

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
a. <u>Witness Testimony</u>	2
b. <u>Jail Calls</u>	5
c. <u>Arguments</u>	7
C. <u>ARGUMENT</u>	8
IMPROPER OPINION TESTIMONY VIOLATED ANDRE’S CONSTITUTIONAL RIGHT TO HAVE THE FACTS DETERMINED SOLELY BY THE JURY	8
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Anderson
141 Wn.2d 357, 5 P.3d 1247 (2000)..... 2, 3, 10

State v. Davis
79 Wn. App. 591, 904 P.2d 306 (1995)..... 11

State v. Demery
144 Wn.2d 753, 30 P.3d 1278 (2001)..... 8, 9

State v. Montgomery
163 Wn.2d 577, 183 P.3d 267 (2008)..... 8, 9, 11, 12

FEDERAL CASES

Bruno v. Rushen
721 F.2d 1193 (9th Cir. 1983) 12

RULES, STATUTES AND OTHER AUTHORITIES

ER 701 9

ER 703 10

ER 704 9

Fed. R. Evid. 702 8

A. ASSIGNMENT OF ERROR

Appellant was denied a fair trial when a state's witness expressed an opinion on guilt.

Issue Pertaining to Assignment of Error

A police officer testified appellant's mention of a "heater" in a jail phone call was a reference to the specific firearm located in the car he was driving. Did this testimony invade the province of the jury and violate appellant's constitutional right to a jury trial by expressing a direct opinion on his knowledge, the only disputed element of the unlawful possession of a firearm charge?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant James Andre with one count of unlawful possession of a firearm in the second degree, one count of possession of stolen property in the first degree, and one count of attempting to elude a pursuing police vehicle. CP 1-2. The jury found Andre guilty as charged, and the court imposed a standard range sentence. CP87-89, 103, 105. Notice of appeal was timely filed. CP 119.

2. Substantive Facts

a. Witness Testimony

Andre was driving lawfully in north Seattle when Officer William Anderson pulled up behind him, checked his license plate, and learned the black Yukon was associated with a mail theft three days earlier. 3RP¹ 38. The suspect in that case was female, but since Anderson could not determine the driver's sex, he decided to pull the car over. 3RP 38-39. Anderson first turned on the lights of his marked patrol car. 3RP 38. After about a block, Andre did not appear to notice, so Anderson "chirped" his siren. 3RP 39, 62. At that point, the Yukon increased speed and turned down a side street. 3RP 39. When the street dead-ended in a guardrail, the Yukon proceeded around the guardrail through Christina MacKinnon's front yard. 3RP 39. It went over a ditch and across the adjacent street before colliding with a parked car and a fence at the edge of Northwest Hospital's grounds. 3RP 39.

Andre got out, and Anderson yelled to him to get on the ground. 3RP 39-40. Andre looked back at Anderson and then climbed the fence onto the hospital grounds. 3RP 39-40. Anderson saw Andre's face and specifically noted the tattoo on his neck. 3RP 47-48. Anderson attempted to

¹ There are eight volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Dec. 10, 2013; 2RP – Dec. 11, 2013; 3RP – Dec. 12, 2013; 4RP – Dec. 16, 2013; 5RP – Dec. 17, 2013; 6RP – Dec. 18, 2013; 7RP – Jan. 17, 2014; 8RP – Jan. 24, 2014.

go around the fence to follow but lost sight of Andre and called on his radio for assistance. 3RP 39-40, 43.

Meanwhile MacKinnon saw a woman come from the area around the car. 2RP 40. MacKinnon testified the woman seemed panicky, said repeatedly she did not know what to do, and then ran away to the north. 2RP 42-43. MacKinnon made a video recording of the woman on her phone and showed it to the police. 2RP 43-45. Anderson testified he was aware of MacKinnon's video, but did not see it or request it. 3RP 65-66. He did not try to find the woman. 3RP 49.

While other officers and hospital security guards searched for Andre, Anderson went back to the Yukon. 3RP 56. He testified that, based on his experience with traffic accidents, the Yukon had hit the parked Honda Civic quite hard. 3RP 55. Anderson briefly opened the door of the Yukon to see if anyone else was inside. 1RP 17. He claimed he did not notice the stolen bass later found in the Yukon. 3RP 58.

