NO. 98415-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Petitioner,

v.

JEFFREY LEVESQUE,

Respondent.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

Both the Superior Court and the Court of Appeals properly ruled that, pursuant to ER 702, *State v. Baity* and *State v. Quaale*, the City did not lay the adequate foundation for Officer Hinson, who was not a Drug Recognition Expert, to testify to his opinion that Mr. Levesque was "definitely impaired" by a stimulant. Because the officer's opinion was not "otherwise admissible" under ER 704, it was an improper comment on Mr. Levesque's guilt. Further, Mr. Levesque's objections were properly preserved for appeal and this case does not present an issue of substantial public interest. This Court should deny the City's petition for review.

B. IDENTITY OF RESPONDENT

Jeffrey Levesque, Respondent, respectfully requests this Court to deny review of the decision of the Court of Appeals designated in section C of this Answer.

C. COURT OF APPEALS DECISION

Jeffrey Levesque requests this Court to deny review of the published decision in the Court of Appeals in *City of Seattle v. Levesque*, No. 78304-1-I (March 16, 2020), a copy of which is attached here as

Appendix A.[1]

D. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals properly analyzed Officer Hinson's testimony under ER 702 and *State v. Baity* and correctly concluded that he was not qualified to offer an opinion as to what specific drug category Mr. Levesque was impaired by, as Officer Hinson was not a Drug Recognition Expert or otherwise qualified to offer such an opinion.

2. The Court of Appeals correctly concluded that, pursuant to *State v. Quaale*, Officer Hinson's testimony that Mr. Levesque was "definitely impaired" by a stimulant was an improper opinion on Mr. Levesque's guilt, as that opinion was not "otherwise admissible" under ER 704.

3. The Court of Appeals properly applied ER 103(a) and correctly concluded that Mr. Levesque preserved his arguments for appeal by asking the court for pretrial rulings on the relevant issues and then subsequently objecting to the improper opinion testimony during trial.

4. This case does not present an issue of substantial public interest, as the Court of Appeals decision in no way prevents or hinders prosecution of DUI offenders in Washington State.

E. STATEMENT OF THE CASE

[1] The City attached a copy of the *Levesque* decision to its Petition for Review; however, many pages of the decision were not included. A complete copy of the *Levesque* Slip Opinion is attached here as Appendix A, for clarity.

Jeffrey Levesque was arrested for Driving Under the Influence after he was involved in a collision on the West Seattle Bridge on April 29, 2015. He was subsequently charged in Seattle Municipal Court with Driving Under the Influence ("DUI"). Mr. Levesque was convicted after jury trial, and timely filed a Notice of Appeal. The King County Superior Court reversed his conviction on RALJ Appeal, and the City sought Discretionary Review in the Court of Appeals. Division I affirmed the reversal of Mr. Levesque's DUI conviction, and the City now seeks review.

Relevant Pretrial Motions

Mr. Levesque moved *in limine* for the court to prohibit the testifying officers from offering certain types of opinion evidence at trial. Mr. Levesque moved the court to prohibit the officers from testifying that the defendant was impaired or that his driving was affected to an appreciable degree, arguing that such testimony would constitute an improper opinion on guilt, citing *State v. Quaale*. *See* Appendix B: Defense Trial Brief at 9. The Trial Court ruled that the officers would be permitted to testify to an opinion that Mr. Levesque was "impaired" but could not say "intoxicated." Report of Proceedings ("RP") 10/18/16 at 34. Mr. Levesque further moved the court to prohibit any expert testimony from the testifying officers on the issue of stimulants or methamphetamines, citing *State v. Baity* and *City of Seattle v. Heatley*. *See* Appendix B: Defense Trial Brief at 10. The City

responded that it did not intend to offer any expert testimony from any officer, so the Trial Court granted the Defense's motion. RP 10/18/16 at 42.

Trial Testimony

Officer Calvin Hinson was the primary arresting officer, and testified first at trial. Officer Hinson had worked for the Seattle Police Department for two years, and had worked for the Baton Rouge Police Department in Louisiana for approximately two years prior to that. RP 10/19/16 at 22. Officer Hinson had attended Basic Law Enforcement Training in Baton Rouge, and then a standard Lateral Training Program in Seattle. *Id*. at 23. As part of the Basic Law Enforcement Training in Baton Rouge, Officer Hinson had complete 40 hours of training on DUIs generally. *Id*. at 23. He later took a DUI Refresher Course in Seattle. *Id*. Officer Hinson was not a Drug Recognition Expert ("DRE"). *Id*. at 24. Officer Hinson had conducted a total of 13 DUI investigations over the course of his career, with approximately four of those investigations involving alcohol only. *Id*. at 52-53. In at least four of those DUI investigations, Officer Hinson only assisted the primary officer. *Id*. at 53.

On April 29, 2015, Officer Hinson was on basic patrol duty and was dispatched to a two-vehicle car accident on the West Seattle Bridge. *Id*. at 26. Jeffrey Levesque, one of the involved drivers, was in his vehicle with a passenger when Officer Hinson arrived. *Id*. at 31. Officer Hinson observed

Mr. Levesque perspiring despite the cool windy weather and that he had constricted pupils.[2] *Id*. at 36. Officer Hinson testified at trial that "through my training experience I recognized [these observations] as a signs" that Mr. Levesque was "possibly being impaired by a stimulant." *Id*. at 36. Officer Hinson did not perform any Field Sobriety Tests because they were "not practical" in the location. *Id*. at 38-39. Officer Hinson testified at trial regarding the basis for his arrest of Mr. Levesque:

> "I based that off of the manifest driving which was including the accident while not being able to remember how the accident was caused. The *signs and symptoms of possible impairment of under a stimulant* which included the perspiring while standing outside of the vehicle on the West Seattle Bridge while it was chilly outside and windy; the inability to recollect the events; and just the overall scene; and the conversation that we had between him and his mannerisms and his actions. I believe I had the probable cause for the arrest." *Id*. at 37-38 (emphasis added).

Officer Hinson subsequently obtained a search warrant for Mr. Levesque's blood and transported him to Harborview Hospital for a blood draw. *Id*. at 44. Officer Hinson's in-car video was played at trial, which portrayed Mr. Levesque handcuffed in the back of Officer Hinson's patrol car. *Id*. at 40-41. While the video was played, Officer Hinson testified that Mr. Levesque's behavior in the patrol car "through my training experience definitely indicated to me that there was some sort of substance that the

[2] Although Officer Hinson stated in his written reports and body-worn video that Mr. Levesque's pupils were "dilated" (not an indicator of stimulant use), at trial he testified that he "misspoke" and that Mr. Levesque's pupils were actually constricted (an indicator of stimulant use). RP 10/19/16 at 36, 61, 72.

defendant might have taken, including what I believed to be a stimulant." *Id*. at 41. Officer Hinson then went on to describe the other observations he made of Mr. Levesque that he believed were "consistent with a stimulant," including flushness of the skin, high body temperature, and constant moving of his wrists while in handcuffs. *Id*. at 42. At the conclusion of the City's direct, the following exchange occurred between Officer Hinson and the prosecutor:

> Q: Based on your training and experience, and all of the observations and interactions you had with Mr. Levesque on this day, did you form an opinion as to whether he was impaired by drugs?
> A: Yes.
> Q: What is it?
> A: Opinion was that he was definitely impaired at the time of the accident.
> Q: And, no further questions.

Id. at 51. After the court's afternoon recess, [3] Mr. Levesque's counsel objected to Officer Hinson's testimony regarding impairment and argued that his testimony violated the Trial Court's rulings during motions *in limine*. *Id*. at 105-06. Mr. Levesque's counsel attempted to direct the Trial Court to a "Supreme Court Case from Washington" but was cut off by the Trial Court, who stated "All right, well … this is RALJ issue. You can, you can make your record, but we're going to have to move on." *Id*. at 106. Mr.

[3] Mr. Levesque's counsel objected to Officer Hinson's testimony after three witnesses had testified (Officer Hinson, Officer Coe, and Martin Hernandez-Mejia) but prior to five other witnesses testifying (Registered Nurse Christin Derig, Officer Sanders, Captain Tracy Franks, Andre Gingras, and Dr. Katherine Mayer).

Levesque's counsel then moved for a mistrial on the basis that "Officer Hinson did not make the adequate foundation to testify to Mr. Levesque being impaired by a drug, when he did not conduct any DRE examination or DRE wasn't called … nor did he do Field Sobriety Tests." *Id*. The Trial Court replied that Officer Hinson had "testified about his training" and the basis for his arrest decision, which the Trial Court deemed sufficient to lay the foundation for his opinion testimony. *Id*. at 107. The Trial Court concluded its ruling on the mistrial motion, stating, "So, your objection is noted, but it goes to weight, not to the admissibility. So, bring in the jury." *Id*. Mr. Levesque's counsel added that he was objecting because Officer Hinson's testimony "goes to the ultimate issue in this case." *Id*. at 108. The Trial Court responded: Well, it does not. If he had testified that the defendant was under the influence, it would have. But, it does not go to the ultimate issue. He just testified as to the basis for his arrest decision." *Id*. The jury then entered the room and testimony recommenced. *Id*.

Officer Sarah Coe, who was also not a DRE, was the secondary officer who provided backup to Officer Hinson at the scene of the accident. *Id*. at 86. Although Officer Coe had limited contact with Mr. Levesque, she observed him to be sweaty and shaky. *Id*. at 88. At trial, Officer Coe testified that "sweating is indicative of an upper involved in the system." *Id*.

Seattle Fire Department Captain Tracy Franks, who was also a certified EMT, responded to the scene of the accident. *Id*. at 135. Captain Franks testified that Mr. Levesque's heart rate was "a little bit up" and that he was "showing behavior consistent with recreational drug use." *Id*. at 139, 144.

Andrew Gingras, a forensic toxicologist with the Washington State Patrol Crime Lab, testified about the results of Mr. Levesque's blood test, which showed the presence of methamphetamine in an amount of 0.55 milligrams per liter. RP 10/20/16 at 7, 17. Mr. Gingras testified that there were also amphetamines present in Mr. Levesque's blood, likely as a metabolite of the methamphetamine. *Id*. at 28. Mr. Gingras testified at length about the effects of stimulants on the human body, including excessive movement, rapid flight of ideas, lack of focus, and possibly increased body temperature or sweating. *Id*. at 17-22. Mr. Gingras testified that methamphetamines would cause dilated pupils, but not constricted pupils. *Id*. Mr. Gingras also testified about how methamphetamine could affect a person's ability to drive a vehicle. *Id*. at 23. Mr. Gingras was not able to say whether any particular amount of methamphetamines would affect a person's driving. *Id*. at 29. Mr. Gingras conceded that even an accurate blood test would be insufficient to establish whether someone was impaired or not by methamphetamine. *Id*. at 33.

