No. 33859-2-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSE LUIS SOSA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable Judge M. Scott Wolfram

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Jose Luis Sosa accepts this opportunity to reply to the State's response brief. For issues not addressed herein, Appellant respectfully requests that the Court refer to his opening brief.

B. SUPPLEMENTAL STATEMENT OF THE CASE

While at the hospital receiving treatment, Mr. Sosa spoke with a deputy during his X-rays. (RP 122). Later and while still at the hospital, a trooper testified he requested Mr. Sosa take a PBT. (RP 173). Though Mr. Sosa did not answer, the trooper believed Mr. Sosa could hear and understand the request because Mr. Sosa had given the trooper his name and date of birth. (*Id*.)

C. ARGUMENT IN REPLY

1. The illegal admission of the blood test results was a manifest error affecting Mr. Sosa's constitutional right to present a defense, and it is not the defendant's burden to prove the State's case.

The State claims Mr. Sosa cannot demonstrate the failure to advise him of his right to independent blood testing was a manifest error affecting a constitutional right that was prejudicial. State's Brief at 6–7. The State also argues it was Mr. Sosa's burden to demonstrate he was read the implied consent warnings. *Id*. at 6–7.

Mr. Sosa respectfully refers to his opening brief, wherein he demonstrates that law enforcement's failure to properly advise him affected his ability to gather potentially exculpatory evidence in his defense. Appellant's Opening Brief pgs. 17–20. The impediment of being unable to gather potentially exculpatory evidence in his defense was obviously prejudicial to Mr. Sosa. *Id*. Since law enforcement failed to properly advise Mr. Sosa, and he was thus denied the right to gather potentially exculpatory evidence and does not know what that potentially exculpatory evidence would have shown, there is no way to demonstrate whether it would have exonerated him. Because potentially exculpatory evidence was lost, Mr. Sosa was prejudiced. And, as shown by at least one other jurisdiction, this alone is grounds for a complete dismissal. Appellant's Opening Brief pg. 19–20 (citing *Minkoff*, 308 Mont. at 254–55).

Moreover, the State asserts that because the State had its own sample, and because Mr. Sosa could have tested the State's sample, there was no harm. State's Brief pg. 6. However, "[a]n accused must be apprised of the [implied consent] warning so that the accused has the opportunity to gather potentially exculpatory evidence, regardless of the fact that there is no right to refuse the mandatory blood test." *State v. Morales*, 173 Wn.2d 560, 569, 269 P.3d 263 (2012) (citing *State v.*

Turpin, 94 Wn.2d 820, 826, 620 P.2d 990 (1980). This "statutory requirement demonstrates an important protection of the subject's right to fundamental fairness which is built into our implied consent procedure." *Id*. (citations omitted). It is fundamentally unfair for a defendant to be required to use the State's blood sample to run tests just because the State failed to advise the defendant of his right to obtain an independent sample. It was never Mr. Sosa's argument that he should have been given the opportunity to test the State's sample; the issue is that Mr. Sosa was never advised of his right to obtain an independent blood draw and test, which thus interfered with his right to defend his case. The State's argument that Mr. Sosa was not prejudiced has no merit.

In addition to Mr. Sosa losing his right to gather potentially exculpatory evidence, he asserts he was prejudiced because a blood test that should not have been admitted was used against him at trial. *See* Opening Brief at 32; (RP 333, 343). The State's sample—a key element of the case—showed Mr. Sosa's blood alcohol content was .12. (RP 333, 343). Mr. Sosa testified he had been awake for many hours prior to the accident, which made him sleepy, and exhaustion led him to fall asleep behind the wheel. (RP 445, 452). The result of the trial might have been different if the blood test had not been admitted.[1]

[1] Appellant directs this Court's attention to the facts in *State v. Morales*, wherein the Washington Supreme Court found the erroneous admission of a blood test prejudicial.

Next, the State asserts Mr. Sosa should have demonstrated the advisement was not given, and that a right to advisement does not exist. State's Brief pgs. 6–7. According to *State v. Morales*, it was the State's burden to prove the implied consent warnings were read at trial. *Morales*, 173 Wn.2d at 574. Mr. Sosa refers to his opening brief for the remaining relevant arguments as to why the State was required to advise him of his right to independent testing. Appellant's Opening Brief pgs. 9–26.

