SUPREME COURT NO. 99641-5

NO. 80364-6-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

REBECCA JOHNSON,

Petitioner.

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

The Honorable Tam Thi-Dan Bui, Judge
The Honorable Bruce Weiss, Judge

PETITION FOR REVIEW

MARY T. SWIFT
Attorney for Petitioner

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Rebecca Johnson asks this Court to grant review of the court of appeals' unpublished decision in State v. Johnson, No. 80364-6-I, filed March 8, 2021 (attached as an appendix).

B. ISSUES PRESENTED FOR REVIEW

Deputy Jonathan Krajcar, testifying as an expert and the prosecution's sole witness, repeatedly expressed his opinion that Johnson drove "impaired," based on his personal observations couched in terms of the scientific reliability. Deputy Krajcar's opinion testimony falls somewhere between the court of appeals' decision in City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), where an officer's opinion on impairment did not invade the province of the jury, and this Court's decision in State v. Quaale, 182 Wn.2d 191, 340 P.3d 213 (2014), where it did.

Is this Court's review warranted under RAP 13.4(b)(1), (3), and (4), where a gap in the case law on impairment opinion testimony persists, creating confusion for courts and practitioners and, furthermore, potentially leading to disparate results for those charged with DUI?

C. STATEMENT OF THE CASE

Deputy Krajcar was dispatched to a verbal domestic dispute at a farm. RP 157-58. Deputy Krajcar contacted Johnson, by herself, in the driver's seat of a car parked in a driveway behind a barn. RP 158-59, 181. The keys were in the ignition and the car was running. RP 158. It did not appear the car had been there long. RP 158.

Johnson told Deputy Krajcar she had an argument with her boyfriend. RP 159, 190. She also said she had moved the car from the front to the back of the property. RP 160, 180-81. Deputy Krajcar could smell the odor of alcohol coming from Johnson. RP 159. He also noted Johnson's bloodshot, watery eyes and slurred speech. RP 160. Johnson admitted she had a sip of vodka. RP 160.

Johnson agreed to perform voluntary field sobriety tests (FSTs). RP 160, 163. Standardized FSTs consist of the horizontal gaze nystagmus (HGN) test, the walk and turn test, and the one leg stand test. RP 161. HGN looks for involuntary jerking of the eyes. RP 163-64. The latter two are divided attention tasks,

testing the individual's balance, as well as the ability to remember instructions and multitask. RP 161-62, 167.

Johnson struggled somewhat with the FSTs, showing six out of six clues Deputy Krajcar looks for on the HGN test. RP 166. Johnson had no difficulty understanding the one leg stand test, but swayed, raised her arms, and put her foot down twice, demonstrating three out of four clues. RP 168. On the walk and turn test, Deputy Krajcar observed four out of eight clues. RP 171. At no point did Deputy Krajcar actually observe Johnson drive the vehicle. RP 158-59.

Based on Deputy Krajcar's observations and Johnson's performance on the FSTs, he arrested her for DUI. RP 172. The prosecution charged Johnson with DUI, alleging she "was under the influence of or affected by intoxicating liquor" at the time of driving. RP 19; CP 315.

At Johnson's jury trial, Deputy Krajcar testified at length about his training and experience, including his experience as a certified drug recognition expert, as well as investigating DUIs. RP 154-57, 173-74. Deputy Krajcar described each FST at length.

RP 161-75. He testified over defense objection that FSTs are "scientifically validated to be able to detect impairment." RP 161.

Deputy further Krajcar testified Johnson "was driving the vehicle and impaired." RP 183. He reiterated his opinion "[t]hat she had consumed alcohol" and "was impaired." RP 188. Deputy Krajcar explained he reached this conclusion "[b]ased upon [his] observations of her, her slurred speech, bloodshot, watery eyes, lethargic behavior as well as her performance on the standardized field sobriety tests." RP 189. He gave the same opinion again on redirect, "Based upon everything that I saw, smelled, heard, I believe she was impaired." RP 197.

The jury found Johnson guilty. CP 319, 326.