After a call from a security guard, Anderson returned to the hospital parking lot, where Andre ran directly in front of him. 3RP 56-57. He yelled stop, and Andre ran approximately 100 feet further before lying on the ground to be handcuffed. 3RP 57.

After detaining Andre, Anderson again returned to the Yukon to photograph it. 3RP 58. While taking photographs through the partially open

window, he noticed some musical instruments inside. 1RP 20-21; 3RP 58. He decided they looked expensive and might be stolen, so he decided to impound the Yukon. 1RP 24, 28, 53.

The case was then assigned to Sergeant George Davisson. 4RP 31. He examined the car from the outside and took photographs through the windows. 4RP 32. The bass stood out because it looked old and he suspected it did not belong to the driver of the car. 4RP 37. He searched police records for a stolen bass and found a report by Scott Teske. 4RP 39.

A musician since childhood, Teske studied classical double bass performance in college and worked as a private instructor and artistic director of the Seattle Rock Orchestra. 3RP 102-05. He called police on April 28, 2013 after returning home to find his home had been broken into and two of his instruments were missing. 3RP 113.

One was an antique bass believed to have been made in the 1860s in France. 3RP 108-09. Teske's family had bought it in 2001 for \$13,000. 3RP 110. The asking price had been \$17,000, but a scholarship was applied to reduce the price. 3RP 112. The second was a student bass made of durable plywood for which he had paid \$500. 3RP 112-13. The instruments in the Yukon appeared to match Teske's description, so Davisson obtained a search warrant. 4RP 39-41. Teske identified the basses and they were returned to him. 3RP 116-17.

In the Yukon, Davisson also found a bag with mail addressed to “Amanda” with several different last names, some women’s jewelry, a bag of women’s make up, and a black backpack containing a loaded 9-millimeter Glock pistol. 4RP 52-56, 63, 110. No fingerprints were found on the pistol. 3RP 81-86. In the course of his investigation, Davisson learned Amanda was prohibited from possessing a firearm on the date of this incident. 4PR 125. There was nothing with Andre’s name on it in the Yukon. 4RP 134.

b. Jail Calls

In addition to the testimony discussed above, the jury heard recordings of several of Andre’s phone calls. On May 6, 2013, approximately a week after his arrest, Andre spoke to a woman about whether he could simply claim the basses if he were not charged with them. Exs. 6, 24.² He told the woman he would not have wrecked the car if the woman in his car at the time had not been “flippin’ out.” Exs. 6, 24.

During a May 7 phone call, Andre discussed whether fingerprints could be used against him. Exs. 6, 24. Andre explained, “Washington doesn’t play with those kinda things and if your fingerprints are on it and they find it on a rooftop of the Empire State Building you’re still getting charged with it.” Exs. 6, 24. In the call, he is heard to say, “I got two standup base [sic] guitars, but then again if you know I try to claim them, um

² Exhibit 6 is the audio recording of the phone calls; exhibit 24 is the transcript, which was given to the jury to follow along but was not admitted.

in the vehicle, then you know I probably gotta claim everything else that was in the vehicle.” Exs. 6, 24. “And that’s not all that was in there.” Exs. 6, 24.

During a May 13 call, Andre is heard to say, “I pushed that car into the fence,” and “I got the, uh, pistol charge.” Exs. 6, 24. He explained, “It’s kinda hard to pull over too when I’m sitting there with a fuckin’ you know a dope pipe and a fuckin’ uh thing in my lap.” Exs. 6, 24. He told a female, “I gotta . . . get outa here and get this fuckin’ heater and shit outta here.” Exs. 6, 24. The female asked, “Where did they find it?” and Andre replied, “With me.” Exs. 6, 24. When asked if he got rid of it, Andre replied, “Yeah but I mean it’s . . . I held it in my fuckin’ hand so, I mean it’s like you know it’s only a matter of time.” Exs. 6, 24.

