

64622-2

64622-2

NO. 64622-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

EVELYN FIELDS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER A. WASHINGTON

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**BRIEF OF RESPONDENT**

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A. ISSUE PRESENTED

1. An appellate court will overturn a trial court's admittance of an opinion testimony if the appellant can show that the testimony is unfairly prejudicial because it invades the exclusive province of the finder of fact. Here, the testimony was not an impermissible opinion. Did the trial court properly allow the witness to testify that Evelyn Fields was conducting "fraudulent" returns?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Evelyn Fields was charged by information with Theft in the Second Degree. CP 1-4. On October 27<sup>th</sup>, 2009, a jury returned a verdict of guilty to that charge. CP 35. Fields was sentenced to thirty-two days of confinement with thirty days converted to community service hours. CP 37-44. She now appeals her conviction. CP 45-54.

2. SUBSTANTIVE FACTS

In September of 2007, Evelyn Fields was transferred to the Bartell Drugs store on Sixty-Fourth Street in Seattle as the Second

Assistant Manager. 1 RP 51-52.<sup>1</sup> The responsibilities of the Second Assistant Manager include ordering, assisting with refunds and responding to requests to make change for registers. 1 RP 54. Shortly after the transfer, Michael Storrbakken, the Store Manager, began noticing a change in pattern with respect to the refunds that were occurring at the store. 1 RP 56-57. First, he noticed that there was a pattern of cash being refunded for credit purchase. 1 RP 55-57. Normal refund procedures require the refund to be done in the same manner at which the item was purchased. 1 RP 54. Second, the use of the refund transaction adjustment form increased. 1 RP 57. The refund transaction forms were used primarily in circumstances where an item was accidentally scanned twice or if the customer immediately changes his or her mind about the purchases. 1 RP 54-57. Furthermore, the high number of cash refunds without a receipt was outside the norm of the store's transactions. 1 RP 59. As a result of these unusual patterns, Storrbakken began researching further into Fields' activities. 1 RP 60-61.

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<sup>1</sup> The Verbatim Report of Proceedings will be referred to as follows: 1 RP (10/19/09, 10/20/09, 10/21/09, 10/22/09, 10/26/09, 11/20/09); 2 RP (10/26/09, 11/20/09).

Storrbakken found a consistent pattern where a suspicious refund would be coupled with a sales transaction. 1 RP 61-62.

There were also two instances where the suspicious refund was sandwiched in between two sales. 1 RP 62. The link to the sales transactions drew suspicion because typically a Second Assistant Manager does not work the registers. 1 RP 61-62. Normally, they are called up to the register when the refund occurs and the manager authorizing the refund wouldn't ring up a sale prior to completing the refund. 1 RP 62. Storrbakken also discovered that the actual store inventory did not match what the inventory on the computer indicated should be in the store. 1 RP 62-63.

Additionally, Storrbakken noticed that some UPC code shelf tags affixed to the store shelves appeared to have been previously removed and some paper fibers had transferred from the store ads and was stuck to the back of the tags. 1 RP 65. The same items corresponding to the UPC shelf tags were the same items that were supposedly returned. 1 RP 66-70.

According to Storrbakken, Fields processed more refunds than the other Second Assistant Manager during the same period of time. 1 RP 70-71. Storrbakken discovered that refund slips typically filled out by customers returning an item contained similar

handwriting and almost all of them came up as unlisted or no number found. 1 RP 75.

After his investigation, Storrbakken notified the corporate office and met with Loss Prevention Manager Russ Mitchell. 1 RP 89, 97-98. Mitchell responded by installing concealed surveillance cameras at the store. 1 RP 97-99. In reviewing the video in conjunction with the electronic journal and the refund receipts, Mitchell was able to determine that refunds were made when no customer was present at the register nor was there any merchandise seen on the video being returned. 1 RP 100-02. Mitchell explained that one portion of the video showed Fields in violation of company policy by removing cash and placing it in her pocket. 1 RP 115. He explained that the proper procedure in clearing a register is to put the money in a bag and then put the bag in the safe. 1 RP 115. He specifically observed Fields conduct a sales transaction at the register with a customer present followed by a refund whereby no customer was present. 1 RP 120-21.

