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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID MCGOVERN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Is the defendant's claim that the trial court improperly allowed the admission of opinion evidence preserved for appeal in the absence of a timely objection?

2. Did the prosecutor improperly elicit opinion evidence under ER 701?

3. Did the prosecutor improperly admit opinions of McGovern's guilt?

4. Has the defendant established that any argument or comment on the part of the State was so flagrant and ill-intentioned that it requires reversal, even absent any defense objection?

5. Did cumulative error prevent the defendant from having a fair trial?

6. Should this Court strike the imposition of discretionary LFOs and interest on such LFOs?

II. STATEMENT OF THE CASE

Kyle Lundquist had worked for Walmart for 18 years. RP 253. On Monday, August 24, 2015, he was employed at the Colville Walmart as an assistant manager. RP 256. Every morning it was his responsibility to verify the accounts – all the deposits from previous day's sales. This was usually done around nine o'clock in the morning. RP 257.

Mr. Lundquist described the practice he used whenever he was getting money in or out of the safe. RP 261. First, he would ensure that the safe was wide open, that any blocking of the camera's view of the open safe was as minimal as possible, and that he would lay all of the money on a

table to the left of the camera so that it was clearly visible to the camera's view. RP 261.

On that Monday morning, August 24, he and customer service manager, Misty Toulou, were verifying the Friday, Saturday, and Sunday deposits when they discovered a deposit was missing. RP 259. After discovering that the missing deposit of $20,533.56 was from Sunday, he notified the store manager, Scott Peterson. RP 263-65, 206.

Ms. Toulou, a Walmart customer service manager had been employed by Walmart for 22 years. RP 272. One of her responsibilities was verifying that the amounts in the bank deposit bags matched the amounts that had been written on the bags themselves. On Monday, August 24, 2015, she was counting the deposits from the weekend – Friday, Saturday and Sunday, when she noticed that the totals did not match. RP 276. She verified that the check total matched the check total, the Canadian currency matched the Canadian currency, and then realized that the cash deposit (bag) was not there. RP 276. Because each day's deposit bags are bundled together with rubber bands, she went back to the safe to determine whether the cash bag from that one day had just dropped out of the bundle, or, perhaps, had been put on a different shelf. RP 276.

Kevin Fryer was employed by the Colville Walmart as an asset protection manager. RP 279. On August 24, 2015, assistant manager Kyle

Lindquist notified him that a deposit bag was missing, so he reviewed the video to determine who may have been involved. RP 283-84.

Mr. Fryer was familiar with reviewing video from the cash room, the procedures that were followed in that room, and he reviewed video every day. RP 282-86.[1] When he was informed that money was missing, he immediately started watching security surveillance video of the cash office. RP 287. He reviewed video pertaining to all five people who processed Sunday's cash, checks, and WIC, including Ms. Megan Chartier and Ms. Samara Bidstrup. RP 288. He was able to determine that the missing deposit bag was placed onto the bottom of the safe shelf at 08:35:34. RP 292. He explained the layout of the safe to the jury, from the video:

> [T]hese bags down here on the bottom of the safe are -- are self-checkout reset bags. These are all -- all the bags that will get pulled out at night to go out to reset all the self-checkouts. Tubs up here are full of cash -- you know, five, tens, twenties, hundreds. All our change, roll change is over here on this side. And then up here is also a self-checkout, I believe, tub that has cassettes in it that also has change -- I believe that might have been for the ATM we had at the time.

RP 292.

Mr. Fryer explained that at 08:39 Ms. Bidstrup shut and locked the safe. RP 293. Then, at 10:06 Ms. Bidstrup reopened the safe and the money

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1 Mr. Provost was the defendant's investigator. He reviewed all the store video and did so "at painstaking lengths." RP 24. There were over 24 hours of video, most of it recording only an empty room. RP 57.

and deposit bag were still visible on the bottom shelf – they had not been moved. RP 293. Thereafter, the safe was observed being re-accessed and open until about 13:23. RP 295. During that time frame, the deposit bag was still visible and again, remained unmoved. RP 294. Then at 14:39, assistant manager Mr. Lundquist opened the safe and performed a change order to process a loan to a register. 295-96. Again, the video established that the deposit bag was still sitting on the bottom shelf on top of the self-checkout reset bags. RP 296-97.

Mr. Fryer observed video of the defendant, McGovern, both from the day the deposit bag went missing – Sunday, August 23 – and from previous days when McGovern was performing his duties in the safe room. RP 297-306. Mr. Fryer found it unusual for an employee in McGovern's position to show up an hour early for work when he was not working on a special project. RP 298. Additionally, McGovern entered the accounting office with a satchel, which was against a company theft protection policy. RP 299. Mr. Fryer explained that employees were not supposed to have any personal coats, backpacks, or anything of that nature in the cash office. RP 299.

