70601-2

70601-2

NO. 70601-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JONES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL SCHAPIRA

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The dismissal of criminal charges is a remedy of last resort that should only be granted when a defendant has been prejudiced. Here, Trooper Ford testified about his background, experience and current duties as an accident reconstructionist; and in doing so, he testified that some of the causes of fatal collisions include: driving under the influence (DUI), reckless driving, not wearing a seatbelt, and speeding. Trooper Ford also explained sometimes officers do not ask a person to perform field sobriety tests because it would be unsafe, the weather is bad, or the person is handicapped. These remarks were made during foundational questions, not attributed to Jones, and the evidence against Jones was so overwhelming that the jury's verdict without the answers would have been the same. Did the trial court correctly deny Jones' motion to dismiss?

2. Opinion testimony is admissible if it is rationally based on the perception of the witness and is helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Trooper Ballard testified that he activated his siren because Jones did not slow down in response to the trooper's emergency lights,

Jones' driving was evasive, and it did not appear that Jones was going to stop. Was Trooper Ballard's testimony proper?

3. The cumulative error doctrine is only applicable where the combined effect of trial errors deny the defendant a fair trial. Here, there were no errors that denied Jones his right to a fair trial. Has Jones failed to show prejudice?

4. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. Here, the findings and conclusions of law pertained to the bifurcated bench trial. Jones' DUI conviction was raised to a felony in light of his prior convictions. Jones did not challenge the increase in severity of his DUI conviction to a felony in this appeal. Has Jones failed to show prejudice resulting from the delay in the filing of the findings?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged the defendant, Stephen A. Jones, with one count of felony DUI and one count of attempting to elude a pursuing police vehicle. CP 12-13. The State further alleged that during the attempt to elude, one or more persons, other than Jones and the police officer, were threatened with physical injury or harm. CP 13. A jury trial was held in April of 2013 before the Honorable Carol Schapira. The jury convicted Jones of DUI and attempt to elude. CP 52, 54; 4RP 59.[1] The jury also found that Jones' driving caused a risk of harm to another person other than himself and the pursuing officer. CP 53; 4RP 59. At a bifurcated proceeding, the trial court found that Jones had been previously convicted of four or more qualifying offenses within ten years, elevating the DUI to a felony. CP 54-55; 4RP 80.[2] The trial court imposed a standard range sentence. CP 118-26; 5RP 37-38. Jones now appeals.

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[1] The Verbatim Report of this trial consists of five volumes referred to in this brief as: 1RP (April 11 and 15, 2013); 2RP (April 16, 2013); 3RP (April 17, 2013); 4RP (April 18, 2013); and 5RP (May 31 and June 24, 2013).

[2] Jones' prior qualifying offenses pursuant to RCW 46.61.5055 are: DUI from December of 2003; DUI from November of 2005; Reckless Driving from May of 2007; and Felony DUI from December of 2010. CP 124; 4RP 81.

2. SUBSTANTIVE FACTS.

On February 27, 2011, at approximately 12:25 a.m., Washington State Patrol Trooper Jacob Ballard was on duty in a fully marked Washington State Patrol vehicle, equipped with lights and sirens, on State Route 18 near Interstate 5. 2RP 12-14. Trooper Ballard first noticed Jones when he moved into the left lane, failing to activate his turn signal until he had already changed lanes. 2RP 13,16-17. Later, Jones veered to the right and crossed over the fog line by half a car's width. 2RP 17. Jones corrected, but crossed the fog line two more times and drove on half of the shoulder. 2RP 17-18. The car then accelerated from 65 miles per hour to 80 miles per hour, in a 60 mile-per-hour zone. 2RP 18. As the road curved, Jones' car straddled two lanes. 2RP 18. Jones was not wearing his seatbelt and was on his cell phone. 2RP 19.

