FILED
FEBRUARY 12, 2013
Court of Appeals
Division III
State of Washington

NO. 30933-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN QUAALE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Gregory D. Sypolt, Judge

REPLY BRIEF OF APPELLANT

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ER 704 1

A. ARGUMENT IN REPLY

I. APPELLANT WAS DENDIED A FAIR TRIAL WHEN THE JURY HEARD IMPERMISSIBLE OPINION TESTIMONY.

In his opening brief, appellant Ryan Quaale asserts he was denied a fair trial when the jury heard Officer Chris Stone's testimony that, based solely on the results of the Horizontal Gaze Nystagmus (HGN) test, he believed Quaale's ability to drive was impaired due to alcohol consumption. Brief of Appellant (BOA) at 10-21. In response, the State attempts to broaden appellant's argument to ridiculous proportions, suggesting: "The defendant is arguing for an enlargement of Washington Constitutional law so that all relevant testimony from a State witness will be labeled an impermissible comment on guilt." Brief of Respondent (BOR) at 2. An informed reading of appellant's brief and the relevant case law shows that no such "enlargement" is advocated or implied. Appellant is simply asking this Court to apply established case law to the facts of this case.

Next, the State suggests that because the opining officer was testifying as a drug recognition expert (DRE), he was permitted to offer his opinion under ER 704. While it is true that experts can testify to ultimate issues of fact under ER 704, it is also true that

evidence rules often must yield to the constitutional rights of the accused when the two are in conflict. E.g., Holmes v. South Carolina, 547 U.S. 319, 326, 126 S.Ct. 1727, 1732, 164 L.Ed.2d 503 (2006) (concluding a rule that excluded evidence implicating third parties violated the defendant's right to have a meaningful opportunity to present his defense); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (finding unconstitutional Mississippi's evidentiary rules which denied the defendant the right to impeach his own witnesses and admit statements against penal interest).

As Washington courts have made clear, despite the fact that the evidence rules permit opinion testimony, a defendant's right to a fair trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when a witness is permitted to express his or her opinion as to guilt. State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007); State v. Johnson, 152 Wn. App. 924, 931-35, 219 P.3d 958 (2009); State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985).

The Washington Supreme Court's opinion in State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987), illustrates this point and presents facts quite analogous to this case. In Black, the Supreme

Court held an expert witness' conclusion that the victim was suffering from rape trauma syndrome amounted to an impermissible comment that the defendant was guilty of rape. Id. at 349. The Court reached this conclusion even though the expert witness had formed her opinion based on inferences she drew from facts she had personally observed (i.e. the victim's psychological and emotional state during the months following the alleged rape). Id. at 339.

This Washington Supreme Court explained that the State could have offered the foundational testimony establishing the witness had observed the emotional trauma suffered by the victim, and then the State could have argued to the jury that it might infer from this testimony that the victim was raped. Id. at 349. However, the State could not submit to the jury the expert witness' conclusion that the victim had been raped because that went to the core issue determining guilt. Id. Instead, it was the jury's duty to weigh the facts known to the expert witness and to independently draw its own inference that the victim had been raped – or reject such an inference. Id.; see also, State v. Montgomery, 163 Wn.2d 577, 592, 183 P.3d 267 (2008) (explaining "It is unnecessary for a witness to express his belief that certain facts or findings lead to a conclusion

of guilt.").

As in Black, the State could have offered Officer Stone's testimony about the HGN's testing procedure[1] and about what he personally observed. But as in Black, however, the State ran afoul of the constitutional bar against comments on guilt when it put before the jury Stone's opinion that, based solely on the HGN test results, Quaale's ability to drive was impaired by the consumption of alcohol. Consequently, as in Black, the expert testimony at issue constituted an impermissible comment on guilt. See also, BOA at 11-19 (analyzing the five factors for determining whether a statement constitutes improper opinion testimony and reaching the same conclusion).

Arguing to the contrary, the State cites Division I's opinion in Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). While Heatley does appear to support the proposition that an officer who has personally observed a person may offer an opinion about his level of intoxication, the Washington Supreme Court has subsequently cautioned against a broad interpretation of that case. The Supreme Court stated:

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[1] This would have to be within the limits discussed below.

