

NO. 49052-8-II

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

---

STATE OF WASHINGTON, Respondent

v.

TRELANE HUGH HUNTER, Appellant

---

FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00349-4

---

BRIEF OF RESPONDENT

---

Attorneys for Respondent:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

ERIK PODHORA, WSBA #48090  
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

## TABLE OF CONTENTS

RESPONDENT’S BRIEF.....	1
ISSUE PRESENTED.....	1
I.    Did the trial court abuse its discretion by allowing an admissible opinion after a proper foundation was laid?.....	1
SHORT ANSWER.....	1
I.    No, considering the facts of this case, the trial court properly admitted this testimony after the State laid a proper foundation. .....	1
STATEMENT OF THE CASE.....	1
ARGUMENT.....	4
I.    The trial court did not abuse its discretion by admitting evidence because Officer Hoover’s testimony was admissible and proper in this DUI case.....	4
a. <i>The type of witness – a trained police officer</i> .....	7
b. <i>The specific nature of the testimony –the rational               inferences of direct observations based on training and               experience</i> .....	8
c. <i>The nature of the charges – DUI</i> .....	10
d. <i>The nature of the defense – a denial that the drugs had               an impairing effect</i> .....	10
e. <i>Other evidence – facts concerning the driving and               Defendant’s overall demeanor</i> .....	11
II.   Defendant’s right to a fair trial was not violated because the admissible opinion testimony did not comment on the defendant’s veracity and did not parrot the legal elements of a DUI.....	12
CONCLUSION.....	14

## TABLE OF AUTHORITIES

### Cases

<i>City of Seattle v. Heatley</i> , 70 Wash.App. 573, 854 P.2d 658 (1993).	4, 6, 7, 8, 9, 11, 12, 14, 15
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278, 1281 (2001)	5, 6
<i>State v. Dolan</i> , 17 Wash. 499, 50 P. 472 (1897)	9
<i>State v. Forsyth</i> , 131 Wash. 611, 230 P. 821 (1924)	9
<i>State v. Jones</i> , 59 Wash.App. 744 , 801 P.2d 263, 267 (1990)	7
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125, 130 (2007)	4, 5, 6
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008)	6, 7
<i>State v. Quaale</i> , 182 Wn.2d 191, 340 P.3d 213 (2014)	5, 9, 12, 13, 15
<i>State v. Ring</i> , 54 Wn.2d 250, 339 P.2d 461 (1959)	6
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	6
<i>State v. Wilber</i> , 55 Wash.App. 294, 777 P.2d 36 (1989)	7, 11

### Rules

RAP 10.1, 10.2, 10.3	1
----------------------	---

## **RESPONDENT'S BRIEF**

COMES NOW the Respondent, State of Washington, by and through Erik Podhora, Deputy Prosecuting Attorney, and pursuant to RAP 10.1, 10.2, 10.3 submits the following brief in response to Appellant's brief.

### **ISSUE PRESENTED**

- I. Did the trial court abuse its discretion by allowing an admissible opinion after a proper foundation was laid?**

### **SHORT ANSWER**

- I. No, considering the facts of this case, the trial court properly admitted this testimony after the State laid a proper foundation.**

### **STATEMENT OF THE CASE**

On February 9, 2016, in Vancouver, Clark County, Washington, the Defendant, Trelane Hunter, was arrested and charged with Assault in the Third Degree, Driving Under the Influence (DUI) and Possession of a Controlled Substance – Methamphetamine. The Defendant was convicted of DUI and Possession of a Controlled Substance and found not guilty of Assault in the Third Degree. Defendant appeals only the DUI conviction based on an evidentiary issue regarding Officer Hoover's testimony.