Accordingly, after the numerous refunds without customers, Mitchell indicated that there should be an excess of money in the registers. 1 RP 140. However, in the course of the investigation,

no excess money was recorded, which led him to the conclusion that it was removed. 1 RP 140-41.

Furthermore, in the course of the investigation, Mitchell determined that Fields' total refunds in April amounted to two thousand six hundred-two dollars and forty cents. 1 RP 145. Whereas, the total refund amount for the other Second Assistant Manager was only six hundred twenty-six dollars and forty cents for the same month. 1 RP 145.

Linda Marsh is an employee at the same Bartell Drugs store working as a cashier. 1 RP 168-69. She recalled that on April 27, 2008, she called Fields for a loan from the safe in the amount of one hundred-twenty dollars for her register. 1 RP 174-75. On this particular day, after she made enough money in the till to pay back the loan, she placed the loan money along with the loan slip aside to repay the safe. 1 RP 175-76. At some point thereafter, she went off the register to do floor duties. 1 RP 176. When she came back, she noticed that eighty of the one hundred twenty dollars was missing. 1 RP 176-77. Fields had been working at her register earlier. 2 RP 176. Marsh reported the shortage to a manager. 1 RP 178.

Fields denied having processed fraudulent refunds.

2 RP 208. She had no independent memory of what her activities were at the time of the suspicious refunds but claims that she may have been conducting legitimate transactions such as price verifications or till audits. 2 RP 212-13. Furthermore, she stated that sometimes customers ask for cash back on debit card transactions which as the manager, she would approve. 2 RP 218.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF RUSS MITCHELL WHEN HE DESCRIBED THE TRANSACTIONS ON THE SURVEILLANCE VIDEO AND ALSO FROM HIS INVESTIGATION NOTES AS FRAUDULENT REFUNDS.

The defendant claims that Russ Mitchell's characterization of her conduct amounted to improper opinion testimony. The fact that his testimony touches upon an ultimate issue for the trier of fact does not render his opinion impermissible. Therefore, her argument fails.

The trial court has wide discretion to determine the admissibility of evidence, and the trial court's decision whether to admit or exclude evidence will not be reversed on appeal unless

the appellant can establish that the trial court abused its discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court. Id. at 758, citing State v. Sutherland, 3 Wn. App. 20, 21, 472 P.2d 584 (1970). Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. Id.

The general rule is that no witness, lay or expert, may testify to his opinion as to the guilt of the defendant, whether by direct statement or inference. City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), citing State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such testimony has been characterized as unfairly prejudicial because it invades the exclusive province of the finder of fact. Id. Improper opinions on guilt usually involve an assertion pertaining directly to the defendant. Id. However, testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. Id. at 578. Moreover, a qualified expert is competent to express an opinion on a proper subject even

though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007), citing Gerberg v. Crosby, 52 Wn.2d 792, 795-96, 329 P.2d 184 (1958). The mere fact that the opinion of an expert covers an issue which the jury has to pass upon, does not call for automatic exclusion. Id. Furthermore, under ER 704, an opinion is not improper merely because it involves ultimate factual issues. Heatley, at 578. Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an “ultimate issue” will generally depend on the specific circumstances of each case. Id. at 579. The court will generally consider the circumstances of the case such as: 1) the type of witness involved, 2) the specific nature of the testimony, 3) the nature of the charges, 4) the type of defense, and 5) other evidence before the trier of fact. Demery, 144 Wn.2d 753 at 759.

