

p 1107), statements made to them are more likely to be testimonial. By contrast, statements made primarily to guide medical care or assess a person's safety are nontestimonial. Although a statement may have multiple facets, the confrontation clause requires the court to identify a singular dominant purpose when evaluating whether statements are testimonial.

In the case of K.E.H.'s statements to Nurse Frey, the court found that nearly all of her statements were nontestimonial because the primary purpose was to guide medical care during a sexual assault exam. The primary medical purpose of the exam is supported by the facts that the examiner is a medical professional, specialized medical care was provided regardless of the patient's intent to report the crime, and the examiner herself did not take direction from law enforcement. The court said that obtaining medical treatment is a nontestimonial primary purpose, distinct from an ongoing emergency. Although K.E.H. had been cleared medically from the emergency department, that did not mean that she no longer required any medical treatment. She was still in need of treatment for her sexual assault. Although some patients at this point may elect to skip this exam, this fact does not negate that it is part of medical treatment, nor does the fact that she needed to wait for the treatment.

The court said that the primary purpose of K.E.H.'s statements were nontestimonial, with the exception of one statement describing the assailant, which was not for the purpose of directing medical care or addressing safety since K.E.H. was clear that she did not know her attacker. The court found that the trial court erred in admitting this statement, but this error was harmless since the male DNA found on K.E.H.'s underwear was compellingly proven to have belonged to Mr. Burke.

Mr. Burke also argued that K.E.H.'s statements should not be admitted because they were hearsay and not covered under a hearsay exception for statements made for primarily medical diagnosis or treatment. Nontestimonial statements must also comply with state and federal rules of evidence. Out-of-court statements used to prove the truth of a matter are typically inadmissible as hearsay under these rules. But, there are certain exceptions, including when statements are made for the purpose of medical diagnosis or treatment. In contrast to the primary purpose test of the confrontation clause, the test for these statements considers the intentions of both the declarant and the medical professional and how the statements relate to the medical diagnosis and treatment. In the

case of K.E.H., the court did not disagree with the trial court's assessment that statements and questions were primarily for medical treatment.

Discussion

The case of *State v. Burke* reviewed occasions when out-of-court statements could be considered testimony such that they could be barred from admission in court when the declarant is not available to testify. Although the *Burke* court acknowledged the predominantly medical nature of the SANE, the court recognized that there are both medical and forensic aspects to the evaluation. The ruling in this case recognized the preeminence of the medical portion of the SANE and qualifications of the examiner.

The *Burke* case serves as a reminder of the ways that medical documentation can be used in legal proceedings and its subsequent challenge to a defendant's Sixth Amendment rights. Similarly, in *People v. Sanchez*, 374 P.3d 320 (Cal. 2016), an expert's opinion was rejected by the California Supreme Court and the case remanded to the court of appeals because of the consultant's reliance on statements in past police reports in forming his opinion. Because witnesses in the previous events were not available for cross examination, the information used from these reports constituted hearsay and was a violation of the Sixth Amendment.

It is useful for forensic experts to be familiar with evidentiary rules and hearsay exceptions in their jurisdiction. The Federal Rules of Evidence generally permit experts to opine on "facts or data in the case that the expert has been made aware of" beyond those that the expert has "personally observed" if "experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject" (Fed. R. Evid. 703 (2011)). But, as evidenced by the *Burke* and *Sanchez* rulings, courts do put limits on admission of hearsay evidence and experts' abilities to rely on hearsay.

Driving under the Influence and Cannabis

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DUI Conviction May Be Based on Cannabis Level, Not Impairment

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In *State v. Fraser*, 509 P.3d 282 (Wash. 2022), the Supreme Court of Washington upheld as constitutional the state's driving under the influence (DUI) law, which includes a prong under which individuals can be convicted of DUI based on the level of tetrahydrocannabinol (THC) in their blood.

Facts of the Case

On July 11, 2017, Douglas Fraser, III, was pulled over for speeding, driving alone in a high-occupancy vehicle lane, and driving erratically. Mr. Fraser had been wearing an employee badge for a local cannabis dispensary and removed it after the patrol trooper noticed the badge. Although the trooper did not observe any odor of intoxicants, he observed Mr. Fraser to be sweating, exhibiting tremors, and had dark circles under his eyes. After asking Mr. Fraser to exit the vehicle, he also observed raised taste buds on the back of his tongue. The trooper later testified that Mr. Fraser acknowledged smoking cannabis "at least 20 hours" before the stop (*Fraser*, p 286).

Mr. Fraser later testified that he did not feel impaired when he was stopped by the trooper. Mr. Fraser participated in nonphysical standard field sobriety tests, which revealed eyelid tremor and poor time estimation, and Mr. Fraser also had difficulty with the finger-to-nose-test. Based on the sum of these findings, Mr. Fraser was arrested for a DUI. He subsequently consented to a blood draw. His THC blood concentration was 9.4 +/- 2.5 ng/mL.

