FILED

JAN 16 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

30933-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RYAN R. QUAALE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

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West 1100 Mallon
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(509) 477-3662

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COURT RULES

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant was denied due process when the jury was permitted (over defense objection) to hear an officer's opinion on guilt.

2. Appellant was denied his right to a fair trial due to prosecutorial misconduct.

3. Cumulative error denied appellant a fair trial.

4. The trial court erred when it denied appellant's motion to dismiss the prosecution under CrR 8.3(b).

II.

ISSUES PRESENTED

A. CAN A DEFENDANT PREVENT A WITNESS FROM TESTIFYING AS TO HIS OBSERVATIONS BY LABELING THE TESTIMONY A COMMENT ON THE EVIDENCE?

B. HAS THE DEFENDANT SHOWN THAT ANY PROSECUTORIAL MISCONDUCT WAS PREJUDICIAL?

C. DOES CUMULATIVE ERROR APPLY TO THIS CASE?

D. DOES REPRISING AN ARGUMENT UNDER CrR 8.3 INCREASE ITS VALIDITY?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's factual Statement of the Case.

IV.

ARGUMENT

A. THE TROOPER WAS TESTIFYING TO THE RESULTS OF HIS OBSERVATIONS AS A TRAINED DRUG RECOGNITION EXPERT.

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 and thus barred from trials.

ER 704 states: "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." ER 704. Aside from the fact that the trooper was a trained DRE officer who was trained in administering the horizontal gaze nystagmus test.

Some time back, Division I of the Court of Appeals addressed this issue in *City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993). The *Heatley* court stated:

> Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an 'ultimate issue' will generally

> depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. See generally Sanders, 66 Wash.App. at 380, 832 P.2d 1326. The trial court must be accorded broad discretion to determine the admissibility of ultimate issue testimony, Jones, 59 Wash.App. at 751, 801 P.2d 263, and this court has expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt. *See State v. Wilber*, 55 Wash.App. 294, 298, 777 P.2d 36 (1989) (analyzing officers' testimony that 'inferentially' constituted opinion on guilt as expert testimony under ER 702).

Heatley, supra at 579.

The court in *Heatley* also upheld the admission of the trooper's observations that the defendant was "impaired." As with the *Heatley* case, the trooper in this case simply related what he saw and what his training told him. There was no comment on the defendant's guilt. Truly, the trooper's comments could lead the jury to find the defendant guilty of DUI, but it is the very fact that the comments could lead a jury to convict is exactly why the comments are relevant in the first place.

The defendant claims that the trooper did not "...merely offer his opinion that the HGN results showed the presence of alcohol..." Brf. of App. 15. The defendant claims that the trooper testified that the defendant had consumed enough alcohol to impair his ability to drive. Brf. of App. 15. The defendant then makes the bald claim that "[t]he case law does not support the scientific reliability of this conclusion, making [the trooper's] testimony misleading and prejudicial."

What is misleading are the defendant's claims on this issue. The defendant cites to *State v. Koch,* 126 Wn. App. 589, 103 P.3d 1280 (2005). What *Koch* holds is that the officer could not testify to *specific* levels of intoxication. *Koch, supra* at 597. The trooper did not testify that the defendant was a .15 based on the HGN. The trooper testified that there was "no doubt" that the defendant was impaired. 2RP 33. This testimony is well within the holding of *Koch.*

The defendant repeats his arguments pertaining to the trooper's testimony and how it is an opinion of guilt.

B. THE DEFENDANT HAS NOT MET HIS BURDEN TO SHOW THAT ANY ALLEGED PROSECUTORIAL MISCONDUCT WAS PREJUDICIAL.

The defendant claims prosecutorial misconduct because the prosecutor inquired, on re-direct, regarding why the defendant's license was revoked. The State trooper testified that the defendant's license was suspended because the defendant had previously refused to take a breath test. 2RP 49.

The defendant fails to note that the defense counsel cross-examined the trooper and asked: "His driver's license was suspended. Right?" 2RP 43. Then defense counsel asked "Did you run his driver's license?" 2RP 43. The defense counsel's next question was: "Was it suspended?" 2RP 43. The trooper replied that the defendant's license was "...revoked first." 2RP 43.

