No. 39660-6-III

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

STATE OF WASHINGTON, Respondent

v.

WILLIAM WADIKA, Appellant

APPEAL FROM THE SUPERIOR COURT

OF KLICKITAT COUNTY

THE HONORABLE JUDGE RANDALL C. KROG

BRIEF OF APPELLANT

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B. The Judgment and Sentence has a scrivener's error which must be corrected.

C. The 500-dollar VPA fee and the 100-dollar DNA fee must be stricken.

ISSUES RELATED TO ASSIGNMENT OF ERRORS

A. Did Mr. Wadika receive ineffective assistance of counsel where counsel failed to object to a law enforcement officer testifying as to issues of ultimate fact to be found by the jury?

B. Does the judgment and sentence have a scrivener's error which must be corrected?

C. Should the Court remand for the superior court to strike the 500 dollar victim's penalty assessment fee and the 100 dollar DNA collection fee?

II. STATEMENT OF FACTS

Klickitat County prosecutors charged William Wadika with one count of assault in the second degree with a deadly weapon, domestic violence. CP 1.

After his third deployment to Afghanistan as an army civilian, William Wadika went to Costa Rica for a vacation. RP 242. When he returned on May 5, 2022, he moved into 50 Pumphouse Road in Klickitat County. RP 242. The home was owned by his friend, "Jay". Jay needed help maintaining his property and Wadika moved in to help him. RP 243.

Because Jay needed income, he rented out his RV to Elizabeth Sherard. RP 186, 243. As Sherard spent more time in the home, Wadika moved to the RV. RP 187,244.

On August 12, 2022, Wadika was removing garbage from the garage. RP 244. He backed his truck up to a double car garage, which had one door rolled up. RP 189. Sherard arrived at the property and Wadika asked her about some money she owed to him, and for help cleaning out the garbage. RP 189, 244.

Sherard said he could load it himself and went inside to put away the groceries. RP 189-190. Once inside the home, she decided she wanted to close the garage door where he was working. RP 190. Although Wadika was not in the house, Sherard said he "wasn't supposed to be in the house" and she felt uncomfortable. RP 190.

She told Wadika to move his truck and get the boxes, because she wanted them out of her way. RP 190. While he worked, she picked up some of the cardboard boxes and threw them in his truck. RP 191. They two exchanged words. RP 190. Sherard and Wadika had had

difficult interactions and she had threatened him with her knife. RP 246.

According to Sherard, when she threw the boxes in his truck, Wadika picked up a large blue barrel and threw it at her. She stopped it with her foot. RP 191. She said he then picked up the lid from the container and threw it at her like a frisbee. RP 192. It hit the back of her hand. RP 192.

Angry, Sherard said she would “beat his ass like she was a man.” RP 193. She reported after she threatened him, he told her he would shoot her because he had a concealed weapons permit. RP 195,196. She said he pulled out his gun and fired a single shot in the air. RP 196.

She said she moved toward him because she was not “wired right” because of her experiences of being abused and shot at by others. RP 196,217.

> I mean after years of abuse, I learned that usually, it was when it was wince, whine, or run that the physical abuse would happen. That when he got confrontational, if I'd just went towards him, he would stop.

RP 218.

In her heightened "trigger" state, she feared Mr. Wadika would have the keys to the house and would shoot her. "And I don't know how many times God is gonna save me." RP 218.

Wadika's sequence of events differed significantly. He testified he never threw a barrel or lid at her. RP 246. Rather, he saw her charging at him, and picked up the barrel and put it between them to "slow her down". RP 246-248.

Wadika feared Sherard because of her previous threats, stories he heard about her, and his knowledge that she always carried a knife. RP 246. When she continued to charge at him, he removed his gun from his shorts and fired 3 shots into the air. RP 248. He said he

discharged the gun to get her attention. RP 248. Wadika reported Sherard told him to shoot her, and he attributed that to her mental health challenges. RP 250.

After the shots were fired, Sherard went into the house. RP 254. Wadika did not follow. RP 202.

By contrast, Sherard testified Wadika turned his gun sideways behind him and fired four shots at her and she ran in the house. RP 196. However, there was no evidence of any bullets striking the house. RP 202, 203.

Police Trial Testimony

Officer Matulovich testified he responded to the call and that after he spoke with Sherard inside the house, he "established probable cause of an aggressor…I should say, who I believed was the aggressor at the time." RP 228. He added

> So, domestic violence, if there's an assault, we're mandated to make an arrest if we can find out who the aggressor is. So, if I could say that this person was the likely person that caused it, starting it that was what I would view as the aggressor. And that

> would likely be the person that I arrest, depending on what the other person says. So, you both have -- well, you separate people, find out individually what they say and then make the determination.

RP 228.

