

No. 49052-8-II

#16-1-00349-4

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

STATE OF WASHINGTON,

Respondent,

v.

TRELANE HUNTER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON, CLARK
COUNTY

The Honorable Robert Lewis, Trial Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

Improper opinion testimony from an officer violated the state and federal rights to trial by jury and to fair trial and the prosecution cannot meet the heavy burden of proving this constitutional error “harmless” beyond a reasonable doubt.

B. QUESTION PRESENTED

Mr. Hunter was accused of having driven under the influence of intoxicants. There was no breath or blood test and no completed field sobriety tests. Over defense objection, the arresting officer was allowed to give his opinion that Hunter was under the influence.

Is reversal required because the state cannot meet its heavy burden of proving that every reasonable jury which heard the untainted evidence in this case would necessarily have found Mr. Hunter guilty of the crime and thus cannot show the error constitutionally “harmless?”

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Trelane Hunter was charged in Clark County superior court with third-degree assault, possession of methamphetamine, and driving under the influence. CP 5; RCW 9A.36.031, RCW 46.61.502(1)(c), RCW 69.50.4013. After preliminary hearings were held before the Honorable Judges Robert Lewis, David Gregerson and Scott Collier on February 10 and 25, March 8 and 31 and June 2, 2016, pretrial motions and jury trial were held before Judge Lewis on June 6-7, 2016. RP 1, 127. Hunter was acquitted of the assault but found guilty of the other two offenses. CP 69-71.

On June 13, 2016, the sentencing court imposed standard-range sentences. RP 277; CP 77.

Mr. Hunter appealed and this pleading follows. See CP 102.

2. Testimony at trial

Vancouver City Police Department Officer Matthew Hoover had been an officer for about two years as of February 9, 2016. RP 149-52. On his usual “graveyard” shift and in his “common life experience,” Hoover said, he came into contact with “a lot of intoxicated individuals.” RP 150-51. The officer also said he had come into contact with people “under the influence of drugs” as a “regular occurrence.” RP 151.

In his basic law enforcement academy class, Hoover was trained to do field sobriety tests. RP 149-51. He was also trained “how to identify driving to negate possible intoxication.” RP 150. According to Hoover, he knew how to look for “the clues” during field sobriety tests. RP 150. Hoover also was involved in a “wet lab” at the police academy, where they test drunk volunteers “to see how different levels affect different people.” RP 150-51.

That February early morning at about one a.m., Hoover was on “basic patrol.” RP 149-52. Another officer had “called in a potentially reckless vehicle in the area,” Hoover said, so Hoover had been looking around for that car. RP 153. The car was described only generally as a “dark sedan.” RP 153.

Hoover was exiting a highway when he saw a car ahead about 100 feet from the stop line of the exit ramp. RP 153. The officer did not see any vehicles in front of the other car, which was either stopped or moving very slowly. RP 153. The car ahead caught Hoover’s attention because Hoover thought “there was no traffic for it to be stopped forward” like it appeared that early morning. RP 153-54.

The officer admitted that, at the time he saw the car ahead, there was nothing “reckless” about its driving. RP 174.

Hoover pulled his patrol vehicle behind the other car, which turned right at the stop line and then started to accelerate. RP 154. The officer did not think the acceleration was “in a smooth manner,” saying he could “kind of see it would jerk back and forth as it was accelerating.” RP 154. Hoover admitted, however, that it could be assumed the person ahead would be aware that someone was behind him and he needed to get moving. RP 174.

The other vehicle made no effort to pull away from the police car. RP 174-75. Hoover said, however, that the other vehicle was “urgently going into the fast lane or No. 1 lane partially before recorrecting into the slow lane or the No. 2 Lane.” RP 154.

There was no traffic in either lane at the time. RP 154-55. That lane was going westbound as was the lane into which the driver corrected. RP 154.

After the turn, with the officer on its heels, the car ahead went slow, about 15 or 20 miles per hour in a 40-mile-per-hour zone. RP 154. This also seemed “notable” to Hoover, so he activated his lights to stop the other car. RP 154-55. The car he was following then made the very first available right turn, pulling into an empty parking lot and stopping, but not in a stall. RP 155. The officer admitted that the driver had only by then gone about 200 feet at a slow pace and that he turned in “at the earliest opportunity[.]” RP 175.

