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**Supreme Court No.** 98415-8
**Court of Appeals No. 78304-1-I**

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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**CITY OF SEATTLE**,
Petitioner,

**vs.**

**JEFFREY LEVESQUE,**
Respondent.

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# PETITION FOR REVIEW

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## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ……………………………………………..…ii

I. **IDENTITY OF PETITIONER**…………………………………1

II. **ASSIGNMENTS OF ERROR**…………..……………………1-2

II. **STATEMENT OF THE CASE**………………………………2-5

III. **ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**…..5
- A. The City's Petition for Review Should be Granted as the Issues Presented are of Substantial Public Interest………. 6
- B. Division I's Interpretation of ER 103(a) Conflicts with Several Appellate Decisions in Washington……………... 9
- C. Division I's Holding that Only a DRE May Provide an Opinion in Drug-DUI Cases and Limiting Relevant Opinion Testimony Conflicts with Several Appellate Decisions in Washington.................................................13

IV. **CONCLUSION**………………………………………………….20

V. **APPENDIX**
- A. *City of Seattle v. Levesque*, No. 78304-1-I (March 16, 2020)

## TABLE OF AUTHORITIES

**TABLE OF CASES** Page

**Washington Cases**

*A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wn. App. 511, 105 P.3d 400 (2004). ………………………………………………………… 11

*City of Bellevue v. Kravik*, 69 Wn. App. 735, 850 P.2d 559 (1993). ...….11

*City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). …………………………6, 16, 17, 19, 20

*Fenimore v. Donald M. Drake Construction Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976). ……………………………………………………...….11

*State v. Austin*, 34 Wn. App. 625, 662 P.2d 872, 874 (1983), aff'd sub nom. *State v. Koloske*, 100 Wn.2d 889, 676 P.2d 456 (1984). ……...10, 11

*State v. Baity*, 140 Wn.2d 1, 991 P2d. 1151 (2000). …….6, 13, 14, 15, 19

*State v. Brooks*, 20 Wn. App. 52, 579 P.2d 961 (1978). ……………..….11

*State v. Fisher*, 74 Wn. App. 804, 874 P.2d 1381 (1994), *aff'd in part, vacated in part sub nom. State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). ……………………………………………………..……19

*State v. Goggin,* 185 Wn. App. 59, 339 P.3d 983 (2014), *review denied,* 182 Wn.2d 1027, 347 P.3d 458 (2015). …………….………..15

*State v. Hernandez*, 85 Wn. App. 672, 935 P.2d 623 (1997). …….……..17

*State v. Hubbard,* 37 Wn. App. 137, 679 P.2d 391 (1984), *rev'd on other grounds,* 103 Wn.2d 570, 693 P.2d 718 (1985). ……………………….. 11

*State v. Kirkman,* 159 Wn.2d 918, 155 P.3d 125 (2007). ....................9, 17

*State v. Lewellyn*, 78 Wn. App. 788, 895 P.2d 418 (1995), *affirmed*, 130 Wn.2d 215 (1996). ……………………………………………….…….16, 19

*State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). ...6, 16, 17, 19

*State v. Nelson*, 72 Wn.2d 269, 432 P.2d 857 (1967). …………………..16

*State v. Ortiz,* 119 Wn.2d 294, 831 P.2d 1060 (1992). …………...……..15

*State v. Perez-Cervantes*, 141 Wn.2d 468, 6 P.3d 1160 (2000). ………....9

*State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). …………………..13

*State v. Powell,* 126 Wn.2d 244, 893 P.2d 615 (1995). …………………15

*State v. Quaale,* 182 Wn.2d 191, 340 P.3d 213 (2014). …………….17, 18

*State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). …………………………………………..….13, 20

*State v. Sullivan,* 69 Wn. App. 167, 172, 847 P.2d 953 (1993). ……..…12

*State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011). ……………..20

*State v. Valdobinos,* 122 Wn.2d 270, 858 P.2d 199 (1993). …………..…15

*State v. Warren,* 134 Wn. App. 44, 138 P. 3d 1031 (2007). …………....16

*State v. Weber*, 159 Wn.2d 252, 149 P.3d 646 (2006). ……………12, 13

**STATUTORY AUTHORITY**

Laws of 1979, 1st Ex.Sess., ch. 176, § 1. ……………………………..…13

Laws of 1995, ch. 332, §§ 1; 19; 24. ……………………………………13

**COURT RULES AND OTHER AUTHORITIES**

ER 103 …………………………………………………………..……. 9

ER 701 ……………………………………………………………. 17

ER 702 ……………………………………………………… 13, 14, 15

ER 704 ……………………………………………………………… 16

RAP 2.5 ……………………………………………………….……..9

RAP 13.4 …………………………………………………...…..5, 6

RAP 10.3 …………..……………………………………………….10

2018 Annual Report of the IACP Drug Evaluation & Classification Program at 13; Available at: https://www.ghsa.org/sites/default/files/2019-10/2018%20DECP%20Annual%20Report.pdf (last visited April 6, 2020). …………………………………………………….………………8