In applying the analysis as set forth in Demery, the trial court properly admitted Mitchell’s testimony. Mitchell gave a narrative explanation of the video surveillance that was shown to the jury. 1 RP 111-39. The investigation resulted in a large number of discs being recorded so he made notes of the suspicious refunds and cataloged them in his investigation summary. 1 RP 144. He further

testified specifically the dates and amounts of each suspicious refund transaction. 1 RP 146-48. He used the term “fraudulent” in his testimony to identify the suspicious transactions. 1 RP 146-48.

At trial, Mitchell testified initially as a lay person and then was qualified as an expert witness due to the fact that he had been employed at the company’s Loss Prevention Department as the Loss Prevention Manager for eighteen years and was responsible for the investigation of Evelyn Fields. 1 RP 96-97. He testified that upon receiving information from Storrbakken, he set up surveillance video at the registers to monitor any behaviors that would explain the suspicious patterns of returns. 1 RP 96-99. The trial court recognized that he would be an expert witness due to his knowledge of store policy as well as interpreting or observing the video arrangement that he set up. 1 RP 127-28.

Fields analogizes his testimony as that of a police officer where the court in Demery recognized that their testimony when offered at trial may often carry an “aura of special reliability and trustworthiness.” Here, Mitchell did not make representations that he held responsibilities consistent with a police officer. He testified merely, as an employee of a private company whose job description happens to be the safeguarding of company assets by

investigating theft, fraud and safety. 1 RP 96. Other than the fact that one of his responsibilities is to investigate internal theft, nothing else about his job description rises to the level of a police officer.

Next, the fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. Heatley, 70 Wn. App. 573, 579, citing State v. Wilber, 55 Wn. App. 294, 777 P.2d 36 (1989). In a trial for the crime of driving while under the influence, the Heatley court held that the officer's testimony that Heatley was "obviously intoxicated," "affected" by alcohol, and could not drive "in a safe manner" was not improper opinion testimony. Heatley, at 581. See e.g., State v. Jones, 59 Wn. App. 744, 749-51, 801 P.2d 263 (1990) (finding that testimony regarding the cause of death was not improper). The basic approach of the current rules of evidence is to admit expert opinions when helpful to the trier of fact. Jones, at 750, citing ER 702.

Similarly, Mitchell's use of the word "fraudulent" was used to describe transactions where the surveillance video does not reflect the same transactions indicated on the electronic journal. Mitchell's testimony was based on information obtained from the store's electronic journals used in conjunction with his observations of the

surveillance video. His use of the term “fraudulent” was used to describe what amounted to a fictitious transaction. His testimony was also helpful to the jury to explain the evidence.

Additionally, Mitchell’s testimony contained no direct opinion regarding Fields’ guilt. He made no assertions to whether Fields unlawfully obtained property belonging to Bartell Drugs with the intent to deprive. Whether Fields committed fraudulent transactions is not an element of the offense for which she is charged.

Conversely, the direct evidence of her theft was never described as “fraudulent.” Rather, the video of her taking money and placing it in her pocket is in fact direct evidence of her guilt. Furthermore, Mitchell only testified that Fields made suspicious transactions that would have resulted in extra money in the till. He also testified that no extra money was accounted for.

Moreover, Mitchell was subject to cross-examination. He was questioned on the reliability of the surveillance video and the accuracy of the time-date stamp. In fact, defense counsel pointed out that there was a two minute difference between the electronic journal and the video. 1 RP 150-51. The jury had the opportunity to evaluate the credibility of the witness and accord appropriate weight to the evidence as it deemed appropriate. Therefore,

Mitchell's testimony was not unfairly prejudicial and it did not lead the jury to abdicate its responsibility to determine the guilt or innocence of the defendant.

Evelyn Fields testified on her own behalf and denied that any fraudulent refunds were conducted by her. 2 RP 208. While she was not able to provide information regarding her activities in the surveillance video at the time of the fraudulent transactions, she did provide alternative explanations regarding what she could have been doing such as price verification or till audits. 2 RP 213. The jury had yet another opportunity to evaluate her testimony in contrast to the testimony provided by the State's witnesses.

