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Division II
State of Washington
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95507-7

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANGEL MICHALAK,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 49368-3-II
Thurston County No. 14-1-01392-6

PETITION FOR REVIEW

CATHERINE E. GLINSKI
Attorney for Petitioner

GLINSKI LAW FIRM PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. IDENTITY OF PETITIONER

Petitioner, ANGEL MICHALAK, by and through her attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Michalak seeks review of the December 5, 2017, unpublished decision of Division Two of the Court of Appeals affirming her conviction.

C. ISSUE PRESENTED FOR REVIEW

Michalak was charged with third degree assault based on allegations that she kicked a law enforcement officer who was performing his official duties. There was no dispute that her foot made contact with the officer's leg, but the parties disputed whether the contact was intentional. Did the officer's testimony that Michalak acted intentionally constitute improper opinion which violated her constitutional right to a jury trial?

D. STATEMENT OF THE CASE

On September 13, 2014, Tumwater Police Officers were dispatched to a disturbance at a gas station, advised that two subjects were lying on the ground and one was punching a wall. 1RP¹ 43. When the

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—7/11/16 and 7/12/16; 2RP—8/24/16.

first officers arrived at the scene, Officer Russell Mize spoke to the male subject, identified as Michael Cook, and Officer Tyler Boling spoke to the female subject, Angel Michalak. 1RP 44, 69.

Boling asked Michalak what was going on. She was sitting on the ground facing the wall and said she did not want to talk to him, telling him to leave her alone. 1RP 45. Boling wanted to separate Cook and Michalak to get independent statements, so he asked Michalak to stand up and walk over to his car. 1RP 46. Michalak stood up and asked if she was under arrest. She then said Boling could not arrest her and asked him what her rights were. 1RP 47. Boling repeated that he wanted to know what was going on and again asked Michalak to step over to his car. Michalak asked if she was being detained, said Boling could not detain her, and said she did not have to do what he asked. 1RP 47.

At that point, Boling grabbed Michalak's arm firmly above the elbow and tried to walk her to the patrol car. 1RP 47. Michalak began pulling away from him and again sat down, flailing her arms and legs. 1RP 48. Michalak's foot came into contact with Boling's right leg, and he quickly stepped to the side so her foot would not make further contact. 1RP 56-57. Boling grabbed Michalak's hair and held her there while two other officers handcuffed her. 1RP 50.

Michalak was very upset and she continued to yell as she was being arrested, handcuffed, and transported to the jail. IRP 51. She asked about her rights and said repeatedly that she was being arrested for crying or being depressed. IRP 100. As Michalak was being arrested, Cook told Mize that she had had a lot of issues that day and she was very intoxicated. IRP 72.

On September 17, 2014, the Thurston County Prosecuting Attorney charged Michalak with third degree assault, alleging she assaulted a law enforcement officer performing his official duties at the time of the assault. CP 1-4; RCW 9A.36.031(1)(g). The case proceeded to jury trial before the Honorable Gary R. Tabor.

Videos from three of the patrol cars at the scene were admitted into evidence at trial. The first, from Mize's car, shows Mize talking to Cook before and after Michalak's arrest. It also shows Boling pulling Michalak toward his patrol car over her objection, Michalak going to the ground, and her foot making contact with Boling's thigh as she resists his attempt to move her. IRP 66; Exhibit 1.

In the second video, Officer Eikum's patrol car arrives at the scene as Boling is moving Michalak toward his car. She is seen going to the ground, but the contact between Boling and Michalak is off screen until the camera position is adjusted, at which point three officers are holding

Michalak down and handcuffing her. The actual contact charged as assault is not depicted. 1RP 85; Exhibit 2.

The third video, from Officer Finch's patrol car, starts pointed at the storefront. Cook is visible in the foreground, and Boling and Michalak can be seen moving behind him, although their actions are partially obscured by Cook. The video continues through Michalak's transport to the jail. She can be heard asking why she is being arrested, saying she did not do anything, and saying repeatedly that she is being arrested for crying, being depressed, and being abused. 1RP 95; Exhibit 3.