Mr. Fryer explained, using video, that it usually took McGovern two to three minutes to accomplish the cash transactions on prior observed video recordings, but that this time it took him five minutes. RP 299-305. Also,

on the date of the theft, the safe door was "hugged up against" by McGovern, and not wide open. RP 302. Additionally, while McGovern was moving around in the safe, a deposit slip from a deposit bag could be seen floating off to the right. RP 304-05. McGovern then grabbed his satchel and left the cash office and went into the store's front bathroom. RP 306. Two minutes later, McGovern walked straight to the front grocery entrance and exited the store, walked to his vehicle, and drove off the store property. RP 306-07. After reviewing all the video, Mr. Fryer contacted his boss, Joseph Smith. RP 308.

Mr. Smith had been employed for the last five years as a territorial market asset protection manager for Walmart. He had worked for Walmart for over 26 years. He had been a department manager over a single department, a store assistant manager, a co-manager, and had extensive experience as a store manager before moving on to a market level position. RP 190-92. Mr. Smith had received training in inventory control and theft, both internal and externally related. RP 192. He provided asset protection services for the Walmart stores in Colville, Omak, Chelan, Wenatchee, Ephrata, Moses Lake, Othello, and Yakima. RP 194.

Mr. Smith testified that there was a standard protocol for how deposits of cash were handled and that he was familiar with that entire policy. RP 195. Each day, money was removed from the store's cash

registers between 11:30 p.m. and midnight and placed into blue bags by two customer service managers. RP 195-96, 201. The money would be carted to the accounting office where there was an outer room as well as an inner room. RP 197. The inner room was where the safe was located and all the handling of cash took place. RP 197. The money would be accounted for from each blue bag, then entered into the system. RP 200. After the amount of recorded cash had been entered into the system, a system that was generated from Arkansas, the system would instruct as to the amount of money that was to be deposited in the bank. RP 201. That amount of money would then be placed in a clear bank deposit bag[2] for pick by the armored car service. RP 202. The deposit bags were kept in the store safe until the armored car pickup. RP 202. The armored car arrived only weekdays, Monday through Friday. The money from Friday, Saturday and Sunday would be kept in the safe through the weekend. RP 205.

On Monday morning, August 24, 2015, Mr. Smith was alerted by manager Mr. Peterson that a substantial amount of money was missing from the Sunday deposit. RP 206. Mr. Smith travelled to Colville and met with Mr. Peterson and asset protection manager Kevin Fryer. RP 207-08.

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2 There were usually 4 clear bags per day for deposit; one for United States bills, one for Canadian currency, one for coinage and one for checks. RP 202.

Mr. Smith reviewed 24 hours of closed-circuit television video (CCTV) and the deposit log that detailed the amount of money in Sunday's deposit bag. He determined that $20,533.66 was missing. RP 208, 222.

Mr. Smith reviewed all the video recording the activities of the personnel that were in the cash office during and after the deposit had been created. RP 208. From this video, Mr. Smith was able to rule out four[3] of the five employees that were in the safe room during that period because it was clear that those four individuals never accessed the deposit bag. RP 217. Mr. Smith's experience informed him to look for a clear bag, because these deposit bags are consistently the same in all Walmart stores. RP 210. The only remaining employee that was not eliminated by the continuous video coverage was the defendant, David McGovern. RP 209, 217.

Mr. Smith noticed some odd variations from usual store procedures on the part of McGovern. RP 210-11. McGovern had come into work an hour before his shift started and had gone into the accounting office, yet there was no apparent reason for him to show up early on that date. RP 212.

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3 All four testified at trial: Ms. Bidstrup (RP 226-36), Ms. Chartier (RP 236-43), Assistant manager Mr. Lundquist (RP 252-68), and Ms. Toulou (RP 273-78).

Also, at 7:00 p.m., McGovern appeared to be pulling the "reset bags"[4] for the next day which was unusually early in the evening to be performing that task. RP 213. McGovern was also in the safe pulling the reset bags for a longer period than was necessary to perform that task. RP 214. Additionally, while in the safe, and while his body was blocking the view of the safe, Mr. Smith could see the clear deposit bag he was looking for being swung from the safe off to McGovern's right side. RP 215. At the conclusion of these activities in the accounting office, McGovern left the accounting office, went into the camera-less store restroom, then left the store, got into his vehicle, and drove out of the Walmart parking lot. RP 215.

Mr. Smith interviewed McGovern and discovered McGovern was going through a divorce. RP 218. It was later determined by Colville Police Officer Anthony Gorst that McGovern was actively hiding money from his wife in the divorce proceedings, RP 337, and that he was also going through bankruptcy, RP 328. McGovern also liked to gamble at casinos, and he was borrowing money from his mother and then using it for gambling. RP 369-70.

