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

---

# BRIEF OF APPELLANT

---

JENNIFER L. DOBSON
DANA M. NELSON
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

WASHINGTON CASES

## TABLE OF AUTHORITIES (CONT'D)

## TABLE OF AUTHORITIES (CONT'D)

A. 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).

Issues Pertaining to Assignments of Error

1. Appellant was charged with felony driving while under the influence (DUI). The sole issue for the jury to decide was whether appellant was under the influence or affected by the use of alcohol such that his ability to drive was impaired. During direct examination, the State asked an officer if, based only on the Horizontal Gaze Nystagmus (HGN) test, he had formed an opinion of whether the defendant's ability to drive was impaired due to alcohol consumption. After the defense's objection was overruled, the officer answered: "Absolutely, there was no doubt in my mind." Did this constitute an improper comment on guilt, denying appellant his constitutional right to a fair jury trial?

2. Prior to closing arguments, the trial court issued a ruling limiting the State's ability to address appellant's previously revoked driver's license. The trial court ruled the State may do so only if the defense argued about license status first. The defense never made the argument. In the State's final argument, however, the prosecutor violated the trial court's order and (over defense objection) delved into evidence that the defense had purposefully avoided as a result of the that order. Consequently, defense counsel was deprived of an opportunity to advance a defense theory she otherwise would have argued had she not avoided opening the door to the State. Did this constitute prejudicial prosecutorial misconduct?

3. Based on the prosecutor's misconduct during rebuttal closing argument, appellant moved for dismissal under CrR 8.3(b). Did the trial court error when it denied the motion to dismiss?

B. STATEMENT OF THE CASE

1. Procedural History

On September 14, 2011, the Spokane County prosecutor charged appellant Ryan Quaale with one count of attempting to elude a pursuing police vehicle (count I) and one count of felony DUI (count II). CP 3-4. At his first trial, a jury found Quaale guilty

of attempting to elude but could not reach a verdict on the other DUI charge. CP 83-84. At his second trial, a jury convicted Quaale of felony DUI. CP 99. He was sentenced to serve 12 months on count I and 60 months on count II. CP 127-38. Quaale timely appeals. CP 139-40.

2. Substantive Facts[1]

On August 28, 2011, Officer Chris Stone observed Quaale's truck speeding down Lane Park Road in the city of Mead. 2RP 4-6.[2] After Stone activated his lights and began to follow, Quaale turned the truck lights off and accelerated. 2RP 6. He overshot a corner, skidded off the road into a front yard, and then continued to drive away. 2RP 7. Officer Stone turned on his siren. 2RP 7.

Quaale stopped his truck and immediately exited. 2RP 11. Stone drew his gun and ordered Quaale to the ground. 2RP 12. As Stone handcuffed Quaale, he detected the odor of alcohol. 2RP 12. Stone conducted the HGN test and determined he had probable cause to arrest Quaale. 2RP 24, 27.

---

[1] Because this appeal raises issues pertaining only to count II, this brief sets forth facts as they were presented at the second trial.

[2] The transcripts are referred to as follows: 1RP (2-13-12, 2-14-12, 6-5-12); 2RP (4-9-12, 5-17-12); 3RP (4-9-12).

After Stone transported Quaale to the police station, he read the implied consent warnings for a breath test. 3RP 28-29. Quaale refused. 3RP 31. Instead, he asserted that Stone had not followed proper field sobriety test procedures. 3RP 32.

3. Opinion Evidence

At trial, Officer Stone testified that he was a Drug Recognition Expert (DRE) who had been trained in HGN testing. He also explained the importance of HGN testing, the procedures employed in conducting the test, and the degree to which the test measures impairment. 2RP 14-27. After so doing, the prosecutor asked:

> In this case, based on the HGN test alone, did you form an opinion based on your training and experience as to whether or not Mr. Quaale's ability to operate a motor vehicle was impaired?