After Boling testified that Michalak had kicked him during the course of their contact, the prosecutor asked, "Did it appear that this was just an unintentional flay or did this appear to be directed at you?" Boling responded, "No, it was directed at me." When the prosecutor asked how he could say that, Boling responded, "Because she kicked at me. If she was just kicking, I would have never got hit." 1RP 52.

In closing, the State argued that there was no dispute as to the date or location of the incident, no dispute that Boling was a law enforcement officer performing his official duties, and no dispute that Michalak kicked Boling. The only element of the charge in dispute was whether the kick was intentional. 1RP 136, 139, 144, 147. The State argued that Michalak did not have to know that her act would constitute a specific crime. Thus,

the question was not whether she intended to commit assault but whether she intended to kick Boling. 1RP 144. It argued that the evidence showed Michalak intentionally kicked Boling while he was in the process of investigating a possible domestic violence situation. 1RP 147.

The defense agreed that there was no question there was physical contact, but the issue for the jury was whether there was intent. 1RP 148. Counsel argued that Michalak's confusion about why she was arrested demonstrated that she did not even know she had kicked Boling, much less done so intentionally. 1RP 149. Instead, the evidence showed that she intended to get away, she did not want to be detained, and she did not want to talk. Boling shoved her to the ground, and she was flailing, but the State had not shown intent to make contact or injure Boling. 1RP 150-51.

The jury returned a guilty verdict. CP 17. The court ordered a first time offender sentencing waiver, imposing six days in jail, a substance abuse evaluation and treatment, and community custody. CP 54-57. Michalak filed this timely appeal, arguing that Officer Boling's improper opinion as to her intent violated her constitutional right to a jury trial and requires reversal. The Court of Appeals affirmed Michalak's conviction in an unpublished opinion.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

WHETHER ADMISSION OF A POLICE OFFICER'S OPINION AS TO THE DEFENDANT'S INTENT VIOLATES THE RIGHT TO A JURY TRIAL IS A SIGNIFICANT CONSTITUTIONAL QUESTION WHICH THIS COURT SHOULD ADDRESS. RAP 13.4(b)(3).

It is well established that a witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); *State v. Hudson*, 150 Wn. App. 646, 208 P.3d 1236, 1239 (2009). Such improper opinion testimony violates the defendant's constitutional right to a jury trial, because the questions of guilt and veracity are reserved solely for the jury. *Montgomery*, 163 Wn.2d at 590; *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)); *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Thus, an explicit or nearly explicit opinion on the defendant's guilt can constitute a manifest constitutional error, which may be challenged for the first time on appeal. *Kirkman*, 159 Wn.2d at 936; RAP 2.5(a).

Michalak was charged with third degree assault, which required the State to prove she assaulted a law enforcement officer who was performing his official duties at the time of the assault. RCW

9A.36.031(1)(g). The jury was instructed that “[a]n assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done...” and “[a]n assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another...” CP 25. The parties acknowledged at trial that the only element in dispute was Michalak’s intent. 1RP 136, 148. During direct examination of Boling, the State asked for and Boling provided his opinion that Michalak had kicked him intentionally. 1RP 52. Despite defense counsel’s failure to object, reversal is required because this improper opinion as to the core issue at trial invaded the province of the jury.

Whether testimony constitutes improper opinion as to the defendant’s guilt depends on the circumstances of the case. In making this determination, the court considers such factors as (1) the type of witness, (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. *Montgomery*, 163 Wn.2d at 591; *State v. Johnson*, 152 Wn. App. 924, 931, 219 P.3d 958 (2009). Courts have recognized, however, that some areas are clearly inappropriate for opinion testimony in criminal trials, including personal opinions as to the guilt of the defendant and the intent of the

accused. *State v. Quaale*, 182 Wn.2d 191, 200, 340 P.3d 213 (2014); *Montgomery*, 163 Wn.2d at 591; *Demery*, 144 Wn.2d at 759.