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[4] The register reset bags are loaded with cash for the cashiers' next day and were loaded in the inner cash room and taken out to the cashiers at the end of the day when the cash and checks were collected from the registers. RP 196-97.

McGovern denied taking the money. RP 362-64. He stated the reason he left the store was because while he was using the store bathroom, he realized he had forgotten his store communication radio at home. RP 360. However, Mr. Fryer testified that while it was the store's policy to allow employees, such as McGovern, to take their store communication radios home to charge them, there were always extra spare radios (approximately ten) at the store that an employee could use if they forgot their radio at home. RP 309-10.

The jury convicted McGovern. CP 50-51; RP 412-15. The court sentenced McGovern to an exceptional sentence of 14 months of confinement and ordered $20,533.66 of restitution. CP 55-56, 60; RP 434-35. The court imposed $1,100 of LFOs, including the $200 criminal filing fee, $50 jail booking fee, and $250 fees for court appointed attorney. CP 59; RP 435. The court also ordered interest on all LFOs, both restitution and non-restitution. CP 60.

III. ARGUMENT

A. DEFENDANT'S CLAIM THAT THE TRIAL COURT IMPROPERLY ADMITTED EXPERT OPINION EVIDENCE IS NOT PRESERVED FOR APPEAL. THE CLAIMED OPINION EVIDENCE CONSISTED OF FACTUAL STATEMENTS IDENTIFYING PHYSICAL ITEMS OBSERVED IN THE VIDEO. IN ANY EVENT, SUCH TESTIMONY WAS ADMISSIBLE UNDER ER 701.

Defendant claims that asset protection managers Mr. Fryer and Mr. Smith improperly narrated the video and thereby invaded the province of the jury. However, as explained below, this claim was not preserved for appeal and most arguments presented on appeal regarding the narration of the video are not based upon any specific evidentiary objection offered during trial. Therefore, the State will begin this response by examining the *actual* objections made before and during trial and the court's responses to these objections.

1. Pretrial motion in limine.

On the day set for motions, defendant argued motions in limine, one that requested:

> In the instant case, to protect McGovern's right to a fair trial, we ask this court exclude any improper opinion testimony including, but not limited to: parroting the statutory language, *descriptions as to why McGovern performed any particular act, identifying items in the video not based on personal knowledge, and any direct opinion on his guilt in this matter.*

CP 27-29 (emphasis added).

At the motion hearing, RP 42-58, defendant clarified that the reason for this objection, by way of motion in limine, was to prevent the loss prevention people from speculating as to why the defendant was doing certain things a certain way, such as speculating that he was standing in a particular fashion in an attempt to block the camera view of the safe. RP 43. The trial court responded that such speculation may be improper; however, an answer that stated that the defendant was positioned in a certain way, such that the camera could not capture him, may be proper. RP 44. The court then continued in an evidentiary colloquy with both defense counsel, Mr. Jones, and the prosecutor, Mr. Radzimski. RP 44-56.[5]

Before ruling on the defendant's first objection (speculation), the court discussed the defendant's other objection regarding loss prevention officers testifying as to things that they could see in the video that others may not be able to see. RP 51-52. This claim was raised under the best evidence rule. (*See* RP 52, where defense counsel stated, "it's best evidence to show the video, let them see the video"). The trial court responded:

> THE COURT: That seems to me to be admissible, with objections going to weight -- I mean, cross examine. I mean, "How can you possibly see something," and maybe be afraid of the answer you get. But -- more artful way to conduct your cross examination, but -- What I'm hearing from the state

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5 Much of the conversation dealt with the type of foundation that would be necessary to admit proposed hypothetical answers to hypothetical questions.

> about how it intends to create a foundation for these witnesses, and the scope of their testimony appears to be within the expertise of what he intends to qualify them for -- which I've just shorthandedly said loss prevention experts for Walmart -- familiar with their loss prevention procedures, which -- with their camera system, with the placement of items in this particular room -- I mean, if all of that is somewhat standardized and they're experienced and familiar, this seems to be something within their ability to talk about.

RP 54-55.

The trial court granted the defendant's motion to prevent opinions on guilt; however, the trial court required the defendant to object at trial because the witnesses may be discussing areas within the province of their knowledge and training. The defense attorney understood that requirement:

> Again, the opinion on guilt versus having the expertise to say what's occurring here is a deviation from the standard of care, say, from the protocol for this position for handling money, per Walmart policy -- So long as it's more like that, that seems to me to not be an opinion on guilt but rather within the province of their knowledge, training, skill and experience. If it's not, then you can object, -- tell me.
>
> MR. JONES: I will, your honor.
>
> THE COURT: Okay. So, I'd respond to this and say granted as to opinion on guilt.

RP 56.