In light of Trooper Ballard's observations of the car: the lane travel, the speed, the improper lane change and the seatbelt violation, Trooper Ballard decided to stop Jones. 2RP 19-20. Before Trooper Ballard turned on his emergency lights, he noticed that Jones slowed down, made another unsafe lane change directly in front of a car, causing that driver and others behind to brake in order to avoid a collision. 2RP 21. Trooper Ballard pulled up

behind Jones and activated his emergency lights to conduct a traffic stop. 2RP 19, 22. After the lights were activated, in an area with a very large shoulder, Jones briefly slowed down with traffic, but then straddled both lanes, accelerated, and passed a car that was directly ahead, coming within inches of hitting it. 2RP 23-25. As traffic slowed down in response to the patrol emergency lights, Jones continued to accelerate, going twice as fast as the rest of the traffic. 2RP 25.

Based on Trooper Ballard's observations – that it did not appear that Jones was going to stop at any time because of the increase in speed, and the evasive moves – the trooper activated his siren. 2RP 25. Jones drove past several shoulders without making any attempts to stop. 2RP 26. Jones continued driving erratically and straddling the lanes. 2RP 27. Jones put on his seatbelt and continued driving over the speed limit while traffic was slowing down and moving out of the way. 2RP 28. Jones exited the freeway about a mile from where the trooper had originally activated his emergency lights. 2RP 28-29.

While on the exit ramp, Jones drove entirely on the right shoulder. 2RP 30. As the car approached the traffic light, it quickly changed from the left to the right lane, and then stopped at the

light. 2RP 33. Trooper Ballard could see Jones moving inside the car reaching for something behind the passenger seat.[3] 2RP 33. Once the light turned green, Jones continued driving a short distance and turned into the Denny's parking lot. 2RP 34. After driving around the parking lot, Jones parked in a stall over the white line divider very close to another parked car. 2RP 34-35.

Trooper Ballard pulled up next to the car at approximately 12:33 a.m. 2RP 35, 47. Trooper Ballard walked up to the driver side door and Jones was talking on a cell phone. 2RP 36. Jones was trying to ignore the trooper and yelled, "What's the problem?" 2RP 36. As Trooper Ballard attempted to speak with Jones, Jones was loud and argumentative. 2RP 36-37. Trooper Ballard instructed Jones to get off the phone, at least three times, but Jones did not. 2RP 37-38. Instead, Jones replied, "Why, am I under arrest? Go to Iraq if you want some fucking action." 2RP 38. Before Jones hung up, he said, "Jenny, I think I'm going to be arrested." 2RP 38. Jones' speech was slurred. 2RP 37.

Jones' movements were slow, his face was flushed, and his eyes were red, bloodshot and glassy. 2RP 37. Trooper Ballard

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[3] Trooper Ballard impounded Jones' car and found a beer can directly behind the passenger seat where Jones was seen reaching. 2RP 57.

smelled a strong odor of alcohol coming from the car. 2RP 37. Trooper Ballard asked Jones for his driver's license and vehicle information. 2RP 36. Jones pulled out a Washington I.D. card from his wallet and handed it to Trooper Ballard. 2RP 37.

Trooper Ballard ordered Jones out of the car. 2RP 39. As Jones exited, he had trouble maintaining his balance and took an aggressive stance. 2RP 39. Jones swayed in an obvious circular motion. 2RP 40. Jones continued to be aggressive and loud. 2RP 41. Ballard did not ask Jones to perform field sobriety tests because of his uncooperative and argumentative attitude. 2RP 42. Based on Trooper Ballard's total observations of Jones, the trooper believed that Jones was impaired. 2RP 57. Trooper Ballard arrested Jones and during the search incident to arrest, Jones continued acting aggressively, asking, "What is taking so fucking long?" 2RP 43.

Trooper Brody Ford arrived to assist in the investigation. 2RP 45; 3RP 94-95. When Trooper Ford arrived, Jones was in Trooper Ballard's patrol car, yelling and very upset. 3RP 96; 104.

Trooper Ballard read Jones his Implied Consent Warnings for Breath. 2RP 45-46. Jones refused to take the breath test. 2RP 46; 3RP 21, 28, 97. As a result of Jones' refusal, Trooper Ballard

obtained a search warrant to obtain Jones' blood. 2RP 46; 3RP 21. Troopers Ballard and Ford took Jones to Auburn Medical Center. 2RP 48; 3RP 97.

