SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case No. 12CA1489	DATE FILED: May 7, 2018 11:37 AM FILING ID: 52AB653CB6283 CASE NUMBER: 2016SC158
Petitioner THE PEOPLE OF THE STATE OF COLORADO v. Respondent SIMON KUBUUGU	
Douglas K. Wilson, Colorado State Public Defender BRIAN COX 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #50258	Case Number: 16SC158
ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 6,528 words.

This brief complies with the standard of review requirement set forth in C.A.R. 28(b).

> In response to each issue raised, the Respondent must provide under a separate heading before the discussion of the issue, a statement indicating whether respondent agrees with petitioner's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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ISSUE ANNOUNCED BY THE COURT

Whether the court of appeals erred in concluding that testimony regarding the respondent's alcohol consumption was expert testimony, which could not be elicited under the guise of lay testimony.

STATEMENT OF THE CASE

On February 1, 2011, Simon Kubuugu was charged with criminal impersonation, a class six felony, §18-5-113(1)(e), C.R.S.; child abuse, a class two misdemeanor, §18-6-401(1)(7)(b)(I), C.R.S.; driving under the influence, a misdemeanor, §42-4-1301(1)(a), C.R.S.; driving under restraint, a misdemeanor, §42-2-138(1)(a), C.R.S.; and reckless driving, a class two traffic offense, §42-2-1401, C.R.S. PCF, Vol. I, p. 12.

On April 5, 2012, a jury found Mr. Kubuugu guilty of criminal impersonation, child abuse, driving under restraint, driving while ability impaired (a lesser included offense of DUI), and reckless driving. *Id*. at 100-04; TR 4/5/2012, pp. 709-10.[1]

The court of appeals held that two errors occurred in this case: statements were admitted in violation of Mr. Kubuugu's *Miranda* rights, and a police officer

[1] The transcripts appear in a single PDF file. All citations are to the page number within the PDF document, not the page number within that date's transcript.

was allowed to offer expert testimony on alcohol consumption without being properly admitted as an expert. *See* slip op. Because neither error affected Mr. Kubuugu's conviction for driving under restraint, the court affirmed that conviction. *See id*., p. 15. The court reversed the remainder of Mr. Kubuugu's convictions due to the two errors. *See id.* This Court denied certiorari on the *Miranda* issue, but granted it on the expert testimony issue.

STATEMENT OF THE FACTS

On January 30, 2011, Officer Luton of the Arapahoe County Sheriff's Office was conducting a traffic stop unrelated to this case, when he heard honking and observed a red Honda turning out of a parking lot in front of other cars. TR 4/3/2012, pp. 352-53. Shortly thereafter, he heard tires screeching and more honking, and he saw the same Honda make a U-turn, which caused other drivers to brake. *Id.*, pp. 355-56. Luton acknowledged that U-turns are legal in that area. TR 4/4/2012, p. 414. The red Honda then drove past Luton, at which point he was able to see Mr. Kubuugu driving and note the car's license plate number. TR 4/3/2012, p. 357.

The car then turned into the parking lot of an apartment complex and parked near Luton's police car. *Id.* Luton called dispatch with the plate number. *Id.* He

then got out of his police cruiser and walked over to the car. *Id.*, p. 358. As he approached, Luton noticed a child in the front passenger seat, and saw Mr. Kubuugu duck down in the driver's seat. *Id.* He testified that Mr. Kubuugu put the car in reverse, backed into a bush, and attempted to drive away. *Id.* Mr. Kubuugu attempted to exit the parking lot, but was blocked by another police car, so he re-parked the car in a different spot. *Id.*, pp. 358-61.

Mr. Kubuugu then got out of his car with a "shiny object" in his hand and began "walking at a brisk pace" with the child. *Id.*, p. 361. Luton followed Mr. Kubuugu, pulled out his gun, and ordered him to stop. *Id.* He testified that Mr. Kubuugu continued walking with the child. *Id.*, p. 362.

Luton pointed his gun at Mr. Kubuugu and ordered him to the ground. *Id.*, p. 362. Mr. Kubuugu complied, and Luton saw that the shiny object in Mr. Kubuugu's hand was a beer can. *Id.* He kicked the can out of Mr. Kubuugu's hand, spilling the beer, then handcuffed Mr. Kubuugu. *Id.*; TR 4/4/2012, pp. 430-31. Luton testified that he smelled a heavy odor of alcohol on Mr. Kubuugu. TR 4/4/2012, p. 431. Luton did not know whether any beer spilled on Mr. Kubuugu when he kicked the can out of his hand. *Id.*, pp. 431-32.

