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Division III  
State of Washington  
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No. 356655-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

TAMMIE A. ELLIOTT, Appellant.

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**BRIEF OF RESPONDENT**

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## I. STATEMENT OF THE CASE

The Appellant has provided an extensive and fairly comprehensive statement of the facts of this case. The Respondent, for the most part, does not take issue with information provided therein. However, certain notable facts have been omitted from the Appellant's account. First it should be noted that the original target of the "Nigerian scam"<sup>1</sup> which the Appellant participated in was not Mr. Joseph McClair, it was his wife Warlenda McClair. Report of Proceedings (hereinafter RP 53). She was the one to first receive the e-mails promising an inheritance. RP 66 - 67. Mrs. McClair is a "sweet lady" who tends to be "a little too" trusting. RP 53. More importantly, she has been diagnosed with dementia and has had several operations in the past few years. RP 60 - 61. While traveling from their home in Toledo, Ohio to Asotin County to participate in the Appellant's trial, Mrs. McClair became disoriented in the Seattle airport and "wandered off" and got lost. RP 52.

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<sup>1</sup> "One of the nation's longest-running scams is taking on new twists, reports the Better Business Bureau. Known as Nigerian letter scams, these "fund transfer" frauds reach intended victims by fax, letter or e-mail. The sender, who claims to be a government official or member of a royal family, requests assistance in transferring millions of dollars of excess money out of Nigeria and promises to pay the person for his or her help. . . . Variations of this con are attracting the attention of a new batch of victims. BBBs advise people to be leery of the following: Beneficiary of a will: An e-mail claims that you are the named beneficiary in a will, to inherit an estate worth a million or more. Your personal financial information is needed to "prove" that you are the beneficiary and to speed the transfer of your inheritance." [www.bbb.org/new-york-city/get-consumer-help/articles/the-nigerian-prince-old-scam-new-twist](http://www.bbb.org/new-york-city/get-consumer-help/articles/the-nigerian-prince-old-scam-new-twist)

Additionally, the Appellant, in her account of the case completely elides the significance of the Appellant's vital role in the "scam." Mr. McClair, upon becoming aware of the emails requesting money, was adamant:

"I want you to send money" - - first thing I write, - not going to Nigeria. Not going to Nigeria, we ain't falling for that Nigerian - "No its not going."

RP 56. It was only after the McClairs were assured that their money would not be sent out of the country and could be directed to an agent in the United States - "Tammie Elliott" - that their resistance was overcome. RP 56 - 57.

Also notably absent is mention that the Appellant's stated defense in this matter was "Duress." See: Defense's Response to Omnibus Application, (Clerk's Papers - *hereinafter* CP 93 - 97); Defense's Response to Omnibus Application Supplemental, CP 98; Defendant's Proposed Jury Instructions, CP 35 - 36; see also: RP 27, RP 179 -181. This defense would fail on factual and legal bases and was not presented to the jury for their deliberations (RP 179- 181), but none-the-less the Defense produced a significant amount of evidence that the Appellant was an "unwilling participant" (RP 117 - 119, 151 - 152) in what all parties agreed was a criminal enterprise (RP 228).

Finally, in her version of the "Facts" the Appellant does not recount that on the stand she actually admitted to all of the criminal

acts charged in this matter, and only disputed her “guilty knowledge.” She candidly admitted to her role as a go-between:

I am not denying that I was picking up the Western Unions and sending them on. I’m not saying that I didn’t do that.

RP 164 - 165. When the Prosecutor pointedly put the matter to her: “Ma’am, you are claiming that you were made to do these crimes.” The Appellant responded:

What I’m claiming is that I agreed to do these things but I was not aware of what was going on in the background. I did not know that other people were being scammed out of money.

