

NO. 42178-0

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHN WESLEY JOHANSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Susan K. Serko

No. 11-1-00033-0

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court violate the Confrontation Clause when it reserved ruling on the admissibility of irrelevant testimony that defendant never attempted to adduce at trial?

B. STATEMENT OF THE CASE.

1. Procedure

On January 4, 2011, the Pierce County Prosecutor's Office filed an information charging appellant, John Wesley Johanson ("defendant"), with felony driving while under the influence. CP 1-2. The Honorable Susan K. Serko presided over the trial. RP 1. The jury found defendant guilty as charged. CP 84. The sentencing court imposed a high-end sentence of 17 months in the Department of Corrections. CP 91, 94. Defendant filed a timely notice of appeal. CP 101.

2. Facts

In evening hours of December 29, 2010, defendant became agitated when his ex-girlfriend, Susan McConnell ("McConnell"), refused to meet him. RP 170-171. Defendant repeated his request to meet through a series of telephone messages. RP 172. McConnell answered one of defendant's calls. RP 172. Defendant's speech was "[e]xtremely slurred" and he stated that he had been drinking for a quite a while. RP

172. McConnell eventually turned her phone off because defendant continued to call. RP 173.

The next morning McConnell discovered defendant had left several messages on her phone. RP 173, 177. McConnell described the messages as “slurred speech in text message” form. *Id.* Defendant sounded intoxicated when he spoke with McConnell at 10:00 a.m. RP 173. Defendant admitted to drinking “all night[,]” and said he was “still drinking.” RP 173, 177-178. McConnell maintained that she would not meet him. RP 174. By 4: 00 p.m. defendant had sent McConnell over seventy text messages. RP 174. Defendant sounded “angry and intoxicated” when McConnell answered her phone. RP 175. McConnell periodically picked up the phone and screamed “leave me alone” before hanging up, but defendant continued to call. RP 178.

At approximately 3:30 p.m. Melissa Sipe (“Sipe”), was at her automotive business on Mountain Highway with her employee Brad Schwartfigure (“Schwartfigure”). RP 117. There were several people in her business’s parking lot. RP 117-118. Defendant pulled into the parking lot, exited his vehicle, and urinated in public. RP 117-118, 121, 123. Schwartfigure watched defendant fumble around in his vehicle while “nodding in and out.” RP 121. Sipe called 911. RP 117, 121. Defendant drove away. *Id.*

Defendant parked his vehicle in McConnell’s driveway. RP 175. McConnell hid in her bathroom and called 911. RP 175. Defendant

peered into McConnell's windows. RP 175. Defendant pounded on a window while saying: "I know you're in there, I know you're in there." RP 175. Defendant paced between the residence and his vehicle. RP 176. Defendant pounded on the steering wheel and screamed. RP 176. Defendant backed his vehicle in and out of McConnell's driveway. RP 176. Defendant drove away approximately ten minutes later. RP 176.

At around 4:29 p.m. Deputy Heimann responded to McConnell's call for help. RP 85-86. Defendant had just left McConnell's driveway. RP 87, 94. Defendant drove around the corner of a gravel road in Deputy Heimann's lane of travel. RP 87, 89. Defendant returned to his lane when Deputy Heimann activated his emergency lights. RP 87. An obvious odor of intoxicants was emanating from defendant's person. RP 90. Defendant's eyes were bloodshot, his eyes were "very watery," and his speech was "very slurred." RP 90. Defendant admitted to drinking five or six beers. RP 91. Defendant gave Deputy Heimann a copy of his vehicle registration, but refused to provide a driver's license. RP 91. Defendant initially told Deputy Heimann "I'm not drunk, just feeling good, but not drunk." RP 92. Defendant nonetheless "[s]way[ed] side to side" and had "great difficulty ... standing..." upon exiting his vehicle. RP 92. Deputy Heimann placed defendant in a patrol car. RP 93. A records check revealed defendant had "a vehicular assault DUI conviction in 2006 and his license was suspended." RP 93. During the records check defendant yelled: "I am drunk, just take me to jail already." RP 94. Defendant

manifested impairment while performing a sobriety test. RP 95-101. Deputy Heimann terminated the test when he noticed defendant had urinated on himself. RP 102. Defendant “balled his fist” and said: “This is bullshit. You know I am drunk, just take me to jail.” RP 102.

Deputy Leach transported defendant to the police station. RP 103, 128-130. Defendant “scream[ed] obscenities” during transport. RP 132. Defendant refused to submit to an alcohol-breath test. RP 132-138. Defendant “rhetorically” asked Deputy Leach why he should submit to the test when his license was already suspended. *Id.* Defendant was transported to jail. RP 152.