> A lay person's observation of intoxication is an example of a permissible lay opinion. City of Seattle v. Heatley, 70 Wash. App. 573, 580, 854 P.2d 658 (1993). But the advisory committee to Federal Rule of Evidence 702 explained that witnesses should not tell the jury what result to reach and that opinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusions.

Montgomery, 163 Wn.2d at 591; see, State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004) (this Court distinguishing Heatley on similar grounds when determining an officer's testimony constituted a comment on guilt). In this case, the opinion testimony should have, and could have, been avoided because the foundational facts were presented to the jury in such a way that the jury could have independently drawn its own conclusion as to guilt without hearing Officer Stone's opinion about it.

Furthermore Heatley involved a different type of foundational evidence, making the case factually distinguishable. In Heatley, the officer testified Heatley's eyes were watery and bloodshot, his speech was "slightly slurred," he had a "strong odor of alcohol on his breath and about him," and he "appeared to be slightly off balance when he walked." Heatley, 70 Wn. App. at 575. Here, Officer Stone's opinion was predicated solely upon the HGN results (2RP 33), not on his personal observation of "commonly known"

alcohol effects such as slurred words, watery eyes, alcohol odor, flushed face. Thus, this case does not involve the type of intoxication opinion testimony that is commonly permitted after the witness has an opportunity to observe someone. 2RP 33, 44-46; see, State v. Lewellyn, 78 Wn. App. 788, 796, 895 P.2d 418 (1995) (distinguishing between permissible lay opinion about degree of intoxication that is based on the witness' observation of the defendant's demeanor and expert opinions regarding the degree of intoxication that are based on specialized knowledge).

The State also takes issue with appellant's analysis of the limitation placed on HGN testimony. BOR at 4. The Washington Supreme Court has stated:

> ... an officer may not testify in a fashion that casts an aura of scientific certainty to the [HGN] testimony. The officer also may not predict the specific level of drugs present in a suspect. The DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs.

State v. Baity, 140 Wn.2d 1, 17–18, 991 P.2d 1151 (2000); see also, State v. Koch, 126 Wn. App. 589, 597, 103 P.3d 1280 (2005) (interpreting this to mean a witness may testify only that an HGN

test can show the presence of alcohol, not the specific levels of intoxicants).

Contrary to Baity's limitations, Officer Stone explicitly told the jury that the HGN was a very important tool in investigating DUIs and that it can detect degrees of impairment. 2RP 25-26. This certainly cast an "aura of scientific certainty" and suggests that the test can predict certain levels of impairment. More importantly, the State did not ask Officer Stone whether, based on the HGN test, the officer concluded there was the mere presence of alcohol; instead, the State asked the officer whether he believed there was enough alcohol present to impair Quaale's driving. 2RP 33. Thus, while the State stopped short of asking for a specific blood alcohol content number, it certainly elicited the officer's opinion about whether there was a sufficiently high enough level of alcohol to impair driving. This type of testimony runs afoul of Baity.

As explained in greater detail in appellant's opening brief, the officer's comment constituted an impermissible comment on guilt. Nothing the State has argued shows otherwise. As such, this Court should reverse.

II. PROSECUTORIAL MISCONDUCT DENIED APPELLANT A FAIR TRIAL.

In his opening brief, appellant argues the prosecutor committed misconduct in her rebuttal argument when she drew the jury's attention to the fact that Quaale had a revoked license, as this violated a previous court order and prejudiced Quaale's right to present a complete defense.[2] BOA at 21-25. In response, the State suggests the error was harmless because there was a limiting instruction during closing, the jury had already heard about the revocation during the trial, and there was no prejudice to the defense. BOR at 5-6. As shown below, the State is incorrect.

