69195-3

69195-3

NO. 69195-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

GARY D. KOLLMAN,

Appellant.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

A. ISSUES RELATING TO CONVICTION.

(1) A police officer testified that the defendant almost caused a collision with another car. The officer testified that he thought the occupants of the other car "were dead." Defense counsel objected to this testimony, but he stated no reason for the objection. Has a challenge to this testimony been preserved for appeal?

(2) Does this testimony constitute "manifest error affecting a constitutional right," which can be challenged for the first time on appeal?

(3) If the issue can be raised, did this testimony violate an order in limine that limited the officer to testifying "only as to what he observed"?

(4) If the issue can be raised, was this testimony admissible as a lay opinion under ER 701?

(5) If the evidence was erroneously admitted, was the error harmless, where the evidence overwhelmingly showed that the defendant endangered other drivers, and defense counsel told the jury that the only question was whether the defendant acted willfully?

(6) If the evidence is considered prejudicial, can the State be precluded for seeking a new trial on the special verdict that the defendant endangered other drivers?

B. ISSUE RELATING TO SENTENCE.

(7) Can the defendant challenge on appeal the trial court's decision to impose a standard range sentence?

II. STATEMENT OF THE CASE

A. THE CRIME.

At around 11 p.m. on January 1, 2010. Sgt. Bart Foutch of the Mill Creek Police Department saw a Toyota 4-Runner driving south on SR 527 in Mill Creek. The car was driven by the defendant (appellant). Gary Kollman. Sgt. Foutch saw that the car had a headlight out. He made a U-turn and got behind it. The defendant accelerated to 55 in a 40 mph zone. Sgt. Foutch decided to stop the defendant to issue a warning. 2 RP 52-56.

Sgt. Foutch activated his emergency lights. The defendant did not stop. He turned right onto a street that terminates in an industrial park. He drove around the park and got back onto SR 527. There, he accelerated to 70-80 mph. Sgt. Foutch activated his siren and pursued. 2 RP 56-60.

The defendant started weaving through traffic. He passed cars on both the left and right. Sgt. Foutch testified that this is extremely dangerous, because drivers are trained to respond to sirens by pulling to the right. Any driver who did so would be likely to collide with the defendant's car. 2 RP 63.

The defendant drove through three red lights without slowing. 2 RP 64. There were collections of traffic at each intersection. 2 RP 62. The defendant took an on-ramp to I-405. He proceeded westbound at speeds between 90 and 100 mph. At one point, he encountered two vehicles side-by side. He passed them by straddling the lane line between the two vehicles. 2 RP 65-67.

The defendant took the exit to I-5 and proceeded northbound. He started to take the exit to 164th. Just before the exit, he made a hard left-hand turn in front of another car. The other car braked and very narrowly avoided a collision. 2 RP 68-71.

Deputy Arthur Wallin of the Snohomish County Sheriff's Office had laid a spike strip on I-5 north of the 164th exit. The defendant's car hit the spike strip. This slowed him, but he still did not stop. Deputy Wallin tried to stop the defendant using the Pursuit Immobilization Technique (PIT). This involves striking the fleeing vehicle on the rear quarter panel. This is intended to cause the

vehicle to spin, thereby stalling it. The defendant, however, maneuvered out of the spin. Finally, the defendant's vehicle got caught on the front end of Dep. Wallin's car, bringing both cars to a stop. 2 RP 126-36.

Dep. Wallin got out of his car. Sgt. Foutch started to get out as well. The defendant drove forward. His car hit the door of Sgt. Foutch's car. Sgt. Foutch was pinned between his car door and his car. He pointed his gun at the defendant and ordered him to stop the car. The defendant complied. 2 RP 81-83, 138.

Sgt. Foutch ordered the defendant to show his hands. The defendant started reaching around the floor of the vehicle and towards the glove box Sgt. Foutch fired two shots at him, which missed. The defendant continued to reach around the car, but he eventually obeyed commands to show his hands. 2 RP 84-86, 139-44, 180-85, 208-11.

An officer broke the defendant's window with his flashlight. Officers pulled the defendant from the car, but he continued to struggle. One officer hit the defendant with a flashlight, and Sgt. Foutch shot him with a taser. The officers placed the defendant in handcuffs. He then stopped resisting. 2 RP 86-90, 148-51, 185-90, 212-14.

The defendant testified that he suffered from a panic disorder. He had experienced prior incidents in which he had panicked and refused to stop for police. In one, police ended up throwing him down and breaking his nose. In another, the defendant was attacked by a police dog and suffered a broken arm. 3 RP 319-25.

