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NO. 52724-3-II

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

CITY OF BREMERTON,

Petitioner,

v.

ROBERT NORMAN THOMPSON,

Respondent.

ON DISCRETIONARY REVIEW FROM THE SUPERIOR COURT OF KITSAP, STATE OF WASHINGTON

Kitsap Superior Court No. 17-1-01297-0

BRIEF OF RESPONDENT, ROBERT THOMPSON

JEREMY A. MORRIS
Attorney For Respondent
623 Dwight Street
Port Orchard, WA 98366

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I. COUNTERSTATEMENT OF THE ISSUES

1. The prosecutor improperly introduced inadmissible opinion testimony from an expert witness (the crime lab scientist) when the prosecutor essentially summarized the evidence in the present case, including the observations from witnesses at the scene, and then asked the expert whether in her expert opinion this evidence showed that a person was impaired.

2. The error regarding the improper opinion testimony was not harmless.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Robert Thompson, was charged by first amended complaint in the 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.

Mr. Thompson then filed a RALJ appeal with the Kitsap County Superior Court. Mr. Thompson argued in that appeal that: (1) the trial court abused its discretion by admitting the results of a portable breath test (PBT); and (2) that the prosecutor improperly introduced inadmissible opinion testimony from an expert witness (the crime lab scientist) when the prosecutor essentially summarized the evidence in the present case, including the observations from witnesses at the scene, and then asked the expert whether in her expert opinion this evidence showed that a person was impaired. CP 32-49. The Kitsap County Superior Court found that the admission of the PBT result was an abuse of discretion, but reversal was not warranted because the court later advised the jury to disregard that evidence. CP 74-75. The Court, however, also held that testimony from the crime lab expert improperly invaded the province of the jury concerning the guilt of the defendant, and that this error could not be said to have been harmless. CP 75-76. Thus the Superior Court reversed the conviction and remanded the case to the Bremerton Municipal Court for a new trial. CP 76. The Petitioner then filed a present Motion for Discretionary Review, which this Court granted.

B. FACTS

On August 13, 2015 Patricia Covington drove her Dodge van to a Little Caesar's pizza store on Callow Avenue in Bremerton where she parked in one of the parking stalls. CP 140-41. Ms. Covington's mother, Kathryn

Sorensen, was a passenger in the van and she remained in the van while Ms. Covington went into the store. CP 132, 141.

A Ford Expedition was parked in the stall to the right of Ms. Sorensen, and eventually a man (later identified as Mr. Thompson) walked out of another store and got into the Expedition. CP 132-33, 141. Ms. Sorensen testified that as Mr. Thompson began backing out of his parking stall, his vehicle struck Ms. Sorensen's van. CP 133-34. Ms. Sorensen yelled at Mr. Thompson, and Mr. Thompson ultimately stopped backing up and pulled forward back into the parking stall. CP 135-37.

Ms. Covington called 911 and Officer Bryan Hall of the Bremerton Police Department arrived at the scene shortly thereafter. CP 153-55. Officer Hall spoke with Ms. Covington and Ms. Sorensen and then spoke with Mr. Thompson. CP 155-56. Officer Hall testified that Mr. Thompson seemed a little "confused" and eventually Officer Hall suspected that Mr. Thompson was "impaired." CP 158.

Officer Hall asked Mr. Thompson if he had been drinking, and Mr. Thompson responded that he had a couple of glasses of beer. CP 158. Later, Mr. Thompson changed his answer and said he had consumed two glasses of wine. CP 159.

Officer Hall also asked Mr. Thompson if he took any medications and

Mr. Thompson apparently indicated that he did take some medications for diabetes and high blood pressure, but that he thought it was ok to drink alcohol and take his medications. CP 159, 165. Although Officer Hall suspected that Mr. Thompson might be impaired, Officer Hall testified that Mr. Thompson's speech seemed normal and wasn't slurred. CP 149, 163. Officer Hall also did not notice any odor of intoxicants, nor did Officer Hall observe that Mr. Thompson had bloodshot eyes or glossy eyes, which are signs of impairment that Officer Hall stated he would have included in his report if he had observed them. CP 158, 164-65.

Another officer, Officer Faidley arrived at the scene and spoke with Mr. Thompson. CP 160, 179. Unlike Officer Hall, Officer Haidley testified that he did notice the odor of intoxicants coming from Mr. Thompson. CP 179. Officer Faidley also testified that Mr. Thompson had bloodshot and watery eyes. CP 208.