Hoover got out of his patrol car and walked up to the driver’s side

window of the car he had stopped. RP 156. The window was open, Hoover said, and Hoover smelled a “strong odor of alcoholic beverages coming from” the breath of the man inside. RP 155. The man did not have slurred speech, however. RP 177. Indeed, Hoover conceded, the man’s speech was “fair.” RP 177, 192-93.

The officer asked where the man had been coming from and the man motioned to the north, saying, “over there.” RP 155-56. He tried to clarify where on his phone but could not get it to work. RP 155-56. Hoover said that it was possible that, when the man said he had come from “over there,” he could have been “lost or something.” RP 179.

Hoover tried to get more information from the man about “where he’d been coming from,” but the man said it did not matter as all the officer wanted was his insurance, license and registration. RP 156. The man gave the officer his insurance and registration and the officer asked again for his license. RP 156. When the man complied, Hoover called for “cover” to come. RP 156. At trial, Officer Hoover testified, “[b]asically, we want another officer there to do a DUI investigation.” RP 156.

The officer admitted that the driver of the car was able to hand over the first two documents without having to fumble around or anything like that. RP 178. In fact, the officer conceded, the man gave the officer the registration and insurance information before the officer even asked. RP 178. It took him a moment to find the license in his wallet, though he did not really “fumble around for it or have difficulty getting it or anything like that[.]” RP 178.

Hoover testified that the man’s eyes were “watery and droopy.”

RP 156. But they were not red or “bloodshot.” RP 193. The officer conceded that the man, identified as Trelane Hunter, had “fair coordination,” did not fumble for his papers and was wearing orderly clothing, not stained or soiled. RP 192-93. RP 193. Hunter’s facial color was normal, not florid or flushed. RP 193.

Hoover went to his car, ran a “records” search and verified that Hunter’s driving record was “clear and current” and there was no reason he should not be driving. RP 156-57. The officer then went back to the car, asking Hunter to turn it off and get out. RP 157, 180. Hunter complied but seemed “kind of” hesitant to get out of the car. RP 157. Officer Hoover had to ask a few times before Hunter finally opened the door and stepped out. RP 157.

Hoover told Hunter he wanted to do field sobriety tests, but they were voluntary. RP 157. Hunter agreed to participate in the tests. RP 157.

At trial, in direct examination, the prosecutor asked Officer Hoover to try to explain one such test, the horizontal gaze nystagmus test. RP 157. The prosecutor wanted Hoover to tell the jury “what that test is and what it’s supposed to measure.” RP 157. The officer responded that the test is “supposed to measure the person - - if they’re impaired by a depressant in their system.” RP 147. Hoover testified that he would “make sure the pupils are of equal size” and “slowly move the pen back and forth” to see if the person’s eyes are “tracking equally.” RP 147-48. The officer said, “[d]uring that you look for a lack of smooth pursuit, where the eyes don’t smoothly move from side to side” and instead “kind of jerk.” RP 158.

Officer Hoover testified that the first question was to ask the color of the officer's pen, which he did to verify that the person was "looking at the correct stimulus." RP 180-81. Hunter seemed "confused" at first, but then correctly said that it was black. RP 180.

Hunter's pupils were completely normal. RP 182. Officer Hoover admitted that, if Hunter's pupils had been dilated or pinpoint small it would have been a "clue" Hunter was under the influence. RP 182.

Officer Hoover watched Hunter's eyes while the officer moved the pen back and forth. RP 158-59. At trial, the officer would testify, "you can see the eyes kind of jerk from side to side as they're following the pen," which is considered "lack of smooth pursuit," a "clue in the test." RP 158-59. The officer said it was considered "horizontal gaze nystagmus" when an officer would put the pen out to the side, the person being tested is looking "all the way over," and the officer "can still see the eye moving." RP 159.

According to Hoover, when he did the test on Hunter, he saw horizontal gaze nystagmus and lack of smooth pursuit, which the officer said were "both indicators" that Hunter "potentially was impaired." RP 159. Hoover never completed the test, however, because Hunter kept starting off fine but would "lose focus and start looking elsewhere." RP 159. During this time, the officer said, Hunter "continued to lick and smack his lips." RP 159-60.

