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COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

No. 52724-3-II

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CITY OF BREMERTON, Appellant,

v.

ROBERT THOMPSON, Respondent.

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BRIEF OF APPELLANT CITY OF BREMERTON

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED ..... 2

    A. Assignment of error ..... 2

    B. Issues pertaining to assignments of error..... 2

        1. Whether the testimony of the City’s expert witness constituted manifest constitutional error..... 2

        2. Whether even if the court determines the testimony of the City’s expert witness constituted manifest constitutional error, the error was harmless. .... 2

III. STATEMENT OF THE CASE..... 2

    A. Procedural History ..... 2

    B. Facts ..... 3

IV. ARGUMENT ..... 8

    A. RAP 2.5(a) requires an objection at trial to preserve issues for appeal. .... 8

    B. A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. .... 9

    C. Three steps are involved in analyzing whether an issue raised for the first time on appeal can benefit from the RAP 2.5(a)(3)’s manifest constitutional error exception. .... 9

        1. Is the error “Constitutional”? ..... 10

2.	Even if the testimony was improper, did the testimony constitute “manifest” constitutional error reviewable for the first time on appeal?.....	11
3.	Is the error “Harmless”?.....	12
V.	CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Cases

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993).....	11
<i>State v. Binh Thach</i> , 126 Wn. App. 297, 106 P.3d 782 (2005).....	13
<i>State v. Boast</i> , 87 Wn.2d 447, 553 P.2d 1322 (1976).....	9
<i>State v. Grimes</i> , 165 Wn. App. 172, 267 P.3d 454 (2011).....	9, 10, 12
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	9, 10, 11, 12, 13
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014).....	13
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	12
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	10
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	8, 9
<i>State v. Wilber</i> , 55 Wn. App. 294, 777 P.2d 36 (1989).....	11

### Rules

ER 702 .....	6
ER 703 .....	11
ER 704 .....	11
RAP 2.5(a) .....	8, 9

RAP 2.5(a)(3)..... 9

## **I. INTRODUCTION**

Mr. Thompson was found guilty of Driving Under the Influence after a jury trial in Bremerton Municipal Court. He appealed his conviction to Kitsap County Superior Court. He raised for the first time on appeal that expert testimony the City introduced at trial was improper opinion testimony that constituted manifest constitutional error. The Superior Court agreed, reversed the conviction and remanded the case to Bremerton Municipal Court.

In reaching its decision, the Superior Court failed to follow established case law that requires a defendant claiming a manifest constitutional error to show the alleged error caused actual prejudice, or practical and identifiable consequences. The Superior Court also failed to conduct the appropriate harmless error analysis after determining the testimony constituted manifest constitutional error.

The Superior Court's decision was legally and factually unsupported and must be reversed.

## **II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED**

### **A. Assignment of error**

The Superior Court erred in reversing Mr. Thompson's conviction for Driving Under the Influence and remanding his case to Bremerton Municipal Court

### **B. Issues pertaining to assignments of error**

1. Whether the testimony of the City's expert witness constituted manifest constitutional error.
2. Whether even if the court determines the testimony of the City's expert witness constituted manifest constitutional error, the error was harmless.

## **III. STATEMENT OF THE CASE**

### **A. Procedural History**

Mr. Thompson was charged by first amended complaint in Bremerton Municipal Court with one count of Driving Under the Influence, one count of Operation of a Motor Vehicle Without an Ignition Interlock Device, and one count of Driving While License Suspended or Revoked in the Third Degree. CP 7-9. Mr. Thompson entered guilty pleas to the interlock and suspended license charges but proceeded to trial on the DUI charge. At trial a jury found Mr. Thompson guilty of DUI. CP 28. The

trial court then imposed a sentence of 364 days in jail with 264 days suspended. CP 29-31.

Mr. Thompson appealed his conviction to Kitsap County Superior Court and argued that expert opinion testimony presented by the City was impermissible opinion testimony and manifest constitutional error. CP 44-49. The Superior Court agreed and reversed his conviction and remanded the case to Bremerton Municipal Court. CP 72-76.

