

1 IN THE MUNICIPAL COURT FOR THE CITY OF SEATTLE

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CITY OF SEATTLE,)
 Plaintiff,) Cause No. 633895
 v.) Superior Court Appeal
 ROOSEVELT WIGGINS,) No. 19-1-03033-6 SEA
 Defendant.)

MOTIONS IN LIMINE and 3.5 HEARING - VOLUME I

The Honorable ANITA CRAWFORD-WILLIS Presiding

January 8, 2019

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A P P E A R A N C E S

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E X H I B I T I N D E X

FOR THE PLAINTIFF:

NO.	DESCRIPTION	MARKED	ADMITTED
4	Constitutional Rights Form	--	61*
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*Exhibits admitted for hearing only

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2 January 8, 2019

3

4 THE CLERK: -- presiding.

5 THE COURT: You may be seated.

6 We can go on the record.

7 THE CLERK: Yes, Your Honor. We're on the record.

8 THE COURT: Thank you.

9 Go ahead, Ms. Sra.

10 MS. SRA: Good afternoon, Your Honor. Gory Sra on behalf
11 of the City.

12 This is the matter of Roosevelt Wiggins, Cause No.
13 633895. We were sent here for motions and trial.

14 THE COURT: Thank you.

15 MR. BURNTON: And good afternoon, Your Honor. Vincent
16 Burnton helping the attorney of record in this case,
17 Lindsey Whyte, for Mr. Roosevelt Wiggins.

18 MS. WHYTE: And for the record, Your Honor, Lindsey Whyte
19 for the Defenders Association on behalf of Mr. Wiggins, and
20 Mr. Wiggins is present.

21 THE COURT: Thank you. Good afternoon.

22 Good afternoon, Mr. Wiggins.

23 MR. WIGGINS: Good afternoon.

24 THE COURT: All right. So we have a motion really that
25 we need to get to first before we get to the motions in

1 limine. Is there testimony?

2 MS. SRA: So, Your Honor, I guess there's two motions.

3 THE COURT: Okay.

4 MS. SRA: So we did have a motions day in this case, and
5 there were two motions that were scheduled, one was the Lui
6 motion --

7 THE COURT: Uh-huh.

8 MS. SRA: -- and then the other was a 3.6 and 3.5 motion.

9 THE COURT: Right.

10 MS. SRA: And so what we're -- so essentially, there's
11 two motions that need to be addressed --

12 THE COURT: Okay.

13 MS. SRA: -- before we can begin trial, which would be
14 the 3.6, 3.5, and then the Lui motion.

15 For the Lui motion, the City will be calling --

16 THE COURT: An expert.

17 MS. SRA: -- Brian Capron from the tox lab, and City's
18 understanding is that Defense will be calling expert
19 witness Janine Arvizu.

20 THE COURT: Okay.

21 MS. SRA: And so Mr. Capron was only available till
22 1 p.m. today, and due to -- so due to that, City would be
23 requesting that we do the Lui motion first thing tomorrow
24 morning.

25 THE COURT: Okay.

1 MS. SRA: Officer Fritsch is on his way. He should be
2 here shortly.

3 THE COURT: Okay.

4 MS. SRA: So we could certainly do the 3.6 motion and the
5 3.5 motion.

6 THE COURT: All right.

7 MS. SRA: And then, I guess, in the meantime, we could
8 probably start with motions in limine if the Court would
9 like. I mean, it's --

10 THE COURT: How close is the officer?

11 MS. SRA: I -- he -- let's see here. I think he's
12 probably 15 to 20 minutes away.

13 THE COURT: Okay. So we probably could -- should do
14 something.

15 MS. SRA: Yes.

16 THE COURT: Okay. So, Defense, are you okay with the
17 3.6, 3.5 today and then the Lui motion in the morning?

18 MS. WHYTE: Yes, Your Honor. So we -- Ms. Sra and I
19 spoke about the Lui/Bullcoming motion, and we -- our expert
20 needs to be able to listen to the testimony of Mr. Capron,
21 so that's part of the reason why we needed to have it
22 tomorrow.

23 THE COURT: Okay.

24 MS. WHYTE: So we're in agreement with that.

25 We're ready to move forward on the 3.5, 3.6 as soon as we

1 get the officer here. I'll be handling the 3.6 portion of
2 the hearing, Mr. Burnton will be handling the 3.5 portion.
3 I anticipate we'll likely need the large screen for that.

4 THE COURT: Okay.

5 MS. SRA: Yeah. City would also need that as well.

6 THE COURT: All right. So in terms of -- I'm just trying
7 to plan out how this is going to (inaudible) timing. Today
8 for the 3.5, 3.6, do we just have the officer's testimony?

9 MS. SRA: Yes, Your Honor. City will only be calling one
10 officer.

11 THE COURT: And so my guess is that between that and
12 argument, that's going to take us to the end of today.

13 MS. SRA: I would imagine so, Your Honor.

14 THE COURT: And then how -- the Lui motion, you're
15 calling your expert and Defense is calling your expert?

16 MS. WHYTE: Correct, Your Honor.

17 THE COURT: Okay. So how long do the parties think
18 tomorrow morning is going to go, both experts with cross?

19 MS. WHYTE: I -- I mean, I think I'm probably expecting
20 it to take the morning.

21 THE COURT: Okay. And that's -- and the argument, right?

22 MS. WHYTE: Correct.

23 THE COURT: Okay.

24 MS. WHYTE: I don't think Defense would object to working
25 on the motions in limine now if the officer is still --

1 THE COURT: I'm just trying to get in my mind thinking
2 more long-term about the length of the trial.

3 Okay. So that would take us through -- today is the
4 8th -- today's the 8th. So that would take us through
5 basically Wednesday before lunch, and then if we don't
6 finish the motions in limine, that's probably going to take
7 us a couple hours. Not getting (inaudible) Wednesday
8 (inaudible).

9 And then can parties tell me how we (inaudible) trial? I
10 see that Defense has one and City, you have three.

11 MS. SRA: That's correct.

12 THE COURT: Same -- the same -- one of the -- the expert
13 and then one of the same officers.

14 MS. WHYTE: That's correct, Your Honor.

15 And I would just note for the Court, Your Honor, that
16 Ms. Arvizu, she's flying in tonight from Texas.

17 THE COURT: Uh-huh.

18 MS. WHYTE: She's flying back out on Thursday. I
19 think --

20 THE COURT: Yeah.

21 MS. WHYTE: -- the -- there's a chance she may have to
22 leave before -- or around the noon recess. So our hope is
23 that we are going to be able to get to her testimony by
24 Thursday morning if that's at all possible, but I just want
25 to flag that for the Court so that --

1 THE COURT: Yeah. So that's why I was trying to map this
2 out because -- so can I -- if we get the jury down by,
3 let's say, 2:00 and get them picked, and it usually takes
4 about an hour or so to get to do voir dire. Each side
5 usually wants to have -- a case that's complicated like
6 this probably wants to have 20 to 25 minutes for your voir
7 dire, and so then I'm just realistically trying to map out
8 the time. So that would probably take us into maybe
9 starting Thursday morning. This is pretty vicious.

10 And so then, City, we might, in order to meet the time
11 schedule of Defense's expert, have to take somebody out of
12 order. I'm just thinking ahead. Because if we -- three
13 city witnesses, and then we wouldn't get to your witnesses.
14 That likely puts us in Thursday afternoon.

15 And you said your witness needs to leave when?

16 MS. WHYTE: My understanding, she was unsure of which
17 destination she's flying to because she's testifying in
18 another case, but one flight was going to have her needing
19 to leave downtown Seattle by about noon, and the other
20 flight was going to have her leaving I think by 2:00 or
21 3:00.

22 THE COURT: Okay.

23 MS. WHYTE: So I think either way, really, morning is
24 what we need to plan on if we can make that happen.

25 THE COURT: So I'm just putting it out there that it's

1 something you should think about. It's going to be a tight
2 schedule. And then I'm thinking about for jurors, because
3 more than likely, they are going to have to come back on a
4 Friday. So I just like to kind of map out all the
5 scenarios before we start.

6 All right. So since the officer isn't here, let's -- why
7 don't we go ahead and start with the motions in limine.
8 And, City, I'll start with your packet. And I'll have you
9 take me through, and for each one then I'll let -- give
10 Defense a moment to -- a chance to either agree or
11 (inaudible).

12 THE CLERK: Your Honor, may I inquire just do we need the
13 TV for anything?

14 MS. SRA: Yes.

15 THE COURT: When the officer gets here, (inaudible).

16 All right. Go ahead, Ms. Sra.

17 MS. SRA: Yes, Your Honor. Thank you.

18 So the first motion in limine is to exclude the witnesses
19 from the courtroom.

20 THE COURT: All right. Defense, any objection?

21 MR. BURNTON: So, Your Honor, no objection in principle
22 to the other witnesses, But Defense would request that
23 Ms. Janine Arvizu be permitted to sit in and observe
24 Mr. Capron's testimony. Ms. Arvizu is, of course, the
25 Defense expert in this case, and an expert is permitted to

1 rely on statements and testimony of the City's witnesses in
2 forming her opinion, and so Ms. Arvizu would need to be
3 present and be able to hear Mr. Capron's testimony in order
4 to effectively testify on Mr. Wiggins' behalf in the
5 Defense's case.

6 THE COURT: Okay. City?

7 MS. SRA: And, Your Honor, the City would ask for the
8 same, that Brian Capron be able to sit in and listen to
9 Ms. Arvizu's testimony so that he may rebut.

10 THE COURT: Okay. So I'm going to put except -- it's
11 granted except for the experts.

12 Next?

13 MS. SRA: Motion to instruct witnesses. Essentially,
14 that whatever the outcome of the motions in limine is, that
15 both parties instruct their witnesses accordingly.

16 THE COURT: All right. Defense?

17 MR. BURNTON: And, Your Honor, Defense has no objection
18 to that.

19 THE COURT: Thank you.

20 Next?

21 MS. SRA: Motion to compel disclosure of defense and to
22 limit defense. I believe the defense in this case, that
23 was noted as general denial, so that's all the City's
24 asking for there.

25 THE COURT: All right. Defense?

1 MR. BURNTON: No objection, Your Honor.

2 THE COURT: Thank you. Granted.

3 MS. SRA: Motion to exclude any Defense motion to
4 suppress evidence or dismiss that has not already been
5 addressed. This just deals with new 3.6 issues cropping up
6 after we've started trial.

7 MR. BURNTON: And, Your Honor, so Defense has noted at
8 3.5 as well as 3.6, if new information comes out that there
9 would have been no way to know from the body-worn video,
10 then Defense may reraise this. At this time, Defense has
11 no objection, no.

12 THE COURT: Okay. I think she said to after the trial
13 started. So you mean after the motions; is that correct?

14 MS. SRA: Yes, Your Honor.

15 THE COURT: All right. Thank you. Granted.

16 Next.

17 MS. SRA: Motion to exclude any reference for any
18 evidence that has been suppressed. So, obviously, the
19 Court hasn't heard the motions yet, but --

20 THE COURT: Uh-huh.

21 MS. SRA: -- if there was evidence that was suppressed,
22 then there should be no mention of that during the trial.

23 MR. BURNTON: And, Your Honor, Defense has no objection.

24 THE COURT: Thank you. That's granted.

25 MS. SRA: Motion to exclude evidence or argument

1 concerning the penalty the Defendant is subject to if
2 convicted. This is -- just deals with the WPIC 1.02. City
3 has no objection if Defense's argument is in comport with
4 the WPIC 1.02, but anything beyond that the City would take
5 issue with.

6 THE COURT: Thank you.

7 MR. BURNTON: And, Your Honor, Defense has no objection
8 so long as, of course, the Defense can talk with the fact
9 of conviction to be careful, because a conviction is, of
10 course, something to take very seriously.

11 THE COURT: Thank you. That's granted.

12 MS. SRA: And then G is motion for production of Defense
13 investigator notes, physical evidence and document. This
14 is if the -- if Defense wanted to impeach any of the City's
15 witnesses, the City would just request that impeachment
16 material be shown to the City before Defense seeks to
17 impeach.

