FILED
7/17/2017 4:43 PM
Court of Appeals
Division III
State of Washington

NO. 34494-1

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

RESPONDENT

v.

GLORIA M. MATHYER,

APPELLANT,

BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR **1**

B. STATEMENT OF THE CASE **1**

C. ARGUMENT **11**

1. The defendant was not denied her right to a fair trial where the court found no basis to excuse a juror who realized she knew a witness, and where defense did not object to, or challenge, the juror's continued service on the panel. **11**

2. The defendant's right to "counsel" was not violated where the defendant's expert included a portion of his interview with the defendant in his report, and that formed a basis of his testimony, when the State was allowed to examine the expert on other statements the defendant made during the interview that contradicted his findings. **15**

3. There is sufficient evidence to convict the defendant where her blood alcohol level exceeded .08 within two hours of driving, where she had methamphetamine in her blood, where she exhibited the effects of intoxication, and where the drugs and alcohol contributed to the defendant causing the fatal collision. **19**

4. The definition instruction that contained the per se prong of .08 was properly given where the defendant had a blood alcohol level of .10 nearly 6 hours after the collision, and where retrograde extrapolation showed her alcohol level to be between .14 and .18 within two hours of the collision. **21**

5. The objection to appeal costs and cost bill is premature **22**

D. CONCLUSION **29**

TABLE OF AUTHORITIES

Cases

City of Seattle v. Personeus,
63 Wash. App. 461, 819 P.2d 821 (1991) 22
Coburn v. Seda,
101 Wash. 2d 270, 677 P.2d 173 (1984) 16
Hickman v. Taylor,
329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947) 17
In re Pers. Restraint Petition of Lord,
123 Wash. 2d 737, 870 P.2d 964 (1994) 14
Jackson v. Virginia,
443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 19
Matter of Pers. Restraint of Lord,
123 Wash. 2d 296, 868 P.2d 835 14
McDonough Power Equip., Inc. v. Greenwood,
464 U.S. 548, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) 14
State ex rel. Carroll v. Junker,
79 Wash. 2d 12, 482 P.2d 775 (1971) 14
State v. Ashcraft,
71 Wash. App. 444, 859 P.2d 60 (1993) 13
State v. Barklind,
87 Wash. 2d 814, 557 P.2d 314 (1976) 24, 25
State v. Blank,
131 Wash. 2d 230, 930 P.2d 1213 (1997) 23, 25, 26
State v. Blank,
80 Wash. App. 638, 910 P.2d 545 (1996) 25
State v. Blazina,
182 Wash. 2d 827, 344 P.3d 680 (2015) 25, 27
State v. Briggs,
55 Wash. App. 44, 776 P.2d 1347 (1989) 14
State v. Casbeer,
48 Wash. App. 539, 740 P.2d 335 (1987) 20
State v. Cho,
108 Wash. App. 315, 30 P.3d 496 (2001) 14
State v. Delmarter,
94 Wash. 2d 634, 618 P.2d 99 (1980) 20
State v. Gentry,

125 Wash. 2d 570, 888 P.2d 1105 (1995) 13
State v. Green,
94 Wash. 2d 216, 616 P.2d 628 (1980) 20
State v. Hamilton,
196 Wash. App. 461, 383 P.3d 1062 (2016) 18
State v. Hughes,
106 Wash. 2d 176, 721 P.2d 902 (1986) 13
State v. Jackman,
113 Wash. 2d 772, 783 P.2d 580 (1989) 14
State v. Jorden,
103 Wash. App. 221, 11 P.3d 866 (2000) 13
State v. Longuskie,
59 Wash. App. 838, 801 P.2d 1004 (1990) 20
State v. Mahone,
98 Wash. App. 342, 989 P.2d 583 (1999) 23
State v. Nolan,
141 Wash. 2d 620, 8 P.3d 300 (2000) 23
State v. Pawlyk,
115 Wash. 2d 457, 800 P.2d 338 (1990) 16, 17, 18
State v. Salinas,
119 Wash. 2d 192, 829 P.2d 1068 (1992) 20
State v. Sinclair,
192 Wash. App. 380, 367 P.3d 612 23
State v. Walton,
64 Wash. App. 410, 824 P.2d 533 (1992) 20
State v. Wilbur-Bobb,
134 Wash. App. 627, 141 P.3d 665 (2006) 21
U. S. ex rel. Edney v. Smith,
425 F. Supp. 1038 (E.D.N.Y. 1976) 16

