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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting Detective Alloway's opinion on the amount of marijuana Mr. Fitchett needed for a 60-day supply.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court error in admitting Detective Alloway's testimony on the amount of marijuana Mr. Fitchett needed for a 60-day supply when:
 - a. The State laid the foundation qualifying Detective Alloway as an expert on the issue.
 - b. Detective Alloway's testimony went to weight not admissibility.
 - c. Detective Alloway did not comment on the guilt or innocence of the defendant.

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP."

The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

Procedural History & Statement of Facts. Pursuant to RAP

10.3(b), the State accepts Fitchitt's recitation of the procedural history except for the following distinctions and additional facts:

Detective Alloway has been a police officer since June of 1978.

At the time of trial he had been assigned as a detective with the West Sound Narcotics Enforcement Team. RP 405. Detective Alloway testified that he had thousands of hours of training on various subjects and 400 hours specific to narcotics investigation and indoor marijuana growing

operations. RP 405. Alloway goes on to testify that the aforementioned 400 hours of training and experience included the way in which marijuana is grown, cultivated, and harvested. RP 405. Alloway further testified that he had training and experience in how marijuana is packaged for sale. RP 406.

Detective Alloway testified that a large percentage of his time over the last ten years, as a detective, was spent on marijuana growing operations. RP 422. He had been to classes on indoor marijuana growing operations from both the FBI and the DEA. RP 422. Several of the classes that Detective Alloway attended were specific to the cultivation of marijuana indoors. RP 425.

Detective Alloway testified that he had written a paper on medical marijuana and the 60- day supply for the Prosecutor's office in Kitsap County and has been involved in hundreds of these types of cases. RP 425. Alloway testified that the research for his paper, in part, was based on a DEA sponsored class and discussions with a doctor who grows marijuana for the University of Mississippi. RP 426. Detective Alloway testified that the marijuana grow at the University of Mississippi was both an indoor and outdoor operation. RP 429.

Detective Alloway also testified that he has had conversations with growers in the hundreds of marijuana growing cases detailing what they

typically are able to yield from adult marijuana plants. RP 426. Detective Alloway testified that he did not have a degree in botany, the study of plants or a post-graduate training. RP 452. Detective Alloway went through a Master Gardener Program at Washington State University. RP 453.

The court allowed Detective Alloway to testify as to the 60-day supply and an average yield from an adult plant from an indoor grow. RP 427. Detective Alloway testified that an individual would need nine plants in adult stage, nine plants in a vegetative stage, and nine juvenile plants to maintain a 60-day supply. RP 435-436. The defense objected to this testimony and the court stated, “Noting your objection, counsel. Weight, not admissibility at this time, I’ll allow him to testify.” RP 427.

E. ARGUMENT

The Appellant’s argument centers on the 60-day supply of marijuana for medical marijuana patients. A qualifying patient may “possess no more marijuana than is necessary for the patient’s personal, medical use, not exceeding the amount necessary for a sixty-day supply. RCW 69.51A.040(3)(b). The defense called Dr. Carter and the State called Detective Alloway to testify regarding this issue.

This examination starts with an analysis of the relevant evidence rule. ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

When considering the admissibility of testimony under ER 702, the reviewing court engages in a two-part inquiry: “(1) does the witness qualify as an expert; and (2) would the witness’s testimony be helpful to the trier of fact.” *State v. Guilliot*, 106 Wash.App. 355, 363, 22 P.3d 1266 (2001). As to the latter inquiry, evidence is helpful if “testimony concerns matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party.” *State v. Jones*, 59 Wash.App. 744, 750, 801 P.2d 263 (1990) Fitchett does not contend that the detective’s testimony would not be helpful, but that he lacked the qualifications to so testify. Therefore, the focus will be on his qualifications.

A witness will not be disqualified from testifying as an expert concerning the manufacture of methamphetamine, notwithstanding his lack of a complete and formal education in the field of chemistry. *State v. McPherson*, 111 Wash.App. 747, 46 P.3d 284 (2002). In *McPherson*, the

court held that an officer's education did not disqualify him from testifying as an expert concerning the manufacture of methamphetamine. *Id.* at 763. In that case, the defense objected to the officer's testimony regarding the manufacture of methamphetamine because he lacked a college degree. The court disagreed and allowed testimony from the officer based on his practical experience that included 40 to 60 meth-lab busts, a 40-hour DEA class on meth-labs, and attendance at several classes regarding meth-labs.

Like the officer in *McPherson*, Detective Alloway in the present case does not have a degree. Detective Alloway, like the officer in *McPherson*, has the practical experience to testify as an expert on the issue of the 60-day supply for a medical marijuana patient and an average yield from an adult plant. This experience is based on ten years as a detective with the West Sound Narcotics Enforcement Team, 400 hours of training specific to narcotics investigation and indoor marijuana growing operations, classes on marijuana growing operations offered by the FBI and DEA, he wrote a paper for the Kitsap County Prosecutor's Office on the 60-day supply issue that was cross-referenced by a Doctor who grows marijuana for the University of Mississippi, the investigation of hundreds of marijuana grows, discussions with many growers and the yields they

receive from their plants, and completed a Master Gardner Program at Washington State University.