Johnson appealed to the superior court. CP 341-42. Among other arguments, Johnson asserted her right to a jury trial under article I, section 21 of the Washington Constitution was violated when Deputy Krajcar was allowed to testify on the ultimate issue of her impairment. CP 43-47.

The superior court rejected Johnson's argument, reasoning "[t]he deputy's testimony was supported by substantial facts in the record and is similar to the testimony approved in Heatley."

CP 12. The court further concluded "the deputy did not use the scientific validity of field sobriety tests to 'bolster' his opinion on impairment." CP 12.

Johnson sought discretionary review in the court of appeals. CP 5. Commissioner Mary Neel granted review, concluding the circumstances of Johnson's case fell somewhere between Heatley, where there no improper opinion, and Quaale, where there was. 2/7/20 Notation Ruling, 4. Commissioner Neel explained:

> Like Heatley, the officer here based his opinion on his observations of Johnson's appearance (bloodshot, watery eyes and slurred speech) and her difficulty performing field sobriety tests, including the HGN test, which he described at length. But unlike the officer in Heatley who testified as a lay witness, and like the trooper in Quaale, here the officer testified as an expert, opined that field sobriety tests are valid and accurate in determining whether a driver is "impaired," and did so in a manner that case an aura of scientific certainty to the ultimate question of impairment. Johnson has demonstrated that the superior court's decision is potentially in conflict with Quaale.

2/7/20 Notation Ruling, 4.

A panel of judges affirmed Johnson's conviction. Opinion, 11. The court of appeals agreed, "like the trooper's testimony in

Quaale, Deputy Krajcar's testimony that the FSTs are 'scientifically validated to be able to detect impairment' was improper because it presented an aura of scientific reliability regarding the FSTs." Opinion, 8. The court recognized Deputy Krajcar "highlighted, three times, the scientific validity of the FSTs." Opinion, 8. Due to the "pervasive nature" of this testimony, the court held Johnson's "constitutional right for a jury to decide the ultimate issue of guilt" was violated. Opinion, 8-9.

However, the court disagreed Deputy Krajcar's repeated testimony that Johnson was "impaired" constituted an improper opinion on guilt. Opinion, 8. The court likened Johnson's case to Heatley, distinguishing Quaale, because "Deputy Krajcar did not base his opinion on a single FST but conducted three FSTs, and he did not base his testimony on the scientific validity of the FSTs." Opinion, 8. The court believed Deputy Krajcar's opinion testimony was proper because it was "based on his personal observations, including what he saw and smelled." Opinion, 8.

The court concluded Deputy Krajcar's improper opinion testimony regarding the scientific validity of FSTs was harmless beyond a reasonable doubt, even though Deputy Krajcar was the

"only witness at trial" and a police officer's testimony may carry "'an aura of special reliability and trustworthiness.'" Opinion, 9 (quoting State v. Demery, 144 Wn.2d 753, 762-63, 30 P.3d 1278 (2001)).

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court's review is warranted to answer whether an officer's expert testimony that a driver is "impaired," when based several factors and not just the HGN test, constitutes an improper opinion on guilt that invades the province of the jury.

The role of the jury is "inviolate" under the Washington Constitution. CONST. art I, § 21. The right to have factual questions decided by the jury is crucial to the jury trial right. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). This Court has recognized opinion testimony is "clearly inappropriate" in a criminal trial when it contains "expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

In Heatley, a police officer pulled Heatley over after seeing him drive through a stop sign, significantly exceed the speed limit,

straddle the center line, and swerve multiple times. 70 Wn. App. at 575. Heatley's eyes were watery and bloodshot; his speech was slightly slurred; he had the strong odor of alcohol on his breath; and his balance was unsteady. Id. at 576. He performed poorly on FSTs. Id.

An officer who assisted with the DUI investigation testified at Heatley's trial. Id. at 576. When asked about Heatley's impairment, the officer replied, without objection, that Heatley "was obviously intoxicated and affected by the alcoholic drink that he'd been, he could not drive a motor vehicle in a safe manner." Id. The officer explained he based this conclusion on Heatley's "physical appearance and [his] observation of that and based on all the tests [he] gave [Heatley] as a whole." Id.

