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COURT OF APPEALS
DIVISION ONE

JAN 20 2009

IN THE WASHINGTON STATE SUPREME COURT

NO. _____

Court of Appeals No. 60359-1-I

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STATE OF WASHINGTON
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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JAN 20 PM 12:00

STATE OF WASHINGTON

Respondent,

v.

ABDINASIR OSMAN,

Petitioner.

PETITION FOR REVIEW

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ORIGINAL

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A. IDENTITY OF PETITIONER

Abdinasir Osman petitions this court for review.

B. DECISION TO BE REVIEWED

Published decision in *State v. Osman*, COA No. 60359-1-I, filed on December 22, 2008. . Appendix 1.

C. ISSUES PRESENTED

1. RALJ 5.4 mandates a new trial when any significant or material portion of the electronic record is lost. When this decision is delegated to the trial court, it is subject to review by the superior court. The Court of Appeals held the trial court's decision is reviewed solely for an abuse of discretion. This is contrary to the well-established rule that application of a court rule to undisputed facts and mixed questions of law and fact—such as the materiality of the lost portion of the appellate record—are reviewed *de novo*. Did the superior court correctly determine the missing portion of the suppression hearing was material when it contained the end of the State's cross-examination and re-direct of Osman, admission of Exhibit D over defense objection, arguments of counsel, and the only record of the district court's findings and conclusions which were contradictory and adverse to Osman?

2. The superior court may be affirmed on any alternative basis supported by the law and the record. Was the superior court required to remand the matter to the district court to determine if the missing portions were “significant or material”? Where the rule delegated that decision to the superior court for 14 years and assessment of the appellate record has traditionally been a function of the appellate courts, did the addition of the last sentence of the rule in 1995 remove that decision from the superior court to the district court?

D. STATEMENT OF THE CASE

Absinasir Osman appealed his DUI conviction in King County District Court, East Division (Bellevue) No. CR03134KC. CP 1. The parties agree the recording of the end of the suppression hearing does not exist. According to the docket, this portion would have contained the remainder of the State’s cross-examination and re-direct of Osman, the admission of Exhibit D over defense objection (the Judgment & Sentence for a reckless driving conviction in KCDC No. C507266, CP 170), arguments of counsel, and the only record of the district court’s findings and conclusions. CP 7-8. Osman contested much of the arresting officer’s testimony. *Compare* CP 227-63 *with* CP 266-

80. Osman repeatedly claimed that he did not understand the arresting officer and that his passenger offered to translate.

No written findings and conclusions were required or filed. *See* CrRLJ 3.5, 3.6. The docket contains only a cursory version of the district court's conclusions: the court suppressed the refusal and some of Osman's statements to the police, but admitted other statements and found probable cause to arrest for DUI. The district court's decision was inherently contradictory as the court ruled that Osman, a native Somalian speaker, did not understand the rights as read to him at the police station, but understood those recited to him in the field. Because this portion of the record is missing, this contradiction is not be subject to appellate scrutiny. Also, the district court's decision to admit Exhibit D over defense counsel's objection and the role that played in the court's suppression decision are left unexplained. While the district court obviously found Osman more credible than the arresting officer on some points, the court appears to have made the opposite conclusion on other points. The cursory conclusions listed in the docket do not contain any findings of fact to explain the court's conclusions.¹

¹STATE CROSS EXAMINATION
PLT EXHIBIT D: MARKED FOR ID – CERTIFIED JUDGMENT AND
SENTENCE FORM

Consequently, Osman moved for a new trial pursuant to RALJ 5.4 or, in the alternative, to continue the matter until the Court of Appeals decision was issued in *State v. Brilliant*, COA No. 56481-1-I. CP 291-321. The superior court determined that the lost portion was material, but granted the State's motion to continue the matter until after the *Brilliant* decision. VRP 1-16, 11-14. The Court of Appeals issued an unpublished decision in *Brilliant* which held the determination that the lost portion of the electronic record is significant is "in the first instance, for the district court." *State v. Brilliant*, 2007 Wash. App. LEXIS 220. While *Brilliant* was not technically binding