RP 170. This despite having previously testified that she had been warned by the police more than five years before this incident, in 2010 that her “friend” was conducting a “Nigerian scam.” RP 139. She also testified that when her friend suggested that she act as a go-between in regards to large amounts it made her “uncomfortable” and so he agreed to “break them up” to make her feel better about her role. RP 143 - 144. She also admitted that after being involved in this scheme for some time she became uncomfortable and told her “friend in Nigeria” that she “did not want to do it anymore.” RP 149. This was well before she agreed to participate in the scam targeting the McClairs. RP 155. As Defense Counsel so well summarized at trial:

One of the things that I think is a big question for everyone is - - why after being told by the police that

you shouldn't do this would you go ahead and do it again. Can you tell us why?

To which the Appellant responded: "He convinced me it was okay."

RP 156. Further, the Defense acknowledged that over the years the Appellant had been told that this was a criminal enterprise on multiple occasions, again, to quote Defense Counsel: "Each time the police talked to you, you would talk to him." *Id.*

The fact that the Appellant was told, on multiple occasions, by police, verbally and in writing, that she was aiding and abetting a criminal enterprise, was established by all of the evidence produced at trial. In light of this, and the legal and factual failure of her proffered "duress" claims, the Appellant's only refuge lay in her assertion of ignorance. The jury rejected this defense and found her guilty as charged.

Following her conviction the Appellant filed a timely appeal. Herein she asks this Court to reverse her conviction and remand the matter for re-trial. The sole basis asserted by the Appellant is a claim that the State improperly offered opinion evidence as to her guilt and thereby deprived her of a fair trial. She advances this claim in the form of accusations of impropriety on the part of the prosecution, and in an attack on her trial counsel.

## II. ISSUES

- A. WAS DETECTIVE DENNY'S TESTIMONY CONCERNING PROBABLE CAUSE TO REFER THE APPELLANT'S CASE FOR PROSECUTION AN IMPERMISSIBLE OPINION AS TO HER GUILT?
- B. WAS THE TESTIMONY BY OTHER OFFICERS CONCERNING THE APPELLANT'S INVOLVEMENT IN PRIOR CRIMINAL SCAMS ADMISSIBLE EVIDENCE?

## III. ARGUMENT

- A. DETECTIVE DENNY DID NOT EXPRESS AN IMPERMISSIBLE OPINION AS TO THE APPELLANT'S GUILT SUCH AS WOULD DEPRIVE HER OF A FAIR TRIAL.
- B. THE TESTIMONY OF VARIOUS OFFICERS CONCERNING THE APPELLANT'S INVOLVEMENT IN PRIOR CRIMINAL SCAMS WAS ADMISSIBLE TO ESTABLISH KNOWLEDGE, RECKLESSNESS, AND TO REFUTE THE ASSERTION OF DURESS.

## DISCUSSION

- A. DETECTIVE DENNY DID NOT EXPRESS AN IMPERMISSIBLE OPINION AS TO THE APPELLANT'S GUILT SUCH AS WOULD DEPRIVE HER OF A FAIR TRIAL.

The Appellant's sole assignment of error revolves around the testimony of the State's witnesses regarding their opinions as to her culpability in regard to the many scams that she was involved in over the years. Of these witnesses, only Detective Bryan Denny testified about the Appellant's involvement in the

scam which formed the basis of the charges herein. Further, Detective Denny NEVER testified as to his belief that the Appellant was guilty, rather, he testified that he had “probable cause” to submit the matter for prosecution. The two are not comparable. The existence of probable cause is determined by an objective standard. State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). It has been said that “probable cause” exists when an arresting officer is aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). This is not the standard for proof of “guilt,” which requires proof “beyond a reasonable doubt.” State v. Sundberg, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (*citing In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). To meet the standard for probable cause, an officer need not have evidence to prove each element of the crime beyond a reasonable doubt. The officer is required only to have knowledge of facts sufficient to cause a reasonable person to believe that an offense had been committed. State v. Knighten, 109 Wn.2d 896, 903, 748 P.2d 1118 (1988).

In the present case Detective Denny testified that as a part of his investigation he contacted the Appellant. After first denying any knowledge of the incidents he was investigating, when

confronted with irrefutable documentation, she admitted that she had participated as a part of the criminal enterprise. At trial he testified that when he told the Appellant that it was a criminal scam, she feigned ignorance. When her protestations failed to convince the Detective, he informed her that he would be submitting the matter for prosecution. On the stand, he testified that the reason he did so because, based on his investigation to that point, he “had probable cause” to believe that she had committed a theft.