While at the hospital, Trooper Ford noticed that Jones was impaired because he was walking very slow, had bloodshot, watery eyes, slurred speech, a flushed face, and smelled of alcohol. 3RP 98. Jones admitted to Trooper Ford that he had been drinking, and said he was sorry for the situation. 3RP 98. In the hospital, Jones asked to use the restroom. 2RP 48. Jones stayed in the restroom for an extended period of time, leading the troopers to believe that Jones had fallen asleep. 3RP 99. Trooper Ballard knocked on the bathroom door and learned that Jones was having a difficult time buttoning his pants, which in Trooper Ford's opinion, was another sign of impairment. 2RP 48; 3RP 22, 100.

Troopers Ballard and Ford observed the blood draw at the hospital. 2RP 48-51. The blood draw was completed at 3:13 a.m. – approximately 2 hours and 45 minutes after Jones was stopped. 2RP 55. A Washington State Patrol Toxicologist, Brianne O'Reilly, received the blood vials and performed the testing on Jones' blood. 3RP 30-31, 36. Jones' blood tested positive for alcohol at .08. 3RP 42-43. Given that more than two hours had elapsed since the

time of the stop and the blood draw, O'Reilly testified about retrograde extrapolation. 3RP 46. According to O'Reilly's calculations, Jones' blood alcohol content would have been between .09 and .10 one hour prior to the blood draw (within two hours of the time of the stop). 3RP 46.

A defense expert challenged the accuracy of retrograde extrapolation. 3RP 127-28. The defense expert concluded that there was a reasonable chance that Jones' blood alcohol content at the time of driving could have been less than .08. 3RP 134.

a. Trooper Ford's Testimony.

At the start of Trooper Ford's testimony, the State inquired as to his current duties, background and experience. 3RP 89. Trooper Ford answered he is a collision reconstructionist. 3RP 90. Trooper Ford explained this involves investigating cases where accidents occur as a result of consumption of alcohol or drugs, reckless driving or racing. 3RP 90. As a follow-up question, the State inquired if part of his duties is to investigate DUIs. 3RP 91. Trooper Ford answered in the affirmative explaining that one of the State Patrol's goals is to decrease fatality collisions. 3RP 91. Trooper Ford elaborated that these fatal collisions occur as a result

of people being impaired by alcohol and/or drugs, speeding, not wearing a seatbelt, or aggressive driving. 3RP 91. Defense counsel objected to this answer and the court instructed the prosecutor to ask another question. 3RP 91.

The prosecutor then asked how many DUI investigations Trooper Ford had conducted, followed by a question about whether field sobriety tests are conducted in every DUI investigation. 3RP 91-93. Trooper Ford said that in a perfect world officers would like to be able to have suspects perform field sobriety tests, but there are obstacles. 3RP 93. The prosecutor asked for clarification, to which Trooper Ford responded that officer safety comes first because their main goal is to go home safe at night. 3RP 93. Defense counsel objected, the trial court overruled the objection, and Trooper Ford articulated some of the various challenges such as a person's demeanor, weather conditions, and handicap impairments. 3RP 93.

C. ARGUMENT

1. TROOPER FORD'S TESTIMONY DID NOT AFFECT THE JURY'S VERDICT.

Jones argues that the trial court erred in denying his motion to dismiss. He argues that Trooper Ford focused the jury's attention on the potential for fatal collisions as a result of people driving under the influence and officers being killed in the line of duty, and that these subjects were not relevant. The State disagrees. Jones' claim is an exaggeration of Trooper Ford's testimony. The trial court did not abuse its discretion in denying Jones' request for a mistrial. Nor did the trial court err in failing to consider a reasonable alternative such as a mistrial.