2RP 33. Defense counsel immediately objected on the ground that opinion solicited went to the ultimate issue determining guilt, but she was overruled. 2RP 33. Stone was allowed to answer: "Absolutely. There was no doubt he was impaired." 2RP 33.

4. Facts Pertaining to Prosecutorial Misconduct and Motion to Dismiss

During cross examination of Officer Stone, defense counsel asked whether Quaale's license was already suspended at the time

of the incident. 2RP 43. Officer Stone confirmed that it had been revoked. 2RP 43. The defense intended to use this fact to argue that Quaale attempted to elude the officer because he had a suspended license, not because he was driving under the influence of alcohol. 3RP 84-85.

Immediately upon redirect, the prosecutor asked Officer Stone why Quaale's license had been revoked. 2RP 47. Defense counsel objected. 2RP 47. Outside the jury's presence, the parties argued whether defense counsel had opened the door to further testimony about the suspended license. 2RP 47-49. It was the defense's position that merely asking Stone about Quaale's license status did not open the door to highly prejudicial testimony regarding why the license had been revoked. 2RP 48. The trial court disagreed and permitted the State to proceed. 2RP 50. When the jury returned, Officer Stone testified Quaale's license had been revoked because he previously refused to take a breath test. 2RP 51.

Prior to closing argument, defense counsel renewed her objection. 3RP 2. The prosecutor stated that she had only delved into the issue of Quaale's suspended license because the defense had opened the door and that she was not going to address it in

closing arguments unless the defense pressed the issue during its argument. 3RP 3. The trial court ruled that it was "going to permit the evidence to stand, and it may be responded to in rebuttal." 3RP 4. Defense counsel then asked: "So Your Honor, to clarify, if in closing arguments it is not discussed by me, is that then limiting the State as well?" 3RP 4. The trial court responded: "Right." 3RP 4.

During closing argument, the defense never once referred to Quaale's license status. Despite this, the prosecutor disregarded the trial court's ruling during its rebuttal argument, prompting the following exchange:

> [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 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.

After argument, the defense moved for a mistrial on the ground that the State violated the trial court's prior ruling. Defense counsel explained she had specifically decided to adjust her theories, relying on the trial court's ruling that if she did not discuss the license status in her closing, the State would not be permitted to address the issue in its closing, either. 2RP 73. The prosecutor responded that she would never have addressed the revoked license status in argument if defense counsel had brought it up in her argument. 2RP 73-74. Defense counsel assured the trial court she never mentioned the revoked status. 2RP 74. The trial court reserved ruling until transcripts could be obtained. 2RP 75.

[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.

Defense counsel obtained the relevant transcript and attached it to her Motion for Mistrial and Motion to Dismiss under CrR 8.3(b). CP 100-120. The transcript revealed defense counsel did not discuss Quaale's license status. 3RP 5-9.

Defense counsel asked for dismissal, arguing the prosecutor had violated the order and no limiting instruction could have cured the resulting prejudice to the defense because defense counsel had already abandoned an important line of defense in reliance on the court's previous ruling. CP 100-120; 2RP 84-89.

Faced with the transcript, the State backed away from its original position that the only reason it brought up the subject of the revoked license was because defense counsel had addressed the issue in closing. 2RP 87-88; 3RP 3. Instead, the prosecutor admitted she had violated the court's ruling. 2RP 88. She asserted, however, that she had been justified in arguing about the revoked license because it was a fair response to the defense's argument. 2RP 88-89. Specifically, it was the prosecutor's position that the defense had opened the door to the improper argument by discussing the fact Quaale had exercised his right to refuse to

undertake a breath test.[4] 2RP 88-89.

The trial court denied the motion, ruling that defense counsel's statements that Officer Stone "told Mr. Quaale had had the right to refuse the test" and that he "exercised his right" opened the door for the prosecutor to argue about the license status. The court reasoned that "the tendency of the defense statement was to advance a rationale for the decision to refuse the breath test" and "[t]he prosecution is entitled to counter with an alternative rationale for refusing the breath test." In so ruling, the court did not consider the parameters of its prior ruling or the prejudice to the defense. CP 121-22.