STATE MOVES TO ADMIT EXHIBIT D
COURT ADMITS EXHIBIT D OVER DEFENSE OBJECTIONS
DEFENSE REDIRECT EXAMINATION
DEFENSE RESTS
PARTIES ARGUMENT ON PROK ISSUE HEARD
DEFENSE REBUTTAL ARGUMENT
COURT FINDS DEFENDANT WAS READ HIS RIGHTS IN THE FIELD AND UNDERSTOOD HIS RIGHTS IN THE FIELD. STATEMENTS MADE THERE AFTER WERE ADMISSIBLE. STATEMENTS MADE ARE A WAIVER BY CONDUCT THAT INCLUDES THE FACT THAT HE STATED HE HAD 2 BEERS AND WAS OKAY TO DRIVE.
COURT FINDS THAT THE DEFENDANT WAS READ HIS RIGHTS AT THE SEATAC FACILITY AND THAT HE INVOKED HIS RIGHTS AND ANY STATEMENTS MADE AFTER THE SECOND READING OF RIGHTS ARE SUPPRESSED.
COURT FINDS IMPLIED CONSENT WARNINGS FOR BREATH WERE READ TO DEFENDANT IN THE FIELD AND AT THE SEATAC FACILITY
COURT IS NOT SATISFIED THAT DEFENDANT UNDERSTOOD HIS RIGHTS. THEREFORE, BAC REFUSAL IS SUPPRESSED.
COURT FINDS THAT THERE WAS PROBABLE CAUSE TO STOP DEFENDANT BASED ON THE DEFENDANT'S DRIVING OBSERVED BY OFFICER JEFFRIES
COURT FINDS PROBABLE CAUSE TO ARREST DEFENDANT

authority, *State v. Fitzpatrick*, 5 Wn.App. 661, 668, 491 P.2d 262 (1971), the superior court judge below was the same judge whose decision was reversed in *Brillant*. Following the *Brillant* decision, the superior court remanded the matter to the district court. VRP 17, 20; CP 322-323.

At that hearing, Osman argued the missing portion was material because of the district court had a duty to make a record of its findings and conclusions pursuant to CrRLJ 3.5. CP 342-49. Defense counsel did not invite the district court judge to make his notes part of the record. CP 344-46. Rather, the district court misapprehended the purpose and scope of its decision under RALJ 5.4. The district court judge devoted the bulk of his ruling to a recitation of his notes and the docket entry. CP 345-48. It appeared the district court judge attempted to re-construct the record from his notes. Even if this had been the appropriate procedure, the district court did not seek input from Osman's original trial counsel (who was coincidentally present) or the trial prosecutor to complete the court's recollection of the testimony and rulings. The judge's recollection and notes were incomplete. CP 347.

Moreover, the district court judge found the missing portion to be material because some rulings were in Osman's favor and the adverse

decisions were “quite simple” and preserved in the docket. The district court also relied on the fact that the jury convicted Osman. CP 347-48. The judge believed the admission of Osman’s statement that he drank two beers benefitted him. The judge was focused on “making a record,” not deciding if the missing portions were material to the appeal.²

Osman asked the superior court to review the district court’s decision as provided in RALJ 5.4. CP324-349. The superior court again found the missing portions were material and ordered a new trial. CP 354-363. The Court of Appeals granted review and reversed.

