

FILED  
Court of Appeals  
Division II  
State of Washington  
11/28/2017 12:29 PM

No. 50234-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

ERNEST LEE WILLIAMS,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF (AMENDED)

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A. ASSIGNMENTS OF ERROR

1. The Court erred in allowing opinion evidence by Det. Thompson that Mr. Williams appeared to be under the influence of a controlled substance.
  - a. There are restrictions on lay opinions under ER 701, generally. Witnesses may describe their observations of a perceived intoxicated individual. However, a witness that describes the basis for intoxication requires expertise under ER 702. Did the trial court commit reversible error by allowing a law enforcement officer witness testify that a defendant appeared to be intoxicated specifically by a controlled substance?
2. The Court erred in excluding evidence of bias regarding Det. Thompson.
  - a. It is an error of constitutional magnitude to deny an accused the right to establish a witness's bias through cross-examination. Such an error requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not occurred. Did the trial court commit reversible error by refusing to allow the defense to cross-examine a law enforcement witness about potential motivations to fabricate evidence in order to protect fellow law enforcement officers from potential excessive use of force claims?

B. STATEMENT OF THE CASE

Mr. Williams was charged with Count 1 Assault in the Third Degree regarding alleged victim Officer Allen Morales, Count 2 Possession of a Controlled Substance – Methamphetamine, Count 3 Resisting Arrest, and Count 4 Unlawful Use of Drug Paraphernalia from an information filed on August 26, 2016. CP 1-2.

A pretrial hearing was held on October 3, 2016 where the State asked for a continuance of the trial date of October 27, 2016 in order to receive a lab report regarding the alleged controlled substance. RP (10/03/2017) at 3. At that point in time, the case was 38 days old with no prior continuances of trial. *Id.* The court granted the State's request over the defendant's objection and set a new trial date of October 31, 2016. *Id.* at 4-5. A pretrial hearing was held on January 19, 2017 where defense counsel requested a continuance of trial in order to investigate a potential issue regarding a search warrant. RP (01/19/2017) at 3. The court noted that Mr. Williams agreed with the continuance, but refused to sign the scheduling order. *Id.* at 2. The court did not inquire of Mr. Williams on the record. *Id.* at 2-4.

The case proceeded to trial on March 2, 2017. RP (03/02/2017) 4. The State informed the court that a supplemental report created by Sgt. Thompson was not received by the State, nor provided to the defense. *Id.* at 4-5. Two photographs purportedly showing injuries of Ofc. Morales were recently sent to the State and then to the defense. *Id.* There was also a Fife Police Department injury report that neither the State, nor the defense had a copy of. *Id.* Based on that new information and based on the need to subpoena a DOC officer John Salter, defense counsel requested a continuance of trial. *Id.* at 12, 27. The DOC officer would testify that Mr.

Williams was found not guilty at a DOC hearing, which was the basis for the warrant that he was arrested for. *Id* at 18. This would corroborate Mr. Williams's theory of the case that he tensed up when he was contacted by law enforcement because there was no basis for them to arrest him. *Id* at 17. The court denied the request for continuance, ruling that the DOC officer's testimony would not be admissible and indicating that the defense could simply interview Sgt. Thompson the same day. *Id* at 22-23.

At trial, Ofc. Robert Eugley testified that at 5:55am, dispatch advised that the wife of Ernest L. Williams was calling in to report that her husband had refused to return her vehicle to her. *Id* at 144. Ofc. Eugley drove around the area of the Days Inn Motel in Fife and did not observe the vehicle. *Id* at 146. At about 7:00am, he received a dispatch that Mr. Williams was back at the Days Inn, so Ofc. Eugley verified the arrest warrant. *Id*. Ofc. Eugley travelled to the Days Inn, where he met Ofc. Morales, and observed Mr. Williams standing at the rear of the vehicle in the parking lot. *Id* at 151-152. Ofc. Eugley asked Mr. Williams if he could talk and then Mr. Williams moved to the side of the vehicle while reaching into his jacket pocket. *Id* at 153. Ofc. Eugley yelled at Mr. Williams to show his hands, while Ofc. Eugley grabbed Mr. Williams's left arm and Ofc. Morales grabbed his right arm. *Id*.

