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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 318974-III

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

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STATE OF WASHINGTON,

Respondent,

v.

BILLIE JO MILLIKEN

Appellant.

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**BRIEF OF APPELLANT, BILLIE JO MILLIKEN**

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Submitted by:

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## **I. ASSIGNMENT OF ERROR AND ISSUE PRESENTED**

### **A. ASSIGNMENT OF ERROR**

1. The trial court erred by admitting into evidence the forensic accountant's final report and conclusions.

### **B. ISSUE PRESENTED**

1. Does the trial court abuse its discretion when it admits the report and conclusions of a forensic accountant, into evidence where the defendant's identifying information is redacted from the report?

2. Is admitting an expert's report that infers the defendant's guilt harmless error?

## **II. STATEMENT OF THE CASE**

### **A. Factual History.**

Pursuant to an Amended Information, Billie Milliken ("Ms. Milliken") was charged with one count of First Degree Theft Other Than a Firearm<sup>1</sup> and subsequently went to trial on April 30, 2013. CP 31; RP at 4. At trial, the State called four witnesses: Lowell Pederson, Melanie Funaro, Shelly Heston, and Stacy Carr. RP at 35; RP at 85; RP at 97; RP at 168. Lowell Pederson ("Mr. Pederson") is the Business Manager and

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<sup>1</sup> RCW 9A.56.030(b)

Assistant Controller for KAYU-TV. RP at 36. Melanie Funaro is a manager at Office Depot. RP at 85. Finally, Shelly Heston ("Ms. Heston") is a CPA at Schoedel & Schoedel, CPAs. RP at 98. Additionally, Ms. Heston is also a certified fraud examiner and works with the Justice for Fraud Victims Project. RP at 100-1.

Mr. Pederson agreed to have a fraud examination conducted by Ms. Heston as part of the Fraud Victims Project. RP at 65-7; RP at 100. At the conclusion of Ms. Heston's examination, she produced a report containing Findings and Conclusions. CP P-6. It was concluded that KAYU suffered a loss of \$25,570 due to employee theft.

Consequently, subsequent to Ms. Heston's testimony the State moved the court during trial to admit Ms. Heston's report containing her Findings and Conclusions. RP at 143. The defense objected to the admission of the report on the grounds it violated ER 701 and ER 702. RP at 143. Additionally, the defense was offered an opportunity to discuss the objection to Ms. Heston's report outside the presence of the jury. RP at 144. A hearing was conducted on May 1, 2013 to discuss the defense objection to the admission of Ms. Heston's report and

conclusions. RP at 156-65. The State provided the court with a redacted version of Ms. Heston's report. RP at 156.

Specifically, the State attempted to redact from the report any conclusory statements that the defendant did it or any time the defendant's name was used; and ultimately, left the portions of the report visible so that it could be concluded that there was an employee theft. RP at 158. Again, the defense objected to admission of the redacted report on the grounds that an expert cannot opine that Ms. Milliken's conduct constituted "theft." RP at 159.

Ultimately, the trial court ruled that the report was admissible on the grounds that it would be helpful to the jury and also eliminate the potential for unfair prejudice with the important caveat that any opinion that came close to guilt would be redacted. RP at 161-2. The defense, however, objected even to the redacted version of the report. RP at 159-60.

Consequently, Ms. Milliken was convicted. RP at 230.

A motion for a new trial was filed on the basis that the trial court abused its discretion in admitting Ms. Heston's report. CP 42. The court, however, denied defense's motion. CP 47.

### **B. Procedural History.**

An Information was filed charging Ms. Milliken with one count of First Degree Theft Other Than a Firearm and seven counts of Forgery<sup>2</sup> on April 5, 2012. CP 1. An Amended Information was later filed, charging Ms. Milliken with one count of First Degree Theft. CP 31. Trial was conducted on April 30, 2013. RP at 4. Subsequently, the jury returned a verdict of guilty to the crime of Theft in the First Degree. RP at 230.

The defense filed a Motion for a New Trial on May 10, 2013. CP 42. A hearing was held on August 16, 2013 to hear argument on Defense's Motion for a New Trial. RP at 236. The court denied Defense Motion for a New Trial and an order was entered August 16, 2013. CP 47. Consequently, a Notice of Appeal was filed on August 16, 2013 by Ms. Milliken. CP 48.