The defendant testified that he sometimes used driving as a way to calm himself. 3 RP 328. On New Year's Day 2010, he was experiencing a lot of stress in his life. After watching football that day, he went out to get something to eat. When a police car turned on its lights behind him, he panicked. He had no clear recollection of what happened after that. 3 RP 329-38.

Dr. Sarah Heavin, a forensic psychologist, testified as a defense witness. She testified that the defendant suffered a panic attack, which rendered him unable to engage in goal-directed behavior. According to Dr. Heavin, the defendant was unable to form the mental intent to willfully fail to pull over. 3 RP 406-11.

B. THE TRIAL.

The defendant was charged with attempting to elude a pursuing police vehicle. The information included an allegation that

the defendant's driving threatened physical injury to persons other than the pursuing officers. CP 132.

The defendant's trial brief included a motion in limine seeking to exclude "[a]ny opinion testimony that the Defendant's driving was 'reckless' or that he was endangering other motorists on the road." CP 123. At the commencement of trial, the parties discussed this motion:

> MR. HANSEN [Defense Counsel]: That's sort of a technical motion. The cases do say the officers should be allowed to testify what they observed and it's a jury question whether it was reckless driving. It's not an issue that is going to be greatly in dispute in this case in any event, but I would ask that he not be allowed to say in my opinion it was reckless. He can certainly testify that I saw him weaving through traffic, he went through a stop light, and that sort of thing.
>
> THE COURT: Mr. Darrow?
>
> MR. DARROW [Prosecutor]: Well, that's fine. I guess it sounds like we're pretty much in agreement. I'm not anticipating – I'm not going to ask him for an opinion about the term "reckless," okay. But in describing the driving he saw, I am anticipating that his testimony will be that the defendant's maneuvers were dangerously close to other vehicles, that he was concerned there was going to be a collision, that the defendant re-entered 527 without looking or stopping, and had there been oncoming vehicles there would have been a collision. So that's the way I believe he's going to couch his testimony. So as long as there is no objection to that. I'm not asking for opinion on reckless.

> MR. HANSEN: Your Honor, I may object to some specific questions, but I don't think it's going to be a big issue at trial.
>
> THE COURT: The officer can testify only as to what he observed. He can't use the term "reckless." Other than that, that certainly gets out what he needs to get out.

1 RP 7-8.

During the trial, Sgt. Foutch testified to the near-collision that occurred near the exit to 164th street:

> Q. When he cut to his left in front of what you have marked as Vehicle 1, did that concern you?
>
> A. I thought they were dead.
>
> Q. Who is "they"?
>
> MR. HANSEN: I object; I move to strike that answer.
>
> MR. DARROW: That's his perception at the time, as he is observing the events.
>
> THE COURT: The objection is overruled.
>
> THE WITNESS: I thought he was going to kill the people that were in the car.
>
> Q. How come?
>
> A. They were traveling sixty miles an hour; and you have a vehicle that takes a left-hand turn in front of you at sixty miles an hour, and he's doing seventy or eighty, I was almost certain that they were going to die.
>
> Q. Did they take any evasive action?
>
> A. I believe that they –

> MR. HANSEN: Same objection, your Honor. I'd like a continuing objection.
>
> THE COURT: You may have a continuing objection. The objection is overruled.
>
> THE WITNESS: I believe they slammed on their brakes.
>
> Q. Did you see brake lights?
>
> A. I saw brake lights on the first vehicle. I assume that they two vehicles behind him applied their brakes also. I don't know that – honestly, I can't tell you to this day whether or not there was a collision there.

2 RP 70-71.

In closing argument, defense counsel argued:

> [J]ust ask yourselves do I have any reason to have a doubt about this case. Or am I convinced beyond a reasonable doubt that he was willfully acting, which is the only issue, that he knew what he was doing, that he was in control?

4 RP 492-93. The jury found the defendant guilty as charged. CP 99-100.

The defendant sought a new trial based on Sgt. Foutch's opinion testimony. CP 35-48, 32-34. In denying this motion, the court pointed out that the order in limine limited the officer to testifying about what he observed. The officer's testimony was "a graphic description of what he observed." The officer was not testifying as an expert. Rather, the testimony was "basically him

telling us about the defendant's driving." The court therefore concluded that the testimony was proper. 4 RP 535-36.

