

NO. 44847-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHARI BRENTIN,

Appellant.

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

The Honorable Michael H. Evans, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Exclusion of relevant evidence denied appellant her right to present a defense.

2. The court admitted highly prejudicial hearsay testimony.

3. Admission of improper opinion testimony as to appellant's guilt denied her a fair trial.

Issues pertaining to assignments of error

1. Appellant was charged with first degree theft, and the State's theory was that she deceived the alleged victim into giving her large sums of money to pay veterinarian bills, when she in fact used the money for other things. The defense was that appellant was offered the money, with no restrictions on how it was used once the vet bills were paid. Appellant offered testimony that the alleged victim frequently carried large sums of cash to give away when she saw the need, but the court excluded that evidence. Where the offered evidence tended to negate the element of deception, did its exclusion deny appellant her right to present a defense?

2. Bank employees were permitted to testify, over defense objection, that the reason the alleged victim withdrew large sums of cash was to save appellant's cat. Where this testimony was based solely on the

alleged victim's out of court statements, did the court improperly admit this hearsay evidence?

3. The bank manager was permitted to testify that after the last transaction she called the police, the bank's fraud department, and Adult Protective Services. Where this testimony served only to convey the witness's opinion that appellant was deceiving the alleged victim and preying on her vulnerability, did admission of this testimony deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On December 29, 2011, the Cowlitz County Prosecuting Attorney charged appellant Shari Brentin with one count of first degree theft. CP 1-2. RCW 9A.56.030(1)(a) and RCW 9A.56.010(18)(c). The State also gave notice of its intent to seek an exceptional sentence, alleging that the victim was particularly vulnerable and/or that the charged offense was a major economic offense. CP 1-2; RCW 9.94A.535(3)(b); RCW 9.94A.535(3)(d). An amended information charged Anthony Brentin with the same offense. CP 3-4.

The case proceeded to jury trial before the Honorable Michael Evans, and the jury returned a guilty verdict and affirmative findings on

the special verdicts. CP 66-68. Relying on the jury finding that the victim was particularly vulnerable, the court imposed an exceptional sentence of 12 months plus one day. CP 75, 79-80. Shari Brentin filed this timely appeal. CP 84.

2. Substantive Facts

Suzanne Faveluke is financially well off and well-known for being kind and generous. RP 223-24, 309, 490, 677. She had made donations to the Woodland police and fire departments over the years, and in June 2011, Faveluke gave the owners of a local restaurant \$20,000 to pay off their debt. RP 202, 479-80. The owners were not close friends or family members. RP 223. Faveluke simply became acquainted with them by eating at the restaurant, she asked them how much they owned, and she gave them the money. RP 221-22.

Faveluke got to know Anthony Brentin when he was fire chief for the City of Woodland. RP 242, 730. She was generous donor, and over time they developed a friendship. RP 242-43, 732. Faveluke also got to know Anthony's wife, Shari¹. RP 178.

In June 2011, Anthony decided to run for City Council. RP 738. During the campaign, a local newspaper ran an article about Anthony, saying he had an outstanding judgment that needed to be paid. RP 691.

¹ The parties are referred to by their first names to avoid confusion. No disrespect is intended.

The Brentins had financial difficulties beginning in late 2010. They were unable to pay their rent and were evicted, and in July 2011 a judgment was entered against them for \$4680.24. RP 420, 429, 435. In October, Faveluke gave Anthony check for \$5000, and he used the money to pay the judgment. RP 437, 745-46. Faveluke told a friend and neighbor that she did not want the newspaper article about the judgment to hurt Anthony's campaign, and she had given him \$5000. RP 674-76, 681.

Faveluke had some difficulties in the fall of 2011. First, her beloved pet dog died, and she was devastated by the loss. RP 174, 266. Then she was severely injured falling down some stairs, and she was in a convalescent care facility for a few weeks. RP 180. The Brentins visited her almost every day. RP 219, 747-48. When she returned home, they continued to care for her. They visited, helped her around the house, and made sure she had food and was eating. RP 219-20. Shari also took her on errands. RP 220.

