

71494.5

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NO. 71494-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES ANDRE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN H. AMINI, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

1. In numerous jail phone calls, the defendant, James Robert Andre, alluded to the fact that he knew there was a gun inside of the vehicle he was driving. In one of those calls Andre stated that he had to get out of here and get this "heater" out of here. At trial, after listening to the jail phone calls, Sgt. Davison testified that he believed Andre was referring to the gun inside of his car when he used the term heater. Was Sgt. Davison's testimony proper when he did not comment on the veracity of witnesses, the guilt of the defendant, or parrot the relevant legal standard?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

On May 13, 2013, the State charged Andre with Unlawful Possession of a Firearm in the Second Degree, Attempting to Elude a Police Vehicle, and Possession of Stolen Property in the First Degree. CP 1-2. The defense filed a 3.6 motion to suppress evidence. CP 12. The defense claimed that the car Andre was driving was unlawfully searched. CP 16. The defense motion was denied. CP 113.

At the conclusion of the trial, the defendant was found guilty of all three counts. CP 83-87.

2. FACTS OF THE CRIME.

On April 30, 2013, Seattle Police Officer Anderson was in full uniform and driving a fully marked patrol car in north Seattle. He observed a black GMC Yukon travelling westbound in the 2100 block of N 122nd Street in Seattle, Washington. CP 111. He ran the plate as a routine patrol check and noted that the vehicle was the suspect in a mail theft case on April 27, 2013. CP 111. The suspect in the mail theft was described as a white female. CP 111. The driver of the vehicle matched the race of the mail theft suspect, but Officer Anderson could not determine whether the driver was male or female because the driver had a hat on. CP 111.

Officer Anderson decided to stop the vehicle and investigate the mail theft. CP 111. He activated his emergency lights, but the driver of the GMC Yukon failed to respond. CP 111. Officer Anderson chirped his siren and the suspect vehicle responded by increasing speed and taking an immediate left turn onto southbound Burke Avenue North. CP 111. Burke Avenue North is a dead end

with a guard rail at the end of the street and a sign in the middle of the guard rail that states "Road End." CP 111.

The suspect vehicle continued southbound and drove past the guardrail and "Road End" sign. CP 112. The vehicle drove through the front lawn of 12003 Burke Ave N and crashed into a parked car and then into a fence located on the north end of Northwest Hospital. CP 112. There was damage to the parked car and to Northwest Hospital's fence. CP 112.

Officer Anderson observed Andre climb out of the driver's side of the GMC Yukon, jump the broken fence, and run into the Northwest Hospital parking lot. CP 112. Officer Anderson, yelled "Police! Get on the ground!" CP 112. The defendant looked back at Officer Anderson and continued running in the parking lot of Northwest Hospital. CP 112. Officer Anderson noticed that the defendant had a distinctive neck tattoo. CP 112.

Officer Anderson was unable to catch Andre, so he went back to the vehicle that Andre was driving to determine if he could locate information about the driver of the vehicle. CP 112. A few minutes later, Northwest Hospital security staff notified the police that they observed Andre running through the parking lot. CP 112. Officer Anderson responded to the area and was able to catch Andre.

CP 112. After Andre was arrested, the GMC Yukon that he was driving was towed to Lincoln Towing. CP 112.

On May 2, 2013, SPD Sgt. Davison was assigned as the detective on the case. He went to the impound yard and inspected the GMC Yukon. CP 112. He noticed that there was a large, older string bass and a smaller similar shaped string instrument in a black soft case. CP 112. Sgt. Davison ran a computer check in an SPD database to determine whether these items had been reported as stolen. CP 112. He was able to verify that both items had been reported stolen by Scott Teske on April 28, 2013. CP 112.

Sgt. Davison took pictures of the bass violins from outside the vehicle and sent the pictures to Teske. CP 112. Teske confirmed that the instruments belonged to him. CP 112. He told Sgt. Davison "Those are my basses! The antique bass without the case is fragile—let me know what I can do to get it in its case and transport it home safely." CP 112. Based on Teske's identifications of his items in the GMC Yukon, Sgt. Davison obtained a search warrant for the vehicle. CP 112.

On May 5, 2013, Sgt. Davison searched the vehicle in the presence of Teske. CP 112. Inside of the vehicle, Sgt. Davison recovered Teske's stolen instruments. CP 112. The bass violin,

which was valued at \$28,000, was damaged; it had fresh damage to each side of the bass and a new crack down the front of the bass.

CP 112. Teske told Sgt. Davison that he did not know the defendant and that he did not give him permission to possess any of his items.

CP 113.