18 MR. BURNTON: And, Your Honor, in accordance with
19 impeachment practices, if that is the circumstance, then we
20 would, of course show them. But Defense would object
21 otherwise as State v. Yates does not apply to courts of
22 limited jurisdiction. State v. Yates is reason for the
23 general criminal rules and the specific policy aimed at the
24 criminal rules regulating courts of superior as opposed to
25 the courts of limited jurisdiction, and as a result, Yates

1 specifically does not apply to courts of limited
2 jurisdiction because of the (inaudible) frequency and
3 high-volume practice inherent to these courts. And so --

4 THE COURT: Can you help her, Madam Clerk?

5 Just a moment, Madam Bailiff. I'm going to get some help
6 for you.

7 I'm sorry. Go ahead, Mr. Burnton.

8 MR. BURNTON: Of course, Your Honor.

9 And so Defense would object and argue that Yates does not
10 apply to courts of limited jurisdiction, but, again, in the
11 instance of impeachment, would give the City the
12 opportunity to review that statement before confronting the
13 witness.

14 THE COURT: Oh, thank you. So I'm going to grant that.

15 Next one?

16 MR. BURNTON: Your Honor, could you clarify what
17 specifically you're granting?

18 THE COURT: That -- for impeachment purposes.

19 MR. BURNTON: Thank you.

20 THE COURT: I think that's all it's asking about.

21 MS. SRA: That's correct, Your Honor.

22 THE COURT: Yeah.

23 MS. SRA: Next is H, motion to bar any undisclosed
24 exhibits. I don't think this should be an issue in this
25 case, but --

1 MR. BURNTON: And, Your Honor, we do not anticipate using
2 any --

3 THE COURT: All right.

4 MR. BURNTON: -- images or video beyond what the City has
5 already disclosed.

6 THE COURT: All right. Thank you. Granted.

7 MS. SRA: I, motion to exclude any 404 or 608 evidence.

8 THE COURT: And could you -- is there specific 404 or 608
9 that you think that the Defense might offer that you're
10 referring to, or you're talking just in general?

11 MS. SRA: Just in general, Your Honor.

12 THE COURT: Defense?

13 MR. BURNTON: So I guess it's a little unclear other than
14 those two specific statements that would have been offered.
15 At this time, Defense does not object to violating the
16 rules -- to not violating the rules of evidence which is,
17 in effect, what this is asking for.

18 THE COURT: All right. So that will be granted.

19 Next?

20 MS. SRA: Next, Your Honor, is that neither party shall
21 conduct an examination that invites one witness to comment
22 on another witnesses accuracy or credibility.

23 THE COURT: (Inaudible.)

24 MR. BURNTON: So, Your Honor, Defense wants to just
25 briefly explore this, because one of Defense's witnesses is

1 going to be a quality assurance expert, Janine Arvizu, who
2 is, of course, going to talk about the nature of blood
3 testing and the procedures that go into blood testing and
4 the things that make blood testing reliable as well as
5 things that make blood testing unreliable. And so that, of
6 course, is information that is going to be helpful to the
7 trier of fact. So if specifically this is concerned with
8 no party saying he's a liar, she's a liar, that's something
9 Defense would not object to. But in terms of the accuracy
10 and reliability of the test results, that is something
11 Defense would object to, because that is precisely what
12 Ms. Arvizu is going to be talking about.

13 THE COURT: And I think that's different. She's
14 testifying as to what she sees as facts. I think that's
15 different than her saying, well, this person didn't do it
16 right or this -- I think that's what the City is referring
17 to.

18 MS. SRA: Yeah. The City's motion is in reference to --

19 THE COURT: This person's -- they're -- they didn't --
20 they didn't do it right, or they didn't -- their thing is
21 not accurate. I think she can testify to facts that this
22 is what she observed and then, you know, this is how it's
23 done. She would do it as long as I think Defense -- City
24 is talking about saying that, you know, she's not truthful
25 and you can't believe that person. I think it's more to

1 that, not to the facts that you're -- because that's why
2 you have your expert witness, because your expert witness
3 doesn't agree with the other expert.

4 MR. BURNTON: And so I want to make sure that Defense --

5 THE COURT: Yeah.

6 MR. BURNTON: -- is clear that, so, of course, Ms. Arvizu
7 would not get up here and say --

8 THE COURT: Right.

9 MR. BURNTON: -- you know, she must be lying or he must
10 be lying.

11 THE COURT: Yes.

12 MR. BURNTON: But in terms of the procedures that are or
13 are not followed --

14 THE COURT: Yeah.

15 MR. BURNTON: -- if there are issues with those
16 procedures, that is something she should be permitted to
17 speak to.

18 THE COURT: She can say that, yeah.

19 MR. BURNTON: And if there is some issue in the records
20 that she has reviewed that suggests that a proper procedure
21 was not followed or if something was not done right --

22 THE COURT: Uh-huh.

23 MR. BURNTON: -- then I do believe that is something she
24 would be --

25 THE COURT: Because the City --

1 MR. BURNTON: -- testifying to.

2 THE COURT: -- could cross on that.

3 So, City, my understanding is that you're basically
4 saying you want them to say that person is not telling the
5 truth or that person is lying. But I think both experts
6 will be saying their facts about how they perceive the
7 evidence that came out and how they would do the testing
8 and what (inaudible) wrong, if any procedure. So can you
9 clarify?

10 MS. SRA: Yes, Your Honor. So yes. That is definitely
11 part of it is, obviously, the -- any one witness commenting
12 on another witness's truthfulness, credibility --

13 THE COURT: Uh-huh.

14 MS. SRA: -- but also on that witness's accuracy. For
15 example, Ms. Arvizu getting up and saying, oh, well, Brian
16 Capron missed something. He's not -- he -- his review is
17 not accurate. Obviously, she can opine on her -- like what
18 her review is --

19 THE COURT: Uh-huh.

20 MS. SRA: -- but it would be inappropriate to try and
21 undermine the credibility of another witness.

22 THE COURT: Okay.

23 MS. SRA: Obviously, that's done indirectly through both
24 parties, but that direct sort of attack is inappropriate
25 under ER 404 and 405.

1 THE COURT: Okay. Thank you.

2 I'll hear from you.

3 MR. BURNTON: And so, Your Honor, what I would say is,
4 again, I think given that we are dealing with the
5 principles of science here, there are certain facts. Two
6 plus two always equal four. And I think if there is
7 something that is clearly incorrect, that is factually
8 incorrect that Mr. Capron did, Ms. Arvizu should, of
9 course, be allowed to testify to that.

10 THE COURT: So I guess, Counsel, what I guess is kind of
11 the way it's said is going to play more because, again, you
12 both have experts, and you have them because the expert is
13 not going to necessarily agree what the other person did.
14 But I think that can be done without saying, you know, he
15 messed up. He should have done this. So, I guess, that's
16 what I'm kind of concerned about, your expert or City's
17 expert that said this is the process that I followed and
18 this is why -- this is my experience and this is the
19 process that is followed. And that's the same as in
20 saying -- without saying he didn't follow it (inaudible).
21 Do you understand what I'm saying?

22 MR. BURNTON: I do believe I do, Your Honor.

23 Just so then to clarify --

24 THE COURT: Uh-huh.

25 MR. BURNTON: -- Defense would want to make sure that

1 Ms. Arvizu has the ability to explore the proper methods
2 and how --

3 THE COURT: Yes.

4 MR. BURNTON: -- blood ought to be kept and can speak to
5 when there are those issues raised why that might be an
6 issue. Now, will she then --

7 THE COURT: I think that's totally appropriate. I think
8 what would be questionable is for her to say you -- he
9 didn't do it right. He should have done, X, Y, Z, and
10 that's why this is off.

11 MR. BURNTON: So what our concern would be, Your Honor,
12 would be that if somebody did a math problem wrong --

13 THE COURT: Uh-huh.

14 MR. BURNTON: -- as you're explaining how he did the math
15 problem wrong, that would be proper for her to say. So if
16 he followed a scientific process incorrectly, she should be
17 permitted to speak why he did the scientific process
18 incorrectly. If (inaudible) long division and I did it --

19 THE COURT: I guess we're saying the same thing, but
20 because when you're doing the math, you could say this is
21 how it's supposed to be done. So you're inferring they
22 came -- they did it differently, so that's why they got the
23 wrong answer. Then you could do that without saying, you
24 know, this person messed up.

25 So I -- I understand what you're saying. I think you

1 should totally be able to bring that out. But I just think
2 it can be done without saying this person and the answer.

3 And if I recall, the witness that you have is really good
4 at doing that. I think I've heard that witness before.
5 Because, you know --

6 MR. BURNTON: I believe she is as well, Your Honor.

7 So with the tenor of character, I think, being central to
8 how this comes out, but the information itself is, of
9 course, subject to being addressed and evaluated.

10 THE COURT: Yeah.

11 MR. BURNTON: Thank you.

12 THE COURT: Next one?

13 MS. SRA: Next, Your Honor, is -- I guess we can actually
14 skip this. It goes to the 3.5, so --

15 THE COURT: Okay.

16 MS. SRA: -- I'll just reserve that.

17 THE COURT: Is that K?

18 MS. SRA: Yes, Your Honor.

19 And then --

20 THE COURT: Just put -- and that takes us to page --

21 MS. SRA: 8.

22 THE COURT: -- 8. So we're reserving that. Okay.

23 MS. SRA: And then continuing with L is motion for my
24 officers to testify using the word "impaired,"
25 "intoxicated" in discussion of -- or the officer's opinion

1 about the Defendant's ability to drive safe.

2 THE COURT: Okay. Defense?

3 MR. BURNTON: And so, Your Honor, Defense would object to
4 this motion. Because in allowing the officers to testify
5 in this manner, it invades the province of the jury. Both
6 Quaale and Heatley that the City cites themselves speaks to
7 the danger that the courts are to safeguard against in
8 allowing officers to make those conclusions. And so, of
9 course, the officer could generally speak to observations
10 that he saw and witnessed, but going any further than that
11 is going to, in effect, direct the jury to render a verdict
12 of guilty.

13 MS. SRA: And, Your Honor, I think the Defense is
14 skipping ahead. It would be inappropriate for the officer
15 to get up on the stand and say it is my belief and my
16 opinion that Mr. Wiggins was driving under the influence.
17 That invades the province of the jury. However, the courts
18 have held repeatedly that the opinion that a person is
19 intoxicated is a layperson's opinion. It's not an expert
20 opinion. The officer testifying as to his opinion based on
21 his observation as to his belief if Mr. Wiggins was
22 intoxicated is distinguishable from pairing that with the
23 charge and invading the province of the jury. And so the
24 City believes that the case law is in comport with that.

25 THE COURT: Thank you.

1 So, Mr. Burnton, that is my -- in this case, I mean, you
2 could even have a layperson to use those words and the
3 cases have said that it was okay. I mean, it's, you know,
4 something that you can -- for the jury to decide whether
5 they believe that.

6 But I think (inaudible) it's true the officer says a
7 person was driving under the influence, and that is that
8 it's the crime itself. And so the officer certainly cannot
9 use that term because that is a question of fact for the
10 jury. But I think the word "intoxicated," as it relates to
11 his opinion about the person's ability to drive, is
12 allowable. I'm going to grant that one.

13 And that takes us (inaudible).

14 MS. SRA: To M?

15 THE COURT: To 11.

16 MS. SRA: Yes, Your Honor.

17 And so M is just a motion to require timely and
18 specific --

19 THE COURT: Okay.

20 MS. SRA: -- objections.

21 THE COURT: All right. Defense, any objection to that?

22 MR. BURNTON: Your Honor, just a moment. I apologize.

23 Let me make sure I understand Your Honor's ruling. So is
24 Your Honor saying specifically that the officers on that
25 previous matter can speak generally to their observations

1 as a lay witness, but if somebody was --

2 THE COURT: And also about, you know, the reason that
3 they felt the person shouldn't be driving, but not use the
4 word "under the influence."

5 MR. BURNTON: And so is Your Honor also precluding the
6 word "impaired" and just allowing the officers to say
7 "intoxicated"?

8 THE COURT: No. I -- I'm saying that they can use those
9 words, "intoxicated" --

10 MR. BURNTON: And impaired?

11 THE COURT: -- (inaudible). Uh-huh.

12 MR. BURNTON: But not "drunk" or not "under the
13 influence," correct?

14 THE COURT: They can't use "under the influence."

15 MR. BURNTON: Defense would object then to the phrasing
16 of the term "drunk" specifically, because I think the term
17 "drunk" in and of itself is something that is so closely
18 aligned with what the crime of DUI is. Oftentimes, jurors
19 think it means drunk driving with the D there.