Dr. Katherine Mayer, Mr. Levesque's personal physician, testified at trial. Dr. Mayer had been treating Mr. Levesque since 2014. *Id*. at 48. Dr. Mayer treated Mr. Levesque in January of 2015 for a whiplash injury. *Id*. at 49. Dr. Mayer also treated Mr. Levesque in April of 2015 for persistent headaches and speech difficulties following a car accident that had occurred in March of that same year. *Id*. at 51.[4] Dr. Mayer at that time diagnosed Mr. Levesque with "post-concussive syndrome," which can manifest symptoms such as headaches, memory issues, or speech issues. *Id*. at 52. Dr. Mayer testified that Mr. Levesque also had a history of neurosyphilis, an infection that can cause severe headaches, blurry vision, ringing in the ears, and stroke-like symptoms in extreme cases. *Id*. at 53. Dr. Mayer also testified more generally to the possible symptoms of shock, including low blood pressure, rapid heart rate, sweating and speech issues. *Id*. at 53.

F. ARGUMENT

1. The Court of Appeals properly analyzed Officer Hinson's testimony under ER 702 and *State v. Baity* and correctly concluded that he was not qualified to offer an opinion as to what specific drug category Mr. Levesque was impaired by, as Officer Hinson was not a Drug Recognition Expert or otherwise qualified to offer such an opinion.

[4] The City incorrectly states that Dr. Mayer treated Mr. Levesque for post-concussive syndrome following the car accident that occurred in this case. Petition for Review at 5. As indicated above, Dr. Mayer had diagnosed Mr. Levesque with post-concussive syndrome after a car accident that occurred in March of 2015, approximately one month *prior to* his arrest in this case.

The City argues that the Court of Appeals "misinterpreted *Baity* … by holding that no officer may opine on the defendant's impairment without extensive DRE training." Petition for Review at 15. Relatedly, the City argues that the Court of Appeals failed to apply ER 702. *Id*.

The City misrepresents the Court of Appeals' holding. The Court of Appeals did in fact evaluate Officer Hinson's testimony under ER 702, and properly concluded that Officer Hinson was not qualified under the rule to testify as an expert on impairment by a specific category of drugs. *Levesque*, Slip Opinion at 12. The Court discussed *State v. Baity* as "instructive in this regard" because, although the primary issue in *Baity* was whether the DRE protocol satisfied the *Frye* standard generally, it also found that "the evidence does have a scientific aspect, which tends to cast a scientific aura about the DRE's testimony." *Levesque* at 12-13; *see also State v. Baity*, 140 Wash.2d 1, 11, 991 P.2d 1151 (2000). The Court in *Baity* outlined the extensive training that DREs receive, the exacting standards they must meet before becoming certified, and the 12-step procedure that they must follow in every case before offering an opinion as to impairment by a specific category of drugs. *Baity*, 140 Wash. 2d at 4-6. *Baity* also recognized that a DRE must still and present a proper foundation to qualify as an expert under ER 702, which would include "a description of the DRE's training, education, and experience in

administering the test, together with a showing that the test was properly administered." *Id*. at 18. The Court of Appeals in *Levesque* reaffirmed *Baity*'s holding that a certified DRE officer, after performing the 12-step DRE protocol, may give an opinion as to whether a DUI defendant's behavior is consistent with impairment by a specific category of drug. *Levesque* at 14; *Baity*, 140 Wash.2d at 18. Importantly, however, the Court of Appeals recognized that there may be "other sufficient foundation testimony" under ER 702 that would similarly qualify a witness to offer such an opinion, explicitly noting that "not every expert presenting an opinion on the issue must be DRE certified." *Levesque* at 14-15. Contrary to the City's assertion, the Court of Appeals properly applied ER 702 to Officer Hinson's testimony, ultimately concluding that his lack of DRE certification *combined with* his minimal police experience did sufficiently qualify him to offer an opinion as to whether Mr. Levesque's behavior was consistent with a particular category of drugs. *Levesque* at 15.

The City argues that, even if Officer Hinson was not qualified to testify as to the specific category of drug Mr. Levesque had ingested, that he should still be permitted to testify to an opinion that Mr. Levesque was impaired by drugs generally. Petition for Review at 14. Nothing in the Court of Appeals' decision prevents Officer Hinson from doing exactly that. Indeed, the Court clearly stated that even Officer Hinson's limited

DUI experience "may provide a basis for testimony that a person shows signs and symptoms consistent with drug or alcohol consumption generally." *Levesque* at 14. In this case, however, Officer Hinson did not limit his statements to such general opinion testimony.

The City finally argues that Officer Hinson's testimony was admissible as lay testimony under *City of Seattle v. Heatley* and *State v. Lewellyn*. This argument was addressed and correctly rejected by the Court of Appeals. The City asserts, without authority, that Officer Hinson's testimony was lay testimony because "CNS Stimulants are very common drugs to encounter regularly … and the effects of stimulants are more obvious than other drug categories." Petition for Review at 17. However, as the Court of Appeals and *Baity* both recognized, discerning which particular class of drug an individual's behavior is consistent with is a sophisticated and technical matter that is not within the realm of a layperson's experience. *Baity* at 4, 5, 11; *see also Levesque* at 15, 17. Simply put, it involves "scientific, technical, or other specialized knowledge within the scope of rule 702." ER 701(a), (c).

As the Court of Appeals noted, this type of specialized knowledge is distinguishable from lay testimony regarding alcohol intoxication. In *Heatley,* Division I considered an officer's opinion testimony regarding alcohol intoxication in a DUI case. *City of Seattle v. Heatley*, 70 Wash.App.

573, 854 P.2d 658 (1993). The Court held that, provided an adequate foundation was established (e.g. experience, direct observations, and field sobriety tests), an officer could properly provide an opinion as to alcohol intoxication. The Court held that this was proper lay witness testimony because "*the effects of alcohol are commonly known* and all persons can be presumed to draw reasonable inferences therefrom" and "the subject matter of [the officer's] opinion—intoxication and impairment by alcohol—did not encompass excessively technical matters." *Id*. at 580 (emphasis added). In *Levesque*, the Court of Appeals noted this "important" distinction and found that because Officer Hinson's opinion testimony involved a technical and scientific matter—impairment by a specific category of drugs, as opposed to alcohol—*Heatley* and *Lewellyn* did not control.[5] *Levesque* at 19.[6]

2. The Court of Appeals correctly concluded that, pursuant to *State v. Quaale*, Officer Hinson's testimony that Mr. Levesque was "definitely impaired" by a stimulant was an improper opinion on Mr. Levesque's guilt, as that opinion was not "otherwise admissible" under ER 704.

[5] *State v. Lewellyn* reaffirmed *Heatley*'s holding regarding lay opinion of alcohol intoxication. 78 Wash. App. 788, 895 P.2d 418 (1995).

[6] The City also cites *State v. Pirtle* and *State v. Russell* in support of its arguments. In *Pirtle*, a defense expert discussed drug and alcohol intoxication as it related to the defendant's diminished capacity defense in a murder trial. The expert's qualifications were not challenged on appeal. 127 Wash.2d 628, 904 P.2d 245 (1995). *Russell* held only that a witness may be cross-examined about their own alcohol or drug use on the night of the incident they witnessed. *State v. Russell*, 125 Wash.2d 24, 83, 882 P.2d 747 (1994). Nothing about *Pirtle* or *Russell* is contrary to the Court's decision in *Levesque*.

The City argues that Officer Hinson's opinion that Mr. Levesque was "definitely impaired" by a stimulant was proper. This is contrary to well-settled law; namely, this Court's own ruling in *State v. Quaale*.

In *State v. Quaale*, a DUI case, the arresting officer testified that he had "no doubt that [the defendant] was impaired" based on the HGN test alone. 182 Wash.2d 191, 340 P.3d 213 (2014). This Court found that, under *Baity*, this opinion testimony was improper because (1) it cast an "aura of scientific certainty" to the testimony when the HGN test only establishes whether a person has consumed alcohol, and (2) use of the word "impaired" implied a specific level of intoxication. *Id*. at 198-99. Because the officer's testimony was inadmissible under *Baity*, the Court found that the opinion testimony was not "otherwise admissible" under ER 704. *Id*. at 197.

Further, the Court in *Quaale* found that the officer's opinion was "an improper opinion on guilt by inference because the trooper's opinion went to the core issue and the only disputed element: whether [the defendant] drove while under the influence." *Id*. at 200. The Court found that the word "impaired" parroted the legal standard for DUI because the word impaired means to "diminish in quantity, value, excellence or strength," which was comparable to the jury instructions defining under

the influence as the "ability to drive … lessened in any appreciable degree." *Id*. at 200. The Court held:

"Because the trooper's inadmissible testimony went to the ultimate factual issue—the core issue of Quaale's impairment to drive—the testimony amounted to an improper opinion on guilt." *Id*. at 200.

The Court went on the distinguish *Quaale* from *Heatley* because "[u]nlike the officer in *Heatley*, Trooper Stone based his opinion on expert and not lay testimony." *Id*. at 201. Similarly, here, Officer Hinson's testimony was not "otherwise admissible" under ER 704 because he was not qualified to give such expert opinion under ER 702 and *Baity*. The opinion that Officer Hinson gave—that Mr. Levesque was "definitely impaired" by stimulants—parroted the legal standard and was an improper opinion on guilt for the same reasons that the officer's "no doubt he was impaired" language was reversible error in *Quaale*.

The City argues that the Court of Appeals' ruling conflicts with *Heatley* because in *Heatley* the Court found that it was proper for an officer to testify that the defendant was "obviously intoxicated" by alcohol. Petition for Review at 19-20. The City again ignores the primary distinguishing factor— that the officer's opinion in *Heatley* was proper lay opinion on alcohol intoxication and therefore was "otherwise admissible" under ER 704. As the Court of Appeals noted, this distinction was

determinative in *Quaale* and similarly controls the outcome in Mr. Levesque's case.

3. The Court of Appeals properly applied ER 103(a) and correctly concluded that Mr. Levesque preserved his arguments for appeal by asking the court for pretrial rulings on the relevant issues and then subsequently objecting to the improper opinion testimony during trial.

The City asserts that Mr. Levesque did not preserve his objections to Officer Hinson's testimony and that he "simply gambled on a verdict" by not objecting. Petition for Review at 12. This assertion was properly rejected by the Court of Appeals and is belied by the record below.

As the City appears to concede, Mr. Levesque raised timely and specific pretrial motions on the relevant issues. Indeed, during motions *in limine*, Mr. Levesque specifically requested that the court prohibit any officers from testifying as experts, to which the City did not object and the court granted. RP 10/18/16 at 42. Mr. Levesque also asked the court to prohibit opinion testimony that went to the ultimate issue of guilt, namely, that Mr. Levesque was "impaired."[7] *Id*. at 34.

