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

STATE OF WASHINGTON, RESPONDENT

v.

ARTUR TYSYACHUK, APPELLANT

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Appeal from the Superior Court of Pierce County

No. 18-1-00025-6

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**Brief of Respondent**

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**I. COUNTERSTATEMENT OF THE ISSUES.**

1. Whether the trial court abused its discretion in denying the defendant's motion to suppress when the record below supports the trial court's finding that Trooper Smith had a valid basis to stop the Defendant's vehicle?

2. Whether the trial court abused its discretion in denying the defendant's motion to bifurcate when the trial court properly found that a defendant has no right to a bifurcated trial and when the trial court instead properly utilized an alternative procedure that has been specifically suggested by the Washington Supreme Court and that is designed to minimize any prejudice to a defendant?

3. Whether the trial court abused its discretion in admitting the BAC results and documents when the State met all of the foundational requirements for the admission of the BAC test results?

**II. STATEMENT OF THE CASE.**

**A. PROCEDURAL HISTORY**

The Defendant, Artur Tsyachuk, was charged with Felony Driving Under the Influence, Driving With License Suspended or Revoked in the First Degree, and Failure to Have an Ignition Interlock. CP 1-2. Following a jury trial, the Defendant was found guilty of the charged offenses, and the

trial court then imposed a standard range sentence. CP 206-08, 253-71. This appeal followed.

## **B. FACTS**

Prior to trial the Defendant filed a written motion to suppress, arguing (among other things) that there was no lawful basis for Washington State Patrol Trooper Nicholas Smith to pull the Defendant over. CP 27-37. On June 4, 2018 a hearing was held on the Defendant's motion. At the hearing, Trooper Smith testified that on December 31, 2017 he observed the Defendant driving in the far left lane of northbound I-5 near the Tacoma Dome. RP (6/4/18) 6-8. Trooper Smith initially noticed the Defendant's vehicle because he noticed the vehicle making some "jerky" movements. RP (6/4/18) 34. Specifically, Trooper Smith observed the Defendant's vehicle come out of its lane and that the right two tires of the Defendant's car went across the broken white line into the center lane where there was another passenger car, and the Defendant's actions caused the other car to slow down and merge away from the Defendant because of the unsafe lane travel. RP (6/4/18) 8, 13-14. The Defendant's car then went back to the left and began driving on the solid line that separates the roadway from the shoulder. RP (6/4/18) 8. Trooper Smith then activated his emergency lights to pull the Defendant over. RP (6/4/18) 8, 14. Trooper Smith's patrol vehicle was equipped with a video recording system that recorded the

Defendant's driving and the video was entered as an exhibit and played at the June 4 hearing. RP (6/4/18) 12-14; CP (TBD).<sup>1</sup>

Trooper Smith also testified that he had extensive training regarding impaired driving and DUI detection, and that he extensive experience in DUI investigations and arrests. RP (6/4/18) 5-6, 9, 57-58.

After the hearing the trial judge gave an oral ruling in which he stated that,

I find that the trooper's initial description of the defendant's driving – the weaving, swerving, failing to maintain a lane of travel – was supported by the video presented in Exhibit 1. While there was no actual collision caused by the defendant's driving, it does appear as though a neighboring motorist felt compelled to take evasive action to avoid collision. . . . In sum, I find that there was a basis for the trooper to conduct a traffic stop to further investigate why the driving was substandard.

RP (6/5/18) 3-4.

The trial judge also issued written findings of fact and conclusion of law. CP 120-27. In those written findings and conclusion the trial judge found that the Trooper Smith was especially well trained and experienced in the detection and investigation of impaired driving cases. CP 120. The

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<sup>1</sup> The video from the trooper's car was admitted as an exhibit at the June 4, 2018 hearing and a redacted version was admitted at trial. Both exhibits have been listed in the State's Supplemental Designation of Clerk's Papers filed simultaneously with this brief.

judge also found that that Trooper Smith's testimony was credible, including the testimony that the trooper saw the Defendant make "several jerky, unsafe lane maneuvers which brought [the Defendant's car] out of its lane and to the lane to the right." CP 123. The trial court, of course, also saw the video for itself, and the court also explained that,

The Court finds the defendant's vehicle was swerving inside and outside of its lane, and when the defendant's vehicle left its lane it nearly caused a collision with a vehicle traveling in the neighboring lane. One vehicle in the neighboring lane slowed and merged to the right to avoid the defendant's unsafe driving.