Statutes

RCW 10.01.160 ..... 24, 25
RCW 10.01.160(2) 24
RCW 10.01.160(3) 25, 26
RCW 10.01.170 24
RCW 10.73.160 ..... Passim
RCW 10.73.160(3) 28
RCW 10.73.160(4) 23, 26, 27
RCW 10.82.090 27
RCW 10.82.090(1) 26
RCW 10.82.090(2) 27, 28

RCW 2.36.110 13
RCW 4.56.110 26

Other Authorities

WPIC 90.06 10

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the defendant denied her right to a fair trial where the court found no basis to excuse a juror who realized she knew a witness, and where defense did not object to, or challenge, the juror's continued service on the panel?

2. Was the defendant's right to "counsel" violated where the defendant's expert included a portion of his interview with the defendant in his report, and that formed a basis of his testimony, when the State was allowed to examine the expert on other statements the defendant made during the interview that contradicted his findings?

3. Was there sufficient evidence to convict the defendant where her blood alcohol level exceeded .08 within two hours of driving, where she had methamphetamine in her blood, where she exhibited the effects of intoxication, and where the drugs and alcohol contributed to the defendant causing the fatal collision?

4. Was the definition instruction that contained the per se prong of .08 properly given where the defendant had a blood alcohol level of .10 nearly 6 hours after the collision, and retrograde extrapolation showed her alcohol level to be between .14 and .18 within two hours of the collision?

5. Is the assertion that defendant should not be responsible for appellate cost premature?

B. STATEMENT OF THE CASE

The defendant was charged by information with Vehicular Homicide and Vehicular Assault, including that she: had an alcohol

concentration of .08 or higher within two hours after driving; and/or did drive a motor vehicle while under the influence of or affected by intoxicating liquor or any drug; and/or did drive a motor vehicle while under the combined influence of intoxicating liquor and any drug. CP 341-343.

On the afternoon of June 7, 2014, Ms. Paula Evans-Duncan was following a motorcycle that was travelling north on State Route 153 between Carlton and Twisp. RP 113-116. The road was bare and dry, with unrestricted visibility. RP 171, 212.

The motorcycle was driven by James Stutzman, and his wife Cynthia Stutzman was the passenger. RP 127, 129. Neither of the Stutzman's had consumed any alcohol. RP 129-130.

The Stutzman's motorcycle was travelling 50 mph, when Ms. Evans-Duncan caught up to it. RP 115. The motorcycle and Ms. Evans-Duncan slowed to the suggested 45 mph as they approached two curves. RP 117.

The defendant was travelling south bound in her car, and swerved to the shoulder of her lane, then turned back across her lane and drove into the oncoming lane, directly in front of the Stutzmans. RP 117-118, 125, 130-131, 181-191.

In the split second available to Mr. Stutzman, he tried to brake, but could not avoid the collision with the defendant's car as it crossed into the motorcycle's path. RP 118-119, 125, 130. From the collision, Ms. Stutzman was left in the middle of the roadway, and was conscious; Mr. Stutzman was on the side of the roadway and was semi-conscious. RP 120-123, 131, 132, 166-167, Ex. 64, pg. 13-14.

Immediately after the collision, Ms. Evans-Duncan made contact with Ms. Stutzman and then attempted to call 911 and contacted other motorists to call 911. RP 120-121.

WSP Trooper Ted Shook received the call from the 911 operator at 5:42 pm, and arrived on scene by 5:49 pm. RP 154. Trooper Shook was the first officer to arrive on scene and was certified as a collision technical specialist. RP 151-153.

In the collision, Ms. Stutzman suffered two pelvic fractures, and eight broken ribs. RP 131-132. James Stutzman died as a result of massive internal injuries caused by the collision. RP 133, 137, 147-149, 170; Ex. 64, pg. 13-25.