Caseloads of the Courts DUI/Physical Control Activity; Year-to-Date; Washington Administration of the Courts, 2015-2019; available at: https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=Statewide&fileID=trend05 ;(last visited April 6, 2020); Year to date report is available at https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=y&tab=&fileID=rpt01 (last visited April 6, 2020). ……………………………………………...……………………7

*Census of State and Local Law Enforcement Agencies,* U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, 2008 report by Brian A. Reaves, Ph.D., BJS Statistician at 15; Available at: https://www.bjs.gov/content/pub/pdf/csllea08.pdf (last visited April 6, 2020); *See* 2018 Annual Report of the IACP Drug Evaluation & Classification Program at 13; Available at: https://www.ghsa.org/sites/default/files/2019-10/2018%20DECP%20Annual%20Report.pdf (last visited April 6, 2020) ……………………………………………………………………..8

Gamble, *The Motion in Limine: A Pretrial Procedure That Has Come of Age,* 33 Alabama L.Rev. 1, 16 (1981). …………………..…………10, 11

Karl B. Tegland, *Washington Practice*, *Courtroom Handbook on Washington Evidence* 111 (2018-2019 ed. 2018). …………….11

Marijuana Use, Alcohol Use, and Driving in Washington State at 1 (April 2018); Document may be found at http://targetzero.com/wp-content/uploads/2020/03/TargetZero2019_Overview_Lo-Res.pdf (last visited April 6, 2020). …………………………………………….…7, 8

## A. IDENTITY OF PETITIONER

The City of Seattle, Petitioner, by and through its attorney, Miriam Norman, respectfully requests that this Court review the published decision of the Court of Appeals in *City of Seattle v. Levesque*, No. 78304-1-I (March 16, 2020), a copy of which is attached as Appendix A.

## B. ISSUE PRESENTED FOR REVIEW

1. Does the Court of Appeal's decision that precludes a police officer, with first-hand knowledge of the events and significant training and experience in identifying drug impairment, from providing opinion testimony about the perceived impairment, conflict with case law and implicate matters of substantial public concern?
2. Is the Court of Appeal's decision that a trial court abuses its discretion by admitting opinion testimony, when training and experience qualifies an officer to provide opinion testimony, and Defendant lodges no timely objection as required by ER 103 inconsistent established case law?
3. The contemporaneous objection rule requires defendants to make a specific and timely objection to the admission of evidence. Does the Court of Appeal's decision that Defendant's untimely and ambiguous objection, to opinion testimony, preserved error for appellate review, conflict with established case law on waiver and

issue preservation?

4. An officer may provide an opinion that embraces the ultimate issue, if proper foundation has been laid and proper credentials have been testified to; does the Court of Appeal's decision that an officer's testimony that Defendant was "definitely impaired" is an improper opinion, conflict with case law on opinion testimony?

## B. STATEMENT OF THE CASE

The defendant, Levesque, was charged and convicted in Seattle Municipal Court with driving under the influence of drugs after a jury trial. In ruling on Levesque's motions in limine, the trial court allowed officers to testify, "…based on the totality of circumstances that the defendant was impaired."[1] RP II at 33-34.

The evidence at trial was that Seattle Police Officers Hinson and Coe arrested Mr. Levesque for DUI on April 29, 2015. Both officers testified they had training and experience in detecting impaired drivers, in identifying drug impairment, and engaging with individuals under the influence of certain drug categories, including stimulants. RP IV at 51, 22, 37-39, 41; RP III at 61. Officer Hinson testified that his training and experience included more than 40 hours of DUI specific training, focusing

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[1] Report of Proceeding Volume II is October 18, 2016, First Day of Trial.
Report of Proceeding Volume III is October 19, 2016, Second Day of Trial.
Report of Proceeding Volume IV is October 20, 2016, Third Day of Trial.

on alcohol and drugs; through daily contacts with individuals, he learned to recognize the signs of possible impairment and physical manifestations of driving impaired. RP III 22-24. He has arrested DUI-drug impaired individuals, he is familiar with drugs and those corresponding drug effects on the human body, and his training and experience taught him that a stimulant would cause certain observable effects. *Id.*