Ofc. Eugley told Mr. Williams he was under arrest and he became rigid and tried to get his arms free. *Id* at 153-154. Mr. Williams's right arm broke free and he pushed Ofc. Morales's in the chest. *Id* at 154-155. Ofc. Morales grabbed Mr. Williams's shirt and pulled both Mr. Williams and Ofc. Eugley to the ground. *Id* at 155. Ofc. Eugley pulled Mr. Williams's shirt partially over his head, put his knee into his back, and put him in a cross-face hold, which is similar to a headlock, while he called for backup. *Id* at 156-157, 179. Ofc. Morales punched Mr. Williams in the body and then once in the nose. *Id* at 159. Mr. Williams was bleeding from the nose. *Id* at 175. He then complied with commands and was placed in handcuffs. *Id* at 160. Det. Sgt. Thompson and Asst. Chief Woods arrived on scene, followed by Det. Kenyon and Det. Gilbert. *Id* at 160-161. The contact with Mr. Williams lasted about two minutes until he was placed in handcuffs. *Id* at 162.

Ofc. Allen Morales testified that he was dispatched to the Days Inn along with Ofc. Eugley to contact Mr. Williams regarding an arrest warrant. *Id* at 194-196. Ofc. Morales observed Mr. Williams standing near the opened rear hatch of a vehicle in the parking lot. *Id* at 198. Ofc. Eugley called out Mr. Williams's name and he walked away while reaching into his jacket. *Id* at 198-199. Ofc. Morales grabbed Mr. Williams's right arm and he was trying to twist away. *Id* at 199. Mr. Williams's arm came free,

Ofc. Morales was pushed and he fell to his knees. *Id* at 201-202, 238-239. Ofc. Morales grabbed Mr. Williams's shirt and tore it entirely down the front. *Id* at 203. While they were on the ground, Ofc. Morales struck Mr. Williams with a closed fist in the ribs and in the face. *Id* at 207, 225. Mr. Williams complied with commands to place his hands behind his back and he was handcuffed. *Id* at 208.

Asst. Chief David Woods testified that he responded to the Days Inn due to Ofc. Eugley's request for assistance. *Id* at 243-244. Asst. Chief Woods observed Sgt. Thompson controlling Mr. Williams in the parking lot. *Id* at 246. Asst. Chief Woods conducted a search of a jacket on the ground next to Mr. Williams and found a 100-dollar bill, Mr. Williams's identification, and a cellular phone in the right pocket, and a glass tubular smoking device with a white chalky substance contained inside a tissue in the left pocket. *Id* at 246-247, 254. This type of pipe can be used to smoke methamphetamine. *Id* at 253. Mr. Williams did not have car keys located on his person, nor were there keys located in the jacket. *Id* at 264-265.

Det. Travis Kenyon testified that he responded to the Days Inn and looked inside the vehicle that Mr. Williams was next to and observed what appeared to be shards of methamphetamine wrapped in green saran wrap on the front seat. *Id* at 273, 275. Det. Kenyon did not observe Mr. Williams wearing a jacket when he arrived on scene. *Id* at 288. Det.

Kenyon eventually conducted a search of the vehicle and seized the suspected methamphetamine, as well as a wallet with Mr. Williams's identification in it from the glovebox. *Id* at 280-281.

Det. Sgt. Thomas Thompson testified that he responded to the Days Inn and observed Ofc. Eugley and Ofc. Morales holding Mr. Williams on the ground. *Id* at 294, 296. Det. Thompson put his arm on Mr. Williams's back and observed Mr. Williams bleeding from his nose. *Id* at 298. Det. Thompson stated that Mr. Williams appeared to be under the influence and that it was consistent with other individuals that were under the influence of a controlled substance. *Id* at 322-323. This opinion was objected to by the defense as lacking foundation for an opinion on controlled substance intoxication, *inter alia*, but was overruled. *Id* at 299-321. In cross-examination, the defense attempted to elicit testimony that Det. Thompson did not file a report until the day of trial and that it would show potential bias of the witness in trying to protect Ofc. Eugley and Ofc. Morales from an excessive force claim. *Id* at 330-337. The State objected on relevance grounds and the court sustained the objection. *Id* at 337.

Ofc. Patrick Gilbert testified that he transported Mr. Williams to the Fife City Jail. *Id* at 351. He observed that Mr. Williams appeared to fall asleep during the transport. *Id* at 352.

Maureena Dudschus testified that she is a forensic scientist at the Washington State Patrol Crime Laboratory. *Id* at 364. She tested the substance previously identified as “Exhibit 1”, which was found in the vehicle, and determined that it contained methamphetamine. *Id* at 281, 377-378. Ms. Dudschus did not do an examination of whatever was contained within the glass pipe. *Id* at 377-378.