WSP Sgt. Lex Lindquist, Trooper Jeffery Eifert, and Trooper Connor Bruchman arrived after Trooper Shook. RP 167. Sgt. Lindquist was a drug recognition expert (DRE) and he contacted

the only other local DRE, Sheriff's Deputy Tony Hawley, to go to the hospital to evaluate the defendant. RP 211.

Trooper Eifert did not make any assessment of the defendant at the scene for the presence of drugs or alcohol. RP 233-234. Trooper Eifert began assisting Trooper Shook with scene measurements. RP 234.

Sgt. Lindquist subsequently directed Trooper Bruchman to assist with collision investigation measurements, and directed Trooper Eifert to travel to the hospital to contact Ms. Stutzman and notify her of her husband's death, and contact the defendant to determine if drugs or alcohol was involved. RP 213, 234.

Deputy Hawley made contact with the defendant and observed she had bloodshot watery eyes, constricted pupils, and observed the odor of intoxicants coming from the defendant. RP 222-225. Deputy Hawley communicated his observations to Trooper Eifert, when Trooper Eifert arrived at the hospital. RP 226, 235-236. Trooper Eifert was also able to confirm the odor of intoxicants and physical observations that Deputy Hawley had made. RP 236-237. Neither Deputy Hawley nor Trooper Eifert was able to conduct field sobriety tests of the defendant, due the defendant being placed in a neck brace. RP 223, 237. A sample

of the defendant's blood was collected while she was at the hospital pursuant to a search warrant. RP 214, 219, 238-242.

Nurse Chris Elder, treated the defendant at the hospital, and testified that the hospital's blood analysis showed the defendant to have ethyl alcohol in her blood, and the defendant was noted to have the smell of alcohol on her breath. RP 217-275. Nurse Elder also conducted the blood draw from the defendant that was collected by the WSP for evidentiary purposes. RP 276-277.

Toxicologist Dr. Naziha Nuwayhi, testified that she analyzed the defendant's blood RP 341. The defendant's blood draw that was taken at approximately 11:20 pm, showed a blood alcohol level of .10, well above the .08 legal limit. RP 351-352, Ex. 74. Using retrograde extrapolation, the defendant's blood alcohol level would have been significantly greater than .10 within two hours of the collision. RP 352-355. [1] The toxicology results were also consistent with the hospital's analysis. RP 355.

Additionally, Dr. Nuwayhi found methamphetamine present in the defendant's blood. RP 362.

---

[1] The collision was reported between 5:41 pm and 5:45 pm. RP 154, 209, Exhibit 64, pg. 5-6. The toxicologist using retrograde extrapolation testified the defendant's blood alcohol at 7:20 pm, less than two hours after the Collison, would have been between .140 and .180. RP 354.

Investigator Dave Temple observed the testing conducted by defense witness Trevor Newberry on the left front ball joint of the defendant's vehicle. RP 254-256. Mr. Temple did not find damage to the ball joint from the collision, and found the vehicles steering to be within specifications. RP 256-258-260.

Both the State and defense sought to call Trevor Newberry RP 283-289, 292-296. The defendant's statements to Mr. Newberry about the collision were discussed by Mr. Newberry during his interview with State. The defendant's statements about the collision were utilized by Mr. Newberry in preparing his report, in formulating his theory that the ball joint was loose or damaged, and to support the defendant's request for destructive testing of the vehicle's left front ball joint. RP 300-307; CP

In his report, Mr. Newberry stated that in preparation of his report, he reviewed police reports and accident scene photographs; examined the defendant's vehicle; examined the motorcycle; and spoke with the defendant on October 29, 2015. CP 290-291. In his report, Mr. Newberry stated:

> *"Ms. Mathyer stated she heard a knock and then her car went to the right. This statement is consistent with the ball joint coming loose just before the clockwise yaw."*

CP 295. Defense motion to allow for destructive testing of the ball joint was based on Mr. Newberry's report. The defendant's motion for destructive testing attached Mr. Newberry's Declaration as Exhibit A, and his Report as Exhibit B . CP 296-298.

At trial, Mr. Newberry testified the presence of some gap between the ball joint and castle nut would allow the vehicle to wander if you took your hands off the wheel. RP 405-406. Mr. Newberry claimed this looseness was a contributing factor to the collision, but the condition would have been pre-existing for some time before the collision. RP 407, 429-431.

