

FILED
Court of Appeals
Division II
State of Washington
1/31/2018 1:21 PM
NO. 50234-8-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ERNEST WILLIAMS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 16-1-03429-4

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
MARK von WAHLDE
Deputy Prosecuting Attorney
WSB # 18373

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....	1
1.	Did the trial court properly exercise its discretion in allowing a witness to testify defendant appeared to be under the influence of a controlled substance?.....	1
2.	Did the trial properly exercise its discretion by rejecting proffered testimony purported to show bias as irrelevant?.	1
3.	Even if the rejected line of questioning showed bias, did the trial court properly exercise its discretion in rejecting defendant's line of questioning where the evidence was vague, merely speculative, and argumentative?	1
B.	STATEMENT OF THE CASE.....	1
1.	PROCEDURE.....	1
2.	FACTS.....	6
C.	ARGUMENT.....	9
1.	THE TRIAL COURT PROPERLY ALLOWED SERGEANT THOMPSON TO TESTIFY THAT DEFENDANT APPEARED TO BE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE.	9
2.	THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY NOT ALLOWING DEFENDANT TO CROSS EXAMINE SERGEANT THOMPSON ON BIAS BASED SOLELY ON THE DATE HIS SUPPLEMENTAL REPORT WAS SUBMITTED.	14
D.	CONCLUSION.....	21

Table of Authorities

State Cases

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993)	4, 10, 11
<i>State v. Blake</i> , 172 Wn. App. 515, 298 P.3d 769 (2012)	4, 9
<i>State v. Hudlow</i> , 99 Wn.2d 1, 15, 659 P.2d 514 (1983)	15
<i>State v. Jones</i> , 67 Wn.2d 506, 512, 408 P.2d 247 (1965)	15
<i>State v. Kilgore</i> , 107 Wn. App. 160, 185, 26 P.3d 308 (2001)	14, 15
<i>State v. Kinard</i> , 39 Wn. App. 871, 874, 696 P.2d 603 (1985)	9
<i>State v. Lewellyn</i> , 78 Wn. App. 788, 895 P.2d 418 (1995)	4
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008)	4, 10, 11
<i>State v. Perez</i> , 139 Wn. App. 522, 529-530, 161 P.3d 461 (2007)	15
<i>State v. Qaale</i> , 182 Wn.2d 191, 340 P.3d 213 (2014)	4
<i>State v. Young</i> , 62 Wn. App. 895, 904, 802 P.2d 829 (1991)	13
<i>State v. Zunker</i> , 112 Wn. App. 130, 140, 48 P.3d 344 (2002)	9

Federal and Other Jurisdictions

<i>Delaware v. Van Arsdall</i> , 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)	18, 20, 21
---	------------

Rules and Regulations

CrR 3.5..... 2

ER 701 9, 10

ER 702 10

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in allowing a witness to testify defendant appeared to be under the influence of a controlled substance?
2. Did the trial properly exercise its discretion by rejecting proffered testimony purported to show bias as irrelevant?
3. Even if the rejected line of questioning showed bias, did the trial court properly exercise its discretion in rejecting defendant's line of questioning where the evidence was vague, merely speculative, and argumentative?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Ernest Lee Williams, hereinafter "defendant," was charged with one count each of assault in the third degree, unlawful possession of a controlled substance, resisting arrest, and unlawful use of drug paraphernalia. CP 1-2.

On the morning of trial, the State learned that a new report from one of the police officers, Detective Sergeant Thomas Thompson, had

never been submitted to the State or defendant. RP 4.¹ The supplemental report contained information Sergeant Thompson had not reported before regarding the incident, including observations that defendant appeared to be under the influence of narcotics, descriptions of his observations of defendant's physical demeanor, and statements he obtained from defendant, some of which were duplicative of statements from other reports. RP 5. The court noted that the report contained four paragraphs of substance, three of which were not new information and not particularly significant. RP 6-7. The only information which appeared to be new was a statement from defendant that he denied smoking methamphetamine and he was on his way to a treatment center.² RP 7. The court found the information was not of a significant magnitude, but still gave defense counsel an opportunity to interview Sergeant Thompson prior to testifying at the CrR 3.5 hearing. RP 11, 22. Defense counsel declined the opportunity. RP 23-24.

As part of his cross-examination of Sergeant Thompson, defense counsel attempted to ask Sergeant Thompson when he submitted his supplemental report. RP 330. The State objected to such as being irrelevant. *Id.* In a hearing outside the presence of the jury, defense

¹ The verbatim reports of proceedings relevant to appeal are contained in six volumes with consecutive pagination.