20 THE COURT: Uh-huh.

21 MR. BURNTON: And I think that terminology is in no way
22 scientific. It is a layman's term. It is charged. And to
23 allow it in I think would cause the jury to improperly
24 (inaudible). So I think "impairment" and "intoxication"
25 are one set of words. I think being allowed to say "drunk"

1 is in effect being allowed to say "under the influence."

2 MS. SRA: And, Your Honor, just to cut this short, the
3 City is not planning on using the word "drunk."

4 THE COURT: I don't know what the officers might say.
5 They don't generally use that word, but okay.

6 And so, Mr. Burnton, do the objections timely and
7 specific?

8 MR. BURNTON: Defense has no objection to that.

9 THE COURT: Okay. And I think both of you have been in
10 trial with me before. If you think it's going to be more
11 that we need to discuss, then we'll just do a sidebar. So
12 either you can ask or if I think it needs some more, then
13 I'll -- we'll do a sidebar outside. Okay? Thank you.

14 MS. SRA: Motion and motion excluded reference to this
15 case's procedural history.

16 MR. BURNTON: No objection, Your Honor.

17 THE COURT: Thank you. Granted.

18 MS. SRA: O, motion to exclude any missing witness
19 argument or instruction.

20 MR. BURNTON: Defense is not intending to (inaudible),
21 Your Honor.

22 THE COURT: Thank you.

23 MS. SRA: P, motion to admit the admissible --

24 MR. BURNTON: Oh, wait. Your Honor, just briefly, so,
25 Your Honor, I do want to just clarify. We are not

1 requesting the specific instruction of a missing witness,
2 but given that the toxicologist in this case is not coming
3 in who tested the individual's blood but that they called
4 in a supervisor, that, of course, would be something that
5 we are going to argue. While I understand that that may
6 not fall under the province of getting a missing witness
7 instruction itself, her absence is something we generally
8 will be arguing, of course, about.

9 THE COURT: Okay. City?

10 MS. SRA: So, Your Honor, since we're not there yet, I
11 guess it might be appropriate to simply reserve this.

12 THE COURT: All right. We'll do that.

13 And next? And (inaudible) when it depends, too.

14 MS. SRA: Yeah. I think we can --

15 THE COURT: Let's wait on that one.

16 MS. SRA: -- skip this one.

17 THE COURT: Mr. Burnton, I'm thinking P, because we don't
18 know what is and isn't going to come in at this point, I
19 think we'll reserve.

20 MR. BURNTON: That make sense to Defense, Your Honor.

21 MS. SRA: And then Q, I'm not sure if the Court wants to
22 address right now or later. That's the motion to admit the
23 nurse's credential in lieu of the nurse actually coming in
24 and having to testify.

25 THE COURT: So I guess we can wait because if it doesn't

1 come in, it wouldn't really be relevant.

2 MS. SRA: Yes, Your Honor.

3 R is along the same line.

4 THE COURT: Let's reserve that one and come back after
5 we -- let's see. There's -- is a box for that to be at the
6 bottom of 15?

7 MS. SRA: Oh, yes. I apologize, Your Honor.

8 THE COURT: That's okay. All right. We'll reserve that.
9 (Inaudible.)

10 So let's (inaudible) get Defense's. All right. You can
11 take me through.

12 MR. BURNTON: So, Your Honor, if we could --

13 THE COURT: What page do we start on for the --

14 MR. BURNTON: So I put in a table of contents, Your
15 Honor, for your reference. We can go ahead and start on
16 page 6, which is where the motions begin.

17 THE COURT: 6. Got you.

18 MR. BURNTON: And so, Your Honor, we would -- Defense
19 would move to preclude the officers from relaying any
20 statements from nontestifying officers in this case or from
21 dispatch that would violate Mr. Wiggins' Sixth Amendment
22 right to confront his accusers.

23 THE COURT: Okay. City?

24 MS. SRA: Your Honor, the City doesn't believe it has any
25 dispatch information. This wasn't on view. City does not

1 object.

2 THE COURT: I'm sorry?

3 MS. SRA: No objection.

4 THE COURT: All right. Let me turn to the box.

5 MR. BURNTON: And that would be on page 11 where those
6 boxes are.

7 THE COURT: Okay. Thank you.

8 MR. BURNTON: And just to clarify, I understand the City
9 has no dispatch, but given the number of officers that
10 responded to the scene of Mr. Wiggins and the number of
11 officers the City is calling at trial, Defense would move
12 to exclude any statements from those officers would not be
13 coming in to testify at trial as well.

14 THE COURT: So that would -- that's Part A of this. So
15 it had several parts, City. I don't know if you saw. is
16 your answer still the same?

17 MS. SRA: Oh, I didn't realize. Just a moment, Your
18 Honor.

19 THE COURT: There's another . . .

20 MS. SRA: Yes. No objection.

21 THE COURT: All right. So let me turn to, you said,
22 page 11. That's where the box is. So that's granted.

23 MR. BURNTON: And then, Your Honor, Subsection B can be
24 stricken. There is no 9-1-1 call in this case.

25 THE COURT: All right. I'll strike . . .

1 MR. BURNTON: And then, Your Honor, No. 2 --

2 THE COURT: Just one second. All right. Stricken.

3 All right. Go ahead.

4 MR. BURNTON: And, Your Honor, Defense would move to
5 preclude the officers from relaying information being
6 obtained from their mobile dispatch transmission center,
7 the in-car computer, as that dispatch can, of course,
8 involve communications back and forth between officers and
9 other agencies. So any statements that they learned or any
10 information they learned from that computer coming in
11 against Mr. Wiggins would still violate his confrontation
12 clause rights.

13 MS. SRA: And, Your Honor, the City is not planning to
14 elicit any information from an MDT.

15 THE COURT: All right. Thank you. Granted.

16 MR. BURNTON: Then, Your Honor, under Section 2, Motion
17 No. 3, Defense moves to preclude officers in this case from
18 testifying to whether they opined the Defendant to be drunk
19 while driving a vehicle as such testimony is improper. I
20 understand we addressed this with the City already.

21 THE COURT: So this is just as it relates to the word
22 "drunk"?

23 MR. BURNTON: As it relates to the word "drunk," "under
24 the influence." The Defense would object to the use of the
25 word "impaired" as well.

1 THE COURT: All right. So we already ruled on that, I
2 think. Right, City?

3 MS. SRA: So, Your Honor, I think we --

4 THE COURT: We said "under the influence."

5 MS. SRA: Yes. And the City is not going to be using the
6 word "impaired" either, so . . .

7 THE COURT: Granted.

8 MR. BURNTON: And as Your Honor --

9 THE COURT: I think 4, should we come back to 4?

10 MR. BURNTON: Yes. I agree. We should come back to 4.
11 So we can reserve on that.

12 THE COURT: And I think we can rule on this if it does
13 come in. (Inaudible) to do No. 5.

14 MR. BURNTON: No. 5, Your Honor, if Your Honor wishes to
15 address it now, so Defense would move to preclude the
16 toxicologist from testifying, quote, that everybody is
17 drunk above a .08. Because in saying that, the
18 toxicologist is saying to the jury this person was under
19 the influence. And that fact specifically is not coming
20 from that individual toxicologist, but rather it's coming
21 from statements that that toxicologist may or may not have
22 read over the course of his or her career, but have no
23 actual basis in their personal knowledge. There's no
24 studies that have been presented that this toxicologist did
25 to conclude, quote, that everybody is drunk at a .08.

1 There's been no evidence offered that any articles that he
2 personally wrote would suggest that conclusion in any way,
3 shape or form. But being permitted to speak to that is
4 giving an inflammatory piece of information to the jury
5 that is, in effect, unfronted, because none of the
6 actual sources for that information would be coming in.

7 THE COURT: Okay. City?

8 MS. SRA: Your Honor, I would ask the Court to reserve on
9 this. I think we're kind of leaping ahead. Experts are
10 allowed to rely on hearsay to offer an opinion. If
11 Mr. Capron can lay such a foundation and has such
12 knowledge, then I think we can address it at that point. I
13 don't want to speak for him. I don't know.

14 THE COURT: Uh-huh.

15 MS. SRA: (Inaudible.)

16 THE COURT: I guess the part that I would be concerned
17 about is that everybody is drunk. He can certainly testify
18 that the person was, you know, .08 and (inaudible) do
19 certain things. I don't know that he can say that
20 everybody's drunk because, again, that would be --

21 MS. SRA: Yeah. I don't think he would say that.

22 (Inaudible.)

23 THE COURT: Yeah. So that part disturbs me, but we
24 can -- we can reserve it. I think he can testify to other
25 things around that. But we can reserve it since we don't

1 know that that's going to come in.

2 MS. SRA: Thank you, Your Honor.

3 THE COURT: But I would be concerned about him saying
4 that word.

5 Okay. So we're going to reserve that.

6 Next?

7 MR. BURNTON: So, Your Honor, in the vein of No. 5
8 then --

9 THE COURT: Same thing?

10 MR. BURNTON: -- I believe it might be best to reserve.
11 What Defense is specifically moving to preclude is that,
12 essentially, an investigation into possibilities of
13 burn-off rate that would give the toxicologist
14 hypotheticals, that would be --

15 THE COURT: Uh-huh.

16 MR. BURNTON: -- inflammatory and suggest potentials for
17 alcohol to be much higher that have no actual attachment to
18 the fact of this case. And that, I think, engagement in
19 hypotheticals game is always dangerous because it directs
20 the jury's attention away from where it should be.

21 THE COURT: That's No. 6. We're going to reserve. Is
22 that right? Is that 6 you're arguing?

23 MR. BURNTON: That's correct, Your Honor.

24 THE COURT: Let's go to 7. And same, I guess.

25 MR. BURNTON: Yes. Because 7 is, again, probably

1 principled on whether the lab results (inaudible). We can
2 reserve on 7.

3 THE COURT: No. 8?

4 MR. BURNTON: So No. 8, Your Honor, Defense is moving
5 here to preclude the City from introducing evidence of the
6 Defendant's prior DUI conviction. It would be, under 403,
7 incredibly prejudicial to the Defendant with no probative
8 value.

9 THE COURT: City?

10 MS. SRA: And, Your Honor, no objection. Of course, if
11 Defense were to open the door, then we would address that
12 at that time.

13 THE COURT: Thank you. Granted.

14 No. 9?

15 MR. BURNTON: So, Your Honor, No. 9 is specifically
16 focusing on moving to preclude the City from eliciting
17 testimony on or making any argument as to the presence of
18 carboxy-THC and the reported presence of carboxy-THC in
19 Mr. Wiggins' blood results. So, again, this will, in part,
20 to kind of whether the blood comes in. So if Your Honor
21 wishes to reserve --

22 THE COURT: We can reserve that one.

23 MR. BURNTON: Okay.

24 THE COURT: 10?

25 MR. BURNTON: So on No. 10, Your Honor, Defense is moving

1 to preclude the City from inquiring into the number of DUI
2 investigations these officers have done or conducted
3 throughout their careers, because it's, in effect,
4 vouching. And where Defense is coming from at this point
5 is that while, of course, there is some basis to explore
6 basic foundations such as when officers talk about having
7 gone through ARIDE or if they're a DRE talking about
8 additional training that they've received, so let the
9 officers just rely on their numbers alone and the number of
10 investigations they've done is giving them a level of
11 credibility that is vouching and potentially bolstering
12 what otherwise would be a weaker case. Just because
13 somebody has done a certain number of these cases does not,
14 in effect, make them more or less accurate. And so by
15 letting the officer speak to those specific number of
16 investigations they've done, that is bolstering the City's
17 case beyond what the facts ought to do. So Defense would
18 move to preclude that testimony.

19 THE COURT: All right. City?

20 MS. SRA: Your Honor, the City would object. The City
21 doesn't believe that eliciting such information goes to
22 vouching or bolstering. City believes that that
23 information goes to the officer's experience, but also it
24 goes to the officer's credibility, it goes to the officer's
25 bias. If the officer testifies that he's conducted

1 numerous DUI investigations, that not every investigation
2 leads to an arrest, it shows that he is objective, that he
3 is not just pulling over people and arresting them for
4 DUIs. And so I think that that is important for the jury
5 to hear so that the officer -- so that the jury is not left
6 in the dark about how many investigations the officer might
7 have done. If he's a new officer, an older officer, is
8 more experienced, it goes to his credibility, which is
9 important given that he's the primary officer in this case
10 and a necessary witness in the City's case.