On cross-examination, Mr. Newberry testified the presence of alcohol and drug was certainly a factor in the collision. RP 417. In addition to the defendant telling Mr. Newberry she heard a knock and her car went to the right; she also told him she was travelling between 45 and 50, did not hit the brakes, but stopped in the roadway for five seconds, pulled her emergency brake, and her car was off when the collision occurred. RP 427-428. These additional statements contradicted Mr. Newberry's own analysis. RP 428-429

Sgt. Kurt Adkinson estimated the defendant was travelling an *average* of 70 mph over the distance of when she began losing control of her vehicle to the collision. RP 453-459.

During trial, one juror, Ms. Alumbaugh, indicated that when Trooper Bruchman was testifying, she heard him reference Trooper Jeffrey Eifert. Ms. Alumbaugh indicated she knew Jeffrey Eifert. RP 89-90. She stated she did not know him personally. She stated she had attended the same church a year prior, and went to the same church frequently. RP 90. Ms. Alumbaugh thought that if the judge had mentioned Jeffrey Eifert, in jury selection, that the name did not even register with her until the name was referenced by Trooper Bruchman. RP 90. However, it does not appear the Appellant designated jury selection as part of the record on appeal.

Ms. Alumbaugh indicated she had no concern about being fair and impartial. RP 90. Ms. Alumbaugh stated she did not know Mr. Eifert very well, and that he since had moved away. RP 90, 98

The judge told Ms. Alumbaugh that if after seeing Trooper Eifert, and hearing his testimony, Ms. Alumbaugh should advise the court if she had concern about being fair and impartial. RP 90-91.

After the colloquy with Ms. Alumbaugh, the trial judge gave both parties the opportunity to raise any issues before ending the session for the day. Neither party objected to Ms. Alumbaugh. RP 92-93.

The next morning at the start of the session, the trial judge summarized the colloquy with Ms. Alumbaugh, and that the judge was comfortable with the juror understanding the importance of being fair and impartial. RP 95. The judge also indicated that the bailiff had relayed a comment attributed to Ms. Alumbaugh asking if it is biased if she believed everything Trooper Eifert said. RP 95, 98. The judge decided to recall Ms. Alumbaugh and allow questions from the attorneys if they desired, and stated he would permit defense to raise a challenge for cause if they chose. RP 96.

Ms. Alumbaugh indicated she knew Mr. Eifert to have integrity and that she would tend to believe him. RP 98-99. Ms. Alumbaugh indicated she also told the bailiff that she did not think Mr. Eifert could *not* be wrong, like everyone else, but that she believed him to be truthful. RP 99. Ms. Alumbaugh said she could listen to all the evidence and put Mr. Eifert's testimony in context. RP 99.

The trial judge asked Ms. Alumbaugh that if she were the defendant, would she want her on the jury, with the feelings she expressed. The juror answered in the affirmative. RP 99-100.

The only question defense asked was whether Ms. Alumbaugh had any discussions about her knowledge or concerns

about Mr. Eifert with fellow jurors. Ms. Alumbaugh answered no. RP 100.

Following the questioning, the trial judge found no basis to excuse Ms. Alumbaugh and defense made no challenge of Ms. Alumbaugh as a juror. RP 101.

Following the close of the evidentiary portion of the trial, the jury was instructed on the definition of under the influence or affected by the use of intoxicating liquor or any drug, in instruction 13, pursuant to WPIC 90.06. [2] CP 16, 231.

On June 10, 2016, the jury found the defendant guilty of vehicular homicide and vehicular assault. CP 64. The jury also found by special verdict the defendant was under the influence of intoxicating liquor or drugs, operated her vehicle in a reckless manner, and operated her vehicle with disregard for the safety of others. CP 59, 63.

---

[2] The instruction included: "A person is under the influence or affected by the use of intoxicating liquor or any drug when he or she has sufficient alcohol in his or her body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable analysis of the person's blood; or the person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of intoxicating liquor, or any drug, or the combined influence or affected by intoxicating liquor and any drug." CP 16.

