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STATE OF WASHINGTON  
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BY SUSAN L. CARLSON  
CLERK

Supreme Court No. 96456-4

Court of Appeals No. 50234-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ERNEST LEE WILLIAMS

Petitioner.

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ON REVIEW FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR PIERCE COUNTY

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Ernest Williams, through his attorney, Sean M. Downs, requests the relief designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Williams requests review of the unpublished opinion of the Court of Appeals in 50234-8-II, filed on September 25, 2018. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court commit reversible error in allowing opinion evidence by Det. Thompson that Mr. Williams appeared to be under the influence of a controlled substance?
2. Did the Court commit reversible error in excluding evidence of bias regarding Det. Thompson?

D. STATEMENT OF THE CASE

Mr. Williams was charged with Count 1 Assault in the Third Degree regarding alleged victim Officer Allen Morales, Count 2 Possession of a Controlled Substance – Methamphetamine, Count 3 Resisting Arrest, and Count 4 Unlawful Use of Drug Paraphernalia from an information filed on August 26, 2016. CP 1-2.

A pretrial hearing was held on October 3, 2016 where the State asked for a continuance of the trial date of October 27, 2016 in order to receive a lab report regarding the alleged controlled substance. RP

(10/03/2017) at 3. At that point in time, the case was 38 days old with no prior continuances of trial. *Id.* The court granted the State's request over the defendant's objection and set a new trial date of October 31, 2016. *Id.* at 4-5. A pretrial hearing was held on January 19, 2017 where defense counsel requested a continuance of trial in order to investigate a potential issue regarding a search warrant. RP (01/19/2017) at 3. The court noted that Mr. Williams agreed with the continuance, but refused to sign the scheduling order. *Id.* at 2. The court did not inquire of Mr. Williams on the record. *Id.* at 2-4.

The case proceeded to trial on March 2, 2017. RP (03/02/2017) 4. The State informed the court that a supplemental report created by Sgt. Thompson was not received by the State, nor provided to the defense. *Id.* at 4-5. Two photographs purportedly showing injuries of Ofc. Morales were recently sent to the State and then to the defense. *Id.* There was also a Fife Police Department injury report that neither the State, nor the defense had a copy of. *Id.* Based on that new information and based on the need to subpoena a DOC officer John Salter, defense counsel requested a continuance of trial. *Id.* at 12, 27. The DOC officer would testify that Mr. Williams was found not guilty at a DOC hearing, which was the basis for the warrant that he was arrested for. *Id.* at 18. This would corroborate Mr. Williams's theory of the case that he tensed up when he was contacted by

law enforcement because there was no basis for them to arrest him. *Id* at 17. The court denied the request for continuance, ruling that the DOC officer's testimony would not be admissible and indicating that the defense could simply interview Sgt. Thompson the same day. *Id* at 22-23.

At trial, Ofc. Robert Eugley testified that at 5:55am, dispatch advised that the wife of Ernest L. Williams was calling in to report that her husband had refused to return her vehicle to her. *Id* at 144. Ofc. Eugley drove around the area of the Days Inn Motel in Fife and did not observe the vehicle. *Id* at 146. At about 7:00am, he received a dispatch that Mr. Williams was back at the Days Inn, so Ofc. Eugley verified the arrest warrant. *Id*. Ofc. Eugley travelled to the Days Inn, where he met Ofc. Morales, and observed Mr. Williams standing at the rear of the vehicle in the parking lot. *Id* at 151-152. Ofc. Eugley asked Mr. Williams if he could talk and then Mr. Williams moved to the side of the vehicle while reaching into his jacket pocket. *Id* at 153. Ofc. Eugley yelled at Mr. Williams to show his hands, while Ofc. Eugley grabbed Mr. Williams's left arm and Ofc. Morales grabbed his right arm. *Id*.

