IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICK B. FITCHITT, Appellant.	No. 38466-3-II UNPUBLISHED OPINION

Johanson, J. — Rick B. Fitchitt appeals his jury conviction for unlawful manufacture of a controlled substance (marijuana). He argues that the trial court abused its discretion by allowing a police officer to testify as to the amount needed for a 60-day supply of medical marijuana. Fitchitt claims that this testimony was (1) opinion testimony given without a proper foundation establishing the officer as an expert and (2) an opinion on the ultimate issue of his guilt or innocence. We affirm.

FACTS

In November 2005, officers executed a search warrant for Rick Fitchitt's home and found a marijuana grow operation, including 10 adult plants, 39 juvenile plants, and 30 unrooted starts. Officers also recovered two marijuana cigarettes; a roach clip; and marijuana, stored in multiple

bags, weighing approximately 4.28 pounds.[1] Fitchitt admitted that the 10 adult plants constituted an additional 10 to 20 ounces of usable marijuana.

The State charged Fitchitt with manufacture of a controlled substance (marijuana) and possession of a controlled substance (marijuana) with intent to deliver. At trial, Fitchitt asserted a medical marijuana affirmative defense.

Over Fitchitt's foundation objection, the trial court permitted Detective Roy Alloway, a member of the West Sound Narcotics Enforcement Team (WestNET), to testify as an expert regarding the manufacture of marijuana and the amount of medical marijuana needed for a 60-day supply. Detective Alloway had worked for the past 10 years as a narcotics detective with WestNET, and his training included police academy; 400 hours of training specific to narcotics investigations and indoor marijuana growing operations; and training and/or experience in the way in which marijuana is grown, cultivated, and harvested. His experience also included training on how marijuana is packed for sale and sold on the street, participating in undercover marijuana buy operations, and investigating marijuana grow operations. Detective Alloway had also attended Federal Bureau of Investigation and Drug Enforcement Agency (DEA) classes on indoor marijuana grow operations. In 2001, he wrote a paper for the Kitsap County Prosecutor's Office on medical marijuana and the amount of medical marijuana needed for a 60-day supply.

In formulating his opinion on what constitutes a necessary 60-day supply of medical marijuana, Detective Alloway attended a DEA-sponsored class on indoor marijuana

[1] An evidence technician reported that the amount of marijuana that he weighed totaled about 3.72 pounds. Detective Alloway testified that marijuana dries when in storage, loses its moisture content and, thus, it will weigh less over time.

investigations, had discussions with a doctor from the University of Mississippi who grows marijuana for the federal government, and had discussions with suspects about the typical plant yield in hundreds of marijuana grow operations that he had previously investigated. He had also read studies on the adult marijuana plant's typical yield.

The record does not contain a clear statement from Detective Alloway of what comprises a 60-day supply. Detective Alloway started to explain the "rule of 9, 9 and 9" as a measure of a necessary 60-day supply, and that it requires nine plants in the adult stage, but the trial court sustained defense counsel's objection before he could finish.[2] 9 Verbatim Report of Proceedings (VRP) at 425. But Detective Alloway also stated that there were three stages to a marijuana plant's life (adult, vegetative, and juvenile or seedling), that a person harvests an adult plant, and that the typical adult marijuana plant harvests four to eight ounces. The jury could deduce that a 60-day supply requires 9 adult plants, 9 vegetative plants, and 9 juvenile or seedling plants, with an average yield from the adult plants being a total of 36 to 72 ounces of marijuana. Detective Alloway's testimony regarding the amount of medical marijuana needed for a 60-day supply did not differentiate between patients that smoke marijuana versus patients that ingest it.

