

091953

091953

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.

COPIES OF THIS DOCUMENT
STATE OF WASHINGTON
2010 MAR 18 PM 3:25

APPELLANT'S REPLY BRIEF

ALLEN, HANSEN, & MAYBROWN, P.S.
Attorneys for Appellant

Richard Hansen
600 University St.
Suite 3020
Seattle, WA 98101
(206) 447-9681

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ARGUMENT IN REPLY TO RESPONDENT’S BRIEF 1

 A. The Defense Made a Complete Record of its Objections, Through a Pretrial Motion and Order *In Limine*, Supported by Legal Argument in its Trial Brief, and Orally Before the Court, in the Course of the Testimony with Contemporaneous Objections, and in Defendant’s Motion for a New Trial..... 1

 B. The Testimony by the State’s Primary Witness, Expressing his Opinion that the Other Drivers “Were Dead,” and that he Thought the Defendant “Was Going To Kill the People,” and that he “Was Almost Certain They Were Going To Die,” is not Competent or Admissible Testimony 9

 C. The Error of Admitting the Statements that “They Were Dead,” Particularly Given their Substantial Prejudicial Effect, Cannot be Deemed Harmless 14

 D. A New Trial Should be Granted or, at the Very Least, the Special Verdict Finding Should Be Stricken 20

II. CONCLUSION..... 21

Proof of Service

TABLE OF AUTHORITIES

Federal Cases

<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968)	19
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	19

State Cases

<i>Carr v. Deking</i> , 52 Wn.App. 880, 765 P.2d 40 (1988).....	11
<i>City of Auburn v. Hedlund</i> , 165 Wn.2d 645, 201 P.3d 315 (2009)	14
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	13
<i>State v. Carlin</i> , 40 Wn.App. 698, 700 P.2d 323 (1985).....	13
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	10
<i>State v. Crenshaw</i> , 98 Wn.2d 789, 659 P.2d 488 (1983).....	14
<i>State v. Farr-Lenzini</i> , 93 Wn.App. 453, 970 P.2d 313 (1999)	2
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985)	19
<i>State v. Haga</i> , 8 Wn.App. 481, 507 P.2d 159.....	13
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	13
<i>State v. Sargent</i> , 40 Wn.App. 340, 698 P.2d 598 (1985).....	12, 13
<i>State v. Sullivan</i> , 69 Wn.App. 167, 847 P.2d 953, <i>review denied</i> , 122 Wn.2d 1002 (1993).....	5, 6
<i>State v. Thamert</i> , 45 Wn.App. 143, 723 P.2d 1204 (1986)	11

State Statutes

RCW 9.94A.834	2, 16, 22
---------------------	-----------

I. ARGUMENT IN REPLY TO RESPONDENT’S BRIEF

In Respondent’s Brief, the State makes the following arguments:

1. The defense did not preserve its objections to the testimony of Sgt. Fouch when he told the jury that he thought other drivers “were dead I thought he was going to kill the people that were in that car . . . I was almost certain they were going to die.”
2. Assuming that the objections were not preserved (which the defense strongly disputes), the erroneous testimony was “not manifest constitutional error,” which could otherwise be raised for the first time on appeal.
3. The objectionable testimony from Sgt. Fouch was properly admissible and did not violate the pretrial order *in limine* entered by the trial judge or, alternatively, that his testimony that other drivers were “dead” constituted “a lay opinion that is permissible under ER 701.”
4. Any error in the admission of this testimony was harmless.
5. If the testimony was erroneous and prejudicial, the remedy should be a new trial, not striking the jury’s special finding that someone other than the Defendant or the pursuing officers was “threatened with physical injury or harm by the defendant’s actions.”

The Defendant will reply to each of these arguments below.

A. The Defense Made a Complete Record of its Objections, Through a Pretrial Motion and Order *In Limine*, Supported by Legal Argument in its Trial Brief, and Orally Before the Court, in the Course of the Testimony with Contemporaneous Objections, and in Defendant’s Motion for a New Trial.