Ofc. Eugley told Mr. Williams he was under arrest and he became rigid and tried to get his arms free. *Id* at 153-154. Mr. Williams's right arm broke free and he pushed Ofc. Morales's in the chest. *Id* at 154-155. Ofc. Morales grabbed Mr. Williams's shirt and pulled both Mr. Williams

and Ofc. Eugley to the ground. *Id* at 155. Ofc. Eugley pulled Mr. Williams's shirt partially over his head, put his knee into his back, and put him in a cross-face hold, which is similar to a headlock, while he called for backup. *Id* at 156-157, 179. Ofc. Morales punched Mr. Williams in the body and then once in the nose. *Id* at 159. Mr. Williams was bleeding from the nose. *Id* at 175. He then complied with commands and was placed in handcuffs. *Id* at 160. Det. Sgt. Thompson and Asst. Chief Woods arrived on scene, followed by Det. Kenyon and Det. Gilbert. *Id* at 160-161. The contact with Mr. Williams lasted about two minutes until he was placed in handcuffs. *Id* at 162.

Ofc. Allen Morales testified that he was dispatched to the Days Inn along with Ofc. Eugley to contact Mr. Williams regarding an arrest warrant. *Id* at 194-196. Ofc. Morales observed Mr. Williams standing near the opened rear hatch of a vehicle in the parking lot. *Id* at 198. Ofc. Eugley called out Mr. Williams's name and he walked away while reaching into his jacket. *Id* at 198-199. Ofc. Morales grabbed Mr. Williams's right arm and he was trying to twist away. *Id* at 199. Mr. Williams's arm came free, Ofc. Morales was pushed and he fell to his knees. *Id* at 201-202, 238-239. Ofc. Morales grabbed Mr. Williams's shirt and tore it entirely down the front. *Id* at 203. While they were on the ground, Ofc. Morales struck Mr. Williams with a closed fist in the ribs and in the face. *Id* at 207, 225. Mr.



Williams complied with commands to place his hands behind his back and he was handcuffed. *Id* at 208.

Asst. Chief David Woods testified that he responded to the Days Inn due to Ofc. Eugley's request for assistance. *Id* at 243-244. Asst. Chief Woods observed Sgt. Thompson controlling Mr. Williams in the parking lot. *Id* at 246. Asst. Chief Woods conducted a search of a jacket on the ground next to Mr. Williams and found a 100-dollar bill, Mr. Williams's identification, and a cellular phone in the right pocket, and a glass tubular smoking device with a white chalky substance contained inside a tissue in the left pocket. *Id* at 246-247, 254. This type of pipe can be used to smoke methamphetamine. *Id* at 253. Mr. Williams did not have car keys located on his person, nor were there keys located in the jacket. *Id* at 264-265.

Det. Travis Kenyon testified that he responded to the Days Inn and looked inside the vehicle that Mr. Williams was next to and observed what appeared to be shards of methamphetamine wrapped in green saran wrap on the front seat. *Id* at 273, 275. Det. Kenyon did not observe Mr. Williams wearing a jacket when he arrived on scene. *Id* at 288. Det. Kenyon eventually conducted a search of the vehicle and seized the suspected methamphetamine, as well as a wallet with Mr. Williams's identification in it from the glovebox. *Id* at 280-281.

Det. Sgt. Thomas Thompson testified that he responded to the Days Inn and observed Ofc. Eugley and Ofc. Morales holding Mr. Williams on the ground. *Id* at 294, 296. Det. Thompson put his arm on Mr. Williams's back and observed Mr. Williams bleeding from his nose. *Id* at 298. Det. Thompson stated that Mr. Williams appeared to be under the influence and that it was consistent with other individuals that were under the influence of a controlled substance. *Id* at 322-323. This opinion was objected to by the defense as lacking foundation for an opinion on controlled substance intoxication, *inter alia*, but was overruled. *Id* at 299-321. In cross-examination, the defense attempted to elicit testimony that Det. Thompson did not file a report until the day of trial and that it would show potential bias of the witness in trying to protect Ofc. Eugley and Ofc. Morales from an excessive force claim. *Id* at 330-337. The State objected on relevance grounds and the court sustained the objection. *Id* at 337.

Ofc. Patrick Gilbert testified that he transported Mr. Williams to the Fife City Jail. *Id* at 351. He observed that Mr. Williams appeared to fall asleep during the transport. *Id* at 352.

Maureena Dudschus testified that she is a forensic scientist at the Washington State Patrol Crime Laboratory. *Id* at 364. She tested the substance previously identified as "Exhibit 1", which was found in the

vehicle, and determined that it contained methamphetamine. *Id* at 281, 377-378. Ms. Dudschus did not do an examination of whatever was contained within the glass pipe. *Id* at 377-378.

