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Court of Appeals
Division III
State of Washington
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NO. 35719-8-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DEREK WAYNE SCHILLING

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Mr. Schilling’s conviction should be reversed because the State presented improper opinion testimony from multiple officers.¹

1. Mr. Schilling may raise these issues under RAP 2.5(a)(3).

a. Unlike the federal plain error test, RAP 2.5(a)(3) does not require the Defendant to show an error caused them harm when they raise an error of a constitutional dimension.

The State conflates the federal plain error test with Washington’s broader RAP 2.5(a)(3). *See* Br. of Respondent at 8. The plain error test requires the error to be “plain” and “affecting substantial rights”, and therefore must have caused a defendant harm before an appellate court may review the issue. *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Conversely, RAP 2.5(a)(3) allows appellate review of manifest constitutional errors, and it is not the defendant’s burden to prove prejudice. *State v. Gordon*, 172 Wn.2d 671, 676 n.2, 260 P.3d 884 (2011) (“It is the defendant's burden to identify this type of error, but it is not the defendant's burden to also

¹ Appellant relies on his opening brief for the argument that the “reckless manner” statute is unconstitutionally vague. The State correctly notes the Supreme Court ruled to the contrary in *State v. Jacobsen*, 78 Wn.2d 491, 477 P.2d 1 (1970), which this Court followed in *State v. Hill*, 48 Wn. App. 344, 739 P.2d 707 (1987). The appellant nevertheless raises the issue to preserve it for possible future review.

show the error was harmful.”). This is because constitutional errors are presumed to have resulted in injustice to the defendant. *See State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988); *see also State v. McCullum*, 98 Wn.2d 484, 487, 656 P.2d 1064 (1983) (“[I]t is an established principle of law that constitutional claims may be heard for the first time on appeal.”). Accordingly, the State’s focus on the harm caused by the errors raised by Mr. Schilling is misplaced. So long as the errors are of a constitutional dimension and are apparent in the record, they are reviewable for the first time by this Court. *See Gordon*, 172 Wn.2d at 676 n.2; RAP 2.5(a)(3).

b. Improper opinion testimony is a manifest error affecting a constitutional right.

Mr. Schilling has identified as an error of a constitutional dimension as “impermissible opinion testimony regarding the defendant's guilt... violates the defendant's constitutional right to a jury trial.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). The State argues, however, that *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), precludes appellate review of improper opinion testimony when the Defendant fails to object. Br. of Respondent at 22. However, *Montgomery* erroneously conflated the prejudice analysis

and the manifest error calculus. *See Gordon*, 172 Wn.2d at 676 n.2. As

the Court later clarified in *Gordon*,

To elaborate on the distinction between a manifest error and a harmless error, a manifest error is “so obvious on the record that the error warrants appellate review.” *O’Hara*, 167 Wash.2d at 100, 217 P.3d 756. It is the defendant’s burden to identify this type of error, but it is not the defendant’s burden to also show the error was harmful. Once the error is addressed on its merits, the State bears the burden to prove the error was harmless under the *Chapman* standard.

Id.

As pointed out in the State’s brief, *Montgomery* requires a court to examine the prejudice to the defendant. Br. of Respondent at 21-22 (*citing Montgomery*, 163 Wn.2d at 595–96). Considering the “it is not the defendant’s burden to also show the error was harmful” language in *Gordon*, *Montgomery*’s “actual prejudice” requirement is not the relevant standard. Here, there is a type of manifest error identified. *See Kirkman*, 159 Wn.2d at 927 (Impermissible opinion testimony regarding the defendant’s guilt... violates the defendant’s constitutional right to a jury trial, which includes the independent determination of the facts by the jury.”)

Accordingly, Mr. Schilling properly raises the issue pursuant to RAP 2.5(a)(3). *Gordon*, 172 Wn.2d at 676 n.2.

Respondent also cites to *City of Seattle v. Heatley*, 70 Wn. App 573, 583, 854 P.2d 658 (1993), to support its arguments that review of the issue is barred by RAP 2.5. Br. of Respondent at 24. The State contends that the improper opinion testimony does not automatically qualify as a manifest error under RAP 2.5(a)(3). *Id.* However, *Heatley* did not have the benefit of *Kirkman*. *Kirkman*, 159 Wn.2d at 927. Because the error is necessarily of a constitutional dimension, the error is reviewable by this court, despite the lack of an objection at the trial court. RAP 2.5(a)(3).