Finally, the State asserts RCW 46.61.506(6) provides that the "failure or inability to obtain an additional test . . . shall not preclude admission of evidence…." State's Brief pg. 8. However this subsection does not absolve the State of its responsibility to advise a DUI suspect of his ability to obtain an independent test. Appellant's Opening Brief pgs. 9–26.

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173 Wn.2d 560, 577–78, 269 P.3d 263 (2012). There, the defendant rolled a stop sign, was in a collision but kept driving for one mile after despite leaving behind a bumper, smelled of intoxicants, had bloodshot and watery eyes, and the interior of the car smelled of intoxicants and contained empty and unopened beer cans. *Id*. at 563–64. The Court determined, despite this other evidence, the defendant had been prejudiced by the illegal admission of the blood test results. *Id*. at 577–78. The defendant had been found guilty of all three alternatives to vehicular assault, but only appealed two of the alternatives. *Id*. at 565–66. Finding prejudice from the erroneous admission, the Court reversed both of the vehicular assault alternatives (vehicular assault by DUI and vehicular assault by reckless driving). *Id*. at 578 (as for the vehicular assault by reckless driving conviction, the Court reasoned the evidence was "not so overwhelming [on that conviction] as to overcome the erroneous admission of [the defendant's] blood alcohol level").

2. The State fails to cite to any authority or facts to support its assertion that suspects who are subjected to a breath test are not similarly situated to those suspects from whom a blood sample is taken.

The State's response in this section fails to cite any authority in support of its argument, and Mr. Sosa respectfully requests this portion of the State's response not be considered. State's Brief pgs. 9–10.

Without citation to authority, the State seems to argue that a DUI suspect who is subjected to a breath test is not similarly situated to a suspect subjected to a blood test via a warrant. State's Brief pg. 9–10. The State overlooks the fact that DUI breath samples are usually obtained pursuant to the "implied consent" statute. RCW 46.20.308. This means that any person who drives in Washington "is deemed to have given consent" to a breath test. RCW 46.20.308(1). Moreover, even if a suspected DUI driver refuses to voluntarily give a sample, law enforcement can still get a warrant to obtain and test a blood sample. *City of Seattle v. St. John*, 166 Wn.2d 941, 215 P.3d 194 (2009) (holding law enforcement may obtain a warrant to test blood after a defendant would not consent to a blood sample). Individuals suspected of driving under the influence are similarly situated—the only difference is how law enforcement chooses to handle the situation and gather the evidence—hence the basis for potential equal protection violations. Mr. Sosa refers

to his opening brief for further argument on this issue. Appellant's Opening Brief pgs. 20–25.

Finally, the State seems to suggest it was under no obligation to advise Mr. Sosa because he may have been unconscious, so an advisement was not necessary. State's Brief pgs. 9–10. The State cites no factual or legal authority for this proposition. *Id*. Mr. Sosa was conscious and should have been advised. Law enforcement testified Mr. Sosa had interacted with him during X-rays (RP 122). And one trooper testified he believed Mr. Sosa could hear and understand the trooper's PBT request as Mr. Sosa had given his name and date of birth. (RP 173). The argument that the State was unable to advise him because he was unconscious is untenable. It was the State's burden to prove *at trial* that Mr. Sosa was properly advised, which it failed to do. *Morales*, 173 Wn.2d at 574; (RP 52–61, 90–97, 107–114, 114–131, 164–189, 190–212, 212–228, 262–263, 396–409).

Also, as noted above and in response to the State's argument (State's Brief pg. 10), Mr. Sosa was entitled to have the choice of whether he could obtain his own blood sample for testing. He is not required to use the State's sample as a second-best substitute. *See Morales*, 173 Wn.2d at 569–70 (citing *State v. Turpin*, 94 Wn.2d 820, 826, 620 P.2d 990 (1980)); *also* RCW 46.20.308(1) & (2) *and* RCW 46.61.506.