Officers observed that Levesque caused a crash, seemed confused as to how the crash occurred, and could not locate this phone despite it being obviously present. RP III at 42, 88. Hinson observed that Levesque had flushed skin, high body temperature, fidgetiness, and never stopped moving. RP III at 42. Hinson also observed small red plastic caps in the vehicle that were consistent with syringe caps. Levesque displayed an altered state of mind, mood swings, and was argumentative. RP III at 43, 42. In addition, he was crying, had poor coordination, and continued sweating in the back of the patrol vehicle. RP III at 71, 42. This led Officer Hinson to believe that Levesque was under the influence of a stimulant. RP III at 41. Officer Hinson testified that his opinion was that Levesque "was definitely impaired at the time of the accident." RP III at 51. Levesque did not object when the officer's opinion was given. *Id.*

Officer Coe observed Levesque was very shaky and sweaty, even though it was windy and cold, and he was wearing a tank top and shorts.

RP III at 88. Levesque never objected to her testimony. RP III 86-105.

Levesque never objected to Seattle Fire Department Captain Franks' expert testimony that Levesque's heart rate, respiratory, and blood pressure were all a bit "up." RP III at 139. Levesque denied that he had been in a collision, which Captain Franks found odd. RP III at 144, 140. Captain Franks testified he observed that Levesque had an altered state of consciousness, was not making sense in his conversation, his motor skills were impacted, he could not open a car door, and conversation was very erratic. RP III at 140, 142. His report concluded, "Patient showing behavior consistent with recreational drug use." RP III at 144.

Levesque objected to foundation and relevance during forensic toxicologist Andrew Gingras's expert testimony about toxicology and methamphetamine but most substantive testimony came in with no objection.[2] Gingras testified about extensive training, education, and experience that qualifies him as a forensic toxicologist. RP IV at 17-18. Gingras testified that he analyzed Levesque's blood and found a high toxic level of methamphetamine and amphetamine. RP IV at 26, 7, 17-18. Gingras explained that methamphetamine is a central nervous system (CNS) stimulant, and someone under the influence of it would exhibit risky behavior, rapid flight of ideas, excitement of the body and motor

function (more body activity), constant movement, inability to focus on one thing for a prolonged period, rapid shifts in focus, fast speech, confusion, increased body temperature and sweating, and an inability to safely drive. RP IV at 19, 19-24. All levels of methamphetamine could impair, and Levesque had toxic levels of methamphetamine in his system. RP IV at 29, 26. Levesque did have his physician testify that, after the crash, he was diagnosed with post-concussive syndrome and given medications (amitriptyline) for that syndrome that might cause slowness, headaches, disorientation. RP IV at 58. She testified that he might have had shock at the time of crash as well which would cause low blood pressure, fear, sweating, rapid heart rate, speech issues. RP IV at 53. She also described symptoms of methamphetamine use: wakefulness, alertness, attentiveness, increased pleasure, hallucinations, mental and motor impairment. RP IV at 59.

Levesque lodged an objection to Officer's Hinson's testimony only after Hinson, Coe, and another witness finished testifying. RP III at 105. The Court of Appeals reversed Levesque's conviction.

## D. **REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT**

RAP 13.4(b) permits review by this Court where a decision by the

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[2] Levesque objected to foundation RP IV at 18, foundation at 26, asked & answered at 26, relevance at 26.

Court of Appeals or the Supreme Court is in conflict with a decision of the Court of Appeals or of the Supreme Court, raises a significant question of law under the Washington State or United States Constitution, or deals with an issue of substantial public interest. These criteria are met here. Review is appropriate under RAP 13.4(b)(4) because the Court of Appeals decision limiting relevant opinion testimony impacts a vast majority of all DUI prosecutions. Review should be granted as Division I's opinion conflicts with appellate cases on ER 103. Finally, review is also appropriate under RAP 13.4(b)(2) because the Division I opinion conflicts with *Baity, Heatley,* and *Montgomery.*

### 1. **The City's Petition for Review Should be Granted as the Issues Presented are of Substantial Public Interest**

The breadth of the *Levesque* decision presents an issue of substantial public interest. RAP 13.4(b)(4). Division I held that only a DRE or an officer with similar extensive training may testify that impairment arose from a specific drug category. *City of Seattle v. Levesque*, No. 78304-1-I (March 16, 2020). The *Levesque* decision will impact nearly all DUI-Drug cases. Impaired driving is one of the leading contributors to highway deaths and major injuries. *See* Washington State Department of Transportation, *Washington State Strategic Highway Safety*

*Plan 2019*¸ at 3,7-20 (February 2020).[3] Despite years of efforts to reduce the number of impaired-driver fatalities, impaired driving is still a factor in half of all traffic deaths in Washington. *See* Marijuana Use, Alcohol Use, and Driving in Washington State at 1 (April 2018).[4]