C. ARGUMENT

1. **The defendant was not denied her right to a fair trial where the court found no basis to excuse a juror who realized she knew a witness, and where defense did not object to, or challenge, the juror's continued service on the panel.**

In the present case, Ms. Alumbaugh was not shown to be biased or prejudiced such that she could not continue in her service as a juror. She indicated she knew a witness (Trooper Eifert) who had previously attended her church. Ms. Alumbaugh indicated she had no concern about being fair and impartial, and did not know Trooper Eifert very well.

Despite Ms. Alumbaugh's statements that she could be fair and impartial, she believed Mr. Eifert could be wrong, like everyone else, and that she could listen to all the evidence and put Mr. Eifert's testimony in context; Appellant argues that the trial judge should have dismissed the juror's based on her comment that she felt Trooper Eifert had integrity and that she would believe him. [3]

---

[3] Contrary to defendant's assertion, Trooper Eifert was not the State's main witness to the defendant's observed intoxication. Deputy Hawley, a DRE, testified about the observations of impairment and possible classes of substance involved. Nurse Elder admitted hospital evidence of signs of intoxication and the defendant's blood alcohol level. Dr. Nuwayhi testified about the defendant's blood alcohol level, the presence of methamphetamine, and the impact on divided attention tasks.

Appellant's position is without support. All witnesses at trial take an oath or make an affirmation that they will testify truthfully. Accordingly, there is a presumption that witness will be truthful, rather than commit perjury or false swearing.

The trial court did not abuse its discretion when it left Ms. Alumbaugh on the panel. Ms. Alumbaugh was not unable to perform her duties as a juror, requiring her replacement with an alternate.

CrR 6.5 states:

> When the jury is selected the court may direct the selection of one or more additional jurors, in its discretion, to be known as alternate jurors. Each party shall be entitled to one peremptory challenge for each alternate juror to be selected. When several defendants are on trial together, each defendant shall be entitled to one challenge in addition to the challenge provided above, with discretion in the trial judge to afford the prosecution such additional challenges as circumstances warrant. ***If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged, and the clerk shall draw the name of an alternate who shall take the juror's place on the jury***. (Emphasis added).
>
> Alternate jurors who do not replace a regular juror may be discharged or temporarily excused after the jury retires to consider its verdict. When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations. ***Such alternate juror may be recalled at any time that a regular juror is unable to serve***, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew. (Emphasis added).

Under RCW 2.36.110, the judge has a duty "to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of ... inattention ... or by reason of conduct or practices incompatible with proper and efficient jury service." *State v. Jorden*, 103 Wash. App. 221, 226–27, 11 P.3d 866, 869 (2000). RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror. *Jorden*, 103 Wash. App. at 226–27.

Compliance with rule concerning replacement of regular juror by alternate is procedural rather than constitutional issue, and thus may not be raised for the first time on appeal. *State v. Gentry*, 125 Wash. 2d 570, 888 P.2d 1105 (1995), *aff'd sub nom. Gentry v. Sinclair*, 693 F.3d 867 (9th Cir. 2012), and *aff'd sub nom. Gentry v. Sinclair*, 705 F.3d 884 (9th Cir. 2013), as amended.

An appellate court reviews a trial court's decision to excuse a juror for abuse of discretion. *State v. Hughes*, 106 Wash. 2d 176, 204, 721 P.2d 902 (1986); *State v. Ashcraft*, 71 Wash. App. 444, 461, 859 P.2d 60 (1993). The trial court's decision will not be overturned on appeal unless a clear abuse of that discretion is shown or the decision is based on an erroneous interpretation of

the law. *State v. Jackman*, 113 Wash. 2d 772, 777, 783 P.2d 580 (1989). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash. 2d 12, 26, 482 P.2d 775 (1971).

Typically, to obtain a new trial for juror bias for undisclosed information in voir dire, a party generally must show that (1) the juror intentionally failed to answer a material question and (2) a truthful disclosure would have provided a valid basis for a challenge for cause. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984) (plurality opinion); *State v. Cho*, 108 Wash. App. 315, 321, 30 P.3d 496 (2001); *Matter of Pers. Restraint of Lord*, 123 Wash. 2d 296, 313, 868 P.2d 835, *decision clarified sub nom. In re Pers. Restraint Petition of Lord*, 123 Wash. 2d 737, 870 P.2d 964 (1994), *clarified, In re Pers. Restraint Petition of Lord*, 123 Wash. 2d 737, 870 P.2d 964 (1994) (citing *State v. Briggs*, 55 Wash. App. 44, 52–53, 776 P.2d 1347 (1989)).