3. Defense counsel was ineffective for failure to object to admission of the blood test.

Again, the State claims Mr. Sosa had the ability to test the State's blood sample, and therefore defense counsel was not ineffective for failing to object to its admissibility. State's Brief pg. 12. However, the right to independent testing does not mean the right to independently test the State's sample. The right to independent testing is a statutory one, providing for a suspect's ability to obtain a blood *draw* and test independent of the State's sample. *State v. Morales*, 173 Wn.2d 560, 569–70, 269 P.3d 263 (2012) (citing *State v. Turpin*, 94 Wn.2d 820, 826, 620 P.2d 990 (1980)); *also* RCW 46.20.308(1) & (2) *and* RCW 46.61.506. This is true "regardless of the fact that there is no right to refuse the mandatory blood test." *Morales* at 569–70 (citations omitted). "This 'statutory requirement demonstrates an important protection of the [suspect's] right to fundamental fairness which is built into our implied consent procedure." *Id*. (citations omitted).

In addition, as Mr. Sosa indicated in his opening brief, the courts have not looked favorably upon law enforcement's interference with a suspect's right to obtain independent testing—and, in particular, a suspect's right to obtain an independent blood *draw*. Appellant's Opening Brief, pgs. 15–16. The State's argument that Mr. Sosa was not prejudiced

because he had ample opportunity to test the State's blood sample is untenable.

Mr. Sosa refers to his opening brief for additional supporting argument. Appellant's Opening Brief, pgs. 26–32.

4. Presentation of the refusal to take part in a PBT which has not gained general acceptance in the scientific community under *Frye* is error, similar to the presentation of evidence showing a refusal to take a polygraph test.

The State argues that because the prosecutor did not offer the results of a PBT, the evidence was admissible that Mr. Sosa was non-responsive when requested to perform one. State's Brief pgs. 12–13. The problem with this argument is that it is very similar to a polygraph. Polygraphs are widely known to be inadmissible at trial. *State v. Sutherland*, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980) (citations omitted). Likewise, referring to a polygraph during trial can be prejudicial if an inference as to the result is raised or if an inference raised as to the result is prejudicial. *State v. Descoteaux*, 94 Wn.2d 31, 38–39, 614 P.2d 179 (1980) *overruled on other grounds*, *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982) (citations omitted). Polygraph evidence "is liable to be prejudicial and should be admitted only when clearly relevant and unmistakably nonprejudicial." *Descoteaux*, at 38–39 (citations and quotations omitted). Just like polygraphs, because Mr. Sosa was nonresponsive when asked to take a PBT test, his failure to respond could

only have been prejudicial in the eyes of the jury (and was argued as such by the State in rebuttal closing). (RP 519–520); Appellant's Opening Brief, pg. 34.

The State also argues the PBT was only meant to provide a preliminary indication as to Mr. Sosa's blood alcohol level and was not a substitution for other testing. State's Brief pp. 12. However, PBTs are not admissible for any purpose. *State v. Smith,* 130 Wn.2d 215, 222, 922 P.2d 811 (1996); Appellant's Opening Brief pg. 34.

Mr. Sosa refers to his opening brief for further argument on this issue. Appellant's Opening Brief pgs. 33–35.

5. WPIC 92.16 should have been proposed by defense counsel, and failure to do so was ineffective assistance of counsel.

Without citation to any legal authority, the State claims the other jury instructions presented at trial could have cured the failure of defense counsel to propose WPIC 92.16. State's Brief at 13.

However, the instructions the State relies upon do not in any way specifically instruct the jury to give due weight and consideration to testing procedures. (*Id.*); (CP 99, CP 114). This is significant given the strong history of case law supporting the importance of proper testing procedures when presenting evidence in support of a conviction for driving under the influence. *See State v. Hultenschmidt,* 125 Wn. App. 259, 265, 102 P.3d 192 (2004) (citing *State v. Bosio,* 107 Wn. App. 462,

466–67, 27 P.3d 636 (2001)); RCW 46.61.502; *also* WAC 448-14-020 (2016) (Operational discipline of blood samples for alcohol). Appellant's Opening Brief at pgs. 36–37. The jury should have been instructed by WPIC 92.16.