² This statement by defendant was not elicited at trial.

counsel argued it was relevant as it goes to show how Sergeant Thompson was standing up for another officer who used unjustifiable force against defendant. RP 331. No offer of proof was provided to support his contention. Defense counsel admitted however, that the sergeant did not see the alleged use of force, but still wrote his report to justify it based upon what other officers had told Sergeant Thompson. RP 331-332. Defense counsel eventually admitted the date the report was submitted did not make a difference, but showed a potential cover-up and poor police work. RP 335-336. No evidence was provided to the court that would substantiate defendant's claims. The court ruled it was not relevant as it had nothing to do with the investigation. RP 336.

On direct examination the following exchange occurred between the State and Sergeant Thompson:

Q. Without telling me anything that he said, what observations, if any, did you make of him?

A. Well, initially –

...

A. Initially, when I came up, he seemed like he was very agitated, you know, pretty worked up, but he quickly calmed down. As he spoke to me, he -- his speech was somewhat slurred. His eyes -- they looked to me like they were bloodshot and watery, so...

Q. Now, as part of your training and experience, approximately how many individuals potentially under the influence have you come into contact with over the course of your career?

A. Many. Hundreds.

Q. And was the defendant's behavior consistent or inconsistent with –

[Defense Counsel]: Objection, Your Honor. He already said he is not DRE qualified. He is not in a position -- there is no foundation to make such a conclusion.

RP 298-299. This related solely to whether the defendant's behavior Sergeant Thompson observed was consistent with an individual who was under the influence of a narcotic. RP 300. No question was asked or answer elicited regarding if defendant's behavior was consistent with the use of a specific controlled substance. RP 300-301. The court noted how stating someone appeared to be under the influence of a controlled substance did not require expertise and could simply be observed. RP 303. However, the court still gave both parties an opportunity to provide further information to the court the following day regarding the admissibility of the statement. RP 312.

The next day, the State returned with five cases that stood for the proposition that an officer can testify that an individual appeared to be under the influence.³ RP 317-318. Defendant cited no authorities in his argument that the evidence should be excluded. RP 318-319. After both

³ The State cited to *State v. Blake*, 172 Wn. App. 515, 298 P.3d 769 (2012), *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), *City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993) (The Court had also cited to this case the previous day. See RP 310), *State v. Qaale*, 182 Wn.2d 191, 340 P.3d 213 (2014), and *State v. Lewellyn*, 78 Wn. App. 788, 895 P.2d 418 (1995). RP 317.

parties had the opportunity to argue the matter, the court ruled that a lay witness could express their opinion on if someone appears to be intoxicated and it does not go to an ultimate question of fact in this case. RP 319-320. The court made it clear though that Sergeant Thompson was not to testify as to defendant's level of intoxication or what controlled substance defendant appeared to have used. *Id.* The following three questions were subsequently asked and answered by Sergeant Thompson:

Q. Detective, you testified yesterday that you had come into contact with hundreds of drug users over the course of your 20-year career; is that right?

A. That's correct.

Q. And during the course of your career, have you had the opportunity to observe individuals who were under the influence of controlled substances?

A. Yes, I have.

Q. And your observations of the defendant on August 26th, 2015, were those observations consistent or inconsistent with the observations that you made of individuals under the influence of a controlled substance?

A. They were consistent.

RP 322-323.

At the conclusion of the trial defendant was acquitted on the assault in the third degree charge and convicted on the three remaining charges. CP 85-88; RP 480. He was sentenced to a period of confinement of 20 months on his unlawful possession of a controlled substance

conviction and 90 days each on the remaining convictions with all time to run concurrent to each other. CP 100-114; 115-119.

2. FACTS

On August 25, 2016, at approximately 5:55 a.m., Officer Robert Eugley of the Fife Police Department received a call from dispatch of defendant failing to return a car to his wife and having an outstanding arrest warrant. RP 143-144. He proceeded to the Days Inn Motel in Fife, the incident location. *Id.* However, upon arrival he saw dispatch had updated the call regarding how defendant had possibly left the property and gone to the Emerald Queen Casino, located across the street. RP 144-145. Officer Eugley checked the Days Inn parking lot for defendant, and seeing defendant was not there, had dispatch inform the casino to be on alert for defendant. RP 145-146.