In addition to the stolen basses, Sgt. Davison also recovered a black backpack that was located on the passenger floorboard directly behind the center console. CP 113. The backpack was accessible to both the driver and passenger. CP 113. Inside the backpack, Sgt. Davison found a black 9mm handgun. CP 113. The handgun was fully loaded with 9mm ammunition in the magazine. CP 113.

At trial, the State played several jail phone calls made by Andre while he was in custody at the King County Jail. In the calls, Andre alluded to the fact that he knew there was a gun inside of the GMC Yukon. For example, during a May 6 jail phone call Andre stated my "thing" was in the car and the female he was talking with stated that the "police have got it." Ex. 24, pg. 2, line 21-24. In a May 7, 2013 phone call Andre talked with a male friend and was very concerned that fingerprints would be used against him.

Ex. 24, pg. 4, line 4. Andre stated:

JAMES: ...I don't think she gets it. I don't think she understands like what all was found, you know what I mean?

MALE: Yeah, I hear you.

JAMES: Washington doesn't play with those kinda things and if your fingerprints are on it and they find it on a rooftop of the Empire State Building you're still getting charged with it you know (unintelligible) your fingerprints.

Ex. 24, pg. 4, line 14-21. In the same conversation with his male friend, Andre stated that he had "two standup bass guitars" in the car, but that if he claimed those basses he would have to claim everything else in the vehicle and "that's not all that was in there." 4 RP, pg. 4-5.

In a phone call dated May 13, 2013, the defendant talked with a woman named Amanda. In that call he states that he has a "pistol charge." Andre also stated the following:

JAMES: It's kinda hard to pull over too when I'm sittin' there with a fuckin' you know a dope

pipe and a fuckin' uh, thing in my lap and
fuckin...you...(unintelligible).

JAMES: Dude, I was like I can't pull over.

JAMES: Oh, but it's good that you're out there at
least you know what I mean? I was
glad...

FEMALE: No.

JAMES: ...of that that you didn't get in fuckin'
mixed up in that shit. That was
(unintelligible) too cause, I was like well,
shit I gotta...you know what I mean?

FEMALE: Yeah.

JAMES: Yup, get outta here and get this fuckin'
heater and shit outta here.

FEMALE: Where did they find it?

JAMES: With me.

FEMALE: Oh, you didn't get rid of it?

JAMES: Yeah, but I mean it's I...I held it in my
fuckin' hand so, I mean it's like you know
it's only a matter of time.

At trial, Sgt. Davison testified that the “heater” the defendant was referring to was likely the gun inside the car. He stated “I believe it refers to the gun that was located in the car, and it was also mentioned earlier in the call that he got a pistol charge, so it’s kind of continuing on in that conversation.” 4 RP 95, line 7. The defense objected to this portion of Sgt. Davison’s testimony, but the court overruled the objection and allowed the testimony. 4 RP 95.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED SGT. DAVISON TO TESTIFY THAT, THE WORD USED “HEATER” IN A JAIL PHONE CALL MEANT GUN.

Andre claims that he was denied a fair trial because Sgt. Davison offered an improper opinion when he testified that Andre’s use of the term “heater” in a jail phone call referred to a gun located in the car that he was driving. Andre’s argument should be rejected. Sgt. Davison did not offer an improper opinion because he did not comment on the defendant’s guilt, the veracity of witnesses, or parrot the relevant legal standard. The trial court’s decision to admit Sgt. Davison’s testimony is reviewed for an abuse

of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

- a. Sgt. Davison Did Not Offer An Improper Opinion Because His Testimony Was Based On Reasonable Inferences From The Evidence; He Did Not Comment On The Defendant's Guilt, The Veracity Of Witnesses, Or Parrot The Relevant Legal Standard.

Generally no 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 Wn.2d 336, 348, 745 P.2d 12 (1987). However, testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658, 660 (1993). Under modern rules of evidence, an opinion is not improper merely because it involves ultimate factual issues. Id. at 578. ER 704 provides that "[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." Id. Thus, opinion

testimony may not be excluded under ER 704 on the basis that it encompasses ultimate issues of fact. Id. at 579.

In determining whether statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: “(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. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267, 274 (2008).

Here, Sgt. Davison testified that the term “heater” referred to in Andre’s jail phone call was likely the gun located inside the car that Andre was driving. Sgt. Davison’s testimony was based upon reasonable inferences from the facts of the case, the physical evidence, and the context of the jail phone call. At trial, Sgt. Davison testified that he had been a Seattle Police Officer for over 13 years. Throughout his time on the force Sgt. Davison has had extensive firearm training—his training has included the use of firearms, purchasing firearms as an undercover officer, and learning about the common street terms for firearms. 4 RP 10. Additionally, he has had experience working as an undercover officer purchasing firearms and recovering firearms from suspects.

