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Court of Appeals  
Division II  
State of Washington  
5/11/2018 3:34 PM**

**NO. 50533-9-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**LUIS RUBEN MEDEL SORIANO,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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Chief Criminal Deputy Prosecutor  
for Respondent**

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**I. RESPONSE TO ASSIGNMENT OF ERROR**

- 1.A. The court did not err in overruling defendant's objection to Officer Gann's testimony which was based solely on speculation. Defendant did not object on the basis of an improper opinion so an objection on an evidentiary ground not made at trial was not preserved.
- B. The court did not err in allowing Officer Gann's testimony that he assumed defendant was looking back to see if he was actually behind him. This testimony was not an improper opinion.
2. The court did not err by excluding testimony and photographs that on five prior occasions defendant pulled over when stopped by law enforcement as evidence of habit under ER 406.
3. The state did not commit prosecutorial misconduct during closing argument.

**II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Where defendant objected to testimony only on the grounds of speculation at trial, did he preserve the issue on review when he argues for reversal based on an evidentiary rule not raised at trial?
2. Did officer Gann express an improper opinion by testifying he assumed defendant was looking back to see if he was actually behind him?
3. Did the court err by excluding testimony and photographs that on five prior occasions defendant pulled over when stopped by law enforcement as evidence of habit under ER 406?
4. Was it prosecutorial misconduct to characterize defendant's testimony as "baloney" once during an extended review of the testimony and argument regarding credibility?

### **III. STATEMENT OF THE CASE**

On August 20, 2016, Castle Rock Police Officer Jeff Gann, while in uniform and operating a marked patrol vehicle equipped with lights and siren, received radio traffic that Washington State Patrol troopers were attempting to overtake motorcycles speeding on I -5. RP 52, 54, 56, 57. Officer Gann entered I-5 to try and intercept the speeding motorcycles. It was a Saturday evening in the middle of summer so there was quite a bit of traffic on I-5. RP 57. As Officer Gann was looking for them, he noticed two motorcycles in his rearview mirror approaching at a high rate of speed.

As soon as the motorcycles passed him he attempted to stop them, activating his siren and all of his emergency lights and getting behind them. RP 59, 60. His patrol vehicle was equipped with more lights than most other patrol vehicles in Cowlitz County. The SUV had a 52 inch overhead light bar with multiple rows of flashing LED lights in red, blue, and white light, red and blue lights on the grill, on the sides of the push bar, on the back of the mirrors, and on the back of the vehicle. RP 55, 56.

When asked, "what happened next," Officer Gann replied, "the lead motorcycle, a black motorcycle, increased its speed significantly and the driver – the rider of the motorcycle looked back over his shoulder. I'm

assuming that he was looking back to see if I was actually behind him." Officer Gann was about 100 feet behind the motorcycle at that point. RP 63. The defense objected only on the grounds speculation, not that the officer expressed an improper opinion. The court overruled the objection. RP 62. When the judge revisited her ruling on the objection the next day, she noted that Officer Gann's statement appeared to be an observation and a process that he was going through at the time as to what he was thinking, and upheld her earlier ruling. RP 122.

It was right after Officer Gann activated his emergency lights that the motorcyclist looked back over his shoulder and sped up dramatically. The motorcycle then started swerving in and out of other cars changing lanes without signaling. While riding on the white dotted line between two lanes the motorcycle passed between two cars that were side-by-side. RP 63. Other drivers began braking and swerving out of the way as the motorcycle weaved in and out of the cars. Officer Gann was traveling approximately one hundred miles per hour at that point but the motorcycle was outpacing him. RP 64. The motorcyclist then swerved from its position on the dotted line between lanes 1 and 2, swerved over Lane 1 right in front of a car, and took the off-ramp at exit 52. There was no gas station at exit 52, nor signs for a gas station before exit 52. RP 65. Officer Gann testified

that based upon his experience, any of the drivers that were swerving out of the way of the motorcyclist could have gotten into a wreck. RP 66.

As he was exiting the freeway Officer Gann temporarily lost sight of the motorcyclist but at the top of the off-ramp a motorist pointed in the direction of Burma Road. Officer Gann went down Burma Road, which is a two lane secondary country road extending about three quarters of a mile and ending at a very large yellow metal gate in front of a Weyerhaeuser truck facility. RP 67, 68. At the gate at the end of Burma Road Officer Gann came upon a crashed motorcycle, and saw the defendant approximately 40 feet from it. It appeared as if defendant attempted to go between the gate and a large tree. Defendant was laying on the ground moaning and groaning and obviously severely injured so Officer Gann summoned medical aid. When the medic arrived it was determined that the defendant needed to be transported via a life flight helicopter. RP 74, 180.