Division One agreed the officer's testimony "encompassed ultimate factual issues," id. at 578, but nevertheless "contained no direct opinion on Heatley's guilt or on the credibility of a witness," id. at 579. The court reasoned the officer's opinion "was based solely on his experience and his observation of Heatley's physical appearance and performance of the field sobriety tests." Id. at 579. The court emphasized the officer testified as a lay witness,

and it is well-established "a lay witness may express an opinion on the degree of intoxication of another person where the witness has had an opportunity to observe the affected person." Id. at 580. The court further reasoned the officer's opinion "was not framed in conclusory terms that merely parroted the relevant legal standard." Id. at 581.

In Quaale, a trooper testified he had "no doubt" Quaale was "impaired," based solely on Quaale's poor performance on the HGN test. 182 Wn.2d at 198. The Washington Supreme Court held this to be an improper opinion on guilt. Id. at 200. This Court based its conclusion in part on existing law that an HGN test alone cannot reveal specific levels of intoxication. Id. at 199 (discussing State v. Baity, 140 Wn.2d 1, 991 P.2d 1151 (2000)). The HGN test "simply shows physical signs consistent with alcohol consumption." Id. at 198-99. The trooper's testimony regarding impairment exceeded that limitation.

As Commissioner Neel noted, Deputy Krajcar based his opinion on his observations of Johnson's appearance and her difficulty performing FSTs, similar to the testimony in Heatley. RP 189; 2/7/20 Notation Ruling, 4. The testimony in Quaale was,

by contrast, impermissibly based solely on the HGN test. There is no dispute Johnson's case is not precisely like Quaale. 2/7/20 Notation Ruling, 4 (recognizing "the circumstances fall somewhere between Heatley and Quaale").

But the question remains whether Quaale should be read narrowly or, instead, more broadly to control in cases like Johnson's. The Quaale court held testimony that the defendant is "impaired" parrots the legal standard and therefore "amount[s] to an improper opinion on guilt" in a DUI case. 182 Wn.2d at 200. Deputy Krajcar testified three times to his opinion that Johnson was "impaired." RP 183, 188, 197. This distinguishes both Quaale and Johnson's case from Heatley, where the court of appeals held the testimony did not parrot the relevant legal standard.[1]

The Quaale court further distinguished Heatley because the officer in Heatley testified as a lay witness rather than an

[1] Interestingly, the Heatley court held the officer's opinion on intoxication did not parrot the legal standard where it "was similar to but not identical to the legal standards set forth in the jury instructions." 70 Wn. App. at 581. But the Quaale court did not require identical language in order to conclude "impaired" parrots the relevant legal standard. 182 Wn.2d at 200. This is yet another reason Heatley should not be applied broadly (see discussion below).

expert, and a lay witness may opine on intoxication. Quaale, 182 Wn.2d at 201. As Commissioner Neel recognized, Deputy Krajcar testified as an expert, just like the trooper in Quaale. 2/7/20 Notation Ruling, 4. The distinction between a lay and expert witness is significant because expert testimony can "unfairly prejudice[] the [defendant] by creating an aura of special reliability and trustworthiness." State v. Black, 109 Wn.2d 336, 348, 349, 745 P.2d 12 (1987) (quoting State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982)).

Finally, like in Quaale, Deputy Krajcar's testimony was couched in terms of scientific reliability. The Quaale court emphasized "an officer may not testify in a manner that casts an "'aura of scientific certainty to the testimony.'" Quaale, 182 Wn.2d at 198 (quoting Baity, 140 Wn.2d at 17). Three times Deputy Krajcar testified FSTs are scientifically reliable in detecting impairment. RP 161, 173, 174. This suggested his conclusion that Johnson was impaired, based on her performance on FSTs, was unassailable.

The court of appeals agreed Deputy Krajcar's testimony "was improper because it presented an aura of scientific reliability

regarding the FSTs." Opinion, 8. But the court went on to hold, incongruously, that Deputy Krajcar's opinion on impairment was permissible because "he did not base his testimony on the scientific validity of the FSTs." Opinion, 8. These two holdings cannot be squared with one another and are inconsistent with this Court's decision in Quaale.