CP 123-24. Based on these findings the trial court concluded that,

The defendant's driving behaviors (weaving in and out of his lane, causing other vehicles to take evasive action to avoid him) provided a reasonable articulable suspicion that criminal activity and/or traffic infractions had occurred, and thus Trooper Smith was justified in initiating a traffic stop of the defendant's vehicle.

CP 125.

At the actual trial, Trooper Smith again testified regarding the observations he made of the Defendant's driving, and this testimony essentially mirrored the testimony given at the earlier suppression hearing. See, RP 57-59, 62-63, 84, 86. Trooper Smith also testified that after making these observation he then activated his emergency lights to conduct a traffic stop of the Defendant's vehicle. RP 63-64. The Defendant merged

to the right and continued to exhibit difficulty staying within his lane, but eventually pulled over to a safe place after being verbally directed by the Trooper. RP 64-65.

Trooper Smith approached the driver's side of the Defendant's car and found that the Defendant was the driver and that there was a female in the passenger seat and that the two were kissing when Trooper Smith approached the car. RP 66. There was a partially consumed bottle of Fireball whiskey on the passenger seat and there were bottles of Corona on the floorboard on the passenger side. RP 66-67. Trooper Smith noticed the strong odor of intoxicants and saw that the Defendant's eyes were bloodshot, red, and watery, and that his face was flushed. RP 66, 70. The Defendant was wearing a bright yellow bracelet on his wrist that said "VIP," consistent with the type of bracelets that given out at places serving alcohol to signify that the person is of legal age to drink. RP 71.

Trooper Smith got the Defendant's attention and asked him for his license, registration, and insurance. RP 69. When the Defendant went to retrieve his license Trooper Smith observed that the Defendant's finger dexterity was poor and that his finger slipped off the license. RP 69. Trooper Smith asked the Defendant if he had been drinking and the Defendant responded, "Not much" or "a little." RP 92. Trooper Smith then

asked the Defendant to step out of the vehicle, and when the Defendant did so he stumbled forward, backwards, and then to the left and had to use the side of the car for balance. RP 69-70. Once the Defendant was outside of the car Trooper Smith could tell that the smell of intoxicants was coming from the Defendant's breath. RP 96.

Trooper Smith arrested the Defendant for driving under the influence and placed the Defendant in the back of his patrol car. RP 71, 73. While in the patrol car the Defendant became even more lethargic and was falling in and out of sleep. RP 73.<sup>2</sup>

Trooper Smith applied for, and obtained, a search warrant for a blood sample from the Defendant and took the Defendant to Allenmore Hospital in Tacoma for the blood draw. RP 75. Trooper Smith asked the staff in the emergency room if someone from the laboratory could perform a blood draw and William Davis from the laboratory came out to assist. RP 75-76. Trooper Smith gave Mr. Davis two gray-topped vials that had been issued to him for blood draws by the State Patrol. RP 76. Trooper Smith checked the expiration date of the vials to make sure they had not expired and inspected them to make sure their seals had not been broken. RP 76.

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<sup>2</sup> Trooper Smith found that the Defendant's car was not equipped with an ignition interlock device. RP 72.

The Defendant provided his identification card to Mr. Davis, and Trooper Smith then watched as Mr. Davis prepped the Defendant's arm with iodine (which Trooper Smith confirmed did not contain alcohol) and drew blood from the Defendant's arm into the two vials. RP 77. Mr. Davis then turned the vials over to mix the contents to make sure that the anticoagulant powder inside was properly mixed in, and Mr. Davis then gave the vials to Trooper Smith who sealed them with evidence tape and put them into a plastic bag and a protective case, and ultimately entered the vials into the evidence lockers at the State Patrol office. RP 81-82.

Rebecca Flaherty, a forensic scientist at the State toxicology lab in Seattle tested the Defendant's blood samples and found that the blood alcohol content was over twice the legal limit; specifically, the result of the testing showed a blood alcohol concentration of .20 and .017 grams per 100 milliliters. RP 132, 160, 163.

At trial, the Defendant entered several stipulations that were read to the jury. First, the jury was informed that at the time of his arrest the Defendant had been previously convicted within the last 10 years of three or more prior offenses as defined by RCW 46.61.5055. RP 181. In addition the jury was informed that on the date of the offense the Defendant's

driver's license was revoked and that the Defendant was required to have an ignition interlock device. RP 183-84.