Officer Gann noted a 70 foot long black skid mark near the crash. Based upon the skid mark and the defendant being 40 feet away from the crashed motorcycle, he opined that the defendant had to have been traveling at a significant rate of speed for him to end up that far from the motorcycle when it came to a stop. The speed limit on Burma Road is 35 miles per hour. The motorcycle, which was equipped with side view mirrors, was

extensively damaged. RP 69-71, 72. Officer Gann had conducted traffic stops on motorcyclists many times where, despite wearing helmets, the riders noticed him and pulled over. RP 88.

The defendant was taken by ambulance and then a life flight helicopter, and spent the night in a hospital. RP 164, 171. He testified his injuries consisted of a broken thumb and only a *sliver* to his stomach. RP 161. He denied seeing any police officers and trying to flee or elude a pursuing police vehicle. RP 162.

In rebuttal, Officer Gann testified that the ambulance crew made the decision to transport defendant for medical treatment, and if he only had a sliver, he would have arrested and taken him to jail. RP 180.

#### IV. ARGUMENT

**1. A. DEFENDANT OBJECTED TO OFFICER GANN'S TESTIMONY AS SPECULATION, NOT IMPROPER OPINION. AS SUCH, HIS ARGUMENT THAT THIS TESTIMONY WAS AN IMPROPER OPINION SHOULD NOT BE CONSIDERED BECAUSE IT WAS NOT RAISED AT TRIAL.**

**B. EVEN IF DEFENDANT’S IMPROPER OPINION ARGUMENT IS CONSIDERED, THE COURT DID NOT ERR IN ALLOWING OFFICER GANN'S TESTIMONY THAT HE ASSUMED DEFENDANT WAS LOOKING BACK TO SEE IF HE WAS ACTUALLY BEHIND HIM.**

On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. *State v. Kronich*, 160 Wash.2d 893, 899, 161 P.3d 982 (2007); RAP 2.5(a)(3). The courts take a strict approach in these situations because trial counsel's failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial. *State v. Kirkman*, 159 Wash.2d 918, 935, 155 P.3d 125 (2007). Appellate courts will not reverse the trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial. *State v. Powell*, 166 Wash. 2d 73, 82–83, 206 P.3d 321, 327 (2009), citing *State v. Korum*, 157 Wash.2d 614, 648, 141 P.3d 13 (2006); *State v. Ferguson*, 100 Wash.2d 131, 138, 667 P.2d 68 (1983); *State v. Koepke*, 47 Wash.App. 897, 911, 738 P.2d 295 (1987) (“A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.”) (citing *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985)).

In the present case, defendant objected specifically on the grounds of speculation, not improper opinion. On appeal defendant now re-characterizes the objection to that of speculative *opinion* testimony and cites to *State v. Farr-Lenzini*, 93 Wash. App. 453, 458, 970 P.2d 313, 317 (1999), a case which addressed improper opinion testimony. (See appellant's brief, page 7) Because at trial defendant did not object on the grounds of improper opinion, he may not raise this unpreserved claim now. Therefore, the court should not consider it absent an analysis of whether it was manifest constitutional error.

Even if this court does consider defendant's argument that the trial court erred in allowing the challenged testimony, the facts of this case are distinguishable from *Farr-Lenzini*. The following addresses this argument.

Farr-Lenzini was charged with one count of attempting to elude, or in the alternative, the lesser included offense of reckless driving. At trial, over defense counsel's continuing objection, the State questioned the trooper as follows:

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*, at 458.

Unlike the case at hand, Farr-Lenzini was driving a car, and there was no testimony that she turned her head in a manner that suggested she looked back at the pursuing officer. When the trooper first tried overtaking Farr-Lenzini he was about 1000 feet behind her but later got between 300 and 500 feet behind her. In the present case defendant was driving a motorcycle and Officer Gann saw him look back and speed up just when he activated his lights and siren. Officer Gann was about 100 feet behind him when this happened. In *Farr-Lenzini* the prosecutor specifically asked for an opinion and the witness testified that the defendant knew the trooper was back there, was refusing to stop, and was trying to get away from him. In the present case, the prosecutor did not ask for an opinion and all Officer Gann testified to was that he *assumed* that defendant was looking back to see if he was actually behind him. As the trial court noted, Officer Gann's statement appeared to be an observation and a process that he was going through at the time as to what he was thinking. His assumption was based upon the fact that defendant sped up and looked over his shoulder towards Officer Gann right after he activated his lights and siren.