The defendant cites to CrR 8.3, arguing that the prosecutor committed misconduct. The record shows that the prosecutor did mention in closing argument that the defendant's license was revoked because he had refused a breath test. 2RP 87.

What the defendant does not note is the trial court sustained defense counsel's objection to the prosecutor's statement and the trial court granted the defendant's request for a "limiting instruction." 2RP 10. The jury was advised to disregard the prosecutor's last comment. 2RP 10. Juries are presumed to follow the court's instructions. *State v. Emery,* 174 Wn.2d 741, 278 P.3d 653 (2012); *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986).

The defendant also fails to point out that this was the *second* time the jury had heard the information regarding the defendant's license being suspended for failure to take a breath test. 2RP 50. Prosecutorial misconduct requires reversal only if there is a substantial likelihood that the misconduct affected the verdict. *State v. Padilla*, 69 Wn. App. 295, 846 P.2d 564 (1993), *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991). The defendant must show prejudice. *State v. Suarez-Bravo*, 72 Wn. App. 359, 864 P.2d 426 (1994).

In testing the degree of error engendered by the remarks, their comparative impropriety, and their likely effect upon the jury, consideration must be given to whether they were inadvertent or deliberate, designed to inflame and prejudice the jury, or whether they unintentionally may have done so. Their prejudicial or

inflammatory effect must be viewed in context with the earlier evidence and the circumstances of the trial in which they were made.

Even if one assumes, arguendo, that the prosecutor's remarks were misconduct, the defense bears the burden of showing that there is a substantial likelihood that the comments affected the verdict. *State v. Wood*, 44 Wn. App. 139, 721 P.2d 541 (1986) *review denied*, 44 Wn. App. 139 (1986).

C. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY.

The State does not concede that any reversible errors occurred in this case. Therefore, the cumulative error doctrine does not apply.

D. REPEATING AN ARGUMENT REGARDING AN ALLEGED ERROR DOES NOT MAKE THE ALLEGATION ANY STRONGER.

The defendant, apparently not satisfied with raising his prosecutorial misconduct arguments, reprises those arguments under the guise of a CrR 8.3 argument.

The defendant faults both the prosecutor and the trial court for alleged misconduct by the prosecutor in rebuttal closing argument. The defendant involves the trial court by including in his argument an alleged failure to act by the trial court.

The State responded to this argument previously. The State noted that the information that is under discussion came as no surprise to the jury. This "closing rebuttal" incident was the *second* time the jury had heard the information regarding the defendant's license being suspended for failure to take a breath test. 2RP 50. What the defendant does not note is the trial court sustained defense counsel's objection to the prosecutor's later statement and the trial court granted the defendant's request for a "limiting instruction." 2RP 10 The jury was advised to disregard the prosecutor's last comment. 2RP 10. Juries are presumed to follow the court's instructions. *State v. Emery*, *supra*; *State v. Mak*, *supra*.

The prosecutor noted during the motion hearing on the CrR 8.3 motion that she had mistakenly mentioned the defendant's license being suspended for failure to take a breath test. It would appear from looking at the transcript that the trial court permitted testimony that simply noted the defendant's revoked license but not testimony regarding the reason for revocation being failure to take a breath test. This is a fine distinction that was overlooked by the prosecutor. The comment was removed from the jury's deliberations by trial court instructions to disregard the comment.

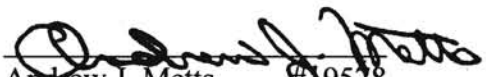
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 15th day of January, 2013.

STEVEN J. TUCKER
Prosecuting Attorney



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v.	)	CERTIFICATE OF MAILING
RYAN R. QUAALE, Appellant,	)	

I certify under penalty of perjury under the laws of the State of Washington, that on January 16, 2013, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Eric J. Nielsen
sloanej@nwattorney.net

and mailed a copy to:

Ryan R. Quaale
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1/16/2013 (Date) Spokane, WA (Place) Kathleen A Cuccia (Signature)