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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

The State of Washington,

Plaintiff,

vs.

SMITH, ALAN JUSTIN

Defendant.

No. 13-1-01546-8

STATE'S RESPONSIVE BRIEF IN OPPOSITION TO MOTION TO EXCLUDE

1. ER 701 Allows the proffered testimony of John Ely

John Ely was Susann Smith's lawyer during her dissolution proceedings with the defendant. After Commissioner Brudvik had made her initial rulings on Temporary Orders related to the divorce on August 3, 2012, the parties and their respective lawyers went out into the hall to reduce the Commissioner's rulings to writing. While this was going on defendant and Susann disagreed on an issue relating to time with the children during the summer. According to attorney Ely defendant got upset; and then fixed upon Susann what he described as an "incredibly angry" stare. Ely describes the stare as lasting approximately 5 seconds. Ely indicated in his written statement to police that the stare was something the like he had never seen in some 15 years of practice. The glare was concerning enough to Ely that he asked Susann about it, and mentioned it to his staff.

ORIGINAL

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ER 701 states a lay witness may offer testimony in the form of opinions or inferences when these opinions or inferences are limited to those 1) rationally based on the perception of the witness, are 2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and 3) not based on scientific, technical or other specialized knowledge. Case law establishes that the limits of ER 701 are exceeded when a witness testifies "in the form of an opinion regarding guilt...of the defendant." State v Demery, 144 Wn2d 753, 759 (2001). However, "testimony that ...is based on inferences from the evidence is not improper opinion testimony". Seattle v Heatley, 70 WnApp 573, 578 (1993). "The fact that an opinion supports a finding of guilt... does not make the opinion improper." State v Collins, 152 WnApp 429, 436, (2009).

The holding and facts in State v Blake, 172 WnApp 515 (2012), offer guidance on this issue. In Blake, a number of witnesses were present when a young man was shot in the head and died in a north Everett neighborhood. None of the witnesses, however, actually saw the shooting or a gun. What they did see and hear was a muzzle flash, the sound of the gun shot, and the relative position of various people at the scene of the shooting relative to the victim. Several witnesses opined at trial that based on this relative position of people at the scene of the shooting, the defendant was the only one who could have shot the victim. The Court of Appeals held that this was proper evidence as the witnesses testimony stemmed from their own sensory perceptions and the inferences they drew from these perceptions. A jury was free to disregard such inference.

The State Supreme Court has held that there are areas clearly inappropriate for opinion testimony in a criminal trial: expressions of personal belief as to the guilt of the defendant, the intent of the accused, and the veracity of witnesses. State v Montgomery, 163 Wn2d 577, 591(2008) (quoting Demery 144 Wn2d at 759). In the instant case, attorney Ely is offering his inference and/or opinion on none of the above (guilt, intent, veracity). What Ely is doing is basing his inference of the meaning of the look defendant gave based on his own sensory

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perceptions (he actually saw the look, and its context), and his knowledge of normal social cues in coming to a conclusion that the look defendant gave his wife was an angry look. People make judgments like this every day when dealing with their spouses, children, co-workers or people they meet on the street for the first time. The various reasons defense gives for excluding this testimony-Ely had never met defendant before and thus had no background to draw from in coming to his conclusion, and that the incident occurred 6 months before the actual murder, all go to the weight the fact finder should place on the evidence, not its admissibility.

The State would ask the Court to deny defendant's motion to exclude this testimony from attorney Ely.

DATED this 14 day of June, 2015.

Respectfully submitted,

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