No. _____

COA # 49052-8-II

Clark County # 16-1-00349-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TRELANE H. HUNTER,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO
AND
THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
CLARK COUNTY

PETITION FOR REVIEW

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WASHINGTON COURT OF APPEALS

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PARTY

Appellant below, Trelane H. Hunter, is the Petitioner.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4.(b)(1), Petitioner seeks review of the unpublished decision of the court of appeals, Division Two, in State v. Hunter __ P.3d __ (2017 WL 6337460), issued on December 12, 2017.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Where a defendant is charged with driving under the influence of intoxicants, does the arresting officer give an improper indirect or direct opinion on guilt in violation of the defendant's right to trial by jury and the jury's fact-finding province when the officer testifies, over defense objection, that he believed the defendant was "intoxicated"?

2. Where an officer testifies that certain tests determine if someone is potentially impaired and the prosecution tells the jury that the tests showed the defendant met that standard, does that testimony and argument amount to a direct or indirect statement of opinion as to the guilt of the defendant, in violation of the defendant's right to trial by jury and the jury's fact-finding province?

3. Where counsel objects to opinion testimony below, is a defendant entitled to have the reviewing appellate court reverse for even an indirect opinion on guilt if the prosecution does not prove the constitutional error harmless, as this Court held in State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007), and similar cases or must there nevertheless be evidence of a direct comment on "the ultimate issue of guilt" addressing an opinion to every element of the crime, as Division Two here held?

[1] 1A copy is attached hereto as Appendix A.

4. In State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), this Court held that a reviewing court is to apply certain factors in order to determine whether there has been improper opinion testimony: 1) the type of witness involved, 2) the nature of the testimony, 3) the nature of the charges, 4) the nature of the defense and 5) the other evidence before the trier of fact in reaching its conclusion. Did Division Two err in failing to properly apply these requirements?

5. Does State v. Quaale, 182 Wn.2d 191, 340 P.3d 213 (2014), stand for the proposition that an officer does not give improper opinion testimony that he believed a defendant was intoxicated, so long as the officer does not cite a test and say that test gives "scientific certainty" to his opinion, or does not give a specific "level" of drugs or alcohol he believes are in the defendant's system, as Division Two effectively here held?

D. STATEMENT OF THE CASE

a. Procedural posture

Petitioner Trelane Hunter was charged in Clark County superior court with third-degree assault, possession of methamphetamine and driving under the influence, but acquitted of the assault after a jury trial. CP 5, 69-71. A standard-range sentence was imposed and Hunter appealed to Division Two of the court of appeals. See CP 102. On December 12, 2017, that Division issued an unpublished opinion affirming. See App. A. This Petition timely follows.

b. Facts relevant to issues on review

The defendant was accused of driving while under the influence of intoxicants after his car was stopped about one a.m. by an officer who had gotten a general report of a "potentially reckless"

vehicle. RP 149-53. The officer admitted that there was nothing "reckless" about the driving but the car was instead going slower than it needed to, including going about 15 or 20 miles per hour in a 40 mile per hour zone. RP 154. After the officer stopped the car, the officer said he smelled a "strong odor of alcoholic beverages" coming from the breath of the driver, Trelane Hunter, but the officer admitted that Hunter's speech was not slurred and was instead, "fair." RP 177-192-93.

Hunter was readily able to give the officer his license and registration, including insurance information, doing so even before the officer asked and without fumbling or having difficulty removing things from his wallet. RP 178. The officer said Hunter's eyes were "watery and droopy," but they were not red or "bloodshot." RP 156, 193. Hunter had "fair coordination," was wearing orderly clothes, had normal facial color and was neither florid nor flushed. RP 192-93.

The officer testified about giving a "horizontal gaze nystagamus test." RP 157. He described the test as follows: "supposed to measure the person - - if they're impaired by a depressant in their system." RP 147-48. The officer explained how the test would show it: "lack of smooth pursuit" by the eyes and if there was "horizontal gaze nystagamus," where the officer could see the eyes moving even after the person tested was supposed to be looking "all the way over" at a pen. RP 158-59.

The officer then testified that he saw both of those when he tested Hunter, and that those were "both indicators" that Hunter "potentially was impaired." RP 159.

Hunter was arrested after he was told to walk a straight line and did so but kept right on walking, which made the officer concerned Hunter was "possibly trying to flee the scene." RP 162, 185. After his arrest, officers found a glass pipe with burn marks and white residue which tested positive for the presence of an unknown quantity of methamphetamine. RP 163-64.

In opening argument, the prosecutor told jurors the HGN test the officer had performed was done "in order to determine, by looking at their eyes while doing that test, if they're under the influence of intoxicants." RP 140-41. Hunter's defense was that he was doing terrible driving but there was no evidence he was affected by alcohol or drugs, such as a blood or breath test. RP 145-46.