The court then proceeded to sentencing. The defendant sought a sentence below the standard range. Counsel argued that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired. 4 RP 540-41. In rejecting this argument, the court pointed to the defendant's history of driving issues. The defendant had taken no adequate step to address his problems. Instead, knowing that he had a panic disorder, he made the choice to relax by getting into a car. Based on this, the court concluded that an exceptional sentence was unwarranted. It sentenced the defendant to confinement for 12 months plus a day, which was the bottom end of the standard range. 4 RP 4 RP 548-51.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED OPINION TESTIMONY FROM A LAY WITNESS.

1. Because The Defendant's Objection To The Testimony Stated No Grounds, The Issue Has Not Been Preserved For Appeal.

The sole basis asserted by the defendant for overturning his conviction is that a police officer purportedly testified to an improper opinion. This issue has not been preserved for appeal.

"An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Here, defense counsel made two objections to the challenged testimony. The first was, "I object; I move to strike that answer." The second was "Same objection, your honor. I'd like a continuing objection." 2 RP 70-71. Neither objection stated any ground at all. This being so, neither did anything to preserve the issue for appeal.

The defendant claims that this testimony violated the trial court's ruling on a motion in limine. As discussed below, it is doubtful that there was any violation. Even if there had been, it would not excuse the defendant's failure to raise an appropriate objection during trial. A motion in limine sometimes gives rise to a standing objection, but only if the motion is *denied*. If the motion in limine is granted but then violated, the party has the duty to raise an objection.

> When granting an order in limine to exclude evidence, the trial court considers whether the contested evidence should be admitted. However, it generally does not consider whether erroneous admission of the contested evidence will be prejudicial or harmless, or what remedy should be applied to rectify the erroneous admission of the evidence. These matters

> are considered when a violation is called to the trial court's attention. The trial court has no duty to remedy a violation *sua sponte.*
>
> It is appropriate then that, where the evidence has been admitted notwithstanding the trial court's prior exclusionary ruling, the complaining party be required to object in order to give the trial court the opportunity of curing any potential prejudice. Otherwise, we would have a situation fraught with a potential for serious abuse. A party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.

State v. Sullivan, 69 Wn. App. 167, 171-72, 847 P.2d 953, review denied, 122 Wn.2d 1002 (1993).

In the present case, the defendant could have objected that the testimony violated the order in limine or that it constituted improper opinion testimony. The court could then have clarified the scope of its order and determined whether any further limitations were necessary. Such a procedure was expressly contemplated by the parties: in discussing his motion in limine, defense counsel said that he might "object to some specific questions," but he didn't think it was "going to be a big issue at trial." 1 RP 8.

The word "objection" does not alert the court to the nature of the objection. An "objection," with no explanation, neither calls for a ruling on the scope of the order in limine nor the limits of

permissible opinion testimony. Absent a proper objection, the issue has not been preserved for appeal.

2. The Officer's Testimony Was Not Manifest Constitutional Error, Because It Did Not Constitute An Explicit Statement On An Ultimate Issue.

The defendant claims that the officer's testimony violated his constitutional right to a jury trial. Under some circumstances, an improper opinion about a defendant's guilt can constitute "manifest error affecting a constitutional right," which can be considered for the first time on appeal. For the error to be "manifest," there must be "an explicit or almost explicit witness statement on an ultimate issue of fact." State v. Kirkman, 159 Wn.2d 918, 936 ¶ 58, 155 P.3d 125 (2007). The defendant must also show that "the asserted error had practical and identifiable consequences in the trial of the case." Id. at 935 ¶ 54.

The Supreme Court applied these standards in State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008). There, a police officer testified to his opinion that the defendants intended to manufacture methamphetamine. The existence of that intent was the key disputed fact in the case. Although this testimony was improper, it was *not* a manifest constitutional error that could be raised for the first time on appeal. The jurors were properly

instructed that they were the sole judges of witness credibility and were not bound by expert witness opinions. Absent any evidence that the jury was unfairly influenced, that court presumed that the jury followed these instructions. Id. at 595-96 ¶ 34.

This court applied similar analysis in State v. Blake, 172 Wn. App. 515, 298 P.3d 769 (2012), review denied, ___ Wn.2d ___, 302 P.3d 180 (2013). There, two witnesses testified to their opinion that the defendant shot the victim. Although these witnesses were present at the time of the shooting, they had not seen the defendant fire the shot. Rather, they based their opinion on the defendant's location and the direction from which the shot was fired. This court held this testimony proper. In an alternative holding, the court also said that the challenge could not be raised for the first time on appeal. "[T]he witnesses' testimony did not parrot a legal standard, nor reference or use the word 'guilt.' Neither testimony arose to the level of explicit statements that [the defendant] was guilty." Id. ¶ 38. The court also pointed out that, as in Montgomery, the jurors was properly instructed that they were the sole judges of witness credibility. Id.¶ 39.