Because the trial court indicated in its pretrial ruling that it would require an objection if the inquiry went too far, McGovern was required to object if he wanted to preserve any claim of error. McGovern understood

this responsibility and informed the trial court that he would object if there was testimony that invaded the province of the jury or was an opinion on guilt. RP 56. When a ruling on a motion in limine is tentative, as it was here, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling. *See State v. Powell*, 126 Wn.2d 244, 257, 893 P.2d 615 (1995) (quoting *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)). In other words, when a trial court makes only a tentative ruling on the admission of evidence subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial. Any failure to object waives his claim of error. *Id.* at 256-57.

Because the trial court's specific ruling required timely objections, a process agreed to by the defendant, one must look to the actual objections and arguments made at the time the testimony was offered at trial, as any claim of error to the failure to sustain such objections must be based on the reason given for the objection at the time such objections were made.[6] It is

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[6] If no objection was stated, then any claim of evidentiary error is waived absent manifest error. On appeal, a party may not raise an objection not properly preserved at trial absent manifest constitutional error. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007); RAP 2.5(a)(3). The appellate courts adopt a strict approach to the timely objection requirement 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 Wn.2d 918, 935, 155 P.3d 125 (2007).

well-established that a party cannot object on one ground at trial and argue a different theory on appeal. This is a specific application of RAP 2.5(a), which recognizes that appellate courts normally will not address issues that were not presented to the trial court. *State v. Korum*, 157 Wn.2d 614, 648, 141 P.3d 13 (2006); *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68 (1983); *State v. Koepke*, 47 Wn. 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 Wn.2d 412, 422, 705 P.2d 1182 (1985))).

Consistent with the above principles regarding evidentiary-error, each of McGovern's claims of testimonial evidentiary error is examined below.[7]

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[7] Familiar rules govern this Court's review of this issue. Trial court rulings relating to the admission of evidence are reviewed for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Assuming a proper objection was made, and the trial court erred in overruling the objection, an error involving the violation of an evidentiary rule is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

On appeal, McGovern complains in a general fashion to opinion and narrative testimony given by Mr. Smith, RP 209-17, and Mr. Fryer, RP 284-309. Br. of Appellant at 15. Each of his actual trial objections to the evidence contained within these pages will be examined separately.

The first objection within these pages is at RP 207, line 20. It is an objection to hearsay, and it is sustained by the trial court. No further discussion is necessary on his point.

The next objection is made at RP 213, line 22. The State asked Mr. Smith whether McGovern was carrying anything when he came into the accounting office. Defendant objected, stating "He's describing a – a video that's going to be introduced later. We can look at the video. That's the best evidence we have --." The trial court sustained the objection (as leading, RP 214, and the question was not resubmitted to the witness. RP 214. Again, no further discussion is necessary on his point.

Another objection is made at RP 214, line 3. Mr. Smith was asked how long it would take him to pull the reset bags when he worked in that capacity, and he responded "[a] minute." He was then asked how long it took McGovern to perform that task (on the video) and he responded he did not have an exact time, but it was longer than a minute. RP 214. The next question asked was "[w]hat was [McGovern] doing when he was standing by the safe." RP 215. To that question, the defendant objected, stating "[w]e

have – video is the best evidence." RP 215:3-4. The trial court overruled the objection and the witness, Mr. Smith, answered "[h]e was having a conversation on his phone, and what appeared to be moving items in the safe."

Apparently, the trial attorney was operating under a misguided understanding that the Best Evidence Rule[8] prohibits witnesses from testifying regarding what is observable in a photograph, writing or video. It does not. *See State v. Hardy*, 76 Wn. App. 188, 884 P.2d 8 (1994), *aff'd and remanded on other grounds sub nom. State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996) (witness had known the defendant for several years and could give opinion concerning the identity of a person depicted in surveillance video, and such was admissible and did not invade the province of the jury.) What ER 1002 does prevent is testimony as to the contents of documents or videos offered as substantive evidence where the actual document *will not be produced* at trial (or hearing), with exceptions, unimportant here, for the loss or unavailability of the document or video. *See* ER 1004.

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[8] ER 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute."

Here, the parties agreed that the video would be introduced at trial,[9] the defendant conceded that testimony would be elicited regarding the contents of the video,[10] and, in fact, the video was introduced and admitted as an exhibit. (Exhibit 1 – admitted without objection, RP 285; published to the jury without objection, RP 287.). There is no violation of the Best Evidence Rule because the best evidence, the video, was introduced at trial. Moreover, the defendant had ample opportunity to cross-examine this witness,[11] and the other witnesses, and did so. And, the jury was able to review the video[12] and decide the facts for themselves. No error was committed under ER 1002.

Defendant made no objections from RP 215 to RP 292. At RP 292, the following transpires:

> Q [BY PROSECUTOR]: Okay. So let this play forward.
>
> MR. FRYER: That's Samara right there putting all the deposits down on the bottom -- shelf of the -- safe.

