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Appeal 36543-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON RAY WEISKOP, A/K/A JASON STAGGS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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INDEX

I. APPELLANT’S ASSIGNMENT OF ERROR..... 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 1

Standard of Review..... 2

A. THE BAC RESULTS WERE IRRELEVANT TO THE VICTIM’S WITNESS CREDIBILITY IN THE ABSENCE OF EITHER A RELIABLE CONNECTION TO MEMORY IMPAIRMENT OR TO THE TESTIFIED AMOUNTS OF ALCOHOL CONSUMED BY THE VICTIM 3

B. THE CONVICTION SHOULD BE AFFIRMED BECAUSE THERE IS NO CONSTITUTIONAL RIGHT TO IRRELEVANT EVIDENCE..... 10

V. CONCLUSION 14

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Arndt</i> , No. 95396-1, at 12 (Wash., Dec. 5, 2019)	passim
<i>State v. Clark</i> , 187 Wn.2d 641, 389 P.3d 462 (2017).....	3, 10, 11
<i>State v. Ellis</i> , 136 Wn.2d 498, 963 P.2d 843 (1998).....	13
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	10, 11, 12
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	4, 10, 11
<i>State v. Sutherland</i> , 94 Wn.2d 527, 617 P.2d 1010 (1980).....	6

Rules

ER 401	4
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Other Authorities

Barhill MT Jr, Herbert D. Wells DJ Jr., <i>Comparison of hospital laboratory serum alcohol levels obtained by an enzymatic method with whole blood levels forensically determined by gas chromatography</i> , J Anal Toxicol, 2007 Jan-Feb; 31(1): 23-30, available at https://www.ncbi.nlm.nih.gov/pubmed/17389080	4
Centers for Disease Control and Prevention, <i>Fact Sheets – Binge Drinking</i> , available at https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm	9
Karl B. Tegland, COURTROOM HANDBOOK ON WASHINGTON EVIDENCE (2019 ed.).....	9
Nat'l Inst. On Alcohol Abuse and Alcoholism, <i>What is a Standard Drink</i> , available at https://pubs.niaaa.nih.gov/publications/Practitioner/pocketguide/pocket_guide2.htm	7

I. APPELLANT'S ASSIGNMENT OF ERROR

The Appellant asserts that the trial court erred in excluding defense evidence about the victim's blood alcohol content shortly after the incident.

II. ISSUES PRESENTED

1. Whether the victim's blood alcohol content is relevant to impeach a victim's ability to accurately perceive and recall events?
2. Whether the victim's elevated blood alcohol content is relevant to impeach the victim's credibility when the victim testified he had only consumed a few beers?
3. Whether the unfairly prejudicial effect of introducing the victim's blood alcohol content significantly outweighs the probative value of the evidence?

III. STATEMENT OF THE CASE

For the purposes of this response to appellant's opening brief, respondent accepts appellant/defendant's statement of the case.

IV. ARGUMENT

Mr. Weiskop (a/k/a Staggs) contends that he was deprived of his ability to present a mistaken identity defense when the trial court excluded evidence of the stabbing victim's blood alcohol content ("BAC"). Weiskop posits that the evidence was (1) relevant to impeach the victim's ability to

accurately perceive and recall events of the attack and (2) relevant to the victim's credibility when testifying about how many drinks he consumed before being stabbed. He further contends that, if the evidence is relevant, the State must show it is so prejudicial as to disrupt the fairness of the fact-finding process. Appellant's Br. at 11-12. Weiskop concludes that the trial court abused its discretion and committed harmful error by excluding evidence that he believes would have called into question Weiskop's identity as the perpetrator. Appellant's Br. at 14.

Standard of Review.

When a defendant contends that his constitutional right to present a defense was violated, Washington courts conduct a two-step standard of review. *State v. Arndt*, No. 95396-1, at 12 (Wash., Dec. 5, 2019) (citing *State v. Clark*, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017)). In the first step, the trial court's evidentiary rulings are reviewed for an abuse of discretion. *Id.* Then, if the rulings are sound, *de novo* review is applied to the constitutional question: whether the evidentiary rulings deprived the defendant of his right to present a defense. *Id.*

A. THE BAC RESULTS WERE IRRELEVANT TO THE VICTIM'S WITNESS CREDIBILITY IN THE ABSENCE OF EITHER A RELIABLE CONNECTION TO MEMORY IMPAIRMENT OR TO THE TESTIFIED AMOUNTS OF ALCOHOL CONSUMED BY THE VICTIM

Under the abuse of discretion standard, the reviewing court must defer to the trial court's evidentiary rulings unless "no reasonable person would take the view adopted by the trial court." *Clark*, 187 Wn.2d at 648; *see also Arndt* at 14. The court may affirm the trial court on any basis supported by the record, including theories established by the pleadings, even if the theories were not considered by the trial court. *Arndt* at 15. For instance, "[b]ecause unreliable testimony does not assist the trier of fact, it is properly excluded under ER 702." *Id.* at 14, 15.