Quaale demonstrates Heatley should apply only in narrow circumstances not present here. Furthermore, a significant body of improper opinion case law has developed since Heatley. For instance, the Heatley court doubted whether a witness's testimony could invade the province of the jury, noting, "[j]urors always remain free to draw their own conclusions." 70 Wn. App. at 583 n.5. The Heatley court also questioned whether an improper opinion could ever be manifest constitutional error, analyzing the issue solely as an evidentiary one. Id. at 578, 583-85.

Since Heatley, this Court has held "an explicit or almost explicit witness statement on an ultimate issue of fact" is manifest constitutional error. State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). In Demery, a majority of this Court agreed a police officer's opinion on the defendant's guilt or credibility

"invades the province of the jury as the fact finder in a trial." 144 Wn.2d at 764 (plurality opinion); id. at 767 (Sanders, J., dissenting). In Montgomery, this Court likewise emphasized the "'inviolate'" role of the jury, 163 Wn.2d at 590 (quoting CONST. art. I, § 21), and held opinions on guilt in a criminal trial are "clearly inappropriate," id. at 591. Thus, the legal landscape has changed significantly since Heatley.

Commissioner Neel recognized Johnson's case falls somewhere between Heatley and Quaale. There is no published authority directly on point. Many DUI cases (most of which are misdemeanors and can easily evade appellate review) likely fall in the gap between Heatley and Quaale. Johnson's case offers this Court an opportunity to fill in that gap—to answer whether a police officer's expert opinion on impairment, when based on more than just the HGN test but couched in terms of scientific reliability, invades the province of the jury.

Given the prevalence of DUI prosecutions, this Court's review is warranted under both RAP 13.4(b)(3) and (4). Review is further warranted under RAP 13.4(b)(1) to determine whether

Heatley remains good law in light of this Court's more recent decisions on improper opinion testimony.

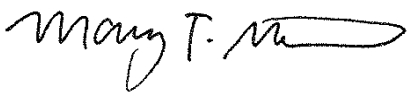
E. CONCLUSION

This Court should grant review to answer the question of whether an officer's opinion on impairment invades the province of the jury, when based on his personal observations but couched in terms of scientific reliability.

DATED this 7th day of April, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



MARY T. SWIFT
WSBA No. 45668
Office ID No. 91051

Attorneys for Petitioner

Appendix

FILED
3/8/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. REBECCA JOHNSON, Appellant.	No. 80364-6-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Rebecca Johnson appeals her conviction for driving under the influence (DUI). Following a reported domestic disturbance, Snohomish County Sheriff's Deputy Jonathan Krajcar found Johnson in a running vehicle on one side of the property where the incident was reported to have occurred. After Deputy Krajcar smelled alcohol and Johnson told him that she had had a drink that day, Johnson volunteered to perform field sobriety tests (FSTs). At trial, Deputy Krajcar testified to Johnson's results, asserting that, during the FSTs, Johnson showed many signs of intoxication. He also testified that FSTs are "scientifically validated to be able to detect impairment" and that, based on his observations and experience, Johnson had driven while impaired.

On appeal, Johnson contends that Deputy Krajcar's testimony constitutes an improper opinion on guilt, properly reserved for the jury. Because Deputy Krajcar opined to the scientific validity of the FSTs, we conclude that this testimony was inadmissible and improper. However, his testimony that Johnson

was impaired was based on his observations and therefore was not improper. Moreover, the evidence presented at trial was so overwhelming that the jury would have found Johnson guilty without the testimony regarding the scientific validity of the FSTs. Therefore, we affirm.

FACTS

On April 1, 2017, Snohomish County dispatch received a call regarding a verbal domestic dispute at a farm. At around 1:45 p.m., Deputy Krajcar responded to the call and found Johnson alone in the driver's seat of a vehicle parked "in the back of the property." The vehicle was running, and Deputy Krajcar later testified that it did not appear that the vehicle had been parked for very long. When Deputy Krajcar asked Johnson what she was doing, she told him that she had driven the car from the front of the property to the rear of the property.