A moment later, when asked to do a "walk-and-turn" test, Hunter danced a little, laughing. RP 160. The officer told Hunter to turn and face westbound and after a few requests, when the officer was finally next to

him, Hunter complied. RP 160. The officer started to explain how to do the walk test, which Hoover testified at trial is “supposed to show impairment.” RP 161.

When the officer asked if Hunter could imagine a straight line on the sidewalk in front of him, Hunter started walking normally down that line. RP 161. The walk was “quick” and the officer had not yet told Hunter to start the test. RP 161. Believing Hunter went beyond the nine steps used in the test, Hoover got concerned, saying he thought that Hunter was “possibly trying to flee the scene.” RP 162, 185.

The officer did not recall ever telling Hunter to stop, and his report did not reflect that any such command was given. RP 186. Instead, Hoover and other officers descended on Hunter right then, arresting him. RP 162, 186. Hoover testified at trial that Hunter “was being arrested for DUI.” RP 162.

Officer Hoover admitted that, up until this point, Hunter had been very cooperative. RP 186. Hunter now started resisting having handcuffs put on, so several officers worked together and were “able to overpower him.” RP 163. Hoover said Hunter kept trying to “rear back and turn towards” officers so Hoover physically pressed his body weight against Hunter, pinning him to the patrol car’s trunk. RP 164.

Another officer searched Hunter and said she had “located a glass pipe with burn marks and white residue” on him. RP 163-64. A forensic scientist confirmed the residue contained methamphetamine in it, but could not confirm the percent. RP 200, 203, 207, 210.

While being put into the back of the patrol car, Hunter rolled onto

his back and started kicking out the open door. RP 164. One of Hunter's kicks landed on Hoover's left elbow. RP 164. The officer admitted it occurred while he was trying to close the door. RP 164, 189.

Hoover had an officer follow him to book Hunter because of Hunter's "aggressive state." RP 166. The officer said it was not "standard on a DUI" if "they're cooperative," but Hunter kept laughing "hysterically," then yelling and kicking the rear door. RP 166. Hoover asked Hunter when he had last smoked methamphetamine and Hunter responded, "I smoke meth. I smoke crystal. I smoke crack. I smoke every drug you got." RP 167.

At the booking, when the custody officer asked if Hunter had taken a preliminary breath test, Hunter said, "I'm not taking no alcohol, no nothing." RP 168. He was read a form which told him his "implied consent" warnings about a breath test but by then had been moved into a "behavioral cell" and was just screaming at the officer through the closed door. RP 169-70.

VPD Officer Robin Griffith had been on the job about a half year longer than Hoover as of February 9, 2016. RP 212. Griffith responded to Hoover's call out and saw Hoover giving the field tests. RP 212. Griffith thought it seemed like Hunter was having a hard time understanding Hoover's instructions and "seemed confused." RP 212-14.

Griffith was one of the officers who "grabbed onto" Hunter as he seemed to be walking away. RP 214-15. It was Griffith who first felt a pipe in Hunter's pocket during a "pat down" before the field tests. RP 215. The pipe was not taken out of Hunter's pocket, however, until the

search incident to arrest, and it was removed by someone other than Griffith. RP 216.

Griffith saw the kick, which occurred as Officer Hoover was trying to close the patrol car door. RP 218. Officer Griffith admitted that the kicking and hitting was “pretty simultaneous” and said Hunter had just started kicking when Hoover got kicked. RP 220.

D. ARGUMENT

IMPROPER OPINION TESTIMONY DEPRIVED APPELLANT HIS RIGHTS TO TRIAL BY JURY

Both the state and federal constitutions guarantee the right to trial by jury, which includes the right to have the jurors serving as sole judge of the evidence, the weight of the testimony and credibility of witnesses. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Sixth Amend. Art. I, § 21. As a result, it is improper to admit evidence from a witness about their opinion on the defendant’s guilt, veracity or credibility. See State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005). Such impermissible opinion testimony is reversible error because it violates the defendant’s constitutional rights to a trial by jury. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

In this case, this Court should reverse, because the prosecution elicited improper opinion testimony over defense objection and cannot meet its heavy burden of proving the constitutional error “harmless.”