Approximately an hour later, Officer Eugley received another call from dispatch that defendant had returned to the motel and was in the lobby. RP 146. He proceeded to the location. *Id.* On his way there, he checked defendant's warrant status from his in-car Mobile Data Center. RP 146-147. It returned with an active warrant and defendant's Department of Licensing photograph. *Id.*

Upon arriving at the motel, the officer waited for Officer Allen Morales, also of the Fife Police Department, to arrive as back-up. RP 148.

They spoke with the desk clerk who informed them that she saw defendant in the security camera at his wife's car on the back of the property in the parking lot. RP 148-149. The officers proceeded to defendant's location on foot. RP 152.

Once there, Officer Eugley saw defendant at the rear of his car, the same car Officer Eugley had been informed earlier defendant had taken. *Id.* As the officers proceeded towards him, defendant looked up and saw them approach. RP 153. As they approached defendant, Officer Eugley called out to defendant by name. *Id.* He looked at the officers and quickly moved to the side of his vehicle while reaching into his jacket pocket. *Id.* This raised a safety concern for the officers as they thought he might be reaching for a weapon. *Id.* The officers closed the distance as quickly as possible and told defendant to show them his hands. *Id.* Officer Eugley grabbed defendant's left arm and Officer Morales grabbed his right arm. *Id.* Defendant became rigid and locked his arms out, ignoring the officer's commands to relax. RP 153-154. The officers told defendant numerous times to stop resisting, but he ignored their orders. RP 154.

Eventually, defendant got his right arm free from Officer Morales. *Id.* Defendant then used his free arm to push or shove Officer Morales in the chest. *Id.* This caused Officer Morales to fall back. RP 155. As Officer Morales was falling, he grabbed defendant's shirt, causing all three

individuals to fall to the ground. *Id.* Officer Eugley landed on his left knee and defendant's back. RP 156. Officer Morales also landed on his knees. RP 201. Officer Eugley placed defendant in a cross-hold to keep him on the ground, but defendant was still struggling. RP 157. Defendant continued to be non-compliant, ignoring orders to relax. RP 158. To subdue defendant and protect themselves, Officer Morales was eventually forced to punch defendant in his ribs and then his nose. RP 159. Once defendant was struck in the nose, he stopped resisting. *Id.* This ultimately resulted in defendant complying with Officer Morales and being placed into handcuffs. RP 160.

Sergeant Thompson eventually arrived upon hearing a call for backup. RP 295. Upon arriving he saw defendant on the ground and Officer Morales' knee bleeding. RP 298. Sergeant Thompson stepped in and held defendant to the ground, and helped him to calm down. *Id.* Based upon his observations he believed defendant's behavior was consistent with the behavior of an individual under the influence of a controlled substance. RP 322-323.

A visual inspection of the car was done by another officer. RP 275. He noticed there appeared to be methamphetamine inside green saran wrap on the front seat of the car. *Id.* The car was subsequently sealed while officers obtained a search warrant for the car. RP 277. The same

officer executed the search warrant once it was issued. RP 280. He recovered the methamphetamine and a wallet with defendant's identification from the car. RP 280-281. Defendant's person was also searched incident to arrest. RP 247. Among various items found on him was a methamphetamine smoking pipe. *Id.* The Washington State Patrol Crime Lab eventually tested the suspected methamphetamine found in the car. The tests confirmed it was indeed methamphetamine. RP 377.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ALLOWED SERGEANT THOMPSON TO TESTIFY THAT DEFENDANT APPEARED TO BE UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE.⁴

A trial court is given wide discretion under ER 701 on the admissibility of evidence. *State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985). The admission of opinion evidence is reviewed for an abuse of discretion. *State v. Blake*, 172 Wn. App. 515, 523, 298 P.3d 769 (2012). An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises its discretion in a manner that is manifestly unreasonable. *State v. Zunker*, 112 Wn. App. 130, 140, 48 P.3d 344 (2002).

⁴ Defendant only challenges his convictions for unlawful possession of a controlled substance and unlawful use of drug paraphernalia for this issue. *See* Brf. of App. at 12.

When a witness is not testifying as an expert their testimony in the form of opinions is limited to those opinions or inferences which are (1) rationally based on their perception; (2) helpful for the jury to have a clear understanding of their testimony or the determination of a fact in issue; and (3) is not based on scientific, technical, or other specialized knowledge within the scope of evidence rule 702. ER 701; *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). This allows for a lay person's observation of intoxication to be admissible evidence when they have had an opportunity to observe the affected person. *Montgomery*, 163 Wn.2d at 591; *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). An individual need not be specially trained to recognize characteristics of intoxicated persons for the opinion of intoxication to be admissible. *Heatley*, 70 Wn. App. at 580.