Mr. Levesque then re-raised these objections during trial and gave the trial court adequate opportunity to address his objections and make an

[7] Because the trial court denied Mr. Levesque's motion *in limine* to prohibit opinion testimony that Mr. Levesque was "impaired," Mr. Levesque had a standing objection that preserved that issue for appeal. *A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wn. App. 511, 525, 105 P.3d 400 (2004).

evidentiary ruling. Under ER 103(a)(1), when an error is raised based on admitting evidence, the adverse party must make "a timely objection or motion to strike . . . , [and] stat[e] the specific ground of objection, if the specific ground was not apparent from the context." As the Court of Appeals noted, the purpose of the objection requirement of ER 103 is to "give[] the trial judge an opportunity to address an issue before it becomes an error on appeal." *Levesque* at 6 (citing *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017)).

The Court of Appeals properly applied ER 103 and concluded that Mr. Levesque's objection to Officer Hinson's testimony was both timely and specific under the rule, as it gave the trial court adequate opportunity to address the issue. Mr. Levesque's objection were specific, as he argued that: (1) Officer Hinson's testimony violated motions *in limine*, (2) Officer Hinson's testimony that Mr. Levesque was impaired by stimulants was improper because there was insufficient foundation, and (3) Officer Hinson's improper testimony went "to the ultimate issue" in the case-impairment. *Levesque* at 7. The trial court had no difficulty discerning the specific basis of the objection or making a full and considered ruling. As to Officer Hinson's opinion testimony, the trial court ruled that Officer Hinson's training, experience and observations provided adequate foundation for such testimony. RP 10/19/16 at 106-108. As to whether it

was an improper opinion on guilt, the trial court reiterated its prior ruling and held that the testimony did not go to the ultimate issue in the case because Officer Hinson said "impaired" and not "under the influence." *Id*.

Although not contemporaneous, Mr. Levesque's objection was timely. As the Court of Appeals noted, the purpose of the objection requirements is to ensure that the trial court is able to rule on the issue and provide a curative instruction if necessary. *Wilcox*, 187 Wn.2d at 788. As described above, the trial court here had ample opportunity to assess and respond to each of Mr. Levesque's specific objections to Officer Hinson's testimony. Mr. Levesque raised his objection during the afternoon recess following Officer Hinson's testimony, and well before the close of evidence.[8]

ER 103 prevents a defendant from "sit[ting] on his rights, bet[ting] on the verdict, and then, if the verdict is adverse, gain[ing] a retrial by asserting his rights for the first time on appeal." *State v. Burns*, 193 Wash. 2d 190, 209, 438 P.3d 1183 (2019). As the Court of Appeals correctly concluded, there is no evidence in the record to suggest that Mr. Levesque "bet on the verdict" here. His objections were timely, specific and preserved for appeal under ER 103(a).

4. This case does not present an issue of substantial public interest, as the Court of Appeals decision in no way prevents or hinders prosecution of DUI offenders in Washington State.

[8] Five additional witnesses testified following Mr. Levesque's objection and motion for mistrial.

The City overstates both the breadth of the *Levesque* decision and its potential impact on DUI prosecutions. The City argues that conviction rates will fall because "it is not possible to only have DREs investigate and testify in every drug-DUI case." Petition for Review at 8.

Nothing in the *Levesque* decision requires, or even suggests, that a DRE officer must investigate or testify in every drug-DUI case. As discussed above, the *Levesque* decision leaves open a variety of methods by which the City may prosecute drug-DUI cases. The Court of Appeals explicitly recognized that non-DRE officers might nonetheless possess the requisite training and experience under ER 702 to offer an expert opinion about the particular category of drugs a person is impaired by. The Court of Appeals merely held that Officer Hinson, with his extremely limited DUI experience, was not qualified to do so in this case.

As the Court of Appeals recognized, there are a variety of other, non-law enforcement witnesses who may also properly offer such an opinion. *Levesque* at 14-15.[9] Indeed, in this case, the State forensic toxicologist who tested Mr. Levesque's blood was properly qualified as an expert and

[9] "For example, 'pharmacologists, optometrists, and forensic specialists' may be qualified to testify as to what specific drug impairment looks like or if, in their opinion, behavior was consistent with consumption of a particular category of drug."

gave extensive testimony about the effects of methamphetamines on the human body. Further, the toxicologist described testifying in court as one of his primary job duties, and stated that he had testified in approximately 70 DUI trials. RP 10/20/16 at 8, 18, 30. Although the City chose not to do so here, nothing would prevent a prosecutor from asking the toxicologist to review the facts of the case and offer an opinion as to whether the defendant's behavior was consistent with a particular category of drugs.[10]

Finally, as the Court of Appeals explicitly noted, a non-DRE officer may still properly testify to their opinion that a DUI defendant was impaired by drugs generally. *Levesque* at 14.

The City asserts that the *Levesque* decision will prevent the "presentation of reliable evidence." To the contrary, the *Levesque* holding merely held Officer Hinson's testimony to the existing standards of scientific reliability that were outlined in *Baity* and reaffirmed in *Quaale*.

G. CONCLUSION

The Court of Appeals properly concluded that Officer Hinson's opinion lacked an adequate foundation under ER 702 and *State v. Baity*. Because Officer Hinson's opinion testimony was not "otherwise admissible" under ER 704, it was an impermissible opinion on guilt. Mr.

[10] Similarly, in Mr. Levesque's case, another properly qualified expert, Fire Department Captain Franks, who was also an EMT, testified without objection that Mr. Levesque's behavior was "consistent with recreational drug use." RP at 134, 144.

Levesque properly preserved his objections for appeal. The Court of Appeal's decision correctly applied established case law and will not hinder or prevent DUI prosecutions in this State. Review by the Supreme Court is not merited under these circumstances.

Respectfully submitted this 12th day of May, 2020,

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APPENDIX A

FILED
3/16/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF SEATTLE, Appellant, v. JEFFREY LEVESQUE, Respondent.	No. 78304-1-I DIVISION ONE PUBLISHED OPINION FILED: March 16, 2020

SMITH, J. — This case arises from Jeffrey Levesque's appeal of his conviction for driving under the influence (DUI). During trial in Seattle Municipal Court, Officer Calvin Hinson testified that when he arrested Levesque, Levesque showed signs and symptoms consistent with having consumed a central nervous system (CNS) stimulant and was "definitely impaired." Following his conviction, Levesque appealed to the superior court, which reversed. The city of Seattle (City) appeals the superior court's decision.

We conclude that because Officer Hinson was not a drug recognition expert (DRE) and lacked otherwise sufficient training and experience, he was not qualified to opine that Levesque showed signs and symptoms consistent with having consumed a particular category of drug. Furthermore, because his opinion that Levesque was "definitely impaired" constituted an impermissible opinion of Levesque's guilt, the trial court's admission of that testimony violated Levesque's constitutional right to have the jury determine an ultimate issue. Finally, because Levesque presented an alternative theory for his behavior, the

City did not establish beyond a reasonable doubt that any reasonable jury would have convicted Levesque. Therefore, we affirm the superior court's reversal of Levesque's conviction.

FACTS

On April 29, 2015, the Seattle Police Department dispatched Officers Calvin Hinson and Sarah Coe to the scene of an automobile accident involving two vehicles. Levesque had failed to stop his vehicle prior to hitting the vehicle in front of him. The accident caused moderate to severe damage, and Levesque's vehicle could not be driven.

Officer Hinson placed Levesque under arrest for DUI. Officer Hinson later testified that he found probable cause to make the arrest based on

> the manifest driving[,] which [included] the accident while not being able to remember how the accident was caused[; t]he signs and symptoms of possible impairment of under a stimulant which included the perspiring while standing outside of the vehicle on the West Seattle Bridge while it was chilly outside and windy; the inability to recollect the events; and just the overall scene; and the conversation that we had . . . and his mannerisms and his actions.

Although Officer Hinson had received training in field sobriety tests (FSTs), he did not perform any FSTs at the scene because of Levesque's symptoms, the absence of any alcohol smell, and the location of the accident and corresponding impracticability of FSTs. Officer Hinson did not perform a horizontal gaze nystagmus (HGN) test for signs of impairment. Officer Hinson, who is not DRE certified, testified that he attempted to contact a DRE by radio, but no DRE was

available.[1]

After arresting Levesque, Officer Hinson transported Levesque to Harborview Medical Center, where he had his blood drawn. The drug analysis results showed that Levesque's blood contained 0.14 milligrams per liter (mg/L) of amphetamine and 0.55 mg/L of methamphetamine. The City charged Levesque with DUI.

Before trial, Levesque moved in limine to, among other things, (1) limit officer testimony to personal observations and (2) exclude any testifying officer's opinion on ultimate issues. The trial court granted the first motion. The trial court also granted the second motion but ruled that an officer *could* state "in his opinion, based upon the totality of the circumstances, that [Levesque] was impaired." The trial court also granted Levesque's additional motion to exclude officers as experts but declared that an officer—testifying as a lay witness—could "certainly testify to what he [or she] objectively observed during the investigation."

At trial, the City played clips of the dashboard videotape from the incident. Additionally, Officer Hinson testified that he approached Levesque at the scene and asked him what happened. Levesque responded that he remembered driving but that "nothing really happened" and that he could not remember the accident. Because Levesque did not have his driver's license, Officer Hinson asked Levesque for his address or the last four digits of his social security

[1] DRE certification involves in-field experience and a series of tests and training. State v. Baity, 140 Wn.2d 1, 4-5, 991 P.2d 1151 (2000). DRE officers learn to identify whether an individual is under the influence of alcohol or a particular category of drug and whether or not the individual is impaired. Baity, 140 Wn.2d at 4.

number to verify his identity. Levesque had difficulty responding and answered inappropriately by stating his birth date many times.

Officer Hinson testified that "through [his] training [and] experience" Levesque showed "signs as possibly being impaired by a stimulant." When asked to opine as to whether Levesque "was impaired by drugs," Officer Hinson testified that his "[o]pinion was that [Levesque] was definitely impaired at the time of the accident." Officer Coe testified that Levesque was "very shaky . . . [and] also very sweaty" and that "[s]weating is indicative of an upper involved in the system." Levesque objected to Officer Hinson's testimony—but not Officer Coe's—and requested a mistrial outside the presence of the jury following a lunch recess. The court overruled Levesque's objections.

The City also presented testimony from Captain Tracy Franks of the Seattle Fire Department and forensic scientist Andrew Gingras. Captain Franks testified that at the scene of the accident, she determined that Levesque's heart rate and blood pressure were slightly elevated but that Levesque's "pupils were mid, equal, and reactive to light." However, Captain Franks also testified that the conversation she had with Levesque "was erratic, [and] he didn't make sense." Captain Franks' report from the scene of the accident stated that Levesque "show[ed] behavior consistent with recreational drug use: Short attention span, having to ask questions multiple times, unable to open door without assistance, patient denies being in an accident."