The defense filed a written pretrial Motion *In Limine*, supported by extensive argument in its trial brief, to prohibit any reference at trial to the following:

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

CP 134 (emphasis added) (copy of motion attached). This motion *in limine* applied to both the "reckless" element of the underlying offense of eluding, and also specifically to the aggravator, which added a full year and a day to the defendant's sentence if the State proved, and the jury returned a special verdict, finding that someone other than the Defendant or the pursuing officers was "threatened with physical injury or harm by the defendant's actions," as required by RCW 9.94A.834.¹

The defense argued in a detailed trial brief:

While the police can certainly testify about their observations of the Defendant's driving, and any action he took that may have threatened other drivers, they are not permitted to express any opinions about whether his driving was, in fact, "in a manner indicating a wanton or willful disregard for the lives or property of others," or whether his driving "threatened" others with "physical injury or harm."

CP 29-34, citing *State v. Farr-Lenzini*, 93 Wn.App. 453, 970 P.2d 313 (1999) and other cases.

¹ The Information specifically 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.

CP 147-148.

In response to the Defendant's motion *in limine*, the prosecutor assured the Court and defense counsel

it sounds like we're pretty much in agreement. . . . I'm not going to ask him for an opinion about the term "reckless," ok? But in describing the driving he saw, I am anticipating that his testimony will be that the defendant's maneuvers were dangerously close to other vehicles, that he was concerned there was going to be a collision, that the defendant re-entered 527 without looking or stopping, and had there been oncoming vehicles there would have been a collision.

RP 7-8. In response to this assurance, the defense responded: "Your Honor, I may object to some specific questions, but I don't think it's going to be a big issue at trial." RP 8.

In his opening statement, the prosecutor gave no inkling that he was going to elicit, or that Sgt. Fouch would provide, such inadmissible and inflammatory testimony. In describing the only incident where the defendant was alleged to have put other drivers at risk, the prosecutor told the jury in his opening statement that the evidence would show

that the defendant was traveling in an exit-only lane and there were three vehicles to his immediate left. The Defendant accelerated hard and then cut in front of the lead vehicle, so close that Fouch was certain there was going to be a collision.

RP 21. He told the jury that the testimony would describe how "the defendant managed to squeeze in front of that vehicle without actually colliding . . . and there was sort of a chain reaction of vehicles locking

their brakes. But as far as Fouch could tell, none of them actually collided with the other.” *Id.*

If Sgt. Fouch had testified as indicated in the State’s opening, there would not be an issue (and the jury would probably not have made a special finding that enhanced the Defendant’s sentence by more than a year). And Sgt. Fouch’s testimony about this incident did start off appropriately, with Sgt. Fouch stating that Mr. Kollman “approached the off ramp and made a very hard left-hand turn . . . so he actually cut across that area of non travel . . . so he took a hard left-hand turn and cut these vehicles off right here.” RP 69-70. However, his factual description of the Defendant’s driving ended here and segued immediately into his inadmissible and highly inflammatory testimony that “I thought they were dead. . . . I thought he was going to kill the people that were in that car . . . I was almost certain that they were going to die.” *Id.* The defense immediately, and repeatedly objected to each of these answers and was granted a continuing objection when the judge overruled the objections. *Id.*

The State claims that the defense failed to make a record of this issue, and it was therefore waived, but nothing could be farther from the truth. As already noted, this issue had been thoroughly briefed and argued in a pretrial hearing, then defense counsel immediately, and repeatedly

objected as the testimony that Fouch was “almost certain they were going to die” ensued.

The prosecutor obviously knew the basis for the defense objection, because he responded by stating after the first objection and motion to strike: “That’s his perception at the time, as he is observing the events.” Only then did the Court rule “The objection is overruled.” As ER 103(a) specifically provides:

error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context.

