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COURT OF APPEALS
PIERCE COUNTY

No. 33722-3-II

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STATE OF WASHINGTON

DIVISION II OF THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RICKIE R. RILEY,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 04-1-03219-1

BRIEF OF APPELLANT

Brett A. Purtzer
WSB #17283

LAW OFFICES OF MONTE E.
HESTER, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue
Suite 302
Tacoma, Washington 98405
(253) 272-2157

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ASSIGNMENTS OF ERROR

1. The trial court admitted inadmissible evidence into trial that denied Mr. Riley his constitutional right to a fair trial.

2. Insufficient evidence existed for the jury to find beyond a reasonable doubt that Mr. Riley was driving a motor vehicle while under the influence of drugs.

3. The prosecutor's closing argument constituted prosecutorial misconduct.

4. The cumulative effect of the trial court's rulings denied Mr. Riley his constitutional right to a fair trial.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court's admission of Mr. Riley's statement to police officers that he ingested Vicodin and an unknown muscle relaxer denied Mr. Riley's constitutional right to a fair trial when neither substance was relevant to whether Mr. Riley was driving a motor vehicle while under the influence of drugs at the time of the accident? (Assignment of Error 1)

2. Whether the trial court erred by excluding the out-of-court statements of William Collison, who died before trial, when such statements were admissible pursuant to ER 803(a)(1), (5) and the Doctrine of Completeness? (Assignment of Error 1)

3. Whether the trial court erred by admitting the testimony of forensic toxicologist, Asa Louis, when such testimony was not relevant to any issue to be determined by the jury? (Assignment of Error 1)

4. Whether sufficient evidence of intoxication by drugs existed to support the jury's verdict when no expert testimony was

presented that two nanograms of THC, the active agent in marijuana, correlated to an individual's driving being impaired? (Assignment of Error 2)

5. Whether the prosecutor's closing argument that Mr. Riley had the burden of producing evidence to support his defense violated his constitutional right to remain silent and to be presumed innocent? (Assignment of Error 3)

6. Whether the cumulative effect of the trial court's ruling denied Mr. Riley a fair trial when, absent such error, Mr. Riley would have been acquitted? (Assignment of Error 4).

STATEMENT OF THE CASE

A. Procedural History

On June 30, 2004, the State filed an Information charging Mr. Riley with one count of vehicular assault for an accident that occurred on March 1, 2004. CP 1-3. The State alleged that Mr. Riley committed vehicular assault by operating a motor vehicle while under the influence of intoxicating liquor and/or drugs. CP 1. Mr. Riley entered a not guilty plea.

On April 25, 2005, the State amended the Information and alleged all three prongs of vehicular assault, to-wit: operating a motor vehicle while under the influence of intoxicating liquor and/or drugs, reckless driving and disregard for the safety of others. CP 22:13-23:14.

At the close of the State's case, the trial court granted defendant's motion to dismiss the reckless driving and disregard for safety of other prongs of vehicular assault. RP 266-274. On April 27, 2005, the jury returned a guilty verdict to vehicular assault. CP 108.

On May 27, 2005, Mr. Riley moved the court for an order arresting judgment, or, in the alternative, for a new trial based upon insufficient evidence to sustain the jury's verdict and based upon prosecutorial misconduct. Supp. RP 2:10-13:22; CP 137-144. The court denied the motion. Supp. RP 15:4-23.

On August 26, 2005, the trial court sentenced Mr. Riley to three months incarceration in the Pierce County Jail. CP 163-173. Mr. Riley appealed the judgement and sentence on August 29, 2005. This appeal follows. CP 178-197.

B. Pre-Trial and Post-Trial Motions

On April 25, 2005, during pre-trial motions, defense counsel raised motions in limine regarding the following evidentiary issues: 1) testimony of toxicologist Asa Louis; and 2) Mr. Riley's statement to police officers that he had ingested Vicodin and muscle relaxants the morning of the accident. RP 91:7-92:8. Additionally, Mr. Riley sought to introduce, through a sheriff's deputy, the out-of-court statement of Mr. Collison, pursuant to ER 803(a)(5), 803(a)(1)

and the Doctrine of Completeness. RP 77:15-81:15. Mr. Collison died before trial, and, as such, was unavailable to testify. CP 47.

