

COURT OF APPEALS  
DIVISION II

NO. 38542-2-II

09 OCT -8 PM 12: 25

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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STATE OF WASHINGTON, Respondent

v.

DAWN MARIE MARRAZZO, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE ROGET A. BENNETT  
CLARK COUNTY SUPERIOR COURT CAUSE NO.06-1-02086-3

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BRIEF OF RESPONDENT

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Attorneys for Respondent:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

MICHAEL W. VAUGHN, WSBA #27145  
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (360) 397-2261

PM 10-6-09

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## I. STATEMENT OF FACTS

On August 24, 2006, around 5:30 p.m., the defendant struck the victim's vehicle at an intersection in Clark County. The victim, Michael Wagner, was working for Clark County Public Utilities at the time on a special shift, in the middle of a call where he was repairing an elderly gentleman's water valve. (RP 533-35). The sheriff's deputy who responded to the scene said Mr. Wagner's vehicle had "massive front end damage ... there was intrusion from the [engine] compartment into the cab." (RP 315). Mr. Wagner reported he knew almost immediately that he was injured because his foot had been hobbled in the wrong direction. (RP 539-40). Michael Wagner was transported to the hospital. (RP 258, 319). He spent two weeks there with a broken leg, crushed foot, burn on high thigh and an obstructed bowel. (RP 539-44). Michael Wagner was in a cast for over two years. (RP 545).

The defendant was also injured in the collision and transported to Emanuel Legacy Hospital in Portland, Oregon. (RP 258, 319). The medical facilities in neighboring Portland are better equipped for dealing with serious injuries than the facilities in Clark County. (RP 303).

Cans of beer were found in and around the defendant's vehicle. (RP 316). While at the hospital, the defendant had blood drawn by a

hospital technician as part of normal medical procedures. (RP 348). A blood sample was also taken under the supervision of Deputy Ryan Taylor, Clark County Sheriff's Office, after the giving of implied consent warnings. (RP 323-28). Deputy Taylor smelled an odor of intoxicants coming from the defendant when he entered her room. The defendant was unconscious or unresponsive at the time. (RP 323).

That forensic blood sample was ultimately analyzed by two toxicologists at the Washington State Patrol Toxicology Lab. (RP 472-76, 498). The first toxicologist, Paige Long, obtained a sample with a blood alcohol level of .16. (RP 891). Ms. Long apparently found employment on the east coast prior to the commencement of trial in this case. The blood sample was retested by toxicologist Alan Capron with the same result. (RP 479, 482, 498). Mr. Capron testified at trial.

At trial, the defendant moved to exclude Ms. Long's blood sample test results on the grounds that CrR 6.13 is an unconstitutional violation of the Confrontation Clause as discussed in *Crawford*. (RP 455). The court admitted Ms. Long's test result under CrR 6.13 as the defense made no demand to have Ms. Long appear in person at trial, pursuant to the court rule. (RP 461). The court initially permitted testimony by Mr. Capron regarding the medical blood test result taken by medical staff at Legacy

Hospital. Mr. Capron testified that the medical blood test result was roughly equivalent to the result obtained by himself, in the range of .17-.19 blood alcohol. (RP 516). The court later decided this testimony should be excluded because the medical blood test result lacked a proper foundation. (RP 894). The defense moved for a mistrial without further elaboration. (RP 896). The court denied the motion for a mistrial and gave a limiting instruction to the jury ordering them to disregard the medical blood test result. (CP 281).

The court gave the following reasoning: “I will tell them that I’ve withdrawn that exhibit, they are to disregard it and any testimony about it, and the reason is because there was no indication in the record as to how or by whom the test was performed or what their qualifications were. That will give them an idea, then that there’s a reason why they’re being asked to regard (sic) it without speculating that something was done improperly other than the Court’s erroneous evidentiary rule.” (RP 896-97). The trial court elaborated on its reasons for denying the motion for a mistrial, “A couple reasons. One, because I’m going to instruct the jury to disregard it. Two, any error from this exhibit could well be harmless in light of the fact of two other test results being admitted, recognizing that you have impeachment argument on those other two.” (RP 897-98).