---

[4] Defense counsel's argument was as follows:

> The trooper told you that he read those implied consent warnings to Mr. Quaale. He told Mr. Quaale he had the right to refuse the test. Mr. Quaale exercised his right. He showed no confusion, the trooper said no confusion about any of the rights. I would submit that someone who is so obviously impaired would probably be a little confused about everything that is going on, probably wouldn't know what typically happens out at the scene, that there are these standard field sobriety tests. I mean, [h]e asked why he had not done them. Why not give him an opportunity to complete them?

3RP 8.

C. ARGUMENT

I. QUAALE WAS DENIED A FAIR TRIAL WHEN THE JURY HEARD POLICE OFFICER STONE'S OPINION ABOUT QUAALE'S GUILT.

Quaale's right to a fair trial was violated when the State presented Officer Stone's opinion that, given HGN results alone, he had no doubt Quaale's ability to drive was impaired. This was an impermissible comment on guilt for which there was a timely objection. As such, the trial court committed constitutional error when it overruled the objection and permitted the opinion to be admitted to the jury as substantive evidence.

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). The evil sought to be avoided by prohibiting a witness from expressing an opinion as to the defendant's guilt or innocence is having that witness tell the jury what result to reach, rather than allowing the jury to make an independent evaluation of the facts. 5A K. Tegland, Wash.Prac., Evidence, § 309, at 470 (3d ed. 1989). Consequently, no witness may express an opinion as to the guilt of

a defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

As the Washington Supreme Court has held, it is "clearly inappropriate" for the State to offer opinion testimony in criminal trials that amounts to an expression of personal belief as to the guilt of the defendant. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citation omitted). Such an opinion is not helpful to the jury and is highly prejudicial; thus it offends both constitutional principals and the rules of evidence. Id. at 591, n. 5.

To determine whether a statement constitutes improper opinion testimony, courts consider the following five factors: (1) the nature of the charges; (2) the type of defense; (3) the type of witness; (4) the specific nature of the testimony; (5) and the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591.

Applying these factors here, Stone's opinion that Quaale's ability to drive was absolutely impaired due to the presence of alcohol constituted an improper comment on guilt.

As to the first factor, Quaale was charged with felony DUI under RCW 46.61.502. This statute provides in relevant part:

> A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state ... [w]hile the person is under the influence of or affected by intoxicating liquor ...

RCW 46.61.502(1). The jury was instructed: "A person is under the influence of or affected by the use of intoxicating liquor if the person's ability to drive a motor vehicle is lessened in any appreciable degree." CP 92.

The defense did not contest the fact Quaale drove a motor vehicle in the State of Washington. 3RP 5-9. Quaale also stipulated to the requisite conviction that elevated the offense to a felony. CP 93. Thus, the core issue for the jury to decide was whether he was impaired by alcohol. See, State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (focusing on the "core element" of the charges when concluding a witness offered an impermissible opinion as to guilt); State v. Farr-Lenzini, 93 Wn. App. 453, 465, 970 P.2d 313 (1999) (reversing where officer's improper opinion on defendant's guilt shown to invade jury's province regarding the "core element" of the case).

Turning to the second factor, Quaale's defense focused on the State's failure to meet its burden of proving impairment, as opposed to proving mere consumption of alcohol. 3RP 5-8. The

defense emphasized the fact that it is not illegal to consume alcohol and drive – it is only illegal if the person's driving is impaired by the presence of alcohol. 3RP 5, 8. The defense argued the State could not show impairment where the only witness to the offense was an officer who conducted just one field sobriety test (HGN) that was not even fully completed, smelled alcohol on the defendant but failed to check his clothing to see if alcohol had been spilled, and failed to note any other common signs of alcohol impairment (such as slurred speech, blood-shot and watery eyes, flushed face, etc.). 3RP 5-8; 2RP 44-46. Thus, the defense theory further emphasized the fact that the core issue for determining guilt was whether Quaale was impaired.