In *Quaale*, the defendant was charged with felony driving under the influence. The trooper who pulled him over conducted a Horizontal Gaze Nystagmus test, and over defense objection, he was permitted to testify he had no doubt defendant was impaired based on that test. *Quaale*, 182 Wn.2d at 194-95. This Court held that this testimony from the trooper constituted an improper opinion on guilt by inference because it went to the core issue and only disputed element, whether the defendant drove while under the influence. *Id.* at 200. The improper opinion on guilt violated the defendant's constitutional right to have a fact critical to his guilt determined by the jury. *Id.* at 201-02.

Here, as in *Quaale*, the arresting officer gave his opinion as to the only disputed element of the charged offense, whether Michalak intentionally assaulted Boling. While Boling could testify to what he saw, his personal opinion as to Michalak's intent was clearly inappropriate and violated Michalak's constitutional right to have this critical fact determined by the jury. *See Quaale*, 182 Wn.2d at 200-02. This explicit or nearly explicit opinion on Michalak's guilt constitutes a manifest constitutional error which this Court may review on appeal. *Kirkman*, 159 Wn.2d at 936; RAP 2.5(a).

“Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error.” *Quaale*, 182 Wn.2d at 202. The question is not whether there is other evidence which would support the verdict but whether the jury necessarily would have reached the same verdict even without the improper evidence. Thus, this Court held the admission of improper opinion in *Quaale*, that the defendant was impaired based solely on the HGN test, required reversal, despite evidence that the defendant had lost control of his vehicle and had a strong odor of intoxicants on his breath. *Id.* at 194, 202. The improper opinion carried an aura of scientific certainty which, under the circumstances, likely increased the weight the jury attached to it. The error could therefore not be deemed harmless. *Id.* at 202.

In this case, the State cannot establish beyond a reasonable doubt that any reasonable jury would have reached the same verdict absent the error. There was testimony that Michalak was escalating and out of control as Boling tried to forcibly move her to his patrol car. 1RP 69-70, 74. The videos showed her flailing when she went to the ground, and her statements after her arrest indicated she was not aware she had kicked Boling but instead believed she was being arrested for crying in a parking lot. Exhibits 1-3; 1RP 95. A reasonable jury could find from this

evidence that Michalak did not intentionally kick Boling. Officer Boling's opinion on this core issue likely carried a lot of weight with the jury on this crucial determination. *See Demery*, 144 Wn.2d at 765 (testimony from law enforcement officer carries "special aura of reliability").

The Court of Appeals' holding that Officer Boling's testimony did not constitute improper opinion evidence presents a significant constitutional question this Court should address. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Michalak's conviction.

DATED this 4th day of January, 2018.

Respectfully submitted,

GLINSKI LAW FIRM PLLC




CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in
State v. Angel Michalak, Court of Appeals Cause No. 49368-3-II, as
follows:

Angel Michalak
6302 Littlerock Road SW Apt A
Tumwater, WA 98512

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
January 4, 2018

December 5, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ANGEL MICHALAK,

Appellant.

No. 49368-3-II

UNPUBLISHED OPINION

BJORGEN, C.J. — Angel Michalak appeals her conviction for third degree assault. She argues that one of the State’s witnesses gave improper opinion testimony as to guilt at trial. She did not object to this testimony at trial.

We hold that the challenged testimony was not an impermissible opinion about guilt and therefore affirm.

FACTS

On September 13, 2014, law enforcement officers responded to a reported disturbance at a gas station involving two suspects. Officers Tyler Boling and Russell Mize arrived at the gas station, and each officer contacted one of the suspects. Officer Boling attempted to speak with Michalak, who told Boling that she did not want to speak with him. Boling attempted to separate Michalak from the other suspect because he was uncertain whether the call he was responding to potentially involved an incident of domestic violence.

Boling asked Michalak to stand up and walk to his vehicle so he could get an independent statement. Michalak stood up and asked Boling if she was under arrest, stated that he could not arrest her, and asked to know what her rights were. Boling again asked Michalak to accompany

him to his vehicle. Michalak responded by asking whether she was being detained, stated that Boling could not detain her, and further stated that she did not have to comply with his request. Boling then grabbed Michalak's arm above the elbow and attempted to physically escort her to his vehicle. According to Boling, Michalak attempted to pull away from the officer and after moving a few steps, she sat down on the ground and began to flail her arms around. While on the ground, Michalak kicked Boling's leg.