The jury found the Defendant guilty of the charged offenses. RP 220. At sentencing the trial court imposed a standard range sentence. CP 253-71. This appeal followed.

### III. ARGUMENT.

- A. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION TO SUPPRESS IS WITHOUT MERIT BECAUSE THE RECORD BELOW SUPPORTS THE TRIAL COURT'S FINDING THAT TROOPER SMITH HAD A VALID BASIS TO STOP THE DEFENDANT'S VEHICLE.

While warrantless seizures are per se unreasonable, a traffic stop that is based on a police officer's reasonable suspicion of either criminal activity or a traffic infraction is an exception to the warrant requirement and thus lawful. *State v. Arreola*, 176 Wn.2d 284, 292-93, 290 P.3d 983 (2012). On appeal, this Court is to review the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior. *State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999).

A reasonable suspicion exists when specific, articulable facts and rational inferences from those facts establish a substantial possibility that

criminal activity or a traffic infraction has occurred or is about to occur. *State v. Snapp*, 174 Wn.2d 177, 197-98, 275 P.3d 289 (2012). On appeal, this Court is to evaluate the totality of the circumstances when reviewing the lawfulness of a traffic stop. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010). Those circumstances may include the police officer's training and experience. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

This Court has previously upheld a traffic stop under circumstances similar to the present case. In *State v. McLean*, 178 Wn. App. 236, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014), for instance, this Court upheld the stop when an officer observed the defendant's vehicle weave within its lane and cross onto the fog line three times. *McLean*, 178 Wn. App. at 245. Those observations, along with the officer's training and experience in identifying driving under the influence, were sufficient for the officer to infer that a substantial possibility existed that McLean was driving under the influence. *Id* at 245. That substantial possibility, in turn, established a reasonable suspicion which permitted the warrantless traffic stop. *Id*.

The Defendant in the present case, however, cites to *State v. Jones*, 186 Wn. App. 786, 788, 347 P.3d 483, 487 (2015) as support for his claim that the reasonable suspicion was somehow lacking in the present case. See,

App.'s Br. at 20. *Jones*, however, is distinguishable. In *Jones* an officer had followed the defendant for about one mile and had observed the defendant's vehicle pass over the fog line approximately an inch three times. *Jones*, 186 Wn. App. at 788. The officer stopped the defendant's vehicle due to erratic lane travel, and at trial the defendant challenged the stop. *Id* at 788-89. In response, the State presented "no evidence about [the officer's] training and experience in identifying impaired drivers," nor was there evidence that the officer suspected the driver was impaired or that the officer stopped him for this reason. *Id* at 793. In addition, there were no other vehicles on the roadway at the time, and thus there were no other vehicles to be endangered by the defendant's driving. *Id* at 788, 793. The court in *Jones* thus concluded the State had failed to justify the warrantless seizure of the defendant. *Id* at 794.

The Defendant in the present case similarly cites to *State v. Prado*, 145 Wn.App. 646, 186 P.3d 1186 (2008), where a traffic stop was based merely on an officers observations that the defendant's car crossed "an eight-inch white line dividing the exit lane from the adjacent lane by approximately two tire widths for one second." *Prado*, 145 Wn.App. at 647. No other traffic was present and thus there was no danger to other vehicles. *Id* at 649. Given the brief incursion over the lane line, the court in *Prado* held that a vehicle crossing over the line for one second by two tire

widths on an exit lane does not justify a belief that the vehicle was operated unlawfully, especially when no other traffic was present. *Id* at 649.

This case is more analogous to *McLean* than to *Jones* or *Prado*. In both *McLean* and the present case, the officers observed the vehicles veer on more than one occasion. In both cases, the officers were specially trained in identifying impaired drivers. In addition, in the present case (unlike in *Jones* or *Prado*) another vehicle was present on the road and the record supports the trial court's finding that this other vehicle had to merge to the right to avoid the defendant's unsafe driving. CP 124.

