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No. 69195-3-I

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

Snohomish County No. 10-1-02239-7

STATE OF WASHINGTON,

Respondent,

v.

GARY D. KOLLMAN,

Appellant.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

Table of Authorities iii

I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

 A. Assignments of Error 1

 B. Issues Pertaining to Assignment of Error 2

II. PROCEDURAL BACKGROUND 4

III. FACTUAL BACKGROUND..... 8

IV. DISCUSSION 10

 A. Sgt. Fouch’s Testimony Was Not Admissible as an Expert “Opinion” and Should Have Been Excluded Under ER 702 13

 B. Appellate Decisions Directly on Point Require a New Trial 16

 C. Fouch’s Subjective “Thought” that the Other Drivers Were “Dead” Invaded the Province of the Jury to Decide this Issue..... 19

 D. Sgt. Fouch’s Repeated Comments That “They Were Dead” Should Have Been Excluded Under ER 403 Because its Potential for Prejudice Substantially Outweighed any Possible Probative Value..... 21

 E. The Error of Admitting the “They Were Dead” Statements, Particularly Given Their Substantial Prejudicial Effect, Cannot be Deemed Harmless..... 23

V. A NEW TRIAL SHOULD BE GRANTED OR,
AT THE VERY LEAST, THE SPECIAL VERDICT
FINDING SHOULD BE STRICKEN25

VI. MITIGATING CIRCUMSTANCES JUSTIFY AN
EXCEPTIONAL SENTENCE BELOW THE
STANDARD RANGE.....26

VII. CONCLUSION.....29

Proof of Service

TABLE OF AUTHORITIES

Federal Cases

Blakely v. Washington, 542 U.S. 296 (2004).....25, 26

Bumper v. North Carolina, 391 U.S. 543 (1968)24

Chapman v. California, 386 U.S. 18 (1967).....24

State Cases

In re Beito, 167 Wn.2d 497, 220 P.3d 489 (2009).....26

Carr v. Deking, 52 Wn.App. 880, 765 P.2d 40 (1988)..... 18

In re Personal Restraint of Delgado, 149 Wn.App. 223, 204 P.3d
936 (2009).....26

City of Auburn v. Hedlund., 165 Wn.2d 645, 201 P.3d 315
(2009).....22, 23

Johnson v. Caughren, 55 Wash. 125, 104 P. 170 (1909) 15

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987)..... 19

State v. Carlin, 40 Wn.App. 698, 700 P.2d 323 (1985)..... 19, 20

State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988)..... 14

State v. Crenshaw, 98 Wn.2d 789, 659 P.2d 488 (1983).....23

State v. Farr-Lenzini, 93 Wn.App. 453, 970 P.2d 313 (1999)*passim*

State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950) 14

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)24

State v. Haga, 8 Wn.App. 481, 507 P.2d 15920

<i>State v. Jeannotte</i> , 133 Wn.2d 847, 947 P.2d 1192 (1997)	26, 27
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	21
<i>State v. Sargent</i> , 40 Wn.App. 340, 698 P.2d 598 (1985).....	19
<i>State v. Thamert</i> , 45 Wn.App. 143, 723 P.2d 1204 (1986)	18

State Statutes

RCW 9.94A.535(1)(e)	7, 27, 28
RCW 9.94A.834	13, 25
RCW 46.61.024	4

I. **ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. **Assignments of Error**

1. The trial court erred in allowing, over repeated defense objections, a pursuing police officer to testify about his subjective opinion that he “thought” other drivers on the roadway “were dead,” and that he “thought [the Defendant] was going to kill the people,” and that the officer “was almost certain that they were going to die,” based on the Defendant’s driving, which did not cause any accidents or injuries.

2. The trial court erred in allowing this highly prejudicial, subjective opinion testimony after granting the Defendant’s written motion *in limine* and ruling, pretrial, that “the officer can testify only as to what he observed. He can’t use the term ‘reckless.’”

3. The trial court erred in denying Defendant’s Motion for a New Trial based upon the officer’s highly prejudicial opinion testimony that other drivers “were dead,” even though the defense obtained an order *in limine* prohibiting this testimony, and the defense repeatedly objected to each and every question that elicited this testimony and was granted a continuing objection by the trial court.

4. The trial court erred in refusing to strike the jury’s special verdict finding that the Defendant’s driving endangered third parties on

the roadway, which added an additional year and a day to the standard sentencing range of 0-60 days imprisonment.

5. The trial court erred in refusing to grant an exceptional sentence downward where the overwhelming evidence from twenty years of counseling records established that the Defendant experiences panic attacks and suffers from Post-Traumatic Stress Disorder after he was severely beaten by the police on several occasions, all of which causes him to lose control of his behavior and awareness of his surroundings.

