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No. 50064-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shaun Johnson,

Appellant.

Clark County Superior Court Cause No. 13-1-01964-7

The Honorable Judge David E. Gregerson

Appellant's Reply Brief

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ARGUMENT

I. DETECTIVE LUQUE EXCEEDED THE STRICT LIMITS THE SUPREME COURT HAS PLACED ON DRE TESTIMONY.¹

The Supreme Court has placed strict limits on DRE testimony.

State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). Detective Luque’s testimony at trial that Ms. Johnson was “impaired” or “under the influence” violated those limits. *Id.*; see *State v. Baity*, 140 Wn.2d 1, 17-18, 991 P.2d 1151 (2000).

First, Luque should have been barred from providing any DRE opinion, because he failed to complete the mandatory 12-step DRE protocol. RP 576; *Quaale*, 182 Wn.2d at 199. Second, even if he had completed the protocol, Luque should have limited his DRE testimony to an opinion that “the 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 18; *Quaale*, 182 Wn.2d at 198.

Luque’s testimony went beyond the Supreme Court’s restrictions on DRE testimony. *Quaale*, 182 Wn.2d at 198. It is irrelevant that he

¹ Ms. Johnson rests on the arguments made in the Opening Brief regarding the court’s refusal to instruct on DRE evidence and the improper admission of Nelson’s testimony.

completed more of the 12 required steps than the officer in *Quaale*. See Brief of Respondent, p. 4.

The Supreme Court has made clear that DRE testimony is inadmissible unless the officer completes all 12 steps, that DRE testimony can never include an opinion on “impairment,” and that a DRE expert “may not testify in a manner that casts an ‘aura of scientific certainty to the testimony.’” *Id.* (quoting *Baity*, 140 Wn.2d at 17). Luque violated all three of these restrictions.

Furthermore, by tying his opinion to his DRE expertise, Luque went beyond the kind of opinion offered in *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). See Brief of Respondent, pp. 3-4.² In *Heatley*, the officer offered an opinion based solely on his observations and experience.³ *Id.* Luque, by contrast, linked his opinion to his DRE expertise, and thus improperly “cast his testimony in a way that gave it an aura of scientific certainty.” *Quaale*, 182 Wn.2d at 198.

² Respondent incorrectly suggests that Luque did no more than provide a more general opinion based on his observations, unrelated to his expertise as a DRE. Brief of Respondent, pp. 4-6. The record does not support this suggestion: Luque testified at length about his DRE training, and fit his partial evaluation into the DRE framework. RP 514-543, 563-567, 569-570, 575-576, 579-580, 610. He told the jury he “believed that obviously -- that at the time that I was seeing her that she was *impaired*.” RP 576 (emphasis added).

³ In *Heatley*, the officer’s opinion testimony “was based solely on his experience and his observation of Heatley’s physical appearance and performance on the field sobriety tests.” *Id.* The *Heatley* court found that this “evidentiary foundation ‘directly and logically’ supported the officer’s conclusion.” *Id.*

The State relied on Luque’s testimony to establish an essential element of vehicular assault. The testimony exceeded the limits set by the Supreme Court in *Quaale* and *Baity*. Its admission violated Ms. Johnson’s “constitutional right to have a fact critical to [her] guilt determined by the jury.” *Quaale*, 182 Wn.2d at 201-202.

The conviction must be reversed, and the case remanded for a new trial with instructions to exclude Luque’s testimony. *Id.*

II. THE STATE IMPROPERLY ELICITED LUQUE’S TESTIMONY THAT “A JUDGE HA[D] APPROVED” HIS SEARCH WARRANT APPLICATION, INJECTING A JUDICIAL COMMENT INTO THE PROCEEDINGS.

The State introduced testimony suggesting that a judge agreed with Detective Luque’s opinion that Ms. Johnson was impaired. Because of this, the error was not invited. *See* Brief of Respondent, pp. 12-14 (arguing invited error).

On direct examination, the prosecutor elicited testimony that Luque had obtained a warrant for Ms. Johnson’s blood. RP 575-576. Ms. Johnson was not the first to raise the subject. *See* Brief of Respondent, pp. 12-14 (arguing invited error).

On redirect, the prosecutor asked Luque to explain his decision to obtain a search warrant rather than rely on consent. When Luque described

a warrant as a “safer” option for obtaining a blood sample, the prosecutor followed up by asking:

Q. Okay. Because it's run by the judge *and a judge has approved it?*

A. Yes, sir.

RP 627 (emphasis added).

The State—not the defense—was the first to introduce evidence about the warrant (on direct examination) and went on to introduce this testimony about judicial approval (on redirect). *See* Brief of Respondent, pp. 12-14 (arguing invited error).

The testimony went beyond what was necessary to explain why Luque sought a warrant instead of relying on consent. Luque could have testified to his belief—that a warrant was more likely to stand up in court—without implying that a judge had endorsed his suspicions.