1. Relevant facts

There was never any question that Hunter was driving a car that night, but there was a dispute about whether Hunter was under the

influence at the time. In opening argument, the prosecutor told jurors about the tests Officer Hoover had performed on Mr. Hunter, including the horizontal gaze nystagmus test. RP 140-41. The prosecutor told jurors that test was “in order to determine, by looking at their eyes while doing that test, if they’re under the influence of intoxicants.” RP 140-41.

For his part, counsel told the jury that it had to decide whether the driving Mr. Hunter was doing “was such terrible driving or driving that was affected by alcohol or drugs.” RP 145. He noted there was no evidence about anything being in Hunter’s system, and reminded them there had been no swerving, speeding or reckless driving. RP 145-46. Hunter stated his defense clearly: that the question was whether his driving was affected by alcohol or drugs and there was a “lack of evidence in this case for that.” RP 147-48.

At trial, in direct examination, the prosecutor asked Officer Hoover to try to explain the horizontal gaze nystagmus test, “what that test is and what it’s supposed to measure.” RP 157. The officer then said it was “supposed to measure the person - - if they’re impaired by a depressant in their system.” RP 147. Hoover testified that he would “make sure the pupils are of equal size” and “slowly move the pen back and forth” to see if the person’s eyes are “tracking equally.” RP 147-48. According to Officer Hoover, “[d]uring that you look for a lack of smooth pursuit, where the eyes don’t smoothly move from side to side” and instead “kind of jerk.” RP 158.

The officer then told jurors that he had watched Hunter’s eyes while moving the pen back and forth in front of Hunter, “[a]nd you can see

the eyes kind of jerk from side to side as they're following the pen." RP 158-59. Officer Hoover testified that this was considered "lack of smooth pursuit," a "clue in the test." RP 158-59. He also said it was deemed "horizontal gaze nystagmus" when an officer would put the pen out to the side, the person being tested is looking "all the way over," and the officer "can still see the eye moving." RP 159.

Hoover testified that, on Hunter, he saw horizontal gaze nystagmus and lack of smooth pursuit, which were "both indicators" that Hunter "potentially was impaired." RP 159. The officer did not finish the test, however, because Hunter would start looking at the pen but then "lose focus and start looking elsewhere." RP 159. The officer discontinued the test after a few similar attempts. RP 159-60.

Hoover later testified that Hunter "was being arrested for DUI." RP 162. The following exchange then occurred:

[PROSECUTOR]: And based on your training and experience and your common understanding at that point, did you believe that he was intoxicated?

A: Yes.

[DEFENSE COUNSEL]: Objection, Your Honor. That's a conclusion.

[PROSECUTOR]: Proper opinion testimony.

THE COURT: Overruled.

The objection's - - he can state his opinion based on training and experience. It's up to the jury as to whether they accept the opinion.

[PROSECUTOR]: Thank you.

- Q: And did you form an opinion as to his - - whether he was intoxicated or not?
- A: Yes.
- Q: And what was [sic] what was your opinion?
- A: I believe he was intoxicated.
- Q: Okay. Was that obvious to you?
- A: Yes.

RP 163.

2. The trial court erred and appellant's rights were violated by admission of the officer's improper opinion testimony over defense objection and the prosecution cannot meet the heavy burden of proving the constitutional error "harmless"

The officer's testimony was improper opinion testimony in violation of Mr. Hunter's constitutional rights to trial by jury. Under ER 704, "[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. Despite this rule, however, "[n]o witness, lay or expert, may testify as to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.3d 12 (1987). Improper opinion testimony may invade the jury's fact-finding province and violates the right to trial by jury. See Kirkman, 159 Wn.2d at 935-36.

As a threshold matter, it is important to note the standard which this Court applies. In general, a trial court has wide discretion in evidentiary rulings and a decision by the court will not be reversed unless the court abused that discretion. Kirkman, 159 Wn.2d at 927. However,

where there has been improper opinion on the defendant's guilt, veracity or credibility, the abuse of discretion standard does not apply. See Kirkman, 159 Wn.2d at 927. Instead, because it amounts to constitutional error, the prosecution bears the burden of proving the error harmless beyond a reasonable doubt - and the burden is high. See Kirkman, 159 Wn.2d at 927; State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

Thus, it was improper opinion testimony when a counselor testified about "rape trauma syndrome" and said the victim's symptoms "fit" and she had been diagnosed with that syndrome," although still allowing that the symptoms could be caused by some other reason. Black, 109 Wn.2d at 349. The Court found that the counselor had given an improper opinion because the very term "rape trauma syndrome" by itself indicated that a rape had occurred and carried with it the implied opinion that the defendant was telling the truth. Id.