*Farr-Lenzini* is distinguishable from the case at hand because (1) there the prosecutor specifically asked for the officer's opinion, and (2) the officer answered the question by addressing almost all of the elements of the crime (the person knew the officer was back there and refused to stop

while attempting to get away from him). The trooper's testimony in *Farr-Lenzini* went far beyond Officer Gann's testimony in this case. Further, in light of the testimony that right after Officer Gann activated his emergency lights defendant looked over his shoulder, dramatically sped up, and then began weaving in and out of traffic, a jury could reasonably infer that defendant saw him. In conclusion, even if this court considers the claimed error of erroneous admission of improper opinion testimony, the authority defendant relies upon is clearly distinguishable from the facts in this case. Officer Gann's testimony did not amount to an improper opinion.

**2. THE COURT DID NOT ERR BY EXCLUDING TESTIMONY AND PHOTOGRAPHS THAT ON FIVE PRIOR OCCASIONS DEFENDANT PULLED OVER WHEN STOPPED BY LAW ENFORCEMENT.**

Defendant offered to admit five photographs which corresponded with five occasions where he was pulled over as directed by the police. He sought to admit the photographs and testify about the occasions as evidence of habit. The trial court ruled that this evidence was not relevant. Defendant argues the court erred in so ruling. The state argues the proposed testimony and exhibits were not admissible as evidence of habit.

ER 406 provides that evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the

conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Admissibility of habit evidence is within trial court's discretion. *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 91 Wash. App. 952, 955, 957 P.2d 1283, 1285 (1998), reconsideration denied. Appellate courts defer to a trial court's evidentiary rulings unless no reasonable person would take the view adopted by the trial court. *State v. Atsbeha*, 142 Wash.2d 904, 914, 16 P.3d 626 (2001) (internal quotation marks omitted) (quoting *State v. Ellis*, 136 Wash.2d 498, 504, 963 P.2d 843 (1998)).

The habit in question must be just that: “[o]ne's regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic.” See *Official Comment on ER 406, Judicial Council Task Force on Evidence* (1978). Caution is essential in dealing with habit evidence, because it verges on inadmissible evidence of character. See ER 404; R. Aronson, *The Law of Evidence in Washington* § IV p. 34 (1986). *Norris v. State*, 46 Wash. App. 822, 826, 733 P.2d 231, 234 (1987). For example, victim's acts, which consisted of grabbing steering wheel from driver on four prior occasions, did not establish “habit” and were not admissible in prosecution for vehicular homicide. *State v. Young*, 48 Wash. App. 406, 739 P.2d 1170 (1987). On the other hand, that the defendant “usually carried a

knife and never left the house without it" was admissible under ER 406. *State v. Platz*, 33 Wash. App. 345, 351, 655 P.2d 710, 713–14 (1982).

In the present case, defendant sought to admit evidence that on five prior occasions he pulled over for the police. This is much like the four times the victim grabbed the steering wheel from a driver in *State v. Young*, and much less like the defendant never leaving the house without a knife in *State v. Platz*. Given the deferential abuse of discretion standard, it cannot be said that no reasonable person would take the view adopted by the trial court by excluding the proffered evidence here.

**3. THE STATE DID NOT COMMIT FLAGRANT PROSECUTORIAL MISCONDUCT IN USING THE WORD "BALONEY" IN THE CONTEXT OF REVIEWING THE CREDIBILITY OF DEFENDANT'S TESTIMONY.**

In his closing argument, defense counsel stated, "the prosecutor spends a lot of time mocking the sliver and having to get treated and spending the night in the hospital. What does that have to do with anything?" Also, defense counsel argued, "and we spend all this other time about he rolled 40 feet. What does that have to do with anything? It doesn't matter." RP 216.