The State also claims that Mr. Sosa argued this particular claim of ineffective assistance only related to the DUI prong of the vehicular assault crime. (State's Brief at 14). However, although the jury did convict on other alternative means, the jury's verdict on the other means was no doubt substantially swayed by the blood evidence.[2] Furthermore, Mr. Sosa in no way conceded this error only applied to one means of the vehicular assault convictions; Mr. Sosa asserted this affected the jury's verdict and did not assert it only applied to one of the alternative means of committing vehicular assault. Appellant's Opening Brief pg. 40.

6. The trial prosecutor's closing argument contained an improper appeal to the jury's passion and prejudice, which constitutes reversible error.

The State relies upon *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006), to claim courts will not find prejudicial error unless it is clear and unmistakable that counsel was not arguing an inference from the evidence. (State's Brief pg. 14). The problem with the State's reliance on *McKenzie*, however, is that case addresses the standard to be applied when

[2] *See* fn 1.

a prosecutor improperly expresses a personal opinion as to the defendant's guilt during closing argument. *Id*. at 54. "Prejudicial error does not occur until such time as it is *clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.*" *Id*. (citation omitted and emphasis in original). This standard does not apply here because the trial prosecutor did not express a personal opinion as to Mr. Sosa's guilt; rather, the trial prosecutor was inflaming the passion and prejudice of the jury. *State v. Claflin*, 38 Wn. App. 847, 849–51, 690 P.2d 1186 (1984) ("A prosecutor may not urge a jury to convict based upon an appeal to the jury's sympathy for the victim"). Appellant's Opening Brief, pgs. 40–43.

Next, the State argues in order for Mr. Sosa to prevail on a claim of prosecutorial misconduct, the prosecutor must also have made references to evidence unsupported by the record. State's Brief p. 17–20. Notably, a prosecutor's references to a defendant's potential for future criminal activity has been deemed an example of improper reference to evidence unsupported by the record. *State v. Ramos*, 164 Wn. App. 327, 332–33, 263 P.3d 1268, 1271 (2011).

In *Ramos*, the prosecutor during closing argument "urged the jury to act on behalf of the community and stop [the defendant] from continuing to sell cocaine" at a shopping center. *Ramos*, 164 Wn. App. at

332–33. Because there was no evidence indicating the defendant in *Ramos* was continuing to engage in drug activity, the prosecutor had made improper "prejudicial statements unsupported by the record." *Id*. at 340–41. Moreover, the statements were so prejudicial the court found an instruction could not have cured the error. *Id*. at 341. *See also United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991) ("A prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking").

Similar to *Ramos*, the trial prosecutor in this case also appealed to the passion and prejudice of the jury by inferring there could be future crimes. (RP 483). Mr. Sosa asserts this is reversible error. Appellant's Opening Brief at pgs. 40–43.

7. Several errors throughout this trial exist, warranting reversal based upon cumulative error.

Mr. Sosa adopts and incorporates by reference the arguments he raised on this issue in his opening brief. Appellant's Opening Brief pgs. 43–45.

8. The trial court had no statutory authority to impose a DUI fine; however, even if the trial court did have statutory authority, it erred by imposing the fine when the defendant is indigent.

The State makes several factual claims throughout this section of its brief which either have no citation to authority or are misconstrued from the record. State's Brief pgs. 21–25. Appellant respectfully requests

those facts which are not properly supported by the record be stricken and not considered by this Court.

First, the State suggests there is nothing to prevent Mr. Sosa from choosing a different career path to pay off his restitution. State's Brief pg. 22. Unfortunately, due to Mr. Sosa's felony conviction, he cannot pursue a job as a corrections officer due to his inability to possess a firearm. (RP 536). The State should be well aware of this problem, along with the indisputable reality that a felony conviction does pose a challenge to finding a well-paying job.