11 THE COURT: Thank you.

12 So, Mr. Burnton, I don't agree that that bolsters. It's
13 just the officer's experience. And whether he's done three
14 or 300, that's part of his experience. For example, in
15 your experts, you're going to testify about what they've
16 done, how many times they have testified, how many times
17 they have done that, and that doesn't go to vouching. It
18 just goes to say this person is experienced. And I'm sure
19 if we had an officer on here and it was his first DUI, I'm
20 sure Defense would point that out, this is your first DUI.

21 So the things that you are suggesting, you can certainly
22 cross on that and you can certainly argue that in your
23 closing that just because a person's done 300 doesn't mean
24 they're accurate. But I don't see that is vouching. So
25 I'm going to deny that.

1 MR. BURNTON: And just briefly, Your Honor, because I
2 want to clarify because I think we got into two categories
3 of responses.

4 THE COURT: Uh-huh.

5 MR. BURNTON: An officer testifying that he did a certain
6 number of investigations that led to a certain number of
7 arrests and a certain number of convictions would prejudice
8 the Defendant --

9 THE COURT: Why don't -- I've never heard them testify --

10 MR. BURNTON: And that's what I wanted to clarify,
11 that --

12 THE COURT: Okay.

13 MR. BURNTON: -- I would not want the officers
14 testifying --

15 THE COURT: Oh, I --

16 MR. BURNTON: -- to any likelihood of arrest or likelihood
17 of conviction upon it. He should not be able to --

18 THE COURT: I've never heard an officer testify. Have
19 you?

20 MR. BURNTON: Pardon, Your Honor?

21 THE COURT: Have you ever -- I've never --

22 MR. BURNTON: I've not yet heard the officer testify,
23 but --

24 THE COURT: All right.

25 MR. BURNTON: -- but the City did talk about whether an

1 officer doing his investigation would then talk about the
2 number of arrests that took place. If that were to happen,
3 Defense would specifically object to that circumstance.

4 THE COURT: Well, we have to wait until that happens.
5 But in general, talking about the number of investigations
6 that they've done is not vouching. And you'll have to wait
7 and make an objection at the time. But I've never heard an
8 officer testifying about the number of arrests they made
9 and just the number of investigations that they've done.

10 All right. Let's go to the next one.

11 MR. BURNTON: So, Your Honor, No. 11, Defense is here
12 moving to preclude the officers from speaking of any
13 relation between a driver not having his headlights on and
14 the likelihood of being intoxicated as such evidence would
15 be essentially improper character evidence, and also
16 parallels, I think, another objection of relying on what
17 is, in effect, unconfrosted hearsay.

18 THE COURT: Okay. And so tell me how that's character
19 evidence. My understanding of the headlight, it's just a
20 factor they consider in determining whether to stop
21 someone, the same as if someone's wobbling in their lane or
22 those kinds of -- so how is that character?

23 MR. BURNTON: So, Your Honor, what I would be looking
24 specifically to preclude is an officer saying, well, you
25 can always tell if somebody doesn't have their headlights

1 on at 3 a.m., it's probably going to be a DUI. That type
2 of testimony is specifically what the Defense would object
3 to. In officer interviews, I myself have heard officers
4 speak to that. There's no basis for why they think that,
5 whether they're citing some (inaudible) treatise that
6 they've never identified, whether that's simply (inaudible)
7 they're getting from other officers. linking headlights
8 being on or off with the likelihood of it being a DUI is
9 what Defense would move to preclude.

10 Now, speaking to an officer saying I stopped this vehicle
11 because a headlight was off, that's one thing that Defense
12 would not object to. But talking about the likelihood that
13 somebody who doesn't have a headlight on is intoxicated or
14 it's a sign of impairment, that is something Defense would
15 object to because there's nothing to say where the fact is
16 coming from.

17 THE COURT: Okay. City?

18 MS. SRA: So, Your Honor, if the officer has, in fact,
19 learned to look for certain patterns of driving or types of
20 driving that could be an impaired driver, then the officer
21 should be able to testify as to that. The City would not
22 be eliciting testimony of the likelihood of an individual
23 without their taillights working or headlights working, but
24 if the officer has been trained in such a way or things to
25 look for what could be possible DUI, I think that the

1 officer should be allowed to testify to that. I don't
2 believe it's character evidence at all.

3 THE COURT: I'm going to deny that one, Counsel. But if
4 something comes up, you can object at the time.

5 MR. BURNTON: Thank you, Your Honor.

6 THE COURT: Next one?

7 MR. BURNTON: And just briefly, Your Honor. I know City
8 has said a couple times that they aren't intending to
9 elicit. Defense's concern isn't necessarily that the City
10 is intending to elicit, but it's the witnesses are going to
11 testify however they are going to testify, and so it's more
12 for making sure that they are being advised of the rulings
13 with the understanding that it may not be intentionally
14 elicited, but they might just volunteer it on their own.

15 THE COURT: Thank you.

16 MR. BURNTON: So, Your Honor, No. 12, Defense is moving
17 to preclude any witnesses from talking about the HGN as in
18 any way measuring impairment as the science itself suggests
19 that there is no way to measure impairment based off of the
20 results of an HGN test.

21 THE COURT: Okay. City?

22 MS. SRA: I have no objection, Your Honor.

23 THE COURT: Okay. Granted.

24 Next?

25 MR. BURNTON: No. 13, Your Honor, here the Defense is

1 moving to preclude from the officers from referring to the
2 coordination test as field sobriety tests as this is
3 actually out of accord with what the tests are designed for
4 and they would lead to improper reasoning under ER 403.

5 THE COURT: City?

6 MS. SRA: Your Honor, they are called field sobriety
7 tests. That's literally what they're called. So City
8 would object.

9 THE COURT: I'm going to deny that one.

10 MR. BURNTON: And, Your Honor, just briefly.

11 THE COURT: Uh-huh.

12 MR. BURNTON: My understanding is that these are really
13 coordination tests, or diverted attention tasks is what the
14 tests are designed for. Officers may refer to them as
15 field sobriety tests, but in being permitted to say field
16 sobriety test, it is saying to the jury it is a test of
17 sobriety. If they fail, then it means they are not sober
18 and directed them towards that improperly under 403.

19 THE COURT: Thank you. No. 14?

20 MS. SRA: And, Your Honor, actually, Officer Fritsch is
21 waiting outside.

22 THE COURT: Okay. Let's just finish up this page.

23 MS. SRA: Okay. Sure.

24 THE COURT: We have one more.

25 MS. SRA: Yeah.

1 MR. BURNTON: And so, Your Honor, here Defense is moving
2 to exclude any reference to the officers applying for or
3 being granted a search warrant. That would be improper
4 vouching. And it also, I think, relates to precluding any
5 reference to procedural history.

6 MS. SRA: Your Honor, I think we might be able to just
7 reserve this to see if the blood (inaudible).

8 THE COURT: Uh-huh. To see if the blood comes in. All
9 right. So we'll reserve that one.

10 And we'll -- let's go in -- do you want to test out --
11 before you get the officer in, maybe you should take a
12 minute to make sure that the TV is operating properly.

13 MS. SRA: Yes, Your Honor.

14 (Conversation regarding setting up television monitor is largely
15 inaudible and was not transcribed.)

16 MS. SRA: And, Your Honor, the City would be calling
17 Officer William Fritsch to the stand.

18 THE COURT: Raise your right hand. Do you solemnly swear
19 or affirm that the testimony you give (inaudible) will be
20 the truth?

21 THE WITNESS: I do.

22 THE COURT: Thank you. Would you like water before you
23 begin?

24 THE WITNESS: Yes, please.

25 ///

DIRECT BY SRA/FRITSCH

1 WILLIAM FRITSCH Witness herein, having first
2 been duly sworn on oath, was
3 examined and testified as
4 follows:

5

6

D I R E C T E X A M I N A T I O N

7 BY MS. SRA:

8 Q. Good afternoon, Officer Fritsch. Would you please state
9 and spell your last name for the record.

10 A. Fritsch, F-R-I-T-S-C-H.

11 Q. And what is your occupation?

12 A. I'm currently employed as a police officer by the City of
13 Kent, Washington.

14 Q. And would you briefly describe your training and
15 background?

16 A. I was hired by the Seattle Police Department in October of
17 2015. I attended the Basic Law Enforcement Academy for the
18 State of Washington. I was commissioned by Seattle in
19 March of 2016, and since then, I went through a field
20 training program and worked the East Precinct in the
21 Seattle Police Department. I also received an Advanced
22 Roadside Impaired Driving Enforcement course and since
23 moved to the Kent Police Department.

24 Q. And how were you employed on November 30th of 2017?

25 A. At that time, I was a police officer for the Seattle Police

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1 Department.

2 Q. And do you have any DUI specific training?

3 A. Yes. I attended the DUI training block of the Basic Law
4 Enforcement Academy which consists of training on SFSTs,
5 the various blood alcohol measuring devices, the breath
6 testers, there's also a wet lab where I was evaluated on my
7 ability to determine whether or not a person was
8 intoxicated who had taken premeasured amounts of alcohol.

9 I also took the Seattle police Advanced Roadside Impaired
10 Driving course, which is designed as a bridge between basic
11 SFST training and drug recognition expert training in order
12 to give officers more tools to detect impaired driving.

13 Q. And how many DUI investigations would you approximate that
14 you've done?

15 A. Approximately 55.

16 Q. Okay. And when you investigate individuals for DUI, what
17 do you base your arrest on?

18 A. I base it on the totality of the evidence in front of me.
19 That could be many varying things. I have to make my
20 decision based on driving, if I see that, their demeanor,
21 any -- you know, their -- if they're acting strangely, any
22 of the verified clues that I have on SFSTs, there could be
23 odors, there could be physical evidence like partially
24 empty bottles. It's a wide variety of things.

25 Q. Okay. And were you working on November 30, 2017?

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1 A. Yes.

2 Q. And on that day, did you encounter anyone in this room?

3 A. I did.

4 Q. And who did you encounter?

5 A. The gentleman in the black jacket sitting in the middle of
6 that table.

7 MS. SRA: And may the record reflect that the officer has
8 identified Defendant.

9 THE COURT: The record will so reflect.

10 Q. (By Ms. Sra) And how did you come into contact with the
11 Defendant on that date?

12 A. I was working patrol on the East Precinct, and I observed a
13 car driving without headlights activated, and I initiated a
14 traffic stop.

15 Q. And do you recall what time this was at?

16 A. I don't recall the exact time. I believe it was around
17 midnight.

18 Q. And did you make contact with the Defendant?

19 A. I did.

20 Q. And upon contact, what observations did you make?

21 A. I observed bloodshot and watery eyes and an odor of
22 alcohol.

23 Q. And on that day, were you equipped with a body-worn video?

24 A. Yes.

25 Q. And would that body-worn video have recorded your

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1 interactions with Mr. Wiggins?

2 A. Yes. It would have.

3 MS. SRA: And, Your Honor, for the record, (inaudible)
4 what's previously marked as Defense Exhibit 2, a body-worn
5 video of Officer Fritsch.

6 (Defendant's Exhibit No. 2 is played for the record.)

7 Q. (By Ms. Sra) And just pausing this at six seconds, Officer,
8 do you recognize this?

9 A. I do.

10 Q. And what is it?

11 A. It's my body camera footage from the day in question.

12 Q. Okay. And I'm going to forward here to 53 seconds -- or 50
13 seconds and resume play.

14 UNIDENTIFIED: (Inaudible.)

15 Q. (By Ms. Sra) And pausing at one minute and seven seconds.

16 Officer Fritsch, was this your first encounter with
17 Mr. Wiggins?

18 A. Yes.

19 Q. And at this time, you just testified it was when you made
20 those observations?

21 A. Yes.

22 Q. Okay. And after making those observations, what did you --
23 what did you do next?

24 A. Those observations, in addition to the reason for the
25 initial stop, which was driving without headlights late at

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1 night, made me suspicious that the driver was driving under
2 the influence of intoxicating liquor and/or drugs.