The State rested and the defense called Ofc. Eugley to testify to clarify some testimony. *Id* at 401. The defense did not call any additional witnesses. *Id* at 408. In closing argument, the State argued that the baggy that contained the controlled substance was Unlawful Use of Drug Paraphernalia. *Id* at 433. The State also argued that Mr. Williams had a pipe in his possession that he could use to smoke methamphetamine and that he had bloodshot eyes, which is consistent with other individuals arrested while under the influence of a controlled substance. *Id* at 434.

Mr. Williams was ultimately found guilty of Count 2 Possession of a Controlled Substance – Methamphetamine, Count 3 Resisting Arrest, and Count 4 Unlawful Use of Drug Paraphernalia. CP 86-88. Mr. Williams was found not guilty of Count 1 Assault in the Third Degree. CP 85.

Mr. Williams filed a *pro se* motion for new trial. CP 127-138. The court denied that motion. RP (10/03/2017) at 503.

This appeal follows.

C. ARGUMENT

**1. The Court erred in allowing opinion evidence by Det. Thompson that Mr. Williams appeared to be under the influence of a controlled substance.**

ER 701 provides: If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Restrictions on lay opinion are based upon the traditional belief that a lay witness is no better equipped than a juror to arrive at an opinion or conclusion from the facts known to the witness. 5D Wash. Prac., Handbook Wash. Evid. ER 701 (2017-2018 ed.). Consequently a lay witness should normally relate facts to the jury and let the jurors form their own opinions and conclusions. *Id.*

An opinion which lacks proper foundation or is not helpful to the trier of fact is not admissible under ER 701 or 702. An otherwise admissible opinion may be excluded under ER 403 if it is confusing, misleading, or if the danger of unfair prejudice outweighs its probative value. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). 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. *Heatley*, 70 Wn. App. at 580 (citing *State v. Forsyth*, 131 Wn. 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”); *State v. Dolan*, 17 Wn. 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)).

In *State v. Baity*, 140 Wn.2d 1, 17–18, 991 P.2d 1151 (2000), the Supreme Court held that opinion testimony “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” was admissible under the Frye<sup>1</sup> standard only if based on a fully completed DRE protocol.

A trial court’s evidentiary rulings are reviewed for abuse of discretion. *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on “untenable grounds, or for untenable reasons.” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court’s decision is manifestly unreasonable if it “adopts a view that ‘no reasonable person would take.’ ” *Id* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is based on untenable grounds or for

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<sup>1</sup> *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *Id.*

In the instant case, Det. Thompson was impermissibly allowed to opine that Mr. Williams was under the influence of a controlled substance without adequate foundation for an expert opinion under ER 702, nor was it permissible as a lay opinion under ER 701, and it was insufficiently probative under ER 403 as the probative value was not substantially outweighed by unfair prejudice. The distinction in the instant case is that Det. Thompson was allowed to opine about the basis of the alleged intoxication – namely, that Mr. Williams had consumed a controlled substance. *Cf. Heatley, supra.* Lay witnesses are allowed to opine that someone appeared to be intoxicated based on their observations, e.g. slurred speech, bloodshot watery eyes, lack of coordination, *et cetera.* However, lay witnesses are not allowed to opine that they believe that someone is under the influence of a particular intoxicant. This would require a proper foundation for an expert opinion, which under *Baity, supra*, requires a twelve-step analysis in order for that opinion to be admissible. Moreover, the prejudicial effect of such an opinion by a professional witness such as a law enforcement member is amplified due to the aura of that law enforcement witness's position.

The effect of Det. Thompson's opinion in the instant case allows the jury to believe that Mr. Williams was under the influence of a controlled substance. That, in turn, allows the jury to believe that Mr. Williams may have smoked methamphetamine from the pipe that was found in a nearby jacket. It also allows the jury to believe that Mr. Williams may have smoked or will smoke some of the methamphetamine that was found in the vehicle. This is problematic because there was no controlled substance found in the pipe. This is also problematic because there was no evidence that Mr. Williams was in actual possession of the methamphetamine found in the vehicle. His identification was found in the glove box, which is on the passenger's side, the opposite side as the methamphetamine. Mr. Williams was contacted outside of the vehicle, not inside, so there very well could have been other people that were occupants of the vehicle. There is also a lack of evidence to show that Mr. Williams was the driver of the vehicle and that he exhibited dominion and control over it, as there were no keys for the vehicle found on Mr. Williams.