**B. Facts**

On August 13, 2015, Patricia Covington drove her Dodge van, loaded with her mother and her five kids, to the Little Caesars pizza store on Callow Avenue in Bremerton where she parked in a parking stall in front of the store. CP 140-141. While Ms. Covington went into the store to get pizza, Ms. Covington's mother, Kathryn Sorenson, stayed in the front passenger seat of the van. CP 141. While Ms. Sorenson was waiting in the van with the children, she saw Mr. Thompson exit the marijuana retailer next to Little Caesars. CP 133. Mr. Thompson got into the driver's seat of the Ford Expedition parked in the stall next to the van and started the vehicle. CP 133. As he drove in reverse out of the parking stall, the front driver's side fender of his Expedition struck the van. CP 133. He continued to drive in reverse, lifting the van off the ground. CP 133. Ms. Sorenson shouted at him and reached over to the driver's side of the van to honk the

horn to get him to stop. CP 134. He shouted at her that she was the one hitting his vehicle. CP 134. Mr. Thompson eventually stopped pulling out of the parking stall and instead pulled forward which caused the van to drop. CP 135. He then started to back up again; however, by that point Ms. Covington had come out of Little Caesars to investigate the honking. CP 142. Ms. Covington blocked his exit and hit the back of his Expedition with her hand trying to get his attention. CP 144.

Mr. Thompson got out of his vehicle and spoke with Ms. Covington and Ms. Sorenson. First, he claimed Ms. Covington's van struck his Expedition. CP 145. Then he claimed he had to hit the van to get out of the parking stall. CP 146. Then he claimed he did not hit the van at all. CP 146. While they waited for police, Mr. Thompson went into the nearby 7-Eleven store and bought a large jug of water. CP 147. He used the water to clean off the paint transfer on his vehicle where it struck the van. CP 149. Then he went and sat in the passenger side of his vehicle. CP 149. Throughout their interactions with Mr. Thompson, Ms. Covington and Ms. Sorenson testified that they observed him to be sluggish, uncoordinated and disoriented. CP 137, 138, 139, 145, 146, 151, and 152. He had slurred speech, smelled like alcohol, and mentioned he was on several medications. CP 138, 146, and 152.

Two Bremerton Police Department officers also testified at trial. Officer Bryan Hall testified that Mr. Thompson seemed confused when he contacted him. CP 157. When Officer Hall asked him for his insurance card, Mr. Thompson handed him expired registrations. This continued three or four times even though Officer Hall explained to him that he was not providing the insurance card. CP 157. Mr. Thompson did not appear to understand that he was providing the wrong document. CP 157. Officer Hall began to suspect he was impaired and asked him if he had been drinking. CP 158. Mr. Thompson claimed to have had a couple glasses of beer. CP 158. Later in the conversation he said he had two glasses of wine. CP 159. Mr. Thompson admitted to also being on medication but thought it was okay to drink alcohol with his medication. CP 159. Mr. Thompson agreed to do field sobriety tests and Officer Hall asked Officer Christopher Faidley to respond to the scene. CP 160.

Officer Faidley arrived on the scene and, after contacting Officer Hall, approached Mr. Thompson. CP 176-177. Officer Faidley noted that he was dirty, disheveled, had slurred speech, appeared unbalanced and smelled like intoxicants. CP 179. Mr. Thompson also told Officer Faidley that he did not collide with the van. CP 181. Officer Faidley testified about Mr. Thompson's poor performance on field sobriety tests and his decision to place him under arrest. CP 182-194. During the administration of the

field sobriety tests, Mr. Thompson provided Officer Faidley with a lengthy list of medication which included medication for seizures, anxiety, heartburn, and cholesterol. CP 192. Officer Faidley suspected Mr. Thompson was under the influence of something in addition to alcohol and transported him to the Bremerton Police Department for a Drug Recognition Expert evaluation. CP 194. Officer Faidley testified as to his drug recognition training and the court recognized him as a Drug Recognition Expert (DRE) under ER 702. CP 197-199.

Officer Faidley testified about his administration of the DRE protocol and ultimately concluded with the opinion that Mr. Thompson was under the influence of a central nervous system depressant. CP 204-223. He testified that in his opinion, Mr. Thompson's level of impairment was extreme. CP 236. Officer Faidley also testified that Mr. Thompson's blood test results he received from the State Toxicologist showed .031 grams per 100 millimeters of ethanol and Benzodiazepine, both of which are central nervous system depressants. CP 275.

The City also called Brittany Thomas from the Washington State Toxicologist's Office. CP 297. Ms. Thomas testified as to her training and experience and was recognized as an expert by the court in the area of forensic toxicology. CP 298. She testified that Mr. Thompson's test results were positive for ethanol and Benzodiazepine. CP 302-305.

Ms. Thomas also testified that further testing of the Benzodiazepine showed specifically Temazepam at a level of 0.055 milligrams per liter. CP 307. She indicated that this drug was used to treat anxiety and sleep issues and can cause sedation. CP 307. She also testified that the warning label for Temazepam advises caution when operating machinery or combining it with alcohol. CP 308. She continued her direct testimony with an explanation of the “additive effect” or combined effect of Temazepam and ethanol. CP 309-314. She concluded her direct testimony with the following hypothetical:

PROSECUTOR: And I’m going to use a hypothetical scenario. If – if a person say, generically, if a person takes Temazepam in the morning and drinks alcohol – two glasses of wine in the afternoon, could those – that time spread still provide an additive effect?