Based on the totality of the circumstances, the record in the present case supports the trial courts findings and conclusions that the defendant's driving gave Trooper Smith a reasonable articulable suspicion that criminal activity and/or a traffic infraction had occurred, and that Trooper Smith was thus justified in initiating a traffic stop. The Defendant, therefore, has failed to show an abuse of discretion.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO BIFURCATE THE TRIAL BECAUSE THE TRIAL COURT PROPERLY FOUND THAT A DEFENDANT HAS NO RIGHT TO A BIFURCATED TRIAL AND THE TRIAL COURT INSTEAD PROPERLY UTILIZED AN ALTERNATIVE PROCEDURE THAT HAS BEEN SPECIFICALLY SUGGESTED BY THE WASHINGTON SUPREME COURT AND THAT IS DESIGNED TO MINIMIZE ANY PREJUDICE TO A DEFENDANT.

An essential element of felony DUI is that the person has three or more prior convictions under RCW 46.61.5055 within 10 years. RCW 46.61.502(6)(a).

The Washington Supreme Court has specifically rejected the argument that a defendant has a right to a bifurcated trial when prior convictions are an essential element of the charged offense. *State v. Roswell*, 165 Wn.2d 186, 198, 196 P.3d 705 (2008). While the Court in *Roswell* acknowledged that the existence of a prior offense can be prejudicial, the Court made it perfectly clear that while *Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) held that a defendant may stipulate to a prior conviction to prevent the State from introducing details about the offense, it did not hold that a jury must be completely shielded from any reference to the prior conviction. *Roswell*, 165 Wn.2d at 195.

The *Roswell* court also discussed the decision in *State v. Oster*, 147 Wn.2d 141, 52 P.3d 26 (2002) and explained that in *Oster* the Court had had “affirmed the principle that all elements should be contained in the to convict instruction,” but had gone on to merely hold that the trial court did not abuse its discretion in bifurcating the *instructions*, while still allowing the jury to make a determination on all the elements of the charged offense. *Roswell*, 165 Wn.2d at 196. The *Roswell* court, however, specifically noted that *Oster* did not provide any authority for a bifurcated *trial*. *Roswell*, 165 Wn.2d at 196-97. The Court further noted that even with respect to bifurcated instructions, the Defendant does not have a right to such bifurcation – rather, it is permitted but not constitutionally required. *Id* at 197.

With respect to a bifurcated trial, the *Roswell* court made it clear that a defendant has no right to a bifurcated trial. *Roswell*, 165 Wn.2d at 196-98. The Court, however, did explain that a trial court can exercise their discretion in several ways, including by allowing a defendant to stipulate to his or her prior convictions and have the trial court inform the jury of this stipulation by using statutory citations (such as “RCW 46.61.520(1)(a)”) rather than the name of the crime (“driving under the influence”). *Roswell*, 165 Wn.2d 198 n. 6. In addition, a trial court may instruct the jury that the stipulation is evidence only of the prior conviction element and that the jury

is not to speculate as to the nature of the prior convictions and the jury must not consider to defendant's stipulation for any other purpose. *Roswell*, 165 Wn.2d 198 n. 6.

The Supreme Court's holding in *Roswell* is, therefore, clear: When the existence of prior convictions are an element of an offense, a defendant does not have a right to bifurcated trial and all elements of the crime should be contained in the jury instructions. Nevertheless, a trial court does have some discretion to utilize some procedures to minimize the danger of prejudice. While a defendant has no right to bifurcated *instructions*, a trial court does not abuse its discretion by using a bifurcated *instruction*, as the trial court did in *Oster*. Furthermore, a trial court can use other procedures, such as the one outlined in footnote 6, whereby a defendant can stipulate to the existence of a prior conviction and the court can essentially "sanitize" this stipulation by using the statutory citations instead of the name of the crime.

In the present case the Defendant filed a motion requesting a bifurcated trial. CP 157-70. Specifically, the Defendant asked the trial court to "bifurcate the pending trial into two phases" where the first phase would deal only with the question of whether the Defendant committed the crime of driving under the influence, and then if (and only if) the jury convicted the Defendant would the jury proceed to a second phase where

the jury would hear of the prior convictions and would be asked to decide if the State had proved the existence of those prior convictions. CP 157, 168, 170. In the alternative, the Defendant proposed to that he should be allowed to stipulate to the existence of the prior convictions but that the trial should “retain” this stipulation until after the jury had made a determination regarding guilt on the driving under the influence charge. CP 170. This “alternative,” however, still required the trial itself to be bifurcated.