In the present case, the juror did disclose her knowledge of the witness. The defendant was given an opportunity to excuse the

juror for cause, which the defendant declined. The trial court did not abuse its discretion.

2. **The defendant's right to "counsel" was not violated where the defendant's expert included a portion of his interview with the defendant in his report, and that formed a basis of his testimony, when the State was allowed to examine the expert on other statements the defendant made during the interview that contradicted his findings.**

Defendant erroneously argues that Mr. Newberry's interview with the defendant, that formed the basis of his theory about the ball joint, was protected by attorney-client privilege.

Contrary to the defendant's assertion, Mr. Newberry specifically included in his report, and relied upon, the defendant's claim that she heard a knock and then her car veered to the right, to conclude that there was a problem with the ball joint. Defense relied upon the statement to obtain an order for destructive testing of the ball joint. Mr. Newberry then offered testimony that that the failure to tighten the castle nut and ball joint explained the vehicles' loose steering, as described by the defendant.

The defendant's claim that the interview of the defendant that formed a basis for the expert's report, was protected by

attorney client privilege is without any support. Attorney-client privilege is not of constitutional dimension. E.g., *U. S. ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1054 (E.D.N.Y. 1976), *aff'd sub nom. Edney v. Smith*, 556 F.2d 556 (2d Cir. 1977) (court found no violation of defendant's right to counsel resulting from the trial court's ordered disclosures or the State's use of the defense expert as a witness).

It is instructive to look at cases involving mental defenses. Regardless of whether defense intends to call a defense expert witness, neither this state's criminal discovery rules nor the work product doctrine preclude the State's discovery of that expert's written reports, or his/her testimony relating thereto, which are based on the experts examination of a defendant who intends to rely upon the mental defense. E.g., *State v. Pawlyk*, 115 Wash. 2d 457, 460, 800 P.2d 338, 340 (1990) (holding the State was permitted to call the expert as a witness, and rejecting defendant's right to counsel claim).

The work product doctrine protects from discovery an attorney's work product, so that attorneys can work with a certain degree of privacy and plan strategy without undue interference. *Coburn v. Seda*, 101 Wash. 2d 270, 274, 677 P.2d 173 (1984)

(citing *Hickman v. Taylor*, 329 U.S. 495, 510–11, 67 S. Ct. 385, 393, 91 L. Ed. 451 (1947)).

The immunity is not absolute; whether the work product doctrine will afford protection depends on both the type of material sought to be discovered and the adversary's need for it. *Pawlyk*, 115 Wash. 2d at 475–76.

The work product protection described in CrR 4.7(f)(1) does not extend to certain reports and testimony of experts: The exception noted in the rule, CrR 4.7(a)(1)(iv), directs disclosure by the prosecution of any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons. CrR 4.7(g) similarly allows discovery of such information from the defense, although, as noted above, this section pertains to such materials to be relied upon by defendant at trial. The point to be made is, however, that CrR 4.7 plainly contemplates that such information is not protected by the work product doctrine. *Pawlyk*, 115 Wash. 2d at 477–79.

The reason CrR 4.7 does not provide protection for such information which the defense obtains is that disclosure by the accused is required in an area where the prosecution has a

particular need to have time for extensive preparation, and where the defense material is least likely to present conflicts with privileges accorded to the accused. *Pawlyk*, 115 Wash. 2d 457

Additionally, pursuant to ER 703 and ER 705, disclosure of the underlying information communicated to Mr. Newberry was admissible on cross examination.