E. ARGUMENT AND AUTHORITY

1. Why review should be granted

This case qualifies for review under RAP 13.4(2) and (4). The Court of Appeals held the lower court’s application of RALJ 5.4 to the undisputed facts is reviewed only for an abuse of discretion. This holding conflicts with

²After reading his notes, the trial judge offered this brief explanation: So these are the oral findings. The record can be transcribed and can go to the other court. Now the issue before me, and this is on the order from Judge St. Clair was to determine whether the lost portion of the record is material and significant. And I’m satisfied that they’re not. In going through the file, the defendant had a full jury trial after. The jury returned the verdict of guilty. And I think that makes the record for today. Now in terms of information going up, this matter should go back to Superior Court. My personal notes should go up in the way of an exhibit although they’re not an exhibit. But that’s so that the judge and the attorneys and Superior Court will have the benefit of seeing the information that has been in the file all this time. I don’t know a better way of making a record. CP 347.

this court's well-established decisions that the application of a court rule to undisputed facts and mixed questions of law and fact are reviewed *de novo*. The Court of Appeals' decision represents a novel interpretation of RALJ 5.4, which has never been addressed by this court. This court should accept review to decide the proper interpretation of the court's own rule.

2. **Application of the rule to the undisputed facts and the mixed questions of law and fact are reviewed *de novo*. Nonetheless, the district court erred as a matter of law and abused its discretion. The superior court correctly found the missing portion is significant to the appeal.**

Under the RALJ, an appellant is entitled to a new trial when a material portion of the electronic record is lost. RALJ 5.4 provides this simple, straight forward remedy.

In the event of loss or damage of the electronic record, or ***any significant or material*** portion thereof, the appellant, *upon motion to the superior court, shall be entitled to a new trial*, but only if the loss or damage of the record is not attributable to the appellant's malfeasance. In lieu of a new trial, the parties may stipulate to a nonelectronic record as provided in rule 6.1(b). The court of limited jurisdiction shall have the authority to determine whether or not significant or material portions of the electronic record have been lost or damaged, ***subject to review by the superior court upon motion***. (Emphasis added.)³

³The last sentence was not included in the original version of the rule. It was added in 1995 when judges in the lower courts requested guidance on how to settle disputes regarding inaudible audio tapes. See Section 3, *infra*.

This rule is a significant departure from the RAPs.⁴ The RAPs have no rule comparable to RALJ 5.4. The RALJ do not authorize a re-construction of the record as in the RAPs.⁵ Yet, that is what the district court attempted to do on remand. The district court went beyond the simple inquiry posited by the rule, “whether or not significant or material portions of the electronic record have been lost or damaged.” RALJ 5.4. By any standard, the district court’s decision that the missing portion is not significant is not defensible under the law and the facts of this case.

⁴The RALJ provides an expedient, less formal appellate process than the RAPs. The RALJ rules for briefs do not require the detailed assignments of errors, issue statements, references to the records, or limitations on what can be raised on appeal. *Compare* RALJ 9.1(a), (b), RALJ 7 *with* RAP 10 and RAP 2.5. The RAPs governing the appellate record are more restrictive and complicated than the RALJ. *Compare* RAP 9 with RALJ 6. The RAPs are “completely unrelated rules” in many respects. *City of Seattle v. Agrellas*, 80 Wn.App. 130, 134-35, 906 P.2d 995 (1995).

⁵Where a *material* portion of the record is lost, through no fault of a party, the remedy is vacation of whatever action took place at the proceeding. *State v. Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963); *State v. Woods*, 72 Wn.app. 544, 865 P.2d 33 (1994). Nonetheless, reconstruction of the record may be ordered when a *portion* of the record is missing. *Brown*, 132 Wn.2d 592 (judge’s contemporaneous notes cures missing court reporter’s notes of CrR 3.5 hearing); *State v. Putman*, 65 Wn.App. 606, 610, 829 P.2d 787 (1992) (lack of record cured by narrative prepared by State, court’s detailed findings and conclusions and court’s detailed oral ruling). *See also* RAP 9.3, 9.4 (narrative and agreed reports of proceedings may be used where the record is lost). The government bears the burden of showing that an alternative record will suffice. *State v. Thomas*, 70 Wn.App. 296, 300 (1993). The defendant is not obliged to prove inadequate alternatives “suggested by the State or conjured up by the court in hindsight.” *Id.*

a. **The superior court correctly reviewed the district court's decision *de novo*.**