Here, the trial court reasonably excluded the BAC evidence because the emergency room doctor could not testify that the BAC level correlated to any effect on the victim's memory of the attack. RP 233-34. Weiskop offered no foundation that the BAC level was relevant to the victim's ability to perceive and remember what happened. Without that, the seemingly high BAC level (0.297)¹ was purely prejudicial; holding no probative value whatsoever in absence of proper expert testimony.

¹ The BAC number itself presumably is inflated because hospital alcohol tests do not use the same testing methodology usually employed in driving impairment cases. Proper foundation would need to establish the difference between alcohol tests administered at a hospital versus "blood draw"

The excluded BAC evidence was irrelevant. The rules of evidence define relevancy as the tendency to make a material fact more or less probable. ER 401; *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). There was absolutely no testimony proffered to connect the high alcohol content level to any impairment of the victim’s gross motor skills or cognition. To the contrary, the proffer on behalf of the ER physician, a defense witness, was that the victim had no trouble answering questions at the hospital, appeared unremarkable, and admitted drinking four beers sometime before being stabbed. RP 229-30, 232-35. In trial testimony, however, the doctor was not asked for further details after mentioning that the victim “was awake and speaking to me,” RP 244, and came back positive for alcohol, RP 247. Tactically, the defense attorney avoided eliciting the proffered details in front of the jury—despite permission from

alcohol tests performed by the Washington State Crime Laboratory. Hospital laboratory tests of alcohol levels are performed on serum or plasma, which leads to a greater alcohol concentration than found in whole blood. Barhill MT Jr, Herbert D. Wells DJ Jr., *Comparison of hospital laboratory serum alcohol levels obtained by an enzymatic method with whole blood levels forensically determined by gas chromatography*, J Anal Toxicol, 2007 Jan-Feb; 31(1):23-30, available at <https://www.ncbi.nlm.nih.gov/pubmed/17389080> (last visited Dec. 10, 2019). Accordingly, serum alcohol content (“SAC”) predictably is about 18% higher than its corresponding BAC level. In our case, the BAC would be approximately .252, compared to the SAC of .297.

the court—because the doctor could not say that the victim was intoxicated or impaired as theorized by the defense. RP 232, 237.

It was reasonable for the trial court to follow Evidence Rule 402 by not admitting the irrelevant BAC/SAC evidence. The court explained “the purpose you’re saying you want to bring [the BAC] out for is to show that it could have affected his memory or otherwise. You’re saying the doctor can’t even testify to that, though, because he didn’t test him for those things. So the reason you want to get it in he can’t give you those answers.” RP 234. Defense counsel responded: “I think the number is significant to most people.”

It is debatable, however, whether the average juror would understand the significance of an alcohol level close to three times the legal limit for driving a motor vehicle. Jurors might not understand that—rather than proving mental impairment—such a high BAC indicates that the victim was a functioning alcoholic; otherwise he would not have been able to stand upright the night of the attack, let alone negotiate traffic intersections and walk eighteen blocks (three of those blocks walking backwards in fear) with the intention of arriving at the Moezy Tavern in competition ready condition to compete in a pool tournament. RP 102.

Instead, the jury might assume unfairly that the victim was impaired since it would have been illegal for him to drive. Unlike judges, most jurors

would not commonly understand that 0.08 is simply a cutoff for the *per se* offense of DUI. In reality, many functioning alcoholics can safely drive at double digit BAC levels, without impairment, even though it is unlawful to do so.

Moreover, the fact that the victim was competent to testify at trial while exuding the odor of alcohol, and admitted drinking during another pool tournament until 12:15 a.m. the very day of trial, shows that this witness was alcohol habituated. The victim further denied having any memory impairment. RP 35, 123. And, outside the presence of the jury, the prosecutor commented that the victim was talking and speaking “no different than I’ve ever talked to him before.” RP 34. Having alcohol in your system, as the trial court noted, is only a problem when it affects the competency of the witness. RP 35-36.

In sum, the victim’s BAC level was not relevant to impeach the victim’s ability to accurately perceive and recall events. There was no evidence that the victim was experiencing impaired memories belied by the fact he acted and spoke just fine.² *See* RP 233 (defense physician would

² Using a BAC test as an indicator of memory impairment is not unlike employing a polygraph to test whether the subject is fabricating memories. Both are unreliable and therefore inadmissible. *See State v. Sutherland*, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980) (“It is a long-standing rule in Washington that the results of polygraph examinations are not admissible, except by stipulation”).

have testified generally that “[a]lcoholics often come off like they’re perfectly fine”).