In the State’s primary authority in support of its argument, *State v. Sullivan*, 69 Wn.App. 167, 847 P.2d 953, *review denied*, 122 Wn.2d 1002 (1993), the defense made no objection whatever during the trial, which is hardly the case here. The *Sullivan* Court reasoned:

For the first time on appeal, Sullivan argues that Norton's testimony violated the trial court's order in limine . . . With limited exceptions, the rule in Washington is that “a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” *State v. Guloy*, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

69 Wn.App. at 169-70.

Significantly, the *Sullivan* Court's holding contains the following reasoning *apropos* to the record in this case:

A means of giving the trial court an opportunity to rule on admissibility of evidence is the motion in limine.

“The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation.” Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party *losing the motion in limine* has a standing objection.”

(Emphasis added. Citation omitted.) *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

69 Wn.App. at 170-171. This approved procedure is exactly what defense counsel did in this case. And the “context” of the defense objection, the prosecutor’s response that Sgt. Fouch’s testimony was “his perception at the time, as he is observing the events,” and the Court’s immediate statement that “The objection is overruled,” make clear that everyone was well aware of the legal issue involved.

Then later, at the hearing on the Defendant’s motion for a new trial, defense counsel raised Sgt. Fouch’s inappropriate testimony, characterizing it as “a very serious issue here about a new trial on the verdict or at least on the special verdict finding.” RP 527. In the very next sentence at the hearing on the motion for a new trial, the defendant reminded the court:

. . . frankly I don't think I could have made a better record from the motion *in limine* to try to exclude the objectionable testimony. I filed a written motion to exclude any opinion testimony that the defendant's driving was reckless or that he was endangering other motorists on the road. That's a quote from my written motion.

We argued that and Your Honor agreed. And quoting Your Honor, you ruled the officer can testify only as to what he observed. He can't use the term "reckless."

Then we get to the testimony of this officer, which I think totally surprised the prosecutor, I hope. I don't think he intended to elicit this. The question didn't. The question was: "When he cut to his left in front of what you have marked as vehicle 1, did that concern you?"

His answer: "I thought they were dead." I immediately objected and I moved to strike the answer. I was overruled.

Then the prosecutor asked another question, and he testified: "They were traveling 60 miles per hour." That's appropriate. He observed the vehicle take a left-hand turn. And then he added, "I was almost certain that they were going to die." That's his subjective view. That is totally inappropriate for reasons that I will get to in a moment.

I made the same objection, and a continuing objection, and the court granted that. The record is perfected here.

RP 528-29.

It is significant that neither the prosecutor nor the judge made any claim of waiver or an inadequate record for the objections during the hearing on Defendant's Motion for a New Trial based on this same issue.

Rather, the prosecutor argued that this testimony was “nothing more than a graphic description of what he was seeing.” RP 531. The prosecutor claimed Sgt. Fouch was merely “talking about what he was seeing as the potential danger,” “simply giving a graphic description . . . simply graphically describing an event . . . just common observations.” RP 531-

32. Defense counsel responded:

This has huge consequences for [the defendant] and I just don't think the court can assume that this did not infect the verdict with improper testimony. And I mean, it's not an observation as the State is trying to gloss over saying they were dead. It's a different way of saying he was driving in a dangerous manner. So I take strong issue with that, Your Honor.

RP 534-35.

And in his ruling, the trial judge did not suggest in any way, shape or form that the defense had failed to make a proper record of its objection. Rather, the judge acknowledged his pretrial ruling on the defense motion *in limine* and claimed it was somehow appropriate for the officer to testify about “a fear that he has of what he's observing” to justify his testimony that “injury or death is a real possibility.” The judge ruled that the testimony was merely “a graphic description of what he observed.” RP 535-36.

However, Sgt. Fouch saying “I was almost certain they were going to die” describes nothing about his observations; it is simply inflammatory

and highly prejudicial to the defense, especially coming from a police sergeant.

B. The Testimony by the State's Primary Witness, Expressing his Opinion that the Other Drivers "Were Dead," and that he Thought the Defendant "Was Going To Kill the People," and that he "Was Almost Certain They Were Going To Die," is not Competent or Admissible Testimony.