Miguel Balderrama, M.D., was the only witness called by the defense. RP 215-262. Dr. Balderrama treated defendant in the jail. RP 231-232. Dr. Balderrama testified defendant arrived at the jail with a diagnosis of advanced liver disease (“cirrhosis”). RP 232, 234. Dr. Balderrama testified the ammonia levels in defendant’s blood stream could cause him to appear intoxicated. RP 237-238. Defendant told jail personnel that he had consumed at least ten beers prior to arriving. RP 242. Dr. Balderrama testified that a person with defendant’s cirrhosis would have an extremely low alcohol tolerance, so that even a “teaspoon” of alcohol would lead to intoxication. RP 234-235. The resulting intoxication would persist at a higher level over a longer period of time than it would in a person without cirrhosis. RP 235.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT VIOLATE THE CONFRONTATION CLAUSE WHEN IT RESERVED RULING ON THE ADMISSIBILITY OF IRRELEVANT TESTIMONY THAT DEFENDANT NEVER ATTEMPTED TO ADDUCE AT TRIAL.

“[T]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (citing *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985); see also *United States v. Larson*, 495 F.3d 1094, 1103, (9<sup>th</sup> Cir. 2007). “[C]onfrontation Clause cases fall into two broad categories: cases involving the admission of out-of-court statements and cases involving restrictions ... on the scope of cross-examination.” *Delaware v. Fensterer*, 474 U.S. at 18. The second category of cases address instances “in which ... some cross-examination ... was allowed [but] the trial court did not permit defense counsel to expose ... facts from which jurors ... could ... draw inferences relating to the reliability of the witnesses. *Fensterer*, 474 U.S. at 19; see also *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1975); *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

A challenge to a trial court’s decision to exclude evidence is not preserved for review unless the substance of the excluded evidence was

made known to the trial court by an offer of proof or was apparent from the context within which questions were asked. *State v. Riker*, 123 Wn.2d 351, 370, 869 P.2d 43 (1994); ER 103(2).<sup>1</sup> Appellate courts review properly preserved challenges to a trial court’s evidentiary ruling to determine if the trial court abused its discretion. *State v. Kilgore*, 107 Wn. App. 160, 185, 26, P.3d 308 (2001) citing (*State v. Mak*, 105 Wn.2d 692, 710, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Kunze*, 97 Wn. App. 832, 859, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 404 (2000)). “Abuse of discretion exists when a trial court’s exercise of its discretion is manifestly unreasonable or based upon untellable grounds or reasons.” *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008) (internal quotation marks and citations omitted). The unreasonableness of a trial court’s decision is manifest when it is “obvious, directly observable, overt or not

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<sup>1</sup> ER 103 (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or (2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. (b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer in question and answer form. (c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. (d) Errors Raised for the First Time on Review. [Reserved—See RAP 2.5(a).]

obscure....” See generally *State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

Defendant claims the trial court violated his right to confront testifying deputies with evidence of bias by excluding testimony detailing defendant’s potential post-conviction liability to the Sheriff’s Department for the cost of responding to his DUI<sup>2</sup> incident. App.Br.<sup>3</sup> at 1, 12, 15; RP 105-109. Under RCW 38.52.430 (“Emergency response caused by person’s intoxication—Recovery of costs from convicted person”):

“A person whose intoxication causes an incident resulting in an appropriate emergency response, and who, in connection with the incident, has been found guilty of ... driving while under the influence ... is liable for the expense of an emergency response by a public agency to the incident ... The charge constitutes a debt of that person and is collectible by the public agency incurring those costs ....”

#### Appendix A.

Defendant did not make an offer of proof as to how he believed the deputies would respond if questioned about their department’s<sup>4</sup> implementation of RCW 38.52.430. RP 105-109. The State provided the court the following summary of the department’s policy: the deputies were directed to calculate emergency response costs by their superiors; the reimbursements were deposited into the agency’s general fund; and the

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<sup>2</sup> Driving while under the influence (“DUI”)

<sup>3</sup> Appellant’s Brief (“App.Br.”)

<sup>4</sup> The Pierce County Sheriff’s Department (“department”).

deputies did not receive any benefit for documenting emergency-response claims as directed. RP 106-108. When the trial court asked defendant to explain the relevance of that evidence, defendant acquiesced to the State's description of the evidence and argued the department's policy was relevant to the testifying deputies' credibility. RP 106-107. Defendant alleged the deputies fraudulently reported spending more time on his DUI incident in their department's cost-recovery report than they did in the incident report. RP 107. The State informed the court that the cost-recovery report documented total time spent on defendant's DUI incident, which included time allocated to report writing; report writing was not an investigatory activity documented in the incident reports. RP 105-107.