### **III. DISCUSSION**

#### **A. Standard of Review.**

When challenging a trial court's evidentiary rulings, such rulings are reviewed for an abuse of discretion. State v. Hudson, 150 Wash. App. 646, 652, 208 P. 3d 1236, 1238 (2009). Specifically, "[a] trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." Id.

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<sup>2</sup> RCW 9A.60.020

**B. The trial court abused its discretion by admitting into evidence the forensic accountant's report and conclusions.**

Article 1, §22 of the Washington Constitution affords a defendant "[I]n criminal prosecutions . . . trial by an impartial jury." Additionally, "[I]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion." ER 702. Specifically, "[T]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. However, [N]o witness, lay or expert may testify to his opinion as to the guilt of a defendant, whether by direct statement or *inference*." State v. Black, 109 Wash. 2d 336, 348, 745 P. 2d 12, 19 (1987) (citation omitted) (emphasis added).

Furthermore,

[W]hether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, including (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) the other evidence before the trier of fact.

State v. Hudson, 150 Wash. App. 646, 653, 208 P. 3d 1236, 1239 (2009) (citation omitted). Consequently, when an opinion

as to the guilt of the defendant is admitted, "[S]uch an opinion violates the defendant's inviolate constitutional right to a jury trial, which vests in the jury the ultimate power to weigh the evidence and determine the facts." Id. at 652 (internal quotations omitted) (citation omitted).

In this case, evidence in the form of a forensic accountant's report was offered and admitted into evidence. RP at 162; CP P-6. This report begins by stating a purely legal conclusion. Specifically, the opening page, in the a box entitled "Findings and Conclusions" states: Loss Due to Employee **Theft** - \$25,570. CP P-6, Pg. 1 (emphasis added). Additionally, the formal conclusion of this report states "[F]alse purchase vouchers and unrecorded credits issued for product returns were methods utilized [REDACTED] to conceal multiple unauthorized purchases of gift cards [REDACTED]." CP P-6, Pg. 7. Additionally, prior to the conclusion stated in the report, there are numerous phrases throughout the report that state conclusions of law; namely, conclusions regarding an alleged employee embezzlement scheme, with language identifying Ms. Milliken redacted out.

Specifically, the report contained statements such as "[T]he false vouchers were submitted [REDACTED] for office supplies which were entered into the accounting system for payment", "[T]he fictitious vouchers became a means by which to conceal the debit cards (gift cards) purchased [REDACTED]", and "[T]his was another method used [REDACTED] conceal the debit purchases." Id. at 5-7. Consequently, the trial court found that the redactions in the report alleviated any concern of prejudice regarding an improper opinion of guilt by an expert. RP at 161.

However, only Ms. Milliken's name was redacted, whereas, there were still conclusions of law within the report. CP P-6, Pg. 5-7. An expert cannot testify as to whether someone is guilty of theft; that is "obviously the jury's job and only the jury's job." United States v. Thanh Quoc Hoang, 891 F. Supp. 2d 1355, 1362 (M.D. Ga. 2012). "While it is true that investigative auditing is a complex and demanding discipline, certified public accountants, like other experts cannot be allowed to invade those factfinding areas which are by law within the jury's province." Palmer v. State, 186 Ga. App. 892, 899-900, 369 S.E. 2d 38, 44 (1988). "The questions of legal

guilt or innocence involves legal principles upon which the court instructs the jury. It is not proper subject of expert testimony." State v. Johnson, 224 N.W. 2d 617, 622 (Iowa 1974) (*holding* in a theft case that a prosecutor goes too far "in asking the witness what crime, if any, was committed . . .")

Now, while Ms. Milliken's identity in the report was removed, it was still apparent who the subject of the report was. In other words, regardless of whether Ms. Milliken's name was redacted, there is still a strong inference that she is the subject of the report considering Ms. Milliken was the focus of the trial. As such, the province of the jury was invaded by the admission of the forensic accountant's report due to the conclusions of law and inferences created. Therefore, the report was improperly admitted into evidence at trial. Finally, it is important to consider what the defense theory of the case. Specifically, Ms. Milliken did not deny buying the gift cards; rather, she explained that it was done within the scope of her employment. RP at 237.