In reply to defendant's arguments, the prosecutor argued, "why are we talking about the sliver and why are we talking about why he was thrown

40 feet from the wrecked motorcycle? Because it goes to credibility, and that's something that you've got to decide. That's why we're talking about those things. I mean, the officer took the measurement that there was a 70 foot skid mark and that he was thrown 40 feet from the bike. Why is that important? Because it tells you that he was going really fast. It tells you that he was going faster than 35 miles per hour. So that's why we're talking about those things. The fact is, he was laying on the ground moaning and groaning and an ambulance was called and trained medical personnel made the decision that he needed to be transported out of there not only by an ambulance, but by life flight and spent the night in the hospital. So when he says, oh it was just a sliver, it goes to credibility." RP 220, 221.

Continuing the argument about the credibility of the defendant's testimony, the prosecutor argued,... "He says he just took – the only reason he took exit 52 was to get gas. To get gas. Well, no gas station; no sign that indicates that there's a gas station. Gas station behind him. Signs saying that there's a gas station behind him. But he's got to come up with some explanation. He's got to come up with some explanation for why he took exit 52 and it's got to be a different explanation than I was trying to get away from the cop. So what's the explanation you hear? It's got to be something, got to come up with something. Gas." RP 222.

The extended argument regarding the credibility of the defendant's testimony culminated with the prosecutor stating, "he took exit 52, that's a – that's a fact. And the explanation out of the defense side of that is it's just a bunch of baloney. Gas station. No gas station there, no signs there. I mean, come on."

To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Magers*, 164 Wash.2d 174, 191, 189 P.3d 126 (2008). The burden to establish prejudice requires the defendant to prove that there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *Id.* at 191. The failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case. *Russell*, at 86. In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. *State v.*

*Thorgerson*, 172 Wash. 2d 438, 448, 258 P.3d 43, 49 (2011), citing *State v. Hoffman*, 116 Wash.2d 51, 94–95, 804 P.2d 577 (1991).

Defendant cites to *United States v. Gaspard*, 744 F.2d 438, 441 (5th Cir. 1984), stating this case held that the prosecutor's closing argument describing a letter that the defendant presented was a "fraud" and was "bogus" was error. (Appellants brief, page 13). This was not the holding in that case. The court in *Gaspard* affirmed the conviction holding "prosecutor's argument to jury that certain letter had been fabricated immediately prior to trial and that jurors were the intended victims of that fabrication was improper, but did not amount to plain error.

Defendant cites to *State v. Hale*, 26 Wash. App. 211, 214–16, 611 P.2d 1370, 1373–74 (1980), stating that this case held that the prosecutor's argument in closing that defendant and defendant's witnesses were liars was error. (Appellants brief, page 13). This was not the holding in that case.

In *Hale*, the deputy prosecutor in his final argument reviewed the testimony of the state's witnesses on the one hand, and of the defendant and his witnesses on the other. During the course of his argument, the deputy prosecutor three times referred to the defendant and his witnesses as "liars" and twice indicated that he personally believed that. The court affirmed the conviction, writing "We have carefully reviewed the deputy prosecutor's

argument in view of the evidence presented and conclude here, as the State Supreme Court concluded in a case involving similar contentions, that “(a)lthough the prosecutor's closing argument might have been better phrased by not using the word ‘liar’, we believe that his argument comes within the rule which allows counsel to draw and express reasonable inferences from the evidence produced at trial.” *State v. Hale*, at 214.

Defendant also cites to *State v. Martin*, 41 Wash. App. 133, 140, 703 P.2d 309, 313 (1985) , stating this case held that prosecutor’s argument that impugned defense experts integrity by characterizing testimony as "fabrication" was error. (Appellants brief, page 13). Again, this was not the holding in that case.

In *Martin* the court held that the prosecutor's remarks impugning defendant's credibility were improper, but did not constitute reversible error. There, the court reasoned that any prejudice was mitigated by the court's instruction (given three times) that counsels' arguments were not evidence, and could have been obviated by a curative instruction which was never requested. The court further observed that given the evidence in the case, there does not appear to be a substantial likelihood the prosecutor's remarks affected the jury's decision. *See also State v. Guizzotti*, 60 Wash. App. 289, 297, 803 P.2d 808, 812–13 (1991) (no reversible error in prosecutor's closing argument characterizing defense counsel's argument as

“a little bit of smoke attempted to confuse the evidence.”); *State v. York*, 50 Wash. App. 446, 458, 749 P.2d 683, 690 (1987) (No reversible error in prosecutor's statement during closing argument that perhaps defense counsel recognizes that defendant's testimony has no believability.)