At trial, after the testimony about giving the tests and their meaning, the prosecutor then asked the officer, "based on your training and experience and your common understanding at that point, did you believe that he was intoxicated?" RP 163. Over defense objection that it was a "conclusion," the prosecutor argued it was "[p]roper opinion testimony," and the court overruled, stating, "he can state his opinion based on training and experience." RP 163. The judge said it was up to the jury to decide whether to accept that opinion. RP 163.

The prosecutor thanked the judge, then asked again for the officer's opinion "as to his - - whether he was intoxicated or not?" RP 163. The officer responded, "[y]es." RP 163. The prosecutor asked, "what was your opinion," and the officer said, "I believe he was intoxicated." RP 163. The prosecutor asked, "[w]as that obvious to you?" RP 163. The officer said, "[y]es." Id.

Later, in closing argument, the prosecutor declared, regarding the tests, that, as the officer had "explained," the evidence from the tests was "not something that you can fool" but "something that kind of the eyes tell the story." RP 247-48. The prosecutor also declared that, when the officer "sees that horizontal gaze nystagamus. . .he knows at that point that Mr. Hunter is under the influence." RP 247-48.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

HUNTER'S RIGHTS TO TRIAL BY JURY AND TO A FAIR TRIAL WERE VIOLATED BY THE IMPROPER OPINION EVIDENCE OF THE OFFICER'S OPINION THAT HUNTER WAS INTOXICATED AND THE STATE HAS NOT SHOWN THE CONSTITUTIONAL ERROR HARMLESS BEYOND A REASONABLE DOUBT

Both the state and federal constitutions prohibit the admission of improper opinion testimony. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The accused have the right to trial by jury, which means to have the jurors serving as the sole judge of the evidence, including the weight and credibility to give to the evidence. See State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d

267 (2005).

This Court has held that admission of improper opinion testimony is reversible error because it violates the defendant's constitutional rights to a trial by jury. Kirkman, 159 Wn.2d at 927. Further, this Court has held that the constitutional harmless error standard applies, so that if there is proof there was improper opinion, the "abuse of discretion" standard is not used. Id. Instead, a presumption of prejudice applies and reversal is required unless and until the prosecution proves the error constitutionally harmless beyond a reasonable doubt. Id.

The "constitutional harmless error" standard adopted by this Court requires the state to prove that every reasonable fact-finder would not have failed to convict based on the untainted evidence - a far cry from the deferential standard used when evaluating claims of sufficiency of the evidence. Id.; see State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

This Court should grant review in this case, because Division Two erred in holding that an officer's testimony of his "opinion" and "belief" that the defendant was "intoxicated" was not improper opinion testimony, and Division Two's decision improperly applies this Court's rulings on opinion testimony and both Kirkman and Quaale, as well as failing to follow the requirements set forth in Demery.

At first, Division Two correctly held that the officer's

testimony that he believed that Hunter was intoxicated was "an opinion." App. A at 3-4. The lower appellate court declared, however, that there was no cause for reversal because the opinion "was not an opinion on the ultimate issue of guilt." App. A at 3-4.

An opinion does not have to be an opinion on "the ultimate issue of guilt," however, for reversal to be required. Kirkman, 159 Wn.2d at 937. Even an *indirect opinion* on the defendant's guilt, veracity or credibility or the veracity and credibility of any witness will be subject to review and may compel reversal if, as here, the defendant objects below and the opinion was sufficiently prejudicial. See id.

Division Two's reasoning appears to be that if the comment only goes to a *part* of the state's case against the defendant, there is no improper opinion on guilt. App. A at 3-4. The theory is that, because the crime requires the prosecutor to prove the defendant was "under the influence of or affected by" intoxicating liquor or drugs, it was not an improper "opinion" on "guilt" to say that Hunter was "intoxicated" because that was not the only element to the charged crime. App. A at 3-4.

Where an arresting officer testifies, over objection, that he believes that someone is intoxicated in a case where that intoxication is an issue, it is difficult to conceive how that officer's opinion is not improper opinion relating to guilt. This Court has explicitly held that the an indirect opinion is enough if counsel raises the issue

below. Perhaps more importantly, the Court has set forth explicit factors for determining when there is an improper opinion. See Demery, 144 Wn.2d at 759. The reviewing court is supposed to look at 1) the type of witness involved, 2) the nature of the testimony, 3) the nature of the charges, 4) the nature of the defense and 5) the other evidence before the trier of fact in reaching its conclusion. Id. This Court has *never* held that an officer does not give an opinion on guilt unless the officer's comment encompasses *all the elements of the crime* - as Division Two here held. Had the lower appellate court properly applied the Demery factors, it would have concluded that the testimony from an officer (known to hold great sway with jurors) that he believed the defendant was intoxicated (a direct expression of belief), where the charge was driving while under the influence of intoxicants (directly relevant to the nature of the charge), the defense claim was that he was a bad but not intoxicated driver (nature of the defense) and the other evidence before the trier of fact was equivocal, the improper opinion testimony would have compelled reversal.