2. Deputy Rassier’s testimony that Mr. Schilling was “driving recklessly” was improper opinion testimony.

Respondent argues that Deputy Rassier’s “driving recklessly” testimony was not improper opinion testimony because it was not a specialized legal term and made in the vernacular of a lay witness. Br. of Respondent at 26. This argument is unsound.

The State incorrectly asserts that Deputy Rassier’s testimony that Mr. Schilling drove recklessly is no more than a lay witness testifying using a non-specialized term. This conclusion conspicuously ignores that Deputy Rassier is no ordinary lay witness and that the

phrase “drive recklessly” is core element of the charge. RCW

46.61.024.

Respondent relies on *United States v. Sheffey*, 57 F.3d 1419, 1426 (6th Cir. 1995), to support its argument. Br. of Respondent at 26. However, *Sheffey* dealt not with the testimony of a law enforcement officer, but a true lay witness. *Sheffey*, 57 F.3d at 1423. Further, *Sheffey*, citing *Torres v. City of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985), notes “The best resolution of this type of problem is to determine whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. If they do, exclusion is appropriate.” *Sheffey*, 57 F.3d at 1426 (citing *Torres*, 758 F.2d at 151).

Here, Deputy Rassier, after laying out his perception of Mr. Schilling’s behavior, plainly concluded that Mr. Schilling drove “recklessly.” VRP 20. Considering Rassier is a law enforcement officer, when he concludes Mr. Schilling is driving “recklessly”, it is not a lay witness merely using a generalized term. Rather, it is an individual who carries an aura of reliability providing a legal conclusion that embraces a core element of the charge. *See State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001); RCW 46.61.024.

A canyon exists between a witness to an accident testifying to an uncontextualized conclusion and a police officer describing the events and then concluding with the relevant legal standard.

3. Deputy Kullman’s “fear scent” testimony was improper opinion testimony.

Respondent proffers two arguments why Deputy Kullman’s “fear scent” testimony was not improper opinion testimony: 1) the testimony was not improper as it was “akin to a simple factual statement regarding commonly understood bodily function,” and 2) the testimony supported Mr. Schilling’s alibi defense. ROB at 21. Both of these arguments are unavailing.

a. Deputy Kullman’s “fear scent” testimony was improper because his description of the “fear scent” implied Mr. Schilling was guilty.

Deputy Kullman’s description of the “fear scent,” and how he understood it, explained how his K9 Unit tracked Mr. Schilling through the unique smell one gives off when they run and hide from police. VRP 61. It was not a simple factual statement about one’s bodily functions. Br. of Respondent at 21. Rather, Kullman’s testimony provides a qualitative reason for how his K9 Unit came upon Mr. Schilling; it tracked the smell one gives off when they try to hide and avoid responsibility for their actions. This guilt by implication is the

exact concern underpinning our State's longstanding prohibition on "guilt scent" testimony. *See State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985), *overruled on other grounds by Heatley*, 70 Wn. App. 573.

Finally, the State's contention that none of the essential elements involve "fear" or "scent" is irrelevant and cites no relevant law. Improper opinion testimony often speaks to one's overarching guilt rather than any individual element. Obviously, if an officer explicitly testified that a defendant was guilty of a crime, it would be improper opinion testimony. However, under Respondent's thinking, such testimony is acceptable because it does not implicate any particular element. That is not the law.

b. Deputy Kullman's testimony undercut, not supported, Mr. Schilling's defense theory.

As discussed above and in Appellant's opening brief, Kullman's testimony was particularly prejudicial because it implied "Mr. Schilling ran and hid from the police because he was guilty." Br. of Appellant at 24. Respondent's contention that Kullman's testimony supports Mr. Schilling's defense is only sound if one accepts the strawman argument that Kullman testified solely to a bodily function. This Court should reject the argument.

B. CONCLUSION

Improper opinion testimony is an error of a constitutional magnitude, and therefore is not barred by RAP 2.5(a). Additionally, Deputy Rassier’s “driving recklessly” testimony is dramatically different from that of truly lay witness. Finally, Deputy Kullman’s “fear scent” testimony was improper and prejudicial. This Court should reverse Mr. Schilling’s conviction.

DATED this 25th day of January, 2019.

Respectfully submitted,

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RESPONDENT,)	
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v.)	NO. 35719-8-III
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DEREK SCHILLING,)	
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APPELLANT.)	

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