Mr. Thompson agreed to perform some field sobriety tests, and those tests were conducted by Officer Faidley. CP 160. Officer Faidley conducted a number of field sobriety tests and ultimately concluded that Mr. Thompson was intoxicated or impaired. CP 187-88, 193. Later, Mr. Thompson was given a number of additional DRE related field sobriety tests, and again Officer Faidley concluded the Mr. Thompson was under the influence of a CNS depressant. CP 223.

At one point during his direct testimony, Officer Faidley began to read from his report and briefly mentioned that he had given Mr. Thompson a "preliminary breath test or PBT" at the scene. CP 201. Defense counsel immediately objected, and the trial court sustained the objection and instructed the witness not to just read from his report. CP 201. Officer Faidley then testified that the preliminary breath test or PBT "gave a reading of .05." CP 202. Defense counsel again objected immediately, and argued that the portable breath test readings were inadmissible. CP 202. The trial judge overruled the objection. CP 203. Later in the day, however, the judge readdressed his previous ruling and made the following statement in the jury's presence:

> I was going to-I think, so far from what I've seen I've overruled defense counsel's objection regarding the information on a preliminary breath test that Officer Faidley testified to, it – I think I'll reverse my ruling. It probably – I know that it's inadmissible to – to show alcohol content. I thought it might be admissible in terms to show a DRE process, which requires the twelve steps. It's a prelim – it's one of the requirements to make his examination or evaluation complete. But counsel's probably correct. The jury shouldn't have heard the reading of the preliminary breath test. So I'm going to ask the jury to disregard that information since it's – it's not a scientifically reliable and hasn't really passed any tests in the State of Washington. So the jury will disregard that testimony and if it's on this form, it'll probably be redacted before you get that Exhibit, if you do get that Exhibit.

CP 239-40.

At trial, the evidence further showed that a blood sample was later

obtained from Mr. Thompson. CP 226-29. Testing at the crime lab revealed that Mr. Thompson had a blood alcohol level of .031. CP 272. In addition, the blood also tested positive for Temazepam. CP 273.

Brittany Thomas, a forensic scientist at the State patrol crime laboratory, also testified at trial. CP 297. Ms. Thomas explained that the level of Temazepam in Mr. Thompson's blood was determined to be 0.055 miligrams per liter. CP 307. Based on that level of the drug being present, Ms. Thomas was unable to say much other than that Mr. Thompson could have taken the Temazepam the evening before his arrest and blood draw and could have even taken the drug as much as 60 hours before the blood draw. CP 317-18. Furthermore, Ms. Thomas clearly testified that based on the actual testing results in this case she would be unable to determine if a person was impaired or not impaired. CP 321.

At the very end of the prosecutor's direct examination of Ms. Thomas, the following exchange between the prosecutor and Mr. Thomas took place:

> Q. 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 Tamezepam?
>
> A. Yes, I would agree with that.
>
> Q. All right. No further questions.

CP 314. Ms. Thomas then essentially repeated this testimony again on re-direct examination. See, CP 322.

The prosecutor highlighted the testimony of Ms. Thomas in her closing argument and stated,

> But the other important part of this was the Toxicologist seeing an expert (inaudible) make an opinion when you give her a task. So I said to her, if this is your drug and alcohol level to do that test you're looking at and you have somebody who gets in a crash, who is slurring their speech, who is disoriented, who is disjointed in their speech and not tracking – when you have that happen with this exact blood test, in your expert opinion, is that person in that situation impaired and she said yes. Yes, that person is.

CP 364. Finally, in her rebuttal closing argument the prosecutor again referenced the testimony of Ms. Thomas and argued,

> She's an expert in this area. She said based on those observations, which were two independent witnesses, two Officers, yes. That person on those medications with that alcohol and that behavior at the scene is somebody in that scenario [that] was impaired.

CP 372. At the conclusion of the trial the jury found Mr. Thomas guilty of the crime of Driving Under the Influence. CP 28.

III. ARGUMENT

A. THE INTRODUCTION OF IMPROPER OPINION TESTIMONY WAS A MANIFEST CONSTITIONAL ERROR THAT WARRANTS REVERSAL.

Generally, a witness may not testify "to his opinion as to the guilt of a defendant, whether by direct statement or inference." *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Opinion testimony can be unfairly prejudicial because it invades the province of the fact finder. *Id*. Conversely, "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley*, 70 Wn.App. 573, 578, 854 P.2d 658 (1993).

Washington law does allow a *lay* witness to express an opinion on the degree of intoxication of a person, but the courts have explained that this is proper only when the witness had the opportunity to personally observe the affected person. *Heatley*, 70 Wn.App. at 580.