Applying the third and fourth factors, the type of witness and the nature of the opinion testimony at issue here demonstrate that Stone's comment on guilt was an unreasonable encroachment on the province of the jury to independently decide facts and reach a conclusion regarding guilt.

First, the opining witness was an officer who was testifying as a Drug Recognition Expert and offering an opinion based on a seemingly scientific method of measuring impairment. 2RP 13-27, 35. Notably, 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 was not the type of intoxication opinion testimony that is commonly permitted after the witness has had 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). Instead, Officer Stone's opinion was based solely upon his specialized knowledge of the scientifically-based HGN test. See, State v. Beatty, 140 Wn.2d 1, 12-18, 991 P.2d 1151 (2000) (holding the HGN test is scientific in nature and an officer presenting the testimony must be qualified as an expert).

Importantly, the nature of Officer Stone's improper opinion was such that it reached beyond the bounds of acceptable expert testimony regarding HGN test results, and thus, was highly prejudicial. A DRE witness may only testify that an HGN test can reliably show the presence of alcohol and may not testify that the test can be used to determine any levels of intoxicants. State v.

Koch, 126 Wn. App. 589, 597, 103 P.3d 1280 (2005) (citing Beatty, 140 Wn.2d at 17-18). Officer Stone did not merely offer his opinion that the HGN results showed the presence of alcohol, he offered an opinion that based on the HGN results alone there was no doubt Quaale had consumed enough alcohol to impair his ability to drive.[5] 2RP 33. The case law does not support the scientific reliability of this conclusion, making his testimony misleading and prejudicial.

Officer Stone's comment on guilt was also particularly troublesome because it carried with it an aura reliability which was not mitigated with proper instructions. The Washington Supreme Court has stated that an officer's live opinion testimony – such as that given by Stone – carries with it "an aura of special reliability and trustworthiness." State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001) (citations omitted). Additionally, the nature of Stone's comment on guilt also carried with it a compelling "scientific aura" because it was predicated solely upon on a DRE's consideration of HGN results. See, Beatty, 140 Wn.2d at 11 (explaining this type of testimony carries with it a "scientific aura"). This type of testimony is dangerous because it has a tendency to

[5] 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.

lead jurors to place undue significance on it. Moreover, in this case, the trial court failed to mitigate this danger by giving the standard expert opinion instruction explicitly informing the jury that it was not bound by the expert's opinion.[6] See, Kirkland, 159 Wn.2d at 937 (explaining expert opinion instruction is an important factor to be considered when determining the constitutional impact of improper expert opinions about guilt).

Officer Stone's opinion was also particularly invasive of the province of the jury because it consisted of a direct expression of personal belief that was presented in terms that parroted the legal standard. "Opinions on guilt are improper whether direct or by inference, but it is very troubling that the testimony in this case was quite direct and used explicit expressions of personal belief...." Montgomery 163 Wn.2d at 594. An opinion is also more troubling if stated in conclusory terms parroting the legal standard. Id.

---

[6] WPIC 6.51 provides: "A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness."

(citing State v. Heatley, 70 Wn. App. 573, 581, 854 P.2d 658 (1993). Here, Officer Stone explicitly expressed his personally belief that the HGN results "absolutely" established Quaale's driving was impaired. Furthermore, the question posed by the prosecutor to which Stone answered affirmatively parroted the legal standard for determining whether the defendant was driving under the influence. Under these circumstances, the opinion can only be characterized as an improper opinion on guilt. See, State v. Mauer, 409 N.W.2d 196 (Iowa.Ct.App. 1987) (concluding it was reversible error where officer testified in a DUI case that, based on his observations of defendant, "it is my opinion beyond any reasonable doubt that the defendant was operating a motor vehicle ... while he was under the influence of an alcoholic beverage ").