First, Trooper Ford's statement about fatal collisions was in response to his current duties as a collision reconstructionist. Trooper Ford indicated that he responds to accidents that are sometimes caused by the use of alcohol or drugs, and reckless driving such as racing. Second, Trooper Ford enumerated several reasons that lead to fatal collisions such as DUI, not wearing a seatbelt, speeding, and aggressive driving. And third, his statement concerning officer safety was simply an explanation for why field sobriety tests are not always conducted. Trooper Ford

said that sometimes the tests are not done because of officer safety concerns, depending on the suspect's demeanor, weather conditions, and a suspect's handicap. Thus, Trooper Ford's answers to general questions regarding his background, experience and duties, did not deprive Jones of a fair trial.

Dismissal of a criminal proceeding is an extraordinary remedy. State v. Koerber, 85 Wn. App. 1, 5, 931 P.2d 904, 906 (1996). Absent a finding of prejudice to the defendant, dismissal of a criminal case is not warranted. Id. Simply stated, dismissal of a criminal case is a remedy of last resort. City of Kent v. Sandhu, 159 Wn. App. 836, 839, 247 P.3d 454 (2011). Instead, a trial judge must consider reasonable alternatives, such as a mistrial, when ordering the extraordinary remedy of dismissal. Koerber, 85 Wn. App. at 4. The appellate court reviews a trial court's decision whether to dismiss charges for a manifest abuse of discretion. State v. White, 126 Wn. App. 131, 135, 107 P.3d 753 (2005). Likewise, this Court reviews the trial court's decision to grant or not to grant a mistrial under an abuse of discretion standard. State v. Escalona, 49 Wn. App 251, 254, 742 P.2d 190, 192 (1987); State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court

abuses its discretion if its decision is manifestly unreasonable or it exercises its discretion on untenable grounds or for untenable reasons. White, 126 Wn. App. at 135.

As a general rule, the trial courts have wide discretionary powers in conducting a trial and dealing with irregularities that arise. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). To determine whether a trial was fair, this Court should look to the trial irregularity and determine whether it may have influenced the jury. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983). A mistrial should be granted only when "nothing the trial court could have said or done would have remedied the harm done to the defendant." Gilcrist, 91 Wn.2d at 612. Simply stated, a mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only those errors which may have affected the outcome of the trial are prejudicial. Id.

In deciding if a witness statement or remark prejudiced the jury, courts examine whether the remark, "viewed against the backdrop of all the evidence," was so prejudicial that it denied the defendant his right to a fair trial. Escalona, 49 Wn. App. at 254.

The trial judge is best suited to determine the prejudice of a statement. Id. at 254-55.

For instance, in State v. Clemons, the defendant was charged with manslaughter in the first degree. 56 Wn. App. 57, 58, 782 P.2d 219, 220 (1989). The court granted a motion in limine excluding testimony about any prior bad acts by Clemons. Id. at 58. During trial, Officer Katzer testified he heard a radio transmission about a homicide that mentioned the name Ken Clemons. He then testified, "We, my partner and I, well, we knew Ken Clemons from prior contacts." Id. On appeal, Clemons argued that the trial court erred in refusing to grant a mistrial after the officer stated that he knew Clemons from "prior contacts" in violation of the order in limine. Id. at 62. This Court noted that while being known to a police officer may be suggestive of bad acts, it is certainly not conclusive, holding that against the backdrop of all the evidence, this incident was insignificant. Id.

By contrast, in Escalona, the defendant was charged with assault in the second degree while armed with a deadly weapon. 49 Wn. App. at 252. Before trial, the court granted a motion in limine to exclude any testimony regarding the defendant's prior conviction for the same crime. Id. At trial, the victim testified that

he was nervous when the defendant threatened him with a knife because the defendant had a record and had stabbed someone before. Id. at 253. This Court concluded that the combination of the serious irregularity, coupled with the weakness of the State's case and the relevance of the victim's statement, prejudiced the defendant. Id. at 256.