B. Issues Pertaining to Assignment of Error

1. Whether a pursuing police officer's subjective speculation that the Defendant's lane change meant other drivers "were dead" and that he "thought [the Defendant] was going to kill the people," and that the officer "was almost certain that they were going to die," is competent expert testimony, especially where there was no accident and no one was injured, much less killed. (Assignment of Error 1.)

2. Whether testimony that a pursuing officer subjectively believed other drivers were going "to die," etc., is more prejudicial than probative within the meaning of ER 403. (Assignment of Error 1.)

3. Whether incompetent and highly prejudicial conclusory testimony by a pursuing police officer that he thought other drivers were going "to die," etc., is harmless error in a case where the special verdict

requires a jury to find, beyond a reasonable doubt, that the Defendant's driving endangered third parties other than the Defendant or the pursuing police officers. (Assignments of Error 1-3.)

4. Whether the remedy for the improper, subjective conclusory and highly prejudicial testimony from a pursuing police officer that he was "certain" other drivers were going "to die," etc., is to strike the special verdict finding, remand the case for resentencing, or to grant a new trial on the underlying conviction for eluding a police officer. (Assignment of Error 4.)

5. Whether defense counsel made a sufficient record of his objection to highly improper opinion police testimony that the officer was "almost certain" other drivers were going "to die," where this issue was the subject of a written, pretrial motion and order *in limine*, it was discussed in Defendant's Trial Memorandum with supporting case law, the defense immediately objected to each of the improper questions but was overruled and granted a continuing objection to this entire line of improper testimony. (Assignments of Error 1-3.)

6. Whether the trial judge's reasoning, in denying Defendant's Motion to Strike the Special Finding or Grant a New Trial based upon the improper conclusory testimony of the pursuing police officer, that this was merely the officer's "way of recalling" how the Defendant was driving, is

a valid basis for denying the Defendant's motions. (Assignments of Error 1-3.)

7. Whether the pursuing police officer's subjective, conclusory impressions of what might happen is even remotely relevant to the officer's factual description of what he actually observed about the Defendant's driving. (Assignment of Error 2.)

II. PROCEDURAL BACKGROUND

On December 15, 2010, the Defendant was charged with a single count of Attempting to Elude a Pursuing Police Officer, in violation of RCW 46.61.024. CP 147-148. That charge was based on an incident that occurred nearly a year earlier, on January 1, 2010. *Id.* The Information also alleged that

the crime was aggravated by the following circumstance: one or more persons other than the defendant or the pursuing law enforcement officer were threatened with physical injury or harm by the defendant's actions while committing the crime of attempting to elude a police vehicle; as provided by RCW 9.94A.834.

Id. The Information was amended on June 11, 2012, on the eve of trial to correct the incorrect definition of driving "in a manner indicating a wanton or willful disregard for the lives or property of others," in the original information, and substitute the language that the Defendant "did drive his or her vehicle in a reckless manner." CP 132-133.

Prior to trial, the defense filed several motions *in limine*, supported by the Defendant's Trial Brief. The Defendant's third motion *in limine* sought

to prohibit any reference at trial to the following matters: . .

(3) Any opinion testimony that the Defendant's driving was "reckless" or that he was endangering other motorists on the road.

CP 134, 143. In his amended trial brief, the defense had separate argument sections on expert testimony regarding the Defendant's impaired mental state, his right to jury instructions on the lesser included offense of reckless driving, and specifically a section in support of the Defendant's motions *in limine* prohibiting "any opinion testimony that the Defendant's driving was 'reckless' or that he was endangering other motorists on the road," citing *State v. Farr-Lenzini*, 93 Wn.App. 453, 970 P.2d 313 (1999). CP 114-128.

The trial began on June 25, 2012 with jury selection, motions *in limine* and opening statements. RP (6/25/12) at 2-44. The State's case was presented through the testimony of six officers on the following day, June 26, 2012. RP (6/26/12) at 48-276. The case was submitted to the jury on June 29, 2012 and the jury sent out two notes. CP 101-102. In the first note, the jury asked the Court to define the term "willfully . . . as used

in Instruction 7.” RP (6/28/12) at 511. The Court responded with the agreement of both parties to instruct the jury: “Use the normal English meaning.” *Id.*, at 512. The next day, the jury sent out another note asking for copies of police reports and, again with the agreement of counsel, the Court responded: “Per the jury instructions, you have already received the evidence that you are permitted to rely on.” RP (6/29/12) at 516.

Later that same day, the jury returned a verdict finding the Defendant guilty of attempting to elude a police vehicle, and also returned a special verdict in favor of the aggravating factor by finding that the Defendant’s driving threatened someone other than the Defendant and the pursuing law enforcement officers “with physical injury or harm.” *Id.* at 520-21; CP 99-100. The defense advised the Court that they would be seeking an exceptional sentence downward based on a failed mental defense and court was recessed. *Id.* at 524-526.