When applying the fifth factor, a reviewing court should consider other evidence before the trier of fact to determine whether the improper opinion testimony should have been avoided and whether it was particularly prejudicial. Montgomery, 163 Wn.2d at 591. The Washington Supreme Court has explained opinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusions. Id. at 592 (explaining "It is unnecessary for a witness to express

belief that certain facts or findings lead to a conclusion of guilt.").

Given the evidence here, the jury did not need to hear Stone's personal belief that the HGN results alone established the core issue that Quaale's ability to drive was "absolutely" impaired by alcohol. The jury had heard Stone's testimony about how the HGN test detects the presence of alcohol, how the test was administered, and what the officer personally observed when he administered the test to Quaale. 3RP 12-27. Hence, the jury was in just as good of a position as Officer Stone to draw reasonable inferences as to whether that test established impairment beyond a reasonable doubt. Consequently, the prosecutor should not have asked Officer Stone to render an opinion as to what conclusion to draw from the HGN regarding Quaale's alleged impairment.

Finally, the comment on guilt was highly prejudicial in this case and its admission cannot be considered harmless error.[7] As the first mistrial indicates, the State's case was not overwhelmingly strong. CP 84. Stone administered solely the HGN test, as far as field sobriety tests are concerned. 3RP 27, 39. And this test only

[7] Because this type of error is of constitutional magnitude, prejudice is presumed, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. Olmedo, 112 Wn. App. at 533.

reliably measures the presence of alcohol, not the degree of impairment. Koch, 126 Wn. App. at 597. There was another field sobriety test that could have been administered, even with the defendant hand-cuffed, but Stone failed to administer it. 3RP 37. Beyond odor, the officer made no other observations of physical characteristics that are commonly known to indicate intoxication. 3RP 44-46. And the officer did not rule out the possibility that the alcoholic odor was coming from Quaale's clothing, rather than his breath. 3RP 46. Quaale showed no confused thinking when engaging with the officer and exercising his right to refuse the breath test. Moreover, the officer testified that he arrested the defendant for attempting to elude, not because he suspected drunk driving. 2RP 43.

In response, the State may argue – as it did to the jury – that defendant's attempt to elude demonstrated impaired thinking. 2RP 67. This argument should be rejected for two reasons. First, whether the defendant's driving during his attempt to elude was the product of a logical thought process or impaired thinking was a question for the jury. Based on this record, however, the State cannot show the jury ever weighed the evidence to determine that factual question, as it already had before it the officer's opinion

(based on the HGN result) that Quaale was absolutely impaired – an opinion that carried with it a special aura of reliability.

Second, as set forth in greater detail below, the defense was never able to fully respond to the State's argument regarding Quaale's thought-process during the eluding, because defense counsel made a tactical decision to forgo certain theories in response to the court's prior ruling – a ruling that was ultimately violated be the prosecutor. As such, any weight that might be given the State's argument regarding Quaale's thinking during the attempted eluding is tainted by prosecutorial misconduct. Given this record, it cannot be said beyond a reasonable doubt that the jury would have reached the same result without that impermissible opinion.

In sum, application all five factors for determining whether an impermissible comment on guilt has occurred support the conclusion that Stone rendered an constitutionally impermissible opinion about Quaale's guilt, thus denying Quaale a fair jury trial. Reversal is, therefore, required. See, e.g., Black, 109 Wn.2d at 349 (reversing where witness testified that the victim suffered from rape trauma syndrome which constituted "in essence" a statement that the defendant was guilty); Farr-Lenzini, 93 Wn. App. at 465

(reversing where improper officer opinion on defendant's guilt shown to invade jury's province).