Because the State introduced testimony about the warrant (on direct), and about judicial approval of the warrant application (on redirect), the error was not invited. *See* Brief of Respondent, pp. 12-14. It can be raised for the first time on appeal as a manifest error affecting a constitutional right. RAP 2.5 (a)(3).

Judicial comments qualify for review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); *State v. Levy*, 156 Wn.2d 709, 720, 132 P.3d 1076 (2006). Furthermore, the showing

required under RAP 2.5 (a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). Instead, the appellant need only show that “the court could have corrected the error” based on information available to the court. *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

The court heard Luque’s testimony about judicial approval of his warrant. The trial judge “could have corrected the error.” *Id.* The judicial comment may be argued for the first time on review. *Id.*

Judicial comments are presumptively prejudicial and require reversal unless the record affirmatively shows that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725. Here, the record does not affirmatively show an absence of prejudice. *Id.* Luque’s testimony suggested that a judge found evidence of impairment. RP 576, 627.

The improper comment violated Wash. Const. art. IV, §16. *See* Appellant’s Opening Brief, pp. 38-41. It also violated Ms. Johnson’s right to a jury determination of the facts. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22; *Id.*; *Alleyne v. United States*, 570 U.S. 99,133 S.Ct. 2151, 186 L.Ed. 2d 314 (2013); *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). The conviction must be reversed, and the charge remanded for a new trial. *Levy*, 156 Wn.2d at 725.

III. THE STATE IMPROPERLY INTRODUCED TESTIMONIAL HEARSAY, VIOLATING MS. JOHNSON’S CONFRONTATION RIGHTS.

The prosecution introduced statements made by a non-testifying, unnamed hospital staff person. CP 164-165; RP 39-40, 433, 453, 550-551, 546, 554-563. The statements described the administration of opiate painkillers prior to Luque’s arrival and provided the basis for his opinion that Ms. Johnson was impaired at the time she’d been driving.

The evidence related directly to the critical issue at trial. Its introduction violated Ms. Johnson’s right to confront adverse witnesses.

The confrontation argument can be raised for the first time on appeal, whether or not Ms. Johnson’s objections were sufficient to preserve the issue under the rules of evidence. RAP 2.5 (a)(3). The testimonial hearsay was admitted in open court. The trial judge had sufficient information, and “could have corrected” the problem by prohibiting the introduction of testimonial hearsay. *O’Hara*, 167 Wn.2d at 100.

Respondent’s intense focus on the scope of Ms. Johnson’s objection ignores the manifest nature of the constitutional error. *See* Brief of Respondent, pp. 19-22.⁴ Likewise unpersuasive is Respondent’s

⁴ Furthermore, counsel’s argument was sufficient to raise two hearsay objections. RP 555. Counsel told the court that the offending statements were “*hearsay* within prior testimony that Detective Luque does not remember.” RP 555; *see also* RP 552, 556, 557-558.

argument regarding a hypothetical alternate reality in which the testimonial hearsay was introduced to provide a basis for Luque's (inadmissible) DRE opinion. Respondent, pp. 22-23. No such limitation was made here; the testimonial hearsay was admitted as substantive evidence. CP 164-165; RP 39-40, 433, 453, 550-551, 546, 554-563.

The unnamed hospital worker made the statement to Detective Luque during a felony investigation. The statement falls within the core definition of testimonial hearsay. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Its admission violated Ms. Johnson's Sixth and Fourteenth Amendment right to confrontation. *Crawford*, 541 U.S. at 58-59.

The statement went to the heart of the State's case. Its admission requires reversal under both the constitutional and the non-constitutional standards for harmless error. *See* Appellant's Opening Brief, pp. 44, 46-47.

IV. THE COURT IMPROPERLY DENIED MS. JOHNSON'S MOTION TO SUPPRESS EVIDENCE UNLAWFULLY OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ART. I §7.

Ms. Johnson rests on the argument set forth in the Opening Brief. *See* Appellant's Opening Brief, pp. 47-62.

V. THE INFORMATION AND INSTRUCTIONS OMITTED ORDINARY NEGLIGENCE, AN ESSENTIAL ELEMENT OF VEHICULAR ASSAULT WHEN COMMITTED BY MEANS OF INTOXICATED DRIVING.

Ms. Johnson rests on the argument set forth in the Opening Brief.

See Appellant's Opening Brief, pp. 62-83.

VI. PROSECUTORIAL MISCONDUCT AND RELATED ERRORS REQUIRE REVERSAL.

Ms. Johnson rests on the argument set forth in the Opening Brief.

See Appellant's Opening Brief, pp. 84-90.

CONCLUSION

The Court of Appeals should reverse Ms. Johnson's conviction, suppress her statements and the blood test results, and remand the case for dismissal. If the charge is not dismissed, the case must be remanded for a new trial with instructions to exclude Luque's testimony.

Respectfully submitted on March 7, 2018,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 7, 2018.



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