One of Faveluke's favorite places to visit was her bank. Before her accident she stopped in every day. She chatted with the tellers, drank coffee, and occasionally conducted a transaction. She was well known and well liked. RP 263-65, 317, 382. After her accident, Faveluke was not the same happy-go-lucky person she had been when she went to the

bank. She did not stop to visit or drink coffee. She had difficulty walking, and Shari accompanied her inside on a few occasions. RP 274, 277.

Shari and Faveluke shared a love of animals. Shari had taken care of Faveluke's cat while she was in the nursing home, and when Faveluke learned that Shari's cat was sick and Shari was unable to pay the veterinarian, Faveluke offered to help. Shari paid \$1899.29 for vet bills during November and December 2011 with money Faveluke had given her, although the original estimate was much higher and the cat required continuing care after that. RP 337, 366, 374-75. She also used money from Faveluke for other expenses. RP 612-13.

Faveluke withdrew \$1000 at her bank November 17, 2011. RP 274, 283. A few days later she cashed a check for \$5000. RP 284. On November 25, Shari negotiated a check from Faveluke for \$4000. RP 532-33. On November 29, Faveluke withdrew \$3400 in cash and had a check drawn for an insurance payment of \$952. RP 286. On December 7, Faveluke asked to withdraw \$5000 in cash, but she was issued a cashier's check instead. RP 292. She went to another branch later that day and cashed the check. RP 723, 726. Shari accompanied Faveluke on November 17, November 29, and December 7. RP 274, 285, 292, 725.

Bank employees became concerned about the number of larger than typical withdrawals Faveluke had made. RP 287-88. After the

December 7 transaction, the branch manager called the police. RP 297. Police visited Faveluke at home on December 14, 2011. RP 555. Anthony was at her house when police came to the door, and he waited outside while they talked. RP 558-59. Police returned to Faveluke's home on December 22 and asked her to make a formal statement. RP 563-64. The officer wrote a statement after speaking with Faveluke, and she signed it under penalty of perjury. RP 214, 566-67.

The statement indicates that Faveluke had met Anthony when he was fire chief in Woodland and she made a donation to the fire department. After she fell down the stairs, Anthony and Shari started coming over every day to help her. They helped around the house, helped her shower, and made sure she ate, but they did not help with her bills or do any financial transactions on her behalf. RP 587. On October 12, 2011, the Brentins were at her house talking about Anthony's campaign for city council. Anthony mentioned some campaign signs he had seen and said signs would help his campaign, but they cost money. Shari said that if they had the money, they would buy campaign signs. Faveluke decided to help Anthony by donating to his campaign. She wrote a check for \$5000, but kept \$100 for herself. The money was to be used solely for the campaign. RP 587.

The statement continues that on November 16, 2011, Shari stopped by her house, crying, and said that her cat was dying and the vet could save him but it would cost \$1000, and the vet only took cash. Faveluke gave Shari the money, understanding that the entire amount would be used to pay the vet. RP 588. On November 29, Shari came by her house again, saying the cat needed surgery or it would die. She again said the vet only took cash, so Shari drove Faveluke to the bank, where she withdrew \$4352 in cash and gave it to Shari. RP 588. Then, on December 7, 2011, Shari came to her house again, saying the cat needed more work done. She said she either had to pay the vet \$5000 in cash or they would put the cat to sleep. Faveluke agreed to give her the money, and Shari drove her to the bank. The bank refused to give her cash and instead issued a cashier's check. Shari then drove her to a number of banks until they found one that would cash the check. Faveluke gave Shari the money, thinking it would be used to pay for an operation for the cat. RP 588-89. At Shari's request, Faveluke did not talk with Anthony about the money she gave Shari for the cat. RP 589.

Faveluke's trial testimony was not completely consistent with her statement to the police. Faveluke testified that Shari told her she had a cat that was dying and asked to borrow \$5000 for medical treatment. RP 178. Although Faveluke had said in her statement that she never talked to

Anthony about money for the cat, at trial she testified that she gave Anthony a check for \$5000 to pay for the cat's surgery. RP 182-83. She then testified she never talked to Anthony about the cat. RP 203. She went to the bank to get the amount Shari told her she would need to save the cat's life. RP 197. She was sure the money would be used for the cat, because Shari did not tell her any other reason that she needed the money. RP 198.