During a May 12 call, a female voice told Andre it was difficult because the basses are very unique, and he replied, “I know, so therefore harder to trace.” Exs. 6, 24. He explained, “somebody has had it comfortably for a very long time” so “they’re not gonna keep paper on it.” Exs. 6, 24. “Once they’re in their comfort zone, that’s when you get ‘em.” Exs. 6, 24. He also asked, “Do I need an alternate uh, identity as far as uh a buyer that I purchased it from possibly? . . . Like a fakey?” Exs. 6, 24. Finally, in a May 13 call, he asked a female to claim some electronic devices found in the car but, regarding the basses, told her, “I wasn’t gonna have you claim those.” Exs. 6, 24.

Davisson was permitted to testify that “heater” is a slang term for a firearm. 4RP 21. Andre requested the testimony be limited to general knowledge of street slang rather than interpreting what Andre meant in any given instance. 4RP 79-81. The prosecutor appeared to agree the testimony would be limited to defining terms. 4RP 79-81. Nevertheless, after the call was played, the prosecutor asked Davisson what Andre meant when he used the term “heater.” 4RP 94-95. Andre objected, but the court permitted Davisson to answer. 4RP 94-95. Davisson then testified that “heater” referred to “the gun located in the car” and was a continuation of the earlier discussion of a “pistol charge.” 4RP 95.

c. Arguments

Andre stipulated he had a prior conviction that precluded him from lawfully possessing a firearm. CP 26; 3RP 35. In closing, Andre argued his phone calls did not indicate he knew the gun was in the car; his concern in the phone calls was the drug pipe he carried at the time. 5RP 121-22, 124. He argued the gun, like many of the other items in the car, belonged to Amanda. 5RP 124-26. Regarding the basses, Andre argued their value could not be proved to be over \$5,000 and the State failed to prove the reckless element of attempting to elude because no one was actually endangered by his driving. 5RP 129-30.

C. ARGUMENT

IMPROPER OPINION TESTIMONY VIOLATED ANDRE'S
CONSTITUTIONAL RIGHT TO HAVE THE FACTS
DETERMINED SOLELY BY THE JURY.

Officer Davisson exceeded the scope of permissible expert testimony and invaded the province of the jury when he told the jury Andre's use of the term "heater" referred to "the gun located in the car." 4RP 94-95. Andre's knowledge that there was a firearm in the car was the only truly disputed element of the unlawful possession of a firearm charge. What he meant in the jail call, and whether that was sufficient to show knowledge of the firearm was a question for the jury. Davisson's testimony that "heater" is one of many street slang terms for a firearm may be helpful to the jury. But his baseless assertion that Andre was, in this particular instance referring to this particular firearm was an impermissible opinion on guilt in violation of Andre's right to have factual questions determined solely by the jury.

Witnesses may not, whether directly or by implication, offer opinions as to the guilt of an accused person. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Opinions on guilt violate the constitutional right to a jury trial by intruding on the jury's role. Montgomery, 163 Wn.2d at 590. In short, "witnesses should not tell the jury what result to reach." Id. at 591 (discussing Fed. R. Evid. 702 advisory committee notes).

Courts consider five factors in determining whether opinion testimony improperly invades the province of the jury: (1) the type of witness involved, (2) the 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. Demery, 144 Wn.2d at 759. Witnesses may express opinions that are rationally based on their perceptions and are helpful to the jury. ER 701. Such opinions are not necessarily objectionable solely because they encompass an ultimate issue of fact. ER 704. But expressions of personal belief as to the guilt of the defendant are “clearly inappropriate.” Montgomery, 163 Wn.2d at 591 (citing, *inter alia*, Demery, 144 Wn.2d at 759).

The type of witness in this case was a police officer. Testimony by police officers carries with it an “aura of reliability” and is particularly likely to unfairly influence the jury. Montgomery, 163 Wn.2d at 595 (quoting Demery, 144 Wn.2d at 765). A jury might assume the police believe a person to be guilty, but that does not excuse admitting opinion testimony. See Montgomery, 163 Wn.2d at 595 (“The State argues the officers’ opinions added nothing new because the jury already knows the defendant was arrested because the officers believed he was guilty. We believe this unavoidable state of affairs does not justify allowing explicit

opinions on intent.”). The appearance that police testimony is particularly reliable thus weighs against admitting the opinion.