Even though the statement of a party opponent is not hearsay, ER 703 and 705 function as exceptions to the hearsay rule that permit disclosure on cross-examination of the facts or data upon which an expert witness relies in forming his or her opinion. *E.g., State v. Hamilton*, 196 Wash. App. 461, 476–77, 383 P.3d 1062, 1069–70 (2016), *review denied,* 187 Wash. 2d 1026, 391 P.3d 454 (2017). When an expert witness bases an opinion on facts or data, the expert may be required to disclose and discuss these facts or data on cross-examination, even if the underlying facts or data would otherwise be inadmissible as hearsay. The key, of course, is that the expert witness must have based an opinion on the facts or data, as set forth in ER 703, in order to be questioned thereon, as allowed by ER 705. *Hamilton*, 196 Wash. App. at 477.

In the present case, Mr. Newberry utilized the defendant's interview to support the claim that there was a problem with the ball

joint and the defendant could not adequately control her vehicle due to this mechanical issue.

The argument that Mr. Newberry did not rely upon the statement of the defendant, is contradicted by Mr. Newberry's own report, the defendant's motion for destructive testing, and Mr. Newberry's testimony

To prevent disclosure and cross-examination on the defendant's statements known to Mr. Newberry, that were contradictory and undermined Mr. Newberry's claim, would have been misleading to the jury.

3. **There was sufficient evidence to convict the defendant where her blood alcohol level exceeded .08 within two hours of driving, where she had methamphetamine in her blood, where she exhibited the effects of intoxication, and where the drugs and alcohol contributed to the defendant causing the fatal collision**.

The defendant challenges the sufficiency of the evidence. On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560

(1979); *State v. Green*, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. *State v. Delmarter*, 94 Wash. 2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wash. 2d 192 (citing *State v. Casbeer*, 48 Wash. App. 539, 740 P.2d 335 (1987)). Thus, this court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Walton*, 64 Wash. App. 410, 415–16, 824 P.2d 533 (1992) *abrogated by In re Cross*, 180 Wash. 2d 664, 327 P.3d 660 (2014) (citing *State v. Longuskie*, 59 Wash. App. 838, 801 P.2d 1004 (1990)).

In the present case the defendant was driving at over 70 mph, drove off her lane of travel and then steered back across the oncoming lane directly into the path of the Stutzmans' motorcycle. The roadway was bare and dry and visibility clear. The defendant

had consumed a significant amount of alcohol and ingested methamphetamine prior to the collision. Deputy Hawley, Trooper Eifert, and hospital staff observed signs of the defendant's intoxication even hours after the collision.

Any mechanical issues that the defendant tried to assert at trial were long standing mechanical issues that predated the defendant's driving and the collision.

The evidence in the present case was not merely sufficient, it was overwhelming.

4. The definition instruction that contained the per se prong of .08 was properly given where the defendant had a blood alcohol level of .10 nearly 6 hours after the collision, and where retrograde extrapolation showed her alcohol level to be between .14 and .18 within two hours of the collision.

Testimony about retrograde extrapolation is admissible. *E.g., State v. Wilbur-Bobb*, 134 Wash. App. 627, 634, 141 P.3d 665, 668–69 (2006). A qualified expert may testify about a person's alcohol "burn-off" rate to permit the jury, if it believes the witness, to assess the quantity of alcohol remaining in the defendant's system at the time he/she was detained; such evidence is relevant in a

prosecution in which driving under the influence of alcohol is an element. *E.g., City of Seattle v. Personeus*, 63 Wash. App. 461, 465, 819 P.2d 821 (1991).

Contrary to defendant's assertion there is no requirement the defendant's blood be *collected* within two hours of driving. The defendant need only be shown to have had a blood alcohol level of .08 or greater within two hours *after* driving. In this case, the evidence showed the defendant to have a blood alcohol level between .14 and .18 within two hours of the collision. The definitional instruction was properly given.

Additionally, defense counsel was not ineffective for proposing the definitional instruction of under the influence, that defined the terms used in the to-convict instruction. The State also proposed the definitional instruction. There was no error. Even if we assumed error, it would be harmless in light to the State's instruction.

5. **The objection to appeal costs and cost bill is premature**.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant.

State v. Blank, 131 Wash. 2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wash. App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wash. 2d 620, 8 P.3d 300 (2000).