Although this could be viewed as “opinion” testimony, it is not impermissible as it was clearly based on the evidence that the Detective had at that time. A witness statement is not impermissible opinion testimony if it is “based on inferences from the evidence.” State v. Saunders, 120 Wn. App. 800, 812, 86 P.3d 232, 239 (2004). Moreover, the mere fact that opinion testimony “embraces an ultimate issue to be decided by the trier of fact” does not make otherwise admissible evidence objectionable or inadmissible. State v. Mason, 160 Wn.2d 910, 932, 162 P.3d 396 (2007). Over one hundred years ago our State Supreme Court stated the rule:

The hypothetical question complained of was a fair summary of the facts which the respondent's evidence tended to prove. True, the question embodied the very fact that was ultimately to be found by the jury, but this does not render it incompetent.

Helland v. Bridenstine, 55 Wash. 470, 104 P. 626, 628 (1909).

This rule, as applied to the facts in the present case, can be seen in the statement by the State v. Sutherby Court:

In some instances, a witness who testifies to his belief that the defendant is guilty is merely stating the obvious, such as when a police officer testifies that he arrested the defendant because he had probable cause to believe he committed the offense.

State v. Sutherby, 138 Wn. App. 609, 617, 158 P.3d 91, 95 (2007),

*aff'd on other grounds*, 165 Wn. 2d 870, 204 P.3d 916 (2009). It

must be noted that the Appellant does not cite to single case where any court has concluded that an officer's testimony regarding his belief in probable cause was error, especially reversible error. In such circumstance, the rule is clear:

Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none. Courts ordinarily will not give consideration to such errors unless it is apparent without further research that the assignments of error presented are well taken.

DeHeer v. Seattle Post-Intelligencer, 60 Wn. 2d 122, 126, 372 P.2d

193, 195 (1962). If the Sutherby Court been in error regarding the

propriety of "probable cause" testimony by an officer, surely the

Supreme Court, which accepted review of that case, or some other

court in the following years, would have so held. No such case

exists. Detective Denny's testimony was not an impermissible

comment on the Appellant's guilt.

B. THE TESTIMONY OF VARIOUS OFFICERS CONCERNING THE APPELLANT'S INVOLVEMENT IN PRIOR CRIMINAL SCAMS WAS ADMISSIBLE TO ESTABLISH HER KNOWLEDGE, RECKLESSNESS, AND TO REFUTE HER ASSERTION OF DURESS.

The Appellant claims that the testimony of the various officers regarding the Appellant's involvement prior criminal scams also constituted improper opinion evidence as to her guilt. As was well discussed in the Appellant's factual recitation, these other officers did not testify regarding the Appellant's role in the crimes which she was held to answer for in this case. Rather, the officers testified about her involvement in previous criminal scams, *ergo* "prior bad acts." Pursuant to the Rules of Evidence this is permissible:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). This rule is exactly on point in the present case. The first of the State's witnesses to testify about the Appellant's involvement in the prior scams was Deputy Michael Babino. When the subject of a prior scam involving a victim from Cedar Falls Iowa arose an objection was raised by the Defense. The Prosecutor explained to the trial court that the evidence was being offered as "Indicative of her knowledge and her intent." Counsel for Defense

acknowledged that this testimony was “in 404(b) territory,” to which the Prosecutor replied that the evidence was admissible:

Even under 404(b), knowledge and intent, and especially when she has offered the – defense of duress. This information directly contradicts her claims of duress.

RP 27. Later, the Deputy would testify that based on his investigation it was his impression that the Appellant’s “surprise” expressed when he told her that she was involved in a criminal enterprise “didn’t seem very genuine.” This was clearly a statement related to his assessment of her knowledge and intent based on his investigation. This is a permissible comment concerning a prior bad act under the aegis of ER 404(b), and not an impermissible comment on the Appellant’s guilt in the subject then on trial.