The Court of Appeals erroneously accepted the State's novel claim that the district court has the authority to craft a "preferred procedure" to determine whether a missing portion of the electronic record is significant and that decision is reviewed only for an abuse of discretion. *State v. Osman*, Slip Opinion at 10-12. Neither the court nor the State cited any authority for this proposition. Neither the court nor the State explained what discretion is necessary to apply the rule to the undisputed facts of this case. Rather, the Court of Appeals made only the assertion –unsupported by analysis or citation to authority– “the [district] court did not just apply the rule to a particular set of facts, but rather exercised its discretion under RALJ 5.4 to determine whether the missing portion was significant or material in the context of the trial.” Slip Opinion at 10-11. The court summarily dismissed cases citing the well-established rule that even discretionary decisions are reviewed *de novo* when they are based on the application of the rule to a particular set of facts. The court completely ignored the fact that the decision at issue is fundamentally a legal question, at best, a mixed question of law and fact, both of which are subject to *de novo* review. *Erwin v. Cotter Health Centers*, 161

Wn.2d 676, 687, 167 P.3d 1112 (2007) (“resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts.”) The court cited no authority in support of its claim that the district court’s decision required anything other than application of the legal standard as stated in the rule –significant or material– to the undisputed facts. The parties never disputed what portion of the electronic record was missing. The only dispute was whether that portion was “significant or material.”

Presumably, the court relied upon cases cited by the State, which are inapposite. These cases reviewed the trial court’s materiality decisions only for an abuse of discretion. In each instance, the decision at issue is made during the course of the trial –admittedly the trial court’s domain– *and is expressly left to the trial court’s discretion by statute, court rule, or case law.* See State v. Boyd, 160 Wn.2d 424, 431, 158 P.3d 54 (2007) (CrR 4.7(e) governing discretionary discovery disclosures, states the “court in its discretion may require disclosure”. This portion of the rule did not apply in *Boyd* and was not the subject of the opinion); State v. Downing, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004) (court rule and statute expressly give trial court

discretion to grant and deny continuances of the trial, CrR 3.3(f) and RCW 10.46.080 both use the permissive term “may”); State v. Uthoff, 45 Wn.App. 261, 268-69, 724 P.2d 1103 (1986) (trial court expressly granted discretion to balance competing interests to decide whether a confidential informant’s identity will be provided to defendant; CrR 4.7(h)(6) gives discretion to hold in camera review of relevant materials); State v. Lodge, 42 Wn.App. 380, 391, 771 P.2d 1078 (1985) (Under RCW 10.55.060, the trial court “may” certify materiality of out-of-state witness as a prerequisite for compulsory process); Williams v. Queen Fisheries, Inc., 2 Wn.App. 691, 699, 469 P.2d 583 (1970) and State v. Gray, 64 Wn.2d 979, 984, 395 P.2d 490 (1964) (trial court’s evidentiary decisions are only reviewed for abuse of discretion).

The decision at issue here is not analogous to any of these rulings. These cases involve rulings by the trial court which create the appellate record. The question here is whether the missing appellate record is material to review. More to the point, the rules and statutes in those cases expressly grant the trial court the discretion to make the challenged decision. The Court of Appeals claimed its holding was grounded in the plain language of the rule. Slip Opinion at 10-12. To the contrary, unlike the rules discussed above which

expressly delegate a decision to the trial court's discretion, RALJ 5.4 confers no such discretion. The language in RALJ 5.4 is not discretionary, but mandatory. If the missing portion is "significant or material," the court *shall* grant a new trial. If the scope of the missing portion is unquestioned, then the only decision left is whether that portion is material to the appeal. This is a question of law or possibly a mixed question of law and fact. Both types of decisions are reviewed *de novo*.