Dr. Gregory Carter testified on Fitchitt's behalf and stated that if one were ingesting marijuana, 70 ounces would constitute a 60-day supply, and only 17.5 ounces if one were to smoke it. Fitchitt stated that his typical consumption method was to ingest it by baking the

[2] Although defense counsel objected, he did not move to strike the testimony, so it remains part of the record for the jury to consider. *State v. Swan*, 114 Wn.2d 613, 659, 790 P.2d 610 (1990) (even when an objection is sustained, if the court does not grant a motion to strike or instruct the jury to disregard it, the testimony "thus remain[s] in the record for the jury's consideration."), *cert. denied*, 498 U.S. 1046 (1991).

substance or making it into capsules, but that he would occasionally smoke it. He claimed that most of the marijuana found belonged to his housemates, not him. The jury found Fitchitt not guilty of possession of a controlled substance with intent to deliver, but guilty of unlawful manufacture of a controlled substance (marijuana). Fitchitt appeals.

ANALYSIS

I. ER 702–Expert Witness Testimony

A. 60-Day Supply

Fitchitt argues that the trial court erred in permitting Detective Alloway to testify as to the amount of marijuana needed for a 60-day supply of medical marijuana when the detective did not have any training in medicine or botany, and he stated that his opinion rested on one study and his own paper written for prosecutors. We agree.

We review the trial court's decision to admit or exclude expert testimony under ER 702 for an abuse of discretion. *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). The trial court abuses its discretion when the basis for its decision is manifestly unreasonable or based on untenable grounds. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

"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." ER 702. When considering the admissibility of testimony under ER 702, we engage in a two-part inquiry: "'(1) does the witness qualify as an expert; and (2) would the witness's testimony be helpful to the trier of fact.'" *State v. McPherson*, 111 Wn. App. 747, 761,

46 P.3d 284 (2002) (quoting *State v. Guilliot*, 106 Wn. App. 355, 363, 22 P.3d 1266, *review denied*, 145 Wn.2d 1004 (2001)). Fitchitt does not contend that the detective's testimony was not helpful or irrelevant. Consequently, we focus on the detective's qualifications.

The Washington State Medical Use of Marijuana Act provides an affirmative defense for patients and caregivers against Washington laws criminalizing marijuana. Former RCW 69.51A.040 (1999).[3] A qualifying patient, who is 18 years of age or older,[4] may use the affirmative defense if he or she (1) meets all criteria for status as a qualifying patient; (2) possesses no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a 60-day supply; and (3) presents his or her valid documentation to any law enforcement official who questions the patient regarding his or her medical marijuana use. Former RCW 69.51A.040(2)(a), (b), (c) (1999). The statute does not define what constitutes a 60-day supply.[5]

Fitchitt contends that Detective Alloway lacks medical or botany training yet testified about the amount needed for a necessary 60-day supply of medical marijuana. The State argues that, as explained in *McPherson*, an officer does not have to possess a college degree to testify as

[3] The legislature recently changed the title of the Act to The Washington State Medical Use of Cannabis Act and, among other amendments, changed the usage of "marijuana" to "cannabis" throughout the Act. Laws of 2011, ch. 181 (effective July 22, 2011). Because of the relevant dates in this case, we continue to use the term marijuana in this opinion.

[4] Fitchitt was born in 1953.

[5] By federal law, doctors cannot, and Dr. Carter specifically does not, prescribe medical marijuana or provide a recommended dosage. Instead, doctors authorize the use for medical purposes without specific dosage suggestions. Dr. Thomas Orvald authorized Fitchitt's medical marijuana use, but he did not recommend a particular dosage and advises all patients to use the "least amount" that gives the patient relief from his or her symptoms. 11 VRP at 594.

an expert about the drug manufacturing process. We hold that, although Detective Alloway did not necessarily need a degree, he was not qualified to testify as an expert on what constitutes a 60-day supply of medical marijuana.

An expert witness does not have to possess a college degree because, "in the appropriate context, '[p]ractical experience is sufficient to qualify a witness as an expert.'" *McPherson*, 111 Wn. App. at 761-62 (quoting *State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992)). In addition, a person with sufficient training and experience may qualify under ER 702 as an expert on narcotics production notwithstanding that person's lack of complete and formal college education. *McPherson*, 111 Wn. App. at 762.