Given the above, the court abused its discretion in allowing Det. Thompson to give an opinion that Mr. Williams appeared to be intoxicated specifically by a controlled substance. Accordingly, the convictions for

Possession of a Controlled Substance and Unlawful Use of Drug

Paraphernalia must be reversed.

**2. The Court erred in excluding evidence of bias regarding Det. Thompson.**

- a. The Confrontation Clause requires that a criminal defendant be allowed to cross-examine an essential state witness as to bias.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution “to be confronted with the witnesses against him.” U.S. Const. amend VI. The right extends to defendants in state proceedings through the Fourteen Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L. Ed 2d 923 (1965).

Article 1, section 22 of our state constitution similarly affords the defendant the right “to meet the witnesses against him face to face.” Const. art. 1 § 22.

“The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.” *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1974). Cross-examination is important not only to test the witness’s memory, but to impeach his or her credibility. *Id* at 316. Impeachment may be achieved through a variety of means, including “revealing possible biases,

prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” *Id.*

Both the confrontation clause and the rules of evidence require that an accused be permitted to cross-examine a witness for bias. *State v. Dolan*, 118 Wn. App. 323, 327, 73 P.3d 1011 (2003). Bias is always relevant “as discrediting the witness and affecting the weight of his testimony.” *Davis*, 415 U.S. at 316 (citing 3A. J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970)). Cross-examination of a witness about statements or conduct that tend to show bias or prejudice is “generally a matter of right,” and although “the scope or extent of such cross-examination is within the discretion of the trial court,” a defendant “should be given great latitude in the cross-examination of prosecution witnesses to show motive or credibility.” *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (citing *State v. Peterson*, 2 Wn. App. 464, 466- 67, 469 P.2d 980 (1970)).

A criminal defendant “states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form or bias on the part of the witness.” *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L. Ed. 2d 674 (1986). “A trial court’s denial of a criminal defendant’s right to adequately cross-examine an essential state

witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment right of confrontation,” Robert H. Aronson, *The Law of Evidence in Washington*, § 607.04[2] (4th ed. 2005) (citing *Davis*, 415 U.S. at 314; *Roberts*, 25 Wn. App. at 834).

The exclusion of evidence offered to establish the State’s witness’s bias is presumed prejudicial. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). The appellate court must reverse “unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place.” *Id.* A reviewing court determine whether the exclusion of bias evidence is harmless beyond a reasonable doubt by considering several factors, including the importance of the alleged biased witness’s testimony to the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the State’s case. *Van Arsdall*, 475 U.S. 684.

In the instant case, the court precluded the defense from cross-examining Det. Thompson about how his report was not filed until the day of trial. The defense wanted to explore the potential bias of Det. Thompson protecting his fellow officers, Ofc. Eugley and Ofc. Morales, from claims of excessive force. Det. Thompson apparently submitted a

report that claimed that Mr. Williams was still resisting on the ground when he arrived on scene. This observation was belied by the testimony of other officers that arrived on scene as well as the testimony of Ofc. Eugley and Ofc. Morales. Their testimony was that Mr. Williams stopped struggling after he was punched repeatedly by Ofc. Morales and he was then placed in handcuffs without issue. Det. Thompson's testimony was therefore subject to inquiry as to why his report was submitted so late in time. The jury could have believed Det. Thompson's testimony that Mr. Williams was still struggling and resisting on the ground after being handcuffed and used that information to convict Mr. Williams of Resisting Arrest. Given the *Van Arsdell* factors listed above, this error was not harmless beyond a reasonable doubt. Accordingly, a new trial regarding the Resisting Arrest charge is required.

D. CONCLUSION

Given the foregoing, Appellant respectfully requests that this court reverse his convictions and remand for entry of an order for new trial.

DATED this 28 November, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Pierce County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on November 28, 2017 to email address PCpatcecf@co.pierce.wa.us. Service was made by email pursuant to the Respondent's consent. On the same date, I also served Appellant, Ernest Williams (DOC #955585), a true and correct copy of the document to which this certification is affixed, via first class mail postage prepaid to Monroe Correctional Complex, 16550 177th Avenue SE Monroe, WA 98272.

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**November 28, 2017 - 12:29 PM**

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**Appellate Court Case Number:** 50234-8  
**Appellate Court Case Title:** State of Washington, Respondent v. Earnest L. Williams, Appellant  
**Superior Court Case Number:** 16-1-03429-4

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