Deputy Krajcar later testified that, while speaking with Johnson, he "could smell the odor of intoxicants or alcohol coming from her," that "[h]er eyes were bloodshot and watery," and that "her speech was slurred." Deputy Krajcar also testified that Johnson told him that she had one shot of vodka at 8:30 a.m. For these reasons, Deputy Krajcar asked Johnson if she would be willing to perform standardized FSTs. Johnson consented.

At trial, Deputy Krajcar demonstrated the FSTs with the prosecutor. He testified that, during the first FST, the horizontal gaze nystagmus (HGN) test, he observed six out of six clues for impairment. The next FST was "the one leg stand." Deputy Krajcar testified that Johnson also showed signs of impairment in

this FST, including raising her arms, swaying, and putting her foot down twice. During the walk and turn FST, Deputy Krajcar observed four out of eight clues of impairment, including stepping off of the line and taking one step too many.

Based on the results of the FSTs, his observations, and his experience as a Drug Recognition Expert (DRE), Deputy Krajcar arrested Johnson for a DUI. Johnson later took a breath test, which resulted in a .05 blood alcohol concentration (BAC) level, below the statutory limit of .08 BAC.[1]

Before trial, the State moved to admit Deputy Krajcar's opinion testimony that Johnson was impaired. The State asserted that it would "avoid using the language that tracks to the jury instructions as that would invade the province of the jury." Johnson asserted in response, "[W]ith this objection, I think we have effectively been reserving it depending on how the testimony comes out." The court noted that Johnson could object during the course of trial if Deputy Krajcar used impermissible language. The court also granted Johnson's motion to exclude reference to the reporting party's statement to Deputy Krajcar.

At trial, Deputy Krajcar testified that FSTs are "scientifically validated to be able to detect impairment." Johnson objected to this testimony, which the trial court overruled. Deputy Krajcar testified that he had administered FSTs "hundreds" of times. He opined that Johnson "was driving the vehicle and was impaired." In another instance, he testified that Johnson "had consumed alcohol," had driven, and "was impaired." He testified that his opinion was "[b]ased upon [his] observations of [Johnson], her slurred speech, bloodshot,

[1] The BAC results were not admitted at trial.

watery eyes, lethargic behavior as well as her performance on the standardized [FSTs]." He reiterated later at trial, "Based upon everything that I saw, smelled, heard, I believe she was impaired."

The jury convicted Johnson.

Johnson appealed to the Snohomish County Superior Court. The superior court concluded that the State produced proof sufficient to satisfy Johnson's conviction. It also held Deputy Krajcar's testimony was not an improper opinion on Johnson's guilt. Johnson sought discretionary review in this court, which we granted.

ANALYSIS

Preservation of Issue for Appeal

As an initial matter, the State claims that Johnson failed to preserve her challenge to Deputy Krajcar's testimony that she was impaired. While we agree, we exercise our discretion to review the unpreserved error.

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). "Under ER 103(a)(1), when an error is raised based on admitting evidence, the adverse party must make 'a timely objection or motion to strike . . . [and] stat[e] the specific ground of objection, if the specific ground was not apparent from the context.'" City of Seattle v. Levesque, 12 Wn. App. 2d 687, 695, 460 P.3d 205 (alterations in original), review denied, 195 Wn.2d 1031 (2020).

When the State asked Deputy Krajcar if he had formed an opinion regarding whether Johnson had been driving a vehicle that day, Johnson

objected to the question based on its foundation. The trial court overruled her objection. After, the State and Deputy Krajcar had the following exchange:

> Q: What was your opinion?
> A: That she was driving the vehicle and was impaired.
> Q: Okay. Could you summarize for the jury what led you to believe the defendant was driving a vehicle that day?
> . . . .
> A: Based upon my conversation with the original reporting party, Ms. Johnson's statements to me that she had been driving, and the - -

Johnson objected again. When the court asked what testimony she wanted struck from the record, she responded, "The response that his belief . . . was based on statements from the reporting party." Johnson objected based on the trial court's ruling to exclude the reporting party's statements. Thus, Johnson did not properly object to Deputy Krajcar's opinion that she was driving and impaired. However, we may review an unpreserved error on appeal. See RAP 2.5(a). Accordingly, we exercise our discretion and review the merits of Johnson's assertion.