The trial court stated that it could not identify the relevance of the department's implementation of RCW 38.52.430. RP 108. After the court stated it was "not going to allow the money issue," the court inquired about defendant's intent to offer the cost-recovery report<sup>5</sup> which documented the potential financial liability at issue and stated:

"Well, I guess we'll just have to see how the testimony comes in. But, again, I don't think the money issue is relevant, quite frankly, unless the individuals stood to gain and I'm being told that that's not true. But I think it is relevant as to the timing because this may be not [sic] consistent with their individual reports or may be it is, I don't know, we'll find out."

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<sup>5</sup> Ex. 13.

RP 108-109. Defendant did not ask any questions about the department's cost recovery policy or the alleged report discrepancy and did not reraise this issue with the court. RP 109-114,115-116, 146-153.

- a. Defendant's challenge to the trial court's tentative evidentiary ruling was not preserved for review.

“When the trial court refuses to rule, or makes a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue ... at trial.” *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (citing *State v. Koloske*, 100 Wn.2d 889, 895-896, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), 113 Wn.2d 520, 782 P.2d 1013 (1989) (other citations omitted). “When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to consider its ruling.” *Id.* at 257 (citing *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993).

The trial court at bar ultimately reserved ruling on the admissibility of the testimony defendant claims was excluded. RP 108-109. It is clear the trial court doubted the relevance of the department's implementation of RCW 38.52.430. RP 108-109. While a fair interpretation of the record indicates the trial court initially precluded any testimony related to that evidence, the record also reflects that the court reconsidered its decision

after further discussion and decided to postpone ruling on admissibility until it could evaluate the relevant testimony. RP 108-109. Defendant nevertheless refrained from pursuing the matter further despite the court's express willingness to reevaluate admissibility in light of the testimony adduced at trial. RP 109-116, 126-153. The court was consequently never called upon to make the ruling defendant assigns error to on appeal.

Even if the challenged ruling was issued, defendant's failure to make an offer of proof forecloses the possibility of review. "An offer of proof must be sufficiently definite and comprehensive fairly to advise the trial court whether or not the proposed evidence is admissible ... An additional purpose of such an offer of proof is to inform the appellate court whether [an] appellant was prejudiced by the exclusion of evidence." *Sutton v. Mathews*, 41 Wn.2d 64, 67-68, 247 P.2d 556 (1952) (internal citations omitted); see also *Riker*, 123 Wn.2d at 370; *State v. Ray*, 116 Wn.2d 531, 539, 806 P.2d 1220 (1991). An "offer must be more than mere argument or colloquy of counsel ... and counsel must make clear what he offers in his offer of proof." *State v. Vargas*, 25 Wn. App. 809, 817, 610 P.2d 1 (1980) (citing *Swanson v. Solomon*, 50 Wn.2d 825, 828-829, 314 P.2d 655 (1957)). "[A]n offer of proof is not served by a statement merely advising the trial court of the question proposed to be asked. [Appellate courts] cannot assume that the witness could have answered the question, or what his [or her] answer would have been ... [Appellate courts] will not reverse the [trial court] on the mere chance that

an answer favorable to [a defendant] would have been returned.”

*Mathews*, 41 Wn.2d at 68.

Defendant merely argued the department’s implementation of RCW 38.52.430 was relevant to the credibility of the testifying deputies; he never made an offer of proof as to the precise questions he wanted to ask or the responses he expected to receive. RP 106-107. Defendant’s claim that the trial court excluded testimony favorable to his case assumes the deputies’ responses would have betrayed the bias his argument assigned to them. Appellate courts will not assume the substance of omitted testimony or reverse a trial court’s ruling because excluded testimony may have proven favorable to the defense. *See Mathews*, 41 Wn.2d at 68. Defendant’s improperly preserved claim of trial court error should be rejected.

- b. A public agency’s potential receipt of legislatively authorized restitution is not evidence of public servant bias.

“[T]he trial court ... has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice....” *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001) (citing *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); *State v. Knapp*, 14 Wn. App. 101, 107-108, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975)). “Courts should exclude evidence that is remote, vague, speculative, or argumentative because otherwise all

manner of argumentative and speculative evidence will be adduced, greatly confusing the issue and delaying the trial.” *Id.* (quoting *Jones*, 67 Wn.2d at 512) (internal quotation marks omitted).

Even if the challenged ruling was final and preserved for review, defendant would still be unable to demonstrate the testifying deputies were biased by their department’s implementation of RCW 38.52.430. It was the legislature—not the department—that decided to offset the costs of Washington’s criminal justice system through the financial obligations imposed on convicted defendants. *See also* RCW 9.94A.760 (legal financial obligations directed to the county clerk); RCW 7.68.035 (penalty assessments partially retained by the county); RCW 10.01.160 (costs imposed on defendant for expenses incurred by the State). Evidence of that policy is not proof the public officials administering that system are biased in the performance of their duties. Evidence of bias is only admissible when it is relevant. ER 401;<sup>6</sup> ER 402.<sup>7</sup> Defendant failed to establish any probative link between the deputies and their department’s potential receipt of restitution. For example, there was no suggestion the deputies were either singled out for preferential treatment for testifying in

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<sup>6</sup> “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without that evidence.