The Court, after conducting a CrR 3.5 hearing, determined that Mr. Riley's statement to the arresting officer that he took Vicodin and a muscle relaxant were admissible notwithstanding the State's concession that Mr. Asa Louis, the State's toxicology expert, would not testify about the effects or combination of effects of the Vicodin, muscle relaxants and marijuana. RP 92:5-8.

Additionally, the court denied the motion to preclude Mr. Louis from testifying, and denied the motion to admit Mr. Collison's out-of-court statement through the investigating officer. RP 90:15-91:4.

Finally, during the State's rebuttal closing argument, the prosecutor argued as follows:

But in this case, this defendant -- the defendant decided to put on a case, so not only do you look at the testimony, but you also look at what the evidence is that they presented, evidence and lack of evidence. And what is the lack of evidence that they presented to you? Any specific information about the defendant. Here, we have got an expert who has done

analyses and research and read literature and knows all about the effects of marijuana on human beings and he said even on animals. And do they present any evidence to you about the effects of the one person we are interested in in this case? Did he tell you anything about Mr. Riley?

RP 321:5-17.

Importantly, defense counsel objected because the State's argument improperly shifted the burden of proof from the State to the defense. RP 321:18-20; 328:5-329:21. No relief was requested by the defense at that time, but the court denied Mr. Riley's subsequent motion for a new trial based upon this misconduct. Supp. RP 13:23-15:23.

C. Facts

On March 1, 2004, Michael Tillman was working as a land surveyor for Barghausen Consulting Engineers. RP 225:24-226:6. At that time, he and his partner, Marcus Hayett, were staking a storm and drainage pond in the South Hill, Puyallup area. RP 227:3-7.

While working from his van that was parked alongside the roadway, Mr. Tillman and Mr. Hayett noticed a truck traveling toward the van, but within the approaching vehicle's lane of travel.

RP 110:5-8; 230:8-231:25. As Mr. Tillman continued to work, he heard Mr. Hayett say something that caused Mr. Tillman to look up whereupon he saw the truck crossing over the fog line. RP 232:3-16. Mr. Tillman watched the vehicle travel completely over the fog line while maintaining its speed. RP 232:24-233:2. Both Mr. Tillman and Mr. Hayett noted that the driver's head was leaning forward and his eyes were closed. RP 110:11-14; 233:4-7.

When Mr. Tillman realized the vehicle was not going to stop, he turned and tried to run away. RP 233:8-11, 23. As he ran, Mr. Tillman heard the vehicle hit the van door, and then the vehicle hit him. RP 234:5-21. The vehicle struck him in the back and he was dragged behind the van for approximately 30 feet. RP 234:23-235:11. As a result of the accident, Mr. Tillman suffered a broken back and three ruptured vertebrae. RP 240:18-24.

After the accident occurred, the driver of the vehicle, Mr. Riley, approached Mr. Tillman and asked what had happened. RP 114:1-4. When Mr. Hayett told him what had occurred, Mr. Riley

became visibly upset and was in disbelief. RP 114:17-21; 244:8-11.

Mr. Riley then tried to help Mr. Tillman up off the ground, which he could not do. RP 237:21-238:14. After that point in time, Mr. Tillman did not have any additional contact with Mr. Riley. RP 238:16-23.

While speaking with Mr. Riley, Mr. Hayett noticed a smell of smoke which he thought was marijuana, although he was uncertain. RP 114:22-115:5. During cross-examination, Mr. Hayett testified as follows regarding the odor he detected:

- Q: And you indicated that you believed that you detected an odor of smoke, but you don't know if that was marijuana smoke, correct?
- A. It smelled like it could have been something else because, I don't know, I have worked with people that have smoked just cigarettes and it smelled different than that.
- Q. Well, you recall you and I had a chance to speak?
- A. Yes.
- Q. And I asked you that question, and you said it smelled like cigarette smoke, correct?
- A. Right.
- Q. All right. And you said that you didn't know that it was marijuana smoke because you don't smoke marijuana?
- A. Right.
- Q. So you don't know, aside from it being possibly cigarette smoke, you don't

know what other odors you might have detected?

