FILED
Court of Appeals
Division II
State of Washington
4/3/2019 8:57 AM

No. 52724-3-II

COURT OF APPEALS,

DIVISION II

OF THE STATE OF WASHINGTON

CITY OF BREMERTON, Appellant,

v.

ROBERT THOMPSON, Respondent

REPLY BRIEF OF APPELLANT CITY OF BREMERTON

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TABLE OF CONTENTS

I. ARGUMENT 1

A. Ms. Thomas' testimony was not manifest constitutional error. 1

B. Even if Ms. Thomas' testimony was manifest constitutional error, the error was harmless. 2

II. CONCLUSION 3

TABLE OF AUTHORITIES

Cases

State v. Binh Thach,
126 Wn. App.313 (2005) 3

State v. King,
167 Wn.2d 324, 219 P.3d 642 (2009) 1

State v. Grimes,
165 Wn. App. 172, 186-187, 267 P.3d 454, 462 (2011) 1

State v. Guzman Nunez,
160 Wn. App. 150, 248 P.3d 103 (2011),
Aff'd and remanded, 174 Wn. 2d 707, 285 P.3d 21 (2012) 2

State v. Kirkman,
159 Wn.2d 918, 934-35, 155P.3d 125, 130, 134 (2007) 1,2,3,4

State v. Lamar,
180 Wn.2d 576, 588, 327 P.3d 46 (2014) 3

State v. Montgomery,
163 Wn.2d 577, 595-96, 183 P.3d 267, 276 (2008)
Citing Kirkman at 937, 155 P.3d 125 2,3

State v. Quaale,
182 Wn.2d 191, 202 340 P.3d 213 (2014) 3

Rules

ER 704 1

I. Argument

A. Ms. Thomas' testimony was not manifest constitutional error.

Thompson cites to *State v. King*, 167 Wn.2d 324, 219 P.3d 642 (2009) and argues that an "explicit (or at the very least an almost explicit) opinion on the Defendant's guilt" is manifest constitutional error. Brief of Respondent at page 14. In *King*, the court's decision was on other grounds and the court did not make any rulings regarding whether opinion testimony constituted manifest error. The court concluded "we need not rule on whether the officer's opinion testimony-which the State concedes was improper-constituted a manifest error and was not harmless." *Id.* at 333. Additionally, Thomas did not testify that she thought Thompson was guilty. Her testimony was an admissible opinion that a hypothetical person was impaired, not that Thompson was guilty of driving under the influence. Expert or lay opinion testimony is not objectionable merely because it embraces an ultimate issue of fact. ER 704.

Even if Thomas' opinion was an improper opinion on guilt, Thompson's analysis is essentially that where there is an improper opinion there is manifest constitutional error. This ignores the body of established case law that requires a showing of actual prejudice or practical and identifiable consequences.

For an error to be "manifest," the defendant must show that the asserted error had practical and identifiable consequences at trial. *State v. Grimes*, 165 Wn. App. 172, 186–87, 267 P.3d 454, 462 (2011). Constitutional error is "manifest" only when the error caused actual prejudice or practical and identifiable consequences. *State v.*

Kirkman, 159 Wn.2d 918, 934-35, 155 P.3d 125, 130, 134 (2007). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim, and if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *State v. Guzman Nunez*, 160 Wn.App. 150, 248 P.3d 103 (2011), *aff'd and remanded,* 174 Wn. 2d 707, 285 P.3d 21 (2012). The determination whether the error is manifest and actual prejudice has been shown is a different question from whether the error was harmless; harmless error analysis takes place only after it has been determined that the trial court committed manifest constitutional error. *Id.* at 159.

Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. *State v. Montgomery*, 163 Wn.2d 577, 595–96, 183 P.3d 267, 276 (2008) *citing Kirkman* at 937, 155 P.3d 125. In *Kirkman*, despite the improper opinion testimony on witness credibility, the jury was properly instructed that jurors "'are the sole judges of the credibility of witnesses,'" and that jurors "'are not bound'" by expert witness opinions. *Id.* (*quoting clerk's papers*). In *Montgomery* virtually identical instructions were given. *Montgomery* at 595, 183 P.3d 267. In *Montgomery*, the court held that despite the admission of several improper opinions on guilt during the trial, because there was no written jury inquiry or other evidence that the jury was unfairly influenced, the court presumed the jury followed the court's instructions absent evidence to the contrary, and the record did not establish actual prejudice. *Id.* at 596.

Here, even if Thomas' testimony was impermissible, Thompson does not show

actual prejudice or practical and identifiable consequences. There is no evidence in the record supporting this claim. Jury instructions 1 and 5 in this case were virtually identical to the instructions in *Montgomery* and *Kirkman*. CP 11-13 and 17. There were no inquiries from the jury, no previous trial with a hung jury, or other evidence in the record indicating Thompson suffered actual prejudice or practical and identifiable consequences because of the allegedly improper opinion testimony. If no actual prejudice is shown, the error is not manifest.

B. Even if Ms. Thomas' testimony was manifest constitutional error, the error was harmless.

Thompson argues that the City cannot show the error was harmless beyond a reasonable doubt because the "improper testimony came from an 'expert" and thus carried with it a certain 'scientific aura'". Brief of Respondent at page 15. That is not the legal standard. 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, 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. In *State v. Quaale*, 182 Wn.2d 191, 202 340 P.3d 213 (2014), the Supreme Court explained that the asserted error was significant because there was no other evidence against Mr. Quaale:

> In light of the fact that there were no other tests administered, such as field sobriety tests or a breath test, this improper evidence renders the

> officer's "absolute certainty" more significant. As the Court of Appeals noted, the jury in the first trial convicted Quaale on the eluding charge but deadlocked on the DUI count, suggesting that the only other evidence, poor driving, was attributed to the fact that Quaale was trying to elude the officer. Under these circumstances, the error in admitting the testimony was not harmless beyond a reasonable doubt.
>
> *Quaale*, 182 Wn.2d at 202 (internal citation omitted).

Here, substantial evidence outside of the disputed opinion testimony supports a reasonable jury's finding of Thompson's guilt. The uncontested evidence is overwhelming and includes opinion testimony that Mr. Thompson was extremely impaired. Officer Faidley testified, "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. The City has shown that there is no reasonable doubt that any reasonable jury would have still reached the same result absent the error. If there was error, it was harmless.

I. Conclusion

"Only with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence." *State v. Kirkman*, 159 Wn.2d 918, 938, 155 P.3d 125, 136 (2007).

The Superior Court should be reversed and jury's verdict finding Mr. Thompson guilty of driving under the influence should be affirmed.

RESPECTFULLY SUBMITTED this 3rd day of April, 2019.

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April 03, 2019 - 8:57 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52724-3
Appellate Court Case Title:	City of Bremerton, Appellant v. Robert Norman Thompson, Respondent
Superior Court Case Number:	17-1-01297-0

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