Here, just as in Clemons, there was little significance in Trooper Ford's testimony and it did not affect the verdict. The claimed irregularities were presented while laying the foundation for Trooper Ford's training and they were not in violation of a motion in limine. The statements did not pertain to Jones, and there was ample evidence from which the jury could convict Jones. In Escalona, the Court noted that the improper testimony was "particularly serious considering the paucity of credible evidence against [the defendant]." 49 Wn. App. at 255. That is simply not the case here. Instead, this case is similar to State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989), where the Supreme Court affirmed the denial of a mistrial, despite a witness referencing the defendant's time in the penitentiary, because "the jury had overwhelming evidence favoring conviction." Id. at 276, 286.

There was overwhelming evidence presented here to support Jones' convictions. With respect to Jones' driving, the evidence established that: 1) Jones was swerving back and forth within his lane of travel; 2) Jones made at least two improper lane changes; 3) Jones crossed over the fog line at least three times and then corrected; 4) Jones was speeding, sometimes reaching 80 miles per hour in a 60-mile-per-hour zone; 5) upon seeing the emergency lights, Jones was driving twice as fast as the traffic that had slowed down; 6) Jones drove erratically; 7) Jones came within inches of hitting another car; and 8) Jones drove through several shoulders almost one mile before stopping.

As to Jones' intoxication level, the evidence established that: 1) Jones' blood alcohol level was .08 approximately 2 hours and 45 minutes after he was stopped; 2) Jones admitted he had been drinking and expressed remorse for the situation; 3) Jones had difficulty buttoning up his pants after using the restroom; 4) Jones' movements were slow; and 5) both troopers indicated that Jones exhibited many of the physical signs of intoxication: his eyes were watery and bloodshot; his speech was slurred; his face was flushed; and he smelled of alcohol. Thus, even if this Court

believes that Trooper Ford's statements constituted an irregularity in the trial, the strength of the evidence against Jones mitigates the isolated remarks.

Jones further argues that Trooper Ford's testimony about common causes of accidents and the desire of police officers to go home safely to their families is irrelevant. Jones takes these two statements out of context. These statements were part of Trooper Ford's answers as to his current duties, qualifications, and training, which were relevant to his observations of Jones, as well as to explain the common practice of field sobriety tests.

A defendant is not entitled to a perfect trial, and admission of testimony is within the sound discretion of the trial court. State v. Golladay, 78 Wn.2d 121, 470 P.2d 191 (1970); State v. Miles, 73 Wn.2d 67, 436 P.2d 198 (1968). Nevertheless, the record must be examined to insure that irrelevant and inflammatory testimony tending to prejudice the defendant was not introduced. Miles, 73 Wn.2d at 70.

To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law

(materiality). State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726, 729 (1987). The relevancy of evidence will depend upon the circumstances of each case and the relationship of the facts to the ultimate issue. Relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense. Id. at 12. Facts tending to establish a party's theory of the case will generally be found to be relevant. Id. The relevancy of evidence, however, must be balanced against any inflammatory effect it might have on the jury. If the relevance is remote and of little necessity and is engulfed by prejudicial effect, the evidence will not be admissible. State v. Westlund, 13 Wn. App 460, 469-71, 536 P.2d 20 (1975).

Trooper Ford's training was relevant. One of the main issues at trial was whether Jones was intoxicated. The jury was entitled to know the troopers' training and experience in investigating people who are driving under the influence. As part of their investigation, troopers typically conduct field sobriety tests. Thus, the jury was entitled to know why field sobriety tests are not always completed since there was no evidence of field sobriety tests in this case.

Trooper Ford provided several explanations 1) the safety of the officers based on the suspect's demeanor; 2) weather conditions; and 3) the person may have a handicap. 3RP 93. Any potential inflammatory effect was miniscule. As the trial court properly noted, Trooper Ford did not imply in any way that officer safety was the reason for not conducting field sobriety tests in this case. 3RP 113-14. Nor was the answer in response to a question directly related to Jones. 3RP 114. Rather, Trooper Ford simply articulated the reasons why although in a perfect world officers would have suspects perform field sobriety tests, it is not always feasible. 3RP 93, 114.