In *Heatley*, a DWI case, an officer testified that defendant was intoxicated and impaired to the extent that defendant could not drive safely home. *Heatley*, 70 Wn. App. at 580. The court found the evidence was admissible as the officer was in a position to observe defendant's physical condition and performance on field sobriety tests. *Heatley*, 70 Wn. App. at 581. Further, the jury was in a position to independently assess the officer's opinion based upon foundation evidence, the officer was available for cross examination, and the jury was instructed that it was

the sole judges of credibility and the weight to be accorded to the testimony of each witness. *Heatley*, 70 Wn. App. at 581-582.

Here, Sergeant Thompson's testimony was even more limited and constrained than the testimony in *Heatley*. The State only asked if defendant's behavior appeared to be consistent with the use of a controlled substance. RP 322-323. At no time was any question asked or answer given on if defendant's behavior was consistent with the use of a specific narcotic or his level of intoxication. This is consistent with the prevailing rule in Washington: an individual may testify that a person appears to be intoxicated. See *Montgomery*, 163 Wn.2d at 591; *Heatley*, 70 Wn. App. at 579. Additionally, just like in *Heatley*, defendant was available for cross examination and the jury was properly instructed that they were the sole judges of a witness's credibility and the weight to be accorded to each witness. CP 53-80 (Inst. No. 1).

The trial court did not abuse its discretion in admitting this evidence. The court considered defendant's objection at the time it was initially made. RP 300-303. The court carefully considered defendant's argument and then stated how a witness testifying that a person appeared to be under the influence of a controlled substance did not require expertise and could simply be observed. RP 303. Even after this, the court still gave both parties time the following day to provide further

information regarding the admissibility of the testimony. RP 312. At the beginning of court the next day, both counsel presented their arguments. RP 317-319. The court ruled that a lay witness could express their opinion on if someone appears to be intoxicated and it does not go to an ultimate question of fact. RP 319-320.

This is exactly what a court should do before exercising its discretion. The court considered all of the possible arguments and gave counsel extensive opportunities to make their argument. Upon hearing counsel's arguments, the court made its final ruling based solely on the law. RP 319-320.

Sergeant Thompson was properly allowed to testify that defendant appeared to be under the influence of a controlled substance. The trial court did not abuse its discretion in allowing this testimony. As such, this Court should affirm defendant's convictions for possession of a controlled substance and unlawful use of drug paraphernalia.

- a. Even if the testimony relating to defendant's intoxication was admitted in error, it was harmless as there was overwhelming evidence connecting defendant to the car and methamphetamine inside.

The test for harmless error is whether, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Young*, 62 Wn. App. 895, 904, 802

P.2d 829 (1991). Defendant complains that the testimony that he appeared to be under the influence of a controlled substance was the only thing connecting him to the car. *See* Brf. of App. at 11. Defendant, however, omits significant other evidence connecting him to the car. Police received a call that defendant had taken his wife's car without permission. RP 143-144. This was the car in which the drugs were ultimately found. RP 148-149. When defendant was contacted by police, he moved to the side of the vehicle. RP 153. When the car was searched, his identification was found in the car. RP 280-281. Defendant being found at the car he had taken without permission with his identification in the car are two pieces of evidence directly connecting him to the car.

Defendant also argues that Sergeant Thompson's testimony allowed the jury to conclude that defendant did, or would have, smoked the methamphetamine found in the car and there was methamphetamine in the pipe found on his person. *See* Brf. of App. at 11. Again, there is significant evidence connecting defendant to the methamphetamine and the reasonable conclusion that there was methamphetamine in the pipe. When the car defendant was in possession of was searched, his identification was found in close proximity to the methamphetamine. RP 280-281. Further, the jury could have easily found that defendant having a

methamphetamine pipe on him also connected him to the drugs found in the car.