Gingras testified regarding how methamphetamine can impact someone's driving abilities and that "while using methamphetamine . . . , driving tends to be

a little faster, so speeding is usually seen, and then excessive lane travel." Gingras also testified regarding the "typical therapeutic range" for methamphetamine levels in the blood and how an individual would react to methamphetamine consumption if prescribed it. Gingras testified, however, that whether a specific level of methamphetamine in the blood impairs an individual's ability to drive "depends on that individual" and agreed that "blood tests . . . [are] insufficient to establish whether someone is impaired or not."

Levesque's defense theory was that he was prescribed medication for injuries which explain his behavior. In support of this defense, Levesque presented testimony from his physician, Dr. Katherine Mayer, about treatment and prescriptions that she provided for Levesque prior to the accident, her diagnoses, and Levesque's symptoms.

The jury convicted Levesque of driving while under the influence. Levesque appealed his conviction to the superior court, which reversed based on the admission of Officer Hinson and Officer Coe's testimonies. The superior court determined that "[b]ecause neither testifying officer was a qualified [DRE] and the required 12-step DRE protocol was not performed, the foundation for this testimony was insufficient pursuant to State v. Baity, 140 Wn.2d 1[, 991 P.2d 1151] (2000)." The court also held that the errors were preserved for appeal through "litigat[ion] in pretrial motions and midtrial," and that the trial court's error admitting the testimony "was not harmless." The City appealed, and we granted discretionary review.

ANALYSIS

The City contends that Officer Hinson's and Officer Coe's testimonies were admissible, and thus, the superior court erred by reversing Levesque's conviction. We disagree. Specifically, reversal was proper based on the erroneous admission of Officer Hinson's testimony.

Preservation of Issues for Appeal

As an initial matter, the City claims that Levesque failed to preserve his challenges to the testimony from Officer Hinson and Officer Coe. We conclude that Levesque failed to preserve his challenge to Officer Coe's testimony but did preserve his challenge to Officer Hinson's testimony.

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Under ER 103(a)(1), when an error is raised based on admitting evidence, the adverse party must make "a timely objection or motion to strike . . . , [and] stat[e] the specific ground of objection, if the specific ground was not apparent from the context." The purpose of these requirements is to "'encourage[ ] parties to make timely objections[and] give[ ] the trial judge an opportunity to address an issue before it becomes an error on appeal.'" Wilcox v. Basehore, 187 Wn.2d 772, 788, 389 P.3d 531 (2017) (quoting State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015)).

Here, Levesque's objections to Officer Hinson's testimony were both timely and specific. The objections were timely because—contrary to the City's

contention that Levesque simply "bet on the verdict"[2]—Levesque objected at one of the earliest opportunities outside of the jury, i.e., at the next recess. And the objections were specific because Levesque provided the trial court with the grounds for his objection. Levesque asserted that (1) "Officer Hinson did not make the adequate foundation to testify to Mr. Levesque being impaired by a drug, when he did not conduct any DRE examination [and a] DRE wasn't called," (2) Officer Hinson's testimony violated the trial court's ruling in limine by stating that Levesque was impaired or under the influence, and (3) the testimony went to the ultimate issue in the case.

The City contends that Levesque's objections were neither timely nor specific enough and that the only issue preserved for appeal is the trial court's denial of Levesque's request for a mistrial. This contention is unpersuasive for two reasons. First, the purpose of the objection requirements is to ensure that the trial court is able to rule on the issue and provide a curative instruction. Wilcox, 187 Wn.2d at 788. Here, Levesque's objections—though not contemporaneous—do not undercut this purpose. The trial court was able to and did decide the issues presented in this appeal and did so independently of the motion for a mistrial. Specifically, the court determined that Officer Hinson did not state a legal conclusion that Levesque was under the influence, that the foundation was appropriately laid for Officer Hinson's testimony, and that his

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[2] See State v. Burns, 193 Wn.2d 190, 209, 438 P.3d 1183 (2019) ("Applying ER 103 and requiring a defendant to object at trial 'protects the integrity of judicial proceedings by denying a defendant the opportunity to sit on his rights, bet on the verdict, and then, if the verdict is adverse, gain a retrial by asserting his rights for the first time on appeal.'" (quoting State v. O'Cain, 169 Wn. App. 228, 243, 279 P.3d 926 (2012))).

testimony did not go to the ultimate issue of Levesque's guilt. Furthermore, the court had adequate time to provide a curative instruction to the jury. Thus, the record reflects that Levesque's objections were sufficiently specific and timely to give the trial court opportunity to correct any error.

Second, the cases on which the City relies in support are distinguishable. In each case, the objecting party either provided no basis for the objection or failed to object entirely. See City of Seattle v. Carnell, 79 Wn. App. 400, 402, 902 P.2d 186 (1995) (holding that the statement "lack of a 'sufficient foundation'" without "indicat[ion of] what specific foundational requirement was lacking" is insufficient to preserve error for appeal); State v. Sullivan, 69 Wn. App. 167, 169, 173, 847 P.2d 953 (1993) (holding that because the defendant failed to object to the testimony and did not cite the testimony's admission in later motions, the error was not preserved for review on appeal); State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991) (holding that "calls for comment on the evidence" lacks specificity and is insufficient to preserve error for appeal); State v. Hubbard, 37 Wn. App. 137, 145, 679 P.2d 391 (1984) (holding that an objection based on a lack of foundation "with no particularity as to the nature of the deficiency" is insufficient to preserve error for appeal), rev'd on other grounds, 103 Wn.2d 570, 693 P.2d 718 (1985). But here, as discussed, Levesque timely provided the trial court with the specific grounds for his objections to Officer Hinson's testimony. Levesque thus preserved his challenge to Officer Hinson's testimony.

Levesque failed, however, to preserve his challenge to Officer Coe's

testimony because he made no objection at all. Levesque claims that his challenge was preserved because Officer Coe's testimony violated the ruling in limine to limit officer testimony to personal observations. Specifically, Levesque contends that the violation is alone adequate to preserve our review of Officer Coe's testimony. But he is incorrect: "A party is obligated to renew an objection to evidence that is the subject of a motion in limine in order to preserve the error for review." City of Bellevue v. Kravik, 69 Wn. App. 735, 742, 850 P.2d 559 (1993). Levesque also contends that his challenge was preserved because the City failed to list Officer Coe as an expert witness. But Levesque cites no authority for the proposition that he can preserve his challenge based solely on the City's exclusion of Officer Coe from its expert witness list. Therefore, we are not persuaded. See DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

Admissibility of Officer Hinson's Testimony

The City claims that the superior court erred by concluding that Officer Hinson's testimony regarding Levesque's impairment by stimulants was inadmissible. Because Officer Hinson's testimony lacked sufficient foundation and because the testimony was an impermissible opinion of guilt, we disagree.

We review admission of opinion testimony for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). And opinion testimony must be deemed admissible by the trial court before it is offered. State v.

Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Opinion testimony may be admissible under ER 701 as lay testimony or ER 702 as expert testimony. However, "[w]hen opinion testimony that embraces an ultimate issue is inadmissible in a criminal trial, the testimony may constitute an impermissible opinion on guilt." State v. Quaale, 182 Wn.2d 191, 197, 340 P.3d 213 (2014) (citing City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)). "Impermissible opinion testimony regarding the defendant's guilt may be reversible error." Quaale, 182 Wn.2d at 199.

Here, the opinion testimony at issue consists of Officer Hinson's statements that Levesque showed signs and symptoms of being impaired by a specific category of drug, i.e., a CNS stimulant, and that Levesque was "definitely impaired" at the time of the accident:

> [Officer Hinson:] I could see that he was perspiring. I misspoke on the in-car video. He did not have dilated pupils, he had constricted pupils which means very, very small. And, as I said, *through my training experience that I recognize as a sign[ ] as possibly being impaired by a stimulant.*
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> . . . .
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> [Officer Hinson:] *The signs and symptoms of possible impairment of under a stimulant* which included the perspiring while standing outside of the vehicle on the West Seattle Bridge while it was chilly outside and windy; the inability to recollect the events; and just the overall scene; and the conversation that we had between him and his mannerisms and his actions.
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> . . . .
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> [Prosecution]: Based on your training and experience, and all of the observations and interactions you had with Mr. Levesque on this day, did you form an opinion as to whether he was impaired by drugs?

> [Officer Hinson]: Yes.
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> [Prosecution]: What is it?
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> [Officer Hinson]: Opinion was that he was *definitely impaired* at the time of the accident.

(Emphasis added.) As further discussed below, Officer Hinson's opinion testimony was not admissible under ER 701 or ER 702 because Officer Hinson was not qualified to opine as to whether Levesque was affected by a specific category of drugs. Furthermore, Officer Hinson's testimony that Levesque was "definitely impaired" constituted an impermissible opinion of guilt. Therefore, the trial court erred by admitting Officer Hinson's testimony.

Officer Hinson's Testimony was Not Admissible as an Expert Opinion

An expert witness may testify in the form of opinion or otherwise "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, [and the] witness qualifie[s] as an expert by knowledge, skill, experience, training, or education." ER 702. "Before allowing an expert to render an opinion, the trial court must find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading." Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 357, 333 P.3d 388 (2014). "[E]xpert opinion evidence is usually not admissible under ER 702 unless it is based on an explanatory theory generally accepted in the scientific community." State v. Sanders, 66 Wn. App. 380, 385, 832 P.2d 1326 (1992). However, "where expert testimony does not concern sophisticated or technical matters, it need not meet the rigors of a scientific theory." Sanders, 66 Wn. App. at 385-86. To this end, the Washington Supreme Court has

"repeatedly held that 'an expert may be qualified by experience alone.'" Johnston-Forbes, 181 Wn.2d at 355 (quoting In re Marriage of Katare, 175 Wn.2d 23, 38, 283 P.2d 546 (2012)).

We conclude that the City failed to establish that Officer Hinson was qualified under ER 702 to opine as an expert. Our Supreme Court's decision in Baity is instructive in this regard. Baity involved two consolidated DUI cases where DRE officers testified to the defendants' impairment after performing the DRE 12-step protocol. 140 Wn.2d at 6-8. The then-novel DRE protocol is used by law enforcement officers to discern whether an individual is under the influence of one of seven categories of drugs: "(1) [CNS] depressants, (2) inhalants, (3) phencyclidine (PCP), (4) cannabis, (5) CNS stimulants, (6) hallucinogens, and (7) narcotic analgesics." Baity, 140 Wn.2d at 5. The 12-step DRE protocol involves:

> "(1) breath (or blood) alcohol concentration; (2) interview of the arresting officer; (3) preliminary examination; (4) eye examinations; (5) divided attention tests; (6) vital signs examination; (7) darkroom examination of pupil size; (8) examination of muscle tone; (9) examination of injection sites; (10) statements, interrogation; (11) opinion; (12) toxicology analysis."