The State rested and the defense called Ofc. Eugley to testify to clarify some testimony. *Id* at 401. The defense did not call any additional witnesses. *Id* at 408. In closing argument, the State argued that the baggy that contained the controlled substance was Unlawful Use of Drug Paraphernalia. *Id* at 433. The State also argued that Mr. Williams had a pipe in his possession that he could use to smoke methamphetamine and that he had bloodshot eyes, which is consistent with other individuals arrested while under the influence of a controlled substance. *Id* at 434.

Mr. Williams was ultimately found guilty of Count 2 Possession of a Controlled Substance – Methamphetamine, Count 3 Resisting Arrest, and Count 4 Unlawful Use of Drug Paraphernalia. CP 86-88. Mr. Williams was found not guilty of Count 1 Assault in the Third Degree. CP 85.

Mr. Williams filed a *pro se* motion for new trial. CP 127-138. The court denied that motion. RP (10/03/2017) at 503.

E. ARGUMENT

- 1. The Court erred in allowing opinion evidence by Det. Thompson that Mr. Williams appeared to be under the**

**influence of a controlled substance.**

ER 701 provides: If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Restrictions on lay opinion are based upon the traditional belief that a lay witness is no better equipped than a juror to arrive at an opinion or conclusion from the facts known to the witness. 5D Wash. Prac., Handbook Wash. Evid. ER 701 (2017-2018 ed.). Consequently a lay witness should normally relate facts to the jury and let the jurors form their own opinions and conclusions. *Id.*

An opinion which lacks proper foundation or is not helpful to the trier of fact is not admissible under ER 701 or 702. An otherwise admissible opinion may be excluded under ER 403 if it is confusing, misleading, or if the danger of unfair prejudice outweighs its probative value. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). It has long been the rule in Washington that a lay witness may express an opinion on the degree of intoxication of another person where the witness has had an opportunity to observe the affected person. *Heatley*, 70 Wn. App. at 580 (citing *State v. Forsyth*, 131 Wn. 611, 612, 230 P. 821 (1924) (in prosecution for driving while intoxicated, “[i]t was not a

question upon which only an expert could express an opinion”); *State v. Dolan*, 17 Wn. 499, 50 P. 472 (1897) (trial court erred in not allowing witness to testify as to whether defendant was so intoxicated he did not know what he was doing)).

In *State v. Baity*, 140 Wn.2d 1, 17–18, 991 P.2d 1151 (2000), the Supreme Court held that opinion testimony “that a suspect’s behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs” was admissible under the Frye<sup>1</sup> standard only if based on a fully completed DRE protocol.

A trial court’s evidentiary rulings are reviewed for abuse of discretion. *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on “untenable grounds, or for untenable reasons.” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). A trial court’s decision is manifestly unreasonable if it “adopts a view that ‘no reasonable person would take.’ ” *Id* (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *Id*.

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<sup>1</sup> *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

In the instant case, Det. Thompson was impermissibly allowed to opine that Mr. Williams was under the influence of a controlled substance without adequate foundation for an expert opinion under ER 702, nor was it permissible as a lay opinion under ER 701, and it was insufficiently probative under ER 403 as the probative value was not substantially outweighed by unfair prejudice. The distinction in the instant case is that Det. Thompson was allowed to opine about the basis of the alleged intoxication – namely, that Mr. Williams had consumed a controlled substance. *Cf. Heatley, supra*. Lay witnesses are allowed to opine that someone appeared to be intoxicated based on their observations, e.g. slurred speech, bloodshot watery eyes, lack of coordination, *et cetera*. However, lay witnesses are not allowed to opine that they believe that someone is under the influence of a particular intoxicant. This would require a proper foundation for an expert opinion, which under *Baity, supra*, requires a twelve-step analysis in order for that opinion to be admissible. Moreover, the prejudicial effect of such an opinion by a professional witness such as a law enforcement member is amplified due to the aura of that law enforcement witness's position.

The effect of Det. Thompson's opinion in the instant case allows the jury to believe that Mr. Williams was under the influence of a controlled substance. That, in turn, allows the jury to believe that Mr.