The Court of Appeals' holding on this point is contrary to the well established law in this State. Application of a court rule to a specific set of facts is subject to *de novo* review. State v. Frankenfield, 112 Wn.App. 472, 475, 49 P.3d 921 (2002) (trial court erred in finding that defendant made an adequate objection to the date of arraignment under CrRLJ 3.3). *See also* State v. Staudenmaier, 110 Wn.App. 841, 43 P.3d 43 (2002) (reviewed *de novo* superior court's decision of RALJ appeal without oral argument, applying RALJ 8.3); State v. Dearbone, 125 Wn.2d 173, 178-79, 883 P.3d 303 (1994) (trial court's "good cause" determination to extend time to serve accused with the death petition is mixed question of law and fact reviewed *de novo*); Magnussen v. Tawney, 109 Wn.App. 272, 275, 34 P.3d 899 (2001)

(determination of the “prevailing party” pursuant to CR 68 is a mixed question of law and fact reviewed under the error of law standard); State v. Tatum, 74 Wn.App. 81, 86, 871 P.2d 1123 (1994) (“When the trial court bases an otherwise discretionary decision solely on application of the court rule or statute to particular facts, the issue is one of law, which is reviewed *de novo* on appeal.”). Where a portion of the electronic record is missing, “significant or material” is the legal threshold for granting a new trial. Where the facts are undisputed—whether and what portion is missing—application of the standard is either a question of law or a mixed question or a mixed question of law and fact, both reviewed *de novo*.

The Court of Appeals opined that “the trial court is in the best position to determine if the missing portion is significant or material.” Slip Opinion at 10. The court reasoned, “by delegating that determination to the court of limited jurisdiction, the rule recognizes the trial court’s critical role in making that decision and accordingly gives the court discretion to fashion an appropriate procedure.” Slip Opinion at 11-12. The court reads broad procedural and substantive powers into language that simply delegates—without elaboration—the materiality decision to the trial court. There is

nothing inherent in the delegation that transforms decision from a basic application of law to facts, nor the procedure used to make that determination.

b. Under either standard of review, the district court erred in ruling that the missing portion was insignificant.

The district court erred as a matter of law, because neither RALJ 5.4 nor the superior court's remand order gives the district court the authority to reconstruct the record. The district court abused its discretion by applying the wrong law and the decision is not based on tenable rationale. State v. Runquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995).

The lost portion contained the end of Osman's testimony at the suppression hearing, the arguments of counsel and the district court's findings of fact and conclusions of law. This portion of the proceedings is clearly material to the appeal. Unlike the superior court rules, the CrRLJ do not require the district or municipal courts to enter *written* findings and conclusions in support of its decision on motions to suppress. *Compare* CrR 3.5, 3.6 *with* CrRLJ 3.5, 3.6. Constitutional errors at a suppression hearing cannot be remedied by substitution of a second suppression hearing, but instead require a new trial. State v. Bone-Club, 128 Wn.2d 254, 261, 906 P.2d 325 (1995). Without the court's oral ruling, particularly the findings of fact,

and the evidence upon which those were based, the superior court cannot review the lower court's decision to admit some of Osman's inculpatory statements. The superior court is charged with determining whether the lower court's factual findings are supported by the record, whether those findings support the legal conclusions, and whether any legal errors were made. RALJ 9.1. That review cannot be conducted on this record where the factual findings are lost and only cursory legal rulings are available in the docket. RALJ 5.4 provides a new trial in this circumstance. If this case had been on appeal from a criminal trial in superior court, the record might have been reconstructed from the court's written ruling. *See State v. Putman*, 65 Wn.App. 606, 610, 829 P.2d 787 (1992) (lack of record cured by narrative prepared by State, court's detailed findings and conclusions and court's detailed oral ruling). But that is not the procedure mandated by RALJ 5.4.