The prosecutor used the term "baloney" one time in the course of an extended argument regarding the credibility of defendant's testimony. In context the word "baloney" was synonymous with not credible, or unworthy of belief. The context was defendant's testimony that he received only a sliver when he was taken from the scene by ambulance, then transported to a hospital by a life flight helicopter where he spent the night at the hospital. His testimony that he only received a sliver was arguably an extreme minimization, meant to minimize as well the crash that led to his injuries. The state's theory was he was driving very fast, as evidenced by him being thrown from the motorcycle 40 feet and leaving a 70 foot skid mark, and the reason he was driving fast was because he wanted to evade the pursuing police vehicle. His description of the crash (he was going the speed limit and he merely bumped into a tree and then fell off his motorcycle) was at odds with the state's evidence. His version conflicted with the physical evidence as described by the officer. Defendant's claim that he only received a minor injury (a sliver) when there was no dispute that he was life

flighted to a hospital where he spent the night was the context in which the term "baloney" was used.

This single statement went far short of the prosecutor's statements in *Hale* referring to the defendant and defense witnesses as liars.<sup>1</sup>

Furthermore, the defense neither objected to the statement nor moved for a mistrial based on it. The absence of a motion for mistrial at the time of the argument strongly suggests that the argument or event in

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<sup>1</sup> Prosecutor's argument in *Hale*: (MR. TRUJILLO:) So, either you are going to believe Mr. Balch, what he told you or you are going to believe the other four witnesses who were present there and described to Mr. Hale, described the clothes he was wearing, described the machine gun that he had, described what he told them, described his actions; or you are going to believe Michael Hale and his witnesses.

Ladies and gentlemen, I'm going to tell you right now that that man sitting there, Michael Hale, is a liar; and I can't tell you how strongly I feel about that

MS. WYATT: Objection, your Honor. His own feelings

MR. TRUJILLO: Because the evidence has shown that.

THE COURT: Sustained. The prosecutor won't give his own personal views, please.

MR. TRUJILLO: The evidence without a doubt in this case, ladies and gentlemen, has shown that Michael Hale was there, that he was in fact the person who committed these crimes.

(MR. TRUJILLO:) Ladies and gentlemen, after consideration of all this evidence, you are going to have to tell someone, "I think you are a liar," and it's not an easy thing to do because no one likes to believe that someone would actually under oath take the stand and have 12 people staring at them and take the stand and sit there and lie.

I am going to suggest to you that is exactly what happened.

Suggest to you that Gilbert Morales, Nicholas Esparza, Erin Egan, Dennis Hofferber, Michael Hale lied to you when they took the stand.

(MR. TRUJILLO:) There are a few things that I just want to briefly go over and I think that they're important.

I told you before I think Michael Hale is a liar.

MS. WYATT: Objection, your Honor. There is no foundation or evidence

THE COURT: Yes. Let's not get into what you think. Talk about the evidence.

MR. TRUJILLO: You have heard the evidence . . .

*Hale*, at 215.

question did not appear critically prejudicial to the defendant in the context of the trial. *State v. Pastrana*, 94 Wash. App. 463, 480, 972 P.2d 557, 566 (1999), citing *State v. Swan*, 114 Wash.2d 613, 661, 790 P.2d 610 (1990).

In considering the context of the entire record and the circumstances at trial, the defendant has not proven there is a substantial likelihood that the alleged misconduct affected the jury's verdict. The statement was made only once, was less egregious than the statements in the cases cited above where the courts found no reversible error, and essentially was another way of expressing the idea that defendant's testimony was not credible.

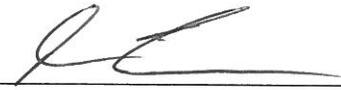
#### V. CONCLUSION

Defendant's argument that Officer Gann expressed an improper opinion was not preserved since his only objection at trial was that it was speculation. Even under the authorities defendant cites on improper opinion the admission of his statement that he assumed defendant was looking back to see if he was actually behind him was not error.

The trial court did not abuse its discretion in denying defendant's proffer of evidence under ER 406 that he had pulled over for the police on five prior occasions. The defendant has not proven there is a substantial likelihood that the prosecutor's statement which he claims was misconduct affected the jury's verdict.

Respectfully submitted this 4 day of May, 2018.

By:

  
THOMAS LADOUCEUR/WSBA # 19963  
Chief Deputy Prosecuting Attorney  
Representing Respondent

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 11<sup>th</sup>, 2018.

  
\_\_\_\_\_  
Michelle Sasser

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

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**Transmittal Information**

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