4 RP 19-21. Based upon these years of training and experience Sgt. Davison has become familiar with common street terms for guns. 4 RP 21. At trial, he testified that one of the terms for a gun is a heater. 4 RP 21. It is called a heater because "when the firearm is fired, it actually heats up." 4RP 22.

At trial, Sgt. Davison testified that he was first assigned this case on May 2, 2013. 4 RP 31. At that time, the vehicle Andre was driving was located in an impound yard. 4 RP 32. Sgt. Davison knew, from reading the reports of the arresting officer, Officer Anderson, that the vehicle Andre was driving was involved in a collision. 4 RP 34. Sgt. Davison investigated and found that items inside of the car were stolen. 4 RP 39. He applied for a search warrant for the car. 4 RP 42. While searching the car he found numerous stolen electronics in the car and two stolen stand-up bass guitars. 4 RP 42. Behind the center console, Sgt. Davison found a black backpack. 4 RP 53. Inside the backpack was a Glock 9mm firearm. 4 RP 55. The gun was easily accessed by both the driver and the passenger. 4 RP 53.

After the case was filed, the State obtained copies of phone calls Andre made from the King County Jail and played redacted versions of those jail phone calls for the jury during Sgt. Davison's

testimony. In those calls, Andre made numerous statements which indicated that he knew a firearm was inside of the car. In a phone call dated May 13, 2013, while talking with a woman named Amanda, Andre stated that he has a "pistol charge." He also used the term "heater."

At trial, Davison testified, when asked about the term heater "I believe it refers to the gun that was located in the car, and it was also mentioned earlier in the call that he got a pistol charge, so it's kind of continuing on in that conversation." 4 RP 95, line 7.

Sgt. Davison's testimony was a reasonable inference based upon the facts of the case, the physical evidence, and his specialized experience.

Courts have held that testimony such as Sgt. Davison's, which is based on reasonable inferences from the facts of the case, do not constitute an improper opinion. State v. Sanders, 66 Wn. App. 380, 388, 832 P.2d 1326 (1992); State v. Stark, 334 P.3d 1196, 1202 (Wn. Ct. App. 2014). For example, in State v. Sanders, 66 Wn. App. 380, 388, 832 P.2d 1326 (1992), this Court, held that the testimony of an officer did not amount to an opinion on the defendant's guilt because the testimony was based on an inference derived solely from physical evidence and experience of the officer.

In Sanders, the defendant was convicted of possession of cocaine with intent to deliver. Id. at 381. At trial, the State presented evidence that during the search of the defendant's home, Seattle Police Officer Murry found 10.5 grams of crack cocaine on a glass dinner plate inside of the defendant's bedroom. Id. He also found two large balls of cocaine on the plate as well as smaller pieces of cocaine that had been cut by a razor. Id. In the bedroom, Officer Murry also found numerous plastic sandwich baggies, corners of baggies, and a vial containing a white powder in the defendant's bedroom. Id. at 382. In the defendant's bedroom closet Officer Murray found a "very clean" rock cocaine smoking pipe. Id. at 382.

On direct examination, Officer Murry testified about the significance of much of the evidence he seized, including how crack cocaine is normally smoked, how a glass crack pipe is used, and why it is unusual to find a clean crack cocaine pipe. Id. at 383. The prosecutor also asked Officer Murry whether, based upon his training and experience, there was any significance to the absence of items associated with smoking cocaine. Id. at 383. Defense counsel objected to Officer Murry's answer to this question—he stated that the answer would constitute "an improper opinion as to the ultimate decision for the jury in this case." Id. at 384. The court

overruled the objection and allowed Officer Murry to testify. Id. at 384. He stated that based upon his training and experience “the lack of items associated with smoking crack cocaine indicates that the house is not used for that purpose and the person within did not do so frequently at all.” Id. at 384.

On appeal, Sanders argued that Officer Murry’s statement about the lack of items associated with crack cocaine amounted to an improper opinion on her guilt. Id. at 385. The Division One Court of Appeals disagreed. The court held that Officer Murry’s opinion was an inference based solely on the physical evidence and his experience. Id. at 389. Moreover, the court noted that Officer Murry did not comment on the defendant’s guilt or credibility. Id. In addition, the court concluded that Officer Murry’s opinion left to the jury the question of whether the defendant possessed the cocaine. Id.