In addressing the Defendant’s motion to bifurcate the trial, the trial court issued it ruling as follows:

I’ve read the cases. I’ve read the briefs. I am not going to bifurcate the trial, but I’m more than happy to figure out some other compromise so that you don’t have – sort of depends on what the defense wants to do. But I don’t believe it’s appropriate to bifurcate, given the case law.

RP 20. The trial court then asked defense counsel if she had any suggestions. RP 20. Defense counsel then asked for some time to discuss the matter with the Defendant, which the court allowed. RP 20. When the subject was brought up again, defense counsel asked the trial court if it would allow the defendant to stipulate but to then have that stipulation “held until after the jury makes a determination on his guilt or innocence on the DUI.” RP 21. The following exchange between the trial court and defense counsel then took place:

THE COURT: I don't think you can do that under the case law. The State has to prove each and every element of the crime charged, and that's one of the elements of the crime.

MS. PERSON-SMITH: Even if we're willing to stipulate to those elements?

THE COURT: You can stipulate to three prior convictions.

MS. PERSON-SMITH: Okay

THE COURT: You're wanting to hold that?

MS. PERSON-SMITH: I am asking to hold that.

THE COURT: I don't think you can do that.

RP 21-22.

The State then mentioned the footnote in the *Roswell* opinion and suggested that the trial court could use the procedure outlined in that footnote whereby the Defendant could stipulate to the prior convictions and the jury would hear a sanitized version where the statutory citation would be used in place of the name of the crime. RP 35-36. Defense counsel then asked for some more time to explain the situation to the Defendant, and the Court again allowed it. RP 36. Shortly thereafter, Defense counsel stated that she had fully explained the matter to the Defendant and he was "steadfast that he does not want to enter into any stipulations." RP 38. The matter was then tabled for the rest of the day. RP 39.

The following morning the parties had prepared a stipulation and defense counsel indicated that she had gone over the matter with the Defendant and the Defendant now wanted to enter into the stipulation regarding the prior offenses. RP 45-47. After the trial court conducted a

colloquy with the Defendant, the stipulation was entered. RP 47-50. The trial court later informed the jury of the stipulation as follows:

I have a document that I'm going to read to you, but it's also a document that you're going to get when you begin your deliberation process, and it's a stipulation.

The introduction is, it is hereby mutually understood, agreed, and stipulated between and among the undersigned parties that the following information shall be submitted to the jury as an agreed fact and may be used by the jury in determining the guilt of the defendant. The parties have agreed that certain facts are true. You must accept the following as true regarding the person before the Court who has been identified in the charging document as the defendant, Artur V. Tysyachuk. That at the time of his arrest on December 31, 2017, the defendant had been previously convicted of three or more prior offenses as defined by RCW 46.61.5055, and the arrest for those prior offenses all occurred within ten years of his arrest for the current offense charged in Count I on December 31, 2017.

RP 180-81.

When the trial court ultimately instructed the jury at the end of the case, the trial court included the following instruction:

INSTRUCTION NO. 13

Certain evidence has been admitted in this case for only a limited purpose. For the purposes of Count I, the defendant has stipulated he has been convicted of at least three prior offenses as defined by RCW 46.61.5055, and that the arrests for those prior offenses all occurred within ten years before his arrest for the current offense charged in Count I.

This stipulation is evidence only of the prior conviction element. The prior conviction element of Count I must be accepted by you as conclusively proved beyond a reasonable doubt. You are not to speculate as to the nature of the prior convictions, and you must not consider the defendant's stipulation about prior convictions for any other purpose.

CP 195.

The process used in the present case, therefore, was the exact process outlined in footnote 6 of the *Roswell* opinion. *Roswell*, 165 Wn.2d 198 n. 6.

On appeal, the Defendant states that a trial court has the discretion to craft a bifurcated *procedure*, and that the trial court failed to understand that it had this discretion (and stated, “I don’t think you can do that under the case law”), and thus abused its discretion by applying an incorrect legal standard. App.’s Br. at 28. This argument, however, is misleading and is without merit.

First, while it is true it is true that the trial court stated that the Defendant’s proposals were not allowed under the law, that was because both of the proposals suggested a bifurcated *trial*, where either the DUI phase would be separate from a fully contested phase regarding the prior convictions, or where the DUI phase would be separate from a second phase where the defendant would stipulate to the prior convictions but where this stipulation would be “held” until after the DUI phase was over. In either proposal the Defendant was clearly calling for a bifurcated trial. The trial court’s response that such a bifurcation of the actual elements of the crime

was not allowed under *Roswell* is absolutely consistent with the actual language and holding of *Roswell*.