The court provided jury instruction No. 14, a first aggressor instruction. CP 84. The court also provided jury instruction No. 11,12,and 13, the pattern instructions for self-defense. CP 81-83.

A jury found Wadika guilty of assault in the second degree, with a deadly weapon, and the parties were members of the same household. CP 91-93. The court found Wadika indigent. CP 98. The court imposed a 500-dollar victim penalty assessment and a 100-dollar DNA collection fee. CP 101-102. In § 4.1 of the judgment and sentence, the court checked “firearm” enhancement rather than deadly weapon enhancement. CP 99.

Mr. Wadika makes this timely appeal. CP 108.

III. ARGUMENT

A. Defense Counsel Was Ineffective In Failing To Object To The Officer's Improper Opinion On Guilt Which Invaded The Province Of The Jury.

A law enforcement officer's opinion on the guilt of the accused is improper. It invades the province of the jury. Here, the testifying officer testified that after talking to both parties, he "established probable cause" and made a determination of "who I believed was the aggressor at the time." RP 228. Defense counsel did not object to this impermissible testimony. The jury was exposed to the officer's opinion that Wadika had started the altercation, committed a crime, and the crime involved domestic violence.

The role of a jury is "inviolate" under the Washington Constitution. A constitutional trial includes the right to have factual questions decided by the jury. Wash. Const. Art. I, §§ 21, 22; *Sofie v. Fibreboard Corp.,* 112

Wn.2d 636, 656, 771 P.2d 711 (1989). The jury is given "the ultimate power to weigh the evidence and determine the facts." *State v. Montgomery,* 163 Wn.2d 577, 590, 183 P.3d 267 (2008). Admission of impermissible opinion testimony may be reversible error. *State v. Carlin,* 40 Wn.App. 698, 701, 700 P.2d 323 (1985)(overruled on other grounds by *State v.Heatley,* 70 Wn.App. 573, 854 P.2d 658 (1993).

It is impermissible for a witness to testify as to his opinion on the guilt of a defendant, or the veracity of a witness, whether by direct statement or inference. *State v. Garrison,* 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *State v. Kirkman,* 159 Wn.2d 918, 927, 155 P.3d 125 (2007). This type of testimony is unfairly prejudicial to the defendant "because it invad[es] the exclusive province of the jury." *Heatley,* 70 Wn.App. at 577.

In determining whether statements amount to impermissible opinion testimony, the Court must

determine whether the statements, in context, fundamentally affected the fairness of the trial. *Dubria v. Smith,* 224 F.3d 995, 1001 (9th Cir. 2000). The Court considers the circumstances of the case and 5 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.

State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)(quoting *Heatley,* 70 Wn.App. at 579).

Here, the context of the case was "he said – she said". It was the jury's task to determine the credibility of the alleged victim and the credibility of Wadika. The jury was tasked with determining whether Wadika was the aggressor, undercutting his self-defense defense, whether firing the gun was an assault and whether Sherard and Wadika shared a residence.

Testimony by law enforcement officers is particularly troublesome as it relates to statements which render an opinion on guilt. An officer's testimony regarding the veracity of a witness, often carries with it a special aura of reliability. *State v. Demery,* 144 Wn.2d at 764; *See also United States v. Espinosa,* 827 F.2d 604, 613 (9th Cir. 1987).

Here, the officer explicitly testified he spoke with both Sherard and Wadika. He then determined there had been an assault, he *believed* Wadika was the aggressor, and the matter involved *domestic violence*. The officer's opinion of what he believed were actually ultimate facts for the jury to determine undermined Wadika's presumption of innocence and his defense.

Wadika's defense was that he was defending from Sherard's aggressive conduct and had no intention to hurt her. He reacted to being "charged" by her by firing his gun

into the air, and it was not disproportionate to her conduct.

In *Warren v. Hart,* 71 Wn.2d 512, 514, 429 P.2d 873 (1967), the Court concluded that issuance or non-issuance of a citation by a police officer was inadmissible as indirect opinion evidence. Here, the officer's testimony was conclusive: he was of the opinion Wadika had been the aggressor and had committed the crime.

In *Demery,* the trial court admitted videotape evidence in which police accused the defendant of lying. *Demery,* 144 Wn.2d at 753, 756 n.2. On review, four Justices concluded the taped statements were the equivalent as live testimony and therefore inadmissible opinion testimony. *Id.* at 773 (Sanders, J., dissenting). A fifth Justice found the videotape statements to be impermissible opinion evidence but found it harmless. *Id.* at 765, 66. A majority concluded the taped statements the

defendant was lying were inadmissible opinions on his credibility.