The situation in the present case is analogous to Blake and Montgomery. As in Blake, the officer's testimony neither mentioned

any legal standard nor referred to "guilt." As in both cases, the jurors were properly instructed that they were the sole judges of witness credibility. CP 82. Nothing in the record suggests that they failed to follow those instructions. Even if the testimony was improper, the issue cannot be raised for the first time on appeal.

3. The Officer's Testimony Complied With The Order In Limine.

Alternatively, if the issue can be raised, there was no error. The defendant first claims that the testimony violated an order in limine. This claim is incorrect.

The defendant points out that his written motion asked to exclude "[a]ny opinion testimony ... that [the defendant] was endangering other motorists on the road." CP 123. In arguing the motion, however, defense counsel did not urge this position. The prosecutor said that the officer would testify that "he was concerned there was going to be a collision." 1 RP 7. In response, defense counsel did not suggest that such testimony would be improper. Rather, he said that he "may object to some specific questions," but he didn't think it was "going to be a big issue at trial." 1 RP 8.

The court's ruling was this:

> The officer can testify only as to what he observed. He can't use the term "reckless."

1 RP 8.

When the officer testified, he did not use the word "reckless" or testify to any opinion about the defendant's mental state. Rather, the officer testified to his own perception at the time he observed the events. 2 RP 70-71. The court later concluded that this was consistent with the order in limine:

> It was essentially [the officer] telling us about the defendant's driving, and he's not talking about the defendant's thoughts. He's talking about essentially what he's observing and a fear that he has of what he's observing.

4 RP 536. There was no violation of the order in limine.

4. The Testimony Constituted A Lay Opinion That Is Permissible Under ER 701.

The testimony also did not violate the evidentiary rules limiting expert testimony. As the trial court recognized, the officer did not testify as an expert witness. 4 RP 536. Rather, the testimony was admissible under ER 701:

> If the witness was not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

For evidence to be admissible under this rule, "the witness must have personal knowledge of matter that forms the basis of testimony of opinion; the testimony must be based rationally upon the perception of the witness; and, of course, the opinion must be helpful to the jury (the principal test)." The trial court's ruling will be reviewed only for an abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308-09, 831 P.2d 1060 (1992).

A pre-rule case explains the rationale of this rule:

> [I]f the subject matter of the testimony cannot be reproduced and described to the jury precisely as it appeared to the witness, a witness who has had means of personal observation may state his opinion, conclusion, and impression formed from such facts and circumstances as came under his observation.

Ulve v. City of Raymond, 51 Wn.2d 241, 253, 317 P.2d 908 (1957) (emphasis omitted).

Here, the officer observed a near-collision between the defendant's car and that of another driver. It is difficult to express the precise factors that would affect the likelihood of a collision: the speed of the two vehicles, the angle at which they approached, and the possible reactions of each driver. The trial court could therefore allow the witness to express his opinion and inference: that the cars

came so close to colliding that he believed that the occupants of the other car were "dead."

The defendant's brief places heavy reliance on State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999). There, a police officer testified to his opinion that the defendant was attempting to get away from him. This court held that the officer had an insufficient factual basis for drawing a conclusion about the defendant's state of mind. Id. at 460-62. In the present case, in contrast, there was no opinion about any mental state. Rather, the testimony related to the likelihood of a collision. The observations made by the officer were sufficient to allow a reasonable inference on that topic. The trial court's decision was consistent with Farr-Lenzini.

Nor was the officer's opinion unduly prejudicial. It bore on its face a warning against literal interpretation. Obviously, the occupants of the other car were *not* "dead": there was no collision, and they suffered no injury at all. Any reasonable juror would recognize that the officer's impression turned out to be excessively pessimistic. The jury could take this into account in determining whether the defendant's driving was such as to endanger others. The admission of this testimony was not an abuse of discretion.