The State also claims to know how much Mr. Sosa paid his trial attorney and that private counsel refused to represent him on appeal. State's Brief pg. 22. This unsupported commentary is irrelevant to Mr. Sosa's current financial status; the State has no idea whether Mr. Sosa received financial help from friends or family or took out loans to pay for his trial attorney, and the State's assertion that private counsel refused to represent Mr. Sosa is completely without factual basis in the record. (CP 144–145). Mr. Sosa wrote a letter requesting someone help him with his appeal—it is improper for the State to guess why his trial attorney did not help him with his appeal. Anyone could waste time guessing as to the reason (and perhaps it is because Mr. Sosa did not have the funds to pay for private appellate counsel). (*Id*.).

The State also claims that a felon with a conviction for vehicular assault has "boundless" potential. State's Brief pg. 23. Given the hurdles he must face with a felony conviction and large amount of restitution, Mr. Sosa would not agree, as pointed out by his trial counsel at sentencing. (RP 537–538).

The State claims Mr. Sosa has a job waiting for him, but does not cite to any support in the record. State's Brief pg. 23. From looking at Mr. Sosa's Report as to Continued Indigency, he currently earns $650 per month, is on food assistance, has a back injury, has large debts to pay off, and also is responsible for supporting his disabled father. Report as to Continued Indigency, filed 7/26/16. It would be difficult to assume Mr. Sosa can meet his basic needs with such an income: "A person's present inability to meet their own basic needs is not only relevant, but crucial to determining whether paying LFOs would create a manifest hardship." *City of Richland v. Wakefield*, 2016 WL 5344247, at *4 (2016). Because Mr. Sosa receives Basic Food (SNAP), he is unable to meet his basic needs, and the discretionary DUI fine should not have been imposed.

The State's other arguments appear to be an attempt to distract this Court from the real issue (State's Brief pg. 23–24), which is whether the trial court erred by imposing a DUI fine pursuant to RCW 46.61.5055(1)(a)(ii) without statutory authority and despite Mr. Sosa's

indigency. *See also* Report as to Continued Indigency, filed 7/26/16. Mr. Sosa refers to his opening brief for further argument on this issue. Appellant's Opening Brief at 45–50.

9. A report as to continued indigency is on file, which details the defendant's impoverished status, and this Court should not imposes costs if the State prevails on appeal.

Contrary to the State's assertion, (State's Brief at pgs. 25–26), Mr. Sosa's Report as to Continued Indigency was filed with the Court and served on the State July 27, 2016. Report as to Continued Indigency, filed and served 7/26/16. As stated above, this report details Mr. Sosa's inability to meet his own basic needs.[3] *Id*.

The State claims Mr. Sosa must produce the transcript upon which the trial court made its finding of indigency. State's Brief at 25. There is no such requirement in the Court's general order of June 10, 2016. Court's General Order, 06/10/16. Rather, the order states a defendant "should" provide a transcript of the indigency determination along with other relevant citations to the record. (*Id*.) Mr. Sosa respectfully requests the Court refer to his Report as to Continued Indigency and opening brief for such references. Report as to Continued Indigency, filed 7/26/16; Appellant's Opening Brief pgs. 8–9, 48–51.

[3] It is also noteworthy that Mr. Sosa never asserted he could "comfortably" pay $150 a month, as claimed by the State. State's Brief at 25 (RP 538). At the time of sentencing, Mr. Sosa specifically corrected his trial counsel by stating he could pay $100 per month. (RP 538).

D. CONCLUSION

The Appellant has reviewed the State's remaining arguments and believes they are already sufficiently contradicted by Appellant's Opening Brief. The Appellant respectfully requests the relief requested therein. Appellant's Opening Brief pgs. 51–52.

Respectfully submitted this 5th day of October, 2016.

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/s/ Kristina M. Nichols_____
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 33859-2-III
vs.	)	
	)	
JOSE LUIS SOSA	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 5, 2016, I deposited for mail by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Jose Luis Sosa
616 White Street
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Having obtained prior permission, I also served Respondent at tchen@co.franklin.wa.us and jnagle@co.walla-walla.wa.us by e-mail using the electronic service feature while e-filing.

Dated this 5th day of October, 2016.

/s/ Kristina M. Nichols
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