Similarly, in *Montgomery,* the detective described the events as they had unfolded and was then asked whether he had formed any conclusions. *Montgomery,* 163 Wn.2d at 587. He replied he felt strongly the defendants had purchased ingredients to make methamphetamine. *Id.*

The Court noted it was "unnecessary for a witness to express belief that certain facts or findings lead to a conclusion of guilt." *Id.* at 592. The Court reversed the convictions because the State's witnesses' testimony amounted to improper opinions of guilt: the opinions went to the core issue and the only disputed element, intent. *Id.* at 594.

Here, the detective testified he had established probable cause of an aggressor, there was an assault, and it was a domestic violence matter: "So, domestic

violence, if there's an assault, we're mandated to make an arrest if he we can find out who the aggressor is. So, if I could say that this person was the likely person that caused it, starting it that was what I would view as the aggressor. And that would likely be the person that I arrest depending on what the other person says. So, you both have – well, you separate people, find out individually what they say and then make the determination." RP 228. The testimony by the officer was an impermissible opinion on guilt.

Defense counsel was ineffective for failing to object to this prejudicial testimony. Improper opinion testimony may be challenged for the first time on appeal if there is "an explicit or almost explicit witness statement on an ultimate issue of fact. *State v. Kirkman,* 159 Wn.2d at 936. Because the testimony of the officer was an "explicit or almost explicit" statement on Wadika's guilt and credibility, it may be challenged for the first time on

appeal as a manifest constitutional error. *Kirkman,* 159 Wn.2d at 936-37.

Similarly, a claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be raised for the first time on appeal. *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A client's constitutional right to effective assistance of counsel is violated when the attorney's performance was deficient and that deficiency prejudiced the accused. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas,* 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

Counsel's performance is deficient when it falls below an object standard of reasonableness. *Thomas,* 109 Wn.2d at 226. Counsel's deficiency prejudices the outcome of the matter when there is a reasonable probability that, but for counsel's error the result would have been different. *Thomas,* 109 Wn.2d at 226. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

The record does not support a conclusion there was a legitimate strategic reason for counsel's failure to object. Rather, it was clear Wadika's defense was self-defense and he was not the initial aggressor. The officer's testimony about why he arrested Wadika and his opinion on ultimate facts was not only unnecessary but unfairly prejudicial.

Counsel's failure to object to the unfairly prejudicial testimony by the officer requires reversal and remand for a new trial.

A. The Judgment and Sentence Contains A Scrivener's Error Which Must Be Corrected.

A scrivener's error is a clerical mistake that when amended, would correctly convey the court's intention, as expressed in the record. The remedy for a scrivener's

error in a Judgment and Sentence is to remand to the trial court for correction. *State v. Makekau,* 194 Wn.App. 407, 421, 378 P.3d 577 (2016).

In § 4.1, of the judgment and sentence has a box checked “The confinement time on count 1 includes months as enhancement for [X] firearm.” CP 99. Mr. Wadika was sentenced under the deadly weapon enhancement, not the firearm enhancement. This matter should be corrected on remand.

B. The Legal Financial Obligations For VPA and The DNA Collection Fee Must Be Stricken.

On July 1, 2023, the Washington State Legislature eliminated the 500-dollar victim assessment for indigent people. RCW 7.68.035(4). The amended statute requires the Court to waive any VPA imposed prior to the effective date of the amendment if the offender is indigent or on the offender’s motion. RCW 7.68.035(5)(b). A person does

not have the ability to pay if he is indigent as defined in RCW 10.01.160(3).

Here, the trial court found Mr. Wadika indigent in § 2.5, of the Judgment and Sentence. CP 98. Because the matter will be remanded to the superior court, Mr. Wadika respectfully requests the superior court be instructed to strike the fee.

Similarly, at the time of sentencing, RCW 43.43.7541 obligated the trial court to impose a 100-dollar DNA collection fee on a defendant if DNA had not previously been collected. The former statute did not provide a waiver if the defendant was found indigent. *State v. Lundy,* 175 Wn.App.96, 102-03, 308 P.3d 755 (2013).

Effective July 1, 2023, the statute was amended, *deleting* the DNA collection fee. Laws 2023, ch. 449 §4. This change in the statute applies to Defendant's case which is pending on appeal. *State v. Ramirez,* 191 Wn.2d

732, 747-48, 426 P.3d 714 (2018); *State v. Wemhoff,* 24 Wn.App.2d 198, 202, 519 P.3d 297 (2022).

The DNA collection fee should be stricken.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Wadika respectfully asks this Court to reverse and vacate his conviction. He also asks the Court to direct that all legal financial obligations be stricken.

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Respectfully submitted this 31st day of October 2023.

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CERTIFICATE OF SERVICE

I, Marie Trombley, hereby certify under penalty of perjury under the laws of the State of Washington, that on October 31, 2023, I electronically served, a true and correct copy of the Appellant's Opening Brief to: Klickitat County Prosecuting Attorney at paappeals@Klickitatcounty.org and William Wadika c/o marietrombley@comcast.net

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