Williams may have smoked methamphetamine from the pipe that was found in a nearby jacket. It also allows the jury to believe that Mr. Williams may have smoked or will smoke some of the methamphetamine that was found in the vehicle. This is problematic because there was no controlled substance found in the pipe. This is also problematic because there was no evidence that Mr. Williams was in actual possession of the methamphetamine found in the vehicle. His identification was found in the glove box, which is on the passenger's side, the opposite side as the methamphetamine. Mr. Williams was contacted outside of the vehicle, not inside, so there very well could have been other people that were occupants of the vehicle. There is also a lack of evidence to show that Mr. Williams was the driver of the vehicle and that he exhibited dominion and control over it, as there were no keys for the vehicle found on Mr. Williams.

Given the above, the court abused its discretion in allowing Det. Thompson to give an opinion that Mr. Williams appeared to be intoxicated specifically by a controlled substance. Accordingly, the convictions for Possession of a Controlled Substance and Unlawful Use of Drug Paraphernalia must be reversed.

Accordingly, this court should accept review pursuant to RAP 13.4(b)(1) as the Court of Appeals decision is in conflict with a decision of the Supreme Court.

**2. The Court erred in excluding evidence of bias regarding Det. Thompson.**

- a. The Confrontation Clause requires that a criminal defendant be allowed to cross-examine an essential state witness as to bias.

The Sixth Amendment to the United States Constitution guarantees the right of an accused in a criminal prosecution “to be confronted with the witnesses against him.” U.S. Const. amend VI. The right extends to defendants in state proceedings through the Fourteen Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L. Ed 2d 923 (1965). Article 1, section 22 of our state constitution similarly affords the defendant the right “to meet the witnesses against him face to face.” Const. art. 1 § 22.

“The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.” *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1974). Cross-examination is important not only to test the witness’s memory, but to impeach his or her credibility. *Id* at 316. Impeachment may be achieved through a variety of means, including “revealing possible biases,



prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” *Id.*

Both the confrontation clause and the rules of evidence require that an accused be permitted to cross-examine a witness for bias. *State v. Dolan*, 118 Wn. App. 323, 327, 73 P.3d 1011 (2003). Bias is always relevant “as discrediting the witness and affecting the weight of his testimony.” *Davis*, 415 U.S. at 316 (citing 3A. J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970)). Cross-examination of a witness about statements or conduct that tend to show bias or prejudice is “generally a matter of right,” and although “the scope or extent of such cross-examination is within the discretion of the trial court,” a defendant “should be given great latitude in the cross-examination of prosecution witnesses to show motive or credibility.” *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (citing *State v. Peterson*, 2 Wn. App. 464, 466- 67, 469 P.2d 980 (1970)).

A criminal defendant “states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form or bias on the part of the witness.” *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L. Ed. 2d 674 (1986). “A trial court’s denial of a criminal defendant’s right to adequately cross-examine an essential state

witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment right of confrontation,” Robert H. Aronson, *The Law of Evidence in Washington*, § 607.04[2] (4th ed. 2005) (citing *Davis*, 415 U.S. at 314; *Roberts*, 25 Wn. App. at 834).

The exclusion of evidence offered to establish the State’s witness’s bias is presumed prejudicial. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). The appellate court must reverse “unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place.” *Id.* A reviewing court determine whether the exclusion of bias evidence is harmless beyond a reasonable doubt by considering several factors, including the importance of the alleged biased witness’s testimony to the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the State’s case. *Van Arsdall*, 475 U.S. 684.

In the instant case, the court precluded the defense from cross-examining Det. Thompson about how his report was not filed until the day of trial. The defense wanted to explore the potential bias of Det. Thompson protecting his fellow officers, Ofc. Eugley and Ofc. Morales, from claims of excessive force. Det. Thompson apparently submitted a

report that claimed that Mr. Williams was still resisting on the ground when he arrived on scene. This observation was belied by the testimony of other officers that arrived on scene as well as the testimony of Ofc. Eugley and Ofc. Morales. Their testimony was that Mr. Williams stopped struggling after he was punched repeatedly by Ofc. Morales and he was then placed in handcuffs without issue. Det. Thompson's testimony was therefore subject to inquiry as to why his report was submitted so late in time. The jury could have believed Det. Thompson's testimony that Mr. Williams was still struggling and resisting on the ground after being handcuffed and used that information to convict Mr. Williams of Resisting Arrest. Given the *Van Arsdell* factors listed above, this error was not harmless beyond a reasonable doubt. Accordingly, a new trial regarding the Resisting Arrest charge is required.

