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RECEIVED BY E-MAIL SUPREME COURT NO. 89666-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

RYAN QUALLE,

Respondent.

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

The Honorable Gregory D. Sypolt, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE

Did the appellate court properly reverse Mr. Quaale's conviction because he was denied his constitutional right to a fair trial when the jury was permitted to hear an officer's opinion on guilt? Yes.

B. SUPPLEMENTAL STATEMENT OF THE CASE

On August 28, 2011, Officer Chris Stone observed Mr. Quaale's truck speeding down Lane Park Road in the city of Mead. 2RP 4-6.¹ After Stone activated his lights and began to follow, Mr. Quaale turned off the truck lights and accelerated. 2RP 6. He overshot a corner, skidded off the road into a front yard, and then continued to drive away. 2RP 7. Stone then turned on his siren. 2RP 7.

Mr. Quaale stopped his truck and immediately exited. 2RP 11. Stone drew his gun and ordered Mr. Quaale to the ground. 2RP 12. As Stone handcuffed Mr. Quaale, he detected the odor of alcohol. 2RP 12. Stone conducted the Horizontal Gaze Nystagmus (HGN) test and determined he had probable cause to arrest Mr. Quaale. 2RP 24, 27.

¹ The transcripts are referred to as follows: 1RP (2-13-12, 2-14-12, 6-5-12), 2RP (4-9-12, 5-17-12); 3RP (4-9-12).

At trial, Stone testified he was a Drug Recognition Expert (DRE) who had been trained in HGN testing. He also explained the importance of HGN testing, the procedures employed in conducting the test, and the degree to which the test measures impairment. 2RP 14-27. After this, the prosecutor asked:

In this case, based on the HGN test alone, did you form an opinion based on your training and experience as to whether or not Mr. Quaale's ability to operate a motor vehicle was impaired?

2RP 33. Defense counsel immediately objected on the ground that the opinion went to the ultimate issue determining guilt, but she was overruled. 2RP 33. Stone answered: "Absolutely. There was no doubt he was impaired." 2RP 33.

C. SUPPLEMENTAL ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED APPELLANT WAS DENIED A FAIR TRIAL WHEN THE JURY HEARD IMPERMISSIBLE OPINION TESTIMONY FROM AN OFFICER.

1. The Issue Was Not Waived.

The State contends the defense failed to preserve the issue for review. State's Supplemental Brief (SSB) at 8-9. This claim should be summarily rejected. Defense counsel timely objected when the prosecutor asked for the opinion. 2RP 33. The Court of Appeals thus correctly concluded that, after the prosecutor asked

for the officer to state his opinion, "Mr. Quaale's lawyer immediately objected that the trooper was being asked to provide an opinion on the ultimate issue determining guilt." Quaale, 177 Wn.2d 608.

Mr. Quaale did not waive his right to challenge Officer Stone's opinion testimony on appeal, and he is not, therefore, required to show "manifest error" to obtain relief. See, State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007) (setting forth the higher standard in cases where no objection was made at trial). The State's contrary argument lacks merit.

2. Applying The Five-Prong Inquiry Set Forth by This Court, The Court of Appeals Correctly Held Stone's Statement Constituted an Impermissible Opinion on Guilt.

A defendant's right to a fair trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when a witness is permitted to express his or her opinion as to guilt. Kirkman, 159 Wn.2d at 927-28.

The role of the jury is to be held "inviolable" under Washington's constitution. State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267, 273 (2008) (citing WASH. CONST. art. I, §§ 21, 22). The right to have factual questions decided by the jury is crucial to the right to trial by jury. Montgomery, 163 Wn.2d at 590.

When a witness opines on a defendant's guilt, he essentially tells the jury what result to reach rather than allowing the jury to make an independent determination. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); 5A K. Tegland, Wash.Prac., Evidence, § 309, at 470 (3d ed. 1989).

“Opinions on guilt are improper whether they are made directly or by inference[.]” Montgomery, 163 Wn.2d at 594. Such an opinion is not helpful to the jury and is highly prejudicial; thus it offends both constitutional principles and the rules of evidence. Id. at 591 n.5.

