

64622.2

64622.2

NO. 64622-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

EVELYN FIELDS,

Appellant.

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
2010 AUG 17 PM 4:20

REC'D
AUG 17 2010
King County Prosecutor
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Christopher Washington, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural History</u>	1
2. <u>Substantive Facts</u>	1
3. <u>Facts Pertinent to Assignment of Error</u>	4
C. <u>ARGUMENT</u>	7
FIELDS WAS DENIED A FAIR TRIAL WHEN MITCHELL IMPROPERLY OFFERED HIS OPINION TESTIMONY THAT FIELDS' ACTIVITIES WERE FRAUDULENT.	7
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Everett v. Diamond</u> 30 Wn. App. 787, 638 P.2d 605 (1981).....	8
<u>Hyatt v. Sellen Constr. Co., Inc.</u> 40 Wn. App. 893, 700 P.2d 1164 (1985).....	8
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).....	7
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987).....	7
<u>State v. Demery</u> 144 Wn.2d 753, 30 P.3d 1278 (2001).....	7, 9, 10
<u>State v. King</u> 167 Wn.2d 324, 219 P.3d 642 (2009).....	7
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	8
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	7, 11
<u>State v. Olmedo</u> 112 Wn. App. 525, 49 P.3d 960 (2002) <u>review denied</u> , 148 Wn.2d 1019 (2003)	8
<u>Stenger v. State</u> 104 Wn. App. 393, 16 P.3d 655 <u>review denied</u> , 144 Wn.2d 1006, 29 P.3d 719 (2001)	8
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
ER 704	8

TABLE OF AUTHORITIES (CONT'D)

	Page
Wash. Const. art. I, § 21	7
Wash. Const. art. I, § 22	7
<u>Webster's Encyclopedic Unabridged Dictionary of the English Language,</u> New Deluxe Ed. 2001	9

A. ASSIGNMENT OF ERROR

Appellant was denied a fair trial when a witness improperly offered opinion testimony.

Issue Pertaining to Assignment of Error

Appellant worked at a retail store and was charged with theft under the theory she took money from the till by disguising the taking as customer refunds. Did the loss prevention manager witness give an improper opinion on appellant's guilt by repeatedly testifying about her "fraudulent" activities?

B. STATEMENT OF THE CASE¹

1. Procedural History

Evelyn Fields was charged by information with second degree theft. CP 1-4. A jury found Fields guilty as charged. CP 35. Fields was sentenced to thirty-two days, thirty of which were converted to community restitution. CP 37-44. Notice of appeal was timely filed on December 18, 2009. CP 36.

2. Substantive Facts

Michael Storbakken manages a Seattle Bartell Drug store. RP 50, 52. In September of 2007, Evelyn Fields began working at that store as a second assistant manager. RP 51.

¹ RP refers to the verbatim report of proceedings of October 19, 20, 21, 22, and 26, 2009 and November 20, 2009, which are sequentially numbered.

Sometime in March of 2008 Storbakken started to notice there was an unusually large number of cash refunds issued where a debit or credit card had been used for the initial purchase, which was atypical. RP 54-55. Some of the refunds were noted on “customer refund slips” and some on a “transaction adjustment form.” RP 54-55. These refunds were also recorded on an electronic cash register journal. RP 100.

Storbakken noticed two or three refunds per day were processed instead of a typical one or two per week. RP 57. Storbakken also compared the inventory levels of the items that had supposedly been returned. RP 62-63. There were fewer inventory items than there should have been if the items had, in fact, been returned. RP 63. Additionally, “almost all” the phone numbers listed on the refund documents were generally unlisted numbers, which further aroused Storbakken’s suspicion. RP 75.