Accordingly, this court should accept review pursuant to RAP 13.4(b)(1) as the Court of Appeals decision is in conflict with a decision of the Supreme Court

F. CONCLUSION

Given the foregoing, Petitioner respectfully requests that this court accept review of this matter.

DATED this 26<sup>th</sup> day of October, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Pierce County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on October 26, 2018 to email address PCpatecf@co.pierce.wa.us. Service was made by email pursuant to the Respondent's consent. I also served Appellant, Ernest Williams (DOC #955585), a true and correct copy of the document to which this certification is affixed, via first class mail postage prepaid to Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326.

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## APPENDIX A

September 25, 2018

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ERNEST LEE WILLIAMS,

Appellant.

No. 50234-8-II

UNPUBLISHED OPINION

MAXA, C.J. – Ernest Williams appeals his convictions of unlawful possession of a controlled substance, unlawful use of drug paraphernalia, and resisting arrest. We hold that the trial court did not err in (1) allowing a police officer to testify that his observations of Williams were consistent with his prior observations during his 20-year career of other individuals who were under the influence of a controlled substance, and (2) excluding evidence that the officer did not file his report regarding Williams’s arrest until the first day of trial. We also hold that Williams’s assertions in his statement of additional grounds (SAG) have no merit. Accordingly, we affirm Williams’s convictions.

**FACTS**

On August 25, 2016, two Fife police officers attempted to arrest Williams on an outstanding warrant as he stood next to his vehicle in a hotel parking lot. Williams resisted their

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attempts to subdue him. In the struggle, one of the officers struck Williams with a closed fist in his side and face. They then were able to hold Williams down and handcuff him.

Sergeant Thomas Thompson arrived shortly after and took custody of Williams. A search incident to arrest revealed a glass smoking device in Williams's jacket. Another officer observed what appeared to be a bag of methamphetamine in the car. After obtaining a warrant, the officer seized the methamphetamine and found a wallet in the glove box containing Williams's identification.

The State charged Williams with unlawful possession of a controlled substance, unlawful use of drug paraphernalia, third degree assault, and resisting arrest.

Thompson testified that Williams was agitated, had slurred speech, and had bloodshot and watery eyes. Over Williams's objection, Thompson stated that his observations of Williams's behavior were consistent with observations he previously had made of individuals who were under the influence of a controlled substance.

During cross examination, Thompson stated that he wrote his report within a few days after the incident. Williams then asked Thompson when he filed his report, and the State objected on relevance grounds. Williams explained his theory that the arresting officers used excessive force. He argued that Thompson tailored his report to protect the officers from an excessive force claim by saying that Williams was still resisting when Thompson arrived on the scene. The trial court sustained the State's objection.

The jury acquitted Williams of third degree assault but found him guilty of unlawful possession of a controlled substance, unlawful use of drug paraphernalia, and resisting arrest. Williams appeals his convictions.

## ANALYSIS

### A. ADMISSION OF LAY OPINION

Williams argues that the trial court erred under ER 701 and ER 403 in allowing Thompson to give an opinion that Williams was under the influence of controlled substances at the time of his arrest.<sup>1</sup> We disagree.

#### 1. Standard of Review

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Quaale*, 182 Wn.2d 191, 196, 340 P.3d 213 (2014). A trial court has considerable discretion in determining the admissibility of evidence. *Id.* An abuse of discretion occurs only where a trial court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* at 197. There is no abuse of discretion if reasonable persons could disagree regarding admissibility of evidence. *Id.* at 196.

#### 2. Challenged Testimony

Initially, Williams mischaracterizes Thompson's testimony when he states that Thompson testified that Williams was under the influence of controlled substances at the time of his arrest. Thompson's actual testimony was as follows:

Q. Detective, you testified yesterday that you had come into contact with hundreds of drug users over the course of your 20-year career; is that right?

A. That's correct.

Q. And during the course of your career, have you had the opportunity to observe individuals who were under the influence of controlled substances?

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<sup>1</sup> Williams also states that there was an inadequate foundation for admitting Thompson's opinion as expert testimony under ER 702. Because the trial court admitted the evidence under ER 701, we do not address ER 702.