On July 3, 2012, the Defendant filed a timely Motion for a New Trial. CP 79. On July 20, 2012, the Defendant filed Defendant’s Memorandum in Support of Motion for New Trial. CP 32-34. And on August 2, 2012, the Defendant filed a Supplemental Memorandum in Support of Motion for New Trial. CP 35-78. On August 12, 2012, the Court heard argument on the defense motions, which requested either a

new trial, or the Court “strike the special finding.” RP (8/12/12) at 527-536. The Court denied the motion. *Id.* at 537.

Then the defense argued for an exceptional sentence below the twelve month and one day to fourteen month standard range based upon the statutory mitigating factor that “the defendant’s capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was significantly impaired,” citing relevant case law in addition to the statutory provision. *Id.* at 540-543. The Defendant then addressed the Court. *Id.* at 544-548.

The Court began its sentencing by acknowledging the provision of RCW 9.94A.535(1)(e), that “allows for a failed diminished capacity defense to be at least considered in terms of sentencing for going below the standard range.” *Id.* at 548. The Court acknowledged that “Mr. Kollman was diagnosed with panic disorder, basically went back to 1991, which we now know has aspects of Post-Traumatic Stress Disorder as well.” *Id.* However, the Court faulted the Defendant for going driving on the night of the incident without a

plan for an encounter with the police . . . In other words, one would think that with this history you would have already had some sort of plan either in your mind or written down or in your car that would have said if I have an encounter with the police this is what I will do immediately.

Id. at 550. The judge did “commend him” for getting serious treatment since the date of the current offense and the date of his sentencing, more than two years later, then sentenced the Defendant to the low end of the range of “twelve months and a day.” *Id.* at 551; CP 16-26. In so doing, the Court recognized: “This is one of these cases there is no good solution no matter what I do. Mr. Kollman is 54 years old and he has an established job. He has an established life. . . .” *Id.* at 548. The judge explained: “So the problem I have is not that he doesn’t have a disorder. The statute clearly says I can take that into consideration.” *Id.* at 551. Bail pending appeal was set at \$5,000 and the Defendant was given two weeks to report to commence serving his sentence. *Id.* at 554; CP 27-28.

The Defendant filed a timely Notice of Appeal. CP 2-13. The State then filed a Notice of Cross-Appeal. CP 1. The Defendant posted bail and is out of custody on appeal. CP 14-15.

III. FACTUAL BACKGROUND

The Defendant, Gary Kollman, is a well educated environmental scientist and the married father of two daughters who are currently in college. There is a long history of depression, anxiety and panic disorders in his family and, since 1991, he has been diagnosed with panic attacks and anxiety. He has been in counseling for these mental disorders since 1975 and he has been receiving treatment for panic attacks since a 1993

incident when he was pulled over by the police, tackled, maced and assaulted.

Another incident occurred in 1997 when a police officer attempted to stop him for a traffic offense and he drove at the speed limit all the way home, trying to gain control of his panic attack. After he pulled into the garage and his family came out to meet him, he was pulled out of the car by the police and beaten, resulting in bruising to his ribs and a broken nose. At this time, his physician Dr. Hockeiser diagnosed him with an underlying panic disorder and Post-Traumatic Stress Disorder (PTSD).

In 2007, a police officer attempted to pull him over for speeding and Defendant had another panic attack, in which he experienced as an “out of body” experience, according to medical records. After driving for 15 or 20 minutes he was able to conquer his panic and pulled his car over. However, when he exited the car to speak to the officers, the police unleashed a German Shepherd attack dog, which bit him and broke both the radius and ulna in his arm. The police then slammed his face into the cement as they subdued him, greatly increasing his PTSD and panic disorder. RP (6/27/12) 373-415 (Testimony of Dr. Heavin); CP 35-78.

Since his arrest for the current offense, Mr. Kollman has intensified his weekly counseling sessions with Dr. Powell and, after 33 sessions over the course of two years, Dr. Powell has concluded that

Kollman has gained control of his panic attacks and related disorders, and that he should “terminate treatment” as of March 8, 2012. Dr. Powell describes Kollman’s prognosis as “excellent.” CP 35-78.

IV. DISCUSSION

The State’s primary, and lead witness at trial was Sergeant Bart Fouch, who first tried to stop Mr. Kollman and led the pursuit of Mr. Kollman until he was stopped. It was also Fouch who then fired two shots through Kollman’s windshield, kicked and struck him with fists numerous times, and shocked him twice with a Taser. RP (6/26/12) at 48-121.

The defense moved *in limine* to prevent Sgt. Fouch (or any of the other officers) from offering opinion testimony whether the Defendant’s driving was “reckless,” as opposed to simply describing it and allowing the jury to draw that conclusion. Specifically, the Defendant’s written motion *in limine* sought to prohibit:

Any opinion testimony that the Defendant’s driving was “reckless” or that he was endangering other motorists on the road.