3 Q. And were there -- did you ask the Defendant any questions?

4 A. Yes, I did.

5 Q. And do you recall what questions you may have asked?

6 A. I believe I asked him if he had been drinking.

7 Q. And what did the Defendant say?

8 A. I don't recall exactly what he said.

9 Q. And did you write a report regarding this incident?

10 A. I did.

11 Q. And would reading your report help to refresh your
12 recollection?

13 A. It would.

14 Q. I am handing you what's been previously marked as
15 Plaintiff's Exhibit 1.

16 And, Officer Fritsch, is this your report?

17 A. Yes, it is.

18 Q. Okay. And you may go ahead and refresh your recollection.
19 After you're done doing so, please turn the report over and
20 then you may answer the question.

21 A. (Pause) I asked him if he had -- he initially told me that
22 he had been out for his birthday with friends. And I asked
23 him if he had been drinking, and he told me that he had
24 not. I asked about standardized field sobriety tests,
25 asked if he would be willing to do them, and he said that

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1 he would definitely pass them.

2 Q. Okay. And I am just going to skip ahead to five minutes
3 and 30 seconds. And I'm resuming play at five minutes and
4 30 seconds.

5 OFFICER FRITSCH: (Inaudible.)

6 MR. WIGGINS: (Inaudible.)

7 OFFICER FRITSCH: Okay. And it smells like alcohol
8 (inaudible).

9 MR. WIGGINS: (Inaudible.)

10 OFFICER FRITSCH: Okay.

11 MR. WIGGINS: (Inaudible.)

12 OFFICER FRITSCH: I don't think it's going to
13 (inaudible).

14 MR. WIGGINS: (Inaudible.)

15 OFFICER FRITSCH: Okay. Would you be willing to do
16 field sobriety tests (inaudible)?

17 MR. WIGGINS: (Inaudible.)

18 OFFICER FRITSCH: Okay.

19 MR. WIGGINS: (Inaudible.) I'm willing to take any
20 kind of (inaudible).

21 OFFICER FRITSCH: (Inaudible.)

22 MR. WIGGINS: (Inaudible.)

23 Q. (By Ms. Sra) And pausing at six minutes and 16 seconds.

24 And after Mr. Wiggins agreed to do the field sobriety
25 tests, which field sobriety tests did you conduct?

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1 A. I conducted the test for horizontal gaze nystagmus, the
2 tracking of a stimulus, I conducted the nine-step walk and
3 turn and the one-leg stand.

4 Q. And what -- how many clues are you looking for on the
5 horizontal gaze nystagmus?

6 A. There are six total clues, three in each eye. You're
7 looking for -- you're looking for -- you're looking for any
8 of them. Any of them are an indicator. There's no set
9 number that you have to have on a particular test where you
10 say this person is or is not intoxicated. It's not
11 (inaudible).

12 MS. WHYTE: Objection. Foundation.

13 THE COURT: Your objection is?

14 MS. WHYTE: Foundation, Your Honor.

15 THE COURT: Foundation to?

16 MS. WHYTE: Well, foundation and motions in limine. I
17 think that we had a motions in limine about whether or not
18 the HGN test detects intoxication, and then I don't think
19 that the officer is able to lay a foundation for the HGN
20 test.

21 THE COURT: I don't think we ruled on that. (Inaudible.)

22 MS. SRA: Your Honor, I --

23 THE COURT: (Inaudible.)

24 MS. SRA: My understanding is motions in --

25 THE COURT: For the trial.

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1 MS. SRA: -- for trial, so I didn't really -- but I'm
2 noting her objection.

3 THE COURT: Thank you.

4 Q. (By Ms. Sra) So, Officer Fritsch, how many clues did you
5 observe when you administered the HGN test on Mr. Wiggins?

6 A. I believe it was four of six.

7 Q. Okay. And --

8 THE COURT: I'm sorry. What was your answer there?

9 THE WITNESS: Four out of six.

10 THE COURT: Oh, thank you.

11 Q. (By Ms. Sra) And I'm going to jump ahead here to six
12 minutes and 55 seconds.

13 THE COURT: What was the minutes?

14 MS. SRA: 50 -- six minutes and 56 seconds, Your Honor.
15 I'm resuming play.

16 Oh, sorry. Excuse me. I'll start that at ten minutes
17 and 39 seconds.

18 THE COURT: 10:39?

19 MS. SRA: Yes, Your Honor. I'm resuming play.

20 OFFICER FRITSCH: See this line here? Take your
21 left foot and put it on that line, and put your right
22 foot (inaudible) in front of it, put your hands to your
23 side.

24 Q. (By Ms. Sra) And pausing at ten minutes and 44 seconds.

25 Officer Fritsch, what is going on here?

DIRECT BY SRA/FRITSCH

1 A. Beginning the instruction phase for the nine-step
2 walk-and-turn test.

3 Q. All right. And resuming play.

4 OFFICER FRITSCH: Stay like that. (Inaudible) to
5 your side for me. (Inaudible) heel to toe (inaudible).
6 No, you see, you've got a little gap there. Yeah.
7 Perfect. Just stay like that while I (inaudible), okay?
8 Do you understand that? All right. So when I tell
9 you to (inaudible) but not before. Okay. (Inaudible)
10 forward.

11 Can you put your hand at your side? You'll take
12 nine heel-to-toe steps out, take a (inaudible), take nine
13 (inaudible). Yep. Nine heel-to-toe steps out.
14 (Inaudible) small steps around your lead foot and take
15 nine heel-to-toe steps back, okay? While you're doing
16 it, you're going to (inaudible) your feet and keep your
17 hands at your side and count your steps out loud. Once
18 (inaudible). Do you understand that? Do you understand?
19 Okay. I'm going to demonstrate it for you, all right?

20 MR. WIGGINS: Okay.

21 OFFICER FRITSCH: (Inaudible.) Go like this, one,
22 two, three, all the way up to nine. (Inaudible) at nine.
23 (Inaudible) small steps around it. That's what that
24 looks like. Then one, two, three, all the way back.
25 (Inaudible.) Do you have any questions? Okay. Give me

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1 (inaudible).

2 Yep. (Inaudible.) Okay. So if you (inaudible)
3 next step. (Inaudible) together.

4 MR. WIGGINS: (Inaudible.)

5 OFFICER FRITSCH: (Inaudible.)

6 Q. (By Ms. Sra) I'm going to pause here momentarily at
7 12 minutes and I think that's 58 seconds.

8 Officer Fritsch, how many clues did you observe on the
9 walk-and-turn test?

10 A. I'm sorry. I wasn't taking notes right there. I observed
11 raising arms for balance, swaying, an improper turn. I'd
12 need to check my report to --

13 Q. Sure. You may go ahead and refresh your (inaudible).

14 A. (Pause) He -- Mr. Wiggins also took an incorrect number of
15 steps on both the initial trip and return trip.

16 Q. Okay. And then before I just paused here, what was the
17 next test?

18 A. The one-leg stand test.

19 Q. And resuming play at 12 minutes 58 seconds.

20 OFFICER FRITSCH: You're going to keep your leg
21 straight and (inaudible), hands at the side and your eyes
22 on your foot. You're going to count out loud 1,001,
23 1,002, 1,003, so (inaudible).

24 MR. WIGGINS: (Inaudible.)

25 OFFICER FRITSCH: And then your (inaudible).

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1 MR. WIGGINS: (Inaudible.)

2 OFFICER FRITSCH: All right.

3 MR. WIGGINS: (Inaudible.)

4 OFFICER FRITSCH: (Inaudible.)

5 MR. WIGGINS: (Inaudible.)

6 OFFICER FRITSCH: Okay. All right. Do you have any
7 questions about it?

8 MR. WIGGINS: (Inaudible.)

9 OFFICER FRITSCH: Well, I --

10 MR. WIGGINS: (Inaudible.)

11 OFFICER FRITSCH: Is this the right leg?

12 (Inaudible.)

13 Okay. (Inaudible.) Okay. Go ahead. You can set
14 your foot down.

15 Okay. (Inaudible) this next step.

16 Q. (By Ms. Sra) And pausing at 14 minutes and 38 seconds.

17 And, Officer Fritsch, how many clues did you observe on
18 the one-leg stand test?

19 A. Two of the four standard clues: raising arms for balance
20 and swaying.

21 Q. Okay. And after the one-leg stand test, what test did you
22 administer next?

23 A. The finger-to-nose test, I think it's called. It's not
24 called the finger-to-nose test. It's a test where I make a
25 circle with my hand and get increasingly closer. I'm

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1 sorry. No, I didn't. I did the Romberg balance test.

2 Q. Okay.

3 A. I have three DUI trials this week, and they run together.

4 Q. No worry. Understandable.

5 And what is the Romberg test and what are you looking
6 for?

7 A. The person closes their eyes, leans their head back and

8 then in their head estimates the passage of 30 seconds.

9 You're looking for their ability to stay standing,

10 obviously, their ability to estimate time. Different

11 substances might change their ability, make them estimate

12 it quicker or slower. You're also looking for large muscle

13 tremors especially in the leg muscles, and eyelid twitches,

14 both of which can be a sign of marijuana.

15 Q. Okay. And what did the Romberg test indicate when you

16 administered it on Mr. Wiggins?

17 A. He had large muscle tremors and eyelid flutters that I was

18 looking for.

19 Q. And how -- which -- how long did it take for him to

20 estimate the 30 seconds?

21 A. I don't recall exactly.

22 MS. WHYTE: Objection to improper refresh of
23 recollection.

24 Q. (By Ms. Sra) And do you need to refresh your recollection?

25 A. I do. Sorry.

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1 Q. Okay. And you may do so.

2 A. (Pause) It took 44 seconds to estimate 30 seconds.

3 Q. And what did that indicate to you?

4 A. That indicated to me that he had possibly consumed
5 marijuana or something else was --

6 MS. WHYTE: Objection, Your Honor. Defense would object
7 at this point that this is a nonstandardized field sobriety
8 test so that it should not be able to be inquired into
9 either at this hearing or at trial.

10 THE COURT: You can respond, City.

11 MS. SRA: Your Honor, I don't believe that that precludes
12 the officer from testifying. This is a test that's
13 routinely used in the field in DUI investigations, either
14 for alcohol or other drugs.

15 THE COURT: Thank you.

16 And, Counsel, unless you have any authority that says it
17 can't be used in this hearing, I'm going to overrule.

18 MS. WHYTE: It's highly speculative, Your Honor, and it
19 has not been validated by NHTSA, which is the authority
20 that, it's my understanding --

21 THE COURT: Do you have a case that says that it can't be
22 used, Counsel?

23 MS. WHYTE: I don't have a case. I can prepare one for
24 the Court for the trial, certainly. But I think --

25 THE COURT: All right. So for now we're going to

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1 overrule.

2 MS. WHYTE: I think I would note, though, that, you know,
3 there are highway -- there are field-side sobriety -- field
4 sobriety tests that are validated or standardized and
5 includes the NHTSA's and those that aren't, and I think
6 this is one that is not.

7 THE COURT: Thank you. Go ahead.

8 THE WITNESS: I'm sorry. What was the question?

9 Q. (By Ms. Sra) What did the estimation of the 44 seconds
10 indicate to you?

11 A. It indicated probable use of marijuana or another drug that
12 slows down the system, makes it take longer to do things.

13 Q. Okay. And after the Romberg test, did you offer
14 Mr. Wiggins any other tests?

15 A. Yes. I believe I offered him the opportunity (inaudible)
16 PBT.

17 Q. And what is a PBT?

18 A. It's a portable or (inaudible) preliminary breath test.
19 It's a small device that's not used for court but that can
20 be used in the field to gain -- to get an accurate sample
21 of a person's breath alcohol in order to assist in making a
22 decision.

23 Q. And did Mr. Wiggins agree to take this test?

24 A. He did not.

25 Q. And sorry. Jumping back a little bit, but I did forget to

DIRECT BY SRA/FRITSCH

1 ask you this. When you're administering the horizontal
2 gaze nystagmus test, the walk-and-turn test as well as the
3 one-leg stand test, what exactly are you looking for in
4 these tests?

5 A. There are validated clues the -- that the National Highway
6 Transport Safety Administration has studied that if you
7 have these clues, they are indicators of a likelihood of
8 consumption. But you're looking for everything. For
9 example, on the one-leg stand, when someone doesn't count,
10 that's an indication that they're not able to divide their
11 attention between multiple things. So they may be able to
12 stand up straight but they can't count. If they start
13 counting, then they'll start falling over.