**C. Admitting the Forensic Accountant's report and conclusions was not harmless error.**

Due to the fact that "improper opinions on guilt invade the jury's province and thus violate the defendant's constitutional

right," on review, courts will apply the "constitutional harmless error standard." State v. Hudson, 150 Wash. App. 646, 656, 208 P. 3d 1236, 1241 (2009) (citation omitted). Moreover, courts "presume that constitutional errors are prejudicial, and the State must convince us beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." Id. (citation omitted). As such, "[T]his test is met if the untainted evidence presented at trial is so overwhelming that it leads necessarily to a findings of guilt" Id. (citation omitted).

Here, the State relied on the testimony of Lowell Pederson (hereafter "Mr. Pederson"), Melanie Funaro, and Shelly Heston. RP 35-150. Consequently, the only individuals providing testimony regarding the KAYU financial statements at KAYU were Mr. Pederson, the business manager and assistant controller for the TV group, and Shelly Heston, a forensic accountant. RP 35-83; RP 97-150.

Mr. Pederson testified that he was unable to reconcile differences contained with the KAYU financial documents. RP 65. Due to this inability to reconcile the financial records, Mr. Pederson agreed to have a fraud examination completed so that a

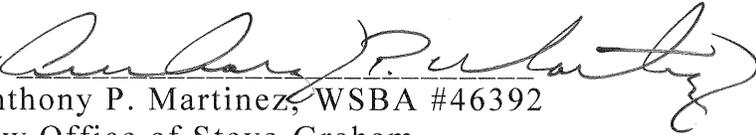
report could be completed to determine whether there was fraud occurring. Id.

Ultimately, the only evidence the State provided regarding an alleged fraud scheme was derived from the conclusions of Shelly Heston's forensic accountant report. Due to the fact that the State's entire case rested on the conclusions of the forensic accountant, admitting the forensic accountant's was not harmless error because the remaining "untainted evidence" is hardly "overwhelming." *See Hudson*, 150 Wash. App. 646, 656, 208 P.3d 1236, 1241 (2009) (citation omitted).

#### **IV. Conclusion.**

In conclusion, admitting the forensic accountant's report and conclusion was an abuse of discretion because the report contained purely legal conclusions that invaded the province of the jury. Additionally it was not harmless error because it was the primary evidence relied on by State. Consequently, the trial court abused its discretion and Ms. Milliken should be afforded an opportunity for a new trial without the admission of the forensic accountant's report and conclusions.

DATED this 5<sup>th</sup> day of May, 2014.

By   
Anthony P. Martinez, WSBA #46392  
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Attorney for Appellant Billie Milliken

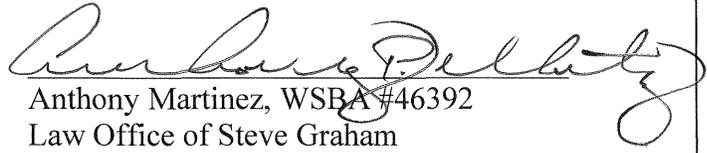
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NO. 318974- III  
COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

<p>STATE OF WASHINGTON</p> <p style="text-align: right;">Petitioner,</p> <p style="text-align: center;">vs.</p> <p>BILLIE J. MILLIKEN,</p> <p style="text-align: right;">Respondent.</p>	<p>SPOKANE COUNTY NO. 12-1-011339</p> <p>AFFIDAVIT OF CERTIFICATION</p>
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I, Anthony Martinez, do hereby certify under penalty of perjury that on May 5, 2014, I hand delivered a true and correct copy of the foregoing Brief of Appellant, Billie Jo Milliken, to the Court of Appeals, Division III, 500 North Cedar Street, Spokane, WA 99210 and to Mark Lindsey, Prosecuting Attorney, 1100 West Mallon Ave., Spokane WA 99260. Finally, I mailed a true and correct copy of the foregoing Brief of Appellant, Billie Jo Milliken, to Ms. Billie Milliken, 1111 East Longfellow Ave., Spokane, WA 99207.

DATED this 5<sup>th</sup> day of May, 2014



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