See CP 134, 143. This issue was the subject of a separate section of Defendant’s Amended Trial Memorandum, with a discussion of another eluding case, *State v. Farr-Lenzini*, 93 Wn.App. 453, 970 P.3d 313 (1999), which reversed the conviction because of similar opinion testimony by the

pursuing officer. CP 114-128. The state did not seem to oppose this motion and the court verbally granted it. RP (6/25/12) 7-8.

Yet, despite this ruling, Sgt. Fouch was asked a series of questions by the prosecutor during direct testimony that flatly violated this order by the court. The defense immediately, and repeatedly objected to this testimony and the court granted the defense a continuing objection. The relevant portion reads as follows:

A. That's okay. So he took a hard left-hand turn and cut these vehicles off right here. I knew there were a bunch of patrol cars behind me, and I was fairly close to him, so I was relatively certain that I could make that turn; but I wasn't sure about the other patrol vehicles behind me. So I believe I yelled "left," I believe I yelled "left-left-left," as he took that left-hand turn, into the radio to warn the vehicles behind me that we were going left.

Q. When he cut to his left in front of what you have marked as Vehicle 1, did that concern you?

A. I thought they were dead.

Q. Who is "they"?

MR. HANSEN: I object; I move to strike that answer.

MR. DARROW: That's his perception at the time, as he is observing the events.

THE COURT: The objection is overruled.

THE WITNESS: I thought he was going to kill the people that were in that car.

BY MR. DARROW:

Q. How come?

A. They were traveling sixty miles an hour; and you have a vehicle that takes a left-hand turn in front of you at sixty miles an hour, and he's doing seventy or eighty, **I was almost certain that they were going to die.**

Q. Did they take any evasive action?

A. I believe that they --

MR. HANSEN: Same objection, your Honor. I'd like a continuing objection.

THE COURT: You may have a continuing objection. The objection is overruled.

THE WITNESS: I believe they slammed on their brakes.

BY MR. DARROW:

Q. Did you see brake lights?

A. I saw brake lights on the first vehicle. I assume that the two vehicles behind him applied their brakes also. I don't know that -- honestly, I can't tell you to this day whether or not there was a collision there.

Q. It looked that close to you?

A. Yes.

See RP (6/26/12) 70-71 (emphasis added).

Fouch's repeated assertions that he *subjectively* "thought they were dead," that he "thought he [Kollman] was going to kill the people that were in that car," and that he "was almost certain that they were going to

die,” and that he “assumed” and “believed” there may have been a collision was not even remotely competent, or even relevant to any valid issue in the case. Obviously, Sgt. Fouch was free to describe the Defendant’s driving, but not to offer his own erroneous speculation that Kollman was almost certainly going “to kill” other drivers on the road.

This testimony was a gross invasion of the province of the jury to make this decision, and it was overwhelmingly prejudicial, especially with regard to the jury’s special verdict that other drivers were “threatened with physical injury or harm by the defendant’s actions,” as required by RCW 9.94A.834.

A. **Sgt. Fouch’s Testimony Was Not Admissible as an Expert “Opinion” and Should Have Been Excluded Under ER 702**

To be admissible, expert opinion testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue” and the witness must be “qualified as an expert by knowledge, skill, experience, training, or education.” ER 702. Courts have interpreted this rule of admissibility to have three separate requirements:

The admissibility of expert testimony under this rule [ER 702] depends upon three factors: whether (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.

State v. Ciskie, 110 Wn.2d 263, 270-71, 751 P.2d 1165 (1988). Sgt. Fouch's testimony satisfies none of the requirements under ER 702 or the *Ciskie* case.

First, on this record there was no attempt to qualify Sgt. Fouch as an expert on accident reconstruction or any related field. He testified that his duty with the Mill Creek Police Department is to "oversee a crew of four men. I answer calls from Dispatch and do proactive traffic enforcement. I'm also a firearms instructor and a taser instructor for the Department." *See* RP (6/26/12) 50-52.

Second, there was no attempt to justify his subjective thoughts that the other drivers "were dead . . . I was almost certain they were going to die" as being "based upon an explanatory theory generally accepted in the scientific community." Indeed, his pure speculation and "belief" was in no sense "scientific" and had no place in the courtroom. The sole effect of this incompetent testimony was to exploit the passions and prejudice of the jury. More than sixty years ago our Supreme Court famously coined the oft-quoted comment applicable to such testimony, "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950). But in this case, even the "minute peg of relevancy" is missing.