To determine whether a particular statement constitutes impermissible opinion testimony, five factors must be considered: (1) the nature of the charges, (2) the type of defense, (3) the type of witness, (4) the specific nature of the testimony, (5) and the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591. The Court of Appeals applied these factors and determined that “four factors weigh[ed] against the admissibility of the opinion (one strongly), and no fact weigh[ed] in favor.” Quaale, 177 Wn. App. at 617.

First, Mr. Quaale was charged with felony DUI under RCW 46.61.502. This statute provides in relevant part:

A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state ... [w]hile the person is under the influence of or affected by intoxicating liquor ...

RCW 46.61.502(1). The jury was instructed: "A person is under the influence of or affected by the use of intoxicating liquor if the person's ability to drive a motor vehicle is lessened in any appreciable degree." CP 92 (instruction 5).

Given the charge and the evidence in this case, the core issue determining guilt, and the only disputed element, was whether Mr. Quaale's driving was impaired. Quaale, 177 Wn. App. at 615. When addressing the issue of impairment, the jury should therefore have heard testimony only as to Stone's observations and whether they were consistent with impairment and left to reach its own conclusion whether there was "no doubt" Mr. Quaale was impaired. Id.; see also, Montgomery, 163 Wn.2d at 594 (finding impermissible opinions that "went to the core issue and the only disputed element"); State v. Olmedo, 112 Wn. App. 525, 532, 49 P.3d 960 (2002) (focusing on the "core element" of the charges when concluding a witness offered an impermissible opinion); State v. Farr-Lenzini, 93 Wn. App. 453, 465, 970 P.2d 313 (1999) (reversing where officer's improper opinion on defendant's guilt was

shown to invade jury's province regarding the core element of the case).

Second, Mr. Quaale's defense focused on the State's failure to meet its burden of proving impairment, as opposed to proving mere consumption of alcohol. 3RP 5-8. Mr. Quaale argued it is not illegal to consume alcohol and drive – it is only illegal if the driving is impaired by the alcohol. 3RP 5, 8. The defense argued the State could not show impairment where the only witness was an officer who conducted just one field sobriety test (HGN), smelled alcohol but failed to check Mr. Quaale's clothing to see if alcohol had been spilled, and failed to note any other common signs of alcohol impairment (such as slurred speech, blood-shot and watery eyes, flush face, stumbling, or fumbling for papers or driver's license). 3RP 5-8; 2RP 44-46. Under the defense theory, the core question was whether Mr. Quaale was impaired.

The third and fourth factors (the type of witness and the nature of the opinion testimony) both weigh against admissibility. Quaale, 177 Wn. App. at 614-15. The opining witness was an officer who was testifying as a DRE and offering an opinion based on an ostensibly scientific method of measuring the degree of impairment. 2RP 13-27, 35. Stone's opinion was not based on his

observation of "commonly known" alcohol effects, such as slurred words, water eyes, alcohol odor and flushed face. This was thus not the type of intoxication opinion testimony that is commonly permitted after the witness had an opportunity to observe someone. 2RP 33, 44-46; See, State v. Lewellyn, 78 Wn. App. 788, 796, 895 P.2d 418 (1995) (distinguishing between permissible lay opinion about degree of intoxication that is based on the witness' observation of the defendant's demeanor and expert opinions regarding the degree of intoxication that are based on specialized knowledge).

Stone's opinion was predicated solely upon the HGN results. The HGN is scientific in nature and an officer presenting the testimony must be qualified as an expert. State v. Baity, 140 Wn.2d 1, 12-18, 991 P.2d 1151 (2000). Mr. Quaale acknowledges that a qualified expert is competent to express an opinion on an ultimate fact to be found by the trier of fact. Kirkman, 159 Wn.2d at 926; ER 704. Stone's testimony, however, went far beyond acceptable expert testimony. Quaale, 177 Wn. App. at 612-14.

A DRE witness may testify only that an HGN test can reliably show the presence of alcohol and may not testify that the test can be used to determine any levels of intoxicants. State v.

Koch, 126 Wn. App. 589, 597, 103 P.3d 1280 (2005) (citing Baity, 140 Wn.2d at 17-18). Yet, Stone told the jury that the HGN was a very important tool in investigating DUIs and that it can detect that degrees of impairment. 2RP 25-26.