A. Correct.

When Pierce County Sheriff Deputy Fleig arrived, Mr. Riley was asked what had occurred whereupon he responded that "I don't know what happened, I was on 152nd Street one minute and the next thing I know I am here." "I must have fallen asleep." RP 151:11-16; 153:6-10. The officer noticed that Mr. Riley seemed a little dazed and his speech was a little slow, but when he asked Mr. Riley if he had anything to drink, he responded that he had not. RP 153:12-17. When asked if he had taken any medications, Mr. Riley responded that he had taken a Vicodin pill between 7 and 7:30 in the morning and some unknown muscle relaxer. RP 153:19-154:3. The deputy noted that the airbag in Mr. Riley's car had deployed, and Mr. Riley's appearance was consistent with other individuals the deputy contacted in the past who had been struck by force and appeared dazed as a result of being involved in a traumatic event. RP 172:9-173:7.

After administering some field tests, the officer transported Mr. Riley to Good Samaritan

Hospital for a blood draw. RP 159:4-163:21. Significantly, the officer did not detect an odor of marijuana about Mr. Riley's person, which he would have noted had it been present. RP 168:18-23. Although the deputy indicated that Mr. Riley failed to perform some of the standardized field tests, the deputy did not need to assist Mr. Riley into the patrol car, assist him out of the patrol car or notice any difficulties of Mr. Riley walking once transported to the hospital. As a trained officer, he would have noted such observations in his report, if any existed. RP 171:4-172:5.

Asa Louis, the State's forensic toxicologist, analyzed the blood draw taken from Mr. Riley and noted two nanograms of THC per milliliter of blood and twelve nanograms of Carboxy THC per milliliter of blood. RP 175:23-176:11; 196. No other substances, aside from caffeine, were detected in Mr. Riley's blood. RP 196:4-7. THC is the active ingredient in marijuana and Carboxy THC is the metabolized product of THC, which is inactive. RP 197:4-198:14.

Importantly, Mr. Louis acknowledged that with respect to a blood sample with two nanograms of THC, Mr. Louis could not offer an opinion, with reasonable scientific certainty, as to what effects, if any, such amount of THC would have on an individual's ability to drive a motor vehicle. RP 213:10-16; 217:1-3. Further, he could not offer an opinion that a person would be impaired with two nanograms of THC in his or her blood system, RP 213:17-19; 223:9-13, nor would it be advisable to try to predict the effects based on blood THC concentrations. Id. at 20-22. Even though there has been a tremendous amount of research in this area of science, it is not possible to correlate two nanograms of THC with a corresponding blood or breath alcohol level. RP 214:25-215:7; 217:7-8.

David Predmore, a forensic toxicologist formerly employed by the Washington State Toxicology Laboratory for over 28 years, RP 248:11-25; 250:9-15, agreed with Mr. Louis' opinion that there was no correlation between a specific THC level and a person's ability to operate a motor vehicle. RP 250:24-251:2; 251:16-

20. Further, no research supported a finding that a THC level of two nanograms would cause an individual to fall asleep or pass out. RP 251:3-10.

ARGUMENT

I. THE TRIAL COURT ADMITTED INADMISSIBLE EVIDENCE INTO TRIAL THAT DENIED MR. RILEY'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

A. The Trial Court Erred by Admitting Mr. Riley's Statements to Deputy Fleig that he had Ingested Vicodin and a Muscle Relaxant on the Morning of the Accident.

As this court is aware, the admission of evidence is governed by ER 401, 402 and 403. In order to be admissible, ER 401 requires that:

the evidence have a tendency to make the existence of any fact that is of consequence to the determination of the action "more probable or less probable than it would be without the evidence."

ER 401.

ER 402 states in pertinent part:

all relevant evidence is admissible and evidence which is not relevant is not admissible.

ER 402.

Importantly, ER 403 governs the admissibility of evidence that might be relevant

but its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

ER 403.