Finally, this testimony was hardly “helpful to the trier of fact.” The question whether Mr. Kollman’s driving placed other drivers in danger is a topic that was readily understandable by a lay jury, all of whom were experienced drivers, without resorting to testimony about Sgt. Fouch’s speculation (which proved to be wrong) that the other drivers were “dead.” Sgt. Fouch testified in great detail about his observations of Mr. Kollman’s driving over the previous fifteen pages, including details about the speed Kollman was traveling, weaving in and out of traffic, driving through stop lights and cutting in front of other cars. The jurors were fully qualified to reach their own conclusion whether or not the State had proved beyond a reasonable doubt that others on the roadway were “threatened with physical injury or harm by the defendant’s actions,” without hearing Sgt. Fouch’s subjective opinions that other drivers were “dead,” that he thought Mr. Kollman “was going to kill the people that were in that car,” and that he “was almost certain that they were going to die.”

This gratuitous evidence tainted the jury’s special finding and, indeed, the entire trial. This has been the law in Washington (and everywhere else) for more than a century. *See, e.g., Johnson v. Caughren*, 55 Wash. 125, 127, 104 P. 170 (1909) (holding that “whenever the question to be determined is to be inferred from particular facts which can

be readily produced before the jury, and the inference to be drawn therefrom is within the common experience of men in general, requiring no special knowledge, skill, or training, the inference is to be drawn by the jury, and not the witness.”).

Another provision, ER 701, similarly requires that opinion testimony be “rationally based on the perception of the witness.” But there was nothing “rational” about Fouch’s purely emotional, subjective reaction. Nor did the state provide adequate basis for an expert opinion as required by ER 703, which requires “facts or data . . . of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.”

B. Appellate Decisions Directly on Point Require a New Trial

Most directly on point is *State v. Farr-Lenzini, supra*, an eluding case that was cited and discussed in Defendant’s Trial Memorandum in support of the defense Motion in Limine. In *Farr-Lenzini*, the court reversed a defendant’s conviction for attempting to elude a police officer when it found that the testimony of an officer that the defendant’s fleeing for 4 ½ miles, while being pursued by the officer with his lights and siren activated, “exhibited to me that the person driving that vehicle was

attempting to get away from me and knew I was back there and refusing to stop.” 93 Wn.App. at 458.

The Court found this testimony required reversal on several grounds, including “an insufficient foundation to qualify the trooper as an expert for purposes of expressing an opinion as to Farr-Lenzini’s state of mind.” 93 Wn.App. at 461 (citation omitted). Second, the court noted: “Nor did the trooper’s opinion satisfy the other requirement of ER 702, that it be helpful to the jury.” *Id.* (citation omitted). The court reasoned that “there must be a substantial factual basis supporting the opinion” and it must be considered “whether there is a rational alternative answer to the question addressed by the witness’s opinion.” *Id.* at 463. In *Farr-Lenzini*, the court recognized three independent actions that supported the officer’s opinion that the defendant was willfully fleeing,¹ yet still found the testimony improper because the defendant “may have been so absorbed in driving her high performance car on a quiet, dry Sunday morning that she was oblivious to her speed and to any vehicles following behind her.” *Id.* at 464. The court required that the basis for the officer’s opinion testimony be sufficiently supported before it could be given to the jury.

¹ “The factual basis supporting this opinion was the trooper’s observation of Farr-Lenzini (1) hitting the brakes as she entered the 72nd Avenue-179th Street intersection and as she went through the 179th Street-50th Avenue stop sign; (2) accelerating ‘extremely hard’ as she came out of her turn; and (3) swiveling her head

See also State v. Thamert, 45 Wn.App. 143, 723 P.2d 1204 (1986), *Carr v. Deking*, 52 Wn.App. 880, 765 P.2d 40 (1988).

The *Farr-Lenzini* Court elaborated on this reasoning in a way that compels a new trial for Mr. Kollman because Sgt. Fouch's testimony was so highly prejudicial:

“Generally, expert testimony is helpful and appropriate when the testimony concerns matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party.” *State v. Jones*, 59 Wn.App. 744, 750, 801 P.2d 263 (1990) (citing *State v. Cunningham*, 23 Wn.App. 826, 854, 598 P.2d 756 (1979), *rev'd on other grounds*, 93 Wn.2d 823, 613 P.2d 1139 (1980).

93 Wn.App. at 461. The *Farr-Lenzini* Court applied an even higher bar of admissibility where “the opinion relates to a core element” because of the “even greater potential for prejudice.” *Id.* at 462-63.

The objectionable testimony from Officer Fouch certainly relates to a “core element” of the charge in this case since it was the only significant evidence in support of the 12+ to 14 month sentencing enhancement.

rapidly side to side three times as she checked the intersection of 50th Avenue and Salmon Street.” *Farr-Lenzini*, 93 Wn.App. at 463-464.