At trial, Officer Hoover testified he contacted the Defendant while responding to a report of a “potentially reckless vehicle” near SB I-205 near Mill Plain in Vancouver, WA. *See* Report of Proceedings (“RP”) 153. Officer Hoover observed that the Defendant’s vehicle stopped approximately 100 feet from the stop line on the exit ramp from I-205. RP 153. He observed Defendant’s vehicle was stopped or nearly stopped. RP153. As Defendant’s vehicle moved the officer described the vehicle’s movement as, “[i]t didn’t accelerate in a smooth manner. You could kind of see it would jerk back and forth as it was accelerating.” RP 154. The Defendant’s vehicle entered an incorrect lane of travel and continued at a speed of approximately 15-20 miles per hour in a 40 zone. RP 154. The officer activated his lights and the Defendant turned into a Walmart parking lot eventually stopping his vehicle in a thoroughfare instead of a parking stall. RP 155.

Officer Hoover made contact with Defendant in the parking lot and observed a strong odor of intoxicants coming from his breath. RP 155. Officer Hoover noted that Defendant’s eyes were watery and droopy. RP 155. When Officer Hoover asked Defendant where he had come from, Defendant replied “over there” and motioned to the north. RP 155. Officer Hoover noted that the Defendant seemed confused during this interaction. RP 178. Based on the Defendant’s driving, the odor of alcohol, and his

droopy eyes, Officer Hoover decided to ask the Defendant to perform voluntary Field Sobriety Tests (FST). RP 157, 179.

Officer Hoover began by attempting to administer the Horizontal Gaze Nystagmus test (HGN). RP 157. Hoover observed several clues on the HGN, but was unable to complete his observations on the test because the Defendant would lose focus on the stimulus. RP 159. Officer Hoover noted that Defendant was licking and smacking his lips during the HGN. RP 160. As a result, Officer Hoover proceeded onto the next FST, the Walk and Turn (WAT) test. As officer Hoover was orienting Defendant to face the west, he was laughing and dancing. RP 160. As Defendant was instructed to imagine a straight line he walked away from Hoover in a normal stride, as opposed to heel to toe as the WAT calls for. RP 160. At that point, believing that Defendant may have been attempting to flee, Officer Hoover and several other officers arrested Defendant.

Defendant resisted Officer Hoover as he pinned him against the patrol car and kicked Hoover as he was taken into the back seat. RP 163-164. Officer Wass discovered a glass pipe with burn marks and white residue, later discovered to contain methamphetamine, on Defendant's person. RP 164, 207-208. Defendant kicked the door of the patrol car and alternated between hysteric laughing and quietness on the way to the station. RP 164-166. Officer Hoover asked Defendant about

methamphetamine and Defendant replied, "I smoke meth. I smoke crystal. I smoke crack. I smoke every drug you got." RP 167. After arriving at the jail Defendant refused the preliminary breath test as well as the evidentiary breath test stating, "I ain't taking alcohol, no nothing." RP 168-169.

The Defendant now appeals the guilty verdict returned by the jury as to the DUI based on testimony of Officer Hoover.

#### ARGUMENT

**I. The trial court did not abuse its discretion by admitting evidence because Officer Hoover's testimony was admissible and proper in this DUI case.**

Defendant claims that his right to a fair trial was violated by improper opinion testimony. Defendant does not explain why the opinion was improper in light of well-established caselaw in this area allowing an officer to express an opinion about intoxication following *City of Seattle v. Heatley*, 70 Wash.App. 573, 854 P.2d 658 (1993). Defendant asks the court to invent a new standard of review, stating that a trial court's evidentiary rulings should not be reviewed for an abuse of discretion and yet citing *Kirkman*, a case utilizing an abuse of discretion standard to evaluate the factors laid out in *Heatley*, to assess if the trial court in a child sex abuse case committed error by admitting opinion testimony. *State v.*

*Kirkman*, 159 Wash. 2d 918, 927, 155 P.3d 125, 130 (2007). Essentially, Defendant confuses the test the reviewing court applies to determine whether error occurred in the first place—which is an abuse of discretion standard—with the test to be applied when determining harmlessness of that error if it is found to have occurred. Appellant’s Brief 12-13. Finally, Defendant calls upon the court to misapply the holding of *Quaale*, where the officer improperly stated that there was “no doubt” an individual was impaired based solely on his observations on the HGN test only without laying a proper foundation for the testimony, by applying the remedy of *Quaale* without any of the accompanying rationale. *State v. Quaale*, 182 Wash. 2d 191, 340 P.3d 213 (2014). As a result, Defendant’s claim that he was deprived of his right to a fair trial is without merit.