The State makes the argument that this was appropriate "lay testimony," but this theory is indefensible. Sgt. Fouch was expressing a highly speculative (and inaccurate) opinion about what he "thought" and what he was "almost certain" was going to happen (which were the actual words he used). This is not in any way "a graphic description of what he observed," as the trial judge ruled. RP 535-36. Rather, it is wholly incompetent and inflammatory testimony.

As the defense argued at the hearing on the motion for a new trial, as well as at the pretrial hearing on the motions *in limine*, "this improper testimony . . . violates every rule in the book." RP 529. Defense counsel then elaborated as follows:

Under Evidence Rule 702, is he qualified as an expert to render that opinion? No. Is it helpful to the jury? No. Is it based on an explanatory theory generally accepted in the scientific community? No. No to all the above. That should not have come in.

Id.

As already noted, Sgt. Fouch testified:

- “I thought they were dead.”
- “I thought he was going to kill the people that were in that car.”
- “I was almost certain that they were going to die.”

RP 70. How can the State, or this Court, reconcile those statements with case law, that was vigorously argued by the defense prior to the commencement of this trial, which limits officer testimony to objective observations about the speed and movement of the Defendant’s car?

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). As defense counsel argued at the hearing on the motion for a new trial, Sgt. Fouch’s testimony satisfies none of the requirements of ER 702 or the *Ciskie* case.

In *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, 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. The court required that the basis for the officer's opinion testimony be sufficiently supported before it could be given to the jury. *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 either striking the special finding or a new trial for Mr. Kollman because Sgt. Fouch's testimony was so highly prejudicial with respect to the special verdict, if not the entire trial on the underlying charge:

“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.

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." *Farr-Lenzini*, 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."). *Accord: State v. Haga*, 8 Wn.App. 481, 507 P.2d 159, *rev. denied*, 82 Wn.2d 1006 (1973). As in *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995), this testimony was far more likely to "stimulate an emotional response rather than a rational decision" among jurors.

A similar statement resulted in reversal in *City of 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. *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).

C. The Error of Admitting the Statements that “They Were Dead,” Particularly Given their Substantial Prejudicial Effect, Cannot be Deemed Harmless.

Detective Fouch testified that, when he started following Mr. Kollman in a full pursuit on Route 527 they “were going anywhere between 70 to 80 miles an hour.” RP 61. “Traffic in that area, that particular area at that point in time, was fairly light,” according to Sgt. Fouch. RP 62.

As the pursuit continued, Mr. Kollman “would either weave in and out of the traffic, or traffic would react to [Sgt. Fouch’s] lights and sirens and move out of the way.” RP 63. Sgt. Fouch was concerned that Mr. Kollman was passing some vehicles on the right, because drivers are trained to pull off to the right when they are being approached by a police car with activated lights and siren, but this never occurred. RP 63-64.

Sgt. Fouch also testified that Mr. Kollman drove through a number of red lights “without stopping,” but there was no cross traffic. Rather he speculated: “if there were oncoming traffic from the sides, I believe that there could have been a very serious collision.” RP 64.

Mr. Kollman then exited Route 527 onto Interstate 405, which is a divided highway with multiple lanes in each direction. RP 65. At this point, the speeds increased to “between 90 and 100” miles an hour. Sgt. Fouch witnessed “two vehicles that were traveling side by side,” move out of Mr. Kollman’s way, but Sgt. Fouch “was pretty sure that it was safe, with regard to one vehicle and the other “may have been pushed all the way off the road,” according to Fouch. RP 66-67.

