

NO. 71494-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES ANDRE,

Appellant.

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

The Honorable Susan H. Amini, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

BY OPINING AS TO WHAT ANDRE MEANT BY THE TERM “HEATER,” OFFICER DAVISSON GAVE A DIRECT OPINION ON THE ONLY DISPUTED ELEMENT, THEREBY INVADING THE PROVINCE OF THE JURY.

The jail calls played to the jury in this case never expressly mention a firearm except in the context of what Andre was charged with. Exs. 6, 24. While it might be a reasonable inference that the “thing” and the “heater” mentioned was the firearm, this was a call for the jury to make. The jury could have concluded, as defense counsel argued at trial, that Andre was referring to his “dope pipe” or any other “thing.” 5RP 121-22, 124. This was not “overwhelming evidence,” Brief of Respondent at 19. Jurors could have had reasonable doubt as to what Andre was talking about in the jail calls.

But the State attempted to remove this doubt by presenting an expert opinion by a law enforcement officer on the state of Andre’s mind. This was improper under State v. Montgomery, 167 Wn.2d 577, 183 P.3d 267 (2008), because it was a direct opinion on Andre’s state of mind, which was the only disputed element.

This Court should reject the State’s analogy to State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992), and State v. Stark, ___ Wn. App. ___,

334 P.3d 1196 (2014), because the witnesses in those cases did not offer direct opinions on the defendants' states of mind. The officer in Sanders testified, that, based on his training and experience and the lack of paraphernalia in the home, the home was not a place used for smoking crack cocaine. 66 Wn. App. at 384. But the State was required to prove, in its prosecution for possession with intent to deliver, that Sanders had a specific intent, the intent to deliver crack cocaine, not merely the absence of another possible intent. RCW 69.50.401. The opinion did not directly relate to Sanders or offer an opinion as to what his intent actually was. Sanders, 66 Wn. App. at 387-88. As the court pointed out, the officer's testimony "left open the possibility that that the cocaine recovered in the search was used by someone other than Sanders for personal use." Id. at 389. Thus, the court held there was no improper opinion on guilt. Id.

Officer Davisson's testimony here did not "leave open" the question of what mental state was implicated or to whom it applied. This case might have been analogous to Sanders if Officer Davisson had stopped after testifying that "heater" is a slang term for a firearm without directly opining as to what Andre meant in a specific conversation. But he did not. His testimony that when Andre used the term "heater" in the phone call, he was referring to "the gun located in the car" was a direct opinion that Andre knew about the gun. 4RP 95.

The opinion testimony in Stark was also far less direct than in this case. The detective who interviewed the defendant testified that she “told me what she wanted me to hear and then the conversation was ended.” ___ Wn. App. at ___, 334 P.3d at 1199. This comment did not necessarily indicate that what the defendant self-defense testimony was untrue. This was simply a reasonable inference as to why she had, in an earlier interview, failed to mention that he grabbed the knife. ___ Wn. App. at ___, 334 P.3d at 1202.

Opinion testimony is, indeed, more problematic when it parrots the legal standard. Montgomery, 163 Wn.2d at 594. But this does not mean an opinion is automatically proper so long as it does not directly quote the wording of the statute. An opinion is improper when it amounts to a direct opinion on guilt. Id. Aside from not using the statutory language, this opinion directly parallels Montgomery. As in Montgomery, there was only one disputed element: the defendant’s mental state. Id.; 5RP 121-22, 124. The State offered what amounted to expert testimony purporting to establish that element by opinion. Id. at 594-95; 4RP 94-95. The fact that the witness was a police officer lent an “aura of authority” to the opinion. Id. at 595; 4RP 94-95.

The testimony that Andre was referring to the gun in a jail phone call amounted to a direct and improper opinion that he knew about the gun and

was, therefore, guilty. This issue was preserved for review by Andre's objection at the time. 4RP 79-81, 94-95. The Court's overruling of the objection made it likely the jury would credit and rely on the improper opinion. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983). Therefore, the invasion of the province of the jury requires reversal of Andre's conviction. Montgomery, 163 Wn.2d at 596 n. 9.

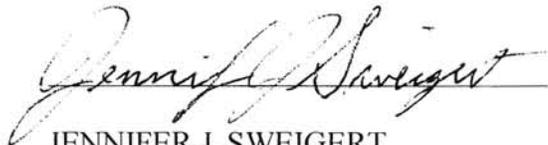
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Andre requests this Court reverse his conviction for unlawful possession of a firearm.

DATED this 2nd day of December, 2014.

Respectfully submitted,

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