Faveluke testified that she gave Anthony \$500 for his campaign, to use for signs and other campaign expenses. RP 183, 245. She acknowledged that she said in her statement to police that she had given Anthony \$4900 for his campaign, out of a \$5000 check, but at trial she testified that she believed that money was going to save the cat's life. RP 195-96. She did not know how much money she had given the Brentins, but she believed it was all to save the cat's life. RP 202.

Faveluke acknowledged that she might have read a newspaper article about Anthony's campaign, and if she read something negative she would have wanted to help. RP 247-48. She then recalled talking to a neighbor about the negative newspaper article and that she gave Anthony a gift to help him with his problem, because she has been known to do things like that. RP 253-54.

Finally, Faveluke testified that she and Shari talked about animals because Shari had cared for Faveluke's cat while she was in the nursing home. Shari told Faveluke that she had a cat that was very sick, but she did not have the money to pay for treatment because she was having trouble financially, so Faveluke offered to pay for the cat's treatment. RP 231-32.

The jury also heard Shari's statements to the police. She told them she had met Faveluke when Anthony was the fire chief. Shari started helping Faveluke after her accident that fall and visited her every day once she returned from the nursing home. RP 593-94. When asked if she had ever taken Faveluke to the bank, Shari said she had, and she would usually wait by the door or stand to Faveluke's side while she conducted her business. RP 597. Shari said that Faveluke had given her approximately \$3000 to pay vet bills, because the vet was going to put her cat to sleep if she could not pay for treatment. RP 597-98.

Shari explained that on December 7, she waited in the car while Faveluke went into the bank. When Faveluke came back out, she said the bank would not cash her check. Shari then went inside with her to find out what was wrong. The bank employee told them the vault was locked and they could not get the cash and asked Faveluke to wait until the next day

to cash the check. Faveluke insisted on going to another branch, because she felt Shari needed the money immediately. RP 602.

The police also asked Shari to provide a written statement. In her statement she said that Faveluke gave her \$4000 for vet bills. RP 605. She had initially told Faveluke the bill would be \$1000, but it turned out to be less. RP 612-13. When she tried to return the money, Faveluke said she did not want it back. RP 628-29. Shari then used the money to pay off some personal bills, because she was in financial distress. RP 612-13.

C. ARGUMENT

1. BY PROHIBITING THE DEFENSE FROM CROSS EXAMINING FAVELUKE REGARDING HER PRACTICE OF CARRYING LARGE SUMS OF CASH TO GIVE AWAY, THE COURT DENIED SHARI HER RIGHT TO PRESENT A DEFENSE.

Prior to trial, the State moved to exclude evidence that Faveluke had previously given money to people other than the Brentins. RP 89. Defense counsel responded that he planned to offer testimony from witnesses about specific unsolicited gifts Faveluke had made. RP 95. The State's position was that evidence relating to Faveluke's prior giving was character evidence which could not be proved by specific instances of conduct unless character was an essential element of the defense. RP 111-13.

The defense argued, however, that Faveluke should be permitted to answer questions regarding her track record of giving several thousands of dollars in gifts to non-family members. RP 128. While the State's case was that the Brentins solicited money from Faveluke for one purpose and used it for another, the defense was that they did not solicit the money, it was offered, and there were no limitations on its use. RP 132. Counsel argued that it would be hard for the jury to believe that happened unless it heard that that was the kind of thing Faveluke did. RP 133-34. The evidence of unsolicited gift-giving with no strings attached would negate the element of fraud or deception essential to the charged offense. RP 137. The proffered evidence was thus highly relevant and not confusing, and it would be nearly impossible to present a defense without it. RP 139. Counsel further argued that the constitutional right to present a defense trumps the operation of any evidentiary rule which would exclude this evidence. RP 140.