In *McPherson*, the court found that the testifying detective qualified as an expert in methamphetamine manufacturing, notwithstanding his lack of a chemistry degree, because the detective had considerable training and hands-on experience. *McPherson*, 111 Wn. App. at 762. Specifically, the detective (1) completed a one-week, 40-hour DEA course on the assessment, analysis, and cleanup of methamphetamine labs; (2) attended several conferences on the subject of methamphetamine labs; (3) passed his training on to other officers; (4) attended a two-day refresher course the week before trial; and (5) investigated 40 to 60 methamphetamine labs in just the first 6 or 7 months of 2000 alone. *McPherson*, 111 Wn. App. at 762.

Here, Detective Alloway, though lacking a college or advanced degree, had considerable experience on the indoor cultivation and harvesting of marijuana. He had practical experience through his 10 years investigating marijuana grow operations, formal training through the FBI and DEA, and had conducted his own independent research. Thus, like the officer in *McPherson*,

Detective Alloway was well qualified to testify about the manufacture of the narcotics at issue, as well as the marijuana plant's typical yield. But although Detective Alloway developed the "9, 9 and 9 rule," he provided no basis for how he came to this conclusion or what were his qualifications for reaching his conclusion that this was the necessary amount for a 60-day supply of medical marijuana. 9 VRP at 427.

Calculating how much marijuana a plant yields does not explain how much is necessary for a patient's 60-day supply. *State v. Shepherd*, 110 Wn. App. 544, 552, 41 P.3d 1235, *review denied*, 147 Wn.2d 1017 (2002). In *Shepherd*, the defendant, asserting a medical marijuana defense, produced a study that referenced a scientific, analytical method for calculating a marijuana plant's actual, usable amount. *Shepherd*, 110 Wn. App. at 552. The court held that this was insufficient to prove the amount of marijuana a patient needed for a 60-day supply because it presented only part of the equation. *Shepherd*, 110 Wn. App. at 552-53. For example, there was no evidence regarding how much marijuana the patient needed for his condition and no evidence whether the patient ate or smoked the marijuana. *Shepherd*, 110 Wn. App. at 552. The court noted that the consumption method would "influence the amount of marijuana necessary to manage [the patient's] condition whether its use is curative or simply palliative." *Shepherd*, 110 Wn. App. at 552-53.

Here, Detective Alloway offered no explanation for his claim that nine plants in each of the three stages of marijuana growth constituted a 60-day supply, and he proffered no training or experience to support his claim. Detective Alloway did not testify that he had any training in the potency of marijuana, the metabolic rate at which a person processes marijuana, dosage

requirements for various qualifying conditions, or how much marijuana is necessary for Fitchitt's own 60-day supply. Although Detective Alloway has considerable training in how to cultivate and harvest marijuana, he offered no knowledge, skill, experience, training, or education in how much medical marijuana a patient, and specifically Fitchitt, needs for a 60-day period. Without a foundation in the record establishing Detective Alloway as an expert in determining the necessary 60-day supply of medical marijuana, the trial court abused its discretion in overruling Fitchitt's objection and permitting Detective Alloway to testify in this regard.

B. Harmless Error

Any error in admitting Detective Alloway's testimony, however, is harmless. The erroneous admission of expert testimony under ER 702 is not of constitutional magnitude. *State v. Huynh*, 49 Wn. App. 192, 198, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988). Thus, the error is not prejudicial unless, within reasonable probabilities, it materially affected the trial's outcome. *Huynh*, 49 Wn. App. at 198.

First, Detective Alloway's testimony is harmless because the 60-day supply of medical marijuana that he recommended is virtually identical to that recommended by Dr. Carter. Detective Alloway recommended essentially 36 to 72 ounces of marijuana, whereas Dr. Carter recommended 17.5 ounces if smoked and 70 ounces if eaten.