A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *State v. Kirkman*, 159 Wash. 2d 918, 927, 155 P.3d 125, 130 (2007); *State v. Demery*, 144 Wash. 2d 753, 758, 30 P.3d 1278, 1281 (2001). “The trial court is given considerable discretion to determine if evidence is admissible.” *State v. Quaale*, 182 Wash. 2d at 196–97 (citing *Demery*). The trial court has abused its discretion on an evidentiary ruling if it is contrary to law. *Id.* (citing *State v. Neal*, 144 Wash.2d 600, 609, 30 P.3d 1255 (1996)). “An abuse of discretion exists ‘[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based on

untenable grounds or reasons.’ ” *Id.* (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)). “Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion.” *Id.* However, an opinion on intoxication in a DUI case from an officer after a proper foundation for the opinion been laid is admissible evidence. *City of Seattle v. Heatley*, 70 Wash. App. at 578–79. The trial court’s decision will not be reversed unless the appellant can establish that the trial court adopted a position that no reasonable person could have adopted. *State v. Demery*, 144 Wn.2d at 758.

In Washington, pursuant to ER 702, experts are permitted to testify on subjects that are not within the understanding of the average person. *State v. Montgomery*, 163 Wn.2d at 590. In a DUI case, even “[a] lay person's observation of intoxication is an example of a permissible lay opinion.” *Id.* (citing *City of Seattle v. Heatley*, 70 Wash.App. at 580). More broadly, however, courts “allow experts to express opinions concerning their fields of expertise when those opinions will assist the trier of fact. ER 702; ER 701. The mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion.” *Id.* (citing *State v. Kirkman*, 159 Wn.2d 918, 929, 155 P.3d 125, 133 (2007); *State v. Ring*, 54 Wn.2d 250, 255, 339 P.2d 461 (1959)).

Generally, before opinion testimony is offered, the trial court must determine its admissibility. The court in this case properly admitted the opinion of intoxication. In determining whether such statements are 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.’ ” *State v. Montgomery*, 163 Wn.2d at 591. The court on appeal must accord the trial court broad discretion to determine the admissibility of ultimate issue testimony. *City of Seattle v. Heatley*, 70 Wash.App. at 579 (citing *State v. Jones*, 59 Wash.App. 744,751, 801 P.2d 263, 267 (1990)). Appellate courts have expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt. *See Id.* (citing *State v. Wilber*, 55 Wash.App. 294, 298, 777 P.2d 36 (1989)). In this case, the factors all suggest that the officer’s opinion was admissible.

*a. The type of witness – a trained police officer*

The pertinent testimony for purposes of this appeal was offered by a trained police officer with two and a half years of experience at the Vancouver Police Department. RP 149. The officer’s experience included training specific to DUI investigations with respect to drugs and alcohol

detection including the administration of FST's. RP 150-151. Officer Hoover testified that he comes into contact with people under the influence of drugs on a regular basis in the field. RP 152. The "type of witness" factor would weigh heavily in favor of admissibility of the officer's opinion because his training and experience clearly informed the judge that the opinion was being formed by an individual with an adequate basis of knowledge.

In this case, as in *Heatley*, Officer Hoover's qualifications, knowledge and personal observations were the sole basis of his opinion and this evidentiary foundation "directly and logically" supported his conclusion. *City of Seattle v. Heatley*, 70 Wash.App. at 579-80. This witness' direct observations and ability to provide testimony helpful to the jury weighs in favor of admissibility of his opinion of the Defendant's sobriety.

*b. The specific nature of the testimony –the rational inferences of direct observations based on training and experience*

Officer Hoover explained his specific interaction with the defendant in this case independent of all his prior experience. Considering the facts of this case, and the defense's theory, the State inquired about the Officer's opinion about the defendant's sobriety based on the interaction.