In addition, the suggestion that the trial court felt that it had no discretion to craft any alternative procedures is simply incorrect. In fact, the trial court specifically told the Defendant that it was open to alternatives, and stated,

I am not going to bifurcate the trial, but I'm more than happy to figure out some other compromise so that you don't have – sort of depends on what the defense wants to do. But I don't believe it's appropriate to bifurcate, given the case law.

RP 20. In fact the trial court ultimately did utilize a compromise procedure where the Defendant was allowed to stipulate to the prior convictions and the jury was given a sanitized stipulation that referred only to the statutory citations and not to the names of the crimes in the prior convictions (DUI). This procedure, of course, was the exact alternative procedure suggested by the Supreme Court in footnote 6 of the *Roswell* opinion. The Defendant's contention on appeal that the trial court was unaware of its options or was steadfast in refusing to consider alternatives authorized by the Supreme Court is misleading and simply inconsistent with the record below.

In short, the trial court in the present case followed the guidance of *Roswell* and crafted a compromise procedure designed to minimize any prejudice to the Defendant. The record below demonstrates that the trial

court was well aware of the controlling case law and was aware of what discretion the court had available and the court properly exercised this discretion in accordance with the suggestions from the Supreme Court. There was, therefore, no abuse of discretion and the Defendant's claims to the contrary are without merit.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE BLOOD ALCOHOL TEST RESULTS BECAUSE THE STATE MET ALL OF THE FOUNDATIONAL REQUIREMENTS FOR THE ADMISSION OF THE BAC TEST RESULTS.

The foundational requirements regarding the admission of blood test results in DUI cases are well established. RCW 46.61.506(3) provides that in order for an analysis of a person's blood to be considered valid the analysis must have "been performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose."

With respect to approved "methods," WAC 448-14-020 outlines the procedures to be used regarding blood samples and the only requirement outlined in this WAC regarding the taking of the sample itself relates solely to the sample container and the preservative, and the WAC reads as follows:

- (a) A chemically clean dry container consistent with the size of the sample with an inert leak-proof stopper will be used; and,
- (b) Blood samples for alcohol analysis must be preserved with an anticoagulant and an enzyme poison sufficient in

amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

*See* WAC 448-14-020(3)(a) &(b). Blood-alcohol test results, therefore, are admissible only if the blood sample was preserved with both an anticoagulant and an enzyme poison “sufficient in amount to prevent clotting and stabilize the alcohol concentration,” as required by the WAC. *State v. Wilbur–Bobb*, 134 Wn.App. 627, 630, 141 P.3d 665 (2006). WAC 448–14–020(3)(b).

Furthermore, Washington courts have explained that in order to admit blood test results the State must present prima facie evidence of compliance with this WAC regulation. *State v. Brown*, 145 Wn.App. 62, 70, 184 P.3d 1284 (2008). In determining whether a prima facie case has been made, the trial court must assume the truth of the State's evidence and draw all reasonable inferences in the State's favor. RCW 46.61.506(4)(b); *Brown*, 145 Wn.App. at 71.

On appeal, this court reviews a trial court's ruling on the admissibility of blood test evidence for an abuse of discretion. *Brown*, 145 Wn. App at 69. With respect to the foundational requirements for blood test results, in *Brown* the court concluded the following facts established a prima facie case:

The toxicologist testified that vials used for the collection of samples for a blood alcohol test are provided by the manufacturer with powdery chemicals, which he identified as potassium oxalate and sodium fluoride. He also stated that he read the labels on the vials that contained Mr. Brown's blood, which indicated that the vials contained sodium fluoride and potassium oxalate. The toxicologist also testified if those chemicals were not present, the blood would be clotted and no alcohol would be detected in the samples. The toxicologist observed in this case that the blood in the samples was not clotted and alcohol was detected in the samples.

*Brown*, 145 Wn. App at 71

Similarly, in, *Wilbur-Bobb* the court held that a prima facie case regarding the enzyme poison was established by a toxicologist's testimony that sodium fluoride is an enzyme poison, and evidence that labels on the vials showed they contained sodium fluoride. *Wilbur-Bobb*, 134 Wn.App. at 630-32.