Jones further argues that the emotional appeal of Trooper Ford's testimony was unfairly prejudicial depriving him of a fair trial. Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another. Rice, 48 Wn. App. at 13. However, "unfair prejudice" is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the juror. Id. Within its context, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis-commonly an emotional one. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Jones equates Trooper Ford's statements to the gruesome details of the 911 call in City of Auburn v. Hedlund, 165 Wn.2d 645, 201 P.3d 315 (2009). Jones reliance on Hedlund is misplaced. There, the 911 caller exaggerated the circumstances and described a gruesome scene, incorrectly reporting that one of the victims was decapitated. Hedlund, 165 Wn. 2d at 655. Some of the more inflammatory excerpts from the tape were: "Really bad. The (indiscernible) car's torn off. There's bodies, there's a head cut off. We're directly under—there—there's three bodies in the road. There's a head cut off. Oh, there's legs cut off, heads cut off. And cars, trucks backing up bad now. There's one, two, three—four bodies. One head cut off. It looks like a child. One head's cut off. One, two, three, four—five bodies. I don't think you guys want to see this." Id. The Supreme Court reasoned that this situation was analogous to the admission of gruesome crime scene photographs, holding that the gruesome nature of the crash was not related to any element of any crime charged. Id. at 655-56. Of importance, the court noted that, "[T]he use of the caller's assertion, repeated no less than five times during the call, that someone had been decapitated appears calculated to inflame the passions of the jury, especially since it was conceded to be untrue." Id. at 656.

Nothing in Trooper Ford's answers suggests that the statements were made with the specific purpose of inflaming the passions of the jury. Trooper Ford's answers about the various causes of fatality accidents, which included not only driving under the influence, but also reckless driving such as racing, and not wearing seatbelts, were general answers to foundational questions. As the court properly noted, this related to his training and not to this case since "there was no accident here." 3RP 114. Similarly, his answers as to the field sobriety tests were not directly related to this case because he was not the primary officer, nor was his decision to not ask for the tests.

In sum, Trooper Ford's remarks were insignificant. Viewed against the backdrop of all the evidence, the testimony was not so prejudicial that it denied Jones a fair trial. This Court should hold that the trial court did not err in denying the defense motion to dismiss.

2. TROOPER BALLARD'S TESTIMONY WAS RATIONALLY BASED ON HIS PERCEPTION OF JONES' DRIVING.

For the first time on appeal, Jones argues that he was denied a fair trial by an impartial jury because the trial court

admitted Trooper Ballard's opinion testimony that Jones was evasive and did not appear that he was going to stop.

RAP 2.5(a)(3) does not permit *all* asserted constitutional claims to be raised for the first time on appeal, but only certain questions of "manifest" constitutional magnitude. State v. Kirkman, 159 Wn.2d 918, 934-35, 155 P.3d 125, 134 (2007). Our Supreme Court has rejected the argument that all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3), noting that "[t]he exception actually is a narrow one, affording review only of certain constitutional questions." Id. Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. Id. at 936. "Manifest error" requires an explicit or almost explicit witness statement on an ultimate issue of fact. Id.

Here, Trooper Ballard's testimony did not amount to "explicit witness statement on an ultimate issue of fact." Trooper Ballard was simply testifying as to his observations and perceptions. Trooper Ballard was not testifying as to Jones' state of mind or intent, rather, he was testifying as to what he perceived – that it did not appear that Jones was going to stop based on his observations of Jones' driving.

But even if this Court believes that Jones could raise this issue on appeal for the first time, his argument should be rejected. It is error to admit lay opinion testimony which goes to a core element of the crime charged unless it has a substantial factual basis. State v. Farr-Lenzini, 93 Wn. App. 435, 463, 970 P.2d 313 (1999). A trial court's decision to admit a witness' opinion testimony is reviewed for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). In determining admissibility, courts consider the circumstances of each case, including the type of witness, the nature of the charges, the type of defense, and the other evidence. City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994). The closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be." Farr-Lenzini, 93 Wn. App. at 460. If the opinion goes to a core element that the State must prove, there has to be a substantial factual basis for the opinion. Id. at 462-53.