A. Yes, I have.

Q. And your observations of the defendant on August 26th, 2015, were those observations consistent or inconsistent with the observations that you made of individuals under the influence of a controlled substance?

A. They were consistent.

Report of Proceedings at 322-23.

In other words, Thompson's opinion was that his observations of Williams were consistent with observations he had made in the past of persons under the influence of a controlled substance. Thompson did not directly state an opinion that Williams was under the influence of a controlled substance.

### 3. ER 701 Analysis

Williams argues that Thompson's testimony constituted an impermissible lay opinion under ER 701. We disagree.

Under ER 701, a witness not testifying as an expert can offer opinions that are (1) rationally based on the witness's perceptions, (2) helpful to the trier of fact in understanding the witness's testimony or determining a fact in issue, and (3) not based on scientific, technical, or other specialized knowledge covered by ER 702. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). We review for an abuse of discretion a trial court's admission of lay opinion testimony under ER 701. *State v. Blake*, 172 Wn. App. 515, 523, 298 P.3d 769 (2012).

A lay witness's observation of a person's intoxication generally is permissible under ER 701. *Montgomery*, 163 Wn.2d at 591. However, testimony regarding intoxication may be improper when it constitutes an opinion regarding the defendant's guilt. *See Quaaale*, 182 Wn.2d at 199-200 (holding that an officer's opinion that the defendant was "impaired" because of

alcohol intoxication was improper in a driving under the influence case); *see also Montgomery*, 163 Wn.2d at 591 (stating that impermissible opinion testimony includes expressions of personal belief as to the defendant's guilt).

Here, Thompson's testimony was based on his perceptions of Williams compared to his observations of many other persons under the influence of controlled substances over his 20-year career. The testimony was helpful to the jury in understanding Williams's behavior in attempting to avoid arrest. And Thompson did not express an opinion regarding Williams's guilt on any of the charges or even regarding whether Williams was under the influence of a controlled substance.

Accordingly, we hold that the trial court did not abuse its discretion under ER 701 in allowing Thompson's testimony.

#### 4. ER 403 Analysis

Williams briefly argues that the trial court should have excluded Thompson's testimony under ER 403. We disagree.

ER 403 allows a trial court to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Evidence may be unfairly prejudicial when it generates an emotional rather than a rational response by the jury or when it promotes a decision on an improper basis. *State v. Haq*, 166 Wn. App. 221, 261, 268 P.3d 997 (2012). The trial court has considerable discretion to consider what evidence is relevant and to balance its possible prejudicial impact against its probative value. *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014).

The trial court ruled that ER 403 did not preclude Thompson's testimony regarding intoxication. As noted above, this testimony was relevant. Williams does not explain why Thompson's testimony was unfairly prejudicial or more prejudicial than probative.

Accordingly, we hold that the trial court did not abuse its discretion in ruling that ER 403 did not render Thompson's testimony inadmissible.

**B. EXCLUSION OF EVIDENCE REGARDING INCIDENT REPORT**

Williams argues that the trial court erred in not allowing him to cross-examine Thompson about why he did not file his police report on the incident until the first day of trial. He claims that the court's ruling violated his right to confront adverse witnesses. We disagree.

**1. Legal Principles**

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, a defendant in a criminal case has the right to confront the witnesses against him. *State v. Lee*, 188 Wn.2d 473, 486-87, 396 P.3d 316 (2017). The main purpose of this right is the opportunity to cross-examine adverse witnesses. *Id.* at 487. A defendant generally has the right to cross-examine witnesses with bias evidence if that evidence is relevant. *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009).

But the right to cross-examination is not without limits. *Lee*, 188 Wn.2d at 487. Despite the confrontation right, trial courts have wide latitude to impose reasonable limits on cross-examination. *Id.* A trial court may limit questioning that is only marginally relevant. *Id.* Similarly, a trial court "may deny cross-examination if the evidence sought is 'vague, argumentative, or speculative.'" *Id.* (quoting *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)).

We apply a three-part test to determine whether a trial court's limitation on the scope of cross-examination violated a defendant's confrontation right:

First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld.

*Lee*, 188 Wn.2d at 488 (quoting *Darden*, 145 Wn.2d at 622).