The caseloads of the Courts of Washington indicates that between January 1, 2020 to March 31, 2020, 4,617 DUI cases were filed in Washington, despite the slow-down of filings both due to the WSP State Toxicology backlog, prosecutorial reluctance to file cases without blood results, the COVID-19 response, and the slowdown in proactive policing.[5] In 2019, 29,218 DUI cases were filed in courts of limited jurisdiction, up from every year preceding it.[6] These cases were distributed among all 150 courts of limited jurisdiction.[7]

Since 2008, 62% of all fatal crashes involved a driver who had at least one drug, in addition to any presence of alcohol, in their systems. *See*

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[3] This document may be found at http://targetzero.com/wp-content/uploads/2020/03/TargetZero2019_Overview_Lo-Res.pdf (last visited April 6, 2020).

[4] Available at http://wtsc.wa.gov/wp-content/uploads/dlm_uploads/2018/05/Marijuana-and-Alcohol-Involvement-in-Fatal-Crashes-in-WA_FINAL.pdf (last visited April 6, 2020). -

[5] The year to date report is available at https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=y&tab=&fileID=rpt01 (last visited April 6, 2020).

[6] The Caseloads of the Courts DUI/Physical Control Activity 2015-2019;l available at: https://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=d&freq=a&tab=Statewide&fileID=trend05 (last visited April 6, 2020).

[7] *See* Washington Courts, Washington State Court Directory (2020); RCW 3.64.010 (providing for the 122 district court judges). DUIs in Superior Court will also be impacted by this ruling.

Marijuana Use, Alcohol Use, and Driving in Washington State at 13 (April 2018).[8] Alcohol-only impairment accounted for only 38% of all fatal crashes, whereas 62% of all fatal crashes involved at least one drug in addition to alcohol. *Id.* Extrapolating this data to DUI arrests, indicates that the *Levesque* opinion limiting relevant opinion testimony would apply to approximately 18,000 of the DUI cases filed in 2019. In Washington State, there are approximately 11,411 sworn police officers, but only 187 certified DREs.[9] Thus, on average, there are fewer than one DRE per law enforcement agency.[10] It is not possible to only have DREs investigate and testify in every single DUI-drug case.

On any given day, multiple DUI cases are set for trial, and most of them will involve officer opinion testimony on whether the defendant was impaired by drugs. Exclusion of this opinion evidence, except when a DRE is testifying, will unreasonably constrain the presentation of reliable

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[8] Available at http://wtsc.wa.gov/wp-content/uploads/dlm_uploads/2018/05/Marijuana-and-Alcohol-Involvement-in-Fatal-Crashes-in-WA_FINAL.pdf (last visited April 6, 2020).

[9] *See Census of State and Local Law Enforcement Agencies,* U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, 2008 report by Brian A. Reaves, Ph.D., BJS Statistician at 15; Available at: https://www.bjs.gov/content/pub/pdf/csllea08.pdf (last visited April 6, 2020); *See* 2018 Annual Report of the IACP Drug Evaluation & Classification Program at 13; Available at: https://www.ghsa.org/sites/default/files/2019-10/2018%20DECP%20Annual%20Report.pdf (last visited April 6, 2020).

[10] There are 260 law enforcement agencies in Washington State . *Census of State and Local Law Enforcement Agencies,* U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, 2008 report by Brian A. Reaves, Ph.D., BJS Statistician at 15; Available at: https://www.bjs.gov/content/pub/pdf/csllea08.pdf (last visited April 6, 2020).

evidence and unnecessarily reduce both conviction rates and the deterrent effect of DUI laws. Division I's opinion, if left undisturbed, will significantly impact the public's interest in safe highways.

### 2. Division I's Interpretation of ER 103(a) Conflicts with Several Appellate Decisions in Washington

It is well settled that Defendant's failure to object to opinion testimony in trial, as required by ER 103(a), precludes consideration of arguments on appeal.[11] Levesque never objected to Hinson's opinion testimony.[12] Levesque failed to identify and argue this issue before any lower court and raised the issue for the first time at the Court of Appeals.