Baity, 140 Wn.2d at 6. The court addressed whether the DRE protocol satisfied the standard for novel scientific procedures set forth in Frye v. United States, 54 U.S. App. D.C. 46, 293 F. 1013 (1923).[3] Baity, 140 Wn.2d at 13.

The Baity court concluded that the DRE protocol satisfied the Frye standard. 140 Wn.2d at 17. In doing so, the court observed that a DRE must

[3] The Frye standard has been adopted in Washington as the standard for determining the admissibility of an expert opinion that is based on a novel scientific theory. State v. Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

complete significant training and education before becoming certified, including a 16-hour "preschool" providing an overview of DRE protocol and "instruction on the seven drug categories and basic drug terminology." Baity, 140 Wn.2d at 4-5. A DRE officer must complete an additional 56 hours of DRE education, which "consists of 30 modules of instruction, including an overview of the development and validation of the drug evaluation process, and sessions on each drug category." Baity, 140 Wn.2d at 5. The program also requires practical field training, and an "officer must pass a written examination before beginning the next phase of training." Baity, 140 Wn.2d at 5. Finally, the officer must successfully complete 12 examinations, and in those examinations, be able to "identify an individual under the influence of at least three of the seven drug categories." Baity, 140 Wn.2d at 5. The officer must "obtain a minimum 75 percent toxicological corroboration rate" and pass a written test as well as skills demonstration tests. Baity, 140 Wn.2d at 5.

Our Supreme Court held that a "DRE officer, properly qualified, may express an opinion 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." Baity, 140 Wn.2d at 17-18. The court stated, however, that "an officer may not testify in a fashion that casts an aura of scientific certainty" and that the DRE protocol does not allow an officer to opine as to "the specific level of drugs present in a suspect." Baity, 140 Wn.2d at 17. Additionally, the court held that a DRE must still qualify as an expert under ER 702 and present a proper foundation, i.e., "a description of the DRE's training, education, and

experience in administering the test, together with a showing that the test was properly administered." Baity, 140 Wn.2d at 18. The court remanded for the trial court to determine whether the DRE properly qualified as an expert. Baity, 140 Wn.2d at 18.

Although Baity was decided in the context of determining whether the DRE protocol satisfied the Frye standard, it follows from Baity that absent other sufficient foundation testimony, an officer is not qualified to opine that a defendant's behavior is or is not consistent with that associated with a *specific category of drug* unless the officer is a DRE.

Here, it is undisputed that Officer Hinson is not a DRE. Furthermore, he lacked otherwise sufficient qualification to express an opinion that Levesque's behavior was consistent with having ingested a specific category of drug. Specifically, Officer Hinson completed only basic training and a 40-hour DUI course. And, at the time of Levesque's arrest, he had completed only 13 DUI investigations, nine of which involved drug related impairment, and most of which involved assisting a lead officer. These experiences may provide a basis for testimony that a person shows signs and symptoms consistent with drug or alcohol consumption generally or what specific symptoms were observed; they do not, however, provide a basis for opining that a person is affected by a *particular category of drug* or that the effect rises to the level of impairment. In short, and while not every expert presenting an opinion on the issue must be

DRE certified,[4] Officer Hinson's lack of DRE certification and minimal police experience are not sufficient to qualify him to give such an opinion. Thus, Officer Hinson's opinion testimony was not admissible as expert opinion testimony.

The City relies on State v. McPherson for the proposition that an officer may testify about a specialized or scientific matter based on experience and training alone. 111 Wn. App. 747, 46 P.3d 284 (2002). In McPherson, Detective Terry Boehmler testified as an expert on meth labs based on police training and experience alone. 111 Wn. App. at 761-62. Division Three concluded the testimony was admissible expert testimony. McPherson, 111 Wn. App. at 762. However, the McPherson court highlighted "that methamphetamine cooking is relatively easy and is done by numerous persons without a higher education." 111 Wn. App. at 762. By contrast, discerning which particular class of drug an individual's behavior is consistent with is a sophisticated and technical matter. See Baity, 140 Wn.2d at 4-5. Such testimony requires an adequate foundation for expert opinion testimony, which did not exist here. More importantly, Detective Boehmler (1) had investigated 40 to 60 meth labs in the previous six to seven months, (2) had completed DEA training and recertification, and (3) "conducted meth lab training for two local police departments." McPherson, 111 Wn. App. at 752, 762. Thus, whereas Detective Boehmler's training

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[4] For example, "pharmacologists, optometrists, and forensic specialists" may be qualified to testify as to what specific drug impairment looks like or if, in their opinion, behavior was consistent with consumption of a particular category of drug. See Baity, 140 Wn.2d at 17; see also State v. Pirtle, 127 Wn.2d 628, 639-40, 904 P.2d 245 (1995) (A neuropharmacologist and clinical psychologists were allowed to testify as to the effect of drug abuse on the defendant's mental processes.).

provided a sufficient foundation for expert testimony, Officer Hinson's did not.

Finally, the City's reliance on nonbinding case law from outside of this jurisdiction is equally misplaced, and we do not address those cases. See State v. Rambo, 250 Or. App. 186, 187-88, 279 P.3d 361 (2012) (holding that a DRE expert who completed 11 of the 12 DRE steps could testify that the defendant was under the influence of a narcotic analgesic); State v. Burrow, 142 Idaho 328, 329-30, 127 P.3d 231 (2005) (holding that in an aggravated assault case, an officer could testify that the defendant showed symptoms consistent with methamphetamine or other stimulant use); United States v. Sweeney, 688 F.2d 1131, 1145 (7th Cir. 1982) (holding that an experienced methamphetamine user could testify that a substance was methamphetamine "based upon his prior use and knowledge of" it); United States v. Habibi, 783 F.3d 1, 5 (1st Cir. 2015) (holding that a Federal Bureau of Investigation special agent could testify that he investigated a case where "'an individual touched . . . a[n] object with a bare hand, but when tested, no detectable DNA was found'") (second alteration in original); Blair v. City of Evansville, 361 F. Supp. 2d 846, 850 (S.D. Ind. 2005) (allowing a security officer's testimony on security plans for a vice-presidential visit). These cases are both nonbinding and distinguishable.

Officer Hinson's Testimony was Not Admissible as a Lay Opinion

Having concluded that Officer Hinson's testimony was not admissible as an expert opinion, we next address whether it was admissible as a lay opinion. We conclude that it was not.

A lay opinion is admissible only if it is "rationally based on the perception

of the witness" and "not based on scientific, technical, or other specialized knowledge within the scope of rule 702." ER 701(a), (c). Put another way, lay testimony must be based on "knowledge . . . from which a reasonable lay person could rationally infer the subject matter of the offered opinion." State v. Kunze, 97 Wn. App. 832, 850, 988 P.2d 977 (1999).

As demonstrated by Baity and the very existence of the DRE protocol and program, specialized knowledge or experience is required to discern the particular category of drug by which an individual is affected absent other specialized experience or knowledge of drug impairment. And a reasonable lay person with general experience does not have knowledge from which to rationally infer that an individual is impaired by a *specific category of drug*. Thus, Officer Hinson's testimony was not admissible as a lay opinion.

The City disagrees and relies on Heatley for the proposition that Officer Hinson's testimony was an admissible expert or lay opinion. In Heatley, Officer Patricia Manning observed Robert Heatley speeding and straddling the center line with his vehicle. Heatley, 70 Wn. App. at 575. When Officer Manning pulled Heatley over, she smelled liquor and noticed that Heatley's speech was slurred and that he had difficulty balancing. Heatley, 70 Wn. App. at 575-76. Officer Manning called the Driving While Impaired (DWI) unit, and Officer Mark Evenson of the DWI unit had Heatley perform a series of FSTs: reciting the complete alphabet, counting backward from 59, balancing, and walking a straight line. Heatley, 70 Wn. App. at 576.

At trial, Officer Evenson testified that he had tested over 1,500 drivers for

impairment while driving. Heatley, 70 Wn. App. at 576.[5] He then opined:

> "Based on . . . his physical appearance and my observations . . . and based on all the tests I gave him as a whole, I determined that Mr. Heatley was obviously intoxicated and affected by the alcoholic drink . . . . [And] he could not drive a motor vehicle in a safe manner."

Heatley, 70 Wn. App. at 576. Heatley was convicted. Heatley, 70 Wn. App. at 577. On appeal, we held that Officer Evenson's testimony regarding Heatley's alcohol intoxication was admissible as lay opinion testimony based on his experience and observations. Heatley, 70 Wn. App. at 579-80. And because a lay witness may testify to a defendant's intoxication by alcohol, we also concluded Officer Evenson's testimony would have been admissible as expert testimony had he been qualified as an expert. Heatley, 70 Wn. App. at 580 ("[I]f a lay witness may express an opinion regarding the sobriety of another, there is no logic to limiting the admissibility of an opinion on intoxication when the witness is specially trained to recognize characteristics of intoxicated persons.").

But here, unlike in Heatley, Officer Hinson did not conduct *any* FSTs or other impairment tests. Instead, Officer Hinson relied solely on his general observations. More importantly, although intoxication by *alcohol* is a proper subject for lay—and thus expert—testimony, signs and symptoms of impairment by a specific category of drug is not. Indeed, as the court said in Baity, a DRE must base its opinion on the totality of the DRE 12-step evaluation "not on one element of the test," and "[w]hen in doubt, the DRE must find the driver is not under the influence." 140 Wn.2d at 6. It follows that Officer Hinson—who was

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[5] Heatley was decided before the widespread use of DRE protocol and our Supreme Court's decision in Baity.

not a DRE and therefore could not and did not perform *any* step of the DRE protocol—should not have been permitted to testify that Levesque was affected by CNS stimulants. In short, such testimony *does* concern a sophisticated and technical matter, and without DRE certification or other sufficient foundation for the specialized testimony, Officer Hinson's opinion as to the drug by which Levesque was affected is speculation. For these reasons, Heatley and other cases involving alcohol intoxication do not control here. See, e.g., State v. Lewellyn, 78 Wn. App. 788, 794, 895 P.2d 418 (1995) (holding that "[i]t is well settled in Washington that a lay witness may express an opinion regarding the level of intoxication of another"), aff'd State v. Smith, 130 Wn.2d 215, 922 P.2d 811 (1996). Therefore, the City's argument fails.