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9 The defendant stated, during the motions in limine, that he would not be objecting to the introduction of the video. RP 42.

10 He also agreed that witnesses, with a properly laid foundation, could testify to items and events on the video, and could testify that the defendant's action were "inconsistent with prior practice." RP 52. However, he complained generally about witnesses speculating as to intent. RP 42-58.

11 Mr. Smith, RP 221-24 (establishing Mr. Smith was not interested in what the defendant had to say because Mr. Smith had already made up his mind).

12 RP 408-10 (video thumb drive with the admitted video would go back to the jury with the clerk ready to assist jury in viewing).

> Q [BY PROSECUTOR]: Okay. And are you able, based on your training and experience, to identify where in the safe the deposit bag (inaudible)—[?]
>
> MR. JONES [DEFENSE ATTORNEY]: Objection, your Honor. I don't think we've established -- based on his training and experience -- capable of—
>
> THE COURT: Overruled. Go ahead.
>
> MR. FRYER: When Samara placed the deposit bags in there the deposit bags are sitting right here.
>
> Q [BY PROSECUTOR]: Okay. After the deposit bags are placed into the safe, do you observe anybody else handling them[?]
>
> MR. FRYER: No.

RP 292-93.

The objection here is a foundational objection as to the witness's training and experience – his ability to identify a deposit bag in the safe.[13] Therefore, the testimony did not have to be supported by any special scientific theory or principle. Indeed, it is hard to imagine what scientific theory or test could be applied to expert testimony of this kind, which is based on the witness' training, experience and observations on the job. Mr. Fryer had six years Walmart experience as an asset protection manager at the Colville store, was familiar with reviewing video from the cash room

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[13] This claim of error is raised at page 16 of the Brief of Appellant: "failure to establish training and experience."

of the accounting staff working, and the procedures that were followed in that room, and he reviewed video every day. RP 282-86. He was familiar with the different employees' responsibilities, change-out orders, and the employees themselves. RP 286-89. He had prepared a timeline for the video. RP 288.

The decision whether to admit expert testimony is within the discretion of the trial court, *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992), as is the determination of whether a witness is qualified to testify as an expert, *State v. Quigg*, 72 Wn. App. 828, 837, 866 P.2d 655 (1994). Practical experience is sufficient to qualify a witness as an expert and the practical knowledge need not be acquired through personal experience. *State v. Yates*, 161 Wn.2d 714, 765, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008).

Review of a trial court's admission of expert testimony is for an abuse of discretion. *Id.* at 762. If the reasons for admitting or excluding the opinion evidence are "fairly debatable," the trial court's exercise of discretion will not be reversed on appeal. *State v. Rodriguez*, 163 Wn. App. 215, 231-32, 259 P.3d 1145 (2011) (quoting *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)). The trial court did not abuse its discretion in this instance. There was sufficient foundation laid as

to Mr. Fryer's experience to enable him to identify a Walmart deposit bag in the Walmart safe in the Walmart cash office.

The next objection occurs at RP 296. The objection was interjected as Mr. Fryer was testifying that he could still see the deposit bag (in the video) sitting on the bottom shelf on top of the self-checkout bags at a point after Mr. Lundquist had performed a cash pickup and change order. RP 296-97.

The objection, as stated, was "Your Honor, he's offering his opinion about the state of the safe. I don't know – established – expert (inaudible)." RP 296. On appeal, McGovern claims that this objection was one objecting to "improper opinion testimony." Br. of Appellant at 16. He also claims ER 701 prohibits witnesses from testifying to, or identifying objects captured by video if those witnesses were not personally present at the time and location that the video was taken, basing this claim on the assertion that such witnesses would lack the personal knowledge requirement under ER 701. Br. of Appellant, 16-17, n.3.

These arguments have little merit. First, whether a deposit bag can be located and described when it appears in a picture or video is more likely a stated fact than a stated opinion. What something is, where something is, when something occurs are facts; "why" the bag may be placed in a certain spot, or hidden from view, would more likely reach consideration under the

lay opinion rule. Here, the testimony that the deposit bag can be seen at the bottom of the safe was a stated fact, not an opinion, and was a fact fully reviewable by the jury having viewed the video at trial and having received the video to review during their deliberations. While no bright line separates fact from opinion, Tegland's observations are apt:

> Rule 701 accepts these difficulties as inevitable, and rather than barring opinion testimony, the rule simply expresses a preference for factual testimony but allows opinion when it "will aid in a clear understanding of the testimony or the determination of a fact in issue." The rule gives the trial court considerable discretion to focus the attention where it belongs—on what the witness knows, not how the witness is expressing himself or herself.

5D Karl B. Tegland Wash. Prac. Handbook, Opinion Testimony by Lay Witnesses, § 701:1 (2019 ed.) (emphasis added).