The district judge's rationale for his decision is not tenable. The judge ignored the contradiction inherent in his decision that Osman, a Somalian speaker, understood the rights read to him in the field but not those read to him at the station. The Court of Appeals provided its own factual findings to justify the district court's decision. Slip Opinion at 14-15. But those findings

were not made by the district court and cannot substitute for review of the district court's decision. Without a record, Osman is unable to challenge the contradictory conclusions. The district court erroneously opined the admission of the consumption of alcohol was beneficial to Osman. In fact, the admission relieves the government of proving an essential fact of the case. This is particularly true where there is no breath test or refusal. City of Seattle v. Wakefield, 24 Wn.App. 48, 976 P.2d 5 (1979) (failure to suppress defendant's admission to drinking was harmless; the untainted evidence included the driver drinking a beer, a breath test and videotape of the driver).

Osman disputed much of the arresting officer's claims. The existing record provides no indication whether or how the district court resolved these disputed facts. The loss of Osman's testimony is significant. It is apparent that the district court believed some of his testimony because the district court suppressed his post-Miranda statements in response to the *Prok* motion. If the court made any credibility determinations or resolved disputed facts, such decisions are material. Finally, there is no record to explain why the district court admitted Exhibit B—a prior reckless driving judgment and sentence-- or what use the judge made of that evidence. There is no apparent relevance of

that information to the suppression decision; without the record there is no way for appellate counsel or court to know if the district court's use of that evidence was improper, reversible error.

For these reasons, the superior court correctly found the missing portions to be material and granted a new trial. The superior court's decision is supported by a plain reading of the rule. Significant and material are generally synonymous, although the former also indicates size or amount as well as importance. WEBSTER'S II New Riverside Dictionary at 430 (Material: 4. Substantial [a *material* difference]. 5. Important : Relevant [*material* evidence] Significant: 2. Important : Weighty).⁶ The Court of Appeals erred in holding that the only record of the district court's suppression decision and some of the supporting evidence is not material to the appeal.

3 The superior court was authorized to determine the materiality of the lost record.

This court may affirm the superior court on any basis supported by the

⁶ The rule does not operate where an inconsequential portion of the proceedings is unavailable. One example would be routine discussions as to when to break for lunch, the entry of an order for interpreter services at the defendant's request (as occurred in this case) or the court's response to a jury inquiry where the written response --as is required by the court rules-- has been preserved. Here, the missing portion of the electronic proceeding contains the district court's revocation of Osman's pretrial release. That decision is not material because the issue is moot and cannot be addressed on direct appeal. If that were the only lost portion of the proceedings, the rule would not authorize a new trial.

law and the record. State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 612 (2000). The superior court has the authority to determine whether the missing portion of the record is significant. RALJ 5.4 was adopted in 1981 and read as it does today, save for the last sentence which was added in 1995. Thus, for 14 years, a motion pursuant to RALJ 5.4 addressed solely to the superior court. The addition of the last sentence did not change that division of labor.

The last sentence of the rule provides for remand to the lower court when necessary to determine whether a material portions are actually *lost*, not whether the lost portions are *significant or material*. The former reading requires remand only in those circumstances when the parties dispute whether portions are lost or damaged, i.e., whether the tapes are really inaudible or the recording is truly missing. The latter reading of the rule, adopted by the Court of Appeals, would require remand in every instance where a portion of the proceeding is missing and the parties' disputed its materiality.

That is the superior court's function. RALJ 6.3.1(d)(3) (the superior court shall decide disputes concerning the "completeness or accuracy of the transcript.") Determining the materiality of a portion of the appellate record is traditionally an appellate court function, not one generally made by the trial

court. Deciding whether a portion of the appellate record is “significant or material” is analogous to determining whether the reconstructed record is sufficient for appellate review. This is the job of the appellate courts. *See State v. Classen*, 176 P.3d 582 (2008) and *State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003). It is illogical to ask the trial judge, whose decision is being challenged on appeal, to review a portion of his own decision for materiality. The lower courts were not involved in the procedure until 14 years after the RALJ were adopted. Until then, the factual and legal rulings made in support of an order to grant or deny a new trial under RALJ 5.4 were made solely by the superior court.