There is also a more recent distinction this Court makes when counsel fails to object below. Where, as here, counsel objects to improper opinion, the Court will review the admission of even an indirect opinion on guilt, veracity or credibility. See Kirkman, 159 Wn.2d at 937. If counsel fails to object, however, the issue is waived unless the testimony is an "explicit or almost explicit" statement on guilt, veracity or credibility. 159 Wn.2d at 937.

Here, counsel objected below, so the issue is thus well-preserved, even if the officer's comments were found to be only "indirect opinion."

To determine whether a comment is an improper opinion, this

Court looks at 1) the type of witness involved, 2) the nature of the testimony, 3) the nature of the charges, 4) the nature of the defense and 5) the other evidence before the trier of fact. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Looking at those factors here, the officer's declaration cannot be seen as anything other than an improper, unconstitutional opinion on Mr. Hunter's guilt.

First, when an officer provides testimony which is arguably an opinion on guilt, whether direct or by inference, it is "well-recognized" that the testimony is given a high "aura of reliability." State v. Quaale, 177 Wn. App. 603, 613, 312 P.3d 726 (2013), affirmed, 182 Wn.2d 191, 340 P.3d 213 (2014), quoting, Montgomery, 163 Wn.2d at 591. At the same time, however, such opinions have "low probative value," because officers have expertise in determining when an arrest is justified, not whether there is guilt beyond a reasonable doubt. Quaale, 177 Wn. App. at 614.

The testimony here came from an officer. RP 163.

Second, the nature of the testimony shows it was a comment on Hunter's guilt. The prosecutor did not ask the officer whether Mr. Hunter displayed HGN or symptoms consistent with the consumption of alcohol or drugs. Instead, after first establishing that the officer arrested Hunter for DUI, the prosecutor directly asked the officer regarding Hunter, "did **you believe** that he was intoxicated" and "did you **form an opinion** as to his - - whether he was intoxicated or not," eliciting "yes" to each. RP 163 (emphasis added). The prosecutor then specifically asked the officer,

“what was **your opinion?**” RP 163. That was followed with the officer declaring, “**I believe he was intoxicated.**” RP 163 (emphasis added).

Indeed, a moment later, the prosecutor further bolstered the strength of the officer’s opinions, asking, “[w]as that obvious to you?” RP 163.

The nature of the testimony was unmistakably opinion and deliberately elicited by the prosecution, over defense objection, as such.

Third, the testimony went directly to the nature of the charges and the fourth factor, the nature of the defense. The only issue for the DUI was whether or not the defendant’s ability to operate a motor vehicle was impaired. The defendant’s argument was that there was insufficient evidence of impairment and intoxication - no blood test, no red or bloodshot eyes, no slurry speech, no rumpled clothes, no accident, no attempt to drive away. The officer’s declaration of his opinion on whether Mr. Turner was intoxicated was thus opinion on guilt in light of the charge and the nature of the defense. Our Supreme Court has recently held that a similar opinion was an unconstitutional indirect opinion on guilt. See Quaale, 182 Wn.2d at 195-200.

Fifth and finally, the other evidence before the trier of fact emphasizes how improper the officer’s testimony was in this case. The prosecution’s evidence was far from strong. There was no blood or breath test result. No red or bloodshot eyes, no slurry speech, no fumbling with paperwork, no alarming driving - nothing save the testimony of this officer that Mr. Hunter had either been pulled to a stop prior to the end of a

highway exit or was moving slow to exit - consistent with being lost. It was only this officer who said Hunter turned into a second lane and who described Hunter as driving unusually slow, and this officer's observations of Hunter which provided the claim he smelled of alcohol. See Quaaale, 177 Wn. App. at 608 (over defense objection, the officer said he had "no doubt" the defendant was impaired; improper opinion).