In the past, the State has on occasion failed to meet the foundational requirements outlined above. For in instance, in *State v. Bosio*, 107 Wn.App. 462, 27 P.3d 636 (2001) (one of the cases cited by the Defendant in the present appeal), the State produced some testimony that an anticoagulant was present in the vial, but the State failed to produce any evidence whatsoever that an enzyme poison was present in the blood vial. *Bosio*, 107 Wn.App. at 468. The court thus held that the State had failed to make a prima facie showing that the blood had been properly preserved. *Id.*

Similarly in *State v. Hultenschmidt*, 125 Wn.App. 259, 102 P.3d 192 (2004) (the other case cited by the Defendant in the present appeal), the State similarly failed to produce any evidence that the vial contained an enzyme poison, and this Court held that the blood test results were, therefore, inadmissible. *Hultenschmidt*, 125 Wn.App. at 267.

In the present case, Trooper Smith testified that he provided two gray-topped vials to William Davis (the phlebotomist at Allenmore Hospital who drew the Defendant's blood). RP 75-76, 110-11. Rebecca Flaherty, a forensic scientist at the State Toxicology Lab in Seattle who tested the Defendant's blood, testified that she checked the certificates of compliance from the manufacturer for the lot of the tubes that were used in the present case which indicated that the tubes were compliant with the FDA requirements for gray-topped tubes; namely, that they contained an enzyme poison and an anticoagulant (sodium fluoride and potassium oscillate) in the required quantities. RP 148, 150. Ms. Flaherty also explained that Washington State Toxicology Laboratory purchased the tubes and that they are then issued to individual troopers. RP 151. Trooper Smith, in turn, testified that the two tubes used in the present case had been issued to him. RP 76. Ms. Flaherty explained that the tubes that were used were approved by the state toxicologist and, as mentioned above, that she had checked the certificate of compliance for the tubes that were used and that the

certificates indicated that the tubes contained the materials needed to meet the FDA requirements. RP 151.

Furthermore with respect to the blood draw in the present case, Trooper Smith testified that he provided the gray-topped tubes to William Davis, and that Mr. Davis drew the Defendant's blood in the presence of Trooper Smith. RP 76. Testimony also established that Mr. Davis was a phlebotomist at Allenmore Hospital who held a medical assistant phlebotomist certification. RP 110-11. Trooper Smith personally observed Mr. Davis label the vials with the Defendant's name and date of birth. RP 80, 94.

Trooper Smith further testified that the tubes or vials were not expired and the seals were unbroken. RP 76. He also saw Mr. Davis prep the Defendant's arm with iodine before the blood draw and confirmed that the iodine used did not contain any alcohol. RP 77. Trooper Smith also personally saw Mr. Davis use a needle to draw blood from the Defendant into the tubes at issue. RP 77. Mr. Davis then turned the vials end over end to mix up the contents with the coagulant powder. RP 81. Neither Mr. Davis nor Trooper Smith tampered with the vials in any way, and Trooper

Smith confirmed that there were no abnormalities regarding how the blood sample was collected. RP 77, 81.<sup>3</sup>

Mr. Davis then gave the tubes to Trooper Smith who sealed the tops of the tubes with red evidence tape, put the tubes into a plastic bag, and then put the bag into a protective case and then took them to an evidence locker at the State Patrol. RP 81-82. Rebecca Flaherty testified that the tubes were later transferred from the State Patrol to the crime lab via “campus mail” and that the samples arrived in an appropriate fashion and were unbroken and showed no signs of tampering. RP 147-48. The blood samples were then tested following the methods approved by the state toxicologist. RP 153.

Drawing all reasonable inferences in the State's favor from the evidence above, the State clearly met the foundational requirements for the admission of the blood test results in the present case. The trial court, therefore, did not abuse its discretion in finding a sufficient foundation to admit the blood test results, and the Defendant’s arguments to the contrary are clearly without merit.

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<sup>3</sup> Kyle Congo, the manager at the laboratory at Allenmore Hospital also testified about the procedures used for blood draws done at the hospital and testified that there was no indication that Mr. Davis deviated in any way from the standard protocol. RP 108-114.

**IV. CONCLUSION.**

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED: May 15, 2019

Respectfully submitted,

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The undersigned certifies that on this day she delivered by U.S. mail 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.

5-15-2019

Date

Signature

**GLISSON & MORRIS**

**May 15, 2019 - 10:17 AM**

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