Lay opinion testimony is admissible if it is (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. ER 701; Farr-Lenzini, 93 Wn. App. at 462. Courts

generally affirm rulings admitting lay opinion testimony when it has a solid factual basis and is based on direct personal observations which directly and logically support the opinion. See, e.g., Heatley, 70 Wn. App. at 579–80 (officer's opinion that defendant was intoxicated to the point that he could not drive safely).

Here, Trooper Ballard's opinion that it did not appear that Jones was going to stop was rationally based on his perception. As soon as Trooper Ballard activated his emergency lights traffic slowed down, except for Jones who accelerated to the point that he was going twice as fast as the rest of the traffic. 2RP 25.

Jones cites Farr–Lenzini, supra, in support of his position. There, a state trooper testified about his opinion of the defendant's state of mind in a trial for attempting to elude a pursing police officer:

> Q: Just based on your training and experience, do you have an opinion as to what the defendant's driving pattern exhibited to you?
>
> A: It exhibited to me that the person driving that vehicle was attempting to get away from me and knew I was back there and refusing to stop.

Farr-Lenzini, 93 Wn. App. at 458.

Division Two held that this testimony was reversible error because the driver's state of mind was a core element of the offense, the officer testified to it without a sufficient factual background, and there was a credible alternative explanation for his observations. Farr–Lenzini is easily distinguishable from the testimony in this case.

Here, the State did not ask Trooper Ballard for his opinion, nor did Trooper Ballard testify about Jones' state of mind. Rather, Trooper Ballard testified as to his observations of Jones – that he had accelerated and was driving evasively – and based on those observations, it did not appear that Jones was going to stop. Trooper Ballard then explained this was the reason for activating his siren. 2RP 25.

In sum, Trooper Ballard's testimony was not an opinion as to Jones' intent. Instead it was an explanation for his need to activate his siren based on his observations of Jones.

3. THERE IS NO CUMMULATIVE ERROR.

Jones claims that the alleged errors, taken cumulatively, deprived him of a fair trial. Under the cumulative error doctrine, this Court may overturn a conviction where the combined effect of

errors, each harmless in its own right, worked to deny the defendant a fair trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). "The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome." Id. In other words, absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

Here, as argued above, there was no error. Thus, Jones was not deprived of a fair trial.

4. JONES CANNOT SHOW HE WAS PREJUDICED BY THE DELAY IN THE ENTERING OF THE FINDINGS OF FACT.

Lastly, Jones contends that because the trial court failed to enter the required findings of fact and conclusions of law after the bench trial where the trial court found Jones guilty of felony DUI, this Court should remand for entry of written findings. Alternatively, Jones claims that if findings are entered, then this Court should reverse his conviction because the delay prejudiced him. The written findings of fact and conclusions of law were filed with the trial court of April 1, 2014. Supp.___ Sub. # 139. Jones does not and cannot articulate what prejudice he received as a result of the

delay in the entry of the findings. Therefore, his argument should be rejected.

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), rev. denied, 153 Wn.2d 1028 (2005). The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice.

In State v. Smith, the court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of Jones appeal. There is no resulting prejudice. Nor can Jones establish unfairness or prejudice resulting from the content of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. Supp.___ Sub. # 138, 139. The language of the findings is consistent with the trial court's oral ruling. 4RP 80-83. The trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal.

Supp.___ Sub. #138. Moreover, none of the issues on appeal related to the findings. The findings were solely as to Jones' prior convictions for DUI making this charge a Felony DUI.

In light of the above, Jones cannot demonstrate an appearance of unfairness or prejudice.

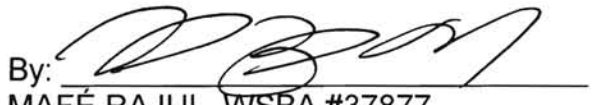
D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm convictions.

DATED this 16th day of June, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By: _____
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. STEPHEN JONES, Cause No. 70601-2 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 16 day of June, 2014

Name
Done in Seattle, Washington

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