Without resorting to the irrelevant and unfairly prejudicial BAC level at issue, the defense had ample opportunity to confront the victim on cross examination about possible memory impairment, and to impeach his credibility about consuming only four or five beers. Defense counsel could have inquired whether the victim was a “lightweight” drinker unaccustomed to alcohol, or a functioning alcoholic. Defense counsel could have asked how much the victim typically drank compared to the day and night in question. Defense counsel could have confronted the victim on the size of his five beers. Were they in one-liter bottles or in 12, 16 or 24 ounce containers? *See* Nat’l Inst. On Alcohol Abuse and Alcoholism, *What is a Standard Drink*, available at https://pubs.niaaa.nih.gov/publications/Practitioner/pocketguide/pocket_guide2.htm (last visited on Dec. 10, 2019). Were they light beers with a low alcohol content or malt beers with a high alcohol content? *Id.* Were these beers chugging liquor? How did the victim keep track of his consumption amounts and times? How much did the victim weigh? And so on.

Defense counsel also could have asked whether the victim had any other drinks earlier in the day before drinking (or chugging) the four of five beers, which he did at home to avoid spending a lot of money at the bar.

RP 101. But the defense chose instead to avoid further exploration of the victim's possible impairment on the night he was stabbed, including whether he was given any alcohol shots to numb the stabbing pain upon arriving at the Moezy Inn Tavern.

Without the above details being asked and answered—and without an expert witness toxicologist to perform the necessary calculations—the jury was left unequipped to compare the victim's BAC level to his alcohol consumption rate to determine whether the victim was being untruthful when he recalled having four or five beers. Mathematically, even a defense toxicologist likely would concede it possible to achieve a .252 BAC or a .297 SAC with “only four or five beers” depending upon the nonstandard size and strength of those drinks or whether the drinks were supplemented by alcohol shots at the Moezy Inn Tavern or were in addition to a baseline BAC from a prior drinking episode not fully metabolized.

Ironically, the jury probably gave more weight to the “4 or 5 beers” testimony than it would have if provided high BAC evidence along with expert testimony suggesting that the victim was an alcoholic who could handle binge level consumption. Lay persons commonly assume it is not safe to drive after two drinks. Therefore, without other evidence to place the victim's drinking habits in perspective, the jury may have assumed that

the victim was intoxicated—perhaps even double the legal driving limit—after only four beers.

Consuming “five drinks in two hours or less” is a lot for a casual male drinker; it is the very definition of binge drinking. *See* Centers for Disease Control and Prevention, *Fact Sheets – Binge Drinking*, available at <https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm> (last visited Dec. 10, 2019). “A witness’s use of alcohol or other drugs at the time of the events in question is generally admissible to show that the witness may not remember the events accurately.” Karl B. Tegland, *COURTROOM HANDBOOK ON WASHINGTON EVIDENCE* at 301 (2019 ed.). The jury here heard little evidence to minimize the assumed effects of the victim’s binge drinking on his memory of the night he was stabbed. Consequently, the absence of the irrelevant BAC evidence likely helped, rather than hurt, the defendant’s case.

For all of the above reasons, the trial court did not abuse its discretion by reasonably excluding the BAC/SAC evidence. Because there was no expert testimony under Rule 702 to explain the probative value of the victim’s alcohol concentration level with respect to (1) his ability to accurately perceive and recall events, and (2) whether consuming four to five beers was incredible, the BAC/SAC evidence had to be excluded under

Rule 402 as irrelevant under 401.³ Even assuming that the excluded evidence was relevant, the danger of misleading the jury and the danger of unfair prejudice (conceded)⁴ substantially outweighed its probative value pursuant to Rule 403 without proper foundation through expert testimony.⁵

B. THE CONVICTION SHOULD BE AFFIRMED BECAUSE THERE IS NO CONSTITUTIONAL RIGHT TO IRRELEVANT EVIDENCE

Assuming *arguendo* that the BAC/SAC evidence was relevant, this Court exercises *de novo* review of whether the evidence exclusion deprived Weiskop of his constitutional right to present a defense. *Clark*, 187 Wn.2d at 648-49. Of course, these rights are not absolute. *Arndt* at 29; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence.” *Jones*, 168 Wn.2d at 720 (emphasis in original); *Lord*, 161 Wn.2d at 294.