Stone did not limit his testimony by simply stating the HGN results showed the presence of alcohol. He instead offered an opinion that, based solely the HGN results, there was no doubt Quaale had consumed enough alcohol to impair his ability to drive.² 2RP 33. This testimony was misleading and prejudicial. The Court of Appeals correctly concluded that Stone's testimony "overstated" the exactness of the HGN test and created an unjustified scientific certainty that the level of alcohol was sufficient to establish impairment. Quaale, 177 Wn.2d at 615.

Stone's position as a police officer lent an aura of reliability to his opinion that was not mitigated with proper instructions. State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001). Stone's opinion also carried with it a compelling "scientific aura" because it was predicated solely on a DRE's consideration of HGN results. See, Baity, 140 Wn.2d at 11 (explaining this type of testimony carries with it a "scientific aura").

² [direct quote here might be stronger]

For these reasons, Stone's testimony tended to lead jurors to place undue significance on it. And, notably, and the trial court failed to mitigate this danger by giving the standard expert opinion instruction explicitly informing the jury that it that is was not bound by the expert's opinion. See, Kirkland, 159 Wn.2d at 937 (explaining expert opinion instruction is an important factor to be considered when determining the constitutional impact of improper expert opinions about guilt).³

Finally, Stone provided the State's only evidence of Mr. Quaale's impairment, making the opinion particularly prejudicial. Yet, it was unnecessary for the jury to hear Stone's opinion. See, Montgomery, 163 Wn.2d at 592 ("It is unnecessary for a witness to express belief that certain facts or findings lead to a conclusion of

³ See WPIC 6.51:

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

guilt.”). The jury heard Stone’s testimony about how the HGN test detects the presence of alcohol, how the test was administered, and what the officer personally observed when he administered the test on Mr. Quaale. 3RP 12-27. The jury was in as good a position as Stone to draw reasonable inferences as to whether that test established impairment beyond a reasonable doubt.⁴ However, the jury was never permitted to do so independently.

In sum, the Court of Appeals properly applied the five-prong inquiry for determining whether a statement constitutes an improper opinion on guilt and concluded Stone rendered a constitutionally impermissible opinion, thus, denying Mr. Quaale a fair jury trial. Quaale, 177 Wn.2d at 618. It also properly found the error was not harmless. Id. As such, this court should affirm the Court of Appeals.

3. An Expert Witness May Not Express An Opinion About an Ultimate Issue When That Issue Determines Guilt or Innocence.

The State suggests the Court of Appeals’ conclusion that Officer Stone’s testimony constituted an impermissible comment on guilt is flawed because it concluded the opinion was not a “direct

⁴ See discussion below which further addresses how the State may properly present its case without resorting to improper opinion testimony.

opinion” on guilt but was an “opinion on an ultimate issue.” SSB at 5. As the Court of Appeals explained, however, while the statement was not a direct opinion on guilt, it nonetheless was an opinion on an ultimate issue that was sufficiently equivalent to the key element in dispute. Quaale, 177 Wn. App. at 615. In other words, the Court of Appeals recognized the officer’s testimony was essentially a comment on guilt because the ultimate fact to which the officer opined was the core issue for establishing guilt and was the only element in dispute.

Washington case law supports the Court of Appeals’ conclusion. For example, in Black, this Court held an expert witness’ conclusion that the victim was suffering from rape trauma syndrome amounted to an impermissible comment that the defendant was guilty of rape. Id. at 349. This Court reached this conclusion even though the expert witness’ statement was not a direct opinion that the victim was credible or that Black was guilty. This Court held a “rape trauma syndrome” diagnosis improperly implied the victim had, in fact, been raped and this “constitutes, in essence, a statement that the defendant is guilty of the crime of rape.” Id.; see also, Farr-Lenzini, 93 Wn. App. at 462–63, (in prosecution for attempting to elude, officer’s testimony that

defendant was trying to get away was improper opinion on guilt because the core issue was the defendant's state of mind). [too much repetition regarding Montgomery]

The Court of Appeals correctly held that, while this was not a direct opinion of guilt, it was impermissible. Quaale, 177 Wn.2d at 615, 618.