Second, Detective Alloway's testimony is harmless because officers recovered 4.28 pounds of marijuana and 10 adult plants. Fitchitt claimed he could harvest about 10 to 20 ounces of usable marijuana from the plants. Fitchitt's total possession was thus between 78.48 to 88.48 ounces,[6] an amount exceeding both 60-day supply estimates. Fitchitt claimed that most of the

marijuana seized was a poor quality not worth smoking and denied that it was his, but this was a credibility matter for the jury to decide that we cannot review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Any error in admitting Detective Alloway's 60-day-supply testimony is harmless.

II. Opinion Testimony

Next, Fitchitt argues that Detective Alloway's testimony on the necessary 60-day supply of medical marijuana was an improper opinion on Fitchitt's guilt. We disagree.

A witness may not offer testimony in the form of an opinion regarding the guilt or veracity of the defendant. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion); *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). Such testimony is irrelevant and invades the defendant's right to a jury trial and invades the jury's exclusive fact-finding province. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *Demery*, 144 Wn.2d at 759 (plurality opinion); *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578. To determine whether statements are impermissible opinion testimony, we consider the circumstances of the case, including, (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *State v. King*, 167 Wn.2d 324, 332-33, 219 P.3d 642 (2009).

[6] There are 16 ounces in a pound.

Admission of witness opinion testimony on an ultimate fact, without objection, is not *automatically* reviewable as a "manifest" constitutional error. *Kirkman*, 159 Wn.2d at 936. But "an explicit or almost explicit" opinion on the defendant's guilt or a victim's credibility can constitute manifest error. *Kirkman*, 159 Wn.2d at 936 (noting, "[r]equiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow").

Although Fitchitt objected to Detective Alloway's testimony because he believed the detective was not qualified as an expert, he did not object based on improper opinion testimony as to the ultimate issue of guilt or innocence. If Detective Alloway had given opinion testimony, we would consider it especially prejudicial because an officer's testimony often carries a special aura of reliability. *King*, 167 Wn.2d at 331. But Detective Alloway did not give improper opinion testimony. The affirmative defense that Fitchitt asserted required evidence as to what is a necessary 60-day supply of medical marijuana. Former RCW 69.51A.040(2). The former version of the statute also does not define what constitutes a 60-day supply. By federal law, doctors cannot prescribe a certain amount of marijuana. Instead, doctors authorize the use for medical purposes without specific dosage suggestions. Thus, testimony of some kind is required to determine the appropriate 60-day supply.[7]

[7] We express no opinion on whether such testimony is necessary going forward in light of the legislature's recent amendments to RCW 69.51A.040 explaining how much marijuana a qualifying patient or designated provider may possess. Laws of 2011, ch. 181, § 401. The legislature also repealed RCW 69.51A.080 which permitted the Health Department to adopt rules on what constitutes a 60-day supply of marijuana. Laws of 2011, ch. 181, § 1204. These changes to the law came into effect on July 22, 2011.

Detective Alloway did not state that Fitchitt possessed an amount greater than the permitted 60-day supply or that he believed Fitchitt to be guilty or innocent.[8] Detective Alloway's only opinion was about what quantity of marijuana constituted a 60-day supply. Detective Alloway did not opine Fitchitt's guilt, let alone make the explicit or almost explicit statement required under the manifest error exception. *Kirkman*, 159 Wn.2d at 936. We hold that Fitchitt has not demonstrated a manifest constitutional error that we can review.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Johanson, J.

We concur:

Armstrong, P.J.

Quinn-Brintnall, J.

[8] Peculiarly, Fitchitt seems to claim that his expert should have been the only person allowed to comment on the necessary 60-day supply of marijuana. Yet if Detective Alloway's testimony was an opinion on Fitchitt's guilt, Fitchitt's expert's testimony was an opinion on Fitchitt's innocence, which is also prohibited. *See Demery*, 144 Wn.2d at 759 (plurality opinion); *Heatley*, 70 Wn. App. at 577.