II. THE PROSECUTOR COMMITED MISCONDUCT WHEN SHE VIOLATED A PRIOR COURT ORDER.

During rebuttal argument, the prosecutor violated the court ruling limiting the State's ability to argue about Quaale's revoked license status. There was no justification for this violation. Furthermore, the violation resulted in Quaale unnecessarily forgoing the opportunity to argue a key defense theory, thus prejudicing his ability to put forth a complete defense and his right to a fair trial.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed under the state and federal constitutions. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (citations omitted); State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676.

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id. Consequently, prosecutorial misconduct has been found where the prosecutor has violated a trial court's ruling limiting the production or use of certain evidence. E.g., State v. Smith, 189 Wash. 422, 428, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993).

Here, the prosecutor admitted she violated the trial court's ruling. 2RP 87. However, she argued – and the trial court ultimately agreed – "Once the defendant made the closing argument that the defendant was exercising his right to refuse the test the State was permitted to argue that the reason the defendant exercised his right was because he did not have a license." CP

121-22. A fair reading of the record does not support this contention and establishes that the prosecutor's violation was both improper and prejudicial.

First, the prosecutor's suggestion that she merely brought up the revocation as a fair response to defense counsel's comments about Quaale's exercise of his right to refuse is belied by the argument she first put forward. The prosecutor originally claimed that she would have never addressed the license status had defense counsel not first addressed the topic in closing. 2RP 73. There was no discussion from the prosecutor about whether the defense's mention that Quaale exercised his right to refuse had invited the improper argument. It was not until after the defense produced the transcript, that the prosecutor manufactured her new position.

Second, the transcript clearly shows the trial court's ruling put the parties on notice that the prosecutor would be permitted to address the revocation testimony in rebuttal only if the defense first addressed in its closing argument. There was no caveat establishing that if the defense mentioned the fact that Quaale exercised his right to refuse a breath test, the State could delve into the revocation testimony. Thus, the defense did not open the door

by mentioning that fact.

Third, contrary to the trial court's ruling, a fair and complete reading of record reveals defense counsel's reference to the fact Quaale exercised his right of refusal had no practical "tendency to advance a rational for the decision to refuse the breath test." CP 122. Defense counsel merely stated that Stone advised Quaale that he had the right to refuse the test and Quaale exercised his right. 3RP 8. Defense counsel then immediately advanced its only argument regarding the significance of this fact, explaining that Quaale did not display any confusion about the advisement and this had the tendency to show his thinking was not impaired by alcohol. 3RP 8. Given this, it cannot reasonably be said that the defense's argument invited the prosecutor to violate the court's ruling and emphasize the prejudicial evidence.

Fourth, both the State and the trial court failed to address the fact that defense counsel had justifiably and detrimentally relied on the court's ruling limiting argument. The defense had planned to address Quaale's license status in closing argument and, from this fact, argue that Quaale attempted to elude, not because he was impaired by alcohol, but because he was driving with a suspended license. Concerned this argument would open the door for the

State to emphasize the prejudicial evidence in rebuttal, however, the defense made the decision to forego this theory. After the State's violation of the court's ruling in its final argument, the defense's abandonment of this theory was without purpose or effect – except to limit Quaale's ability to present a complete defense to the jury.

In sum, the prosecutor's violation of the court's previous ruling was a significant irregularity and patently unfair. As such, the prosecutor's misconduct prejudiced Quaale's right to present a complete defense and his right to a fair trial.

## III. CUMMULATIVE ERROR DENIED QUAALE A FAIR TRIAL.

The cumulative error doctrine applies when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). That is the case here.

As set forth above, the prosecutor asked a witness to render an impermissible and misleading opinion regarding Quaale's guilt. This testimony added significant weight to the State's evidence.