The City also relies on Montgomery for the proposition that Officer Hinson's testimony was the proper subject of a lay opinion. In Montgomery, the court cited Heatley for the proposition that "[a] lay person's observation of intoxication is an example of permissible lay opinion." 163 Wn.2d at 591. But, as discussed, Heatley pertained to *alcohol* intoxication. As discussed, this principle does not extend to the testimony at hand because unlike the effects of a class of drugs, "[t]he effects of alcohol 'are commonly known and all persons can be presumed to draw reasonable inferences therefrom'." Heatley, 70 Wn. App. at 580 (quoting State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985)). A lay witness does not need an individual's BAC to discern that the individual is stumbling, smells of alcohol, and therefore is intoxicated. But there are not ordinary or obvious cues by which a lay witness can determine that an individual

is impaired by a particular class of drugs. Likewise, while the DRE protocol includes observation as a step, there are no observations, or ordinary or obvious cues, that, alone, can tell the officer the specific drug an individual ingested or if they are impaired. Thus, an officer can describe that an individual was shaky or sweaty, or had dilated or constricted pupils, but an officer may not comment on the drug class by which an individual is affected based solely on those observations. Therefore, the principle cited in Montgomery is distinguishable and does not control.

The City's reliance on cases where officers identified substances or offered perspectives on crime scenes is similarly misplaced. See State v. Hernandez, 85 Wn. App. 672, 678, 935 P.2d 623 (1997) (officer opinion that substance was cocaine); State v. Russell, 125 Wn.2d 24, 71, 73, 882 P.2d 747 (1994) (detective opinion on typicality of murder crime scenes); State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993) (officer opinion that substance was semen); State v. Ferguson, 100 Wn.2d 131, 141, 667 P.2d 68 (1983) (lay witness opinion that substance was semen); Kunze, 97 Wn. App. at 857-58 (law enforcement officers' opinions on murder crime scene). None of these cases involved the type of testimony at issue here. And as discussed, this type of testimony requires specialized knowledge or experience for an expert opinion. Therefore, we are unpersuaded.

In sum, a witness must have the specialized or technical knowledge, skill, training, or education, or sufficient experience required under ER 702 to opine that an individual is affected by a particular class of drug. Thus, we hold that

because Officer Hinson was not DRE certified, did not complete any of the DRE steps, and lacked otherwise sufficient experience or training, the trial court abused its discretion by admitting Officer Hinson's opinion that Levesque's behavior was consistent with having taken a specific category of drugs, i.e., CNS stimulants.

Impermissible Opinion of Guilt

Because we conclude that Officer Hinson's testimony was otherwise inadmissible, we next review whether the testimony was an impermissible opinion on the ultimate issue of Levesque's guilt. The City contends that the testimony did not constitute an impermissible opinion of guilt. We disagree.

Under ER 704, "opinion testimony is not objectionable merely because it embraces an ultimate issue that the jury must decide." Quaale, 182 Wn.2d at 197. However, in general, "no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant 'because it invad[es] the exclusive province of the [jury].'" State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (alterations in original) (internal quotation marks omitted) (quoting Heatley, 70 Wn. App. at 577). "When opinion testimony that embraces an ultimate issue is inadmissible in a criminal trial, the testimony may constitute an impermissible opinion on guilt." Quaale, 182 Wn.2d at 197. We consider the circumstances surrounding the case to determine whether the testimony was an impermissible opinion of guilt, "including the following factors: '(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense,

and (5) the other evidence before the trier of fact.'" Montgomery, 163 Wn.2d at 591 (internal quotation marks omitted) (quoting Demery, 144 Wn.2d at 759). But some testimony is "clearly inappropriate for opinion testimony in criminal trials, including . . . expressions of personal belief[ ] as to the defendant's guilt." Quaale, 182 Wn.2d at 200. The trial court's admission of such testimony may result in a constitutional error and support reversal. Quaale, 182 Wn.2d at 201-02.

In Quaale, State Patrol Trooper Chris Stone pulled Ryan Quaale over after Quaale attempted to elude him. 182 Wn.2d at 194. Trooper Stone smelled alcohol, performed an HGN test on Quaale, and observed that Quaale's eyes bounced and had difficulty tracking stimulus. 182 Wn.2d at 194. The State charged Quaale with a DUI, and at trial, Trooper Stone testified that "'[t]here was no doubt that [Quaale] was impaired'" by alcohol. Quaale, 182 Wn.2d at 195. The court concluded that Trooper Stone's testimony constituted an impermissible opinion of guilt because Trooper Stone testified as to the defendant's specific level of intoxication by referring to him as "impaired":

> The trooper's testimony that Quaale was "*impaired*" *parroted the legal standard contained in the jury instruction definition for "under the influence.*" The word "impair" means to "diminish in quantity, value, excellence, or strength." Thus, the trooper concluded that alcohol diminished Quaale to such an appreciable degree that the HGN test could detect Quaale's impairment.

Quaale, 182 Wn.2d at 200 (emphasis added) (citation omitted). The court reasoned that "the conclusion that the defendant was impaired rests on the premise that the defendant consumed a sufficient level of intoxicants to be impaired" and that "the alcohol consumed impaired the defendant, which is the

legal standard for guilt." Quaale, 182 Wn.2d at 199.

The court's decision in Quaale is instructive for two reasons. First, the testimony by the trooper in Quaale is nearly identical to Officer Hinson's. In Quaale, Trooper Stone testified that there was "no doubt that [Quaale] was impaired" by alcohol. 182 Wn.2d at 195. Here, Officer Hinson testified that Levesque was "definitely impaired" by drugs. Second, the relevant jury instruction in Quaale was substantially identical to the one used here. In Quaale, the jury was instructed that "'[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*.'" 182 Wn.2d at 200 (emphasis added). Here, the instruction stated, "A person is under the influence of or affected by the use of a drug if the person's ability to drive a motor vehicle is *lessened in any appreciable degree*." (Emphasis added.)

Quaale controls here. Like in Quaale, the primary issue before the jury was whether Levesque drove while under the influence of drugs. And like Trooper Stone, Officer Hinson opined that drugs affected Levesque to such an appreciable degree that Officer Hinson's observations alone could determine that Levesque was impaired. Finally, like in Quaale, Officer Hinson's testimony parroted the legal standard of guilt, which is properly decided by the jury. Thus, Officer Hinson impermissibly opined as to Levesque's guilt.

The City relies on Heatley for the proposition that Officer Hinson's testimony was not an improper opinion on guilt. The City's reliance is misplaced. In Heatley, the arresting officer testified that Heatley "'was obviously intoxicated

and affected by the alcoholic drink . . . [and unable to] drive a motor vehicle in a safe manner.'" 70 Wn. App. at 576. There, the testimony was not an impermissible opinion on defendant's guilt because the testimony was admissible lay opinion based on personal observations and merely supported a conclusion of Heatley's guilt. Heatley, 70 Wn. App. at 580. We emphasized that the officer did *not* parrot the legal standard. Heatley, 70 Wn. App. at 581. Furthermore, in Quaale, the court distinguished Heatley because "[u]nlike 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." 182 Wn.2d at 201. The same is true here. Thus, Heatley is distinguishable and not persuasive.

Harmless Error

The City claims that even if the trial court erred by admitting Officer Hinson's testimony, the error was harmless, and therefore, the superior court erred in reversing Levesque's conviction. We disagree.

Because Officer Hinson's testimony invaded the province of the jury to determine Levesque's guilt and thus violated his constitutional right to a fair trial, "we apply the constitutional harmless error standard." State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009). In a constitutional harmless error analysis, we presume prejudice. Hudson, 150 Wn. App. at 656. A "[c]onstitutional 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." Quaale, 182 Wn.2d at 202; Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144

L. Ed. 2d 35 (1999).

For the following reasons, we conclude that the City has not established that any reasonable jury would have convicted Levesque. First, "[a]n officer's live testimony offered during trial, like a prosecutor's statements made during trial, may often 'carr[y] an aura of special reliability and trustworthiness'" and is "especially likely" to influence a jury. Demery, 144 Wn.2d at 762, 763 (second alteration in original) (internal quotation marks omitted) (quoting United States v. Espinosa, 827 F.2d 604, 613 (9th Cir. 1987)). Officer Hinson was the arresting officer, and he expressed certainty as to his conclusion of Levesque's impairment by drugs. Moreover, the City bolstered Officer Hinson's testimony with evidence of his experience and training, portraying particular reliability. Additionally, Officer Hinson testified first, thus framing all other evidence considered by the jury.

Second, the jury could have reached another rational conclusion. Specifically, Levesque's physician, Dr. Mayer, testified that shock can result in symptoms including "[l]ow blood pressure, rapid heart rate, fear, [and] sweating." Additionally, prior to the accident, Dr. Mayer treated Levesque for neurosyphilis and injuries resulting from earlier car accidents. She testified that neurosyphilis can cause "blurry vision." And Dr. Mayer noticed Levesque did have some word finding difficulties. She also diagnosed Levesque with postconcussion syndrome—which can cause memory loss and speech problems—and prescribed amitriptyline, a medication for postconcussion syndrome. Amitriptyline can cause grogginess and mental fogging, and can make an

individual drowsy. Dr. Mayer also testified that Levesque has a history of neurosyphilis, which may cause blurry vision and loss of motor functions. In short, Dr. Mayer's testimony may have persuaded the jury that there was another explanation for Levesque's behavior and that his ability to drive was not lessened to an appreciable degree by the drugs in his system.[6]

The additional testimonies of Gingras, Captain Franks, and Officer Coe do not establish beyond a reasonable doubt that any reasonable jury would have convicted Levesque. Captain Franks testified that Levesque's heart rate was up, he had an altered state of consciousness, and his conversational and motor skills were impaired. Captain Franks also testified that Levesque "'show[ed] behavior consistent with recreational drug use.'" But Captain Franks did not claim Levesque was affected by or, more specifically, impaired by drugs or what category of drug. Officer Coe testified that Levesque was shaky and sweaty, and that sweating indicates the potential for stimulant consumption. Gingras testified regarding the accuracy of the lab report and that the levels of methamphetamine and amphetamine in Levesque's system were higher than therapeutic levels. However, even Gingras could not determine whether the level of methamphetamine in Levesque's blood impaired him. Specifically, during closing arguments, the City noted that Gingras testified that "he can't say whether someone was impaired at .55" mg/L of methamphetamine in their system.

The City contends that Officer Hinson's statements are similar to those

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[6] Indeed, had the DRE protocol been performed, the DRE may have been able to rule out other medical conditions. See Baity, 140 Wn.2d at 6 ("In theory, the DRE protocol enables the DRE to rule in (or out) many medical conditions, such as illness or injury, contributing to the impairment.").

admitted in State v. Smith, 67 Wn. App. 838, 841 P.2d 76 (1992). In Smith, the trial court erroneously admitted without correction statements regarding a testifying officer's awards and commendations. 67 Wn. App. at 840, 845. We concluded that the State used the testimony to "improperly elevate [the officer's] character" but that the error was harmless. Smith, 67 Wn. App. at 845. Here, Officer Hinson made a statement that directly implicated Levesque's guilt; the statement did not merely bolster his testimony. Thus, Smith is distinguishable.