All of the other witnesses who commented on their impression of the Appellant’s knowledge and intent in regards to her other prior criminal scams, must be similarly characterized. In his closing argument the Prosecutor again reminded the jury that the evidence introduced concerning the other criminal scams was offered to prove the “knowledge” or “reckless” elements of the crimes charged. RP 224 - 225.

As set forth in the factual recitation herein, the Appellant never denied the *actus reus* (or criminal act), rather she staked her

claim of innocence on her assertion that she lacked the *mens rea*. This being the case, proof of what she had been told by law enforcement prior to the incidents charged herein was at the very heart of the matter. It is well-established that witnesses may offer opinion testimony in this regard:

Since the decision in Forsyth, this state has adopted the Federal Rules of Evidence which also accommodate the opinions of lay witnesses: If the witness is not testifying as an expert, the witness' 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 and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

State v. Lewellyn, 78 Wn. App. 788, 794, 895 P.2d 418, 421

(1995), *as amended on reconsideration* (Aug. 3, 1995), *aff'd sub nom.* State v. Smith, 130 Wn. 2d 215, 922 P.2d 811 (1996). All of the officers who testified in this case based their opinions on their perceptions of the Appellant. The testimony regarding their assessment of the Appellant's "guilty knowledge" went directly to the central issue of the case. As such, these opinions, by nonexpert witnesses, were not only helpful but also permissible. ER 701. The Prosecution was not acting out of line when it solicited this testimony. The Defense was not ineffective in failing to object to this admissible evidence. And, finally, the Appellant was not deprived of a fair trial when the jury heard this evidence.

#### **IV. CONCLUSION**

This case involves what has become an all too often told story which rarely leads to criminal prosecution: the “Nigerian scam.” As the evidence played out at trial, the Appellant acted as a go-between for some shadowy and nefarious character and his victims. The very fact that the Appellant was presented as an agent in this country was a deciding factor in overcoming the victims’ reluctance. The Appellant, eventually, admitted to all of the criminal acts alleged. Why then did this case proceed to trial?

As the Appellant’s Trial Counsel so aptly framed it when he questioned the Appellant, this case turned on the question: “Why after being told by the police that you shouldn’t do this would you go ahead and do it again?” RP 156. The jury determined that the Appellant did so because she was a criminal participant in the “Nigerian scam” to defraud the McClairs.

The Appellant’s assertion that she was forced to participate wilted under the scrutiny of investigation. Her claim of ignorance could not stand up to the testimony of all of the officers who had conducted prior investigations into similar schemes involving the Appellant.

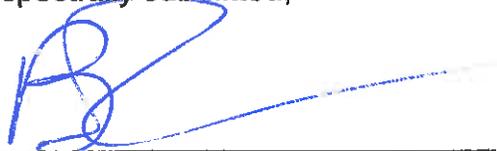
The Appellant’s assertion herein that she was denied a fair trial when the investigating officer testified that he referred the matter for prosecution because he believed that he had “probable

cause” is not supported by the law. Her assertion that the testimony of the other officers who investigated her involvement in prior criminal scams constituted an impermissible comment on her guilt is contrary to the facts and the law.

Based upon the foregoing the Court should reject all of the Appellant's claims and affirm the Judgment and Sentence entered in this matter.

Dated this 24<sup>th</sup> day of April, 2018.

Respectfully submitted,



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THE STATE OF WASHINGTON,

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TAMMIE A. ELLIOTT,

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Court of Appeals No: 356655

**DECLARATION OF SERVICE**

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**DECLARATION**

On April 24, 2018 I electronically mailed, through the portal, a copy of the BRIEF OF RESPONDENT in this matter to:

DAVID B. KOCK  
Sloanej@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on April 24, 2018.



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LISA M. WEBBER  
Office Manager

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**DECLARATION  
OF SERVICE**

**ASOTIN COUNTY PROSECUTOR'S OFFICE**

**April 24, 2018 - 11:23 AM**

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