Furthermore, opinion testimony is more likely to be improper if it recites or parrots a legal conclusion. *Heatley*, 70 Wn. App. at 581. For example, in *State v. Quaale*, 182 Wn.2d 191, 199–200, 340 P.3d 213 (2014), the Supreme Court held that a law enforcement officer's testimony that the defendant was "impaired" was inappropriate because it "parroted the legal

standard contained in the jury instruction definition for 'under the influence.'" 182 Wn.2d 191, 199–200, 340 P.3d 213 (2014). On the other hand, in *Heatley* the Court of Appeals held that an officer's testimony that the defendant was "obviously intoxicated," "affected" by alcohol, and could not drive in a safe manner was similar to but not identical to the legal standards set forth in the jury instructions." *Heatley*, 70 Wn. App. at 581.

Given the law outlined above, it was arguably permissible for the Officer who personally observed Mr. Thompson to give lay opinion testimony about whether Mr. Thompson's appeared *intoxicated.* This evidence was arguably admissible under *Heatley* because these opinions were based on the officers' personal observations of the defendant's physical appearance and performance on the field sobriety tests. *See, Heatley*, 70 Wn.App. at 579-80.

The issue in the present case, however, was not the opinion testimony of the officers who were at the scene. Rather, the improper evidence in the present case was the admission of opinion evidence from the crime lab technician, Ms. Thomas, who was not present at the scene and did not personally observe the Defendant. Furthermore, Ms. Thomas gave her opinion on the Defendant's "impairment."

It is one thing for a witness to give a lay opinion based on the facts

that they personally witnessed. It is an entirely different situation when a witness is asked to give an opinion based on testimony from other witnesses. In that scenario the prosecutor is doing little more than giving the witness a summary of their case, going through all of the evidence from the other witnesses in a light most favorable to the government, and asking the expert to give an expert opinion on the defendant's guilt based on the evidence as a whole. That is absolutely improper.

In the present case the prosecutor asked Ms. Thomas if, in light of the facts witnessed by other people, it was her opinion the evidence showed Mr. Thompson was impaired. CP 314. This question amounted to little more than the prosecutor asking an expert witness to give an expert opinion on the defendant's guilt based on the evidence as a whole.

Furthermore, this error was particularly troublesome as Ms. Thomas was an expert and thus her testimony carried with it a certain "scientific aura," significantly increasing the weight the jury likely attached to it. *See, State v. Baity*, 140 Wn.2d 1, 11, 991 P.2d 1151 (2000). In addition this improper opinion evidence was emphasized by the prosecutor in her closing argument:

> But the other important part of this was the Toxicologist seeing an expert (inaudible) make an opinion when you give her a task. So I said to her, if this is your drug and alcohol level to do that test you're looking at and you have somebody

> who gets in a crash, who is slurring their speech, who is disoriented, who is disjointed in their speech and not tracking – when you have that happen with this exact blood test, in your expert opinion, is that person in that situation impaired and she said yes. Yes, that person is.

CP 364. Finally, in her rebuttal closing argument the prosecutor again referenced the testimony of Ms. Thomas and argued,

> She's an expert in this area. She said based on those observations, which were two independent witnesses, two Officers, yes. That person on those medications with that alcohol and that behavior at the scene is somebody in that scenario [that] was impaired.

CP 372.

The testimony from the state's expert witness in the present case constituted an improper opinion on guilt which violated Mr. Thompson's *constitutional* rights. With respect to the constitutional nature of this error, the case of *State v. Quaale*, 182 Wn.2d 191 (2014) is instructive. In *Quaale* a trooper testified that based on the HGN test alone it was his expert opinion that the defendant was impaired. *Quaale*, 182 Wn.2d at 195. The Supreme Court ultimately reversed, noting that,

> A lay witness may express an opinion on another person's intoxication when the witness had the opportunity to observe the affected person. *Id.* at 580, 854 P.2d 658. Unlike the officer in *Heatley*, Trooper Stone based his opinion on expert and not lay testimony, and in doing so, he gave impermissible opinion testimony that constituted an improper opinion on guilt.

Quaale, 182 Wn.2d at 201. The Supreme Court then went on to explain that this error was a constitutional error,

> This improper opinion on guilt violated Mr. Quaale's constitutional right to have a fact critical to his guilt determined by the jury. Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002). As the Court of Appeals noted, the officer testified and the State argued that the HGN test alone established that Quaale's ability to drive a motor vehicle was impaired. *Quaale*, 177 Wash.App. at 618, 312 P.3d 726. That assertion, improperly admitted, was offered by an officer in a manner that "cast an aura of scientific certainty," significantly increasing the weight the jury likely attached to it.

Quaale, 182 Wn.2d at 201-02.