The prosecutor also committed flagarant misconduct during rebuttal argument by introducing – in violation of a court order – a highly prejudicial fact (i.e. that Quaale's license previously had been revoked because he refused to take a breath test). Remarkably, even after the defense's first objection was sustained, the prosecutor went on to again violate the same order by drawing the jury's attention back to the fact that appellant had a revoked license. There was no legitimate justification for this violation. Furthermore, the prosecutor's violation was particularly prejudicial to Quaale because the defense had made a tactical decision not to argue a key theory so as to not open the door to the State. Had the defense known the prosecutor would so flagrantly violate the order and emphasize the previous license revocation during closing, defense counsel certainly would not have decided to amputate a significant arm of the defense in reliance on the ruling.

In sum, the errors cited above resulted in adding significant weight to the State's case, while simultaneously lessening the ability of the defense to fully present its case to the jury and obtain an independent verdict. As such, the combined impact of these errors was to significantly and unfairly tip the scale in the State's favor.

## IV. THE TRIAL COURT ERRED WHEN IT DENIED QUAALE'S MOTION FOR DIMISSAL UNDER CrR 8.3(b).

The trial court abused its discretion when it denied Quaale's motion to dismiss.[8] CrR 8.3(b) provides:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reason in a written order.

"Fairness to the defendant underlies the purpose of CrR 8.3(b)." State v. Koerber, 85 Wn. App. 1, 5, 931 P.2d 904 (1996). Thus, dismissal of charges pursuant to CrR 8.3(b) is appropriate when the defendant shows (1) government misconduct and (2) prejudice. State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997).

First, a defendant must show arbitrary action or governmental misconduct. For purposes of this rule, governmental misconduct need not be of evil or dishonest nature to warrant dismissal of criminal charges in furtherance of justice; simple

---

[8] Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

mismanagement is sufficient. Id. As discussed above, the prosecutor's failure to abide by the trial court's trial ruling constituted government misconduct, and the trial court's post-trial ruling to the contrary was manifestly unreasonable.

Second a defendant must demonstrate prejudice. To succeed with a motion to dismiss a charge due to arbitrary action or government misconduct, the defendant need only prove by a preponderance of the evidence that he suffered actual prejudice that affected his right to a fair trial. State v. Cannon, 130 Wn.2d 313, 328-29, 922 P.2d 1293 (1996). The requirement for showing prejudice under CrR 8.3 is satisfied where the misconduct interfered 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 shown above, the prosecutor's misconduct interfered with Quaale's ability to present a complete defense, and the trial court's failure to consider this factor was unreasonable.

For these reasons, this Court should reverse the trial court's ruling under CrR 8.3(b) and order dismissal.

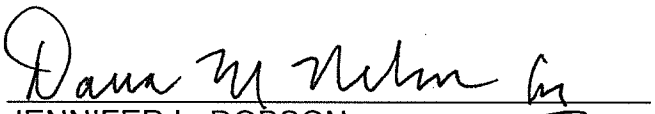
D. CONCLUSION

For reasons stated above, this Court should find Quaale was denied his right to a fair trial. It should also reverse the trial court's ruling under CrR 8.3(b) and dismiss the prosecution or, at the very least, remand for a new trial.

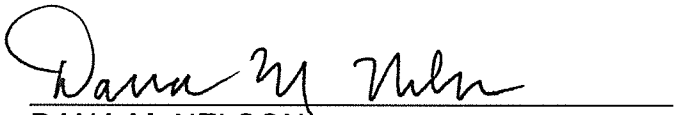
DATED this 18th day of November, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER L. DOBSON
WSBA No. 30487



DANA M. NELSON
WSBA No. 28239

Office ID No. 91051
Attorneys for Appellant

*LAW OFFICES OF*
**NIELSEN, BROMAN & KOCH, P.L.L.C.**
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Ryan Quaale

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 19th day of November, 2012, I caused a true and correct copy of the **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.

Spokane County Prosecuting Attorney
kowens@spokanecounty.org

Ryan Quaale
DOC No. 760187
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001

**Signed** in Seattle, Washington this 19th day of November, 2012.

X Patrick Mayovsky