Even if the testimony was admitted in error, the outcome of the trial would not have been affected if the evidence had been excluded. Any error in admitting this portion of Sergeant Thompson's testimony was harmless. As such, this Court should affirm defendant's convictions.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY NOT ALLOWING DEFENDANT TO CROSS EXAMINE SERGEANT THOMPSON ON BIAS BASED SOLELY ON THE DATE HIS SUPPLEMENTAL REPORT WAS SUBMITTED.⁵

A trial court has discretion to control the scope of cross examination. *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001). This is true even though a court should zealously guard a defendant's right to cross examine a witness and give the defendant great latitude in exposing a witness's bias. *Id.* Whether the trial court has impermissibly restricted cross examination is based on two factors: (1) the relevance of the evidence, and (2) a balance between the defendant's need for relevant and probative information and the State's compelling interest in excluding evidence so prejudicial that it disrupts the fact finding role of

⁵ On this issue defendant only challenges his conviction for resisting arrest. See Brf. of App. at 15.

a trial. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). As with a court's discretion to admit lay witness opinion, an appellate court will only reverse a trial court's ruling on the scope of cross examination when there has been a manifest abuse of discretion, the trial court's decision is manifestly unreasonable, or is based on untenable grounds or for untenable reasons. *State v. Perez*, 139 Wn. App. 522, 529-530, 161 P.3d 461 (2007).

- a. Cross examination regarding Sergeant Thompson's bias based upon the date he submitted a report would not have showed bias or prejudice and was vague, merely speculative, and argumentative.

A trial court may reject lines of questions which only remotely tend to show bias or prejudice or where the evidence is vague or merely speculative and argumentative. *Kilgore*, 107 Wn. App. at 185. Courts should exclude this evidence because otherwise "all manner of speculative evidence will be adduced" and thus, greatly confuse the issue and delay the trial. *Id.* (quoting *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)).

Here, the excluded cross examination questions would not have showed bias or prejudice and would have been vague, merely speculative, and argumentative. Defense counsel wanted to question Sergeant Thompson about how a supplemental report was only submitted on the

day of trial. RP 4. Of the four substantive paragraphs in the report, three of them were not new information and not particularly significant. RP 6-7. The only information which appeared to be new was a statement from defendant that he denied smoking methamphetamine and how defendant was on his way to a treatment center. RP 7. Neither party ever asked any questions nor was any testimony given regarding this new statement.

During cross examination of Sergeant Thompson, the following exchange occurred regarding when he wrote his report and submitted it:

Q. And you wrote a report on this case?

A. Yes, sir.

Q. When did you write that?

A. I believe I was going on days off. I think that I wrote it the Monday when I came back from going on days off.

Q. When did you submit it to the prosecutor?

[Deputy Prosecutor]: Objection; relevance.

[Court]: Sustained.

Q. When you write a report, do you submit it to the prosecutor?

[Deputy Prosecutor]: Objection; relevance.

[Court]: Sustained.

Q. Based on your training and experience, when someone is arrested, you write a report?

A. That's correct.

Q. You wrote a report on this matter?

A. Yes, sir.

Q. When you are done with your report, what do you do with them?

[Deputy Prosecutor]: Objection; relevance.

[Court]: Sustained.

RP 329-330. Defendant did not want to even question Sergeant Thompson regarding how this new information showed his bias. Defense counsel wanted to question Sergeant Thompson about turning in his report late, allegedly showing how the sergeant was standing up for another officer who used unjustifiable force against defendant. RP 331. Counsel's argument would have been that Sergeant Thompson's report was written to justify the force used against his client based upon what other officers had told the sergeant. RP 331-332. No offer of proof was given which would indicate how turning in a supplemental report on the day of trial showed how Sergeant Thompson was biased against defendant or was told by other officers what to include in his report. Defense counsel eventually admitted that the date the report was submitted did not make a difference, but showed a potential cover-up and poor police work. RP 335-336.

Counsel's rationale and line of questioning would have not have shown that the late report proves there was any bias or prejudice absent some other supportive evidence. It is speculative to conclude that the officers were "covering their bases" based solely on the day a single police report is turned in, especially when it is consistent with all other police

reports previously submitted. *See* RP 330-331, 335. This line of questioning thus would have been the definition of vague, merely speculative, and argumentative. Counsel had no possible means of connecting his line of questioning with any factual information. He was hoping to try and convince the jury of something which had no basis in the reports or any of the testimony. As such, the trial court did not abuse its discretion in limiting defense counsel from asking questions in this area. Defendant's conviction for resisting arrest should be affirmed.

- b. Even if the trial court abused its discretion, exclusion of the testimony was harmless as to defendant's resisting arrest conviction.