On September 17, 2014 the State charged Michalak with third degree assault based on her kicking Boling.¹ At trial, Boling testified as follows:

[Prosecution (P)]: Now, when – when you went ahead and were kicked, were you – were you standing? You said you were standing in front of [Michalak] to her left?
[Boling]: Correct.
[P]: Did it appear that this was just an unintentional flay or did this appear to be directed at you?
[Boling]: No, it was directed at me.
[P]: How would you say that?
[Boling]: Because she kicked at me. If she was just kicking, I would have never got hit.

Verbatim Report of Proceedings (VRP) (July 11, 2016) at 52. The defense did not object to this questioning. As part of its case, the State also admitted three videos of the physical struggle between Boling and Michalak taken from three different police vehicles that were present or arriving as the alleged assault occurred.

¹ Under RCW 9A.36.031(1)(g),

[a] person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

.....

Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

The defense waived its opening statement and rested at the conclusion of the State's case in chief. The court instructed the jury in part:

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.

In considering a witness'[s] testimony, you may consider these things: The opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness'[s] memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness'[s] statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

VRP (July 12, 2016) at 125-26.

As part of its closing argument, the State played the three video recordings for the jury.

The jury ultimately found Michalak guilty of third degree assault. Michalak appeals her conviction.

ANALYSIS

Michalak argues that Boling gave impermissible opinion testimony as to her intent when he testified that her kick was directed at him. We conclude that Boling's testimony did not improperly express an opinion and therefore affirm. With that, it is not necessary to consider whether Michalak waived her challenge by failing to object at trial.

In general, a witness may not testify regarding the guilt or veracity of the defendant, because to do so would unfairly prejudice the defendant and usurp the function of the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). However, a lay witness may offer opinions or inferences that are: (1) based on rational perceptions, (2) helpful to the jury, and (3) not based on scientific or specialized knowledge. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing ER 701). For example, a witness may properly offer an opinion on

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the speed of a vehicle, relative sobriety in a driving while intoxicated case, the value of one's own property, or the identification of a person from a videotape. *State v. Farr-Lenzini*, 93 Wn. App. 453, 462, 970 P.2d 313 (1999). In contrast, a witness may not opine on another person's mental capacity for the purpose of entering into a lease or whether a person's capacity was diminished absent knowledge of whether the individual was on drugs. *Id.* In *Farr-Lenzini*, this court held that a police officer's statement that the defendant "was attempting to get away from [the officer] and knew [he] was back there and [was] refusing to stop," was an impermissible opinion because the officer had insufficient factual information to speculate about the defendant's state of mind. *Id.* at 463-64.

The fact that an opinion supports a finding of guilt does not necessarily make the opinion improper, particularly where the opinion is supported by inferences from evidence. *State v. Blake*, 172 Wn. App. 515, 523, 298 P.3d 769 (2012). However, opinion testimony is more likely to be improper if it recites or parrots a legal conclusion. *City of Seattle v. Heatley*, 70 Wn. App. 573, 581, 854 P.2d 658 (1993). For example, in *State v. Quale*, our Supreme Court reasoned that a law enforcement officer's testimony that the defendant was "impaired" was inappropriate because it "parroted the legal standard contained in the jury instruction definition for 'under the influence.'" 182 Wn.2d 191, 199-200, 340 P.3d 213 (2014). On the other hand, in *Heatley*, Division One of this court held that an officer's testimony that the defendant was "'obviously intoxicated,' 'affected' by alcohol, and could not drive 'in a safe manner' was similar to but not identical to the legal standards set forth in the jury instructions." 70 Wn. App. at 581. Aside from its conclusion that the opinion testimony at issue did not parrot a legal standard, the court held that the officer's opinion was appropriate, in part, because:

[The officer's] opinion was based on his detailed testimony about his observations of [the defendant's] physical condition and performance on the field sobriety tests. The jury was therefore in a position to independently assess the opinion in light of the foundation evidence. [The officer] was available for cross examination, and the jury was instructed that it was the sole judge of credibility and the weight to be accorded the testimony of each witness. Under these circumstances, nothing in the record suggests that the testimony was unfairly prejudicial, *i.e.*, that it persuaded the jury to abdicate its responsibility and decide the case on a basis other than the evidence and the pertinent law.