As they approached Interstate 5, the Defendant “took a right-hand turn onto I-5, which is a large, sweeping entrance. He was probably doing about 70 or 80 at this point in time.” RP 68. He then “decreased his speed” down to 70 miles an hour, which is barely over the speed limit and would probably not merit a speeding ticket under normal circumstances. *Id.* It was at this point where the Defendant “took a hard left-hand turn and cut these vehicles off.” RP 70. When asked “did that concern you?” Sgt. Fouch then gave the objectionable answers that he “thought they were dead,” and defense counsel immediately objected and moved “to strike that answer.” *Id.* The prosecutor stated that this was “his perception at the

time, as he is observing the events,” and the judge responded: “The objection is overruled.” *Id.* The defense continued to object and was granted a continuing objection to Fouch’s testimony that: “I thought he was going to kill the people that were in that car,” and that he “was almost certain that they were going to die.” RP 70-71.

Following this incident, the Defendant drove over spike strips that had been laid in the road by another officer and “he started to slow.” RP 72-73. The Defendant’s interaction from that point forward was only with police vehicles, which are not relevant to the special jury finding that the Defendant threatened someone other than himself and the pursuing law enforcement officers “with physical injury or harm.” CP 99-100, RCW 9.94A.834.

On cross-examination, Sgt. Fouch testified that “pretty much all the way down 527 [the Defendant] was using his turn signal, even when he was weaving in and out of the vehicles.” RP 100. In his report, he described this behavior as “surreal” because: “That’s the very first pursuit I’ve ever had where the guy running from me was polite enough to use a turn signal.” *Id.* at 100. The entire pursuit lasted “seven or eight miles,” and took less than seven or eight minutes. RP 101. When the Defendant took the exit from I-405 to Interstate 5, he again used his turn signal. *Id.*

The State next called Officer Tony Bittinger, who was called to back up Sgt. Fouch and caught up with him on State Route 527. RP 170-71. Officer Bittinger testified: "I don't recall real erratic driving until we got onto Interstate 405," and he estimated the speed of Mr. Kollman's driving at "sixty miles per hour in a forty-five" zone. RP 172-73. On Interstate 405, "we were driving 80 miles an hour in a 60 mile per hour zone." RP 173. When Mr. Kollman moved from I-405 to Interstate 5, he continued at "a high rate of speed . . . as high as 90 miles per hour" until he hit the spike strips. RP 175.

Officer Bittinger's testimony did not corroborate in any way, shape or form the testimony of Sgt. Fouch that, while traveling "northbound up I-5 in the far right-hand lane to the point where it exits onto 164th," the Defendant "took a hard left-hand turn and cut these vehicles off right here," causing Sgt. Fouch to conclude "I thought they were dead . . . I thought he was going to kill the people that were in that car . . . I was almost certain they were going to die." RP 70. Similarly, Officer Jesse Mack joined the pursuit just behind Officer Bittinger on State Route 527. RP 200-202. He estimated their speed at "approximately around 60 miles an hour, maybe a little more," as they entered onto Interstate 405. RP 203. On the interstate, they reached "approximately 80" miles per hour until the spikes were deployed on Interstate 5 and Kollman was stopped. RP 203-

204. Like Officer Bittinger, he did not observe or testify about the incident that Sgt. Fouch described in which he concluded the occupants of another car “were dead.”

In summary, the only testimony in the entire trial court record that is relevant to the aggravating factor that “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,” was the objectionable testimony of Sgt. Fouch. This is especially true in light of the fact that the other pursuing officers, who were driving right next to Sgt. Fouch, did not observe or testify about the Defendant’s alleged actions that Fouch described which led to his totally inappropriate conclusion that the occupants of some other, phantom vehicle “were dead,” and that he “thought [Kollman] was going to kill the people that were in that car . . . I was almost certain that they were going to die.” RP 70.

The fact that Fouch, Bittinger and Mack saw the Defendant traveling 80 miles per hour, possibly 90 miles per hour in a 60 mile per hour zone as he used his turn signal to make lane changes is not relevant to this aggravating factor. The aggravator was not proven by testimony that, with numerous police cars pursuing Mr. Kollman with their lights and sirens going, other drivers merely pulled off the road as required by

law. The entire pursuit lasted a few minutes and covered seven or eight miles. Although Fouch testified that Defendant Kollman went through several red lights, there was no cross traffic so no one was endangered.