For these reasons, the City cannot establish beyond a reasonable doubt that any reasonable jury would have found Levesque guilty absent Officer Hinson's testimony. Therefore, the error was not harmless.

We affirm.

WE CONCUR:

APPENDIX B

Court

FILED/RECEIVED
OCT 18 2016
COURT 1001

IN THE MUNICIPAL COURT OF THE CITY OF SEATTLE

CITY OF SEATTLE,

Plaintiff,

vs.

JEFFERY LEVESQUE,

Defendant.

No. 605863

TRIAL BRIEF

I. FACTUAL STATEMENT

The Seattle City Attorney's Office charged Mr. Levesque with driving under the influence, which allegedly occurred on April 29, 2015. Mr. Levesque entered a plea of not guilty.

II. POTENTIAL WITNESSES

1. Jeffery Levesque
2. ~~Jack James~~ not calling
3. Dr. Katherine Mayer
4. Defense cross-endorses all government witnesses and asks the Court to order government witnesses released by the Court to be available and subject to recall by the Defense.

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III. TIME ESTIMATES

The Defense estimates that this trial will last approximately three court days.

IV. MOTIONS

1) **Exclude and Suppress testimony of Detective Ron Sanders, Christin Derig, SFD Captain Tracy Franks and Martin Hernandez Mejia:** To date Mr. Levesque and Defense counsel has complied with CrRLJ 4.7(a)(1)(i). The City has failed to provide Defense Counsel with, "the substance of any oral statements of such witnesses." If the Court should elect to deny to Exclude and Suppress the testimony of the above referenced witnesses, the Defense moves for a continuance so that Defense interviews can be conducted.

[ ] Granted
[X] Denied
[ ] Reserved

2) **Exclude Witnesses/Prohibit Discussion of Testimony**: Mr. Levesque moves to exclude all witnesses from the courtroom during trial except for when actually testifying and requests that witnesses be instructed to refrain from discussing with anyone the questions asked or their testimony at any point during the course of the trial, either directly or indirectly. ER 615.

[X] Granted
[ ] Denied
[ ] Reserved

3) **Disclosure of Discovery Produced During Course of Trial**: Mr. Levesque demands that the government comply with ongoing discovery obligations pursuant to CrRLJ 4.7 and disclose to the defense the subject(s) of any conversations or discussions related to Mr. Levesque's case that take place during the course of trial with any witnesses for the government.

[X] Granted
[ ] Denied
[ ] Reserved

4) **Police Reports, Notes & Documents at Witness Stand**: Mr. Levesque moves to prevent any witness from taking any notes, police reports, documents or other materials to the

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witness stand while testifying until the proper foundation for those materials has been laid. ER 612; State v. Little, 57 Wn.2d 516, 358 P.2d 120 (1961).

Can't use unless need to refresh

[ ] Granted
[ ] Denied
[X] Reserved

5) **Rebuttal/Impeachment Witnesses**: Mr. Levesque moves to require disclosure of potential rebuttal and impeachment witnesses. Failure to disclose rebuttal and impeachment witnesses deprives the defendant of his right to effective assistance of counsel because these witnesses cannot be challenged in a meaningful way. CrRLJ 4.7(a)(1)(i). While the government is not required to disclose a true rebuttal witness in advance of trial, the government is "not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of the defendant's case." State v. White, 74 Wn.2d 386, 395, 444 P.2d 661 (1968).

[ ] Granted
[X] Denied
[ ] Reserved

6) **Disclosure of Government Presentation Materials**: Mr. Levesque requests advance notice of, and an opportunity to review, any multi-media or other demonstrative materials intended to be used by the government at any point during trial. This includes written or printed demonstrative exhibits, PowerPoint slides, and any other multimedia or audio/visual materials. State v. Walker, 182 Wn.2d 463, 341 P.3d 976 (2015).

ICR Provided →

[ ] Granted
[X] Denied
[ ] Reserved

7) **Witnesses Be On-Call**: Mr. Levesque moves to allow defense witness Dr. Katherine Mayer to be on-call.

[X] Granted
[ ] Denied
[ ] Reserved

8) **Prior Acts or Misconduct**: Mr. Levesque moves to preclude any testimony or reference to his prior acts including prior felonies and prior DUI convictions. The Defense specifically moves for the City to inform their testifying Officers that no mention of Mr. Levesque's driving history and criminal history be made as this would be unfairly

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prejudicial and not assist the trier of fact in establishing whether Mr. Levesque was under the influence of intoxicants on the day in question.To date, the City has given no notice of intent to admit evidence of his prior acts. Comments or questions that elicit testimony about Mr. Levesque's prior acts or misconduct are improper comments upon the defendant's character. ER 404(b), ER 609. Evidence of other crimes or misconduct is not admissible to prove character of the defendant. ER 404(b), ER 609. Such restrictions apply even if the evidence in question is in the nature of a confession or admission by the defendant. State v. Perrett, 86 Wn. App. 312, 935 P.2d 426 (1997). Under ER 404(b) evidence of other crimes is excluded if the prejudicial effect is even slightly more than the probative value. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

Misconduct for which the defendant has been charged is likely to be more prejudicial than probative. State v. Bowen, 48 Wn. App. 187, 738 P.2d 316 (1987). ER 609 limits admissibility of prior crimes to: (1) crimes punishable by death or imprisonment for over 1 year when the court determine that the probative value outweighs the prejudice; and (2) crimes involving dishonesty or false statement occurring within in a 10 year time limitation.

Evidence of Mr. Levesque's prior acts is not relevant to the charged crime and could only be used as character evidence. Therefore, any reference to such acts should be excluded.

It won't present 404(b)
609 Provided — It may use
(Case) — Sno Co - 1A Traffic + PSP (2x)

[ ] Granted
[ ] Denied
[X] Reserved

9) **Motion to Exclude Mention of Traffic Infraction:** The Defense moves to exclude all officer testimony and submission of evidence that references any infractions that may have been issued against Mr. Levesque during this incident.

[ ] Granted
[X] Denied
[ ] Reserved

10) **Motion to Exclude Mention of injured party due to accident:** The Defense moves to exclude any and all video including 7753@20150429153919.mpg and its rear facing view equivalent between 4:30 and 5:00 and its audio equivalents. During this portion of the video an unknown individual indicates to Officer Hinson that an individual will be transported to Harborview. Also at 17:34 to 18:12 Officer Hinson states, "you do realize you just injured someone" and other statements along those same lines. These statements are unrelated to the charged crime and are unfairly prejudicial to Mr. Levesque.

Hearsay (SIXTH) out

[ ] Granted
[ ] Denied

Reserved

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[ ] Reserved

11) **Motion to Exclude Mention of Mr. Levesque's lack of car insurance:** The Defense moves to exclude video 7753@20150429153919.mpg and its rear facing view equivalent between 13:17 to 16:00, and 18:55 to 19:30 and its audio equivalents. During this period officers mention Mr. Levesque's lack of insurance and his possible warrant for military desertion. A further statement lists that Mr. Levesque may have alcohol and drug addiction. This statement is both unrelated to the charged crime and are unfairly prejudicial to Mr. Levesque.

[X] Granted
[ ] Denied
[ ] Reserved

12) **Motion to Exclude Mention of "Patrick":** The Defense moves to exclude video 7753@20150429153919.mpg and its rear facing view equivalent between 16:08 and 16:40. During this period of the video, Officer Hinson interrogates Mr. Levesque for the purposes of ascertaining whether a warrant is active for his arrest, one is not. In the audio Officer Hinson states, "Who is Patrick" and then states, "I have a feeling you are not telling me the truth. Officer Hinson at 17:29 then says, "I know that you are lying." These statements are both unrelated to the charged crime and are unfairly prejudicial to Mr. Levesque.

[X] Granted
[ ] Denied
[ ] Reserved

13) **Motion to Exclude Mention of Prior Arrest:** The Defense moves to exclude video 7753@20150429153919.mpg and its rear facing view equivalent between 11:26 and 11:50 and its audio equivalents. During this portion of the video Officer Hinson asks Mr. Levesque if he has been arrested before. Mention of prior arrest and guilt is also mentioned at 1:29 of 7753@20150429185016. Mr. Levesque answers honestly in the affirmative. Defense moves to exclude this audio as it would be unfairly prejudicial.

[X] Granted
[ ] Denied
[ ] Reserved

14) **Motion to Exclude Mention of Prior Drug Use:** The Defense moves to exclude video 7753@20150429153919.mpg and its rear facing view equivalent between 21:10 and 21:20 and its audio equivalents, Officer Hinson states that Mr. Levesque has a history of prior

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grant Grant

narcotics use and that there are needles in the car. Defense moves to exclude this audio as it would be unfairly prejudicial and is not relevant to the case at hand.

It can exist if Syringe caps found.

[X] Granted
[ ] Denied
[ ] Reserved

15) **Defense Failure to Testify**: Mr. Levesque moves to preclude the government or any of its witnesses from commenting on Mr. Levesque failure to testify. It is improper for the government or their witnesses to mention, comment, question, argue, or make any other reference whatsoever regarding the defendant's failure to testify. Any such reference, direct or otherwise, violates the defendant's right to remain silent under the Fifth Amendment to the U.S. Constitution and Art. I, Section 9 of the Washington Constitution. Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965); State v. Ashby, 77 Wn.2d 33, 459 P.2d 403 (1969).

[X] Granted
[ ] Denied
[ ] Reserved

16) **Defense Failure to Call Witnesses**: Mr. Levesque moves to prohibit any reference by the government or its witnesses to Mr. Levesque' failure to call witnesses. No mention, comment, question, argument, or other reference whatsoever may be made by the government or their witnesses in the presence of the jury regarding the defendant's failure to call witnesses. A defendant has no duty to present any evidence. It is not proper for the government to comment on a failure of the defense to do what it has no duty to do. State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986).

[X] Granted
[ ] Denied
[ ] Reserved

17) **Defense Failure to Produce Evidence Regarding Alcohol Level or Other Evidence**: Mr. Levesque moves to prohibit any reference by the government or its witnesses to his failure to produce evidence regarding an alcohol level or any other evidence. No mention, comment, question, argument or other reference whatsoever may be made by the government or their witnesses in the presence of the jury regarding the defendant's failure to produce evidence, including regarding alcohol level in the form of a blood test or other method. A defendant has no duty to present any evidence. The government bears the entire burden of proving each element of its case beyond a reasonable doubt. State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986); State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546 (1990).