Even if the testimony that the deposit bag is visible at the bottom of the safe is considered opinion testimony, the trial court did not abuse its discretion in admitting the testimony. Though McGovern characterizes this issue as a constitutional one, appellate court's review a trial court's decision to admit lay opinion testimony for abuse of discretion. *Ortiz*, 119 Wn.2d at 308; *see also Kirkman*, 159 Wn.2d at 927-28 (noting that such testimony may have constitutional implications, but the standard of review is abuse of discretion). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009).

2. If the factual statements are considered opinions, they were fully admissible under ER 701.

A lay witness may give opinion testimony as to the identity of objects in a video or picture if there is some basis for concluding that the witness is more likely to correctly identify the object from the recording than is the jury. *Cf. Hardy*, 76 Wn. App. at 190. In this case, while the prosecutor and the defense attorney could not readily identify the deposit bag in the video,[14] because of the grainy nature of the video,[15] both Mr. Fryer and Mr. Smith could, as could the other Walmart witnesses that testified, as they were more familiar with the appearance of a Walmart deposit bag, [16] and the "standardized" procedures for making the deposits and using these bags.[17] These witnesses possessed sufficiently relevant familiarity with the objects they were identifying in the video. However, these objects may have been more difficult for the jury members to identify in a grainy video because of their lack of familiarity with the objects, and

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14 On appeal, McGovern claims that the State stated they could not see the deposit slip on the video. Br. of Appellant at 18 (claiming the state admitted that the deposit slip could not be seen on the video). This claim is, at best, mistaken, because no such admission was made; the first mention of the deposit slip in the transcript occurs 150 pages later, at RP 204.

15 The defendant's attorney pointed out that the video was grainy. RP 53.

16 Mr. Smith testified the deposit bags all looked the same. RP 203.

17 Mr. Smith testified there was a standard protocol for making deposits. RP 195.

the method and way they were used in the accounting office. The jury would not be familiar with Walmart deposit bags, "war wagons,"[18] the Walmart accounting office set up, the position of the safe, or the Walmart employees who were inside the accounting office during the period of the 24-hour video. Mr. Fryer and Mr. Smith, as well as the other store witnesses that testified regarding the deposit bags and slips,[19] would also be more familiar with the appearance of the special deposit slip that goes inside the deposit bag.[20] Thus, this factual – or opinion testimony – was helpful to the jury because these witnesses were more likely to correctly identify the objects from the video than was the jury.

In *State v. Collins*, 152 Wn. App. 429, 436, 216 P.3d 463 (2009), Collins contended that testimony concerning the identity of the person shown in the taxicab security photos amounted to improper opinions on guilt. The appellate court noted that the cab surveillance system produced still photographs at set intervals, the photos were black and white, *blurry*, and *grainy*, and that lighting conditions in the cab were poor. *Id.* at 438. Under these circumstances, the court found the testimony helpful and held

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18 A heavy steel rolling cart used to go from register to register to collect money. RP 196.

19 Ms. Bidstrup, RP 230, 232; Ms. Chartier RP 241.

20 Mr. Smith, RP 204-05.

that the opinion given as to "the identity of the [object] in the photographs was helpful to the jury and the court did not err in admitting it." *Id.* In reaching this decision, the court stated:

> This accords with the weight of authority, which holds that identity testimony is helpful "at least when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess, and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification." Human features develop in the mind's eye over time. Witnesses who have interacted with the defendant in a variety of circumstances, in a way the jury could not, may have a great advantage over the jury's limited exposure to the defendant in a sterile courtroom setting.

Id. at 437-38 (internal citations omitted).

In *Hardy*, 76 Wn. App. at 190-92, the appellate court held the opinion concerning the identity of a person depicted in surveillance video was admissible and did not invade the province of the jury where the witness had known the defendant for several years and, thus, was in a better position to identify the defendant in the somewhat *grainy* videotape than the jury, who had only seen defendant motionless in court; moreover, the trial court noted the jury was free to disbelieve the witness.[21]

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[21] *But see State v. Jamison*, 93 Wn.2d 794, 613 P.2d 776 (1980) (where there was no evidence that the photographs were not clear and did not accurately depict the robber, or the defendant did not possess some peculiarity not readily comparable under trial conditions, it was, in that case harmless error to use opinion testimony as to his identity. However,

Therefore, it is not required that a lay witness be a percipient witness to the actual event. A lay witness may give opinion testimony if it is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony or determination of a fact in issue. ER 701. While a witness may not offer opinion testimony regarding the defendant's guilt, either by a direct statement or by inference, testimony is not objectionable simply because it embraces an ultimate issue the trier of fact must decide. *George*, 150 Wn. App. at 117.