Generally, appellate courts will not consider issues raised for the first time on appeal.[13] But, under RAP 2.5(a)(3), a claim of error may be raised for the first time on appeal if it is a manifest constitutional error.[14] The defendant must identify the constitutional error and show how it actually affected his rights at trial.[15] It is this showing of actual prejudice that makes the error "manifest."[16] Although Levesque never established actual prejudice, Division I still considered his claims on the merits.[17]

Levesque fails to show how Hinson's testimony adversely affected

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[11] *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000).
[12] RP III at 106-108.
[13] RAP 2.5(a); *State v. Kirkman,* 159 Wn.2d 918, 926, 155 P.3d 125 (2007).
[14] *Kirkman,* 159 Wn.2d at 926, 155 P.3d 125.
[15] *Id.* at 926–27, 155 P.3d 125.
[16] *Id.* at 927, 155 P.3d 125.

his rights at trial. Other witnesses and experts, including Officer Coe, Captain Franks, and Forensic Scientist Andrew Gingras, testified without objection that Levesque's behavior was consistent with an "upper,"[18] was consistent with methamphetamine intoxication and that he had a toxic level of methamphetamine in his blood,[19] and was consistent with recreational drug use.[20] Hinson's testimony corroborated and was cumulative to this testimony. While Officer Hinson's opinion of Leveque's impairment by a CNS Stimulant supported the City's theory of guilt, Levesque fails to establish actual prejudice considering properly admitted testimony. There is no manifest constitutional error.

A majority of the courts that have considered the question, require a defendant to object at trial, despite a granted motion in limine, to preserve the claimed error.[21] Any error is committed, not at the time of the ruling, but only when the evidence is improperly admitted over objection at trial.[22] While the admissibility of some types of evidence may be determined before trial, most evidence problems are best resolved in the

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[17] *See* RAP 10.3(6).
[18] RP III at 88.
[19] RP IV at 19-24.
[20] RP III at 144.
[21] *See* Gamble, *The Motion in Limine: A Pretrial Procedure That Has Come of Age,* 33 Alabama L.Rev. 1, 16 (1981).
[22] *State v. Austin*, 34 Wn. App. 625, 627, 662 P.2d 872, 874 (1983), aff'd sub nom. *State v. Koloske*, 100 Wn.2d 889, 676 P.2d 456 (1984).

atmosphere and context of the trial.[23] In many instances, the determination of a matter's admissibility cannot be made before the point in the trial when its relationship to the theory of the case and to the other evidence becomes apparent.[24] If a court grants a motion to exclude, but then at trial admits the evidence in violation of its own order, dictum in two cases from the 1970's suggests that the opposing party need not object again.[25] However, more modern opinions reject this dictum and hold that the party that prevails on a motion in limine has a duty to object at trial.[26]

Levesque had a duty to object at the time of the perceived error. The granting of a motion in limine to preclude officers as experts was not specific enough to alert which opinion of Hinson's was alleged to be error. A general objection is insufficient and may cause the objecting party to be penalized on appeal.[27] Levesque's objection based on lack of foundation was non-specific and does not preserve error related to opinion testimony.[28] Additionally, as the Court of Appeals noted, there is great potential for abuse when a party does not object because "[a] party so

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[23] *Id* at 627-28.
[24] Gamble, *supra* at 13.
[25] *See Fenimore v. Donald M. Drake Construction Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976); *State v. Brooks*, 20 Wn. App. 52, 60, 579 P.2d 961 (1978).
[26] *See, e.g., A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wn. App. 511, 105 P.3d 400 (2004); *City of Bellevue v. Kravik*, 69 Wn. App. 735, 850 P.2d 559 (1993).
[27] Karl B. Tegland, *Washington Practice*, *Courtroom Handbook on Washington Evidence* 111 (2018-2019 ed. 2018)
[28] *State v. Hubbard,* 37 Wn. App. 137, 679 P.2d 391 (1984), *rev'd on other grounds,* 103 Wn.2d 570, 693 P.2d 718 (1985).

situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal."[29] In *Weber*, this Court addressed this very issue and held:

> We follow the commonsense approach of the Court of Appeals … *Without an objection, the trial court never had an opportunity to determine whether the evidence would even have been covered by the pretrial motions, or if it was covered by the motions, whether the court could have cured any potential prejudice through an instruction. Thus, ... the complaining party should object to the admission of the allegedly inadmissible evidence in order to preserve the issue for review....*[30]

In this case, any prejudice could easily have been avoided by a timely objection, which would trigger the trial court to determine whether, based on his testimony, Officer Hinson was qualified to render an opinion. Instead, like *Weber*, Levesque simply gambled on the verdict and did not object. Levesque had a duty to object to attempt to correct the error. He failed to object, move to strike, request a curative instruction, move for a mistrial, and/or fail to request a new trial. Having done none of these things, it appears he chose to gamble on a verdict. By nevertheless considering Levesque's unpreserved evidentiary claim, Division I's opinion conflicts with case law and encourages defendants to withhold timely objections during trial when the Court could obviate any prejudice.

**3. <u>Division I's Holding that Only a DRE May Provide an</u>**

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[29] *State v. Sullivan,* 69 Wn. App. 167, 172, 847 P.2d 953 (1993).