After conducting a pat-down search, Luton walked Mr. Kubuugu to his police car. *Id.*, pp. 363, 366. Mr. Kubuugu's speech was not slurred, and his

balance was not impaired. TR 4/4/2012, pp. 436-37. Another officer took photos of several empty beer cans he found in the back of the red Honda. TR 4/3/2012, p. 345.

Luton testified that he then orally advised Mr. Kubuugu of the Colorado Express Consent Law, because he believed he had been drinking. TR 4/4/2012, p. 386. Mr. Kubuugu initially agreed to a breath test, but then later refused to take the test because "he didn't believe that he was drunk and . . . he had not done anything at all." *Id.*, pp. 386-88.

Luton then arrested Mr. Kubuugu and took him to jail. *Id.*, p. 389. Luton testified that he gave Mr. Kubuugu the option to take the breath test one more time, but that Kubuugu refused, saying "he did nothing wrong." *Id.*

Mr. Kubuugu testified at trial, and disputed many aspects of Luton's version of events. Mr. Kubuugu testified that he borrowed his ex-wife's car, something he did often, and spent the day with his son. *Id.*, pp. 495-96. They visited some friends, then went to Burger King. *Id.*, pp. 497-99. Mr. Kubuugu then stopped at a liquor store and bought one beer. *Id.*, p. 499.

Afterwards, Mr. Kubuugu and his son saw a police car stopping a driver across the street. *Id.* Kubuugu made a U-turn and parked in a parking lot near the police car so his son could the see police car's lights. *Id.*, pp. 500-02. They began

to eat their burgers; Mr. Kubuugu then moved the car and parked closer to his friend Abubaker's home. *Id*., pp. 502-03. After re-parking the car, Mr. Kubuugu opened his beer and began to drink it. *Id.*, p. 504. He saw a police officer walking towards the car. *Id*. He got scared since he had an open container, so he and his son got out of the car and began to walk away. *Id.* Mr. Kubuugu then heard the officer scream, "Stop police, stop." *Id.*, p. 505. Two officers threw him to the ground and handcuffed him. *Id.*, pp. 505-06.

Sometime after arresting him, Luton said to Mr. Kubuugu, "You are going to jail, buddy." *Id.*, p. 512. Mr. Kubuugu testified that Luton never explained that refusing to take a blood or breath test would result in the revocation of his license. *Id.*, pp. 512-13. Mr. Kubuugu insisted, however, that he did take a breath test. *Id.* When he was asked about the beer cans that were recovered from the back seat of the red Honda, Kubuugu testified that the cans were from a different day. *Id.*, p. 517.

SUMMARY OF THE ARGUMENT

The court of appeals properly concluded that Officer Luton's testimony required that he be qualified as an expert. Though a lay witness could testify that Mr. Kubuugu smelled of alcohol based on his personal observation, Luton went far beyond those limits, and thus testified as an expert, when he discussed alcohol

metabolization and the effects of time and quantity on the scent of metabolized alcohol. His testimony that the smell of Mr. Kubuugu's breath was consistent with the empty beer cans found in his car was an expert opinion. Moreover, Mr. Kubuugu did not open the door to this testimony because he never explored any of Luton's expert training, experience, or opinions.

The court of appeals also properly concluded that this error required reversal. Luton's testimony would likely have failed a *Shreck* hearing if the prosecution had properly moved to admit him as an expert, and thus would not have been admissible. In the absence of direct evidence of intoxication, Luton's testimony was crucial to establish that Mr. Kubuugu was intoxicated when he was driving. Lack of notice also prevented Mr. Kubuugu from effectively responding to Luton's testimony, either through cross-examination or by securing a defense expert to rebut Luton.

Finally, even if this Court holds that there was no error or that it was harmless, the court of appeals properly reversed Mr. Kubuugu's only felony conviction on independent grounds, and thus the arguments in this Court only affect his misdemeanor convictions.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT OFFICER LUTON'S TESTIMONY WAS EXPERT TESTIMONY IN THE GUISE OF LAY TESTIMONY, AND IT CORRECTLY REVERSED MR. KUBUUGU'S CONVICTIONS BECAUSE THE ERROR WAS NOT HARMLESS.

Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *Venalonzo v. People*, 2017 CO 9, ¶ 15. Defense counsel repeatedly objected to Luton's testimony on the basis that he had not been qualified as an expert. TR 4/4/2012, pp. 448, 449, 553-54.

Relevant Facts and Proceedings

At Mr. Kubuugu's request, the trial court ordered the parties to disclose all experts, their opinions, the bases and reasons for those opinions, and their qualifications, prior to trial. PCF, Vol. I, pp. 21, 35. The prosecution endorsed no experts and made no disclosures.

When Officer Luton testified at trial, the prosecutor elicited testimony that he had been working as a police officer for almost ten years, and that he had extensive training and experience dealing with drunk drivers, including police academy training focused on detecting drinking and driving, as well as yearly in-service DUI and alcohol detection training. TR 4/3/2012, p. 352; TR 4/4/2012, p. 384. The prosecutor also asked Luton to explain what a wet lab is:

> Q: And do you ever do any sort of practical training with regards – have you ever heard the term wet lab?
>
> A: Yes.
>
> Q: Tell the jury what a wet lab is.
>
> A: A wet lab is where individuals that have been drinking various amounts of alcohol come in before people that are going through certification so that you can see the different levels of intoxication of someone that has had, say, one beer versus five.

TR 4/4/2012, p. 384.

On redirect, the prosecutor elicited testimony that Luton had performed one to three hundred DUI investigations. *Id.*, p. 441. The prosecutor then asked Luton:

> Q: When you are dealing with people that are intoxicated, does the alcohol that is coming from their breath smell differently than the alcohol that may have been spilled?
>
> A: Yes. When the body metabolizes alcohol…

Id., p. 447.

At this point, defense counsel objected, since Luton had not been qualified as an expert, for lack of foundation, and because the question was outside the scope of cross-examination. *Id.*, p. 448. The court sustained the objection on foundation grounds. *Id.* The prosecutor then asked:

> Q: Officer, do you have training and experience with regards to understanding why alcohol might smell

> differently coming from a person's breath rather than just spilled on their coat?
>
> A: Yes.
>
> Q: And can you tell the jury kind of what that training is?
>
> A: When a person, a body metabolizes --

Id.

Again, defense counsel objected since Luton had not been endorsed as an expert. *Id.* The court overruled the objection, finding that Luton was "just talking at this point about his training." *Id.* Luton went on, "When a person exhales alcohol through --" *Id.* Defense counsel objected a third time since Luton was talking about "what he learned at his training." *Id.*, pp. 448-49. The court replied, "I'm overruling the objection. I will let the officer talk about what he learned during his training." *Id*., p. 449. Luton continued:

> A: As a person exhales alcohol, it is coming out of their system versus where if it is spilled on the ground or on the clothing, it does not have that metabolized odor.
>
> Q: Okay. And is that in your training and experience a pretty distinctive thing as far as smelling alcohol on someone's breath as opposed to smelling it on somebody's shirt sleeve?
>
> A: Yes; very much so.

> Q: So with regard to this case, let me ask you, did you notice any sort of smell difference between -- or did you notice any smell coming from his jacket?
>
> A: I don't recall any odor coming from his jacket. The odor that I do recall is the odor that was emitting from his person and his breath in the backseat of the car.

Id., pp. 449-50.

The jury submitted several questions for Luton, and the judge conferred with counsel off the record to determine which questions could be asked. *Id.*, p. 455. The court later made a record of counsel's objections to the questions. *Id.*, pp. 551-55. One of the questions was about how the passage of time and quantity of alcohol affect a person's breath. *Id.*, p. 456. Defense counsel objected that Luton was "not qualified as an expert [and] does not have the qualifications to opine in the area." *Id.*, p. 553. She argued that Luton's testimony "does rise above knowledge and training of a general nature for police officers." *Id.*, pp. 553-54. The court overruled the objection, finding that it was "really more of an opinion testimony by a lay witness pursuant to 701." *Id.*, p. 554. Thus, the court allowed the following testimony:

> Q: And then would the odor coming from the mouth be the same whether the beer was consumed five minutes ago compared to 30 minutes ago, and does it matter how much was consumed?

> A: It matters how much was consumed, not so much for the odor coming from the person, because there is -- in my experience there has been -- there is, you know, where you first take a sip there is that type of odor, versus the odor of someone who has been drinking for a few hours and maybe has not had a drink in the last hour but I can still smell the unknown alcoholic beverage emitting from their mouth.

Id., pp. 456-57.

To follow up, the prosecutor asked:

> Q: [I]s [the smell coming out of someone's mouth] going to be the same smell as if they just spilled it on their jacket?
>
> A: No.
>
> Q: Little different?
>
> A: Yes. The odor are you -- I'm sorry. Are you referring to the odor that is like when they're exhaling, or like they just took a fresh sip -- the fresh?
>
> Q: That potentially could smell the same, yes, because it hasn't been digested and coming back out of their lungs via the blood?
>
> A: Right. Yes.
>
> Q: And can you always tell based upon when somebody has been drinking a lot or a little, is the odor pretty much going to be more constant?
>
> A: In my experience and training, the more that the individual has had to drink the stronger the odor is.

> Q: Okay. And with regards to this case, how strong was the odor on the defendant?
>
> A: I described it in my report as strong, and I believe just from all of the encounters that I've had with people over the years that it was a strong odor.
>
> Q: Okay. With regards to the number of beer cans that were found in the car, would the odor have been consistent?
>
> A: Yes.

Id., pp. 457-58.

Later, during its case-in-chief, the defense called Catherine Nanda. *Id.*, p. 475. She testified that Mr. Kubuugu used to do yard work for her. *Id.*, p. 477. She noted that "[h]e never appeared to be drinking at the time" when he worked for her, but that he had "an old odor of alcohol" about him. *Id.*, p. 481. On cross-examination, the prosecutor asked her if she had received any "formalized training in detecting alcohol" and if she had ever done any DUI stops or participated in wet labs. *Id.*, p. 484. The prosecutor then compared her training and experience to that of Luton, asking:

> [W]hen it really comes to determining someone's intoxication level, a trained officer who has been on the street for ten years and has had numerous classes on detecting alcohol, stopped numerous people from driving under the influence and who has also been dealing with people that are drunk driving during other types of stops,

> they probably have a lot better understanding of what was going on as far as intoxication?

Id., pp. 485-86.

Nanda responded that the prosecutor "[had] a point," but that she could "tell when people are impaired." *Id.*, pp. 485. The prosecutor continued to press the point that Luton was the expert:

> As far as you being able to tell whether somebody is impaired or somebody who has had far more training and experience, they are going to be a little better at it than you are. Fair to say?

Id., p. 486.

Nanda responded, "No," *id.*, but when asked, "the better person to determine whether or not [Mr. Kubuugu] was drinking that day is probably the officer that was there and not you?", Nanda agreed. *Id.*, p. 488.

Discussion

The United States and Colorado Constitutions guarantee criminal defendants the right to a fair trial by an impartial jury. U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25. "A jury that has been misled by inadmissible evidence . . . cannot be considered impartial." *Harris v. People*, 888 P.2d 259, 264 (Colo. 1995).

A. Officer Luton's testimony was expert testimony presented in the guise of lay testimony.

1. Governing law on police officers' expert or lay testimony

When police officers offer testimony that relies on specialized knowledge, training, or experience beyond the scope of an ordinary person's life experience, they are testifying as experts and must be qualified as such. Colorado Rule of Evidence 702 states, "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

Conversely, when a witness has not been qualified as an expert, their "testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) *not* based on scientific, technical, or other specialized knowledge within the scope of Rule 702." C.R.E. 701 (emphasis added).

In *People v. Stewart*, this Court held that police officers must be qualified as experts when their testimony relies on "specialized skills or training." 55 P.3d 107, 123 (Colo. 2002), *as modified on denial of reh'g* (Sept. 23, 2002), *as modified on denial of reh'g* (Oct. 15, 2002). Applying that principle, this Court held that a police officer improperly offered his expert opinion in the guise of a lay opinion when he testified about accident reconstruction, and when he offered his conclusions about what happened in that case based on what he saw at the crime scene. *Id.* at 122-24.

In *People v. Veren*, a division of the court of appeals applied *Stewart*, and held that a police officer needed to be qualified as an expert before he could testify that a person who possessed a large amount of pseudoephedrine likely planned to manufacture methamphetamine. 140 P.3d 131, 138-39 (Colo. App. 2005). This Court has recently cited *Veren* with approval. *Venalonzo*, 2017 CO 9, ¶¶ 20, 50.

In *Venalonzo*, this Court recently clarified the test to determine whether opinion testimony may be offered as lay testimony or expert testimony. "If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness provides testimony that could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert

testimony." *Venalonzo*, 2017 CO 9, ¶ 23. This Court then held that a child forensic interviewer describing her training and experience, and her interview techniques, did not constitute expert testimony. 2017 CO 9, ¶ 27. This Court also held that it was not expert testimony when she explained that children have a poor sense of physical measurements and that they often disclose secrets to other children before adults, as most adults who have spent time around children would be familiar with these basic facts. *Id*., ¶ 28. However, it was expert testimony when she testified about how children behave in forensic interviews, and about their recollection of core versus peripheral details of an event. *Id*., ¶¶ 29-30.

Applying the *Venalonzo* test, this Court also recently held that it was expert testimony when a police officer testified about the concept of "grooming" in the context of sexual predation. *Romero v. People*, 2017 CO 37, ¶ 15. Divisions of the court of appeals have also applied *Venalonzo* to impose limits on what a police officer may testify to as a lay witness. For example, in *People v. Garrison*, a division of the court of appeals held that police testimony about tracing IP addresses was expert testimony. *People v. Garrison*, 2017 COA 107, ¶¶ 48-55, *reh'g denied* (Sept. 7, 2017), *cert. denied*, No. 17SC677 (Colo. Jan. 29, 2018).

Similarly, this Court also recently applied the *Venalonzo* test to hold that it was expert testimony when a police officer offered an opinion on whether a blood

stain was a result of physical contact, or whether it was "spatter" or "cast-off." *People v. Ramos*, 2017 CO 6, ¶¶ 1, 9, 10. The opinion in *Ramos* notes that an officer is more likely offering expert testimony when the prosecution emphasizes his training and experience, and when the officer uses specialized or technical language. *Id*., ¶¶ 9, 10. Finally, *Ramos* also notes that unless an officer is offering an expert opinion, his opinion testimony may be unnecessary, as it may not add anything with which jurors are not already personally familiar. *Id*., ¶ 10.

2. Officer Luton's testimony was expert testimony because it relied on his expert training and experience, and because it was beyond the knowledge of a typical lay person.

Applying the principles discussed above to this case, Officer Luton's testimony was expert testimony. As in *Ramos*, the prosecution capitalized on Luton's training and experience: the prosecutor had Luton recount his extensive experience, his involvement in one to three hundred DUI investigations, and his wet lab training.[2] Moreover, the prosecution explicitly compared Luton's expertise in alcohol consumption to that of the defense witness, Catherine Nanda, in order to

[2] The State correctly notes that Mr. Kubuugu did not object to this testimony. OB, pp. 7, 28. However, as this Court noted in *Venalonzo*, a witness describing his or her training and experience is not expert testimony, and thus there was no reason to object. 2017 CO 9, ¶ 27. Rather, the objectionable testimony is when a witness, not qualified as an expert, offers testimony that *relies on* that training and experience. *Id.*, ¶ 29. Though not objectionable in and of itself, a witness's testimony about his training and experience is a relevant factor in deciding whether their subsequent testimony is expert or lay testimony. *Ramos*, 2017 CO 6, ¶ 9.

argue that Luton's testimony was more credible. It is ironic that the prosecution argues on appeal that Luton was a lay witness, after arguing to the jury that he possessed an expertise that other witnesses lacked.

Moreover, as in *Ramos*, Officer Luton used specialized terminology when he discussed how the body "metabolizes" alcohol. An ordinary person is not familiar with that term, its meaning, or its significance as it relates to a person's intoxication level or the odor of a person's breath.

The State cites *Stewart* for the principle that "police officers regularly, and appropriately, offer testimony under Rule 701 based on their perceptions and experiences." 55 P.3d at 123; OB, pp. 20, 23. However, the State neglects to mention that *Stewart* also held that police officers must be qualified as experts when their testimony relies on "specialized skills or training"; and that, as discussed above, this Court held that the challenged police testimony in *Stewart* was expert testimony. 55 P.3d at 123. Because Luton's testimony went far beyond his lay perceptions and experiences, the State's citation to *Stewart* does not support its argument.

The State also notes that "Colorado courts have consistently held that common knowledge and experience allow a lay witness to express an opinion regarding whether someone was under the influence of alcohol." OB, p. 22. The

State's assertion misses the point. Luton did not testify that Mr. Kubuugu appeared intoxicated. *See* TR 4/4/2012, pp. 436-37. Rather, Luton's testimony went far beyond an ordinary person's knowledge of alcohol consumption or its effects: not only was he asked about the difference between the smell of ingested alcohol versus spilled alcohol, but he was also asked about the difference between alcohol that was ingested within the past five minutes versus a half hour ago. *See id*., pp. 456-58. Ultimately, the prosecution asked Luton's opinion of whether the smell of ingested alcohol on Mr. Kubuugu was consistent with having consumed the number of empty beer cans found in his car—a conclusion far beyond the ken of a lay witness. *Id*., p. 458:14-17.

The State notes that alcohol use is pervasive in Colorado, and that an ordinary person would therefore recognize signs of intoxication and the odor of alcohol. OB, p. 24. Again, this misses the point: Luton did not testify to signs of intoxication, and Mr. Kubuugu did not object to testimony that he smelled of alcohol. Rather, Mr. Kubuugu objected to testimony about the smell of alcohol over time, and how that smell changes, which an ordinary person would not know. Luton also testified that the smell of alcohol was consistent with the number of empty beer cans in Mr. Kubuugu's car, a conclusion that an ordinary person could not reach.

Finally, any claim that Luton's testimony was within an ordinary person's knowledge and experience is belied by the fact that a juror asked Luton about the difference between the smell of alcohol consumed five versus thirty minutes ago: if an ordinary person would know this, why would the juror need to ask? The only reason the juror would ask Luton is if he or she believed Luton had expert knowledge that the jury did not.

B. If Luton's testimony was not an expert opinion, it was still inadmissible as a lay opinion because, in the absence of any expertise, Luton's opinion was not helpful to the jury.

A witness may only offer an opinion as lay testimony if it is "rationally based on the perception of the witness" and if it is "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." C.R.E. 701.

A lay witness's opinion is not helpful, and therefore not admissible, unless he or she is "in a better position than the jurors" to evaluate the evidence. *Robinson v. People*, 927 P.2d 381, 384 (Colo. 1996) (officer can only testify about identity of person on surveillance tape if there "is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury."); *accord Ramos*, 2017 CO 6, ¶ 10 (noting that where lay jurors would understand an issue based on their own life experience, a police officer's opinion testimony becomes unnecessary); *United States v. Jackson*, 849 F.3d 540,

554 (3d Cir. 2017) ("Rule 701(b)'s helpfulness requirement mandates the exclusion of testimony where the witness is no better suited than the jury to make the judgment at issue. A [witness]'s testimony may not simply dress up argument as evidence.") (internal quotation marks and citations omitted).

Here, if Luton's testimony was not expert testimony, it was unnecessary and unhelpful. If an ordinary person would already know how alcohol metabolizes and how that affects its smell, there would be no reason to elicit any of that testimony from Luton. The only testimony that was based on Luton's own perception was his description of the odor of Mr. Kubuugu's breath—not any of his testimony about factors that affect that odor, or his opinion of what that odor meant about Mr. Kubuugu's alcohol consumption that day.

Accordingly, even if Luton's testimony was not expert testimony, all of his abstract testimony about alcohol metabolization and odors—in other words, everything but his testimony that Mr. Kubuugu smelled of alcohol—was also inadmissible as lay testimony. The trial court therefore erred when it allowed Luton's testimony over Mr. Kubuugu's repeated objections.

C. Mr. Kubuugu did not open the door to Luton's testimony.

The State argues in the alternative that Mr. Kubuugu opened the door to Officer Luton's testimony. OB, pp. 30-32. As the State correctly notes, the

concept of opening the door can allow otherwise inadmissible evidence to become admissible—specifically, when one party presents evidence on an issue, and fairness requires that the opposing party be able to rebut or contextualize that evidence. OB, p. 30. However, because Mr. Kubuugu did not question Luton on his expert training, experience, or opinions, he did nothing to open the door to the challenged testimony, and the State's argument therefore fails.

The State relies on this Court's decision in *Golob v. People*, 108 P.3d 1006, 1012 (Colo. 2008). OB, p. 30. That case is distinguishable. In *Golob*, the prosecution asked its expert to discuss the defense expert's report and conclusions. 180 P.3d at 1012. Thus, even though it was a "close" question whether the defense expert was qualified to offer expert testimony, this Court held that the prosecution opened the door to the defense expert's testimony by asking its expert to discuss the defense expert's conclusions. *Id*. The reasoning of *Golob* thus has no bearing on this case: Mr. Kubuugu did not call an expert to preemptively refute Luton's expert testimony, nor did he otherwise explore any of Luton's expert training, experience, or conclusions.

Rather, all Mr. Kubuugu did was ask Luton if he knew whether any alcohol was spilled on Mr. Kubuugu's clothing. TR 4/4/2012, p. 432. That was a simple factual question, and it did not rely on Luton's training or experience in any way.

Unlike in *Golob*, where the prosecution opened the door to expert testimony by discussing the purported expert's report, Mr. Kubuugu did not broach the topic of how alcohol metabolizes or how its odor changes by time or quantity. Accordingly, Mr. Kubuugu did not open the door to the challenged testimony.

D. The error was not harmless

1. *The State misapprehends the standard of reversal for improperly admitted expert testimony.*

The State argues that improperly admitted expert testimony is only reversible "if the defendant asserts that he was surprised by the testimony and could not effectively cross-examine it," and suggests that the defendant must specifically make that assertion on the record in the trial court. OB, p. 32. The State cites no authority from this Court for that rule, because it is not the rule.

Instead, the State cites *People v. Conyac*, 2014 COA 8M, ¶¶ 68-70. Though the *Conyac* division noted as part of its analysis that the defendant in that case did not assert that he was surprised by the testimony, 2014 COA 8M, ¶ 69, the *Conyac* division did not hold that a defendant *must* do so, nor that he must do so on the record in the trial court, in order to prevail on appeal.

Moreover, *Conyac* is distinguishable in other important respects. Most notably, the challenged testimony in that case was properly admissible as expert testimony, meaning that the only problem with its admission as lay testimony was

lack of adequate notice and preparation for the defense. *Id.*, ¶ 67. Here, however, Mr. Kubuugu does not concede that Officer Luton's testimony met the reliability requirements of C.R.E. 702 and *People v. Shreck*, 22 P.3d 68 (Colo. 2001), nor did the trial court or the court of appeals reach that conclusion. *See infra.* Thus, the *Conyac* division was analyzing the harm from a different type of error than this one: an error of notice and procedure, whereas here there is no basis to conclude that the evidence would have been admissible even if proper notice had been given.

In addition, the *Conyac* division was reviewing for plain error, whereas here the error was preserved. 2014 COA 8M, ¶ 67.

Finally, *Conyac* is a court of appeals case, and neither the State nor the *Conyac* division cite any authority from this Court to suggest that a defendant must make a record that he is "surprised" by expert testimony in order for the error to be reversible. To the contrary, this Court's recent decisions reversing for improperly admitted expert testimony make no mention of such a rule, either implicitly or explicitly. *See Romero*, 2017 CO 37, ¶ 16 (reversing based on the prejudicial substance of the testimony, without any discussion of whether the defendant was caught off-guard by it); *Venalonzo*, 2017 CO 9, ¶¶ 47-52 (mentioning the prejudice from lack of notice in addition to the prejudice from the substance of the

testimony, but not mentioning or requiring a specific record that the defendant was surprised); *see also Ramos*, 2017 CO 6, ¶ 12 (affirming the court of appeals without any harm analysis).

2. Mr. Kubuugu was prejudiced by the lack of notice that Officer Luton would offer expert testimony.

The State asserts that despite the lack of notice, Mr. Kubuugu was able to effectively cross-examine Officer Luton. OB, p. 33. But the lack of notice undermined Mr. Kubuugu's preparedness in two key respects. Specifically, he was unable to impeach Luton on the adequacy of his training and experience, any defects in his expert techniques, or any disagreements or controversies within the field of alcohol detection (to the extent that such a field actually exists and that Luton was actually qualified in that field, *see infra*). Mr. Kubuugu was also unable to secure his own expert to rebut Luton's testimony. *See Venalonzo*, 2017 CO 9, ¶ 50 ("If Venalonzo had had the benefit of pretrial disclosure of the interviewer's expert testimony and the bases for her opinions, then he would have had the opportunity to evaluate the testimony in advance of trial or to obtain his own expert witness.") (internal quotation marks and citation omitted).

3. *Mr. Kubuugu was prejudiced by the substance of Officer Luton's testimony.*

The harm from the improperly admitted expert testimony in this case runs much deeper than lack of notice. Because Luton was never endorsed as an expert, the trial court never held a *Shreck* hearing to review Luton's qualifications or the scientific consensus on alcohol detection from human perception of odors. There is nothing in the record to suggest that there is a reliable scientific technique to determine, by the simple human perception of a scent, whether someone has consumed alcohol versus spilled it, nor how much they consumed, nor how recently; nor whether Luton was adequately trained in such a technique, nor whether he reliably applied it in this case. *See* C.R.E. 702; *People v. Shreck*, 22 P.3d 68 (Colo. 2001). Counsel is unaware of any cases holding that such a scientific field exists or that police officers are adequately trained in it.