14 MS. WHYTE: Objection. Speculation, relevance,
15 foundation.

16 MS. SRA: Your Honor, I believe the officer has laid
17 foundation. He testified as to his training and experience
18 for wet labs. And so -- and they are absolutely relevant.
19 This is part of the DUI investigation.

20 THE COURT: Thank you. Overruled.

21 Go ahead.

22 MS. WHYTE: I guess I would note that I don't believe the
23 officer has testified about wet labs.

24 THE COURT: Thank you. Noted.

25 Go ahead.

DIRECT BY SRA/FRITSCH

1 Q. (By Ms. Sra) So I think you just left off saying the
2 divided-attention tasks. And so if someone's --

3 A. Yes. Someone might -- they might appear to be able to
4 maintain their balance, but then if they have to divide
5 their attention and do something else as well, they start
6 to lose it. There -- they might not be able to follow
7 instructions, like on the walk and turn, during the
8 instruction phrase, they might -- there are validated clues
9 where they leave the starting position, things like that,
10 but they might just have trouble understanding what you
11 mean by putting your hands to your sides or putting your
12 feet heel to toe. During the testing, they might make
13 inappropriate comments that seem unusual for a person who's
14 not intoxicated to make. There are just a myriad of things
15 that indicate possible intoxication.

16 Q. Okay. And after Mr. Wiggins refused the portable breath
17 test, what did you do?

18 A. I placed him under arrest for --

19 MS. WHYTE: I would object, Your Honor, to the use of the
20 word "refused." I think the officer testified that the
21 breath test was voluntary.

22 MS. SRA: And, Your Honor, it is a refusal whether
23 something is voluntary or not.

24 MS. WHYTE: And, Your Honor, the refusal at issue here is
25 not of a portable breath test.

DIRECT BY SRA/FRITSCH

1 THE COURT: I don't know that Officer -- and it's just my
2 recollection, if he said he refused, he just said he didn't
3 take it. So --

4 Q. (By Ms. Sra) Sure. Officer Fritsch, what exactly did
5 Mr. Wiggins say to you when you offered him the breath
6 test?

7 A. I don't remember his exact words.

8 Q. Is that something you might have written in your report?

9 A. It is.

10 Q. And if you are able to refresh your recollection, do you
11 think you might be able to answer the question?

12 A. I do.

13 Q. All right. And you may do so.

14 A. (Pause) He told me that he would not take it.

15 Q. Okay. And after he indicated that, what happened next?

16 A. I placed him under arrest for DUI.

17 Q. And upon placing him under arrest, did you read him his
18 Miranda rights?

19 A. I did.

20 Q. And what were the exact warnings that you read to him?

21 A. (Inaudible) to read the Miranda warning? You have the
22 right to remain silent. Anything you say can be used
23 against you in a court of law. You have the right at this
24 time to talk to an attorney and have him present with you
25 while you're being questioned. If you cannot afford to

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1 hire an attorney, one will be appointed to represent you
2 before any questioning, if you wish. Do you understand all
3 these rights that I have explained to you?

4 Q. And what did Mr. Wiggins indicate? That he understood?

5 A. He indicated to me that he understood.

6 Q. And after placing Mr. Wiggins under arrest, did you -- what
7 happened next?

8 A. I transported him to the East Precinct at the Seattle
9 Police Department and completed an application for a search
10 warrant for Mr. Wiggins's blood.

11 Q. Okay. Did you offer Mr. Wiggins a breath test?

12 A. I did. I'm sorry. In between completing the -- of the
13 arrest and completing the application, I read him the
14 implied consent form from the Washington State DUI packet,
15 and he refused the breath test.

16 MS. SRA: Before I go further, Your Honor, City would be
17 moving to admit the portions played in court for purposes
18 of this motion.

19 THE COURT: Defense?

20 MS. WHYTE: No objection.

21 THE COURT: Thank you. It will be admitted.

22 (Defendant's Exhibit No. 2 admitted into evidence)

23 Q. (By Ms. Sra) Officer Fritsch, I'm handing you what's been
24 previously marked as Plaintiff's Exhibit 4 and 5. And
25 we'll start with Plaintiff's Exhibit 4. Do you recognize

DIRECT BY SRA/FRITSCH

1 this document?

2 A. I do.

3 Q. What is it?

4 A. It's the constitutional rights page from the DUI arrest
5 report.

6 Q. And is that document -- is that -- does that document --

7 A. It's the -- it's the page I used for this case. I read the
8 constitutional rights to Mr. Wiggins.

9 Q. And did Mr. Wiggins indicate that he understood those
10 rights?

11 A. Yes, he did.

12 MS. SRA: And City would move to admit Exhibit 4 for
13 purposes of this motion.

14 THE COURT: Defense?

15 MS. WHYTE: No objection for this motion, Your Honor.

16 THE COURT: Thank you. Admitted.

17 (Plaintiff's Exhibit No. 4 admitted into evidence)

18 Q. (By Ms. Sra) And, Officer Fritsch, turning next to
19 Plaintiff's Exhibit No. 5, do you recognize this document?

20 A. It's the implied consent warning for breath that I read to
21 Mr. Wiggins.

22 Q. And is there any indication regarding whether Mr. Wiggins
23 agreed or refused that breath test?

24 A. Yes. It says that he refused the breath test.

25 MS. SRA: And City would move to admit Plaintiff's

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1 Exhibit 5 for purposes of this motion only.

2 THE COURT: Defense?

3 MS. WHYTE: Again, no objection for this motion only.

4 THE COURT: Thank you. Admitted.

5 (Plaintiff's Exhibit No. 5 admitted into evidence)

6 Q. (By Ms. Sra) And so, Officer Fritsch, after Mr. Wiggins
7 refused the BAC test, what did you do next?

8 A. I completed an application for a search warrant, submitted
9 it to the Seattle Municipal Court.

10 MS. SRA: Okay. I think I will stop there. Defense
11 counsel have split up 3.6 and 3.5, so I'll have a few more
12 questions for the 3.5 after Ms. Whyte does her
13 cross-examination for the 3.6.

14 THE COURT: Say that one more time.

15 MS. SRA: So since Ms. Whyte and Mr. Burnton had split up
16 their cross-examination, I'm just going to reserve my 3.5
17 questioning till after we conclude their cross-examination,
18 if that makes sense.

19 THE COURT: So you're going to come back --

20 MS. SRA: Yeah.

21 THE COURT: -- to have me --

22 MS. SRA: Because then I believe that Mr. Burnton wants
23 to cross on the 3.5.

24 MS. WHYTE: That's correct.

25 MR. BURNTON: That's correct, Your Honor.

CROSS BY WHYTE/FRITSCH

1 THE COURT: And so, Counsel, you are -- are you moving to
2 the 3.6?

3 MS. WHYTE: Yes, Your Honor. I have questions that
4 regard the 3.6, and then Ms. Sra can inquire about the 3.5,
5 and then Mr. Burnton has questions about that.

6 THE COURT: Thank you.

7 MS. WHYTE: Thank you. And then I'll be handling the
8 argument for the 3.6 and Mr. Burnton for the 3.5.

9

10 C R O S S E X A M I N A T I O N

11 BY MS. WHYTE:

12 Q. Good afternoon, Officer Fritsch.

13 A. Good afternoon.

14 Q. So let's talk about exactly where the stop occurred. It
15 was on East Pine near about Broadway that you first noticed
16 Mr. Wiggins; is that right?

17 A. Yes.

18 Q. And you drove with him about two to three blocks to where
19 Belmont Avenue intersects East Pine?

20 A. Yes.

21 Q. That's in Capitol Hill?

22 A. Yes, it is.

23 Q. You would call that a fairly busy bar district?

24 A. Yes.

25 Q. It's fairly densely populated there?

CROSS BY WHYTE/FRITSCH

- 1 A. Yes.
- 2 Q. There are streetlights on the road there?
- 3 A. Yes.
- 4 Q. You acknowledge that this is one of the better lit parts of
5 the East Precinct?
- 6 A. Yes.
- 7 Q. And Pine Street is one of the main roadways through Capitol
8 Hill?
- 9 A. It is.
- 10 Q. You stopped Mr. Wiggins's car you said because you noted a
11 taillight or a headlight/taillight violation?
- 12 A. No. I stopped him for driving without his headlights
13 activated.
- 14 Q. Okay. So in other words, his headlights weren't on.
- 15 A. Yes.
- 16 Q. And that's the reason that you stopped him?
- 17 A. Yes.
- 18 Q. Okay. So, Officer, I'm going to play a portion of this
19 video. Do you recognize what I have up here on the
20 display?
- 21 A. That looks like my in-car video.
- 22 Q. 8375, is that your badge number?
- 23 A. Yes, it is.
- 24 Q. Does that appear on the video?
- 25 A. It does.

CROSS BY WHYTE/FRITSCH

1 Q. We want to move this to about 52 seconds. I'm going to
2 play the video from here.

3 (Defendant's Exhibit No. 3 is played for the record)

4 Q. (By Ms. Whyte) So I'm stopping at one minute. Is that when
5 your lights have activated, Officer?

6 A. Yes, it is.

7 Q. Okay. And the car that we can see here on this video at
8 one minute in the video, is that Mr. Wiggins's car?

9 A. I believe it is.

10 Q. Okay. And I'm stopping -- I'm sorry. I'm playing the
11 video from one minute to one minute two seconds and
12 stopping again at one minute, two seconds.

13 Officer, do you see -- does it appear to you that the
14 brake lights on that vehicle are activated at this point --

15 A. Yes.

16 Q. -- at one minute and two seconds?

17 So I'm going to resume playing at one minute, two
18 seconds.

19 And there, Officer, I'm stopping at one minute five
20 seconds. Did it appear to you that that car had activated
21 a signal, a directional signal?

22 A. Did it occur to me?

23 Q. Did it appear to you?

24 A. Oh, I think so. It was a pretty quick clip, but I think it
25 looks like it signaled.

CROSS BY WHYTE/FRITSCH

1 Q. I can play that again for you again. So I had stopped at
2 1:05. I can wind it back to 1:02.

3 And stopping at 1:06.

4 Did it appear to you, Officer, that the car had activated
5 a directional indicator?

6 A. It did.

7 Q. Okay. So I stopped at 1:06. I'm now resuming.

8 And I've stopped at minute 1:12 of the video.

9 I'm sorry. I'm not sure whether I made this clear for
10 the record, but this is Defense Exhibit 3.

11 And so, Officer, at that point, does it appear now that
12 Mr. Wiggins has pulled his car over to the side of the road
13 and come to a stop?

14 A. It does.

15 Q. Now, you noticed the car first when you were about at
16 Broadway and Pine?

17 A. Yes.

18 Q. And you started pursuing the car (inaudible)?

19 A. No. I didn't pursue the car.

20 Q. I'm sorry?

21 A. I didn't pursue the car.

22 Q. You didn't -- you did not pursue Mr. Wiggins's car?

23 A. No. Pursuit has a particular destination.

24 Q. I see.

25 A. I did not pursue the car.

CROSS BY WHYTE/FRITSCH

1 Q. You followed the car and initiated a traffic stop?

2 A. Yes.

3 Q. You initiated that following the car within moments of
4 noticing the headlight violation?

5 A. No. That's -- I did not initiate -- initiate following the
6 car. I was driving. I continued to drive the same
7 direction that I was driving, then I initiated a stop.

8 Q. Okay. Well --

9 A. I'm not really sure what you're asking me.

10 Q. Let's look at the video, Officer. So then this is
11 Defense 3. Okay. So I'm at two seconds of your in-car
12 video, and I'm playing from here.