[30] *State v. Weber*, 159 Wn.2d 252, 271–72, 149 P.3d 646 (2006) (emphasis added); the unusual circumstances mentioned in *Weber* did not apply here.

**Opinion in Drug-DUI Cases and Limiting Relevant Opinion Testimony Conflicts with Several Appellate Decisions in Washington**

Expert and lay opinion testimony on drug impairment existed long before the DRE program. In *Pirtle*, this Court held that defense experts may properly discuss and form opinions on drug impairment without any reliance on or reference to the drug recognition evaluation.[31] Officer testimony about drug impairment has been admitted as relevant evidence to witness credibility; the *Russell* Court observed that it is well settled that impairment by a drug goes to a person's credibility.[32] Drug impairment opinion testimony preexisted *Baity* and was admitted if ER 702[33] was met.

The drug-based means of committing DUI pre-dates Washington's DRE program. DUI was first codified at RCW 46.61.502 in 1979; at that time and earlier, Washington statutes defined DUI of any drug to be a crime.[34] In 1995, the legislature amended RCW 46.20.308(2) to allow an officer to acquire a blood test of any driver that an officer believed was under the influence of a drug.[35] Yet Washington did not begin its DRE program until 1997 and it was operating in only five counties by late

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[31] *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995).
[32] *State v. Russell*, 125 Wn.2d 24, 83, 882 P.2d 747, 783–84 (1994).
[33] "… a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702
[34] Laws of 1979, 1st Ex.Sess., ch. 176, § 1.
[35] Laws of 1995, ch. 332, §§ 1; 19; 24.

1999.[36] Washington Courts have upheld convictions and testimony for DUI-drugs for decades without requiring officers to have the same training as DREs. A DRE evaluation is to determine the precise category of drug ingested and whether the suspect is impaired by that drug category.[37]

*State v. Baity* established standards for the admissibility at trial of novel scientific and expert opinion testimony based on the 12-step DRE process.[38] *Baity* did not eliminate or render the opinion evidence rules nullities. Instead it simply applied the evidence rules to a fact set involving a DRE.[39] *Baity* does not hold only DREs may express an opinion of drug impairment. The *Baity* Court could have announced this rule but did not.

Since *Baity* does not apply when a DRE and 12-step process were not conducted, the trial court here properly evaluated this testimony under ER 702. In a DUI prosecution, the question before the jury is whether the defendant's driving was appreciably affected by a drug, not a specific drug class. Thus, even if Officer Hinson's testimony was objectionable under *Baity* for identifying the specific drug class, CNS Stimulants, it was still not error to testify that Levesque was impaired by a drug. Neither Officer Hinson nor Officer Coe testified that they were DREs, and no scientific

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[36] *State v. Baity*, 140 Wn.2d 1, 5, 991 P.2s 1151 (2000).
[37] *Id.* at 5–6.
[38] *Id.* at 9–10.
[39] *Id.* at 18; 9-10.

testimony of DRE magnitude was ever admitted.[40] ER 702 is the proper framework to determine the admissibility of an opinion proffered by an experienced and trained officer as to impairment by a drug category. By holding that no officer may opine on the defendant's impairment without extensive DRE training, available to only a small percentage of patrol officers, the Court of Appeals misinterpreted *Baity*.

A trial court's decision to admit opinion testimony is reviewed for abuse of discretion.[41] A court abuses its discretion when it bases a decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable.[42] A trial court's evidentiary ruling may be upheld on the grounds the trial court used or on other proper grounds the record supports.[43] The trial court will be reversed only if there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred.[44] There is no showing of that here. As Levesque did not object, the trial court exercised no discretion, and there is no ruling for an appellate court to review. The failure to object deprived the prosecution of the opportunity to provide any foundation. The improper admission of evidence alleged to constitute an opinion of guilt is

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[40] RP III at 24; 86.
[41] *State v. Ortiz,* 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).
[42] *State v. Valdobinos,* 122 Wn.2d 270, 279, 858 P.2d 199 (1993).
[43] *State v. Powell,* 126 Wn.2d 244, 259, 893 P.2d 615 (1995).
[44] *State v. Goggin,* 185 Wn. App. 59, 69, 339 P.3d 983 (2014), *review denied,* 182 Wn.2d

not a constitutional error.[45]

A lay person's observation of intoxication is a permissible lay opinion.[46] Officer Hinson certainly falls under this long-accepted rule from *Montgomery* that a witness may testify to his or her observation of another's intoxication. ER 704 states: "Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." ER 704. Division I addressed this issue in *Heatley*[47]*:*

> Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an 'ultimate issue' will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. S*ee* generally *Sanders*, 66 Wn. App. at 380, 832 P.2d 1326. The trial court must be accorded broad discretion to determine the admissibility of ultimate issue testimony, *Jones,* 59 Wn. App. at 751, 801 P.2d 263, and this court has expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt. *See State v. Wilber,* 55 Wn. App. 294, 298, 777 P.2d 36 (1989). *Heatley,* supra at 579.