THOMAS: Yes. As long as either of those are still present in the blood, then there can be an additive effect.

CP 313-314.

The hypothetical was then revisited.

PROSECUTOR: If a person who – going back to my scenario – while taking Temazepam in the morning and two glasses of some type of wine or beer in the afternoon, if that person was exhibiting effects of being – you know, would be – of striking another vehicle, of being confused and not knowing they were in an accident, of not being able to track a conversation, of slurred speech or up on (inaudible) unsteady

balance and disorientation, in your professional opinion, would that person be impaired by the combination of alcohol and Temazepam?

THOMAS: Yes, I would agree with that.

CP 314.

The hypothetical was revisited a third time on re-direct. CP 321-322. There was no defense objection to this testimony. The City rested, the defense called no witnesses and rested. CP 325. The jury found Mr. Thompson guilty and Thompson raised for the first time on appeal that Thomas' opinion was an improper opinion and its admission was a manifest constitutional error. The Superior Court agreed with him regarding Ms. Thomas' opinion, reversed the conviction and remanded for a new trial.

#### IV. ARGUMENT

**A. RAP 2.5(a) requires an objection at trial to preserve issues for appeal.**

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). The rule reflects a policy of encouraging the efficient use of judicial resources. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492, 494 (1988). An objection gives a trial court the opportunity to prevent or cure error. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125, 130 (2007) citing *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). Appellate courts "will not sanction a party's failure

to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Scott*, 110 Wn.2d at 685. Here, Mr. Thompson did not object to Ms. Thomas’ testimony at trial and failed to preserve the issue for appeal.

**B. A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right.**

A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). RAP 2.5(a)(3) does not permit *all* asserted constitutional claims to be raised for the first time on appeal, but only certain questions of “manifest” constitutional magnitude. *State v. Grimes*, 165 Wn. App. 172, 180, 267 P.3d 454, 459 (2011). This exception to RAP 2.5(a) must be narrowly construed. *Kirkman*, 159 Wn.2d at 934.

**C. Three steps are involved in analyzing whether an issue raised for the first time on appeal can benefit from the RAP 2.5(a)(3)’s manifest constitutional error exception.**

The defendant has the initial burden of showing that (1) the error was “truly of constitutional dimension” and (2) the error was “manifest.” *Id.* citing *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). A defendant cannot simply assert that an error occurred at trial and label the error “constitutional”; instead, he must identify an error of constitutional magnitude and show how the alleged error actually affected his rights at trial. *Id.* at 461–62. If the defendant successfully shows that a claim raises

a manifest constitutional error, then the burden shifts to the State to prove that the error was harmless beyond a reasonable doubt. *Id.*

### **1. Is the error “Constitutional”?**

To determine whether an error is truly of constitutional dimension, appellate courts first look to the asserted claim and assess whether, if the claim is correct, it implicates a constitutional interest as compared to another form of trial error. *Id.* Impermissible opinion testimony regarding the defendant’s guilt may be reversible error because such evidence violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *Kirkman*, 159 Wn.2d at 927. Here, Mr. Thompson alleges his trial involved testimony improperly opining on his guilt. Thus, he has raised an alleged error of constitutional dimension (i.e., the right to jury trial). However, as discussed below, the testimony was not an improper opinion on guilt.

Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an “ultimate issue” will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658, 661 (1993). It has long been recognized that a qualified expert is competent to express an

opinion on a subject even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact. *Kirkman*, 159 Wn.2d at 929; ER 704. 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. *Heatley*, 70 Wn. App. at 579 (emphasis in original). “[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.” *Id.* citing *State v. Wilber*, 55 Wn. App. 294, 298 n. 1, 777 P.2d 36 (1989).

Here, the prosecutor posed a hypothetical question that summarized relevant facts in the record, which is permissible under ER 703, and Ms. Thomas answered in the affirmative and opined that the person in the hypothetical was “impaired by the combination of alcohol and Temazepam.” CP 312-322. Ms. Thomas’ testimony was an admissible opinion that involved an ultimate issue. The testimony did not comment on Mr. Thompson’s guilt. The testimony was properly admitted.