Here, the court allowed into evidence the testimony of Deputy Fleig regarding statements Mr. Riley made regarding ingesting Vicodin and a muscle relaxant in the early morning hours of March 1, 2005. RP 91:7-92:8. Importantly, there was no testimony connecting the relevance of Mr. Riley taking such medications because Mr. Louis, the State Toxicologist, could not relate what effect, if any, such substances might have because the blood draw analysis did not reveal the presence of such substances in Mr. Riley's blood. RP 91:7-92:8. Accordingly, such evidence was not relevant to any of the facts at issue in this case, and the trial court erred by allowing such evidence into trial. Given the nominal THC level determined from the blood analysis, it cannot be said that allowing this evidence into trial did not prejudicially effect Mr. Riley's right to a fair trial. Accordingly, the trial court erred by allowing such evidence.

B. William Collison's Statement is Admissible Pursuant to ER 803(a)(5), ER 803(a)(1) and the Doctrine of Completeness.

At the time of the incident, Mr. Riley was working for Collison Realty, and Mr. Collison appeared at the scene of the accident and spoke with the responding deputy. RP 77:15-78:1.

Mr. Collison told Deputy Fleig that Mr. Riley had been at work all morning, that Mr. Riley never left that morning, and that he did not consume any alcohol. RP 78:15-79:6.

On April 1, 2005, William Collison unexpectedly died. CP 47. The defense sought to introduce into evidence Mr. Collison's statements made to Deputy Fleig, pursuant to ER 803(a)(1), 803(a)(5) and the Doctrine of Completeness.

1. ER 803(a)(5)

ER 803(a)(5) governs the admissibility of documents purported to contain the recorded recollection of a witness. If a statement meets the foundational requirements, it is admissible as an exception to the hearsay rule, regardless of the availability of the witness. A statement is properly admitted pursuant to ER 803(a)(5) when certain factors are met:

The Court "must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness avowed accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

State v. Alvarado, 89 Wn.App. 543, 548, 949 P.2d 831 (Div. I. 1998). The existence of the requirements is determined by the judge under rule 104(a). State v. Mathes, 47 Wn.App. 863, 867, 737 P.2d 700 (1987).

Foundational issues include establishing the authenticity of the memorandum or record. 5B Karl B. Tegland, Wash. Prac. § 368 at 187 (3rd Ed. 1989). An ideal foundation consists of witness testimony that he or she "presently remembers that he [or she] correctly recorded the fact or that he [or she] recognizes the writing as accurate". Tegland, supra, § 368 at 186.

The issue in Mathes involved the prosecution's proffer of a police report purporting to memorialize the statement of a witness to a confession. At trial, the witness could not recall the confession, testifying first that the person had said 'nothing really' and

then that she did not remember. The witness did not write the report, nor did she attest to its accuracy. The prosecutor, nonetheless, offered the statements as a recorded recollection. The report was read into the record without objection.

The Court of Appeals refused to address the ER 803(a)(5) admissibility of the statement on appeal because counsel had not objected at trial. However, a concurrence in that opinion did address the issue, which opinion was subsequently analyzed and largely adopted in State v. Alvarado, supra.

The basis of the appeal in Mathes was that the statement contained in the police report was not sufficiently authenticated by the witness because she could recall nothing of the confession at the time of trial. The Alvarado court was confronted with the same situation when a witness who had made recorded statements to the police subsequently testified that he could not recall any of the events at issue or verify that his statements had been accurate. The witness' statements were admitted, pursuant to ER

803(a)(5) as a recorded recollection, over defense counsel's objection.

The Alvarado Court noted that under these circumstances, the witness normally testifies that, despite lack of memory, he or she remembers making the statement, and that it was accurate when made'. 89 Wn.App. at 550 (*citing* Robert H. Aronson, The Law of Evidence in Washington, 803-35.0 (1994)). The court also noted that the Washington Practice manual indicates that the declarant should be required at trial to testify to the accuracy of the memorandum or record. Id., *citing* 5B Karl B. Tegland, Washington Practice § 368 at 187 (3rd ed. 1989). However, the court did not adopt Tegland's rule, noting "what is ideal in theory may be some distance from what is possible in practice." The court went on to state:

Tegland implicitly acknowledges this, noting that a witness' testimony that he or she habitually records matters accurately, or would not have signed an inaccurate memorandum, may be sufficient in lieu of an ideal foundation. See Tegland, supra § 368 at 186-187. (Test cited with approval by the Mathes majority, 47 Wn.App. at 867-68.) The facts of a particular case may not even allow this much, however, and we've concluded that the rule does

not require it. Indeed, the rule applies regardless of the declarant's availability to testify, and thus, apparently, does not contemplate that the declarant will always testify, let alone affirmatively vouch for the record's accuracy.