The court ruled that only evidence of Faveluke's reputation for being generous to non-family and the specific gift to the restaurant owners would be admissible. RP 149-50. It excluded all other offered testimony on this issue. RP 153. Defense counsel clarified that much of the information the defense had on this issue, including gifts of thousands to many people needing money, came directly from Faveluke. RP 154. The

court ruled that evidence regarding Faveluke's reputation and the gift to the restaurant owners was sufficient to allow the parties to argue their cases without going too far afield. RP 154-55.

Despite the State's pretrial argument that Faveluke's prior or normal behaviors had no bearing on the issues in this case², the prosecutor elicited testimony from several bank employees regarding Faveluke's customary actions and transactions when she visited the bank. The branch manager testified that when Faveluke came to the bank prior to November 2011, she would typically check her balance, but she would never withdraw large sums of cash. RP 264, 271. Occasionally she would have one of the tellers make up a cashier's check to pay a bill, but she did not typically withdraw thousands in cash. RP 272. A teller testified that Faveluke typically came to the bank to visit, drink coffee, check her balances, cash a small check, or get change for large bills, but she did not typically withdraw large sums of cash. RP 317-18. Another teller testified that Faveluke would come to the bank to visit, drink coffee, and check her balances, but she did not normally get cashier's checks to pay her bills. RP 382, 391.

Following this testimony, the defense moved for a mistrial on the basis that the court precluded the defense from eliciting evidence about a

² RP 90, 111, 146.

number of unsolicited cash gifts by Faveluke. RP 666-67. Counsel explained that he specifically sought to adduce that Faveluke had said in her defense interview that a lot of her giving was in cash and that she would always have multiple thousands to give. RP 666-68. Counsel argued that this evidence was necessary in order to present a defense. RP 667. The court denied the motion for mistrial, ruling that the issue was covered in the motions in limine and noting that Faveluke had testified about some donations to the fire and police department, despite the court's ruling that those gifts were not admissible. RP 668.

Both the state and federal constitutions guarantee a criminal defendant "a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); U.S. Const. Amend. VI, XIV; Const. art. I, § 22. This right to present a defense guarantees the defendant the opportunity to put his version of the facts as well as the State's before the jury, so that the jury may determine the truth. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (citing Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). "The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions." State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing Washington v. Texas, 388 U.S. at 23).

Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates that the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Darden, 145 Wn.2d at 622; State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Moreover, the State's interest in excluding prejudicial evidence must "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Darden, 145 Wn.2d at 622). Although a trial court has discretion to determine whether evidence is admissible, a decision which is manifestly unreasonable or based on untenable grounds must be reversed on appeal. See State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000), review denied, 142 Wn.2d 1024, (2001).

Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more or less probable than it would be without the evidence. ER 401. Only minimal logical relevancy is required for evidence to be admissible. State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986) (quoting 5 K. Tegland, Wash. Prac. § 83, at 170 (2d ed. 1982)), affirmed, State v. Bebb, 108 Wn.2d 515, 740 P.2d 829 (1987).

As trial counsel argued, evidence that Faveluke frequently made large, unsolicited cash gifts to people she felt were in need was relevant to support the defense that that is precisely what occurred in this case. Such evidence tended to negate the element of fraud or deception. Moreover, the need for this evidence was great. The defense was that Faveluke offered Shari cash when she learned of the Brentins' financial difficulty with regard to the vet bills, and she placed no restriction on the excess funds given once those bills were covered. As counsel noted, such generosity was not within the common experience of most jurors. Testimony from Faveluke that she frequently made such gifts, and carried large sums of cash to do so, would support the defense, rebut the State's evidence, and make the element of deception less probable. By contrast, there is no compelling need for the State to suppress this evidence. Because there was no showing that admission of this testimony from Faveluke would have disrupted the fairness of the trial, exclusion of this relevant and necessary evidence was error.

The State argued below that evidence that Faveluke's other giving was improper character evidence. The trial court determined that Faveluke's generosity was a pertinent character trait but limited proof of that trait to her reputation and to one specific gift. See ER 404(a)(2) (allowing evidence of a pertinent character trait of the victim offered by

the accused). Under ER 405, a pertinent character trait may be proved by evidence of reputation, and “[o]n cross examination, inquiry is allowable into relevant specific instances of conduct.” ER 405(a). Here, the defense sought to introduce evidence, through cross examination of Faveluke, that she often carried large amounts of cash to give away. Cross examination regarding this pertinent character trait, to rebut the State’s evidence that she did not typically withdraw large sums of cash, is not precluded by the evidentiary rules.