Division Two's holding here is contrary to the factors set forth in Demery - and the Court's holdings that even an indirect comment on guilt may be found to be constitutional error compelling reversal if objected to below. The comments here were directly relating to guilt - the officer said he believed the defendant was "intoxicated" in a case involving the crime of "driving under the influence of

intoxicants." But even if it could be argued that the officer's comments were "indirect" opinion on Mr. Hunter's guilt, that was irrelevant here under Kirkman because counsel *objected* to the improper opinion below.

Review should be granted under RAP 13.4(b)(1) to address the apparent conflicts between the decision in this case and this Court's holdings in Demery, applying different factors than Division Two relied on here, and Kirkman, regarding whether an opinion must somehow amount to a direct comment on guilt for all of the elements of the charged crime. The prosecution has not shown the constitutional error harmless beyond a reasonable doubt, nor can it, given the equivocal nature of the other evidence below.

Review should also be granted because of the conflict between the holding of Quaale and the use to which Division Two put that decision. Division Two relied on Quaale, supra, as holding that the comments here were proper because they did not cast "scientific certainty" on the tests and "did not testify to a certain level or effect" on the defendant. App. A at 3-4.

Thus, Quaale is being cited as holding that it is proper for an officer to give his opinion and "belief" that the defendant was "intoxicated" based on tests and "training and experience," in a case where the prosecutor argued in closing that those tests could not be fooled and that, once the tests were done, the officer "knows at that point that Mr. Hunter is under the influence." RP 247-28. This

Court should review to address whether Quaale so limits the issue of improper opinion testimony to only "scientific certainty" comments as Division Two held, or generally prohibits testimony giving an aura of such certainty without explicit details, as Quaale appears to hold.

Under RAP 13.4(b)(1), this Court will consider granting review when there is a conflict between a decision of the court of appeals and one in this Court. That standard is met in this case, and this Court should grant review. On review, this Court should hold that the officer's comments were improper comments of opinion and that the prosecution has not met its burden of proving that constitutional error harmless beyond a reasonable doubt, by showing that every rational fact-finder would necessarily have found Hunter guilty, absent the error.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 11th day of January, 2018.

Respectfully submitted,

/s/ Kathryn Russell Selk
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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Clark County Prosecutor's Office via this Court's upload service and caused a true and correct copy of the same to be sent to appellant by deposit in U.S. mail, with first-class postage prepaid at the following address: 7141 S.E. Cora St., Portland, OR. 97206.

DATED this 11th day of January, 2018.

/s/ Kathryn Russell Selk
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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 2.

STATE of Washington, Respondent,
v.
Trelane Hugh HUNTER, Appellant.

No. 49052–8–II
|
Filed December 12, 2017

Appeal from Clark Superior Court, 16–1–00349–4, Honorable Robert A. Lewis, Judge.

Attorneys and Law Firms

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UNPUBLISHED OPINION

Sutton, J.

***1** Trelane H. Hunter appeals his conviction for driving while under the influence. Hunter argues that the arresting officer testified to an improper opinion on his guilt which violated his right to a fair jury trial. The officer's testimony was not an improper opinion on guilt. Accordingly, we affirm.

FACTS

On February 11, 2016, the State charged Hunter with driving while under the influence.[1] The arresting officer, Matthew Hoover of the City of Vancouver Police Department, testified at Hunter's jury trial.

1 RCW 46.61.502(1)(c). The State also charged Hunter with assault in the third degree and possession of a controlled substance—methamphetamine. A jury found Hunter guilty of possession of a controlled substance—methamphetamine. However, Hunter does not appeal his conviction for possession of a controlled substance—methamphetamine. The jury found Hunter not guilty of assault in the third degree.

Officer Hoover testified that, on February 9, 2016, he was on patrol and observed Hunter's car moving very slowly toward the stop line of a highway exit ramp. Hunter's car caught Officer Hoover's attention because there were no other vehicles that would require Hunter's car to slow down. Officer Hoover pulled behind Hunter's car and Hunter's car began to accelerate in an inconsistent and jerky manner. Hunter's car then quickly made a right turn. Hunter's car partially entered the left lane before correcting and pulling completely into the right lane. Hunter's vehicle continued to travel approximately 15–20 miles per hour in a 40 mile per hour speed zone. Officer Hoover then executed a traffic stop and contacted Hoover in his vehicle.