C. **Fouch’s Subjective “Thought” that the Other Drivers Were “Dead” Invaded the Province of the Jury to Decide this Issue**

It is noteworthy that the *Farr-Lenzini* Court drew an analogy to *State v. Sargent*, 40 Wn.App. 340, 698 P.2d 598 (1985), in support of the notion that “a police officer’s impression of a defendant’s conduct can constitute an improper opinion as to the defendant’s guilt or innocence.” *Farr-Lenzini*, 93 Wn.App. at 464. In *Sargent*, the court reversed convictions for first degree murder and second degree arson because of testimony from a police officer that the defendant’s reaction to learning of his wife’s death seemed “contrived.” *Sargent*, 40 Wn.App. at 351. Based on the holding of *Sargent*, the *Farr-Lenzini* Court held that the officer’s “opinion or impression addressed the major contested issue at trial, whether *Farr-Lenzini* was willfully eluding the trooper.” 93 Wn.App. at 464.

The issue of dangerousness to third parties in this case was equally contested, and Sgt. Fouch’s repeated, inflammatory and incompetent opinions that the other drivers “were dead” requires a new trial, or at least striking the special finding. *Accord: State v. Carlin*, 40 Wn.App. 698, 700 P.2d 323 (1985) (reversible error for officer to testify that a trained canine unit was able to track the defendant’s “fresh guilt scent.”); *State v. Black*, 109 Wn.2d 336, 349, 745 P.2d 12 (1987) (“No witness, lay or expert, may

testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.”).

In *Carlin*, the court reasoned that opinion testify inferring guilt violates a defendant’s “constitutional right to a jury trial, including the independent determination of the facts by the jury.” *Id.* at 701. The danger of prejudice is especially great “where such an opinion is expressed by a government official, such as a sheriff or a police officer,” because “the opinion may influence the factfinder and thereby deny the defendant of a fair and impartial trial.” *Id.* at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 507 P.2d 159, *rev. denied*, 82 Wn.2d 1006 (1973), the court reversed a double murder conviction because an ambulance driver was allowed to testify that the defendant had not shown the usual grief over the violent murders of his wife and child. In *Haga*, the ambulance driver based his opinion on his experience of 27 years responding to death scenes, and not on personal knowledge of the defendant. The court reasoned that the witness should have been limited to a statement of facts, leaving the jury free to form its own conclusions. *Id.*, 8 Wn.App. at 491.

D. Sgt. Fouch's Repeated Comments That "They Were Dead" Should Have Been Excluded Under ER 403 Because its Potential for Prejudice Substantially Outweighed any Possible Probative Value

Evidence Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." And even if Fouch's subjective opinion that the other drivers "were dead" had some relevance, it was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," within the meaning of ER 403.

Where the probative value of evidence is substantially outweighed by its unfairly prejudicial effect it is to be excluded under ER 403. "Unfair prejudice," as described in the rule, is present when evidence is more likely to "stimulate an emotional response rather than a rational decision" among jurors. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

Sgt. Fouch's objectionable statements had no probative value about danger to others,² and were highly prejudicial within the meaning of

² Fortunately, there were no deaths or injuries, other than one officer who received two bruises and Mr. Kollman's near death from gunshots that barely missed his head, and being beaten in the head, kicked, punched and shocked with a taser, all of

ER 403. The objectionable statements followed a long line of questions detailing Mr. Kollman's driving on the night of the incident, and Fouch's testimony should have stopped there.

At trial, the prosecutor argued in response to the defense objection: "That's his perception at the time, as he is observing the events." Exhibit 2, RP 23. But this was not Fouch's "perception"; it was his subjective characterization and concern, and *that* was not in any way relevant to what he was describing about Mr. Kollman's driving.

First, the statement violated the court's motion *in limine* prohibiting police officers from testifying in a conclusory way whether Mr. Kollman drove in a reckless manner or that Mr. Kollman was endangering other motorists on the road. Sgt. Fouch's "they were dead" opinions were far more egregious than the reversible error in *State v. Farr-Lenzini, supra*. This testimony on the ultimate jury questions whether Mr. Kollman was endangering other civilian drivers invaded the province of the jury.

Second, as an inaccurate statement of fact, these statements were profoundly prejudicial because of their inherent tendency to arouse the emotions of the jury. A similar statement resulted in reversal in *City of*

which occurred after he had been stopped. Thus, Sgt. Fouch's opinion that the other drivers were "dead" in the course of the chase had no probative value.

Auburn v. Hedlund. 165 Wn.2d 645, 201 P.3d 315 (2009), which involved a 911 call that was played for the jury where the witness incorrectly described the scene of an accident as having decapitated bodies and mangled bodies of children. The court ultimately determined that “[a]dmission of the 911 tape was an abuse of discretion because the recording was inflammatory and of dubious probative value.” *Id.* at 655. The facts of this case, where a police sergeant wrongly concluded other drivers were “dead,” was both factually inaccurate and highly inflammatory with no legitimate probative value, much like the 911 call in *Hedlund*.