Storbakken contacted Russ Mitchell, a Bartell loss prevention manager. RP 97. Mitchell had closed circuit surveillance cameras installed in the store. RP 97. Footage on the cameras showed Fields conducting transactions at the cash registers when neither a customer nor merchandise was present. RP 113, 123, 135, 139. The electronic cash register journal notes the time and date of any transaction. RP 101. Mitchell believed refunds were made at the times Fields was shown

conducting transactions based on his review of the electronic journal corresponding to the date and time of the footage. RP 100-101.

Mitchell testified if a customer were given a cash refund then money would be taken out of the till and given to the customer. RP 140. If a cash refund was recorded but the cash was not actually taken out of the till there would be more money in the till than the transaction record would indicate. RP 139. This excess of cash would be noticeable if not later removed. RP 139-140. Mitchell testified there was no excess cash in the till, indicating that someone removed cash from the till before the discrepancy was noticed. RP 141. The surveillance footage also showed Fields removing money from the cash register and placing it in her pocket on three occasions. RP 147.

Linda Marsh, a clerk at the store, worked with Fields on occasion. RP 174. Marsh testified that she would sometimes notice inconsistencies in the amount of cash in her drawer. RP 176.

Fields denied engaging in fraudulent refunds at the Bartell Drug Store. RP 208. Fields testified that there were several reasons to account for the inconsistencies in the amount of cash in the till. RP 213. Fields explained that her presence at a cash register without a customer was because she was either conducting a price verification or a till audit. RP

213. Fields further testified that her refund procedures were commonly accepted practices. RP 218-219.

3. Facts Pertinent to Assignment of Error

Prior to trial Fields moved to exclude improper opinion testimony.

RP 29; CP 11-12. The court ruled that witnesses should not:

give their opinion as to guilt or innocence in this case. But, they...will be allowed to testify about what they observed, what they personally thought was unusual, and why they reacted to it as they did. And I'll just – I'll just trust cross-examination to flush out the Defense theory as to that perhaps this isn't unusual and perhaps this is a baseless opinion or whatever...So, I guess, my – I'm denying the defense motion.

RP 30.

The prosecutor played the surveillance footage for the jury. RP 111. Before the footage was played, the court limited Mitchell's testimony "to observations" about what was shown on the footage and not his "ultimate opinions." RP 106-107. Throughout the course of his testimony, Mitchell described or the jury what was depicted in the footage. Despite the court's earlier ruling, while narrating the footage Mitchell continually referred to Fields' actions as "fraudulent." See RP 111, 146-148.

At the beginning of the footage Fields is shown at the register and Mitchell tells the jury "just right off the top, it [inaudible] a fraudulent

refund....” RP 111. Fields objected on the grounds that it was improper opinion testimony. RP 112. The court overruled the objection stating, “...I think it’s a term of art that’s being used. You can follow up on that on cross-examination.” RP 112.

Mitchell continued to narrate the transactions shown on the surveillance footage. Mitchell was asked if he noticed anything unusual when viewing a particular section of the footage. RP 120. Fields objected again but her objection was overruled. RP 120.

I’ll object again for the same reason. If the Court wishes to overrule my objection again, I’ll simply make a standing objection to all of this subsequent testimony and I’ll stop standing up and stopping everybody. ...[I]t invades the province of the jury, and it is a – an opinion testimony.

RP 120.

Mitchell then testified that there was one “legit transaction” and then another refund without a customer or merchandise present. RP 120-121. Fields again noted her repeated objections and requested a standing objection to Mitchell’s opinion testimony. RP 125. After overruling the objection, the judge declared Mitchell an expert:

Yeah, I think I – I – I agree, as I have indicated, with the – the State's position here is this witness is being called in his capacity as someone who has expertise in both store policy as well as interpreting or - or observing the video arrangement that he set up.

RP 127-128.

Fields argued Mitchell was not listed as an expert by the State. The court, however, found there was sufficient disclosure even though Mitchell was only disclosed as a lay witness. RP 129.