This Court’s conclusion in Sanders is similar to the conclusion of Division Three in State v. Stark, ___ Wn. App. ___, 334 P.3d 1196, 1202 (2014), which held that the testimony of a detective did not constitute an improper opinion on the defendant’s guilt. In Stark, the defendant was charged with first degree murder and asserted a self-defense claim at trial. Id. at 1198. At trial, the

In contrast, courts have held opinion testimony is improper when it includes expressions of personal belief of the defendant's guilt, the intent of the accused, or the veracity of witnesses. See State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008). For example, in Montgomery, the Washington Supreme Court held that two detectives and a forensic scientist offered improper opinions on the defendant's guilt when they opined on the intent of the defendant. 163 Wn.2d at 591. In Montgomery, the defendant was charged with possession of pseudoephedrine with intent to manufacture methamphetamine. Id. at 583. At trial, the State presented evidence that the police followed the defendant and a friend as they went to several different stores and purchased items that could be used to manufacture methamphetamine. Id. at 585. On direct examination, Detective Knechetel, one of the officers that followed the defendant, testified that he "felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I'd seen those actions several times before." Id. at 587-88. Similarly, Detective Blashil, another officer who followed the defendant, testified that "those items were purchased for

manufacturing.” Id. at 588. Finally, a forensic chemist surveyed the combined purchases of the defendant and testified that “these are all what led me toward this pseudoephedrine is possessed with *intent.*” Id. at 588 (emphasis added).

The Washington Supreme Court held that these opinions were improper because they were direct opinions on the defendant’s guilt. Id. at 594. The court held that the opinion of the witnesses, especially the opinion of the chemist, was improper because he “parroted the legal standard.” Id. at 594. The court cited Heatley, which stated that an opinion is more troubling when stated in conclusory terms parroting the legal standard. Id. at 594.

The facts of this case are more similar to the facts in Sanders and Stark than Montgomery. Like the officers in Sanders and Stark, Sgt. Davison’s testimony was based on an inference from the evidence. Sgt. Davison testified that he had been an officer for over 13 years and that during his time on the force he was involved in numerous investigations involving firearms. Based upon this training and experience Sgt. Davison became familiar with the common street terms for firearms. His training and experience included the fact that “heater” is a common street term for a firearm. In this case, Sgt. Davison reviewed Officer

Anderson's report which stated that Andre had crashed the GMC Yukon after eluding a police vehicle. In addition, once Mr. Andre crashed the car, he ran from police officers. After the car was impounded, Sgt. Davison located a firearm behind the center console—the firearm was accessible to the driver.

In Andre's jail phone calls, which Sgt. Davison listened to before and during trial, Andre made numerous statements that indicated he knew there was a firearm in the car. Only after Sgt. Davison testified about the circumstances of how the gun was found and the jail phone calls were played for the jury did Sgt. Davison testify that he believed when Andre used the term heater he was referring to the gun that was found inside of the car. This statement was a reasonable inference based upon the facts presented at trial and is a permissible opinion. In Stark, the court noted that the fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt." Heatley, 70 Wn. App. at 579, 854 P.2d 658 (emphasis in original). "[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." Id. (quoting

State v. Wilber, 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989);

State v. Stark, ___ Wn. App. ___, 334 P.3d 1196, 1202 (2014)).

Moreover, this case can be distinguished from Montgomery because Officer Davison did not comment on the credibility of witnesses, the guilt of the defendant, or parrot the "legal standard." The single statement that the defense has an issue with is Sgt. Davison's testimony that he believed the term heater used by Andre in the jail phone call referred to the gun located in the car. This one statement is quite different from the statements made by the witnesses in Montgomery, who parroted the legal standard when they stated the defendant was acting with intent.

Lastly, even without Sgt. Davison's testimony that he believed the term heater referred to the gun located in the car, the jury had overwhelming evidence that the defendant knew there was a gun inside of the car. Thus any error was harmless. In this case, the circumstances of how the gun was found and Andre's jail phone calls provided overwhelming evidence that Andre knew there was a gun inside of his car.

D. CONCLUSION.

Sgt. Davison's testimony that the heater referred to in Andre's jail phone calls was likely the gun inside of the car was a reasonable inference based upon the evidence. Sgt. Davison did not comment on the veracity of witnesses, the defendant's guilt, or parrot the relevant legal standard. Therefore, Sgt. Davison did not offer an improper opinion on the defendant's guilt and the trial court did not abuse its discretion by admitting the testimony. Consequently, the defendant's conviction should be affirmed.

DATED this 19 day of November, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JAMES ANDRE, Cause No. 71494-5-I, in the Court of Appeals, Division I, for the State of Washington.

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

Kathryn LeMay
Name

11/20/14
Date

Done in Seattle, Washington