The defendant was found guilty by the jury of one count of Vehicular Assault. (RP 987). The jury was presented with three separate prongs of the Vehicular Assault statute by which to find the defendant guilty. The jury returned special interrogatories with its verdict. The jury stated it could not unanimously agree that the defendant was: a) affected by alcohol while driving, or b) driving with disregard for the safety of others, but it did state it unanimously agreed it was convicting under the third prong—that the defendant was driving while over the legal limit of .08 BAC. (RP 987-89). The defendant was sentenced by the court to five months jail. (RP 1028).

## II. ARGUMENT

- A. THE COURT DID NOT ABUSE ITS DISCRETION, IN EXCLUDING AS IRRELEVANT, THE TESTIMONY OF A WITNESS ABOUT A STATE CRIME LAB AUDIT, WHEN THAT WITNESS HAD NO KNOWLEDGE OF ANY TAMPERING WITH BLOOD SAMPLES, AND THE DEFENSE TOLD THE COURT IT WAS MAKING NO CLAIM OF ANY TAMPERING WITH BLOOD SAMPLES IN THIS CASE.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004) (citing State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990)); Reese v. Stroh, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). The reviewing court will reverse only if the decision is one “no reasonable

person would have decided ... as the trial court did.” Thomas, 150 Wn.2d at 856 (citing State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). Furthermore, “proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal.” Thomas, 150 Wn.2d at 856 (citing State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985)).

An error in admitting evidence does not require reversal unless it prejudices the defendant. Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Thieu Lenh Nghiem v. State, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994). Where the error arises from a violation of an evidentiary rule, that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

The admission of relevant evidence is governed by ER 401 and is within the sound discretion of the trial court. State v. Mak, 105 Wn.2d 692, 702, 718 P.2d 407, cert denied, 479 U.S. 995 (1986). However, even relevant evidence may be excluded by the trial court if its probative value

is substantially outweighed by the danger of unfair prejudice. Mak, at 703; ER 403.

In the instant case, the defense wished to present evidence by a former Washington State Patrol sergeant that she had audited the state toxicology lab in 2004 and recommended changes in the way the lab handled evidence samples, particularly in the way samples were ordered in the laboratory freezer, and in ensuring access to that freezer was secure. Her proffered testimony would include no indication that samples kept in the lab had been altered, tampered with, or affected by their handling. (RP 199-204). The defense affirmatively told the court it was not making any claim that the wrong sample had been tested in this case. (RP 205).

The court ruled that:

In the absence of any evidence that there were problems with this specific sample, just a generalized concern about the door being left open and things moved around inside wherever they're kept, I think has no materiality; that is, it's so insufficient that it cannot possibly affect a rational jury, and therefore any presentation to the jury would be to invite the jury to speculate.

(RP 206)

The trial court's clear and well-articulated finding indicates why the evidence proffered by the defendant was immaterial, irrelevant, and unconnected with the matters at issue in the trial. The trial court did not abuse its discretion in excluding this testimony as irrelevant.

B. THE COURT DID NOT ABUSE ITS DISCRETION, IN EXCLUDING AS IRRELEVANT, CROSS-EXAMINATION ABOUT THE ADEQUACY OF LAB PROTOCOLS FOR BREATH TESTING WHEN BREATH TESTING PROCEDURES WERE NOT IN EVIDENCE OR AT ISSUE IN THE TRIAL.

The defense asked the trial court to cross-examine the state toxicologist in this case about the procedures used in preparing machines used for testing breath alcohol. The defense contended that Anne Marie Gordon, a co-worker for the toxicologist testifying in this case, may have falsified documents relating to breath testing instruments while employed by the state toxicology lab. (RP 216-222). The trial court granted a motion in limine preventing this line of inquiry. It stated:

I'm going to grant the motion in limine. I don't think Ms. Gordon's conduct, if it could even be proven, is linked to the testing of blood in this case. Again, one problem is when you throw general allegations of wrongdoing on some unrelated behavior and try to extrapolate, that's—that's ER 4.04(a), isn't it, that you're trying to show propensity evidence to prove something happened on a particular occasion?