Officer Hoover smelled the strong odor of alcohol coming from the vehicle and observed Hunter's eyes were watery and droopy. Officer Hoover attempted to administer field sobriety tests (FSTs) to Hunter. Officer Hoover terminated the FSTs due to Hunter's inability to follow directions and perform the tests.

After Officer Hoover testified about Hunter's attempted FSTs, the following exchange took place,

> [STATE]: And based on your training and experience and your common understanding at that point, did you believe he was intoxicated?
>
> [HOOVER]: Yes.
>
> [DEFENSE]: Objection, You Honor. That's a conclusion.
>
> [STATE]: Proper opinion testimony.
>
> [COURT]: Overruled.
>
> The objection[ ]s—he can state his opinion based on his training and experience. It's up to the jury as to whether they accept the opinion.
>
> [STATE]: Thank you.

[STATE]: And did you form an opinion as to his—whether he was intoxicated or not?

[HOOVER]: Yes.

[STATE]: And what was what was (sic) your opinion?

[HOOVER]: I believed he was intoxicated.

[STATE]: Okay. Was that obvious to you?

[HOOVER]: Yes.

II Verbatim Report of Proceedings (VRP) at 162–63.

Officer Hoover arrested Hunter and transported him to the jail. While in the patrol car, Hunter stated, "I smoke meth. I smoke crystal. I smoke crack. I smoke every drug you got." II VRP at 167. Hunter was behaving aggressively, yelling, and kicking the door during the transport. Hunter's aggressive behavior continued after he was placed in a cell in the jail. While being booked into the jail Hunter stated, "I'm not taking no alcohol, no nothing." II VRP at 168. Hunter refused the breath test.

***2** The jury found Hunter guilty of driving while under the influence. Hunter received a standard range sentence. Hunter appeals.

ANALYSIS

Hunter argues that Officer Hoover's testimony was an improper opinion on his guilt. Opinion testimony as to the guilt of the defendant invades the exclusive province of the jury and may be reversible error because it violates the defendant's right to a trial by jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). To determine whether testimony is an improper opinion on guilt, this court considers

> "(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."

Kirkman, 159 Wn.2d at 929 (internal quotation marks omitted) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). "Testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a special aura of reliability." *Kirkman*, 159 Wn.2d at 928. An officer may not

testify that FSTs produce scientifically certain results. *State v. Quaale*, 182 Wn.2d 191, 198, 340 P.3d 213 (2014). An officer is also prohibited from predicting the "specific level of drugs present in a suspect." *Quaale*, 182 Wn.2d at 198. However, an officer is permitted to testify that a person was intoxicated provided that the testimony does not imply "a specific level of intoxication: that the alcohol consumed impaired the defendant, which is the legal standard for guilt." *Quaale*, 182 Wn.2d at 199.

In *Quaale*, an officer testified that he had "no doubt" that the defendant was impaired based on an FST. 182 Wn.2d at 198. The officer also testified that the defendant was "impaired." *Quaale*, 182 Wn.2d at 199. Our Supreme Court held that the officer's testimony was an improper opinion on defendant's guilt because the testimony cast scientific certainty on the reliability of the FST and the officer impliedly testified to the level of drugs in the defendant's system by characterizing the defendant as impaired. *Quaale*, 182 Wn.2d at 198–99. Here, Officer Hoover's testimony is sufficiently distinguishable from *Quaale* to be proper.

First, Officer Hoover's testimony did not cast scientific certainty on any of the attempted FSTs because Officer Hoover testified to his opinion based on the totality of his training and experience. Second, Hoover did not testify to a certain level or effect of the suspected drugs in Hunter's system. Because Officer Hoover testified that Hunter was intoxicated rather than impaired, Officer Hoover's testimony did not imply a certain level of drugs in Hunter's system. Accordingly, Officer Hoover's testimony was within the bounds expressed by our Supreme Court in *Quaale*.

Officer Hoover's testimony, while an opinion, was not an opinion on the ultimate issue of guilt. To prove driving under the influence of intoxicating liquor, the State must prove that the defendant is "under the influence of or affected by" the intoxicating liquor or any drug. RCW 46.61.502(c). It is not sufficient to simply prove that the defendant is intoxicated. Because Officer Hoover's testimony did not offer an opinion as to whether Hunter was under the influence or affected by alcohol or methamphetamine, his testimony was not an improper opinion on the ultimate issue of whether Hunter was guilty of driving under the influence.

***3** We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Worswick, P.J.

Lee, J.

All Citations

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RUSSELL SELK LAW OFFICE

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