5. Since The Testimony Did Not Relate To Any Issue That Was In Genuine Dispute, Any Error Was Harmless.

Finally, if the admission of this testimony was error, the error was harmless. The appropriate standard depends on whether any error is considered to be constitutional in nature. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." Guloy, 104 Wn.2d at 425. A non-constitutional error is harmless "unless, within reasonable probabilities, the materially affected the outcome of the trial." State v. Hopson, 113 Wn.2d 273, 285, 778 P.2d 1014 (1989).

In the present case, there is no reason to believe that the officer's opinion affected the verdict. This is because the dangerous nature of the defendant's driving was never a significant issue. Defense counsel acknowledged this at both the beginning at the end of the trial. In discussing the motion in limine, counsel told the court that the recklessness of the defendant's driving was "not an issue that is going to be greatly in dispute in this case." 1 RP 7. In closing argument, defense counsel said that the *only* issue was whether the defendant was acting willfully. 4 RP 493. As already

pointed out, the officer never expressed any opinion about the defendant's mental state.

The officer testified that the defendant passed other cars on the right while fleeing from him. This is dangerous because drivers are trained to move to the right when they hear sirens. Any driver who did so would have put himself in the defendant's path. 2 RP 63. The defendant drove through red lights without slowing. 2 RP 64. When he encountered two vehicles travelling side-by-side, he passed them by straddling the lane line between them. 2 RP 67. He made a hard left turn in front of a car whose driver had to slam on his brakes to avoid a collision. 2 RP 70-71. None of this evidence was disputed. Based on this evidence, any reasonable juror would have concluded that the defendant's driving endangered motorists other than the pursuing officer. Beyond a reasonable doubt, or at least within reasonable probabilities, the challenged testimony did not affect the verdict.

6. Any Evidentiary Error Should Be Remedied By A New Trial, Not By Striking The Jury's Finding.

Finally, if the court decides that there was prejudicial error, the proper remedy is a new trial. In all of the cases that the defendant cites as involving similar errors, this remedy was applied.

Farr-Lenzini, 93 Wn. App. at 466; State v. Black, 109 Wn.2d 336, 350, 745 P.2d 12 (1987); State v. Sargent, 40 Wn. App. 340, 353, 698 P.2d 598 (1985); State v. Haga, 8 Wn. App. 481, 495, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973). When a trial error affects only a sentencing factor, a new trial can be limited to that factor. See State v. Thomas, 150 Wn.2d 821, 876, 83 P.3d 970 (2004).

The defendant cites two cases that were remanded for re-sentencing without a new trial. In re Beito, 167 Wn.2d 497, 220 P.3d 489 (2009); In re Delgado, 149 Wn. App. 223, 204 P.3d 936 (2009). Both of these involved sentences that were unauthorized by the jury's verdict. The problem was not a jury verdict based on improper evidence. Rather, the jury did not render any finding on facts that were necessary to support the sentence. These cases bear no resemblance to the present case. If the admission of the opinion evidence was prejudicial error, the proper remedy is a new trial.

B. THE IMPOSITION OF A STANDARD RANGE SENTENCE CANNOT BE AN ABUSE OF DISCRETION.

Finally, the defendant appears to challenge the sentence imposed. He argues that the evidence at sentencing established

that his capacity to appreciate the wrongfulness of his conduct as significantly impaired, thereby justifying an exceptional sentence under RCW 9.94A.525(1)(e). Brief of Appellant at 27-28. In his conclusion, however, the defendant seeks only a new trial, not re-sentencing. Brief of Appellant at 29.

"A sentence within the standard sentence range ... for an offense shall not be appealed." RCW 9.94A.585(1). "[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length." State v. Williams, 1349 Wn.2d 143, 146-47, 65 P.3d 1214 (2003). Although the trial court could have chosen to impose an exceptional sentence, its failure to do so cannot be considered an abuse of discretion.

Even if the court's decision was subject to review, it is supported by the facts in the record. As the trial court pointed out, the defendant knew that he was susceptible to panic attacks when pursued by police. 4 RP 549-53. The defendant testified that, prior to his commission of the crime, he was aware that he was likely to panic when pursued by police. He had even avoided driving because of that possibility. 3 RP 349-50. The defendant was also

aware that he was more likely to panic when under stress. 3 RP 325. Yet he chose to drive when under stress for the specific purpose of relaxation. 3 RP 328. In other words, the defendant deliberately put himself in a position where he was likely to act in an unpredictable manner that would endanger the public. The trial court properly determined that these facts justified a sentence within the standard range. The sentence was not an abuse of discretion.

IV. CONCLUSION

The judgment and sentence should be affirmed

Respectfully submitted on July 8, 2013.

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