“[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *State v. Darden*, 145 Wn.2d 612, 622,

³ “The label that trial counsel attaches to its proffered evidence cannot change the actual purpose for which the evidence is offered.” *Clark*, 187 Wn.2d at 651.

⁴ See Appellant’s Br. at 2 (Issue No. 3).

⁵ “When the relevance and helpfulness of expert testimony is debatable, there is no abuse of discretion in excluding the testimony on tenable grounds.” *Arndt* at 17-18 (citing *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003)).

41 P.3d 1189 (2002). The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." *Id.* We must remember that "the integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983).

Jones, 168 Wn.2d at 720 (alteration in original). Even if relevant evidence is excluded in violation of a constitutional right, however, it can be harmless beyond a reasonable doubt. *Id.* at 724; *Lord*, 161 Wn.2d at 295-96.

Our case is most similar to two recent Washington State Supreme Court cases that affirmed the exclusion of evidence, holding that the constitutional right to present a defense was not offended. In *Clark*, the trial court excluded a doctor's expert testimony, but reminded counsel that relevant observation testimony by lay witnesses was admissible. 187 Wn.2d at 647. There, the doctor described Clark's participation, motivation, focus, and effort as being entirely within normal limits. That testimony was contrary to Clark's desire to have the doctor present expert testimony to explain his flat affect while testifying. *Clark* is analogous to Weiskop's desire for his ER physician to allege memory impairment via a high BAC, despite the physician's own observations that Weiskop appeared unremarkable and had no difficulty speaking and providing information to him. RP 230, 232.

Arndt likewise involved limitations on expert testimony on the basis of relevancy. *Arndt* at 12. The trial court in *Arndt* lawfully excluded defense expert testimony about fire origin and causation. It found that testimony about certain test results was not relevant because there was no connection to the origin of the fire. *Id.* at 21, 22. This is similar to the instant case where the trial court refused to admit the victim's BAC results because it bore no demonstrated connection to Weiskop's mistaken identity defense or the credibility of the victim.

Even if this Court finds that the BAC results were relevant, the lack of expert testimony to guide the jury would have made the evidence so prejudicial as to disrupt the fairness of the fact-finding process at trial. The State's interest outweighs Weiskop's need for the information sought because Weiskop had many other available means to impeach the victim and present a mistaken identity defense.

Lastly, if the BAC evidence was relevant and not prejudicial, any constitutional error was harmless. When the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error, an error of constitutional magnitude is harmless. *Jones*, 168 Wn.2d at 724. The victim here did not deny his alcoholic beverage consumption. And he was not the only witness to the attempted robbery.

Co-defendant Stickney reluctantly testified about his personal observation that Weiskop did the stabbing. RP 127-49. Stickney had already pleaded guilty to being an accomplice and was not a cooperating witness. Stickney was transported to court from the Washington State Penitentiary in Walla Walla and received no consideration for his testimony. RP 135-36. In fact, Stickney was adamant from the beginning of the investigation that he would help administer street justice to Weiskop but would not voluntarily testify at trial. RP 88-89; Exs. 13-15. On direct examination, Stickney explained the negative personal consequences he would suffer in prison as a result of being forced to testify. RP 146, 149. Additionally, the jury viewed Facebook messenger communications that corroborated Stickney's eyewitness testimony. RP 70-76, 129-32; Exs. 5-6, 8-9, 17-20. Assuming error, for sake of argument, it was harmless beyond a reasonable doubt.

The *Arndt* court was mindful that the trial court must not abdicate its gatekeeping role by receding from difficult decisions and letting the jury decide how much weight to give to evidence that is, in fact, irrelevant. *Arndt*, at 29; *State v. Ellis*, 136 Wn.2d 498, 540, 963 P.2d 843 (1998). Here, despite placing limitations on the testimony of the emergency room physician, the trial court allowed Weiskop to advance his defense theory

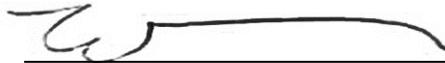
and did not intrude on Weiskop's Sixth Amendment and article I, section 22, right to present a defense.

V. CONCLUSION

The trial court properly exercised its gatekeeping function when it excluded the irrelevant and unfairly prejudicial evidence. Weiskop has no constitutional right to present evidence which is not relevant. The State respectfully requests that the court affirm the conviction for attempted robbery.

Dated this 13 day of December, 2019.

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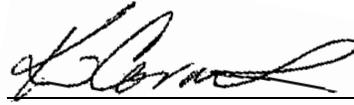
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I certify under penalty of perjury under the laws of the State of Washington, that on December 13, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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(Place)



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SPOKANE COUNTY PROSECUTOR

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