89 Wn.App. at 550. (emphasis added) The court then stated the rule thus:

We hold that the requirement that a recorded recollection accurately reflect the witness' knowledge may be satisfied without the witness' direct averment of accuracy at trial. The Court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness avowed accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

89 Wn.App. at 551.

Having set the standard, the Alvarado Court applied the four-factor test to the witness statements before the Court. The Court noted that (1) the witness had never recanted or disavowed the accuracy of two of the statements; (2) the witness affirmatively avowed the accuracy of the statements at the time he made them; (3) the statements were recorded and there was no indication the recordings were inaccurate; (4) the statements were given on the same day, eight

days after the murder and only two hours apart, the answers were clear and lucid and there was no question of uncertainty on the part of the witness. 89 Wn.App. at 552. The Court held that the two statements that had not been disavowed were therefore admissible under ER 803(a)(5). Id. at 552-53. The same result obtains here.

Here, Mr. Collison's statement clearly satisfies the requirements for admissibility under ER 803(a)(5). First, the statement may be authenticated by Deputy Fleig, who obtained the statement; thus satisfying the foundational issue. Turning to the four-factor test, there is (1) no indication that the statement was ever disavowed by the witness; (2) the witness was speaking to a Pierce County Sheriff's Deputy in a vehicular assault investigation at the time he made the statement; thus understanding the need for accuracy in his statement; (3) the process is as reliable as the officer himself, and Deputy Fleig testified that the statement accurately reflected what Mr. Collison told him; and (4) other indicia of reliability exist, including the contemporaneous nature of the statement and Mr.

Collison's knowledge that he was providing information for use in a serious felony case. RP 79:2-9. Accordingly, and pursuant to ER 803(a)(5) and State v. Alvarado, supra, Mr. Collison's statements were admissible and the trial court erred by excluding this evidence.

2. ER 803(a)(1)

A present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or immediately thereafter." ER 803(a)(1). It is admissible as an exception to the hearsay rule based upon the assumption that the statement's contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant. See 5A K. Tegland, Wash. Prac. Evidence at 205 (2d Ed. 1982). Thus, a statement made at the time of the event is admissible, but one made several hours later may be too remote in time to qualify as being a "present sense" impression. See State v. Heib, 39 Wn.App. 273, 693 P.2d 145 (1984); overruled on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986).

State v. Martinez, 105 Wn.App. 775, 20 P.3rd 1062 (Div. III, 2001), addresses the application of ER 803(a)(1) to witness statements to police. There, a witness allegedly made statements to police regarding a vehicle and a passenger within the vehicle. The statements were later offered through detectives, and over the defendant's objection, to establish accomplice liability. The trial court admitted the statements under two theories. First, they were offered to establish the officer's understanding after they spoke with the declarant; thus a non-hearsay purpose, since the statements were not offered for the truth of the matter asserted. Second, they were offered as the declarant's present sense impression. On appeal, Division III held the statements to be inadmissible hearsay.

Division III of the Washington Court of Appeals stated that the present sense impression exception is narrowly interpreted "to avoid admitting evidence where particularized factors guaranteeing trustworthiness are not present." Martinez, supra. The U.S. Supreme Court has stated that "particularized guarantees of

trustworthiness are present only when cross examination would add nothing to the reliability of the statement." Id. (citing Idaho v. Wright, 497 U.S. 805, 820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)).

In Martinez, the court held that the statements failed the above test and should not have been admitted. First, the officer's testimony at trial contradicted the written reports. Second, it was impossible to determine from the reports and officer testimony what was actually said by the witness. Thus, cross examination of the declarant was necessary to establish what was actually said and ER 803(a)(1) would not support admissibility.