Even if this evidence does not fall squarely within ER 404(a)(2) and ER 405(a), constitutional concerns trump strict application of court rules. See Jones, 168 Wn.2d at 723-24; State v. Anderson, 107 Wn.2d 745, 749-50, 733 P.2d 517 (1987); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007). Thus, evidence that is relevant and material to a defense cannot be excluded under an evidentiary rule or statute unless the governmental interests furthered by the rule or statute outweigh the interests protected by the defendant’s constitutional rights. State v. Baird, 83 Wn. App. 477, 482-83, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997); see also Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 504 (2006) (rules excluding evidence may violate the right to present a defense if the rules are disproportionate to the purpose they are designed to serve). And where the evidence has high

probative value to the defense, “no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. 1, § 22.” Jones, 168 Wn.2d at 723-24; Hudlow, 99 Wn.2d at 16.

In Jones, the Supreme Court held that exclusion of evidence of high probative value to the defense violated the right to present a defense, even if that evidence was inadmissible under the rape shield statute. Jones, 168 Wn.2d at 720-21; see also Baird, 83 Wn. App. at 483 (evidence which would be excluded under privacy act may be admissible to protect right to present a defense). Here, testimony that Faveluke customarily carried large amounts of cash to give away when she saw the need was highly probative of whether Shari needed to use deception to obtain the cash gifts she received from Faveluke. It also rebutted the State’s evidence that Faveluke never withdrew large amounts of cash from the bank. Even if this evidence did not conform to the requirements of the evidentiary rules, it was necessary to protect Shari’s right to present a defense, and it should have been admitted in this case.

Exclusion of this highly probative evidence denied Shari a meaningful opportunity to present a complete defense. This constitutional error is presumed prejudicial unless the State proves beyond a reasonable doubt that the error was harmless. Maupin, 128 Wn.2d at 928-29. The

evidence at trial, including Faveluke's testimony, showed that she was eccentric and generous. Shari did not dispute that she received generous gifts from Faveluke or that she used that money to pay her vet bills as well as other expenses. Had Faveluke been permitted to testify that she often carried large sums of cash to give away, the jury could have entertained a reasonable doubt as to the circumstances under which Faveluke gave Shari the money in this case. The State cannot prove that the erroneous exclusion of this evidence did not contribute to the verdict, and Shari's conviction must be reversed.

2. THE TRIAL COURT ERRONEOUSLY ADMITTED HEARSAY TESTIMONY CONCERNING FAVELUKE'S REASONS FOR WITHDRAWING MONEY.

Teresa Loucks, the customer service manager at Faveluke's bank in Woodland, testified that Faveluke came in with Shari on November 17, 2011. RP 274. Loucks testified that Faveluke wanted to withdraw \$1000, and she asked Faveluke why she needed that much money. RP 278. The prosecutor asked what Faveluke's response was, and the court sustained defense counsel's hearsay objection. RP 278. When the prosecutor asked whether Faveluke's explanation related to Shari, however, the court overruled counsel's hearsay objection. RP 279. Loucks testified that

Faveluke explained that the money was for Shari's cat, and she needed cash to pay the veterinarian. RP 280-81.

When defense counsel's hearsay objections to this testimony were overruled, he asked to voir dire the witness. Counsel established that everything Loucks knew about how the money was to be used came from what Faveluke told her. RP 282. The court noted counsel's objection to her testimony. RP 282.

Loucks testified next that Faveluke returned a few days later, without Shari, and cashed a check for \$5000. The prosecutor asked Loucks if this transaction was similar to the previous transaction as far as what Faveluke said the money was to be used for. Defense counsel raised a hearsay objection, which the court overruled. Loucks answered that the money was for the cat. RP 284-85.