**2. Even if the testimony was improper, the testimony did not constitute “manifest” constitutional error reviewable for the first time on appeal.**

For an error to be “manifest,” the defendant must show that the asserted error had practical and identifiable consequences at trial. *Grimes*, 165 Wn. App. at 186–87. Constitutional error is “manifest” only when the

error caused actual prejudice or practical and identifiable consequences. *Kirkman*, 159 Wn.2d at 934-35; *See also State v. Montgomery*, 163 Wn.2d 577, 595–96, 183 P.3d 267, 276 (2008) (holding improper opinions not manifest constitutional error because there was no evidence of prejudice in the record, such as written jury inquiry or other evidence that the jury was unfairly influenced, and the jury was instructed they were the sole judges of the credibility of witnesses and that jurors were not bound by expert opinions). In this case there is no evidence in the record, such as jury inquiries or comments, that indicates the alleged error caused actual prejudice or practical and identifiable consequences and the jury was instructed they were sole judges of the credibility of witnesses and not bound by expert opinions. CP 11-12, CP 17. If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review of the unpreserved error claim is not warranted. *Kirkman*, 159 Wn.2d at 935. Here, even if Ms. Thomas’ testimony was improper, the testimony was not objected to, and did not constitute “manifest” constitutional error reviewable for the first time on appeal because the record contains no evidence that indicates the alleged error caused prejudice or identifiable consequences. The Superior Court should not have considered the argument on appeal.

### **3. Is the error “Harmless”?**

Even if a court determines that improper opinion testimony is manifest constitutional error, harmless error analysis applies. *Kirkman*, 159 Wn.2d at 927. To be harmless, the government must show that there is no reasonable doubt that any reasonable jury would have still reached the same result absent the error. *State v. Lamar*, 180 Wn.2d 576, 588, 327 P.3d 46 (2014); *State v. Binh Thach*, 126 Wn. App. 297, 313, 106 P.3d 782 (2005). The untainted evidence must be so overwhelming that it necessarily leads to a finding of guilt. *Binh Thach*, 126 Wn. App. at 313.

Here, even setting aside Ms. Thomas' "impaired" testimony, the overwhelming remaining evidence necessarily led to a finding of guilt of Driving Under the Influence. In this case, there is ample evidence Mr. Thompson drove a vehicle in the City of Bremerton and ample evidence he was under the combined influence of or affected by intoxicating liquor and a drug. He admitted to driving CP 145-146, to consuming alcohol CP 158-159, and to consuming drugs CP 159. He also appeared to attempt to leave the scene after the collision CP 143-144, and when he could not leave, went to the 7-Eleven store to buy water to wash the area where his vehicle had contact with the van before the police arrived. CP 149. Ms. Covington and Ms. Sorenson both testified about their observations of Mr. Thompson that are consistent with the jury's conclusion that he was under the combined influence of or affected by intoxicating liquor and a drug. Ms. Covington

and Ms. Sorenson observed him to be sluggish, uncoordinated and disoriented. CP 137, 138, 139, 145, 146, 151, and 152. He had slurred speech, smelled like alcohol and admitted he was on several medications. CP 138, 146, and 152. Also, it was clear from his question to Ms. Sorenson - "Why are you hitting me?" - that while the collision was taking place, he believed Ms. Sorenson's van, which was stationary, was striking his vehicle which was moving in reverse. CP 134. This interaction indicates extreme impairment. Mr. Thompson's impairment clearly affected his mental faculties to the point where he could not understand he was causing a collision and thought a non-moving vehicle was hitting his vehicle.

Officer Hall testified that Mr. Thompson repeatedly handed him expired registrations when Officer Hall asked him for his insurance card. CP 157. This continued even though Officer Hall explained to him that he was not providing the insurance card. CP 157. Mr. Thompson initially told Officer Hall he had a couple glasses of beer but later in the conversation said he had two glasses of wine. CP 158-159. Officer Faidley testified that, "Starting from the collision all the way through the, you know, field sobriety tests at the scene and then the driver condition evaluation, that – the totality of the entire interaction with Mr. Thompson, I believe his impairment – I observed and gave the opinion of his impairment being extreme." CP 236.

Accordingly, even assuming Ms. Thomas' opinion testimony about the hypothetical person being "impaired" was improper opinion testimony, the error was harmless beyond a reasonable doubt. The Superior Court erred in not conducting a harmless error analysis and instead concluding, "It is impossible to determine from the record what weight the jury gave to this improper evidence. As a result, the Court cannot determine that this error was harmless as a matter of law." CP 76.

## V. CONCLUSION

Ms. Thomas' testimony was properly admitted. However, even if it was improper testimony, Mr. Thompson bears the burden to show that the error had practical and identifiable consequences at trial. He has not met that burden and the Superior Court erred in relieving him of that burden. Even if he were able to show practical and identifiable consequences at trial, the overwhelming untainted evidence proves beyond a reasonable doubt that he is guilty. This Court should reverse the decision of the Superior

Court and affirm Mr. Thompson's conviction for Driving Under the  
Influence.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of February, 2019.

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