William Collison's statement to Deputy Fleig is qualitatively different than those in Martinez, as it contains his remarks of his impressions and observations of Mr. Riley earlier in the day. As such, his statements are "spontaneous or instinctive utterance of thought that meet the requirements of ER 803(a)(1) as a present sense impression.

Further, his statement was made contemporaneous to his observations of Mr. Riley. It was made by the witness to a police officer after the witness was made aware of the gravity of the situation and the need for accuracy was apparent. Unlike Martinez, there is no issue of confusion as to what it is that William Collison was talking about. In Martinez, the court could not determine whether the witness' statement related to a vehicle or to a person within the vehicle. Here, Mr. Collison's statement clearly relates to Mr. Riley. Cross examination would add nothing, because there is nothing in the statement that can be added to by cross examination. Thus, Mr. Collison's statement to Deputy Fleig on March 1, 2004 regarding Mr. Riley's whereabouts on the morning of the accident passes the test, and, therefore, is admissible under ER 803(a)(1).

3. DOCTRINE OF COMPLETENESS

The Doctrine of Completeness is a common law rule that has been partially codified in ER 106. See Beech Aircraft Corp. Rainey, 488 U.S. 153,

109 S.Ct. 439, 102 L.Ed.2d 445 (1988)

(referencing Fed.R.Civ.P. 106).

Fed.R.Civ.P. 106 provides that:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

The doctrine also appears in ER 612 and applies where a witness refers to a report to refresh his recollection, such that statements contained within the report become admissible. ER 612.

In the instant case, William Collison's statement describing Mr. Riley should have been admitted as it contradicts the observations made by responding law enforcement officers. Although, this is a matter for the Court's discretion, it is clear that the admission of the officer's statements without Mr. Collison's statement leaves an indelible and incorrect impression in the juror's minds that Mr. Riley was impaired at the time of the accident based upon the subjective tests administered by the officer. In the interest of fairness and

justice, William Collison's statement should have been admitted and the trial court erred by excluding his statement.

C. The Trial Court Erred When it Admitted the Testimony of Asa Louis, the Forensic Toxicologist.

Generally, witnesses are to state facts and not to express inferences or opinions, State v. Wigley, 5 Wn.App. 465, 466, 488 P.2d 766 (1971), because it is uniquely the function of the jury . . . to draw reasonable inferences from the evidence. Gazijo v. Nicholas Jern Co., 12 Wn. App. 538, 541, 530 P.2d 682, *aff'd*, 86 Wn.2d 215 (1975).

Importantly, the admissibility of expert testimony is governed by ER 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Evidence Rule 702 is the same as Federal Rule of Evidence 702, and the Federal Rules of Evidence Advisory Committee's note is

instructive when considering the propriety of expert testimony.

An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the expert to take the further step of suggesting the inference which should be drawn from applying the

specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore ' 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extended to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the work, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as

bankers or landowners
testifying to land values.

Fed.R.Evid. 702 (FRE Advisory Committee Note)
(emphasis added).

Three prongs dictate the application of ER 702: (1) the witness must be qualified as an expert; (2) the opinion must be based on an explanatory theory generally accepted in the scientific community, and (3) the expert testimony must be helpful to the fact finder. State v. Black, 109 Wn.2d 336, 341, 745 P.2d 12 (1987); State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984).

The trial court should not have allowed the state toxicologist, Asa Louis, to testify because his opinions on the general effect of marijuana and how it relates to levels of impairment caused the jury to speculate, as opposed to being helpful to the jury, regarding the facts and evidence in this case.

Although Mr. Louis qualified as an expert to test blood, what the results suggest is a separate question. Unlike cases where an individual's blood or breath alcohol level provides a framework of when a person is under the

influence of alcohol, no corresponding THC level from marijuana ingestion can provide the same information and Mr. Louis confirmed this fact. RP 213:10-16; 217:1-3.