Detective Alloway's lack of a degree does not disqualify him from testifying as an expert as to the proper 60-day supply of medical marijuana. The court in *McPherson* goes on say that an expert witness does not have to be "a rocket scientist"; in the appropriate context, "practical experience is sufficient to qualify an expert." *McPherson*, 111 Wash.App. 762, 46 P.3d 292 (2002). Detective Alloway has the practical experience as well as formal training to testify as an expert on this issue. The trial court did not error in allowing Detective Alloway to testify as an expert on this issue.

Practical experience is sufficient to qualify a witness as an expert. *State v. Ortiz*, 119 Wash.2d 294, 831 P.2d 1060 (1992). In that case, the testimony of a tracker who had tracked a defendant was admissible as expert testimony because the tracker had extensive training and experience tracking individuals. The testimony consisted of the defendant's size and movements after the crime. The court held that the experience that the tracker had, which consisted of 23 years of he worked for the border patrol as a tracker, he was qualified as an expert tracker by National Search and Rescue, and had tracked 5,000 people qualified him as an expert *Id* at 310.

Again, Detective Alloway, like the tracker in *Ortiz* has the practical experience and training to testify as an expert on this issue.

The purpose of permitting expert opinion testimony is to assist the trier of fact in understanding matters not within the common experience of mankind. *Weber v. Biddle*, 4 Wash.App. 519, 483 P.2d 155 (1971). The court review's a trial court's evidentiary rulings for an abuse of discretion. *State v. Stenson*, 132 Wash.2d 668; 701, 940 P.2d 1239 (1997). When the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion occurs. *Id.* Otherwise stated, an abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *State v. Castellanos*, 132 Wash.2d 94, 102, 935 P.2d 1353 (1997). When the question pertains to expert opinion evidence, the trial court does not abuse its discretion if the ruling is fairly debatable. *Fraser v. Beutel*, 56 Wash. App. 725, 734, 785 P.2d 470 (1990). It is well established that the qualifications of an expert is within the discretion of the trial court, and, absent abuse, will not be disturbed on appeal. *In re Estate of Hastings*, 4 Wash.App. 649, 484 P.2d 442 (1971). Determination of whether or not a witness possesses the special skill or knowledge necessary to qualify as an expert witness is discretionary with the trial judge. *State v. J-R Distributors, Inc.*, 82 Wash.2d. 584, 512 P.2d 1049 (1973).

The decision made by the trial court to allow the testimony of Detective Alloway was not manifestly unreasonable or based upon untenable grounds. The ruling was fairly debatable, and as stated above in *Beutel*, was not an abuse of discretion. The state was required to lay the proper foundation to qualify Detective Alloway, it was done and satisfied the court. The Defense objected three more times as to foundation and qualifications and the court stated the objection goes to weight, not admissibility. RP 427, 435, 437. There has been no showing of abuse of discretion on the trial court's part. Therefore, the decision qualifying Detective Alloway as an expert witness should not be disturbed.

Once basic qualifications of an expert are shown, deficiencies in the qualifications go to weight rather than admissibility. *Palmer v. Masser-Ferguson, Inc.*, 3 Wash.App. 508, 476 P.2d 713 (1970). The thoroughness of an expert's examination of the real evidence is a matter of weight for the jury. *Ulmer v. Ford Motor Co.*, 75 Wash.2d 522, 452 P.2d 729 (1969). The court was correct in allowing Detective Alloway to testify as an expert on this issue and it was the jury's decision to determine how much weight his testimony received.

It is well settled that no witness, expert or lay, may utter an opinion as to the guilt or innocence of a criminal defendant, whether the opinion is a direct statement or an inference. *State v. Black*, 109 Wash.2d 336, 745

P.2d 12 (1987). To do so is to violate the defendant's constitutional right to a jury trial and invade the fact-finding province of the jury. *State v. Demery*, 144 Wash.2d 759, 759, 30 P.3d 1278 (2001). "However, testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. *State v. Heatley*, 70 Wash.App. 573, 578, 854 P.2d 658.

An opinion is not improper simply because it involves ultimate factual issues. *Id.* ER 704 provides that "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Thus, opinion testimony may not be excluded under ER 704 on the basis that it encompasses ultimate issues of fact. *Id.* At no time did Detective Alloway comment on the defendant's guilt or innocence. Detective Alloway testified about what he believed was a proper 60-day supply for a medical marijuana patient based on his training and experience. The State never asked Detective Alloway if he believed the amount of marijuana possessed by Fitchett exceeded the 60-day supply. In fact, Detective Alloway never testified that Fitchett exceeded the 60-day limit.

F. CONCLUSION

The State respectfully requests the Court to affirm the judgment and sentence.

Dated this 16th day of August, 2010.

Respectfully submitted by:



Timothy W. Whitehead, WSBA #37621
Deputy Prosecuting Attorney for Respondent
Mason County, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	No. 38466-3-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
RICK FITCHITT,)	
)	
Appellant,)	
_____)	

I, MARGIE OLINGER, declare and state as follows:

On MONDAY, AUGUST 16, 2010, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Suzanne Lee Elliott
705 Second Avenue
Suite 1300
Seattle, WA 98104

FILED
COURT CLERK
19 AUG 17 AM 11:36
MASON COUNTY

I, MARGIE OLINGER, declare under penalty of perjury of the laws
of the State of Washington that the foregoing information is true and correct.

Dated this 16TH day of AUGUST, 2010, at Shelton, Washington.


MARGIE OLINGER