Under the reasoning of these cases it cannot be said that the trial court abused its discretion in allowing testimony as to the deposit bag's location in the safe or that a deposit slip could be seen floating in the video on one occasion.

3. Harmless error.

Any error in the admission of this testimony was harmless. The defendant admitted to handling the bag as described by Mr. Fryer; he admitted that money fell out of the bag as described by Mr. Fryer. Mr. Fryer never testified he could see the defendant steal the bag. Nothing noted by the State's witnesses regarding the video was denied by the defendant. RP 357-60.

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identification opinion testimony may be particularly helpful where the photography is imperfect).

B. THE DEFENDANT FAILS TO ESTABLISH THAT ANY ALLEGED IMPROPER ARGUMENT OR COMMENT ON THE PART OF THE STATE WAS PRESERVED FOR APPEAL, OR WAS SO FLAGRANT AND ILL-INTENTIONED THAT IT COULD NOT HAVE BEEN CURED BY AN INSTRUCTION.

On appeal, McGovern complains that the State elicited testimony that Mr. Smith and others stopped their investigation after reviewing the video and talking with the defendant. Because the instances cited by defendant were admitted without objection there is nothing to review and any issue in this regard is waived. RAP 2.5, *State v. Strine*, 176 Wn.2d 742, 293 P.2d 1177 (2013). This is especially relevant here, where the trial court informed the defendant he would be required to object to this type of evidence at trial, and the defendant's trial attorney agreed that he would object.[22] Moreover, for tactical reasons, the defense attorney decided not to

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[22] The trial court required objections at trial where the testimony entered this disputed area regarding opinion on guilt; the defense attorney agreed that he would object:

> Again, the opinion on guilt versus having the expertise to say what's occurring here is a deviation from the standard of care, say, from the protocol for this position for handling money, per Walmart policy -- So long as it's more like that, that seems to me to not be an opinion on guilt but rather within the province of their knowledge, training, skill and experience. If it's not, then you can object, -- tell me.
>
> MR. JONES: I will, your honor.
>
> THE COURT: Okay. So, I'd respond to this and say granted as to opinion on guilt.

RP 56.

object to the store's failure to investigate others. He made the choice to use this "failure to investigate" theme to his advantage when, during cross-examination of the *first* witness, Mr. Smith, he established that Mr. Smith was not at all interested in what McGovern had to say, but, instead, jumped to conclusions without investigating McGovern's answers:

> DEFENSE ATTORNEY: Okay. And, you tried to soften him up with some small talk.
>
> MR. SMITH: Uh-huh.
>
> DEFENSE ATTORNEY: And that -- but ultimately you weren't interested in what he had to say about whether or not he took any money, -- were you.
>
> MR. SMITH: Repeat that?
>
> DEFENSE ATTORNEY: You weren't interested in his explanation that he didn't take any money?
>
> MR. SMITH: No; I thought his explanation might shed some light on -- on what -- what was going on in his life that could explain some of the troubles he was dealing with.-
>
> . . .
>
> DEFENSE ATTORNEY: *You'd already made up your mind*?
>
> MR. SMITH: I did.
>
> DEFENSE ATTORNEY: And anything he say about going to change your mind?
>
> MR. SMITH: It wouldn't have changed my mind, it may—

RP 223-24.

The defendant's failure to object was tactical in this situation as he wanted the jury to concentrate on what the investigators failed to do in this case – investigate. This failure to investigate theme was also used in closing where defense counsel argued the store failed to investigate or establish what other persons had access on Friday and Saturday; that Mr. Fryer had never had been involved with a missing bag situation, but, satirically, "he's so good he knows what's happened." RP 400.

There is no manifest error in this instance and defendant's failure to object was tactical. There is no error in this regard.

McGovern also complains of the use of the term "convenient," three times when the State cross-examined him and twice during closing. Br. of Appellant at 28-30. Again, the failure to object waives any error. Moreover, it is not misconduct for a prosecutor to argue the evidence does not support the defense theory; prosecutors are entitled to respond to defense counsel's arguments. *State v. Russell,* 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

McGovern also presently objects, after failing to object at trial, to the State's argument employing a logical argument – the use of the principle of parsimony.[23] Again, to the extent that the State's use of a logical

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[23] Occam's razor, also known as the principle of maximum parsimony, is one of the fundamental guiding principles in both logic and science. It is commonly explained as, "the simplest solution is usually the correct one."

argument may be considered improper, the failure to object waives any claim in this regard. Logical arguments may be more effective than illogical arguments.

The defendant claims that these "errors," that drew no objection, were so flagrant and ill-intentioned that they "may require reversal even absent any defense objection." Br. of Appellant at 38. This claim is without merit. When evaluating whether misconduct is flagrant and ill-intentioned, courts "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). In other words, prosecutorial misconduct is flagrant and ill-intentioned only when it crosses the line of denying a defendant a fair trial.