Finally, Fields argues that Mitchell's testimony unfairly lent more weight to the State's evidence of the crime, namely, the surveillance video and the electronic journal. But for the fact that Mitchell was allowed to color the evidence with this testimony, the jury would have found her explanation to be credible. Her argument fails to take into account that the video depicted her putting the store's cash in her pocket. 1 RP 115. Furthermore, there is no dispute that the electronic journals were accurate. Despite Fields' assertions that she was doing otherwise, as it relates to the suspicious transactions, there is no credible evidence

that the transaction was anything other than a supposed return as opposed to a price verification or a till audit. The jury considered other credible evidence at trial which would support their conclusion.

2. ANY ERROR WAS HARMLESS.

Even if the court finds that the trial court erred in allowing the opinion testimony, any error was harmless. The evidence presented in trial was overwhelming in establishing the defendant's guilt.

Any error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), citing State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). The State bears the burden of proving that the error was harmless. Id. The standard to determine whether an error was harmless is the "overwhelming untainted evidence" test. Id. at 426. Under this test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. If the error was harmless,

reversal is not required. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The evidence in this case is overwhelming. First, the electronic journal revealed a specific pattern of behavior. Due to the defendant's position, it was established that her normal course of duties did not include the task of cashiering. Her responsibilities did include authorizing refunds. Storrbacken testified that the fact that these refunds were accompanied with sales transactions were odd because managers would only get called up to the register to authorize the refund and would not have been present previously to conduct a sale. Second, the surveillance video provided further corroboration that the refunds were fraudulent because the footage did not show a customer or the returned merchandise. Third, the evidence showed that the defendant's returns were not in the same manner in which the purchase was made. Fourth, the defendant was observed pocketing money from the till in direct violation of company policy. Fifth, the store inventory of the items involved in the fraudulent refunds did not correspond with the computer inventory amount. Sixth, when compared to the other Second Assistant Manager, Fields had a substantially greater amount of refunds. Seventh, the UPC shelf codes with transferred paper

fibers on the back correspond to the items that were supposedly returned. Eighth, the defendant clearly had access to the store's cash as she testified that she was one of four people who could access the safe. 2 RP 222. She also testified that she was responsible for bringing money from the safe to the register and back. 2 RP 222. The evidence regarding the defendant's theft is overwhelming and would not have led a jury to a different verdict. Any reasonable jury would have reached the same result without the error.

Finally, Fields argues that improper opinion testimony may be mitigated if the trial court properly instructs the jury that they are the sole judge of witness credibility and it is not bound by witness opinions. She relies on State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). There, the jury was instructed that they are the "sole judges of the credibility of witnesses and that jurors are not bound by expert witness opinions." Id. Fields now claims that no such instruction was given in this case. The invited error doctrine prohibits a party from introducing an error at trial and then challenging it on appeal. State v. Lucero, 140 Wn. App. 782, 786, 167 P.3d 1188 (2007). The trial court properly instructed the jury that it is the sole judge of witness credibility under Jury Instruction

Number 1. CP 14-28. A review of the records show that Fields took exception to the instruction regarding the expert witness and the trial court did not submit that instruction to the jury. 2 RP 202. She cannot now claim that the instruction should have been given.

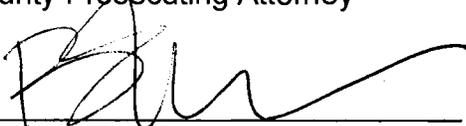
D. CONCLUSION

The trial court properly allowed Mitchell's testimony regarding the fraudulent refunds. She was not denied a fair trial. For all the foregoing reasons, the State respectfully asks this Court to affirm Fields' conviction.

DATED this 26<sup>th</sup> day of October, 2010.

Respectfully submitted,

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