

70601-2

70601-2

NO. 70601-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JONES,

Appellant.

REC'D

JUL 14 2014

King County Prosecutor
Appellate Unit

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

The Honorable Carol Schapira, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2014 JUL 14 PM 4:15

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
TAKEN TOGETHER OR SEPARATELY, TROOPER FORD’S INFLAMMATORY TESTIMONY AND TROOPER BRADY’S IMPROPER OPINION ON GUILT NECESSITATE REVERSAL.....	1
a. <u>The Reasons Why People Die on Freeways and Why Field Sobriety Tests Might Not Be Administered Are Irrelevant to Any Issue in this Case</u>	1
b. <u>The Only Effect of this Testimony Was to Encourage an Emotional Reaction to the Dangers Presented by Drunk and Aggressive Drivers</u>	3
c. <u>Trooper Ballard’s Opinion Testimony Invaded the Province of the Jury</u>	5
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Seattle v. Mesiani
110 Wn.2d 454, 755 P.2d 775 (1988)..... 4

State v. Edwards
131 Wn. App. 611, 128 P.3d 631 (2006)..... 2, 3

State v. Farr-Lenzini
93 Wn. App. 453, 970 P.2d 313 (1999)..... 5

State v. Montgomery
163 Wn.2d 577, 183 P.3d 267 (2008)..... 5

State v. Peterson
133 Wn.2d 885, 948 P.2d 381 (1997)..... 4

State v. Wicker
66 Wn. App. 409, 832 P.2d 127 (1992)..... 2, 3

FEDERAL CASES

Perez v. Campbell
402 U.S. 637, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971)..... 4

A. ARGUMENT IN REPLY

TAKEN TOGETHER OR SEPARATELY, TROOPER FORD'S INFLAMMATORY TESTIMONY AND TROOPER BRADY'S IMPROPER OPINION ON GUILT NECESSITATE REVERSAL.

a. The Reasons Why People Die on Freeways and Why Field Sobriety Tests Might Not Be Administered Are Irrelevant to Any Issue in this Case.

No one died as a result of the offense in this case. No one was injured. No property was damaged. Yet Trooper Ford testified that driving under the influence and aggressive driving are “one of the core reasons why people are actually dying on the freeways.” 3RP 91. Ford also testified field sobriety tests might not be administered because “We don't want to get hurt or – our main goal is to go home safe at night. We have families, and it's our main goal to be safe.” 3RP 93. This testimony was also unfairly prejudicial and utterly irrelevant.

The State argues Trooper Ford's testimony about not administering field sobriety testing for reasons of officer safety was not improper because it explained why the tests might not have been administered in this case. Brief of Respondent at 17-19. The State asserts, “The jury was entitled to know why field sobriety tests are not always completed since there was no evidence of field sobriety tests in this case.” Brief of Respondent at 18. The State cites no authority for this assertion, and it is in conflict with this Court's precedent.

Information is not relevant merely because it serves to explain why a police officer took a given action, or, by implication, did not take a given action, in the course of an investigation. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006). In Edwards, a police officer testified a confidential informant told him Edwards was dealing in crack cocaine. Id. at 613. The State argued the informant's statement was relevant for a non-hearsay purpose, namely, to explain why the officer began his investigation. Id. at 614. The court rejected this argument because why the officer investigated was "not an issue in controversy" and was therefore "not relevant." Id. The court explained that the only issue was who sold the cocaine, not why an officer investigated. Id. at 615. When the officer's state of mind is not relevant to an element of the crime, hearsay is not admissible to illustrate that state of mind. Id.

Similarly, in State v. Wicker, 66 Wn. App. 409, 411-12, 832 P.2d 127 (1992), the State argued a non-testifying fingerprint examiner's initials verifying the analysis were admissible to explain police department procedures. The court rejected this argument because those procedures were not challenged or in dispute. Id. at 412. "The State cannot volunteer an unnecessary explanation as an excuse to introduce otherwise inadmissible hearsay." Id.

As in Edwards and Wicker, Officer Ford's testimony about the potential reasons for not administering field sobriety tests was, at best, an unnecessary explanation that was not relevant to any fact at issue in the case. No element of driving under the influence or attempt to elude depends on the arresting officer's state of mind. Additionally, as the State concedes, Ford did not claim that any of the listed reasons was the actual reason why the tests were not administered to Jones. Therefore, it was even less relevant than the testimony in Edwards. It was probative of no fact whatsoever that could inform the jury's decision.