This court should apply the same reasoning as the *Hedlund* Court and find that this inflammatory statement constituted an error that requires a new trial, or at least strike the special verdict finding because that was directly impacted by this testimony. *See also State v. Crenshaw*, 98 Wn.2d 789, 806–07, 659 P.2d 488 (1983) (cautioning prosecutors to use restraint in admitting emotionally charged evidence when the criminal act is amply proved by non-inflammatory evidence).

E. **The Error of Admitting the “They Were Dead” Statements, Particularly Given Their Substantial Prejudicial Effect, Cannot be Deemed Harmless**

Our courts have used two tests to determine whether error was harmless beyond a reasonable doubt: the “overwhelming untainted

evidence test,” and the “contribution test.” The “overwhelming evidence test” will only find the asserted error harmless “if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Under the “contribution test” the court looks “only at the tainted evidence to determine if that evidence could have contributed to the fact finder’s determination of guilt. If so, reversal is required.” *Id.* When tainted evidence *could have been* used by a jury to reach a finding against a criminal defendant, the court cannot say beyond a reasonable doubt that the error was harmless. *See Bumper v. North Carolina*, 391 U.S. 543, 550 (1968), *Chapman v. California*, 386 U.S. 18, 22 (1967).

In this case Sgt. Fouch’s “they were dead” statements were almost certainly the primary basis for the jury’s special finding that Mr. Kollman put other motorists in danger when he fled from the police.³ This error cannot be deemed “harmless.”

³ The only other evidence that Mr. Kollman drove in a manner that put other motorists in danger was when Sgt. Fouch stated that Mr. Kollman “split” two cars by driving very close to their back bumpers and forcing them out of their lanes of travel but, on cross examination, he readily agreed that these cars could have been pulling off the road in response to the pursuing police officers’ emergency lights and sirens, as required by law. *See* RP (6/26/12) 99-100.

V. **A NEW TRIAL SHOULD BE GRANTED OR, AT THE VERY LEAST, THE SPECIAL VERDICT FINDING SHOULD BE STRICKEN**

As already noted, the standard range for this offense was 0-60 days in jail but the jury's special verdict finding that other drivers were "threatened with physical injury or harm by the defendant's actions," as required by RCW 9.94A.834 to enhance the sentence by a year and a day, should at least be stricken and the Defendant resentenced without that finding.

From this record, it is clear that the objectionable testimony from Sgt. Fouch was the most compelling, and probably the exclusive evidence in support of this special verdict finding. Fouch's numerous, inflammatory statements that he, as an experienced police officer, thought the other drivers on the roadway "were dead," and that he "thought [the defendant] was going to kill people," and that he "was almost certain they were going to die," was not relevant to any other issue in the case besides this special finding. Accordingly, even if this Court does not order a new trial, it should at least strike the special verdict finding and order that the Defendant be resentenced.

There is ample authority for an appellate court to strike a special verdict. The most obvious example is the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), where a superior court judge

imposed an exceptional sentence based upon a judicial finding of an aggravating factor. For example, in the case of *In re Beito*, 167 Wn.2d 497, 220 P.3d 489 (2009), the Court found a *Blakely* violation and reversed the sentence only, and remanded the case “for resentencing within the standard range.” 167 Wn.2d at 508. Similarly, our courts have stricken firearm and deadly weapons findings without ordering a new trial. *In re Personal Restraint of Delgado*, 149 Wn.App. 223, 237, 204 P.3d 936 (2009).

VI. MITIGATING CIRCUMSTANCES JUSTIFY AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE

In *State v. Jeannotte*, 133 Wn.2d 847, 947 P.2d 1192 (1997), the Washington Supreme Court recognized that:

The SRA provides certain “failed defenses” may constitute mitigating factors supporting an exceptional sentence below the standard range. . . . These “failed defense” mitigating circumstances include self-defense, duress, mental conditions not amounting to insanity, and entrapment: RCW 9.94A.390(1)(a) (victim was aggressor); RCW 9.94A.390(1)(c) (defendant acted under duress or compulsion insufficient to constitute a complete defense); RCW 9.94A.390(1)(d) (defendant, with no apparent predisposition to do so, was induced by another to participate in the crime); RCW 9.94A.390(1)(e) (capacity to appreciate wrongfulness of conduct was significantly impaired). *See also* Boerner, *supra*, at 9-24 to 9-30. By allowing failed defenses to be treated as mitigating circumstances, the Legislature recognized there may be “ ‘circumstances that led to the crime, even though falling short of establishing a legal defense, [that] justify

distinguishing the conduct' ” from that in other similar cases. *Hutsell*, 120 Wn.2d at 921, 845 P.2d 1325 (quoting Boerner, *supra*, at 9-23).