In short, for the DUI, this officer's testimony was the basis for the state's case. The prosecutor's closing argument illustrates this point and further exacerbated the prejudice. In initial closing, in discussing the sobriety tests, the prosecutor declared:

[Hunter is] able to follow some of the instructions in order to do the horizontal gaze nystagmus test. As Officer Hoover explained to you guys, those - - the things that he sees in the eyes are evidence of impairment. **It's not something that you can fool. It's something that kind of the eyes tell the story.**

And so [the officer] . . . takes the pen, according to his training, and put it upon - - or across Mr. Hunter's field of view. And he sees eyes jerking back and forth as they're trained on the pen; and then when he's holding it out on maximum deviation, he shows that - - he sees that horizontal gaze nystagmus, the eyes shaking. **And so he knows at that point that Mr. Hunter is under the influence.**

RP 247-48 (emphasis added).

Our state Supreme Court has explicitly limited the types of opinions which are permissible regarding the HGN test. State v. Baity, 140 Wn.2d 1, 14, 991 P.2d 1151 (2000). Even if an officer has fully evaluated a driver using all 12 steps of DRE including HGN testing, which is only one of those 12, the officer is not permitted to "testify in a fashion that casts an aura of scientific certainty," may not "predict the specific

level of [intoxicant] present in a suspect,” and must instead confine herself to expressing an opinion “that a suspect’s behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs.” Baity, 140 Wn.2d at 17-18.

Thus, as one Court has noted, “[a] failed HGN test is relevant to impairment in the same manner as the smell of alcohol on the subject’s breath or the presence of empty or partially empty liquor containers in his car’ - each fact is evidence of alcohol consumption and is relevant and admissible for that reason.” Quaale, 177 Wn. App. at 613, quoting, People v. McKown, 236 Ill. 2d 278, 293, 338 Ill Dec. 415, 924 N.Ed. 2d 941 (2010).

The prosecution cannot meet the heavy burden of proving this constitutional error harmless. To meet that burden, the state must show that the untainted evidence of guilt is so overwhelming that every single reasonable juror faced with that evidence would still have convicted, even absent the error. Guloy, 104 Wn.2d at 425.

This “overwhelming” evidence standard is far different than the standard used by this Court on review of sufficiency of the evidence. See, e.g., State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Romero is instructive. In that case, the very same evidence was examined in light of the two tests. The Court found sufficient evidence to meet the “sufficiency” test, which places the burden on the defendant and affirms unless *no* reasonable juror faced with the same evidence could *possibly* have convicted. 113 Wn. App. at 784-85.

But that same evidence was insufficient to satisfy the prosecutor’s

burden of satisfying the Court that the constitutional error was harmless beyond a reasonable doubt. 113 Wn. App. at 785. In Romero, there was ample evidence from which a jury could have found guilt but the officer also testified that he and his family would not speak to police. Because the state did not prove that *every* reasonable juror faced with the same evidence would *necessarily* have convicted absent the untainted evidence, the evidence was thus not “overwhelming” as required and reversal for a new trial was required. Id.

Here, the prosecution cannot meet its burden. The evidence was far from overwhelming. There was evidence of intoxication, of course, but even the prosecutor himself admitted that Hunter had only some of the common symptoms of being intoxicated but not others. RP 268. There was no evidence how much alcohol was in his system. RP 263. His speech was not slurred but was fair, his face was normal, not red, his eyes were not bloodshot, his pupils not dilated. He had fair coordination, did not fumble with his papers and got his license out of his wallet, albeit after a moment. The driving described by the officer could very well be explained by being lost, taking an exit in the dark of early morning and pausing or going slow to get your bearings.

The prosecution cannot meet its heavy burden of proving the officer’s comment on Hunter’s guilt to be harmless beyond a reasonable doubt, applying the constitutional harmless error standard of Guloy. This Court should so hold and should reverse.

E. CONCLUSION

The officer gave improper opinion testimony on Mr. Hunter's guilt and the prosecution cannot meet the heavy burden of proving the error harmless. This Court should so hold and should reverse.

DATED this 13th day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at Clark County Prosecutor's Office at prosecutor@clark.wa.gov and to Trelane Hunter/DOC#391690 at Monroe Corrections Center, PO Box 777, Monroe, WA 98272.

DATED this 13th day of March, 2017.

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