In *Nolan*, 141 Wash. 2d 620, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Nolan*, 141 Wash. 2d at 622. As suggested by the Supreme Court in *Blank*, 131 Wash. 2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in *State v. Sinclair*, 192 Wash. App. 380, 389–390, 367 P.3d 612, *review denied,* 185 Wash. 2d 1034, 377 P.3d 733 (2016), prematurely raises an issue that is not before the Court. *If* the defendant does not prevail; and *if* the State files a cost bill, the defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

If appellate costs are imposed, the Legislature has provided a remedy in the same statute that authorizes the imposition of costs. RCW 10.73.160(4) provides:

A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant argues that the Court should not impose costs on indigent defendants. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *RCW 10.01.160(2).* In *State v. Barklind*, 87 Wash. 2d 814, 814, 557 P.2d 314 (1976), the Supreme Court held that requiring a defendant to

contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Barklind*, 87 Wash. 2d at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, 131 Wash. 2d 230, the Supreme Court held this statute constitutional, affirming this Court's holding in *State v. Blank*, 80 Wash. App. 638, 641–642, 910 P.2d 545 (1996), *aff'd,* 131 Wash. 2d 230, 930 P.2d 1213 (1997).

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

In *State v. Blazina*, 182 Wash. 2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). As *Blazina* instructed, trial courts should

carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, *Blazina* does not apply to appellate costs. As *Sinclair* points out at 389, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship". *See* RCW 10.73.160(4).

The Legislature's intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW 10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In *Blank*, 131 Wash. 2d 230, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as

much as 12%. *Blazina*, 182 Wash. 2d 827. RCW 10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

> (2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090. The rest of the "relief" is equally limited and demonstrative of the Legislature's intent and presumption that the debts be paid:

> (a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family*;
> (b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;
> (c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender*

> *has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period,* excluding any payments mandatorily deducted by the department of corrections;
> (d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations*. The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2)(emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A, the Sentencing Reform Act, and most recently amended in 2015.

The unfortunate fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel". Obviously, all these defendants have been found indigent by the court. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

The question for the Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in *Blank*, and what the Court did *not* do in *Blazina*. It is for the Legislature to change the statute if it so desires.

However, because the Court of Appeals has not decided this case yet, the defendant's claim of relief is premature and must be denied.

D. CONCLUSION

The defendant was not denied a fair trial when the court did not excuse a juror who knew a witness. There was no objection or challenges from defense to the juror's continued service.

The defendant's right to counsel was not violated where the defendant's expert included a portion of his interview with the defendant in his report, and the State was allowed to examine the expert on other statements made at the same time related to the collision.

There was sufficient evidence to convict the defendant where her blood alcohol level exceeded .08 within two hours of driving, where she had methamphetamine in her blood, where she exhibited the effects of intoxication, and where the drugs and alcohol contributed to the defendant causing the fatal collision.

The definition instruction that contained the per se prong of .08 was properly given where the defendant had a blood alcohol level of .10 nearly 6 hours after the collision, and retrograde extrapolation showed her alcohol level to be between .14 and .18 within two hours of the collision.

The appellant's challenge to appellate costs is premature.

The defendant's conviction should be affirmed.

Dated this 17 day of July 2017

Respectfully Submitted by:

KARL F. SLOAN, WSBA #27217
Prosecuting Attorney
Okanogan County, Washington

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 17th day of July, 2017, I provided email service to the following, a true and correct copy of the Respondent's Brief:

E-mail: sean@greccodowns.com

Sean M. Downs
Grecco Downs, PLLC
500 W 8th St Ste 55
Vancouver, WA 98660-3085

Shauna Field, Legal Assistant

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

July 17, 2017 - 4:43 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34494-1
Appellate Court Case Title:	State of Washington v. Gloria Marie Mathyer
Superior Court Case Number:	15-1-00066-5

The following documents have been uploaded:

- 344941_Briefs_20170717163946D3648204_7974.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was 7.17.17 Respondent Brief.pdf

A copy of the uploaded files will be sent to:

- sean@greccodowns.com

Comments:

Sender Name: Shauna Field - Email: sfield@co.okanogan.wa.us
Filing on Behalf of: Karl F Sloan - Email: ksloan@co.okanogan.wa.us (Alternate Email:)

Address:
PO Box 1130
Okanogan, WA, 98840
Phone: (509) 422-7288

Note: The Filing Id is 20170717163946D3648204