We review the relevance of proposed cross-examination for an abuse of discretion.<sup>2</sup> *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017). Abuse of discretion exists when the trial court's ruling is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

## 2. Analysis

Williams asserts that Thompson's incident report stated that Williams was still resisting after the arresting officers had handcuffed him, which he claims was inconsistent with the officers' testimony that Williams stopped resisting after being punched. Williams argues that he should have been allowed to cross-examine Thompson about the late filing of the report because the timing of the report showed that Thompson was trying to protect his fellow officers from an excessive force claim.

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<sup>2</sup> The standard of review for a limitation on cross-examination is somewhat unsettled. The Supreme Court in *State v. Jones* stated that a claim that the trial court violated a defendant's right to present a defense is reviewed de novo. 168 Wn.2d 713, 719, 230 P.3d 576 (2010). But in *Lile* and *Lee* the court more recently stated without qualification that a limitation on the scope of cross-examination is reviewed for an abuse of discretion. *Lile*, 188 Wn.2d at 782; *Lee*, 188 Wn.2d at 486. Nevertheless, this court has agreed that at least the relevance prong is reviewed for an abuse of discretion. *State v. Blair*, 3 Wn. App. 2d 343, 350-51, 415 P.3d 1232 (2018); *State v. Horn*, 3 Wn. App. 2d 302, 311, 415 P.3d 1225 (2018).

However, this evidence is not even minimally relevant. Williams did not explain at trial and does not explain on appeal why *when* Thompson filed his report was relevant to Williams's position that Thompson was biased; that he was trying to protect his fellow officers from an excessive force claim. Thompson testified that he prepared the report shortly after the incident. Williams has not shown that waiting to file the report until the day of trial rather than filing the report immediately would have affected any excessive force claim. The contents of the report may have supported Williams's position, but he was not precluded from cross-examining Thompson regarding the contents.<sup>3</sup>

We hold that the trial court did not abuse its discretion in precluding Williams from cross-examining Thompson regarding the timing of filing his incident report.

#### C. SAG CLAIMS

Williams raises three grounds in his SAG. First, he asserts that the jury verdict incorrectly referred to him as Ernest L. Williams, Jr., when in fact he has never been a junior. The heading in the jury verdict forms did refer to Williams's "AKA" as Ernest Lee Williams, Jr. Clerk's Papers (CP) at 85-88. But the jury's actual verdict stated, "We, the jury, find the defendant, ERNEST LEE WILLIAMS, guilty." CP at 86-88. We find no error.

Second, Williams asserts that defense counsel improperly told the jury to find him guilty of resisting arrest when in fact he pleaded not guilty to all charges. But this was a strategic decision on the part of defense counsel. Defense counsel argued that the facts only supported resisting arrest, not third degree assault. This strategy apparently was successful; the jury

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<sup>3</sup> At trial, Williams argued that when Thompson filed the report was relevant because it showed sloppy police work. But he does not make that argument on appeal, so we do not address it.

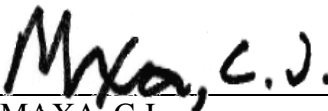
convicted Williams of only misdemeanor resisting arrest and not felony assault. *See State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011) (stating that defense counsel does not provide ineffective assistance by pursuing legitimate trial strategies).

Third, Williams asserts that the trial court violated his time to trial rights when the court continued the trial beyond the commencement date of October 31, 2016. But on that date, the trial court continued the trial to January 19, 2017 under CrR 3.3(f)(2) because of witness unavailability. And on January 19, the trial court continued the trial to March 2 at Williams's request under CrR 3.3(f)(1) and (2). In granting each continuance, the trial court complied with CrR 3.3(f). The trial court did not violate Williams's time to trial rights.

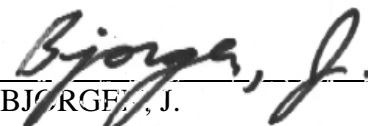
CONCLUSION

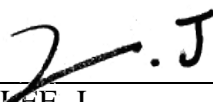
We affirm Williams's convictions of unlawful possession of a controlled substance, unlawful use of drug paraphernalia, and resisting arrest.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
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MAXA, C.J.

We concur:

  
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BJORGE, J.

  
\_\_\_\_\_  
LEE, J.

**GRECCO DOWNS, PLLC**

**October 26, 2018 - 3:17 PM**

**Filing Petition for Review**

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**Appellate Court Case Number:** Case Initiation  
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