13 And stopping the video at 29 seconds.

14 Are you currently now in your vehicle, Officer, at the
15 intersection of Pine and Broadway?

16 A. Yes.

17 Q. Thank you. So I would note that it appears to be
18 29 seconds into the video; is that correct, Officer?

19 A. Yes.

20 Q. So I'm restarting at 29 seconds.

21 Okay. So I paused the video at 51 seconds.

22 Is Mr. Wiggins's car visible at this point?

23 A. It is.

24 Q. Restarting the video at 51 seconds.

25 Pausing the video at 59 seconds.

CROSS BY WHYTE/FRITSCH

1 Fair to say that you increased your rate of speed?

2 A. Yes.

3 Q. Pausing the video -- restarted at 59 seconds, pausing the
4 video at one minute, one second.

5 By that point, officer, you indicated -- you activated
6 your lights?

7 A. Yes.

8 Q. And at that point, fair to say that you were initiating a
9 traffic stop?

10 A. Yes.

11 Q. So you initiated the traffic stop at about one minute, one
12 second on this video?

13 A. Yes.

14 Q. And you had begun to speed up around I believe you said it
15 was 53 seconds or so? 56 seconds?

16 A. Yes.

17 Q. So within about ten seconds, you activated your lights?

18 A. Uh-huh.

19 Q. You pulled up right behind his car, correct?

20 A. Yes.

21 Q. And the whole distance that you traveled from Broadway to
22 Belmont was a space of about two to three city blocks?

23 A. Yes.

24 Q. Okay. Now, during the time that you were behind

25 Mr. Wiggins, presumably you were looking at his car?

CROSS BY WHYTE/FRITSCH

- 1 A. Yes.
- 2 Q. You didn't observe any swerving?
- 3 A. No.
- 4 Q. You didn't observe him doing any weaving?
- 5 A. No.
- 6 Q. You didn't observe him appear to brake randomly for no
7 reason?
- 8 A. No.
- 9 Q. He wasn't driving in the wrong lane of travel?
- 10 A. No.
- 11 Q. He wasn't driving the wrong way down a one-way street?
- 12 A. No.
- 13 Q. He wasn't straddling any lines?
- 14 A. No, he was not.
- 15 Q. He did not hit anything?
- 16 A. No.
- 17 Q. You didn't note anywhere that he was -- appeared to be
18 going too fast?
- 19 A. No.
- 20 Q. You didn't note anything about him appearing to go too
21 slow?
- 22 A. No.
- 23 Q. You didn't notice -- or note anything about him hitting a
24 person or nearly hitting a person?
- 25 A. No.

CROSS BY WHYTE/FRITSCH

1 Q. You didn't note anything in your report about recent damage
2 to his vehicle?

3 A. No.

4 Q. You didn't note anything about smoke emanating from the
5 vehicle?

6 A. No.

7 Q. If you'd seen any of that, of course you would have noted
8 it in your report?

9 A. I might have. I couldn't say for sure what I would have
10 done.

11 Q. You don't believe that you would have noted smoke coming
12 from the vehicle?

13 A. I just don't know. You're asking me a hypothetical about
14 something that happened last year. I can't say for sure
15 what I would or would not have done. I think it's likely I
16 would have, but --

17 Q. Okay.

18 A. -- you're asking me for a definitive answer on a
19 hypothetical situation. I'd like to think I would, but I
20 can't say for sure.

21 Q. Sure. So fair to say, Officer, that you're trained in
22 report writing?

23 A. Yes.

24 Q. You know that you frequently get called to testify in
25 court?

CROSS BY WHYTE/FRITSCH

1 A. Yes.

2 Q. You know that when you testify in court, you may have to
3 rely on your report?

4 A. I do.

5 Q. And that your report is the contemporaneous narrative about
6 what happened?

7 A. Yes.

8 Q. You also know that your report is used to make potential
9 filing and charging decisions?

10 A. I do.

11 Q. So you understand that it's important to include important
12 details in your report?

13 A. Of course it's important to include important details. I'm
14 just saying that I'm a human being and I can't say for
15 certain whether on November 30th of 2017 I would have
16 definitely included something. That's all I'm saying.

17 Q. Of course.

18 Now let's talk about the headlights. That's an
19 infraction?

20 A. Yes, it is. It's a traffic infraction.

21 Q. A person can get a ticket for it?

22 A. They can.

23 Q. It's not a crime?

24 A. It's not a crime.

25 Q. You spoke to a Defense investigator about this incident,

CROSS BY WHYTE/FRITSCH

1 correct?

2 A. Yes.

3 Q. And when -- she asked you what signs of impairment you
4 relied on in deciding to investigate Mr. Wiggins further;
5 is that right?

6 A. Yes.

7 Q. And you told her that driving with the headlights --
8 driving without your headlights on is a pretty vague
9 indicator?

10 A. Yes, it is. Based on my training and experience.

11 Q. You also said you didn't have any exact statistics about
12 that?

13 A. No, I did not.

14 Q. Aside from that, you noted the smell of alcohol coming from
15 the car?

16 A. Yes.

17 Q. And red, watery eyes?

18 A. Yes.

19 Q. You didn't note any other signs of impairment at that time
20 besides those.

21 A. No.

22 Q. You're not a DRE.

23 A. I'm not a DRE.

24 Q. Let's talk about the car. There were passengers in the
25 car?

CROSS BY WHYTE/FRITSCH

1 A. Yes.

2 Q. Three other passengers?

3 A. Yes.

4 Q. So one person in the front, two people in the backseat?

5 A. Yes.

6 Q. I'm going to show you what's been previously marked for
7 identification Defense Exhibit 8. Do you recognize that,
8 Officer?

9 A. Yes. It's a still of my body cam footage.

10 Q. Does it show passengers in the car?

11 A. Yes.

12 Q. And does that appear to be a true and accurate depiction of
13 what you saw on the night in question?

14 A. It does.

15 MS. WHYTE: Your Honor, I would move at this time to
16 admit Defense Exhibit 8 for purposes of this hearing.

17 THE COURT: City?

18 MS. SRA: No objection.

19 THE COURT: (Inaudible) to admit it.

20 (Defendant's Exhibit No. 8 admitted into evidence)

21 Q. (By Ms. Whyte) Let's talk about the odor of alcohol you
22 said you observed. So you noted in your report that you
23 smelled an odor of alcohol when you contacted the car.

24 A. Yes.

25 Q. When you talked with my investigator about that, you said

CROSS BY WHYTE/FRITSCH

1 you can't smell in stereo; is that right?

2 A. That's correct.

3 Q. So meaning that you weren't -- you weren't able to tell her
4 exactly where she -- where you thought that odor was coming
5 from?

6 A. Your Defense investigator asked me, I believe, which person
7 the odor was coming from, and I explained to her that
8 because I can't smell in stereo, that's not how the human
9 nose works, I could simply detect the odor coming out of
10 the car. That's what I was talking about.

11 Q. Okay. You said that the odor you noticed was coming out
12 the window at you.

13 A. Yes.

14 Q. And that it was therefore reasonable to assume that it was
15 coming from him.

16 A. Yes.

17 Q. And him meaning Mr. Wiggins?

18 A. Yes.

19 Q. You also said that you didn't notice any diminishing of the
20 odor when Mr. Wiggins was outside the car?

21 A. Yes. If the driver hadn't been drinking and I took them
22 outside of the car, I would think that the odor would
23 diminish when I was outside the car in the fresh air. If
24 it were coming from the other passengers or from an open
25 bottle that were in the vehicle, I think it would be

CROSS BY WHYTE/FRITSCH

1 reasonable to say that someone who was sober wouldn't
2 continue to smell like alcohol.

3 Q. You did note -- well, you initially contacted Mr. Wiggins
4 at his car.

5 A. Uh-huh.

6 Q. Then you went back into your -- he opened his window to
7 speak to you.

8 A. Yes.

9 Q. You went back into your vehicle to run his license.

10 A. Uh-huh.

11 Q. And you reapproached his car, correct?

12 A. Yes.

13 Q. At that point, the window was still open?

14 A. Yes.

15 Q. And at that point, you observed to him it's kind of gotten
16 dissipated now because the windows are down?

17 A. Uh-huh.

18 Q. Meaning the odor of alcohol had dissipated from the car
19 with the windows down?

20 A. Uh-huh.

21 Q. When you contacted Mr. Wiggins, his speech wasn't slurred?

22 A. No.

23 Q. He was able to provide his license to you?

24 A. Yes.

25 Q. He provided it to you immediately upon you asking?

CROSS BY WHYTE/FRITSCH

- 1 A. Yes.
- 2 Q. You're also asking him other questions at the same time?
- 3 A. Yes.
- 4 Q. And that's a divided-attention technique?
- 5 A. Yes. It's also necessary to get other information.
- 6 Q. Of course.
- 7 A. Registration, insurance. So --
- 8 Q. You asked him -- well, you didn't ask him about
- 9 registration; is that correct?
- 10 A. I don't think I did.
- 11 Q. But you did ask him whether he had insurance.
- 12 A. Uh-huh.
- 13 Q. And he was forthcoming with you that he did not.
- 14 A. Yes.
- 15 Q. You also talked to him about a previous conviction that you
- 16 believed he had a conviction for DUI?
- 17 A. Yes.
- 18 Q. But he was able to correct you that he did not, in fact,
- 19 have a conviction for DUI.
- 20 A. Yeah. That sounds right.
- 21 Q. Now, in terms of the ambient noise that was going on around
- 22 this the time of the stop, do -- there was a person
- 23 screaming and being extremely disruptive?
- 24 A. Yes.
- 25 Q. Mr. Wiggins noted that that was distracting to him?

CROSS BY WHYTE/FRITSCH

- 1 A. I -- yes. I think so.
- 2 Q. But he was still answering your questions?
- 3 A. Yes.
- 4 Q. And he was cooperative with you while he was in the car.
- 5 A. He was.
- 6 Q. Now, you asked Mr. Wiggins whether he had anything to
- 7 drink.
- 8 A. I did.
- 9 Q. And he told you that he had not been drinking at that
- 10 point.
- 11 A. Yes.
- 12 Q. He told you he had been out with his friends.
- 13 A. Yes.
- 14 Q. You also talked with Mr. Wiggins about doing field sobriety
- 15 tests?
- 16 A. I did.
- 17 Q. During both of your interactions with Mr. Wiggins, the two
- 18 times you approached him in his car, you were standing at
- 19 the driver's side?
- 20 A. Yes, I was.
- 21 Q. And there was another officer standing at the passenger's
- 22 side?
- 23 A. My partner, Officer Baughman.
- 24 Q. At various points, there were multiple officers present?
- 25 A. Yes.

CROSS BY WHYTE/FRITSCH

1 Q. Multiple officers did respond to this incident?

2 A. Yes. I believe at least two other cars at some point
3 (inaudible).

4 Q. At least two other cars. So a total of three cars?

5 A. I think.

6 Q. Would that information be in your report?

7 A. It would be attached to the cover page of the report. It
8 wouldn't be in the narratives.

9 It's (inaudible) normal for multiple cars to show up. We
10 like to have at least one backing car, and then in a place
11 like Capitol Hill, especially when people can hear over the
12 radio that there's someone screaming in the background,
13 it's not unusual for more officers to show up to make sure
14 no unsafe situation develops.

15 Q. Your report indicates that as many as five officers
16 responded to this?

17 A. That sounds right.

18 Q. You didn't go deal with the person screaming, did you?

19 A. I did not. I looked over. They appeared to be someone
20 that I recognize from Capitol Hill as exhibiting their
21 baseline behavior.

22 Q. Officer Baughman, you didn't see him go over and deal with
23 that guy?

24 A. I don't believe he did.

25 Q. You didn't see any other officers go deal with that guy?

CROSS BY WHYTE/FRITSCH

1 A. I don't think so.

2 Q. There were also civilian witnesses who were around?

3 A. I think so.

4 Q. People who appeared to be filming the incident?

5 A. Yes. That's not unusual on Capitol Hill.

6 Q. Officer, I'd like to talk a little bit about your equipment
7 when you're out working on patrol.

8 A. Yes.

9 Q. You -- you are a patrol officer for Seattle PD?

10 A. No. I'm a patrol officer for the Kent Police Department.
11 At the time, I was a patrol officer for the Seattle Police
12 Department.