In its brief the City argues pursuant to *Heatley* 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. Brief of Appellant City of Bremerton at 10-11. The City's argument, however, ignores the fact that in *Heatley* the issue was whether it was improper for the arresting officer to testify that the Defendant was intoxicated and affected by alcohol. *Heatley*, 70 Wn.App. at 576. The *Heatley* Court focused on the fact that lay witnesses may express an opinion on the degree of intoxication of another and that the officer in *Heatley* had personally

observed the defendant and that his testimony was thus based on the officer's personal observations. *Id* at 579-80. In *Quaale*, however, the Supreme Court explained that the situation is different when the opinion is based on "expert, and not lay testimony." *Quaale*, 182 Wn.2d at 201.

In the present case, the crime lab technician never personally saw Mr. Thompson, thus *Heatley* is inapplicable. Rather, what occurred in the preset case is that the prosecutor essentially laid out her case as a hypothetical and then asked the expert witness to opine on whether given those facts the defendant would be impaired. The City has cited no case that supports that it is proper to ask an expert to give such an opinion. The RALJ court, therefore, did not err in finding that such expert testimony was improper.

Furthermore, the City argues that the error regarding the improper opinion testimony was not a manifest constitutional error. Brief of Appellant City of Bremerton at 10-12. A claim of error, however, may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). As the Supreme Court has explained, the *Heatley* decision rejected only the notion that improper opinion testimony *necessarily* constitutes manifest constitutional error that will be considered for the first time on appeal. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (emphasis in original), *citing Heatley*, 70 Wn.App. at 586. The *King* court went on to explain that

Heatley "does not stand for the broad assertion that such opinion testimony on guilt can *never* be raised on appeal if there was no objection at trial." *King*, 167 Wn.App. at 332 (emphasis in original). In addition, the *King* decision states as follows:

> [T]his court recently clarified the issue in *Kirkman*, providing an outline of the scope of RAP 2.5(a)(3) as applied to improper opinion evidence. *Kirkman*, 159 Wash.2d at 936, 155 P.3d 125. "Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error." *Id.* (emphasis added). But, "an explicit or almost explicit" opinion on the defendant's guilt or a victim's credibility can constitute manifest error. Id. (noting, "[r]equiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow").

King, 167 Wn.App. at 332.

In the present case Ms. Thomas's improper opinion testimony was clearly an explicit (or at the very least an almost explicit) opinion on the Defendant's guilt and this fact was essentially pointed out as such by the prosecutor in closing argument. The error, therefore, was a manifest constitutional error pursuant to *King* and *Kirkman*.

Finally, the City argues that the RALJ court erred in "not conducting a harmless error analysis." Brief of Appellant at page 15. The RALJ court, however, clearly explained that it could not determine that the error was harmless as a matter of law. CP 76. This conclusion was not erroneous, as

the City could not show that the error was harmless beyond a reasonable doubt, especially since the improper testimony came from an "expert" and thus carried with it a certain "scientific aura," significantly increasing the weight the jury likely attached to it. *See, Baity*, 140 Wn.2d at 11. In addition, the prosecutor below emphasized the improper testimony repeatedly in her closing argument. Given these facts, the RALJ court did not err in finding that the City could not show that the error was harmless.

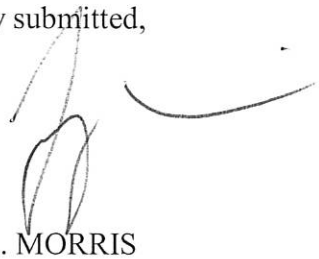
At the end of the day, the prosecutor in the trial below essentially summarized all of the evidence in a question to the expert witness from the crime lab, and then (after going through all of the evidence from the other witnesses in a light most favorable to the government) asked that expert to give an expert opinion on the defendant's guilt based on the evidence as a whole. The RALJ court did not err in finding that this was improper. This Court, therefore, should affirm the RALJ decision reversing the conviction in the trial court.

IV. CONCLUSION

For the foregoing reasons, the Respondent, Robert Thompson, urges this Court to affirm the Kitsap Superior Court's Decision on RALJ Appeal which reversed the conviction in the trial court.

DATED March 4, 2019.

Respectfully submitted,



JEREMY A. MORRIS
WSBA No. 28722
Attorney for Respondent Robert Thompson

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

Counsel for Petitioner, City of Bremerton.
Kylie Purves
Templeton Horton Weibel & Broughton PLLC
3212 NW Byron Street, Suite 101
Silverdale, WA 98383

__X__ Via U.S. Mail, postage prepaid

__X__ Via email to kylie@kitsaplawgroup.com

Dated at Port Orchard, Washington, March 4th, 2019

Jeremy A. Morris
WSBA # 28722
Attorney for Respondent

GLISSON & MORRIS

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