Admissibility of Deputy Krajcar's Testimony

Johnson asserts that the trial court erred in admitting (1) Deputy Krajcar's testimony regarding the scientific validity of the FSTs and (2) his opinion testimony that she was driving and impaired. While we agree that the testimony regarding the scientific validity of the FSTs was improper, Deputy Krajcar was allowed to opine, based on his observations, that Johnson was impaired.

We review the admission of opinion testimony for abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). And opinion testimony must be deemed admissible by the trial court before it is offered. State

v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). To determine whether such testimony constitutes "impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: '(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.'" Montgomery, 163 Wn.2d at 591 (internal quotation marks omitted) (quoting Demery, 144 Wn.2d at 759).

However, Washington courts have "held that there are some areas that are clearly inappropriate for opinion testimony in criminal trials," including "expressions of personal belief, as to the guilt of the defendant." Montgomery, 163 Wn.2d at 591. "Impermissible opinion testimony regarding the defendant's guilt may be reversible error." State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). But "[t]estimony 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.

Two cases guide our analysis. First, in City of Seattle v. Heatley, Officer Patricia Manning observed Robert Heatley speeding and straddling the center lane with his vehicle. 70 Wn. App. 573, 575, 854 P.2d 658 (1993). When Officer Manning pulled Heatley over, she believed Heatley was intoxicated and called the Driving While Impaired (DWI) unit. Heatley, 70 Wn. App at 575-76. DWI unit Officer Mark Evenson had Heatley perform a series of FSTs: reciting the complete alphabet, counting backward from 59, balancing, and walking a straight line. Heatley, 70 Wn. App. at 576. At trial, Officer Evenson opined,

> "Based on . . . his physical appearance and my observations . . . and based on all the tests I gave him as a whole, I determined that Mr. Heatley was obviously intoxicated and affected by the alcoholic drink . . . . [And] he could not drive a motor vehicle in a safe manner."

Heatley, 70 Wn. App. at 576. Heatley was convicted. Heatley, 70 Wn. App. at 577. On appeal, we held that Officer Evenson's testimony, which was based on his experience and observations, was admissible lay opinion testimony. Heatley, 70 Wn. App. at 579-80.

Second, in Quaale, State Patrol Trooper Chris Stone pulled over Ryan Quaale. 182 Wn.2d at 194. Trooper Stone performed an HGN test on Quaale and observed that Quaale's eyes bounced and had difficulty tracking stimulus. Quaale, 182 Wn.2d at 194. The State charged Quaale with a DUI, and at trial, Trooper Stone, testifying as an expert witness, opined, "There was no doubt [Quaale] was impaired." Quaale, 182 Wn.2d at 195. Our Supreme Court held that Trooper Stone's testimony was inadmissible because he completed only 1 of the 12 DRE steps, the HGN test, and because he cast his opinion in "an aura of scientific certainty." Quaale, 182 Wn.2d at 198-99. Specifically, the court observed that Trooper Stone's testimony was cast in absolute terms and gave the appearance that the HGN test produces scientifically certain results. Quaale, 182 Wn.2d at 198-99. The court also concluded that the testimony that Quaale was "impaired" necessarily and improperly indicated a specific level of intoxication, which the HGN test alone could not reveal. Quaale, 182 Wn.2d at 198-99.

Here, the State charged Johnson with a DUI. Deputy Krajcar testified

based on his experience as an officer, including his training as a DRE and his training under the National Highway Traffic Safety Administration's Advanced Roadside Impaired Driving Enforcement. Deputy Krajcar opined that, based on his observations and experience, Johnson was impaired by alcohol. He also testified that Johnson told him that she had drunk alcohol that morning and had driven the vehicle. Deputy Krajcar's testimony was the only evidence presented at trial. And Johnson presented no defense.

Like in Heatley, Deputy Krajcar's could opine as to Johnson's intoxication. See also Montgomery, 163 Wn.2d at 591 ("A lay person's observation of intoxication is an example of a permissible lay opinion."). Unlike in Quaale, Deputy Krajcar did not base his opinion on a single FST but conducted three FSTs, and he did not base his testimony on the scientific validity of the FSTs. Indeed, Deputy Krajcar testified multiple times that his opinion was based on his personal observations, including what he saw and smelled. Thus, his testimony that, based on his observations, "[Johnson] was impaired" was not improper.