Importantly, the third prong under ER 702 is whether the testimony is relevant, that is, whether it will be helpful to the trier of fact. State v. Black, supra, 109 Wn.2d at 348; State v. Allery, supra, 101 Wn.2d at 596. As discussed above, because Mr. Louis' testimony provided a laundry list of potential physical effects that THC has on an individual, as opposed to what specific effects a THC level of two ng/ml had on Mr. Riley, his testimony caused the jury to speculate about the relationship between impairment, if any, and the THC level found in Mr. Riley's blood. Accordingly, the trial court should have excluded his testimony as being irrelevant. See State v. Atsheha, 142 Wn.2d 914, 16 P.3d 626 (2001) (expert testimony considered helpful to the trier of fact only if its relevance can be established.)

II. INSUFFICIENT EVIDENCE EXISTED FOR THE JURY TO FIND BEYOND A REASONABLE DOUBT THAT MR. RILEY WAS DRIVING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF DRUGS.

As this court is aware, due process requires the state to prove its case beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). When challenging the sufficiency of evidence, this court must determine:

whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). See also State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

In Weisberg, this Court reversed a jury's conviction when the state produced insufficient evidence of forcible compulsion in a rape case. There, testimony failed to establish that the defendant either suggested or threatened harm to the alleged victim if she did not comply with his request to engage in sexual intercourse.

Based upon the evidence, which the court presumed to be true, the court found that the evidence was insufficient to support a finding of guilt.

The only reported case regarding the potential effects of marijuana on a vehicular homicide case is set forth in State v. Knowles, 46 Wn.App. 426, 730 P.2d 738 (1986). There, the Court of Appeals upheld Knowles' conviction finding that the evidence established that the vehicular homicide alternative prong re: intoxication, had been established based upon the evidence.

Viewed in a light favorable to the State, the evidence and inferences thereon support the trial court's findings. Knowles admitted smoking marijuana and drinking beer prior to the accident. According to the toxicologist, the driving of a person with a blood alcohol content similar to that of Knowles at the time of the accident would be impaired.

Knowles, 46 Wn.App. at 431. (emphasis added)

Here, however, no such evidence exists and Mr. Riley challenges the sufficiency of the evidence that he was driving a motor vehicle while under the influence of drugs, to-wit: marijuana.

The consistent testimony from the State and defense experts establish that no connection existed between the low level of THC found in Mr. Riley's blood and impairment. This failure of proof for the element of intoxication for vehicular assault is critical, and without any evidence to support such finding, the jury's verdict cannot stand.

Importantly, jury instruction #6, which defined "under the influence," states as follows:

a person is under the influence of or affected by the use of drugs if the person's ability to drive a motor vehicle is lessened in any appreciable degree.

CP 125.

Clearly, the evidence admitted was insufficient to establish beyond a reasonable doubt that Mr. Riley was "under the influence of or affected by the use of drugs" as there was no testimony that related any use of any drug to Mr. Riley's ability to drive a motor vehicle, let alone indicating that it was lessened in any appreciable degree by the use of the marijuana. When reasonable minds cannot differ because the evidence is such that it does not lend support for

proof of a necessary element, then insufficient evidence exists to uphold the conviction, and the jury's verdict should be reversed. See also State v. Bridge, 91 Wn.App. 98, 955 P.2d 418 (1998) (fingerprint evidence, without more, was insufficient to support burglary conviction.)

III. THE PROSECUTOR'S CLOSING ARGUMENT CONSTITUTED PROSECUTORIAL MISCONDUCT.

"To prevail on an allegation of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect." State v. Henderson, 100 Wn.App. 794, 800, 998 P.2d 907 (2000). "Prejudice is established by demonstrating a substantial likelihood that the misconduct affected the jury's verdict." Id. "The defendant 'bears the burden of establishing both the impropriety of the prosecutor's conduct and it's prejudicial effect'." Id.

Further, "'a defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt'." State v. French, 101 Wn.App. 380, 385, 4 P.3d 857 (2000) (citing State v. Fleming, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996)). When misconduct directly violates a

constitutional right, "'it is subject to the stricter standard of constitutional harmless error'." Id. at 386 (*citing State v. Traweek*, 43 Wn.App. 99, 108, 715 P.2d 1148 (1986)). "When a prosecutor improperly remarks on a defendant's failure to testify, it violates if Fifth Amendment privilege against self-incrimination." Id. (*citing Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)).