It has long been the rule in Washington that 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. *See, e.g., State v. Forsyth*, 131 Wash. 611, 612, 230 P. 821 (1924) (in prosecution for driving while intoxicated, “[i]t was not a question upon which only an expert could express an opinion”, quoting *State v. Dolan*); *State v. Dolan*, 17 Wash. 499, 50 P. 472 (1897) (trial court erred in not allowing witness to testify as to whether defendant was so intoxicated he did not know what he was doing).

*City of Seattle v. Heatley*, 70 Wash.App. at 580. The specific testimony that was elicited was based on the totality of Officer Hoover’s observations that Defendant was “intoxicated” and not “impaired.” The Washington Supreme court seemed to disfavor the use of the word “impaired” because it parroted the legal standard in *State v. Quaale*, 182 Wash. 2d at 200. Given the long-standing approval of the lay opinion of “intoxication” this is the preferred nomenclature for expressing the officer’s opinion. Unlike the officer in *Quaale*, who relied on HGN only to form the opinion that there was “no doubt” that the defendant was “impaired,” the record supports that Officer Hoover based his opinion on the totality of his observations including “[d]riving, alcohol, and then some watery and droopy eyes” as well as the Defendant’s behavior during FST’s, the actual clues of intoxication observed during the FST’s, the pipe containing methamphetamine found on Defendant as well as the statements and behavior following arrest. RP 153-170,179.

As a result, the specific nature of the testimony much more closely aligns with the long-standing approval of Washington courts for a trial court's authority to allow a lay witness to express an opinion of intoxication. The testimony did not parrot the legal standard of "impairment" and did not go to the defendant's veracity. As a result, this factor also weighs in favor of admissibility.

*c. The nature of the charges – DUI*

The defendant was charged with a DUI. The nature of this charge placed the burden of proving beyond a reasonable doubt that that the defendant's ability to operate a motor vehicle was affected to an appreciable degree. The defense put the Defendant's state of sobriety directly in issue. Therefore, the testimony was relevant to tie the Defendant's strange driving behavior to the defendant's physical state. The officer's opinion of the Defendant's sobriety based on direct observation of the Defendant and based on logical inferences from that experience weighs in favor of admissibility because it is related to the elements of the DUI charge in dispute.

*d. The nature of the defense – a denial that the drugs had an impairing effect*

In closing, Defendant essentially argued that although he may have consumed intoxicating substances, he was not affected by them. RP 264.

As a result it was the State's duty to present evidence that the Defendant's driving behavior was affected by the alcohol and/or drugs that were in his system. Considering the nature of the defense, Officer Hoover's testimony that Defendant was intoxicated is highly probative.

The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. "[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." *Wilber*, 55 Wash.App. at 298 n. 1, 777 P.2d 36

*City of Seattle v. Heatley*, 70 Wash. App. at 579–80. Again, the nature of the defense suggests that the opinion testimony should be admissible in this case.

*e. Other evidence – facts concerning the driving and Defendant's overall demeanor.*

The other evidence before the trial court at the time the opinion testimony was offered included the observations of Defendant while driving and while interacting with the officers. Officer Hoover had the opportunity to observe the Defendant directly on the night of the incident. Strange driving behavior could be caused by an operator or they may be a result of mechanical issues. Laughing and dancing may be entirely appropriate even if no drugs or alcohol are involved. An odor of alcohol may or may not indicate consumption based on the circumstances. All of

these examples illustrate that the Officer's opinion was helpful to the jury to explain what the totality of his observations led him to conclude.

In this case, the Defendant cannot show that the trial court abused its discretion by allowing the opinion of intoxication because the proper foundation was laid and because the testimony challenged on appeal did not go directly to the guilt or veracity of the Defendant.