4. Regardless of Whether Officer Stone's Opinion Was Admissible Under The Evidence Rules, It Was Constitutionally Impermissible and Should Have Been Excluded.

The State suggests that under ER 704, Stone was permitted to offer his opinion as an expert. The State forgets that evidence rules yield to the constitutional rights of the accused when the two are in conflict. See ER 402 ("All relevant evidence is admissible, except as limited by constitutional requirements..."); Crawford v. Washington, 541 U.S. 36, 69 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (Washington's hearsay rule was trumped by the defendant's constitutional right to confrontation); Holmes v. South Carolina, 547 U.S. 319, 326, 126 S. Ct. 1727, 1732, 164 L. Ed. 2d 503 (2006) (striking down an evidence rule that violated the defendant's right to have a meaningful opportunity to present his defense); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297

(1973) (finding unconstitutional Mississippi's evidentiary rules that denied the defendant the right to impeach his own witnesses and admit statements against penal interest); Kinder v. Bowersox, 272 F.3d 532, 545 n.9 (8th Cir. 2001) (recognizing states are free to formulate their own rules of evidence subject to the limits imposed by the Constitution).

As Washington courts have made clear, despite the fact ER 704 permits expert opinion testimony on an ultimate fact, a defendant's constitutional right to a fair trial trumps this when the two conflict. E.g., Montgomery, 163 Wn.2d at 594; Black, 109 Wn.2d at 349; State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985).

Despite this, the State urges that City of Seattle v. Heatley 70 Wn. App. 573, 579, 854 P.2d 658 (1993) is dispositive and stands for the proposition that in all cases "opinion testimony may not be excluded under ER 704 on the basis that it encompasses ultimate issues of fact." SSB at 6. While Heatley might be read to support the proposition that an officer who has personally observed a person may offer an opinion about his level of intoxication, this Court has cautioned against a broad interpretation of that case:

A lay person's observation of intoxication is an example of a permissible lay opinion. City of Seattle v. Heatley, 70 Wash. App. 573, 580, 854 P.2d 658 (1993). But the advisory committee to Federal Rule of Evidence 702 explained that witnesses should not tell the jury what result to reach and that opinion testimony should be avoided if the information can be presented in such a way that the jury can draw its own conclusions.

Montgomery, 163 Wn.2d at 591; see also, State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004) (distinguishing Heatley on similar grounds when determining an officer's testimony constituted a comment on guilt).

As the Court of Appeals pointed out, Heatley itself recognizes that one size does not fit all when it stated: "whether testimony constitutes an impermissible opinion of guilt or a permissible opinion embracing an 'ultimate issue' will generally depend on the specific circumstances of each case." Quaale at 177 Wn. App. at 617 (quoting Heatley, 70 Wn. App. at 579). This suggests that Heatley is not viewed as creating a bright-line rule that experts may testify to opinions on ultimate issues of fact regardless of whether such testimony denies a defendant his right to have the jury decide ultimate facts that are in essence a finding of guilt.

However, even if the State were correct and Heatley might still be read as saying evidence rules permit the State to present opinion testimony as to ultimate issues determining guilt, the decision must be overturned. This is because such a reading places ER 704 in conflict with the defendant's constitutional rights, and the evidence rule must yield to conflicting constitutional principles.

5. Contrary To The State's Assertions, It Has The Ability To Prosecute Impaired Drivers Without The Admission Of Impermissible Opinion Testimony.

The State claims the admission of opinion testimony is necessary because "without an officer's opinion that the driver was 'impaired' the State cannot meet its burden of proof" because "surely the defendant will claim he is not impaired." SSB at 8. However, the State appears to forget that juries can, and do, make reasonable inferences from properly admitted evidence to support a finding of guilt. If the State cannot put forth enough evidence to support an inference of guilt without resorting to impermissible expert opinions, it should not prosecute the case.