On December 7, 2011, Faveluke returned to the bank by herself and asked to withdraw \$5000 in cash. RP 288. Loucks testified that she showed Faveluke her bank statement, so she could see how much money she had already spent to take care of the cat. She testified that Faveluke was very concerned about the cat and wanted to save its life. Defense counsel's hearsay objections to this testimony were overruled. RP 288-90.

Loucks testified that, instead of cash, she gave Faveluke a cashier's check for \$5000. RP 292. Faveluke left, but she returned later with Shari

and insisted that she needed cash. RP 292. Loucks testified that she tried to get information from Shari about the veterinarian, because Faveluke was in favor of getting a check payable to the vet at that point. RP 293-95. Counsel's hearsay objection to this testimony was overruled. RP 295.

Marjorie Morrison, a teller at the Woodland bank, was also permitted to testify over defense objection that she had talked to Faveluke about the money she withdrew in November. Although Morrison testified that everything she knew about what Faveluke planned to do with the money came from what Faveluke told her, she was permitted to testify that Faveluke withdrew the money for a cat. RP 322-25.

The bank employees' testimony constituted hearsay, which the court should have excluded. Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible as evidence, subject to a few well-established exceptions. ER 802. Direct quotation of an out of court statement is not the only means of putting hearsay into evidence. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001), overruled on other grounds by State v. Rangel-Reyes, 119 Wn.App. 494, 81 P.3d 157 (2003). Where a witness's testimony incorporates out of court statements, that testimony constitutes hearsay, even if the out of court statements are not quoted directly. *Id.*

In Martinez, the trial court at first sustained defense objections to the direct quotation of out of court statements. The prosecutor then modified the questions to elicit the witness's understanding after talking to the declarant. Martinez, 105 Wn. App. at 780. The Court of Appeals characterized this as "backdoor" hearsay. The court noted that having the witness testify to the nature of his understanding after talking to the declarant, instead of reporting what the declarant actually said, was simply an attempt to circumvent the hearsay rule. It held that the resulting evidence was inadmissible hearsay. Martinez, 105 Wn. App. at 782; see also State v. Johnson, 61 Wn. App. 539, 546-47, 811 P.2d 687 (1991) (where inescapable inference from testimony is that witness's knowledge is based on out of court statement, the testimony is hearsay).

Here, as in Martinez, the State was permitted to circumvent the hearsay rule by asking about the bank employees' understanding after talking to Faveluke. Even though these witnesses did not recount what Faveluke actually said, they were permitted to testify that Faveluke was withdrawing money to save Shari's cat. Because their knowledge in that regard was based solely on Faveluke's out of court statements, their testimony was hearsay which the jury should not have been permitted to consider. See Martinez, 105 Wn. App. at 782.

Although evidentiary rulings lie within the trial court's discretion, the court abuses its discretion when its ruling is based on untenable grounds. State v. Crowder, 103 Wn. App. 20, 25-26, 11 P.3d 828 (2000). A decision is based on untenable grounds if it rests on facts unsupported in the record or is reached by applying the wrong legal standard. State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006). Because there was no legal basis for admitting the bank employees' "backdoor" hearsay testimony, the court abused its discretion.

The trial court's erroneous evidentiary ruling requires reversal if, within reasonable probabilities, the outcome of the trial would have been different had the error not occurred. See State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Such is the case here.

Shari was charged with first degree theft by color or aid of deception, and the State's case relied on the jury believing that Shari fooled Faveluke into withdrawing thousands of dollars to save her cat. RP 873. The defense argued that Faveluke gave the Brentins money to help them pay their vet bills and other bills, just like she gave monetary gifts to others. RP 891. And Shari's statement to the police that Faveluke did not want Shari to return the excess money after the vet was paid supported this argument. RP 888. Faveluke was not consistent in her statements as to how much she gave the Brentins and for what purpose, leaving

considerable room for doubt as to the truth of the charges. But the improperly admitted hearsay allowed the State to argue in closing that the jury knew from the bank employees that Faveluke believed all the money she gave Shari was to save the cat. RP 873. Under these circumstances it is reasonably likely the court's erroneous admission of hearsay affected the outcome of the trial, and reversal is required.