133 Wn.2d at 852 (footnotes omitted). The most applicable statutory “Mitigating Circumstance” for this case is where:

The defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.

RCW 9.94A.535(1)(e).

There can be no doubt that Mr. Kollman’s behavior fits neatly within this statutory basis for an exceptional sentence downward because his “capacity to appreciate the wrongfulness of his conduct, or to conform his . . . conduct to the requirements of the law was significantly impaired.” All five officers described Kollman’s demeanor as “surreal,” “unreal,” “blank,” “completely calm,” exhibiting a “thousand yard stare as if he was looking right through us.” *See, e.g.*, RP (6/26/12) 100-102. They described his reaction to gun shots fired at point blank and barely missing his head as if someone was “lightly tapping on his window to get his attention.” *Id.* at 104-115. He was hit extremely hard on the top of his head three times with a heavy flashlight, but neither that, nor being shocked twice with the Taser “appeared to have any effect on him.” *Id.* at 117-120; 150-152; 211-214. And, when he finally “became rational,” he profusely and repeatedly apologized to the police officer who inflicted his

head wounds, asked if anyone had been hurt, and explained that he gets “panic attacks.” *Id.* at 151-152; 160-163; 167-168; 198-199; 214-217; 220; 234-235. Deputy Stein described him in testimony as a “genuinely nice man,” after he spoke with Mr. Kollman in the aid car and at the hospital. *Id.* at 246-251.

The opinions and testimony of Dr. Heavin, and prior evaluations by Dr. Hockeiser, and Dr. Ron Powell all reached the same conclusion: that Gary Kollman was suffering from a severe mental disorder and out of touch with reality when he fled the police. RP (6/27/12) 367-437. He has a wonderful family, job, and everything to live for. *Id.* at 29-365. The only possible explanation for his conduct is that his “capacity to appreciate the wrongfulness of his . . . conduct, or to conform his . . . conduct to the requirements of the law, was significantly impaired,” as set forth by the Legislature in RCW 9.94A.535(1)(e).⁴

⁴ Since his arrest for the current offense, Gary Kollman met with counselor, Dr. Ron Powell, for “forty-three sessions . . . and unlike our previous therapy episodes, this one ended at a point (*i.e.*, 3/8/12) where I considered his response to treatment optimal and considered him no longer symptomatic or in need of further services.” *See* RP (8/2/12) 540-548; CP 35-78. Over the course of this treatment, Gary made “changes [that] were meaningful” and he learned “various cognitive behavioral methods that he actually did have control over his behaviors even during a panic attack.” *Id.* at 3. His progress has been “put to the ultimate test when Mr. Kollman actually was pulled over by the police (once for a bad headlight and on another occasion, when he had an expired tag on his vehicle),” and he did not panic. *Id.* It is significant that Gary has also “reported high functioning at his new job of three months or so; was no longer having nightmares; was able to tolerate being in the presence of police and weighted his confidence in the ability to stop his car if police told him to as 10 out of 10; could again read articles in the paper about police and watch police shows and his only complaint was mild startle in the face of sudden unexpected stimuli.” *Id.*

VII. CONCLUSION

Sgt. Fouch's objectionable testimony clearly violated the court's order *in limine* and, pursuant to *State v. Farr-Lenzini, supra*, and the numerous other cases and rules of evidence discussed herein, Defendant's motion for a new trial should have been granted. At the very least, the jury's special verdict finding should be stricken since it was most directly affected by this error, which cannot be deemed harmless.

DATED this 28th day of January, 2013.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

Dr. Powell is of the opinion that Mr. Kollman will not "need further treatment for either the PTSD or Panic Disorder as it seems the gains he has made this time are substantive and his confidence in the principles of treatment and what he has learned from his therapy should continue to grow." *Id.* at 4. Dr. Powell concludes that Gary's "prognosis for maintenance of these gains is excellent in that he is quite motivated not to allow himself to engage in patterns of emotional and behavioral avoidance that could rekindle his fears, grow his anxiety and place the recovery of his life in jeopardy." *Id.*

PROOF OF SERVICE

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

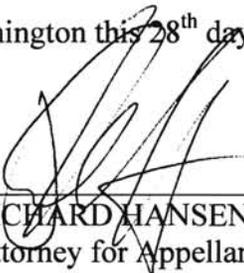
On the 28th day of January, 2013, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

Seth Aaron Fine
Deputy Prosecuting Attorney
Snohomish County Prosecuting Attorney
Attention: Appeals
3000 Rockefeller Avenue, MS 504
Everett, WA 98201

And mailed to Appellant:

Gary D. Kollman

DATED at Seattle, Washington this 28th day of January, 2013.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant