SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 14, 2018 1:56 PM FILING ID: 4F50B079DEC6F CASE NUMBER: 2016SC158
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 12CA1489 Petitioner, THE PEOPLE OF THE STATE OF COLORADO, v. Respondent, SIMON KUBUUGU.	▲ **COURT USE ONLY** ▲ Case No. 16SC158
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PEOPLE'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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/s/ Rebecca A. Adams

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

RULES

STATEMENT OF THE ISSUE

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 AND THE FACTS

The defendant, Simon Kubuugu, was convicted of criminal impersonation, child abuse, driving under restraint (DUR), driving while ability impaired (DWAI), and reckless driving. (PCF, v. I, pp. 100-04). The court of appeals affirmed the defendant's conviction for DUR, but reversed his convictions for criminal impersonation, child abuse, reckless driving, and DWAI. *People v. Kubuugu*, (Colo. App. No. 12CA1489, Dec. 17, 2015) (not published pursuant to C.A.R. 35(f)). This Court granted certiorari review to determine whether the court of appeals erred in concluding that the officer's testimony was expert testimony.

The People agree that this Court's resolution of this issue only affects the defendant's convictions for child abuse, reckless driving, and DWAI.[1]

ARGUMENT

I. The trial court properly admitted the officer's lay opinion testimony regarding the defendant's alcohol consumption. Alternatively, any error does not require reversal.

A. Standard of Review

A trial court's evidentiary decisions, including determinations of whether proffered testimony constitutes lay or expert testimony, are reviewed for an abuse of discretion. *See Venalonzo v. People*, 2017 CO 9, ¶¶ 15, 24. Any error is reviewed under the non-constitutional harmless standard. *Id.* at ¶ 48.

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[1] The defendant's conviction for criminal impersonation was reversed by the court of appeals and is unaffected by the outcome of these proceedings. The court of appeals held that the defendant's statements at the scene should have been suppressed because they were taken in violation of *Miranda* and that "[w]ithout his statements that he was the man on the driver's license, there is no evidence that he had used or would use the driver's license at all, let alone to defraud the police." This Court declined to grant certiorari on the *Miranda* issue.

The defendant objected to the officer's testimony on redirect that alcohol that has been spilled smells differently than alcohol that is emanating from a person's breath. (TR 4/4/12, pdf 448-49). The defendant also objected to the officer's testimony, following a question from the jury, that the amount of alcohol consumed impacts the odor. (*Id*. at pdf 456-57).

The defendant did not object to the prosecutor's follow-up questions to the officer after the jury question, including whether the odor of alcohol was consistent with the number of beer cans found in the car. (*Id*. at 457-58). The defendant did not object to the officer's testimony regarding his training and experience or his observations of the defendant. (*Id*. at pdf 384:21-25, 386:6-18; TR 4/3/12, pdf 372:11-12). Where, as here, a defendant does not object, reversal is only required if the admission amounts to plain error. *See Hagos v. People*, 2012 CO 63, ¶ 18.

B. Law and Analysis

1. The officer properly provided lay opinion testimony.

In determining whether testimony is lay testimony under CRE 701 or expert testimony under CRE 702, the controlling question is whether the testimony "could be expected to be based on an ordinary person's experiences or knowledge." *Venalonzo*, ¶ 16.

Here, the defendant objected to the officer's testimony that alcohol coming from a person's breath smells differently than alcohol that has been spilled. (TR 4/4/12, pdf 447-50). That the officer recognized this distinction because of his training and experience does not mean that his observation was expert testimony. *Id*. at ¶ 28.

In *Venalonzo*, this Court held that the interviewer's testimony "that children are not very good at understanding physical measurements, that they often use generalities when speaking, and that they often reveal secrets to other children before they tell adults" was not expert testimony even though the "the interviewer recognized this behavior because of her years of experience interviewing child sex

assault victims." *Id*. The determining factor was whether an ordinary person who has spent time with children could reasonably be expected to recognize those behaviors without additional training or specialized experience.[2] *Id*.

Here, because an ordinary person who has spent time around alcohol and people who have consumed alcohol could also recognize that alcohol coming from a person's breath smells differently than alcohol that has been spilled, the officer's testimony was not expert testimony. The same is true of the officer's testimony that the amount of alcohol consumed impacts the strength of the odor. An ordinary person can be expected to know that the more a person drinks, the stronger the odor or that a person who has had one sip of alcohol will have a different

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[2] The defendant argues that because a juror asked a question about the odor of alcohol based on the time it was consumed and the amount consumed, the testimony was not based on an ordinary person's experiences or knowledge. (AB, p. 20). However, the test does not require that *every* person possess this knowledge—only that the testimony "could be expected to be based on an ordinary person's experiences or knowledge." *Venalonzo*, ¶ 16. In *Venalonzo*, this Court held that an ordinary person who has spent time with children could recognize the same behaviors, which is not to say that *every* person has spent time with children sufficient to reach those conclusions.

odor than someone who has been drinking for a few hours. (TR 4/4/12, pdf 456-57). And while the prosecutor referred to the officer's training and experience during redirect examination, the critical inquiry is whether the testimony could be expected to be based on an ordinary person's experiences or knowledge. *Venalonzo*, ¶ 23

Similarly, the officer's use of the term "metabolized odor" to explain the odor of alcohol "coming out of [a person's] system" is not a term unfamiliar to lay persons. *Id. at* ¶ 27 ("As for the distinction between leading and non-leading questions, the terms themselves may not be familiar to a lay person, but the concepts certainly are."). In any event, it is the substance of the testimony that matters, and here, the officer discussed common odors associated with alcohol use that an ordinary person could be expected to recognize. The officer did not explain how the body metabolizes alcohol or alcohol absorption or elimination rates. *See Venalonzo*, ¶ 22 (expert testimony "is that which goes beyond the realm of common experience and requires experience, skills, or knowledge that the ordinary person would not have").

The officer's remaining testimony, including his testimony that the amount of alcohol consumed was consistent with the beer cans in the car, can only be reviewed for plain error. Here, the officer essentially testified that the he smelled a strong odor of alcohol, which was "consistent" with the empty beer cans in the car. However, the officer agreed with defense counsel that he could not determine the quantity of alcohol consumed by the strong odor of alcohol and further agreed that beer has a stronger odor than other forms of alcohol. (TR 4/4/12, pdf 459-60). Thus, there was no error, let alone plain error.

While the prosecutor questioned defense witness CN about her training and experience as compared to that of the officer, CN consistently asserted that she was just as qualified as the officer to judge a person's intoxication. (*Id*. at 484-86). While she did agree that the officer "was the better person to determine whether or not [the defendant] was drinking that day," that was because the officer observed the defendant on the date of the offense while CN did not. (*Id*. at pdf 488:2-11).

2. The officer's testimony was helpful.

Alternatively, the defendant contends that, even if the officer's testimony was not expert opinion, it was inadmissible because it was not helpful to the jury. *See* CRE 701. However, the officer's testimony was helpful because the officer was present at the scene and could describe his observations—including what he smelled at the scene—which the jury could not have evaluated without his testimony. *Compare People v. Ramos*, 2017 CO 6, ¶ 10 ("If ordinary people had a well-developed understanding of blood transfer, then his testimony would have been unnecessary—the jury could have correctly interpreted the photographic evidence of blood … by itself."); *see also Robinson v. People*, 927 P.2d 381, 384 (Colo. 1996) ("[W]e ... hold that a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is *some* basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.") (emphasis added); *People v. Brown*, 731 P.2d 763, 765 (Colo. App. 1986) (lay testimony that paper and tape tears "matched"

was helpful to the jury even though photographs of the tears were also given to the jury).

3. The defendant opened the door to the officer's testimony.

"The concept of 'opening the door' represents an effort by courts to prevent one party from gaining and maintaining an unfair advantage by the selective presentation of facts that, without being elaborated or placed in context, create an incorrect or misleading impression." *Golob v. People*, 180 P.3d 1006, 1012 (Colo. 2008).

The officer's testimony was directly responsive to defense counsel's cross-examination regarding whether the odor of alcohol could have been the result of beer spilled on the defendant's jacket. (TR 4/4/12, pdf 431-32). On redirect, the prosecutor referenced defense counsel's question and asked, "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?" (*Id*. at 447:19-22). Over objection, the officer explained, "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." (*Id.* at 449:12-15).

The defendant reads *Golob* too narrowly when he argues that *Golob* "has no bearing on this case" because he did not call an expert to "preemptively refute" the officer's testimony, "nor did he otherwise explore any of [the officer's] expert training, experience, or conclusions." (AB, p. 22). In *Golob*, this Court considered whether a defense witness, who may have lacked sufficient expert qualifications, could still give expert testimony under the doctrine of "opening the door." 180 P.3d at 1012-13. This Court held that such testimony was permissible because the prosecution had introduced a witness who commented on the validity of a report prepared by the defense witness, reasoning that, "[b]y limiting [the defense witness's] testimony, the trial court permitted the jury to hear only one side of this issue." *Id.*

Similarly, in *Venalonzo*, this Court held that the officer's testimony that "in his experience as a school teacher, children only make up trivial stories, not serious accusations" was admissible because

the defendant had previously questioned the officer about this exact issue and opened the door for further questioning. *Venalonzo*, ¶ 44.

Here, without the ability to follow-up on redirect examination, the jury could have been left with the impression that the odor of alcohol was the result of a spilled beer, giving the defendant an unfair advantage. The officer's testimony on redirect examination placed his answer on cross-examination in context and did not exceed the scope of cross-examination. Therefore, because the defendant opened the door to the officer's statements, the trial court did not err in admitting this testimony.

4. Any error was harmless.

Assuming that the trial court erred in admitting the officer's testimony, any error was harmless because, contrary to defendant's contention, there is no reasonable possibility that any error could have contributed to his convictions. *See Venalonzo*, ¶ 48.

First, the allegedly improper testimony was only admitted during redirect examination after defense counsel asked the officer whether the odor of alcohol could be the result of spilled beer. Second, the officer

agreed with defense counsel that he could not determine the quantity of alcohol consumed by the strong odor of alcohol and agreed that beer has a stronger odor than other forms of alcohol. (TR 4/4/12, pdf 459-60). Third, the prosecution presented overwhelming evidence of the defendant's guilt, including the officer's observations of the defendant before and after the stop, the fact that the defendant refused to take a blood or breath test, and the open beer cans. (TR 4/3/12, pdf 368:21-23, 372:11-12). *See* § 42-4-1301(6)(d), C.R.S. (2017); *People v. Hyde*, 2017 CO 24, ¶ 13 (citing § 42-4-1301(6)(d) (refusal admissible at trial to prove guilt of DUI)); *Fitzgerald v. People*, 2017 CO 26, ¶ 27 (same). Fourth, the prosecutor did not rely on the allegedly improper testimony in closing argument. *See Marsh v. People*, 2017 CO 10M, ¶ 42 (error was harmless where prosecutor did not rely on the forensic interviewers' testimony in closing argument); *compare Romero v. People*, 2017 CO 37, ¶ 16 (error not harmless where prosecutor argued inadmissible expert testimony in closing). Fifth, the jury convicted the defendant of the lesser-included offense of DWAI rather than DUI, demonstrating that the officer's testimony was not unduly prejudicial. (TR 4/5/12, pdf 710).

The defendant asserts that he was not required to make a record in the trial court that he was surprised by the testimony and could not effectively cross-examine the witness. *See People v. Conyac*, 2014 COA 8M, ¶ 69. Even if the defendant is not *required* to make such a record, these are certainly factors this Court can consider in determining whether any error is harmless.[3] *See Venalonzo*, ¶ 50 (considering the lack of pretrial disclosure in determining that the error was not harmless). In this case, the defendant effectively cross-examined the officer and asked many questions of the officer, including questions about "metabolized alcohol." (TR 4/4/12, pdf 459-60). And the fact that he did not make any record in the trial court or request any relief, weakens his claim on appeal that the lack of notice undermined his preparedness. (AB, p. 25). *See cf. Chambers v. People*, 682 P.2d 1173, 1180 (Colo. 1984) (any claim that prejudice resulted from the

[3] The defendant also notes that the *Conyac* division was reviewing the claimed error for plain error, whereas here the error was preserved. (AB, p. 24). As noted above, two of the defendant's claims of error were preserved while the remaining claims were not.

prosecutor's failure to disclose an expert report "is convincingly belied by the defendant's failure to seek a continuance").

In summary, in light of the entire record, any error in admitting the officer's opinion did not substantially influence the verdict or impair the fairness of the trial. *People v. Stewart*, 55 P.3d 107, 124-25 (Colo. 2002). Thus, any error was harmless.

CONCLUSION

Based on the foregoing arguments and authorities, the People respectfully request that this Court reverse the decision of the court of appeals and affirm the defendant's convictions for DWAI, child abuse, and reckless driving.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **REPLY BRIEF** upon **BRIAN COX** and all parties herein, via Colorado Courts E-filing System (CCES) on August 14, 2018.

/s/ David Reuter