During the State's rebuttal closing argument, the prosecutor commented about Mr. Predmore's testimony, and, specifically, whether he questioned Mr. Riley about his whereabouts or whether Mr. Riley had consumed any marijuana on the date of the accident. RP 321:5-17. Mr. Predmore's testimony, however, was for purposes of educating the jury, pursuant to ER 702, regarding the relationship, if any, between THC, the active ingredient in marijuana, and impaired driving. Consistent with the State's expert's testimony, Mr. Predmore also testified that no correlation exists between the presence of THC and impaired driving and that two nanograms of THC in Mr.

Riley's blood results does not support a finding of impaired driving. RP 251:16-20.

During closing arguments, the State expanded on Mr. Predmore's testimony by arguing that Mr. Riley had some affirmative obligation to provide information to Mr. Predmore, which comment violated Mr. Riley's Fifth Amendment right to remain silent. RP 321:9-17. See Griffin v. California, supra. The State also argued that Mr. Riley had the burden of proving he was not impaired, which burden is not required in any criminal case, and it is improper to suggest that the defendant has any burden of proof. Id. See WPIC 4.01.

Counsel for Mr. Riley timely objected during plaintiff's closing argument. Further, it was of constitutional magnitude as it violated Mr. Riley's right to remain silent and right not to present any evidence. RP 321:18-20. The State's argument, therefore, was improper. Additionally, that argument, unfortunately, "[was] so flagrant and ill-intentioned as to create incurable prejudice" such that a curative instruction would

not remedy the comment. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

Significantly, the prosecutor's comments invited and actually required the jury to speculate as to what evidence Mr. Riley should have provided in his defense when, clearly, the burden of proof remains with the State throughout the case. Under such circumstances, no curative instruction could have obviated the prejudice, particularly since the expert's testimony could not relate Mr. Riley's THC level to any impaired driving.

Accordingly, and based upon the holdings of Henderson and Belgarde, supra, the State's closing argument was improper and prejudicially effected Mr. Riley right to a fair trial.

IV. THE COURT SHOULD REVERSE THE CONVICTIONS BECAUSE THE ERRORS TAKEN TOGETHER PREJUDICED MR. RILEY'S RIGHT TO A FAIR TRIAL.

Reversal may be required due to the cumulative effects of trial court errors, even if each error standing alone would otherwise be considered harmless. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v.

Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992). Error may take one of two forms-- constitutional and non-constitutional error. State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

Constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. Whelchel, at 728; Guloy, at 425. Non-constitutional error requires reversal if, within reasonable probabilities, it materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Here, all of the errors mentioned above unfairly prejudiced Mr. Riley's right to a fair trial. In addition to preventing Mr. Riley the opportunity to present testimony as set forth above, evidence was allowed into trial that should not have been, and State witnesses were allowed to testify on irrelevant matters.

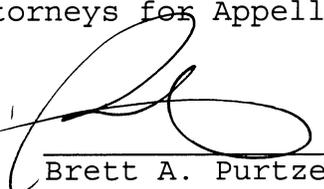
Absent the errors set forth above, Mr. Riley would have been acquitted. Because it cannot be stated beyond a reasonable doubt that Mr. Riley's conviction would stand absent the jury receiving, and not receiving, the evidence as outlined above, reversal is required.

CONCLUSION

Based upon the above, this court should reverse the jury's verdict with directions to the trial court to dismiss, or, in the alternative, order a new trial for Mr. Riley.

RESPECTFULLY SUBMITTED this 27th day of February, 2006.

LAW OFFICES OF MONTE E.
HESTER, INC. P.S.
Attorneys for Appellant

By: 

Brett A. Purtzer
WSB #17283

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor
Deputy Prosecuting Attorney
946 County-City Building
Tacoma, WA 98402

Rick Riley
14118 - 108th Ave Ct E
Puyallup, WA 98374

BY 
STATE OF WASHINGTON
COUNTY

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PACIFIC DIVISION

Signed at Tacoma, Washington this 27th day of February, 2006.


Lee Ann Mathews