3. ADMISSION OF IMPROPER OPINION TESTIMONY AS TO SHARI'S GUILT DENIED HER A FAIR TRIAL.

Prior to trial the defense moved to exclude testimony from the bank employees that they suspected Shari Brentin of wrongdoing and contacted the police based on that suspicion. Counsel argued that such testimony was improper opinion as to Shari's guilt. RP 79. The court denied the motion, stating that bank employees are trained to observe, and the fact that they observe something that makes them suspicious is not opinion. RP 85-86.

Loucks testified that after the December 7, 2011, transaction in which Faveluke was issued a cashier's check instead of \$5000 in cash, she contacted the Woodland Police, Adult Family Protective Services, and the bank's fraud department. RP 297-98. Defense counsel objected that this was improper opinion testimony, and the court overruled the objection. RP 298. The defense moved for a mistrial, arguing that Loucks' opinion

as to Shari's guilt had tainted the jury. RP 311-12. The court disagreed, saying Louck's had merely expressed concern over what she had seen. It denied the motion for mistrial. RP 313.

Loucks's testimony that she called the police, the bank's fraud department, and Adult Protective services served only one purpose: to convey to the jury her opinion that Shari was guilty of deceiving Faveluke and preying on her vulnerability. The court's admission of this improper opinion testimony violated Shari's right to a fair trial.

It is well established that a witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236, 1239 (2009). Improper opinion testimony violates the defendant's constitutional right to a jury trial, because the question of guilt is reserved solely for the jury, and an opinion on guilt, even by mere inference, invades the province of the jury. Montgomery, 163 Wn.2d at 590; State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

Whether testimony constitutes improper opinion as to the defendant's guilt depends on the circumstances of the case. In making this determination, the court considers such factors as (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. Montgomery, 163 Wn.2d at 591; State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009).

In Johnson, this Court reversed the defendant's conviction because the jury was allowed to consider impermissible and highly prejudicial opinion testimony. Johnson, 152 Wn. App. at 926. There, the defendant was charged with second degree child molestation. State's witnesses were permitted to testify about a confrontation between the victim and the defendant's wife, during which the wife said she believed the victim's allegations. Johnson, 152 Wn. App. at 932-33. On appeal Johnson argued that testimony about the confrontation amounted to improper opinion testimony as to his guilt. This Court agreed. Although the State argued that the testimony was admitted only to help the jury assess the wife's credibility, this Court noted that the testimony in actuality demonstrated only what the wife believed about the allegations in the case. The wife's opinion was not only collateral, but it "served no purpose except to prejudice the jury." Id. at 934. Admission of the improper opinion evidence denied Johnson his constitutional right to a fair trial. Id.

Here, as in Johnson, improper opinion testimony denied Shari a fair trial. Loucks was permitted to testify, over objection, that after observing Shari with Faveluke and witnessing the transactions Faveluke

had made in the past month, she felt the need to report Shari's conduct to the police, the fraud department, and Adult Protective Services. Loucks' testimony in this regard was not relevant to any issue in the case. It simply conveyed her opinion that Shari was guilty of deceiving Faveluke and preying on her vulnerability. See also State v. Lahti, 23 Wn. App. 648, 649-50, 597 P.2d 937 (testimony that witness expressed suspicions about defendant's conduct constituted improper opinion, substituting witness's judgment for jury's), review denied, 92 Wn.2d 1036 (1979). As in Johnson, this collateral opinion testimony served no purpose except to prejudice the jury, and it denied Shari her constitutional right to a fair trial. Shari's conviction must be reversed.

D. CONCLUSION

For the reasons discussed above, this court should reverse Shari Brentin's conviction and remand for a new, fair trial.

DATED November 29, 2013.

Respectfully submitted,



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Today I mailed copies of the Brief of Appellant in *State v. Shari*

Brentin, Cause No. 44847-5-II as follows:

Shari Brentin DOC# 366168
Mission Creek Corrections Center for Women
Gold Creek A-148-4
3420 NE Sand Hill Road
Belfair, WA 98528

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
November 29, 2013

GLINSKI LAW OFFICE

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