Turning first to the limiting instruction, the State is correct that the following occurred:

> [Prosecutor]: ... I mean you also know that he is revoked because he refused the breath test before. So, at this point, what does he have to lose –
>
> [Defense Counsel]: objection, Your Honor –
>
> [Judge]: Just a minute. Let me hear the objection. I

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[2] The State's initial response appears to confuse the issue raised. The State suggests appellant is claiming the prosecutor committed misconduct during its examination of Stone. BOR at 4. However, appellant never made nor suggested such a proposition. Instead, he always maintained the misconduct occurred during closing. BOA at 21-25.

> will sustain the objection because it was not raised during closing directly ... Jury will disregard the last comment.
>
> [Prosecutor]: We know he was revoked. We know he didn't have a license. So, at that point, what do we have to lose –
>
> [Defense Counsel]: Objection, Your Honor.
>
> [Judge]: I will permit that. Go ahead.[3]
>
> [Prosecutor]: He doesn't have a license. So okay, I don't have a license, revoke it, revoke my privilege to drive because I don't have it anyway.

3RP 9-10.[4] However, the State is incorrect in assuming this limiting instruction cured the harm.

The problem here is that, while the jury was told to disregard the argument as to <u>why</u> the license was revoked, it was never told to disregard the argument about the revoked license in its entirety.

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[3] The trial court later explained its decision to sustain the first objection but not the second was based on a distinction between the license status and the reasons for the suspension. 2RP 74. However, the trial court's clarification to defense about the limitations that would be placed on State's argument was never predicated on this distinction. 3RP 4.

[4] The State suggests appellant failed to acknowledge that a limiting instruction was given. BOR at 5. However, appellant specifically included the above cited portion of the transcript in his opening brief (complete with the footnote) for the very purpose of drawing this Court's attention to exactly what transpired below – including the giving of a limiting instruction. BOA at 6.

Thus, even with the limiting instruction, the State was permitted to violate a court order and emphasize facts that the defense had assured would not be discussed during closing arguments. Justifiably relying on that order, the defense had strategically chosen to give up a line of argument so as to not allow the State the chance to emphasize that fact. BOA at 24-25 (detailing defendant's detrimental reliance). This put the defense in the position of being unable to minimize the damage done by the State's violation of the trial court order by arguing the fact to its own benefit. As such, the limiting instruction did not cure the prejudice to the defense.

Similarly, the fact that the jury heard witness testimony about the revocation is irrelevant to the determination of whether this error was harmless. The harm in this case was that the defendant was denied his opportunity to present a complete defense because he detrimentally relied on the trial court's previous order in which the trial court specifically told defense counsel the State would not be permitted to address the revocation evidence if the defense did not do so first. Again the State violated the order, emphasized the prejudicial facts in rebuttal argument, and the defense was left with no opportunity to respond or present its own

argument about that fact.

Finally, the State claims there is not a sufficient showing of prejudice. This is not so. The prosecutor's misconduct denied Quaale his constitutional right to present a complete defense. As such, prejudice need not be shown with exactitude. See, Webb v. Texas, 409 U.S. 95, 98, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) (overturning a conviction where judge's misconduct denied appellant his right to present a complete defense, even where the showing of prejudice was minimal). Instead, prejudice may be established by showing the misconduct "interfere[d] with the defendant's ability to present his case." City of Kent v. Sandhu, 159 Wn. App. 836, 841, 247 P.3d 454 (2011). As argued in detail in appellant's opening brief, the prosecutor's violation of the court order unfairly interfered with Quaale's ability to put his complete defense before the jury. BOA at 21-24. Consequently, his conviction should be reversed.

B. CONCLUSION

For reasons stated herein and in appellant's opening brief, this court should reverse appellant's conviction.

DATED this 11th day of February, 2013.

Respectfully submitted,

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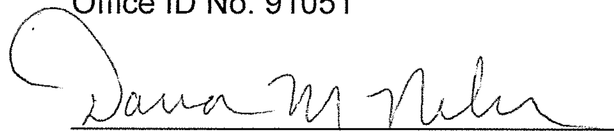

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No. 30933-9-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 12th day of February, 2013, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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kowens@spokanecounty.org

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Signed in Seattle, Washington this 12th day of February, 2013.

x