Mr. Fraser was charged under a *per se* THC prong of the state's DUI law, which was established when Washington voters approved the legalization of cannabis. The initiative modified existing law and set the THC threshold for DUI conviction at 5.0 ng/mL. Mr. Fraser moved to declare the *per se* THC prong unconstitutionally vague and an invalid exercise of police power.

Mr. Fraser presented testimony that there is not a standard blood level that equates with impairment. The trial court concluded that the statute created a rule that sufficiently put cannabis consumers on notice and, therefore, was not unreasonably vague. The court found that it is a legitimate use of police powers because the *per se* limit was rationally tied to a legitimate state interest in preventing impaired driving. The trial court found him guilty of his DUI based on his blood THC level exceeding 5.0 ng/mL. Mr. Fraser appealed to the Snohomish County Superior Court, which affirmed the trial court. He then directly appealed to the Washington Supreme Court.

Ruling and Reasoning

On appeal, Mr. Fraser argued that the *per se* prong of the statute was unconstitutionally vague, not a legitimate exercise of police power, and is "facially unconstitutionally overbroad" because of the lack of reliable correlation between THC level and impairment. The court reviewed the legislative history of the cannabis law, which was created through a voter-approved initiative. Statutes enacted through the initiative process are presumed to be constitutional; the challenging party bears the burden of proving unconstitutionality beyond a reasonable doubt.

Pertaining to police powers, the court agreed with the state that the relevant question was whether a lawmaker could reasonably conclude that the state's roads are safer with the *per se* THC limit than they would be without the limit. The court said there need not be a link between impairment and the THC blood content limit akin to the blood alcohol limit, provided that there is a reasonable and substantial relationship between the *per se* THC prong and interests in public safety. Here, the court said that Mr. Fraser's expert evidence gave an incomplete picture as it is undisputed that cannabis use can impair a person's ability to drive. Although the THC blood levels do not correlate the same way as alcohol impairment, THC "levels above 5.0 ng/mL do appear to indicate recent consumption in most people (including chronic users) and recent consumption is linked to impairment" (*Fraser*, p 290). The court also noted that high THC blood levels can reflect imminent impairment. With this, the court ruled the statute is "reasonably and substantially related to recent consumption, which is related to impairment" (*Fraser*, p 291). In addition, the court found that the law aims to deter people who have consumed cannabis from

driving when they could be impaired, which promotes public safety.

Regarding Mr. Fraser's vagueness argument, the state supreme court said that a statute is not unconstitutionally vague merely because individuals cannot predict the exact point at which their behaviors are prohibited conduct. The court found convincing here that the statute gave people sufficient notice and did not invite an inordinate amount of police discretion in enforcement. The court reiterated the lower court's finding that the THC prong does not authorize arbitrary law enforcement decisions as to whether the statute has been violated, rather the law created a bright line blood level of 5.0 ng/mL to be applied to anyone in similar circumstances.

Finally, the court addressed Mr. Fraser's challenge on the grounds that the statute was facially unconstitutional. The court rejected Mr. Fraser's contention, saying that he did not explain why there is no circumstance in which the statute could be applied constitutionally or why the blood limit is "in no way" related to preventing impaired driving. The court ruled that the THC prong is a legitimate exercise of police powers, is not unconstitutionally vague, and is not facially unconstitutional.

Discussion

This case brings up several noteworthy points for psychiatrists and forensic experts. As an initial matter, the *Fraser* court reviewed the legislative history of the state's cannabis law, including the fact that it was created through a voter initiative. The law not only legalized use of cannabis in the state, but it modified the existing DUI law to reflect concerns of persons driving after having consumed cannabis. The case provided an overview of how courts review the

legislative history and intent when interpreting laws. For psychiatrists who participate in the legislative process, it is useful to have an understanding about how laws come to be enacted and how courts interpret their meaning, when questioned.

The *Fraser* case is also relevant to practicing psychiatrists who may have patients who consume cannabis. Although most clinicians will be familiar with driving under the influence laws with respect to alcohol, they may be less familiar with similar laws on cannabis and driving in their state. As Mr. Fraser and his expert pointed out, there is less scientific information about the impact of cannabis on driving compared with alcohol, and some studies have shown a weak relationship between immediacy of cannabis use and driving impairment. Increases in cannabis blood levels may also vary related to sex, percentage of body fat, and release of THC from fat cells during exercise. In its analysis, the court recognized that cannabis use may affect people differently, but also found convincing that the *per se* prong can serve to deter people who have recently consumed cannabis from driving a few hours later, when there is a likelihood of impairment.

Familiarity with laws like the statute in the *Fraser* case permits psychiatrists to provide education on the topic to their patients. Under Washington law, it is important for clinicians to emphasize that one can be convicted for a DUI for cannabis based on blood cannabis level, even if the person does not feel subjectively impaired. In states like Washington, where a broad duty exists to protect third-party victims of foreseeable harm from their patients, it further behooves clinicians to be familiar with these laws and discuss the implications with their patients.