Mitchell then continued to describe a number of transactions that were shown on the footage. RP 132-139. After this review of the surveillance footage was concluded, the prosecutor asked Mitchell to summarize the suspect transactions by date and to either note the amount of refund given or whether cash was taken from the till. RP 146. Mitchell referred to his investigation summary notes. RP 146 (Ex. 40). Mitchell summarized the transactions as follows:

On 4/10, **fraudulent** refund, \$54.49. On 4/11, a **fraudulent** refund, \$32.69. On 4/11, **fraudulent** refund for \$17.43. On 4/11, **fraudulent** refund, and then gets change for 17.43. On 4/11 makes change, but takes the cash. On 4/15 takes cash and puts it into pocket.

...

Uh, 4/15, a **fraudulent** refund for 26.15. 4/15, a **fraudulent** refund for 17.43. 4/16, a **fraudulent** refund for 21.79. 4/16, a **fraudulent** refund for 27.24. On 4/16 comingling funds; that would be mixing [Fields'] money with ours. 4/23, a **fraudulent** refund for 43.59. 4/23, cash in the pocket and a **fraudulent** refund for 21.79. 4/24, a **fraudulent** refund for 33.78. 4/24, that was the cash **fraudulent** refund, comes from the safe with money palmed in hand. \$20.70 was the refund. 4/25, a **fraudulent** refund for 31.60. 4/25, a **fraudulent** refund and makes change refund 39.23. 4/25, a **fraudulent** refund for 21.79. 4/25, Evelyn [Fields] goes to the safe after the lights are turned off.

4/26, a **fraudulent** refund, takes more cash and returns with less than the amount, refund of 38.14. 4/26, a **fraudulent** refund for 21.79. 4/26, Evelyn's [Fields] in safe, sets cash aside. 4/27, a **fraudulent** refund for 19.06. 4/27, a **fraudulent** refund for 18.52. 4/27 Evelyn [Fields] takes \$80 money, sets aside to pay a loan from the safe to make change, but only returns to the register of \$40. This is reported by one of our cashiers. 4/27, **fraudulent** refund for 38.14. 4/27, sets cash in the drawer and conceals it under the blue cash bag.

RP 146-148 (emphasis added).

C. ARGUMENT

FIELDS WAS DENIED A FAIR TRIAL WHEN MITCHELL IMPROPERLY OFFERED HIS OPINION TESTIMONY THAT FIELDS' ACTIVITIES WERE FRAUDULENT.

The role of the jury must be held inviolate. Wash. Const. art. I, §§ 21, 22. The jury's fact-finding role is essential to the constitutional right to trial by a jury. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). A witness, therefore, may not render an opinion on the defendant's guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such testimony is unfairly prejudicial because it invades the exclusive province of the jury. State v. King, 167 Wn.2d 324, 219 P.3d 642 (2009) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). An opinion on guilt, even by mere inference, invades the province of the jury. State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008). A law enforcement officer's opinion testimony may be

especially prejudicial because the officer's testimony often carries a special aura of reliability. State v. Kirkman, 159 Wn.2d 918, 928, 926, 155 P.3d 125 (2007).

Moreover, under ER 704, a witness may testify as to matters of law, but may not give legal conclusions. State v. Olmedo, 112 Wn. App. 525, 49 P.3d 960 (2002), review denied, 148 Wn.2d 1019 (2003) (citing Hyatt v. Sellen Constr. Co., Inc., 40 Wn. App. 893, 899, 700 P.2d 1164 (1985); Everett v. Diamond, 30 Wn. App. 787, 791-92, 638 P.2d 605 (1981)). Improper legal conclusions include testimony that a particular law applies to the case or testimony that the defendant's conduct violated a law. Hyatt, 40 Wn. App. at 899. Furthermore, “[e]xperts may not offer opinions of law in the guise of expert testimony.” Stenger v. State, 104 Wn. App. 393, 407, 16 P.3d 655, review denied, 144 Wn.2d 1006, 29 P.3d 719 (2001).