However, it is not misconduct for a prosecutor to argue the evidence does not support the defense theory; prosecutors are entitled to respond to defense counsel's arguments. *Russell*, 125 Wn.2d at 87. It is also worth noting that the courts have found "prosecutorial misconduct to be flagrant and ill intentioned in a narrow set of cases where [the courts] were concerned about the jury drawing improper inferences from the evidence,

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More accurately, it states that, "all else being equal, the solution that makes the fewest assumptions is usually the correct…" *See:* https://thelogicofscience.com/2015/02/25/the-rules-of-logic-part-5-occams-razor-and-the-burden-of-proof/ last reviewed 10/28/19.

such as those comments alluding to race or a defendant's membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner." *Matter of Phelps*, 190 Wn.2d 155, 170-71, 410 P.3d 1142 (2018). Here, there is no argument that a jury instruction would not have cured any alleged misconduct. Moreover, closing arguments are not evidence, and the jury here was given an instruction to that effect. CP 32.[24] McGovern fails to establish any real misconduct, and more importantly, fails to establish that if there were misconduct, that it was flagrant or ill-intentioned, or incurable. There was no error in this regard.

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24 The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that **the lawyers' statements are not evidence**. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

(Emphasis added.)

C. WHERE THE RECORD ESTABLISHES MCGOVERN'S EXCELLENT EMPLOYMENT HISTORY AT THE TIME OF SENTENCING, IT IS NOT READILY APPARENT THAT THIS COURT SHOULD STRIKE THE TRIAL COURT'S IMPOSITION OF DISCRETIONARY COSTS, INCLUDING THE CRIMINAL FILING FEE AND COMMUNITY SUPERVISION. REMAND WOULD BE MORE APPROPRIATE FOR FURTHER INQUIRY INTO MCGOVERN'S FINANCIAL STATUS.

At sentencing, McGovern's boss, Mr. McIntosh, established McGovern was a valued working employee and had been employed with his organization for over two years. RP 427. At sentencing, the trial court found McGovern had established an excellent work history and entered an order regarding costs and interest, stating:

> I will impose, given McGovern's excellent work history, the $500 crime victims assessment, the $200 filing fee, the $250 -- attorney's fee reimbursement, the $50 booking fee and the $100 DNA collection fee. I believe that's $1,100.

RP 435.

McGovern had been working and well-employed for over two years, and this fact establishes that he was not indigent at the time of sentencing. Prior to that employment, he apparently had enough surplus money to gamble. RP 369-70. However, as argued on appeal, he was found indigent for the purposes of appeal and trial. Br. of Appellant at 46. Under these

circumstances, McGovern requests that the discretionary fees[25] be stricken. Br. of Appellant at 47. McGovern also requests the interest accrual on non-restitution LFO's be stricken. *Id.* 48. The State agrees that the interest accrual must be stricken on all LFO's other than restitution. RCW 10.82.090(1), However, remand may be a more appropriate avenue to resolve McGovern's discretionary costs where there was *no objection* to these costs at the time of sentencing, and where the defendant appeared financially stable at that time.

IV. CONCLUSION

For the reasons stated above, the defendant's conviction should be affirmed. The defendant's claim that the trial court improperly admitted expert opinion evidence was not preserved for appeal. Moreover, if the factual testimony is considered opinion evidence, the trial court properly admitted such opinion evidence under ER 701.

All claims of prosecutorial misconduct were waived by the failure to object. In any event, the defendant has failed to establish that any argument or comment on the part of the State was so flagrant or ill-intentioned that it requires reversal even absent a defense objection or request for curative instruction.

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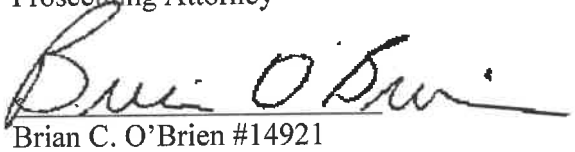
25 The $200 criminal filing fee, the $50 jail booking fee, and the $250 fee for a court appointed attorney.

Remand may be necessary to determine the defendant's ability to pay discretionary LFO's. This Court must remand to strike the interest on non-restitution LFO's.

Dated this 30th day of October 2019.

TIMOTHY RASMUSSEN
Prosecuting Attorney



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Affidavit of Certification

I certify under penalty of perjury under the laws of the State of Washington, that I electronically filed a true and correct copy of the Brief of Respondent to the Court of Appeals, Division III, and e-mailed a true and correct copy to Kate R. Huber, Attorney for Appellant at katehuber@washapp.org and wapofficemail@washapp.org on October 30, 2019.

Michele Lembcke

Michele Lembcke, Office Admin.
Stevens Co. Prosecutor's Office

STEVENS COUNTY PROSECUTOR'S OFFICE

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