A qualified expert may express an opinion on an ultimate fact.[48]

This was clarified and reaffirmed by the Court's holdings in both

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1027, 347 P.3d 458 (2015).

[45] *State v. Warren,* 134 Wn. App. 44, 56-58, 138 P. 3d 1031 (2007).

[46] *Montgomery*, 163 Wn.2d at 591 (citing *Heatley*, 70 Wn. App. at 580).

[47] *City of Seattle v. Heatley,* 70 Wn. App. 573, 854 P.2d 658 (1993).

[48] ER 704; *State v. Nelson*, 72 Wn.2d 269, 288, 432 P.2d 857 (1967).

*Heatley*[49] and *Lewellyn*.[50] A trial court does not abuse its discretion by admitting an officer's opinion that encompasses an ultimate issue.[51] A lay witness with personal observations may testify to opinions "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) *not based on . . . specialized knowledge* within the scope of rule 702."[52] Limitations on this testimony involve opinions which invade the providence of the jury.[53] "Opinions on guilt are improper whether made directly or by inference."[54] A witness who demonstrates an expertise "acquired either by education or experience" in an area may still give lay opinion testimony.[55] Officer Hinson qualifies as a lay witnesses with education and training in the effects of stimulants on the human body. CNS Stimulants are very common drugs to encounter regularly as they are used regularly, e.g., caffeine, and the effects of stimulants are more obvious than other drug categories.

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[49] *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994).
[50] *State v. Lewellyn*, 78 Wn. App. 788, 791; 793–96, 895 P.2d 418 (1995), *affirmed*, 130 Wn.2d 215 (1996).
[51] *Id.*
[52] ER 701 (emphasis added); *State v. Montgomery*, 163 Wn.2d 577, 591 183 P.3d 267 (2008); (citing ER 701).
[53] *State v. Kirkman*, 159 Wn.2d 918, 926, 934, 155 P.3d 125 (2007) (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).
[54] *Quaale*, 182 Wn.2d at 199 (citing *Montgomery*, 163 Wn.2d at 594).
[55] *State v. Hernandez*, 85 Wn. App. 672, 676, 935 P.2d 623 (1997) (lay opinion testimony from police officers admissible as circumstantial evidence of identity of a drug).

The court in *Heatley* upheld the admission of the officer's observations that the defendant was "intoxicated." As with *Heatley*, Officer Hinson related what he saw and what his training told him. There was no comment on the defendant's guilt because Levesque's impairment was not the basis of his guilt—the State had to prove that Levesque's intoxication affected his ability to drive safely. While the officer's observations of Levesque's impairment clearly support jury's determination of guilt, that is the very reason that the comments are relevant in the first place and not a basis for exclusion.

Division I erred in holding that an officer testifying the defendant was "definitely impaired" improperly parrots the legal standard and presents a personal opinion on guilt. The jury instructions do not use the word "impaired,"[56] nor does "impaired" appear in any DUI pattern jury instruction. Instead, "A person commits the crime of Driving Under the Influence when he or she drives a motor vehicle within the City of Seattle *while he or she is under the influence of or affected by any drug*. A person is under the influence of or affected by the use of a drug if the person's ability to drive is *lessened* in any appreciable degree."[57] "To convict the defendant…[the City must prove] that the defendant at the time of driving

[56] RP IV at 76-85.
[57] RP IV at 76-85.

a motor vehicle was under the influence of or affected by any drug."[58] The trial court properly precluded the officers from parroting the legal standard by ruling that the officers could not utter the "words under the influence."[59] This ruling permitted the officers to use the word "impaired" and to provide an opinion that Levesque appeared to be impaired by stimulants based on their training and experience.[60]

The Court of Appeals erroneously concluded that *Heatley* does not apply in this case, and then conflated *Baity*'s holding concerning the DRE methodology, with admission of non-DRE drug impairment opinion testimony. This approach is inconsistent with *Fisher,* in which the Court of Appeals held that testimony that the defendant, charged with drug possession and delivery, was "running the show," and "involved in the transaction" did not constitute an impermissible opinion of guilt.[61] The instant case is akin to *Heatley, Montgomery, Lewellyn,* and *Fischer.*

Officer Hinson's testimony was not an improper opinion that either parroted the legal standard or conveyed his personal opinion on guilt. The Court of Appeals placed great importance on the officer's testimony that

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[58] RP IV at 82.