Heatley, 70 Wn. App. at 581-82.

Our Supreme Court has developed a set of five considerations to aid courts in determining whether witness testimony constitutes impermissible opinion testimony. In addition to the circumstances of the particular case, a 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) other evidence before the trier of fact. *Montgomery*, 163 Wn.2d at 591. Opinion testimony by law enforcement officers as to veracity may be particularly prejudicial because an officer's testimony is often accompanied by a "special aura of reliability." *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Michalak argues that Boling's testimony was analogous to the improper opinion testimony in *Quaale*, 182 Wn.2d 191. In *Quaale*, a law enforcement officer testified that "[t]here was no doubt [the defendant] was impaired," based on the horizontal gaze nystagmus (HGN) test the officer performed on the defendant. 182 Wn.2d at 195. Our Supreme Court determined that such testimony was improper opinion testimony because it exceeded the limits of testimony regarding a defendant's response to a HGN test as described in *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000). *Quaale*, 182 Wn.2d at 197-98. Specifically, the testimony was improper because (1) the opinion was stated in a manner that implied an "aura of scientific

certainty,” and (2) the officer testified to a specific level of intoxication, despite the fact that “[t]he HGN test alone cannot reveal specific levels of intoxication.” 182 Wn.2d at 198-99. In this case, Michalak does not argue that Boling’s testimony carried an “aura of scientific certainty.” Because the court’s analysis in *Quaale* was concerned with whether an officer’s testimony exceeded the proper boundaries of a scientific test, the analysis is distinguishable from the facts of this case.

Turning to the five considerations described in *Montgomery*, their application shows that Boling’s testimony was permissible opinion testimony. Under the first factor, the type of witness, Boling’s statement may have carried additional weight with the jury because he was a law enforcement officer, but he was also the victim in this case and experienced the alleged assault first hand. Turning to the second factor, Boling’s testimony was that the kick “was directed at me.” VRP (July 11, 2016) at 52. This testimony was based on Boling’s rational perceptions, but not on any scientific or specialized knowledge. As to the third and fourth factors, the State charged Michalak with third degree assault, and her defense was a general denial with no testimony or evidence introduced by the defense. Regarding the fifth factor, the State introduced video records of the alleged assault from three different angles that the jury could compare to Boling’s testimony.

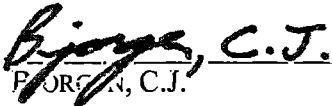
Taken together, the *Montgomery* factors signal that Boling’s testimony was appropriate. While there may be some concern that Boling’s testimony was improper due to his status as a law enforcement officer, he was also the victim in the case, he testified on the basis of his personal perception of the events, he did not parrot a legal standard, and the jury was allowed to compare Boling’s version of the events to the different video records presented at trial.

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In addition, Boling's testimony satisfies the three-part test for permissible lay opinion testimony under ER 701. First, Boling's testimony that the kick was directed at him was based on his direct perception of the events. Second, Boling's testimony was helpful to the jury. Boling was at a closer vantage point than any of the recording cameras and could communicate to the jury the relative force and direction of Michalak's kick, such as whether the kick was a direct or glancing blow. Third, Boling's opinion did not rely on any scientific, technical, or otherwise specialized knowledge.

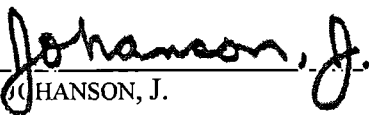
Under both *Montgomery* and ER 701, Boling's testimony was proper. Therefore we affirm Michalak's conviction.

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.



BJORGE, C.J.

We concur:



JOHANSON, J.



SUTTON, J.

GLINSKI LAW FIRM PLLC

January 04, 2018 - 11:03 AM

Transmittal Information

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