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[ ] Granted
[ ] Denied
[ ] Reserved

18) **Witness Testimony Regarding Awards/Commendations/Certifications**: Mr. Levesque moves to preclude any government witness from testifying about awards, certifications or commendations received. Without proper foundation and an individualized determination of relevance, such testimony is inadmissible as it is not probative of the witness's truthfulness, is particularly likely to taint the jury and serves only to improperly bolster the witnesses' testimony. State v. Smith, 67 Wn. App. 838, 842-843, 841 P.2d 76 (1992).

except nurse & toxicologist

[X] Granted
[ ] Denied
[ ] Reserved

19) **Confrontation/ Testimonial Statements of Technicians and Toxicologists**: Mr. Levesque moves to prohibit the government and/or its witnesses from introducing any out-of-court testimonial statements or documents unless the declarant testifies and is available to be cross-examined by the defendant in open court. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004).

Specifically, the defense moves to exclude evidence that the simulator solution and/or thermometer were certified unless all of the parties necessary to the certifications are present in court and subject to cross examination. The Confrontation Clause does not permit the prosecution to introduce a laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2710, 180 L.Ed.2d 610 (2011). It is not enough that the accused be allowed to question the witness's colleague simply because the court believes it is "fair enough." *Id* at 2716. In short, if the Court admits out-of-court testimonial statements- in this case in the form of laboratory reports- Mr. Levesque has the right to be confronted with the individual(s) who made those statements. *Id.*

N/A

[ ] Granted
[ ] Denied
[ ] Reserved

20) **Preclude Testimony Regarding State of Mind**: Mr. Levesque moves to prohibit government witnesses from testifying regarding Mr. Levesque state of mind. Such testimony is speculative and an impermissible opinion on guilt. State v. Farr –Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999) (Officer's opinion testimony regarding the

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defendant's state of mind as to eluding police should not have been admitted at trial); State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996)(Officer's testimony that defendant was being evasive in response to questioning and was being a "smart drunk" was an impermissible opinion on guilt.).

[X] Granted
[ ] Denied
[ ] Reserved

21) **Reference to Locating of Syringe Caps:** Mr. Levesque moves to preclude any reference by any city witness regarding the locating of syringe caps in Mr. Levesque's vehicle. From the Defense's review of discovery, the alleged syringe caps were not seized from Mr. Levesque's motor vehicle. As mention of syringe's carry a stigma of being related to illicit drug use, their mention would be unfairly prejudicial. Defense requests that city witnesses be specifically instructed to not mention the syringe caps.

[ ] Granted
[X] Denied
[ ] Reserved

22) **Preclude Testimony Requiring Speculation and Assumption**: Mr. Levesque moves to limit the testimony of law enforcement officers to facts observed and preclude testimony regarding speculation and assumptions. For example, it is not uncommon for officers to make assertions and statements such as "the defendant could have hit another car." Such testimony is not factual and is intended to appeal to the jurors' emotions. ER 401, 403.

[X] Granted
[ ] Denied
[ ] Reserved

23) **Preclude Testimony Regarding Sharing Road with Impaired Drivers/Defendant**: Mr. Levesque moves to preclude statements by the government or its witnesses and argument regarding the dangers of "sharing the road" (or family members sharing the road with) impaired drivers or the defendant. Such comments have no probative value, are unduly prejudicial and designed to inflame the fears of the jurors. ER 403.

[X] Granted
[ ] Denied
[ ] Reserved

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24) **Comments Regarding Prior Arrests/Investigations by Officer**: Mr. Levesque moves to prohibit testimony or comment regarding the number of people the officer has arrested for DUI and/or the number of people the officer has stopped on suspicion of DUI. ER 401, 402 and 403. Such testimony lacks relevance and any slight probative value is substantially outweighed by the danger of unfair prejudice in that it suggests a ratio of stops to arrests. This ratio creates a prejudicial inference of reliability on the officer's conclusion that the defendant's ability to drive was appreciably affected by alcohol at the time of the stop and arrest. This type of testimony has the effect of improperly bolstering witness credibility and lacks relevance to Mr. Levesque's case. Any slight probative value to this evidence is substantially outweighed by the danger of unfair prejudice. ER 401, 402, 403.

[ ] Granted
[X] Denied
[ ] Reserved

25) **Officer Opinion on Ultimate Issue of Fact**: Mr. Levesque moves to suppress any opinion testimony that the defendant's ability to drive was lessened to any appreciable degree by alcohol or drugs, that the defendant was impaired due to alcohol or drugs, or other words that express the government's opinion on the ultimate issue of fact for the jury. No witness, lay or expert, may offer an opinion as to the guilt or innocence a defendant, whether by direct statement or inference. ER 704; State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This rule is violated by the admission of evidence which even indirectly indicates a witness's opinion as to guilt. State v. Quaale, 182 Wn.2d 191, 340 P.3d 213 (2014). Admission of opinion testimony that an accused is guilty is presumed to be prejudicial. State v. Haga, 8 Wn. App. 481, 507 P.2d 159 (1973). A law enforcement officer's testimony regarding the ultimate issue of fact for a jury is "especially prejudicial because the officer's testimony often carries the special aura of reliability." State v. King, 167 Wn. 2d 324, 331, 219 P.3d 642 (2009).

This is ok

[X] Granted
[ ] Denied
[ ] Reserved

26) **Consistency With Other Impaired Persons**: Mr. Levesque moves to prohibit any testimony or argument that his behavior or appearance was consistent with impaired persons the officer has stopped, arrested or observed in the past. Such testimony lacks

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relevance and any slight probative value is substantially outweighed by the danger of unfair prejudice. ER 401, 402, 403.

[X] Granted
[ ] Denied
[ ] Reserved

27) **Injury Accidents and Alcohol Levels**: Mr. Levesque moves to preclude testimony from any government witness regarding injury accident studies related to methamphetamine/amphetamine levels. Such testimony is prejudicial and inflammatory and not relevant to the elements in Mr. Levesque's case. ER 403. In addition, the City has not provided any notice of intent to qualify officers as experts.

[X] Granted
[ ] Denied
[ ] Reserved

28) **Prohibit Testimony and Video of the Handcuffing, Arresting, and/or Jailing of Mr. Levesque**: Mr. Levesque moves to prohibit testimony and video referencing or showing his arrest, handcuffing, or booking into jail. Such evidence is highly prejudicial and not relevant. ER 402. "Arrests and mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are usually irrelevant and highly prejudicial." Tegland, Karl B., Evidence Law & Practice, 4th ed. 1999, § 404.11 at 404.

Plays video — 31.42 min RV
Probative → Silent

[ ] Granted
[X] Denied
[ ] Reserved

29) **Officer as Expert**: Mr. Levesque moves to limit the testimony of officers to personal observations. The government has not provided Mr. Levesque with notice that they intend to qualify any officers as an expert witnesses on any subject. Mr. Levesque asks that the Court require officers to confine their testimony to helpful firsthand observations and to *specifically prohibit medical opinion testimony about the effect methampheatime/amphetamine would have on a person.* Allowing such testimony would cast their opinion in a scientific aura in violation of ER 702. City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993); State v. Baity, 140 Wn.2d 1, 991 P.2d 1151 (2000); United States v. Horn, 185 F.Supp.2d 530 (D.Md 2002).

[X] Granted
[ ] Denied
[ ] Reserved

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30) **Hearsay Evidence to Show Police State of Mind/Procedure**: Mr. Levesque moves to preclude hearsay evidence elicited to show an officer's state of mind or explain why the police proceeded in the investigation as they did. ER 802; State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990)(hearsay evidence admitted to show state of mind of officer at the time of investigation improperly admitted because not relevant as the legality of the officer's actions were not being challenged.). It is improper to admit otherwise irrelevant or hearsay evidence to "explain" police procedures. State v. Wicker, 66 Wn. App. 409, 412, 832 P.2d 127 (1992). An officer's state of mind in reacting to information received from dispatch has been held not relevant. State v. Aaron, 57 Wn. App. 277, 280, 787 P.2d 949 (1990).

[X] Granted
[ ] Denied
[ ] Reserved

31) **Use of Given Names** Mr. Levesque moves to require the government and its witnesses to make reference to Mr. Levesque by his given name, not as the "Defendant," "Subject," "Suspect," or other similar title. While Mr. Levesque may have been given various labels by the criminal justice system, she has a name and use of that name is less likely to create fears, passions, or prejudices than that of labels.

Mr. Levesque further moves to preclude the government and its witnesses from referring to any individual or entity as the "victim." Likewise, the use of the word "victim" presumes that a crime has been committed and violates the presumption of innocence and is prejudicial. The limit on labels and name-calling serves to increase the civility of this proceeding.

[ ] Granted
[X] Denied
[ ] Reserved

32) **Government Misconduct –Personal Opinion of Defendant's Guilt**: Mr. Levesque moves to preclude the government from expressing or implying a personal opinion as to his guilt. State v. Robinson, 44 Wn. App. 611, 722 P.2d 1379 (1986); RPC 3.4(f)."[S]uch comments can convey the impression that evidence not presented to the jury, but known to the government, supports the charges against the defendant and can thus jeopardize the defendant's evidence presented to the jury; and the government's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." United States v. Young, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985).

[X] Granted
[ ] Denied
[ ] Reserved

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33) **Government Misconduct -Probable Cause**: Mr. Levesque moves to preclude the government from expressing or implying that "probable cause" has already been found and/or established in the case. State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993).

[X] Granted
[ ] Denied
[ ] Reserved

34) **Advise Witnesses**: Mr. Levesque moves to require the government to specifically advise all its witnesses of all applicable pretrial rulings and motions in limine. The purposes of obtaining pre-trial rulings on evidentiary issues are to ensure the defendant's right to a fair trial and to preserve the integrity of the fact finding process. Such rulings would be meaningless if not communicated in a timely manner to the witnesses. Tegland, 5A Washington Practice: Evidence 266 (3rdEd. 1989); United States v. Buchanan, 787 F.2d 477, 485 (10thCir. 1986); United States v. Johnston, 578 F.2d 1352, 1355 (10thCir.), cert. den. 439 U.S. 931 (1978).

[X] Granted
[ ] Denied
[ ] Reserved

35) **Reservation of Additional Motions**: Mr. Levesque reserves the right to assert additional motions both prior to and during trial, depending upon the nature of the evidence presented.

[X] Granted
[ ] Denied
[ ] Reserved

VII. CONCLUSION

This memorandum has been prepared solely to acquaint the trial court with the issues as they will be presented at trial.

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DATED this 18 day of Oct 201_.

Arthur T. Chiam, WSBA #46765

Attorney for Defendant

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I declare that on May 12, 2020, I caused to be served:

ANSWER TO PETITION FOR REVIEW

To: Miriam Norman, Seattle City Attorney's Office, by e-mail delivery.

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

Signed and dated this 12th day of May, 2020, at Seattle, WA.

_/s/ Whitney H. Sichel_____
Whitney H. Sichel, WSBA #44474
Attorney for Respondent Jeffrey Levesque
King County Department of Public Defense—TDA Division

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

May 12, 2020 - 4:00 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98415-8
Appellate Court Case Title:	City of Seattle v. Jeffrey Levesque

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