13 Q. Correct. I said you were a patrol officer for the Seattle
14 PD?

15 A. I thought you said you are. I was confused.

16 Q. At the time of this incident, you were a patrol officer for
17 Seattle PD.

18 A. Yes, I was.

19 Q. Okay. And the other officers who responded were also
20 patrol officers at that time?

21 A. Yes.

22 Q. Patrol officers have certain police department issued gear
23 that they wear while they're out on patrol?

24 A. Yes.

25 Q. So you had your badge?

CROSS BY WHYTE/FRITSCH

- 1 A. Yes.
- 2 Q. You had a bulletproof vest?
- 3 A. Yes.
- 4 Q. You had a Taser on you?
- 5 A. Yes.
- 6 Q. Mace?
- 7 A. I'm not sure if I had mace.
- 8 Q. You had a baton?
- 9 A. I'm not sure if I had a baton on me.
- 10 Q. Handcuffs?
- 11 A. Yes.
- 12 Q. Gun?
- 13 A. Yes.
- 14 Q. These are things that all patrol officers carry?
- 15 A. Yes.
- 16 Q. Reasonable to assume that your fellow officers right there
- 17 had those things, too?
- 18 A. Yes.
- 19 Q. Tasers?
- 20 A. Yes. Not everyone carries a Taser. I couldn't say for
- 21 sure. But all the things you were naming are standard
- 22 pieces of police equipment that they would likely have.
- 23 Q. Everyone would have had a gun, correct?
- 24 A. Yes. Everyone would have had a gun.
- 25 Q. Mr. Wiggins is an African-American man?

REDIRECT BY SRA/FRITSCH

1 A. Yes. I believe so.

2 Q. Relatively slender build?

3 A. Yes.

4 Q. Not particularly tall?

5 A. Not particularly tall.

6 Q. At the point at which you were getting Mr. Wiggins out of
7 the car, you asked him if he wanted to do the PBT or SFT's
8 or something?

9 A. Yes.

10 Q. You did not use the word "voluntary"?

11 A. No, I did not. I'm not required to.

12 Q. You got him out of the car?

13 A. I did not get him out of the car. He stepped out of the
14 car voluntarily.

15 Q. At that point when he got out of the car, you did not
16 notice any problems with his balance?

17 A. No.

18 Q. You did not note any in your report?

19 A. No. That's not unusual.

20 MS. WHYTE: I have no further questions.

21 THE COURT: (Inaudible)

22

23 R E D I R E C T E X A M I N A T I O N

24 BY MS. SRA:

25 Q. Officer Fritsch, Defense played the video, and actually, we

REDIRECT BY SRA/FRITSCH

1 see the stills. Is that occurring at 2:08 a.m.? In the
2 area of Capitol Hill, according to your training and
3 experience, is there anything notable about this time in
4 this area?

5 A. This is shortly after bar close on Capitol Hill.

6 Q. And what does that mean for you in terms of DUI
7 investigations?

8 A. It means that there's --

9 MS. WHYTE: Objection. Speculation.

10 THE COURT: I'm sorry?

11 MS. WHYTE: Speculation.

12 MS. SRA: Your Honor, the officer hasn't even answered
13 the question. If he knows, he should be able to answer
14 that question.

15 THE COURT: All right. I'm going to overrule.

16 You may answer.

17 THE WITNESS: It makes a bigger, increased number of
18 people out, drivers and non-drivers who have just left bars
19 where they've been consuming alcohol.

20 Q. (By Ms. Sra) Okay. And when you made a decision to place
21 Mr. Wiggins under arrest for DUI, what did you base that
22 arrest on?

23 A. I based it on the totality of everything I had observed. I
24 had someone who was driving without their headlights on,
25 which I know, based on my training and my experience, is a

REDIRECT BY SRA/FRITSCH

1 very good indicator at that time of night that a person
2 (inaudible).

3 MS. WHYTE: Objection. Foundation.

4 THE COURT: Overruled.

5 Go ahead. You can continue.

6 THE WITNESS: The obvious odor of alcohol coming from the
7 car and coming from Mr. Wiggins when he exited the car, his
8 bloodshot, watery eyes, the base on dilation (inaudible),
9 which I know is a sign that someone has been consuming
10 alcohol, his --

11 MS. WHYTE: Objection. Foundation.

12 THE COURT: City, you can respond.

13 MS. SRA: Your Honor, the officer has testified to
14 foundation regarding the various trainings that he's had
15 that qualifies him to investigate DUIs.

16 THE COURT: Thank you. And I believe he has. Overruled.
17 So we'll just note those going forward, Counsel.

18 Go ahead.

19 THE WITNESS: His performance on the SFSTs, the multiple
20 verified clues, and then other additional observations like
21 not counting on the one-leg stand, and his refusal to take
22 a --

23 MS. WHYTE: Objection, Your Honor, as to -- for
24 relevance. The issue at this hearing is not whether there
25 was probable cause to arrest, it's whether the officer had

REDIRECT BY SRA/FRITSCH

1 reasonable, articulable suspicion required by Terry to
2 extend the stop from an investigation of traffic infraction
3 to a DUI investigation. So whether or not the officer
4 relied on probable cause -- or relied on standard field
5 sobriety tests to determine probable cause is not relevant
6 at this hearing.

7 THE COURT: So whether he -- let me make sure I
8 understand what you're saying. You're saying whether or
9 not he had probable cause to arrest, that the field
10 sobriety tests are not relevant. Is that --

11 MS. WHYTE: No, Your Honor. I'm saying that the issue
12 before the Court at the 3.6 hearing is whether or not
13 Officer Fritsch improperly extended the scope of a traffic
14 infraction stop to a Terry investigation for DUI, and
15 whether or not Mr. Wiggins completed FSTs or didn't
16 complete them, or whether or not there were indications
17 there is not relevant.

18 MS. SRA: So, Your Honor, if the Defense is stipulating
19 that there was probable cause to arrest, then we can move
20 forward.

21 MS. WHYTE: Defense --

22 THE COURT: Because in your -- go ahead.

23 MS. WHYTE: I'm sorry, Your Honor. Please continue.

24 THE COURT: Go ahead.

25 So is that what you're -- you're saying then that your

REDIRECT BY SRA/FRITSCH

1 only issue is whether he had to extend, not whether once it
2 was extended he had probable cause to arrest? Is that what
3 you're saying, Counsel?

4 MS. WHYTE: No, Your Honor. I'm saying that we don't
5 even get to the arrest if the officer did not have
6 reasonable, articulable suspicion to further detain
7 Mr. Wiggins and investigate him for DUI.

8 MS. SRA: Your Honor, my only issue --

9 THE COURT: But you also, in your -- Counsel, you talk
10 about the officer's request to complete (inaudible) for his
11 arrest was unlawful, so (inaudible) later in your brief, so
12 for me to not allow the City to talk about it now when we
13 have to come back later to talk about it, because your
14 Subsection C talks about that.

15 MS. WHYTE: That's -- I suppose, Your Honor, that is a
16 separate issue from whether or not -- I think -- I think
17 what I'm saying is that it's important to be very clear
18 about what evidence is being considered for what purpose
19 because --

20 THE COURT: So City can ask questions and make her
21 argument the way she sees fit because that's all going to
22 be part of the argument at the end. You're not going to.
23 So if we determine that the expanded DUI investigation was
24 proper, then are you not going to argue further that there
25 was probable cause? And so we might as well get all the

REDIRECT BY SRA/FRITSCH

1 information out now because we're not going to call the
2 officer back just to testify about that piece.

3 MS. WHYTE: Okay. Understood.

4 THE COURT: All right. Go ahead, City.

5 Q. (By Ms. Sra) And, Officer Fritsch, I wasn't sure. Were you
6 done?

7 A. I think the last thing I was saying was the refusal to take
8 a preliminary breath test. Based on all of those factors,
9 it appeared to me that there was probable cause to place
10 Mr. Wiggins under arrest for DUI.

11 Q. Okay. And in expanding your scope for the DUIs, you
12 testified earlier on direct where, after stopping
13 Mr. Wiggins's vehicle, upon contact, you noticed the odor
14 of intoxicants as well as the bloodshot, watery eyes. Was
15 one of the factors that you considered the fact -- to
16 expand the investigation or the traffic stop into a DUI
17 investigation, the fact that -- the fact that --
18 Mr. Wiggins's race?

19 A. No.

20 Q. Okay. And was one of the factors whether or not
21 Mr. Wiggins may or may have had a prior in the past?

22 A. No.

23 Q. Okay. And before the actual arrest of Mr. Wiggins took
24 place, did you or any other officers place Mr. Wiggins in
25 handcuffs?

REDIRECT BY SRA/FRITSCH

1 A. No.

2 Q. Did you, at any time, point your weapon at Mr. Wiggins?

3 A. No.

4 Q. Did you see any of the other officers point their weapons
5 at Mr. Wiggins?

6 A. No.

7 Q. Did you, at any time, threaten Mr. Wiggins?

8 A. No.

9 Q. Did any of the other officers in your presence threaten
10 Mr. Wiggins?

11 A. No.

12 MS. SRA: And I don't think I have any further questions.

13 THE COURT: Okay. Anything else, Counsel?

14 MR. BURNTON: Just a couple questions, Your Honor.

15 THE COURT: Oh, is this for -- I thought you were doing
16 the 3.5.

17 MR. BURNTON: I am. I wasn't sure if City had additional
18 questions (inaudible).

19 THE COURT: Yeah. We're not going to -- no. We're not
20 going to go to the next issue today.

21 MR. BURNTON: Okay, Your Honor. Perfect.

22 MS. SRA: Your Honor --

23 THE COURT: (Inaudible.)

24 MS. SRA: This was the 3.5.

25 THE COURT: Oh, I'm sorry.

REDIRECT BY SRA/FRITSCH

1 MS. SRA: I'm not going to identify specific statements.

2 THE COURT: Okay.

3 MS. SRA: I would -- we can sort of hash those out later.

4 THE COURT: Okay.

5 MS. SRA: The -- for my (inaudible) --

6 THE COURT: Do you need additional testimony or is the
7 officer going to be done? We just need to hear --

8 MS. SRA: So I -- I'm done with all of my questioning.

9 THE COURT: Okay. So Mr. Burnton just needs time for his
10 questions.

11 MS. SRA: Correct, Your Honor.

12 THE COURT: Okay. And so unless you can do it in like
13 five minutes, I'm going to say we start tomorrow morning.
14 I don't want to rush you.

15 MR. BURNTON: That's perfect, Your Honor. I appreciate
16 the time.

17 THE COURT: Okay.

18 MS. SRA: Thank you, Your Honor. If we could do it in
19 the next five or -- I don't know how many questions.

20 THE COURT: I'd have to let the -- I'm not going to keep
21 the staff past five.

22 MR. BURNTON: And also, I do have a number of clips that
23 I wanted to revisit and extend.

24 THE COURT: Yeah. I don't think -- I don't want to rush
25 Mr. Burnton's time.

REDIRECT BY SRA/FRITSCH

1 Officer Fritsch, we are going to need you to come back
2 tomorrow.

3 THE WITNESS: That's okay, Your Honor.

4 THE COURT: So we're going to release you for today.
5 We're going to start up again at 9:00. Does that work for
6 everyone's schedule?

7 MR. BURNTON: Your Honor, because I know time is of the
8 essence with regards to our expert, we theoretically could
9 be here at 8:30 if Your Honor would prefer.

10 MS. SRA: And --

11 THE COURT: Ms. Sra?

12 MS. SRA: Your Honor, I don't think that my expert could
13 be here that early. I would prefer just to start at 9:00.

14 MR. BURNTON: Well, I -- well, we wouldn't necessarily
15 need the expert at 8:30, but we could theoretically finish
16 the 3.5 as well as the motions in limine just to keep
17 things moving.

18 THE COURT: Can you be at 8:30?

19 MS. SRA: That's fine, Your Honor.

20 THE COURT: Okay. So does that work for your schedule,
21 Officer?

22 THE WITNESS: I could make it work.

23 THE COURT: Okay. Thank you. So we're going to release
24 you for today.

25 THE WITNESS: Thank you.

1 THE COURT: Thank you.

2 THE CLERK: (Inaudible.)

3 THE COURT: No.

4 So we will be in recess until tomorrow morning at 8:30,
5 and we'll start with the officer first thing.

6 And just so I'm clear, so you were going to ask your
7 questions. You were going into your 3.5. That's what was
8 confusing. I thought --

9 MR. BURNTON: I did believe City had done their 3.5. I
10 know we didn't formally denote it, so that's why I was
11 getting up.

12 (January 9, 2019 hearing concluded)

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C E R T I F I C A T E

STATE OF WASHINGTON)

) ss

COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the audio and/or video files in the court format; that I am not a relative or employee of any attorney or counsel employed by the by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of March, 2019.

Bonnie Reed, CET