However, like the trooper's testimony in Quaale, Deputy Krajcar's testimony that the FSTs are "scientifically validated to be able to detect impairment" was improper because it presented an aura of scientific reliability regarding the FSTs. Deputy Krajcar also testified that "[t]here's [sic] been many scientific studies validating" FSTs' ability to determine how alcohol might affect a person's performance. Deputy Krajcar highlighted, three times, the scientific validity of the FSTs. Because of the persuasive nature of officer testimony and because a defendant has the constitutional right for a jury to decide the ultimate

issue of guilt, we conclude that the testimony regarding the scientific validity of the FSTs was improper.

Harmless Error

Johnson asserts that Deputy Krajcar's improper opinion violated her "constitutional right to have a fact critical to her guilt determined by the jury" and constitutes reversible error. Because Deputy Krajcar's testified to what he observed and because Johnson herself had admitted to drinking and driving, we disagree.

Deputy Krajcar's improper testimony regarding the scientific validity of the FSTs invaded the province of the jury in determining guilt and violated Johnson's constitutional right to a fair trial. Thus, "we apply the constitutional harmless error standard." State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009). In a constitutional harmless error analysis, we presume prejudice. Hudson, 150 Wn. App. at 656. And a "[c]onstitutional 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. "This test is met if the untainted evidence presented at trial is so overwhelming that it leads necessarily to a finding of guilt." Hudson, 150 Wn. App. at 656.

"An officer's live testimony offered during trial . . . may often 'carr[y] an aura of special reliability and trustworthiness'" and is "especially likely" to influence a jury. Demery, 144 Wn.2d at 762-63 (some alterations in original) (internal quotation marks omitted) (quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987)). Deputy Krajcar was the only witness at trial, and he

testified regarding the scientific validity of the FSTs. However, he properly testified regarding sensory observations that any lay individual would notice as signs of impairment and would draw inferences therefrom regarding the individual's impairment. Specifically, "[t]he effects of alcohol 'are commonly known and all persons can be presumed to draw reasonable inferences therefrom.'" Heatley, 70 Wn. App. at 580 (quoting State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985)). To this end, Deputy Krajcar testified that he smelled "the odor of intoxicants or alcohol coming from [Johnson]," that her eyes were blood and watery, and that "her speech was slurred."

Similarly, the testimony regarding what he witnessed during the FSTs involved evidence that a lay witness would interpret as signs of intoxication. Deputy Krajcar testified that during the one leg stand test, Johnson "raised her arms . . . , she swayed, and she put her foot down twice." He also testified that during the walk and turn test, Johnson took one step too many, stepped off the line on her eighth step, and missed placing her heel to her toe several times. Furthermore, he testified that Johnson had difficulty counting to 15 and that it took her 30 seconds, that she was overall lethargic, and that her movements were slow. He based his conclusion "upon [his] observations of [Johnson], her slurred speech, bloodshot, watery eyes, lethargic behavior[,] as well as her performance on the standardized [FSTs]."

Most importantly, Deputy Krajcar testified to Johnson's statements that (1) she began drinking at 8:30 a.m. that day and had one shot and (2) she drove to the back of the property. Deputy Krajcar contended that what he saw and

smelled was not consistent with having had only one shot of vodka. Any reasonable juror would have concluded that Johnson was guilty, despite Deputy Krajcar's improper opinion testimony and based only on the untainted evidence. Therefore, we conclude that the error in his testimony was harmless.

For the foregoing reasons, we affirm.

WE CONCUR:

NIELSEN KOCH P.L.L.C.

April 07, 2021 - 2:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80364-6
Appellate Court Case Title:	State of Washington, Respondent v. Rebecca Loan Johnson, Petitioner
Superior Court Case Number:	18-1-00634-6

The following documents have been uploaded:

- 803646_Petition_for_Review_20210407141415D1838394_9278.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR 80364-6-I.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- shalloran@co.snohomish.wa.us

Comments:

Client address is unknown at this time

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Mary Swift - Email: swiftm@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20210407141415D1838394