Similarly, the State argues Ford's testimony about people "actually dying on the freeways" was been relevant to his training and experience as a collision reconstructionist. Brief of Respondent at 11. But since there was, as the State concedes and the trial court noted, no accident in this case, his training in reconstructing accident scenes was entirely irrelevant. Describing driving aggressively or while under the influence as core causes of fatal accidents is entirely unrelated to proving those offenses, and it is likely to provoke a prejudicially emotional response by the jury.

- b. The Only Effect of this Testimony Was to Encourage an Emotional Reaction to the Dangers Presented by Drunk and Aggressive Drivers.

Because Ford's testimony did not relate to the actual circumstances of this case, it was likely to cause the jury to speculate about far more dire

outcomes. The State argues Ford merely listed possible reasons why an officer may not administer field sobriety tests in a given case. Brief of Respondent at 19. But Ford clearly and repeatedly emphasized one reason: officer safety. 3RP 93. Moreover, he did not discuss officer safety solely in neutral terms such as “officer safety.” He raised the specter of officers hurt or killed in the line of duty who do not get to “go home safe at night.” 3RP 93. Although Ford did not claim tests were not administered in this case because of Jones’ behavior, this testimony was unfairly prejudicial because it was likely to encourage the jury to speculate about what might have happened had Jones’ obvious belligerence gone even further.

Ford’s testimony about the reasons people are dying on the freeways was similarly likely to encourage speculation about fatal accidents caused by impaired drivers. Whether intentional or not, Ford’s testimony was likely to ensure the jury felt revulsion and outrage towards Jones due to what has been described in case law as “slaughter” and “carnage” on the roads of our nation. Perez v. Campbell, 402 U.S. 637, 657, 91 S. Ct. 1704, 29 L. Ed. 2d 233 (1971) (Blackmun, J. concurring); City of Seattle v. Mesiani, 110 Wn.2d 454, 459, 755 P.2d 775 (1988).

The State is limited to trying the charged offenses. State v. Peterson, 133 Wn.2d 885, 889, 948 P.2d 381 (1997). It may not present evidence designed to suggest that, under facts not present in this case, the charged

offenses can morph into more serious crimes such as assaulting or intimidating a police officer and vehicular homicide. As discussed in the opening Brief of Appellant, the evidence in this case was far from overwhelming. See Brief of Appellant at 15. The improperly admitted evidence was likely to encourage the jury to set aside its reasons for doubt based on its emotional response to the dangers caused by drunk and aggressive drivers. This Court should reverse.

c. Trooper Ballard's Opinion Testimony Invaded the Province of the Jury.

Whether Jones intended to stop is a question of his mental state. While circumstantial evidence is usually the only possible evidence of a mental state, witnesses may not offer a direct opinion on a person's mental state when that mental state is a disputed element of the charged offense. State v. Montgomery, 163 Wn.2d 577, 591, 594, 183 P.3d 267 (2008); State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999). The State's attempt to distinguish this case from Farr-Lenzini fails.

Ballard did not merely testify about his observations of Jones' driving pattern. He drew the conclusion that Jones was "evasive," which is no different from saying he was "attempting to get away from me" as in Farr-Lenzini. 2RP 25; 93 Wn. App. at 458. Ballard drew the conclusion that Jones "did not appear to be finding a safe spot to stop," and "didn't seem to

be braking to let me know they were just simply trying to find a safe spot.” 2RP 25-26. These comments are no different from the comment in Farr-Lenzini that the driver “knew I was back there and was refusing to stop.” 93 Wn. App. at 458. In both cases, the officer did not limit himself to observations of the person’s driving; he instead offered opinions about what was in the driver’s mind. This was a direct opinion on guilt that requires reversal. Id. at 466.

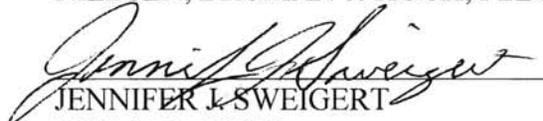
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Jones requests this Court reverse his convictions.

DATED this 14th day of July, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