An alleged violation of the confrontation clause is subject to a harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Any conviction tainted by a confrontation clause violation is harmless where the error is harmless beyond a reasonable doubt. *Id.* Among the factors relevant to a harmless error analysis are: (1) the importance of the witness's testimony in the prosecution's case; (2) whether the witness provided only cumulative testimony; (3) the extent of cross examination permitted; and (4) the strength of the State's case. *Id.*

Here, the untainted evidence is harmless beyond a reasonable doubt. Three questions in isolation without any follow-up or an offer of

proof showing there bias or relevance would not have affected the outcome of the trial. Numerous officers testified regarding how defendant was resisting their lawful orders for defendant to comply. When they first arrived at the scene, Officer Eugley called out to defendant, at which point defendant looked at them and quickly moved to the side of the car while reaching into his jacket pocket. RP 153. When the officers grabbed his arms to address any safety concerns and handcuff defendant, he became rigid, locking his arms to prevent them from handcuffing him. RP 153-154. When they told defendant to stop resisting them, he refused. RP 154. He broke his right arm free of Officer Morales and shoved Officer Morales in the chest, causing Officer Morales to fall to the ground. RP 155. When all three individuals were eventually on the ground, defendant continued to struggle with them and be non-compliant, ignoring their orders to relax. RP 157-158. Officer Eugley eventually had to place defendant in a cross-hold and Officer Morales had to use force to get defendant to stop resisting the officers' attempts to handcuff defendant. RP 159-160. A jury would have been able to consider all of this untainted evidence and would have been able to find beyond a reasonable doubt that defendant was guilty of resisting arrest, even if evidence of Sergeant Thompson's duplicative report on this portion of the investigation was only submitted the morning of trial.

This evidence is harmless under all four of the *Van Arsdall* factors. The overall importance of Sergeant Thompson's testimony to the State's case was minimal and the vast majority of his testimony was cumulative. Most of his testimony was simply as a third witness testifying about the events that transpired when defendant was contacted by the police. Sergeant Thompson did not see defendant fighting with Officer Morales or being struck by the officer. RP 298. All that Sergeant Thompson saw was defendant moving around on the ground and Officer Morales' knee bleeding with his jumpsuit torn. *Id.* He saw nothing else that would indicate that a fight had occurred or defendant was resisting arrest. The only information not testified to by any other witness was how defendant appeared to be under the influence of a controlled substance. RP 322-323.

The scope of defendant's cross examination of Sergeant Thompson was not limited or constrained in any other way. Counsel was permitted to ask whatever question they wanted outside of this one area. But even then, the court still allowed defendant to ask questions regarding the training the sergeant undertook regarding how a report should be written and if his report in this case was consistent with his training. RP 338-339.

Finally, as previously discussed, the strength of the State's case was quite strong. Defendant still would have been convicted of resisting arrest even if the evidence about the day Sergeant Thompson submitted

his report was admitted. All four of the *Van Arsdall* factors are met here. Any error, if one even exists, on the trial court's limiting defendant's cross examination of Sergeant Thompson regarding when he turned in his supplemental report is harmless beyond a reasonable doubt. As such, this Court should affirm defendant's conviction for resisting arrest.

D. CONCLUSION.

The trial court properly exercised its discretion in allowing a police sergeant of twenty years to testify that it appeared defendant was under the influence of a controlled substance based on his observations of hundreds of intoxicated individuals over the years. If the evidence was submitted in error, the overwhelming evidence still would have resulted in defendant's conviction. The trial court also properly exercised its discretion in not allowing defendant to cross examine the sergeant on the date his report was submitted, as such would have not have showed bias or prejudice and was vague, merely speculative, and argumentative. Even if the exclusion was error, it was harmless beyond a reasonable doubt as the officer's testimony was minimally important to the State, was duplicative, the rest of cross examination was not limited in any way, and the strength of the

State's case was overwhelming. For the aforementioned reasons, this Court should affirm defendant's convictions.

DATED: January 31, 2018

MARK LINDQUIST
Pierce County
Prosecuting Attorney



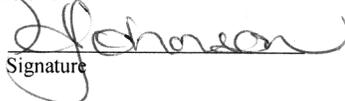
Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373



Nathaniel Block
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ ^{efile} or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/31/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

January 31, 2018 - 1:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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

The following documents have been uploaded:

- 502348_Briefs_20180131132024D2888988_2212.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Williams Response Brief.pdf

A copy of the uploaded files will be sent to:

- sean@greccodowns.com

Comments:

Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

Filing on Behalf of: Mark Von Wahlde - Email: mvonwah@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7875

Note: The Filing Id is 20180131132024D2888988