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. At the hearing on the motion for a new trial, defense counsel pointed out that the jury “was given an expert testimony instruction,” and that “the cases I cited in

here talk about how juries tend to give a lot of weight to police officers' testimony, and obviously he's in the business of law enforcement and of traffic enforcement, and that's his subjective conclusion, which took that issue away from the jury, which is totally inappropriate." RP 529.

For all these reasons, and measured against the rest of the trial record, this error cannot be deemed "harmless," and has certainly tainted the special verdict finding, and probably the fairness of the entire trial.

D. A New Trial Should be Granted or, at the Very Least, the Special Verdict Finding Should Be Stricken.

The State argues that, if anything, this egregious error should require a new trial and not merely result in striking the special verdict finding. The defense is not necessarily opposed to a new trial, but submits that, in the absence of Sgt. Fouch's inadmissible testimony, there is insufficient evidence to support the special finding.

It is noteworthy that the other two officers who were adjacent to Sgt. Fouch during this pursuit never observed Mr. Kollman engaging in the maneuver that Fouch claimed to have seen. And the testimony of all three officers consistently described Mr. Kollman's driving in a manner that did not threaten any other drivers at other times during the six to seven mile pursuit. He was signaling his lane changes, there was no cross traffic when he went through red lights, and while he passed some cars on

the right (which is commonplace driving), this gave rise to mere speculation that those cars *might have* pulled off to the right because that is what drivers are supposed to do when being approached by emergency vehicles. RP 63-64. However, none of them did, and no one testified that this driving actually endangered other drivers.

Accordingly, the special finding by the jury should at least be stricken and Mr. Kollman be resentenced. There is ample authority for an appellate court to strike a special verdict. *See* discussion in Section V of Appellant's Opening Brief. However, if the Court agrees with the State that the improper testimony tainted the entire trial (which it may well have), then a new trial should be ordered without the objectionable testimony.

II. CONCLUSION

The surprise testimony by Sgt. Fouch constituted trial by ambush, and it is simply inaccurate to claim that the defense failed to make a record of its numerous objections in writing and several times orally, consistent with the rules of proper courtroom decorum. The prejudicial impact of his improper testimony about "certain death" is immeasurable since none of Mr. Kollman's other driving endangered other drivers on the road. And neither of the other officers pursuing Kollman in close proximity to him and Sgt. Fouch witnessed this "deadly" maneuver.

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," pursuant to RCW 9.94A.834, increased the sentencing range to 12+ to 14 months. Mr. Kollman is the lead scientist on the Duwamish River cleanup project, he has a family to support with children in college, so a prison sentence will have a devastating effect on him and his family.

Accordingly, this Court should either strike the enhancement or reverse the entire conviction and order a new trial.

DATED this 8th day of August, 2013.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

PROOF OF SERVICE

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

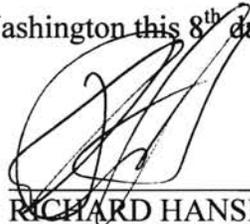
On the 8th day of August, 2013, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

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 8th day of August, 2013.



RICHARD HANSEN, WSBA #5650
Attorney for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY

STATE OF WASHINGTON,
Plaintiff,

v.

GARY D. KOLLMAN,
Defendant.

NO. 10-1-02239-7

DEFENDANT'S MOTIONS *IN LIMINE*

COMES NOW the Defendant, Gary Kollman, through his attorney Richard Hansen,
and moves *in limine* to prohibit any reference at trial to the following matters:

1. The Defendant's "recreational" use of cocaine in the 1990s.
2. The Defendant's convictions for DUI in approximately 1997, resisting arrest in 1993, and for eluding in 2003.
3. Any opinion testimony that the Defendant's driving was "reckless" or that he was endangering other motorists on the road.

This motion is supported by the Defendant's Memorandum of Authorities and the files
and records herein.

DATED this 10th day of June, 2012.



RICHARD HANSEN, WSBA #5650
Attorney for Defendant