In determining whether testimony amounts to an improper opinion on guilt, the courts consider the totality of the circumstances including 1) the type of witness, 2) the specific nature of the testimony, 3) the nature of the charges, 4) the type of defense, and 5) the other evidence before the trier of fact. Kirkman, 159 Wn.2d at 928. Each of these factors indicates Mitchell’s testimony was improper. By repeatedly describing Fields’

actions as fraudulent Mitchell told the jury it was his opinion she committed theft. RP 111, 146-148.²

First, a police officer's testimony offered during trial often carries an aura of special reliability and trustworthiness. Demery, 144 Wn.2d at 763 (citations omitted). Even though Mitchell is not a police officer he has been Bartell's loss prevention manager for 18 years and his job is to investigate theft and fraud. RP 96. Like a police officer, Mitchell is a detective and like a police officer, his testimony carried the same aura of special reliability and trustworthiness.

Second, the nature of Mitchell's testimony usurped the jury's function. Mitchell repeatedly told the jury it was his opinion Fields engaged in fraudulent behavior. RP 111, 146-148. His testimony invited the jury to abdicate its responsibility to determine guilt or innocence and to rely instead on his trained investigator opinion.

Third, the charge was serious. Second degree theft is a felony. CP 38.

Fourth, Fields' defense was that she did not take any money. She testified the refund procedures she used were commonly accepted

² Fraud is defined as "deceit, trickery, sharp practice, or breach of confidence, perpetrated for profit or to gain some unfair or dishonest advantage." Webster's Encyclopedic Unabridged Dictionary of the English Language, New Deluxe Ed. 2001, at 762. A juror would necessarily equate fraud with theft as charged here since fraud is defined as using trickery for profit or gain.

practices. RP 218-219. Fields also explained when she was at the till without a customer present she was conducting price verifications and audits. Id. The jury had to determine whether Fields was credible. Mitchell's opinion absolved the jury from making that crucial determination by implying Fields' testimony was not credible.

Moreover, the trial court admitted Mitchell's testimony under the guise of characterizing Mitchell as an expert. An expert witness may provide an expert opinion on matters within his or her field of expertise. But, it is the jury's role to evaluate the credibility of a witness. Demery, 144 Wn.2d at 759. Whether Mitchell was characterized as expert or lay witness, his opinion that Fields' actions were fraudulent took that role away from the jury.

Fifth, the other evidence primarily consisted of the surveillance footage and transaction records. The jury was shown the footage and the records. It had to decide whether that evidence supported the State's theory. In the absence of Mitchell's opinion testimony that the evidence showed Fields committed theft the jury may not have believed that evidence supported the State's theory but was instead consistent with Fields' testimony. Mitchell's testimony, that in his opinion the footage of Fields on the surveillance camera and the refund forms she completed

showed fraudulent acts, told the jury Fields committed the theft tipping any close credibility determination against Fields.

Improper opinion testimony may be mitigated if the trial court properly instructs the jury that it is the sole judge of witness credibility and it is not bound by witness opinions. Montgomery, 163 Wn.2d at 595-96. There was no such instruction in this case.

Mitchell's opinion testimony was improper. His improper opinion testimony invaded the jury's role to determine both credibility and whether the facts supported the elements of the offense. Thus, Fields' conviction should be reversed.

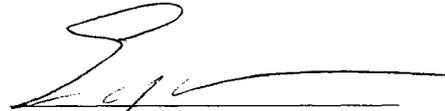
D. CONCLUSION

Fields was deprived of her constitutional right to a fair and impartial jury by Mitchell's improper opinion testimony. For the above reasons, this Court should reverse Fields' conviction.

DATED this 17 day of August, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC,



ERIC NIELSEN
WSBA No. 12773
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64622-2-1
)	
EVELYN FIELDS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 17TH DAY OF AUGUST, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] EVELYN FIELDS
10705 LINDEN AVENUE N
SEATTLE, WA 98133

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF AUGUST, 2010.

x *Patrick Mayovsky*

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 AUG 17 PM 4:20