<sup>7</sup> All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

cases where cost recovery is awarded or treated unfavorably if acquittals result in nonpayment. The record does not even indicate whether the department has ever actually recovered any restitution by pursuing the claims authorized by statute. Defendant's theory that the deputies were nonetheless prepared to perjure themselves to enhance their department's chance collection of legislatively authorized restitution was nothing more than unsubstantiated speculation. In the absence of any probative value peculiar to the deputies, it would have been proper for the trial court to shield the jury from the likely consequences of defendant's conviction. *See generally State v. Todd*, 78 Wn.2d 362, 375, 474 P.2d 542 (1970) (punishment is a question of legislative policy; it is not of the jury's concern); *see also State v. Townsend*, 978 Wn. App. 25, 30, 979 P.2d 453 (1999).

The agency reimbursement authorized by RCW 38.52.430 is also highly distinguishable from the personal inducements presented in the authority cited in support of defendant's claim. Those cases addressed personal benefits or concerns that could have reasonably influenced a witness's testimony. *See Davis v. Alaska*, 415 U.S. at 315-317 (Davis prevented from cross-examining a key prosecution witness about his probation status to show government influence); *State v. Brooks*, 25 Wn. App. 550, 551-552, 611 P.2d 1274 (1980) (Brooks prevented from cross-examining codefendant about charge reduction to show motive to lie); *see also State v. Smits*, 58 Wn. App. 333, 337-338, 792 P.2d 565 (1990)

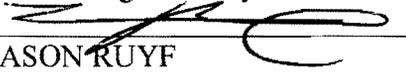
(Smits precluded from inquiring into testifying officer's possible civil suit against him). The Confrontation Clause does not contemplate a right to confront testifying public servants with baseless conspiracy theories. Accordingly, it would have been proper to exclude evidence of the department's implementation of RCW 38.52.430 had the issue not been rendered moot by defendant's failure to pursue that evidence at trial. Defendant's claim of constitutional error should be rejected.

D. CONCLUSION.

The trial court did not make the evidentiary ruling underlying defendant's claim of constitutional error. Based on the record developed below, it would have been proper for the trial court to exclude evidence of post-conviction liability under RCW 38.52.430 as evidence of officer bias. Jury's verdict should be affirmed.

DATED: November 18, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
JASON RUYF  
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WSB # 38725

Certificate of Service:

*replied*

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/18/11      *Johanson*  
Date              Signature

# **APPENDIX “A”**

*RCW 38.52.430*

RCW 38.52.430

Emergency response caused by person's intoxication — Recovery of costs from convicted person.

A person whose intoxication causes an incident resulting in an appropriate emergency response, and who, in connection with the incident, has been found guilty of or has had their prosecution deferred for (1) driving while under the influence of intoxicating liquor or any drug, RCW 46.61.502; (2) operating an aircraft under the influence of intoxicants or drugs, RCW 47.68.220; (3) use of a vessel while under the influence of alcohol or drugs, \*RCW 88.12.100; (4) vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a); or (5) vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), is liable for the expense of an emergency response by a public agency to the incident.

The expense of an emergency response is a charge against the person liable for expenses under this section. The charge constitutes a debt of that person and is collectible by the public agency incurring those costs in the same manner as in the case of an obligation under a contract, expressed or implied.

In no event shall a person's liability under this section for the expense of an emergency response exceed one thousand dollars for a particular incident.

If more than one public agency makes a claim for payment from an individual for an emergency response to a single incident under the provisions of this section, and the sum of the claims exceeds the amount recovered, the division of the amount recovered shall be determined by an interlocal agreement consistent with the requirements of chapter 39.34 RCW.

[1993 c 251 § 2.]

Notes:

**\*Reviser's note:** RCW 88.12.100 was recodified as RCW 88.12.025 pursuant to 1993 c 244 § 45. RCW 88.12.025 was subsequently recodified as RCW 79A.60.040 pursuant to 1999 c 249 § 1601.

**Finding – Intent -- 1993 c 251:** "The legislature finds that a public agency incurs expenses in an emergency response. It is the intent of the legislature to allow a public agency to recover the expenses of an emergency response to an incident involving persons who operate a motor vehicle, boat or vessel, or a civil aircraft while under the influence of an alcoholic beverage or a drug, or the combined influence of an alcoholic beverage and a drug. It is the intent of the legislature that the recovery of expenses of an emergency response under this act shall supplement and shall not supplant other provisions of law relating to the recovery of those expenses." [1993 c 251 § 1.]

# PIERCE COUNTY PROSECUTOR

## November 18, 2011 - 2:39 PM

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