

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) No. 64622-2-I
)
 v.) DIVISION ONE
)
 EVELYN DENISE FIELDS,) UNPUBLISHED OPINION
)
 Appellant.) FILED: May 31, 2011

Grosse, J. — Expert opinion testimony that is otherwise admissible is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. Evidence that is helpful to the jury and is not a direct comment on a defendant’s guilt is admissible. We affirm.

FACTS

In September 2007, Evelyn Fields worked as a second assistant manager for Bartell Drugs in the Ravenna area. Fields’ duties included ordering, assisting with refunds, and responding to requests for change at the registers. In March 2008, the store manager, Michael Storbakken, noticed an unusually large number of cash refunds issued to customers who used a debit or credit card for the initial purchase. The usual procedure required refunds to be issued in the same manner in which the item was purchased. Since Field’s arrival, the store was processing two or three refunds daily. Previously, refunds had been processed at a rate of once or twice a week. Additionally, inventory numbers of returned items were lower than they should have been, had the item been returned.

Storbakken contacted Russ Mitchell, a Bartell's loss prevention manager, who installed closed circuit surveillance cameras in the store. The video from those cameras revealed Fields conducting transactions at cash registers when neither a customer nor merchandise was present. Mitchell's testimony characterized these transactions as fraudulent. Additionally, the video revealed at least one incident where Fields placed money from the cash register directly into her pocket. Company policy required that money removed from a cash register be placed in one of the supplied money bags and then deposited in the safe. Mitchell initially testified regarding the contents of the video as a lay witness; the trial court later found him to be an expert.

Fields testified. Although she could not specifically recall what she was doing at the cash registers at that time, she gave various explanations for why it would be appropriate for her to be there.

A jury convicted Fields of second degree theft. She was sentenced to 32 days, 30 of which were converted to community restitution. Fields appeals contending that opinions expressed by Mitchell during his testimony were inappropriate and invaded the provenance of the jury.

ANALYSIS

ER 702 governs the admissibility of expert testimony. Expert testimony is admissible if the witness qualifies as an expert and the expert's opinion will assist the trier of fact. ER 702 allows an expert witness to qualify based on "knowledge, skill, experience, training, or education." We review the trial court's

admission of expert testimony under the abuse of discretion standard. An abuse of discretion occurs when no reasonable person would take the position adopted by the trial court.¹ Here, Mitchell's knowledge of Bartell's policies, his skill with the equipment used, as well as his experience with various components of loss prevention, qualified him as an expert. The trial court did not abuse its discretion.

Fields argues that Mitchell was erroneously permitted to express an opinion on the ultimate issue in the case—that the transactions were fraudulent. But expert opinions are not prohibited because they embrace the ultimate issue to be decided by the trier of fact.² Indeed, ER 704 expressly permits the admission of an otherwise admissible opinion or inference on an ultimate issue that the trier of fact must decide.³ An expert may not comment on a defendant's guilt or innocence.⁴ Washington courts have expressly declined to take an expansive view “of claims that testimony constitutes an opinion of guilt.”⁵

To determine whether testimony constitutes an impermissible opinion on guilt or veracity, or a permissible opinion on an ultimate issue, a court should consider the totality of the circumstances, including the type of witness, the nature of the testimony and charges against the accused, the type of defense,

¹ State v. Atsbeha, 142 Wn.2d 904, 912-14, 16 P.3d 626 (2001).

² State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007).

³ ER 704 provides, “Testimony 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.”

⁴ State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

⁵ City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

and the other evidence.⁶

Here, the alleged error is that Mitchell, the loss prevention investigator, repeatedly testified that certain transactions observed on video surveillance were fraudulent. While the choice of the word “fraudulent” was unfortunate, it does not amount to a comment on Fields’ guilt. In overruling defense’s objection to Mitchell’s description, the court noted that it was a term of art and defense would have an opportunity in cross-examination to address Mitchell’s characterizations. Moreover, when Mitchell used the word “fraudulent” he was not commenting on Fields’ guilt, rather he was describing a transaction that appeared suspicious. This testimony was helpful to the jury in deciphering the evidence presented.

There were 27 discs of video from the camera surveillance of the check stands and safe. Mitchell testified that he wrote a report on the videos and the suspect transactions. Those specific videos were shown to the jury. The State then asked Mitchell about whether he had observed anything unusual in the video shown. Mitchell responded that it was a fraudulent refund.

At one point, Mitchell described a video as showing a transaction of a regular customer, which tracked along with the transaction receipt from the cash register. The video then showed Fields processing a refund, yet no merchandise or customer was present. What the video did show was a Universal Product Code (UPC) being scanned without the product. At the same

⁶ State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); Kirkman, 159 Wn.2d at 928.

time, the computer transactions from the cash register did not reveal any money being put in for the initial purchase.

After counsel objected to Mitchell's opinion testimony, the court ruled that the witness was an expert because he was called in his capacity as someone who had expertise in both store policy and interpreting or observing the video from the cameras that that he set up. Since defense counsel was aware that Mitchell would be called and what he would be testifying to, there was no surprise and the court's characterizing him as an expert did not result in any harm.

Mitchell also used the term "fraudulent" in response to questioning by the State as to the amounts and dates of refunds and cash removed from the cash registers. Testifying from his notes, comparing the electronic cash register journals with the videos, Mitchell used the term "fraudulent refund" to describe particular refunds made on specific dates with specific amounts. Under these circumstances, it is evident that Mitchell was not commenting on Fields' guilt, but rather on what he observed to be fictitious transactions.

Fields likens Mitchell to a police officer and argues that such testimony is prejudicial because it carries a special aura of reliability. State v. Demery,⁷ cited by Fields, is inapplicable. That case involved tape recordings of police officers directly accusing the defendant of lying.⁸ Additionally, the majority opinion in Demery ruled that admission of the tapes either was not error, or was

⁷ 144 Wn.2d 753, 30 P.3d 1278 (2001).

⁸ Demery, 144 Wn.2d at 757.

harmless error.⁹ The statement by Mitchell that certain transactions were fraudulent is not equivalent to a statement that the defendant is lying. Furthermore, the special aura of reliability ascribed to a police officer's statements does not apply to a private employee investigating potential irregularities at a commercial establishment. Mitchell did not invade the provenance of the jury.

Fields argues that there was no instruction that the jury was the sole judge of witness credibility. While it is common to issue a specific instruction regarding an expert's testimony, this was not done here.¹⁰ However, the jury was instructed that it was the "sole judges of the credibility." Instruction No. 1 provided:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

This was sufficient.

Affirmed.

⁹ Demery, 144 Wn.2d at 765.

¹⁰ Defense counsel requested that the expert witness instruction be deleted on the grounds that there was no expert witness. The State had no objection and the court removed the instruction.

Grosse, J

WE CONCUR:

Spears, J.

Cox, J.