(RP 223)

The defense also contended that the state toxicologist testifying at trial, Mr. Capron had "changed dates that testing had been done" on breath test simulator solutions. (RP 220). During an offer of proof by the defense, the toxicologist, Mr. Capron, testified that a former glitch in the software used in the toxicology lab caused some apparent inconsistencies

with the dating of a database used to certify breath testing solutions and that corrections to the computer printout were made. (RP 395-96). The trial court excluded as irrelevant, cross-examination on breath testing protocols at the State Toxicology Lab because all the evidence related to the instant case involved blood samples. The trial court stated:

I see absolutely no relevance, no impeachment. And even if there was, it would be impeachment on a collateral matter. So that line of inquiry is foreclosed.

(RP 400)

A witness cannot be impeached on matters collateral to the principal issue being tried. A matter is collateral if the evidence is inadmissible for any purpose independent of contradiction. State v. Oswalt, 62 Wn.2d 118, 381 P.2d 617 (1963); State v. Lahti, 23 Wn. App. 648, 597 P.2d 937, review denied, 92 Wn.2d 1036 (1979).

In each instance, the court decided to exclude cross-examination related to the minutiae of preparing breath testing machines when the issue in the instant case was the testing of blood samples. Not only was the proposed cross-examination related to a collateral matter, but the offers of proof demonstrated that Mr. Capron's responses would yield little or nothing in the way of impeachment. There is no indication the trial court acted in a manifestly unreasonable way in excluding this line of cross-examination.

C. THE COURT DID NOT ABUSE ITS DISCRETION, IN EXCLUDING AS IRRELEVANT, CROSS-EXAMINATION ON THE MERITS OF THE W.A.C.'S FOUNDATIONAL REQUIREMENTS.

The Washington Administrative Code (WAC) requires that blood samples in criminal cases meet certain foundational requirements. Among these is the use of an enzyme poison in the tube used to collect the blood sample. (RP 486). This enzyme poison prevents degradation of the blood sample. (RP 484, 488-89). The defense attempted to cross-examine toxicologist Alan Capron on the merits of the standard employed by the state toxicologist in terms of how strong that enzyme poison should be. (RP 490-97). The State Toxicologist's standards specifies an enzyme poison of 25 milliliters and Mr. Capron stated that was present in this case. (RP 487). The defense, in an offer of proof, attempted to impeach Mr. Capron with a document that was not a learned treatise and which referred to standards in clinical laboratories, not forensic toxicology laboratories. (RP 490-96). The court ruled that "the foundation is satisfactory here and the document that Mr. Muenster's relying upon has not been shown to be admissible for any purpose." (RP 493). The court went on to say that the defense could not cross-examine Mr. Capron on the standard used by the State Toxicology Lab in establishing the foundational requirements under the WAC. (RP 493).

Clearly the court did not act in a manifestly unreasonable way by prohibiting the defendant from inquiring into the foundational standards of the WAC, particularly when that cross-examination relied upon improper hearsay.

D. CrR 6.13 REQUIRES THE DEFENDANT TO DECLARE PRIOR TO TRIAL WHETHER HE OR SHE WISHES TO CONFRONT THE WITNESS USED IN PREPARING CERTAIN REPORTS. THE DEFENDANT'S FAILURE TO DO SO IN THIS CASE CONSTITUTES WAIVER OF ANY CLAIM SHE MAY HAVE UNDER CRAWFORD V. WASHINGTON.