The nature of the testimony also weighs against admission because Davisson exceeded the scope of his expertise by giving an opinion on Andre’s state of mind. Davisson’s testimony of the street meaning of the term “heater” was likely admissible under ER 703. But Davisson is no more qualified than any other juror to listen to a phone call and determine what Andre was referring to in any given instance. Merely because “heater” can be a street term for a firearm does not mean that is what Andre meant in this instance, and Davisson’s expertise does not extend to mind-reading. But Davisson went even further, testifying not only that Andre was referring to a firearm, but specifically to the firearm that was found in the vehicle. 4RP 95. This opinion went far beyond the scope of Davisson’s expertise and invaded the role of the jury as the sole arbiter of the facts.

The nature of the charges and the defense demonstrate why the opinion was damaging in this case. Unlawful possession of a firearm requires proof of knowing possession. State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). Mere control of a vehicle that contains a firearm is insufficient. Andre did not dispute his dominion and control over the vehicle where the firearm was located. His sole defense, as expressed in closing argument, rested on denying knowledge that the firearm was there.

5RP 117-30. Davisson's opinion testimony, therefore, pertained to Andre's mental state, an element which is otherwise not generally subject to direct evidence. See State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306, 307 (1995) ("Because of the nature of the charge of possession with intent to deliver, evidence is usually circumstantial."). And it purported to directly refute Andre's sole defense to the charge.

The final factor to be considered is the other evidence in the case. Here, the other evidence included another occupant of the car, Amanda, whose name was on many of the items found in the car. 4RP 52-56, 63, 110. Thus, a reasonable jury could easily have found reasonable doubt regarding Andre's knowledge of the firearm. While Andre's use of the term "heater" in the phone call could have provided sufficient circumstantial evidence of knowledge, it was far from overwhelming without Davisson's unwarranted opinion that he was, in fact, referring to the specific firearm at issue in this case.

When the defendant's state of mind is the only disputed element of an offense, it is an impermissible opinion on guilt for a police officer to opine as to that element. Montgomery, 163 Wn.2d at 594-95. In Montgomery, the detectives and a forensic scientist offered opinions that, based on Montgomery's purchases, he intended to manufacture methamphetamine. Id. at 587-89. The court declared that opinions on an

accused person's intent are "clearly inappropriate" for opinion testimony, particularly when the mental state is "the core issue and the only disputed element." Id. at 591, 594. The opinion testimony, the court declared, "was improper." Id. at 595.

The officer's opinion in this case was also improper. His opinion that Andre was referring to the gun found in the car went directly to the core disputed issue, Andre's knowledge.

This error was preserved for appeal by defense counsel's objection to the testimony both beforehand and at the time. 4RP 79-81, 94-95. The court's reaction only exacerbated the damaging effect of the opinion and its likely influence on the jury. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983) (rejecting harmless error argument in part because objectionable remarks were not withdrawn upon objection). The jury might normally be presumed to follow the court's written instruction that it is the sole judge of the facts. Montgomery, 163, Wn.2d at 595-96. But here, the court essentially overruled the objection and allowed the witness to answer, thus signaling to the jury that it could properly consider Davisson's opinion. 4RP 94-95. The Montgomery court noted that, "if there were evidence that these improper opinions influenced the jury's verdict, we would not hesitate to find actual prejudice." 163 Wn.2d at 596 n. 9. Because the trial court's

overruling of the objection makes it likely the jury would be unfairly influenced by the improper opinion, Andre asks this Court to reverse.

D. CONCLUSION

For the foregoing reasons, Andre requests this Court reverse his conviction for unlawful possession of a firearm.

DATED this 8th day of August, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 71494-5-1
)	
JAMES ANDRE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF SEPTEMBER, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES ANDRE
REYNOLDS WORK RELEASE
401 4TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF SEPTEMBER, 2014.

x Patrick Mayovsky

2014 SEP -8 PM 11:12
COURT OF APPEALS
STATE OF WASHINGTON