**II. Defendant's right to a fair trial was not violated because the admissible opinion testimony did not comment on the defendant's veracity and did not parrot the legal elements of a DUI**

When assessing whether an individual's right to a fair trial has been violated, the court on appeal looks for testimony directly related to an opinion the defendant is "guilty" or opinion testimony about the witness's veracity. *City of Seattle v. Heatley*, 70 Wash.App. at 579 (finding that the lay opinion of intoxication was permissible where no direct opinion on Heatley's guilt or on the credibility of a witness was expressed). Under ER 704, "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." "An opinion that embraces an ultimate issue, however, must be "otherwise admissible." *State v. Quaale*, 182 Wn.2d 191, 197, 340 P.3d 213, 216 (2014). For the reasons explained above, the opinion offered in this case was admissible.

An example of improper opinion testimony is an officer offering an opinion of absolute certainty that alcohol diminished a person's ability to drive to an appreciable degree based solely on the clues he observed during the HGN test. *See id.* at 202. The officer in *Quaale* stated, 'Absolutely. There was no doubt he was impaired.' *Id.* at 195. The Supreme Court held that an officer's statement that he had "no doubt" that the driver was impaired based on his HGN observation alone violated the specific limits that the Court had placed on HGN testimony and was therefore "contrary to law." *Id.* at 198–99. As a result, the opinion in *Quaale* was not "otherwise admissible." In sum, when an opinion is not admissible and the opinion parrots the legal standard of proving the case beyond a reasonable doubt, there is precedent for impermissible opinion testimony related to impairment.

However, the facts of this case are distinguishable from *Quaale* because the opinion was admissible and the Officer expressed no opinion about Defendant's veracity or the standard of proof. The State laid a proper foundation for the opinion of intoxication and the opinion was a direct and logical inference of the officer's experience and his observations. Further, the opinion expressed did not parrot the legal standard. Finally, in *Quaale* the Washington Supreme Court re-affirmed a trial court's discretionary authority to admit lay opinion of the defendant's

intoxication. *See id.* at 201 (citing *City of Seattle v. Heatley*, 70 Wash.App. at 578 (distinguishing inadmissible opinion on specific levels of intoxication due to HGN observations from admissible testimony when “[t]he officer testified that the defendant was “ ‘obviously intoxicated and affected by the alcoholic drink that ... he could not drive a motor vehicle in a safe manner.’”)) The testimony in this case conformed to the rules of evidence and established case law providing specific guidance for opinion testimony about a defendant’s impairment in DUI cases. The court on appeal should conclude that Defendant was not deprived of a fair trial because the trial court did not abuse its discretion as it committed no error.

#### CONCLUSION

The trial court properly admitted Officer Hoover’s testimony. As in *Heatley*, “The jury was therefore in a position to independently assess the opinion in light of the foundation evidence. Officer [Hoover] 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.” *City of Seattle v. Heatley*, 70 Wash.App.

at 581–82. Unlike the facts in *Quaale*, there is nothing to suggest that Officer Hoover’s opinion, supported by a proper foundation, was unsupported by the facts or the law. As a result, the Defendant cannot explain how the trial court abused its discretion in admitting this evidence. Defendant makes no argument why there should be a change in well-established law that “where the testimony is supported by proper foundation, the trial court has discretion to admit opinion testimony on the degree of intoxication in a prosecution for driving while under the influence.” *City of Seattle v. Heatley*, 70 Wash.App. at 582. Accordingly, the court should deny Defendant’s claims on appeal.

DATED this 12 day of May, 2017.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By: Erik Podhora  
ERIK PODHORA, WSBA #48090  
Deputy Prosecuting Attorney  
OID# 91127

**CLARK COUNTY PROSECUTOR**  
**May 12, 2017 - 4:24 PM**  
**Transmittal Letter**

Document Uploaded: 5-490528-Respondent's Brief.pdf

Case Name: State v. Trelane Hunter

Court of Appeals Case Number: 49052-8

Is this a Personal Restraint Petition?    Yes     No

**The document being Filed is:**

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Jennifer M Casey - Email: [jennifer.casey@clark.wa.gov](mailto:jennifer.casey@clark.wa.gov)

A copy of this document has been emailed to the following addresses:

[KARSdroit@aol.com](mailto:KARSdroit@aol.com)