The State agrees that under the ruling in Melendez-Diaz v. Massachusetts, 57 U.S. \_\_\_\_, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the report of toxicologist Paige Long is “testimonial” under a Crawford analysis. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed 2d 177 (2004). However, there is a critical difference between Melendez-Diaz and this case. In this case, Washington Court Rules require the defendant to state ten days prior to trial whether he or she wishes to confront the witness whose testimonial report is being offered into evidence. Failure to demand the right to confront these specialized witnesses ten days prior to trial, is deemed by the Washington Court Rules to be a waiver of the right to confront that witness at trial. CrR 6.13. The test results of Paige Long were testimonial under Crawford, but the

defendant in this case waived her right to confront Ms. Long under CrR

6.13.

The opinion in Melendez-Diaz explicitly spells this out:

The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.

- Melendez-Diaz, Slip Opinion at 8, footnote 3.

The U.S. Supreme Court elaborated on this point further in

Melendez-Diaz:

The dissent believes that those state statutes ‘requiring the defendant to give early notice of his intent to confront the analyst’ are ‘burden shifting statutes [that] may be invalidated by the court’s reasoning.’ [*citation omitted*] That is not so. In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use the analyst’s report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of evidence absent the analysts appearance live at trial. [*citations omitted*] Contrary to the dissent’s perception, these statutes shift no burden whatsoever. The defendant *always* has the burden of raising the Confrontation Clause objection; notice-and-demand statutes simply govern the *time* in which he must do so.

- Melendez-Diaz, Slip Opinion at 21.

The Defendant’s reliance on Melendez-Diaz is obviously misplaced.

E. EVEN IF THE TEST RESULTS OF TOXICOLOGIST PAIGE LONG WERE INADMISSIBLE, THE ADMISSIBLE TESTIMONY OF TOXICOLOGIST ALAN CAPRON, WHO RETESTED THE BLOOD AND OBTAINED A DUPLICATE RESULT, MAKES ANY ERROR HARMLESS.

Where an error arises from a violation of an evidentiary rule, that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt. State v. Saraceno, 23 Wn. App. 473, 475-76, 596 P.2d 297 (1979), review denied, 92 Wn.2d 1030 (1979). Nonetheless, the defendant must first raise at least the possibility of prejudice. See, e.g. United States v. Ford, 632 F.2d 1354, 1379 (9<sup>th</sup> Cir. 1980); cf. State v. Smith, 85 Wn.2d 840, 853, 540 P.2d 424 (1975) (where counsel given prior notice of communication and proceedings recorded, “at least a possibility of prejudice must be shown”).

Nothing in the record suggests the defendant could have been prejudiced in any way by the admission of the test results of Paige Long. Toxicologist Alan Capron testified for the jury that he found the same .16 BAC result when he retested the sample. Unlike cases where cumulative evidence by multiple witnesses has some degree of

subjectivity and variation, this case does not. Mr. Capron testified that he ran a blood sample through a scientific instrument that gave a reading of .16. He did not testify to any subjective impressions. He read a result off a machine. Likewise that is what the result indicated in Ms. Long's written report. The most that can be said is this testimony was cumulative or duplicative. There is no rational way to interpret Ms. Long's report of the same result, on the same sample, as Mr. Capron's, as somehow influencing the jury's verdict in this case. Any error in the admission of this duplicate result is harmless.

F. A JURY IS DEEMED TO FOLLOW THE COURT'S INSTRUCTIONS. IN THIS CASE, AFTER HEARING EVIDENCE REGARDING A BLOOD TEST RESULT, THE COURT ORDERED THE JURY TO DISREGARD IT. THE COURT'S INSTRUCTION, BY SPELLING OUT THE REASON FOR EXCLUSION, QUELLED ANY SPECULATION BY THE JURY THAT MIGHT HAVE BEEN DAMAGING TO THE DEFENDANT.

Juries are presumed to follow the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Absent any contrary showing, it is presumed that a jury follows the trial court's instructions. State v. Davenport, 100 Wn.2d 757, 763-64, 674 P.2d 1213 (1984). Jury instructions are reviewed *de novo*, within the context of the jury instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). A judge is prohibited by Article IV, Section 16 from "conveying

to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” Article IV, §16 of the Washington State Constitution.

