31897-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BILLIE J. MILLIKEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

WASHINGTON CASES

COURT RULES

I.

ASSIGNMENT OF ERROR

1. The trial court erred by admitting into evidence the forensic accountant's final report and conclusions.

II.

ISSUE

A. DID THE TRIAL COURT ERR IN ADMITTING THE FORENSIC ACCOUNTANT'S WRITTEN REPORT?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the Defendant's Statement of the Case.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN ADMITTING THE EXPERT'S WRITTEN REPORT.

The defendant's sole issue is the trial court's admission of the forensic accountant's redacted report. Admission of evidence is left to the sound

discretion of the court and a trial judge has wide discretion in balancing the probative value of evidence against its potential prejudicial impact. *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984), *State v. Laureano*, 101 Wn.2d 745, 682 P.2d 889 (1984) *overruled on other grounds State v. Brown*, 111 Wn.2d 124, 132-33, 761 P.2d 588 (1988); *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 95 (1996). "The admission or exclusion of relevant evidence is within the discretion of the trial court and its decision will not be reversed absent a showing of manifest abuse of discretion." *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991). *See also State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)); *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060, (1992).

The decision of the trial court will not be overturned absent a manifest abuse of discretion. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997).

"Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (*citing MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959); *State v. Mak*, 105 Wn.2d 692, 702, 718 P.2d 407 (1986).

The defendant does not raise issues regarding the expert's oral testimony. The written report is largely the expert's testimony reduced to written form. The

defendant maintains that the written document contains improper opinions. The written report was redacted so that the defendant's name is removed.

In determining whether witness statements are impermissible opinion testimony, the court will 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. *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008).

In this case the witness was an expert witness. The nature of the testimony was that the evidence supplied to him by the victim showed discrepancies in the accounting. The defendant was in charge of entering accounting data into the computer and occasionally purchasing items directly from Office Depot. The charge was that the defendant obtained funds by manipulating the accounting. Her defense was, "I did not do anything wrong." The defendant's testimony did not point to a clear reason explaining the evident discrepancies. In addition to the forensic accountant, the State presented testimony from an Office Depot employee that witnessed the defendant signing checks and identified the defendant's handwriting. RP 88. Mr. Lowell Peterson testified that he was a Business Manager and Assistant Controller for the victim company, KAYU T.V. RP 36. He identified the defendant in court and indicated that the defendant had worked for KAYU as an Accounts Payable Clerk. Mr.

Peterson described the accounting procedures and the defendant's role in those procedures. Mr. Peterson testified that he noticed a problem with the Office Depot account. It was supposed to be paid in full each month, but he noticed an outstanding balance. RP 52. He started a full-scale investigation of the Office Depot revolving credit account. RP 54. The investigation pointed to the defendant.

"Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed." *Montgomery, supra* at 595. The jury in this case was instructed that they were the sole judges of credibility. CP 30-32. There was no written jury inquiry or other evidence that the jury was unfairly influenced, and the court should presume the jury followed the court's instructions absent evidence to the contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

There was a specific instruction dealing with the testimony of the expert. The jury was advised that they did not have to accept the expert's opinion. CP 35. The jury is presumed to follow the court's instructions. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007) (citation omitted).

The defendant must show actual prejudice. Actual prejudice, as it applies to opinion testimony, is only shown when the statement was an "'*explicit or almost explicit*'" opinion on the defendant's guilt or the victim's

veracity. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (*quoting State v. Kirkman*, 159 Wn.2d at 936).

"[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

The report prepared by the accountant was based on the evidence of invoices and check stubs. The report established that someone had undertaken some nefarious activities. The testimony of Ms. Heston mentioned no names, did not give an opinion on who should be believed and never said that the defendant was guilty. Likewise, the written report of the expert does not state anything other than how she proceeded and what she found. Undoubtedly, the report indicates that there is some guilt to be had. This should not have surprised the defendant. The State presented testimony and evidence that showed the defendant was the one who committed the crime charged. The defendant claims that the expert's report contains legal conclusions, yet she does not state clearly what, exactly, was a conclusion. The only real conclusion is that over $27,000 was obtained from the KAYU firm by way of the purchase of "gift cards" and other items from Office Depot.

The alleged error was the result of the alleged violation of an evidentiary ruling, so 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). In other words, the alleged improper admission of exhibit P6 is considered harmless if its admission is of minor significance compared to the evidence as a whole. Exh. P6. The State prepared a "straightforward" case that showed that the defendant had worked for KAYU for a number of years, she was in charge of accounting practices at KAYU, a scheme had been created to defraud KAYU of money, and the defendant was the person who perpetrated the scheme. The defense presented nothing but the defendant's denials of wrongdoing. The information in the expert's report was largely the same as the information to which the expert testified. The report made the scheme easier to follow.

The defendant objected to the admission of the expert's report on multiple generalized grounds. RP 143. The defendant claimed the report was hearsay, but did not explain how the written report of a testifying witness was hearsay. The defendant also claimed that the report violated ER 701 and ER 702. ER 701 applies to lay witnesses and the forensic accountant was qualified as an expert. ER 702 deals with experts, and shows that the report was admissible. ER 702. The defendant was given a chance to address the issues outside the presence of the jury. The defendant initially asked that the entire report be redacted because there was nothing admissible in the report. RP 163. The defendant then objects because there seems to be an expert opinion that a theft occurred, but even with

the redactions of the defendant's name, the defense counsel asserted that his "strident" objections made it obvious who the report was referencing. The defendant is arguing that she made the report inadmissible by objecting a number of times. RP 163.

The defendant claimed that the written report had the improper inference that the KAYU assistant manager, and the claims, were credible. RP 163. The defendant did not produce any defense, except her bald denials. This is not a reason to prevent the admission of the expert's written report.

The only "opinions" or "conclusions" contained in the report were those the forensic accountant reached using the data she was given. There are no improper opinions in the report. If the defendant had wanted to counter the expert's report, she could have called her own expert. She did not. The defendant took the stand and told the jury she did nothing wrong. The jury looked at the facts and concluded that the defendant had stolen money from KAYU.

The objections by the defendant were so general and non-specific that it is difficult to discern the basis for the trial objections. The defendant may only assign error on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Since the defendant's basis for objecting to the written report vary, and none seem specific, the State argues that the issues raised by the defendant on appeal are improper and should be excluded.

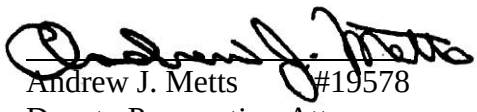
V.

CONCLUSION

For the reasons stated above, the State respectfully requests that this court affirm the defendant's conviction.

Dated this 5th day of June, 2014.

STEVEN J. TUCKER
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 31897-4-III
v.	)	
	)	CERTIFICATE OF MAILING
BILLIE J. MILLIKEN,	)	
	)	
Appellant,	)	

I certify under penalty of perjury under the laws of the State of Washington, that on June 12, 2014, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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6/12/2014 **(Date)** Spokane, WA **(Place)** Kathleen K. Owens **(Signature)**