There are plenty of options left to prosecutors, and this Court has provided ample guidance as to how the State can present expert testimony without running afoul of the constitution. In State

v. Black, 109 Wn.2d at 349, this Court held an expert witness' conclusion that the victim was suffering from rape trauma syndrome amounted to an impermissible comment that the defendant was guilty of rape. Id. at 349. In so holding, it explained that the State could have offered the foundational testimony establishing that the witness had personally observed the emotional trauma suffered by the victim, and then the State could have argued to the jury that it might infer from this testimony that the victim was raped. Id. at 349. The State could not, however, submit to the jury the expert witness' conclusion that the victim suffered rape trauma syndrome because that went to the core issue determining guilt. Id. Instead, it was the jury's duty to weigh the facts known to the expert witness and the other evidence and then independently accept or reject the inference that the victim had been raped. Id.

This Court has further elaborated by explaining how the State might specifically phrase its examination without violating the defendant's right a fair trial:

To avoid inviting witnesses to express their personal beliefs, one permissible and perhaps preferred way is for trial counsel to phrase the question "is it consistent with" instead of "do you believe." For example, experts are often asked if a history given is "consistent" with clinical findings or if certain assumptions are "consistent" with a conclusion.

Montgomery, 163 Wn.2d at 592-93.

Additionally, in State v. Baity, this Court gave specific guidance on how a DRE may properly testify to drug recognition evidence (including the HGN testing). It said:

The DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes are or are not consistent with the behavior and physical signs associated with certain categories of drugs.

Baity, 140 Wn.2s at 17-18.

Applying these principles to the facts of this case, the State could have presented Stone's testimony about what he observed that night. It could have asked about how the HGN test detects the presence of alcohol, how the test was administered, and what he personally observed when he administered the test on Mr. Quaale. 3RP 12-27. The State could have asked if Mr. Quaale displayed a HGN consistent with the consumption of alcohol. Then, in argument, the State could have argued that from this evidence the jury could infer that Mr. Quaale was impaired and, thus, guilty.

The State stepped over the line, however, by asking Stone to state his own opinion about Mr. Quaale's impairment rather than asking the jury to make a finding of impairment based on the evidence before it. Quaale, 177 Wn. App. at 614. This is why the opinion was constitutionally impermissible.

In sum, Mr. Quaale had a right to have the jury determine the ultimate fact of impairment which was the equivalent of a finding of guilt. The State had the ability -- and the duty -- to present its case in such a way that it did not intrude upon this constitutional right. It failed to do so. As such, the Court of Appeals properly held that Mr. Quaale is entitled to a new trial in which the State will not offer Stone's impermissible and prejudicial opinion on guilt.

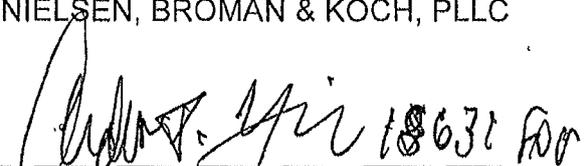
D. CONCLUSION

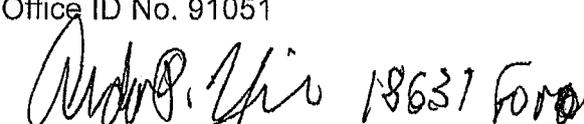
For the reasons stated above, this Court should hold The Court of Appeals correctly decided the case and affirm the reversal of Quaale's conviction on the ground he was denied due process. If this Court disagrees, it should either make a determination, or remand to the Court of Appeals' to make a determination, whether the trial court should have declared a mistrial due to prosecutorial misconduct.⁵

DATED this 3 day of April, 2014.

Respectfully submitted,

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⁵ The Court of Appeals specifically declined to rule on this in light of its decision as to the impermissible comment on guilt. Quaale, 177 Wn. App. at 606.

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Today I E-Filed and E-Served (Per Agreement):

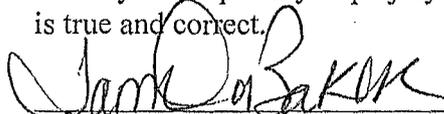
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Containing the Supplemental Brief of Respondent in State v. Ryan Quaale, Cause No. 89666-6, in the Supreme Court, of the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Jamila Baker
Done in Seattle, Washington

4/8/14
Date

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Attached for filing today is a supplemental brief of respondent for the case referenced below.

State v. Ryan Quaale

No. 89666-6

Supplemental Brief of Respondent

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