[59] *Id.*

[60] *Id.*

[61] *State v. Fisher*, 74 Wn. App. 804, 814, 874 P.2d 1381 (1994), *aff'd in part, vacated in part sub nom. State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Levesque was "definitely impaired."[62] But in *Heatley* the trooper testified the defendant "was obviously intoxicated;"[63] the same term used in the jury instructions. Hinson's opinion, which did not parrot the legal standard, is less prejudicial than the permissible opinion in *Heatley.*

Division I's decision in this case amounts to a rejection of well settled case law. By rejecting these holdings, the court requires the City to provide unspecified proof of training prior to asking an officer about a DUI-drug defendant's impairment by drugs.

The "failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."[64] As Levesque did not object or ask for an admonition to the jury, any objection to the officer's testimony was waived. Division I's holding that this error was preserved and rejection of well-settled law creates a conflict in appellate law that should be reviewed.

## E. CONCLUSION

Review is appropriate as Division I's opinion is inconsistent with decisions issued by this Court and the court of appeals and is of substantial public interest due to devastating impact on efforts to reduce DUI.

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[62] RP III at 51.
[63] *City of Seattle v. Heatley*, 70 Wn. App. 573, 576, 854 P.2d 658, 660 (1993).

Respectfully submitted this Monday, the 13th of April, 2020.

**PETER S. HOLMES**
**SEATTLE CITY ATTORNEY**

By Miriam Norman 4/13/2020
Miriam Norman
Assistant City Attorney; WSBA #40624

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[64] *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011), *quoting State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert, denied*, 514 U.S. 1129 (1995).

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# APPENDIX A

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| CITY OF SEATTLE,<br>Appellant,<br>v.<br>JEFFREY LEVESQUE,<br>Respondent. | No. 78304-1-I<br>DIVISION ONE<br>PUBLISHED OPINION<br>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

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.

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.

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

[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 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.

> [Officer Hinson]: Yes.
>
> [Prosecution]: What is it?
>
> [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

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

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.).

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

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

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,

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

L. Ed. 2d 35 (1999).

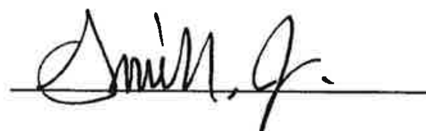
For the following reasons, we conclude that the City has not established that any reasonable jury would have convicted Levesque. First, "[a]n officer's live testimony offered during trial, like a prosecutor's statements made during trial, may often 'carr[y] an aura of special reliability and trustworthiness'" 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

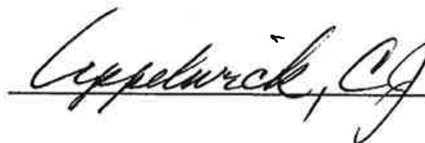
admitted in State v. Smith, 67 Wn. App. 838, 841 P.2d 76 (1992). In Smith, the trial court erroneously admitted without correction statements regarding a testifying officer's awards and commendations. 67 Wn. App. at 840, 845. We concluded that the State used the testimony to "improperly elevate [the 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:



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6 **IN THE SUPREME COURT OF WASHINGTON**

7 **CITY OF SEATTLE,** )
8 Respondent, ) **Supreme Court No. __________**
9 ) **Court of Appeals No. 78304-1**
10 vs. )
11 ) **CERTIFICATE OF PROOF OF SERVICE BY MAILING**
12 **JEFFEREY LEVESQUE** )
13 Petitioner. )

14 I am an Assistant City Attorney representing respondent in this case. On April 13,
15 2020, I served an emailed electronic copy of the Petitioner's Petition for Review on
16 Respondent's attorney at the following email address Whitney Sichel:
17 whitney.cork@kingcounty.gov, whitney.sichel@kingcounty.gov, and
18 john.ostermann@kingcounty.gov. Also, through the assistance of Michelle Wills, Chief
19 Paralegal, I served a true copy of the Notice of Motion for Discretionary Review on
20 respondent by mailing the same to him and his attorney, postage prepaid, at the following
21 addresses:

22
23
24
25 Respondent:
26 Jeffrey Levesque
6940 123rd St, Apt #241
27 Seattle, WA 98178
28 Attorney for Respondent:
29



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

Signed this 10th day of April, 2019 at Seattle, Washington.

_/s/ *Miriam Norman*________________
Miriam Norman
WSBA #40624



**Peter S. Holmes**
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7090
(206) 684-7757

## CITY OF SEATTLE CITY ATTORNEY'S OFFICE

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| **Appellate Court Case Number:** | 78304-1 |
| **Appellate Court Case Title:** | City of Seattle, Petitioner v. Jeffrey Levesque, Respondent |

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