point out Jeremiah questioned whether the injuries to his father's face were self-inflicted contending he was "not buying any of that." 10/16/14 RP 69-70.

Where the defense had to establish a dissociative state to prevail on the case, they had to establish something out of character for Rodgers. His counsel used his children's opinions of his character and their bias to support the theory that Sheri was strangled out of character in a dissociative state.

No prejudice can be established.

3. Given the issue in the case being whether the defendant was in a dissociative state, even if the admission of the statements are held to be opinions as to guilt or veracity, any error would be harmless beyond a reasonable doubt.

We will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Where the error is from violation of an evidentiary rule rather than a constitutional mandate, we do not apply the more stringent "harmless error beyond a reasonable doubt" standard. *Id.* Instead, we apply "the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *Bourgeois*, 133 Wn.2d at 403.

State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

It is undisputed in this case, that the true issue was whether the defendant was in a dissociative state at the time he strangled his wife. The defense sought to establish that his wife's slap caused Rodgers to feel like he was being attacked by his father and respond with physical violence causing him to strangle his wife because he believed he was being brutalized by his father. 10/24/14 RP 43-7.

The claimed opinion evidence of the children and friends involved questioning of the father shortly after the death. But the defense expert testified that Rodgers himself admitted his statements to officer and friends was false, knew he had killed his wife and gave the story in order to "stay out jail for a day, two, or three" so he could get his children home before he was arrested and commit suicide. 10/24/14 RP 45-6.


The complained of "opinion" testimony addressed the claim that the death was accidental, which was admitted by the defense to be a false claim. As such, the admission of the statements of the witness had minor significance in relation to the other evidence admitted and the overwhelming evidence as a whole.

V. CONCLUSION

For the foregoing reasons, the Williams Rodgers conviction for Murder in the First Degree must be affirmed.

DATED this 24th day of February, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:
I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jared B. Steed, addressed as Neilsen, Broman & Koch, PLLC, 1908 E. Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 24th day of February, 2016.


KAREN R. WALLACE, DECLARANT

TABLE OF REPORTS OF PROCEEDINGS.

State's Designations:	Description	Defense Designations:
7/30/14 RP	Deposition, in volume 1 with 9/12, 10/2/14	1RP
9/12/14 RP	Motions & 3.5 Hearing, in volume 1 with 7/30, 10/2/14	1RP
10/2/14 RP	Motions, in volume 1 with 7/30, 9/12/14	1RP
10/9/14 RP	Trial Confirmation	2RP
10/13/14 RP	Trial Day 1, in volume 2 with 10/14, 10/15/14 – Jury Selection	3RP
10/14/14 RP	Trial Day 2, in volume 2 with 10/13, 10/15/14 – Jury Selection	3RP
10/15/14 RP	Trial Day 3, in volume 2 with 10/13, 10/14/14, - Testimony	3RP
10/16/14 RP	Trial Day 4, in volume 3, Testimony	4RP
10/20/14 RP	Trial Day 5, in volume 4, Testimony	5RP
10/21/14 RP	Trial Day 6, in volume 5, Testimony	6RP
10/22/14 RP	Trial Day 7, in volume 6, Testimony	7RP
10/23/14 RP	Trial Day 8, in volume 7, Testimony	8RP
10/24/14 RP	Trial Day 9, in volume 8, Testimony	9RP
10/27/14 RP	Trial Day 10, in volume 9, Testimony	10RP
10/28/14 RP	Trial Day 11, in volume 10, Testimony	11RP
10/29/14 RP	Trail Day 12, in volume 11, Testimony	12RP
10/30/14 RP	Trail Day 13, in volume 12, with 10/31/14, 1/5/15– Closing arguments	13RP
10/31/14 RP	Trial Day 14, in volume 12 with 10/30/14, 1/5/15 - Verdicts	13RP
1/5/15 RP	Sentencing, in volume 12 with 10/30/14, 10/31/14	13RP

APPENDIX A

TABLE OF WITNESS TESTIMONY

		Direct	Cross	Redirect	Recross	Re-Redirect
7/30/14	Timothy Livingston (Deposition) Voire Dire	21	49	72		
			48			
10/15/14	Jeff Nelson	81	97			
	Joel McCloud	99				
	Michael Hammer	105	116			
	Beth Ganz	121	126	129		
	Mike Voss	131	138	144		
	Tim Boyd	145	149	149		
	Yvonne North	150	153	154		
	Brandon Young	159				
10/16/14:						
	Brandon Young	13				
	Voire Dire		16			
	Heidi Kjos	18	21			
	Nicholas Rodgers	50	64	88		
	Natasha Rodgers	100	129			
10/20/14						
	Natasha Rodgers		3	26		
	Voire Dire				27	
	Jeremiah Rodgers	37	58	90	91	
	Jason Brown	93	99			
	Donald Cunningham	100	119	134		
	Alan Graves	136	141			
	Rex Watt	149	156			
	William Waters	58				
10/21/14:						
	William Waters		8			
	John Garman	15				
	William West	21	33	39	40	45
	Jared Ely	47	93	95		
		88	117			
	Voire Dire		90			
		92				
	Mark Thompson	101	111			
	Meihgan Nichols	123				

10/22/14	Meighan Nichols	12	24	40	46		
	Brian May	47	66	78			
	George Zeigen	82	104				
	Nate Dunham	106	124				
	Jonna Dunham	130	137				
	Jan Thorton	142	145				
	Jared Ely	146					
10/23/14	Kara Janicki	4	15				
	Brandon Young	15					
	Jared Ely	15	48				
		46	95				
		87					
		117	121				
	Voir Dire pages 91 and 93						
	Heidi Kjos	42					
	Kristina Hoffman	49	60	66	67	68	
	Dave Shackelton	72	82	115	116		
	Rick Vandergriend	85					
	Peg Drummond	98					
	Brenda Booth	108	113				
10/24/14	Delton Young	8	58	78	80		
	Daniel Selove	82	128				
10/27/14	Brandon Young	5	9	11			
	Jerrad Ely	13	51	85			
	Voir Dire 33						
		109					
	Darin Gallagher	111	121				
	Leanne Haywood	125	145	149			
10/28/14	Roger Estep	3	17	26	27		
	Leslie Trout	29	57	69	72	73	73
10/29/14	Brian Waters	6	9				
	Mark McClung	10	64	113	116		