It is thus likely that, had the proper notice been given and had the proper procedural safeguards been in place, Luton's testimony would not have been admissible at all—either as expert testimony or as lay testimony. Thus, this Court should look not only to the harm that stemmed from the lack of notice that Luton would offer expert testimony, but also to the harm that stemmed from the substance of that testimony. *See Romero*, 2017 CO 37, ¶ 16 (focusing on the

prejudicial substance of the testimony); *Venalonzo*, 2017 CO 9, ¶¶ 49-52 (considering both the substance of the testimony and the lack of notice).

Here, Luton was allowed to testify to the differences between how alcohol smells when it has been spilled, when it has been consumed recently, and when it has been consumed some time ago. TR 4/4/2012, pp. 456-58. He was then allowed to testify that Mr. Kubuugu's scent was consistent with having consumed all of the empty beer cans in his car. *Id*., p. 458. This testimony, which should not have been admitted, was extremely important to establishing whether Mr. Kubuugu was intoxicated while he was driving, and how intoxicated he was if so.

As this Court noted in *Venalonzo*, allowing improper expert testimony can "imbue[] [the witness's] testimony with an air of expertise" and lead the jury "to credit [the witness's] assessment . . . over other evidence in the case." 2017 CO 9, ¶ 50. Indeed, the prosecution leveraged the false aura of expertise attached to Luton's testimony when it cross-examined Catherine Nanda, the defense witness, and compared her qualifications to Luton's. TR 4/4/2012, pp. 484-86. Moreover, the false aura of expertise was particularly problematic here because the witness was a police officer, and thus the jury may have held him in higher regard than other witnesses. *See Veren*, 140 P.3d at 140 ("because the public holds police officers in great trust, there can be potential harm where a police officer gives

expert testimony without first being qualified as such") (citing *Roberts v. Grafe Auto Co*., 701 So.2d 1093, 1099 (Miss. 1997)).

4. The properly admitted evidence against Mr. Kubuugu was not overwhelming.

Moreover, though the State asserts that the evidence of Mr. Kubuugu's guilt was overwhelming, OB, p. 34, it was in fact far from overwhelming. As the court of appeals noted, there was no direct evidence that Mr. Kubuugu was intoxicated. Slip op, p. 8. Officer Luton did not observe that Mr. Kubuugu had any difficulty walking or speaking. *Id*.; TR 4/4/2012, pp. 436-37. Though Mr. Kubuugu admitted to opening one beer, he maintained that the other empty cans of beer in his car were from drinking on a previous occasion. TR 4/4/2012, pp. 504, 517. Accordingly, Luton's improper expert testimony was essential to Mr. Kubuugu's DWAI conviction, and this Court should therefore affirm the court of appeals' conclusion that the error was not harmless.

CONCLUSION

In its conclusion, the State asks this Court to reverse the court of appeals and to affirm Mr. Kubuugu's "convictions." OB, p. 36. However, the State has not articulated any reason to affirm Mr. Kubuugu's only felony conviction in this case, which was for criminal impersonation. The court of appeals reversed that

conviction because Mr. Kubuugu's *Miranda* rights were violated. *See* slip op., pp. 14-15. This Court denied certiorari on the *Miranda* issue. The court of appeals' decision reversing the criminal impersonation conviction thus stemmed from an issue that is not before this Court, and which is entirely unaffected by the issue before this Court. *See M.S. v. People*, 2013 CO 35, ¶ 7 n. 6 (this Court does not address questions outside the scope of certiorari); *Vaughan v. McMinn*, 945 P.2d 404, 406 n.3 (Colo. 1997) (same).

Based on the reasons and authorities set forth herein, Mr. Kubuugu asks this Court to affirm the court of appeals' decision reversing all but one of Mr. Kubuugu's convictions. In the alternative, if this Court agrees with the State's arguments, it should still only affirm Mr. Kubuugu's misdemeanor convictions.

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CERTIFICATE OF SERVICE

I certify that, on May 7, 2018, a copy of this Answer Brief was electronically served through Colorado Courts E-Filing on Rebecca A. Adams of the Attorney General's Office.