In this case, nothing in the record demonstrates the jurors failed to follow the court’s instructions. They were told to disregard the testimony of the Oregon medical blood test in reaching their verdict and nothing suggests otherwise. Clearly, the jury in this case was able to rely upon the testimony of toxicologist Alan Capron about his test of the defendant’s blood sample performed at the Washington State Patrol Toxicology Lab.

The suggestion that the court instructed the jury that matters of fact had been established as a matter of law, or that the judge was conveying his personal attitudes towards the merits of the case is not borne out by the plain language of the instruction the trial court gave. That instruction told the jury that the court had decided to exclude the exhibit and testimony about it, “because it does not state by whom, when or how the testing was done.” If anything, the defendant benefited by the language contained in this instruction. It informed the jury that there was a question as to authenticity and foundation of the evidence and for that reason they should not consider the exhibit or the testimony about it. Including this specific language was much better for the defendant than making no comment on the reason for exclusion, as it would have allowed the jury to speculate

why the exhibit and testimony had been withdrawn. Instead, the court provided the jury with a legitimate reason for the withdrawal of this evidence and a legitimate reason why they should not consider it. This instruction was curative because it quelled any possible speculation by the jurors that could have tainted their consideration of the excluded evidence.

Finally, the Appellant's suggestion that the court's comments implicitly endorsed the analysis of the medical blood test simply does not logically follow from the words of the instruction and the context in which it was given.

G. EVEN IF THE COURT'S INSTRUCTION TO THE JURY REGARDING THE EXCLUSION OF THE MEDICAL BLOOD TEST FROM OREGON CONSTITUTED ERROR, IT WAS HARMLESS ERROR. THE JURY HAD THE TESTIMONY FROM THE SAME TOXICOLOGIST THAT HE HAD ANALYZED A BLOOD SAMPLE HIMSELF AND OBTAINED AN ANALOGOUS MEASUREMENT TO THE MEDICAL BLOOD TEST FORM OREGON.

The evidence of the medical blood test result follows the same harmless error analysis as Paige Long's written report. *Supra*.

Mr. Capron testified that the medical blood test result form Oregon was in a range equivalent to his own analysis performed on the forensic blood sample he analyzed at the Washington State Patrol Toxicology Lab. This is one more duplicative piece of information that in no way demonstrates the defendant was prejudiced. The jury was presented with Mr. Capron's

live testimony about his forensic analysis of the defendant's blood and the attendant BAC--.16 – twice the legal limit for driving. Given this essentially uncontested piece of evidence, no rational juror could help but find the defendant guilty of driving with over a .08 BAC. Any error in admission of the medical blood test result was harmless.

### III. CONCLUSION

The trial court was well within its discretion, and acted reasonably and for well-articulated reasons, in limiting cross-examination on irrelevant collateral matters. Admission of duplicative .16 blood test results was, at most, harmless error. These duplicative results were objective scientific measurements that could have had no bearing on the jury's decision to find the defendant's BAC was over .08. This is especially true in light of the basically uncontested evidence by the toxicologist that the defendant's blood tested at .16 BAC.

DATED this 5 day of October, 2009.

Respectfully submitted:

ARTHUR D. CURTIS  
Prosecuting Attorney  
Clark County, Washington

By:

  
MICHAEL W. VAUGHN, WSBA#27145  
Deputy Prosecuting Attorney

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STATE OF WASHINGTON  
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STATE OF WASHINGTON,  
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DAWN MARIE MARRAZZO,  
Appellant.

No. 38542-2-II

Clark Co. No. 06-1-02086-3

DECLARATION OF  
TRANSMISSION BY MAILING

STATE OF WASHINGTON )

: ss

COUNTY OF CLARK )

On OCTOBER 6, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

Lisa E Tabbut  
Appellate Attorney  
PO Box 1396  
Longview WA 98632

Dawn Marie Marrazzo  
c/o Appellate Attorney

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland  
Date: October 6, 2009.  
Place: Vancouver, Washington.