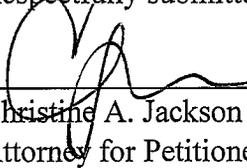
This abrupt shift in the division of labor is curious and inconsistent with appellate practice and law. To the extent that the rule is ambiguous, this court should look to the history to discern the court’s intent in adopting the rule. The language at issue here was adopted as recommended by the Washington State Bar Association Rules Committee.⁷ The last sentence was added to permit the trial court to determine whether the audio recording could

⁷One of the official duties of the Bar Association is to recommend court rules and procedures. GR 12(b)(3). The supreme court has given the Bar Association (as well as the various judges’ associations) an official role in recommending court rules. *See* GR 9(f)(2) and (i)(6).

heard and the court could understand what was said.⁸ The addition is logical. The trial court is responsible for maintaining a system that ensures the production of an audible electronic record. The trial judge who presided at the hearing and is familiar with the participants is in a better position to hear and understand what was recorded.

Here, there was no dispute that the missing portion is *lost*. Thus, the superior court is authorized to determine in the first instance whether the portion is *significant or material*. This court should accept review and determine the proper division of labor between the superior and district courts pursuant to RALJ 5.4.

Respectfully submitted this 20th day of January, 2009,


Christine A. Jackson WSBA #17192
Attorney for Petitioner

⁸ The proposed rule was accompanied by the following comment: **(1) Background:** The amendment was developed by the WSBA Court Rules and Procedures Committee, based on a suggestion from Seattle Municipal Court Judge Ronald Kessler. **(2) Purpose:** Parties occasionally will dispute whether the electronic record (i.e., audiotapes) are lost, damaged or, more likely, inaudible in part. No procedure currently exists for determining these disputes. (A handful of cases are reversed each year because it is alleged that a tape is lost, damaged, or inaudible.) The superior courts are reluctant to listen to the tapes to make an independent determination. The committee determined that a reasonable procedure would be for the trial court to *listen to the tapes and make a decision*. (Emphasis added.) K. Tegland, 4B Wash. Pract., Rules Practice RALJ 5.4 (6th ed. 2002).

APPENDIX 1

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	No. 60359-1-I
Appellant,)	
)	
v.)	PUBLISHED OPINION
)	
ABDINASIR OSMAN,)	
)	
Respondent.)	FILED: <u>December 22, 2008</u>
<hr style="width: 100%;"/>)	

Schindler, C.J.—In courts of limited jurisdiction, all proceedings are electronically recorded. Under RALJ 5.4, a party is entitled to a new trial if “any significant or material portion” of the electronic record is lost or damaged. RALJ 5.4 expressly delegates to the court of limited jurisdiction the authority to determine whether the missing portion of an electronic trial record is significant or material and grounds for a new trial. RALJ 5.4 provides that the court’s decision is subject to review by the superior court. In this case, Abdinasir Osman filed a motion challenging the district court’s determination that the missing portion of a pretrial hearing was not significant or material and requested a new trial. The superior court disagreed with the district court, found that the missing portion of the pretrial hearing was material, and ordered a new trial. We granted the State’s motion for discretionary review to

address the question of what standard of review applies to the district court's determination under RALJ 5.4. We conclude that under the plain language of the rule, the standard of review is abuse of discretion. Because the superior court applied a de novo standard of review, we reverse the superior court's finding that the missing portion of the record was material, and remand.

FACTS

In April 2004, Abdinasir Osman was charged in King County District Court with driving while under the influence of alcohol (DUI). Before trial, the defense filed a motion to exclude evidence under CrRLJ 3.5 and a motion to suppress evidence under CrRLJ 3.6. Osman argued there was no lawful basis to stop and no probable cause to arrest him. Osman also argued that all statements that he made to the arresting officer, as well as his refusal to submit to an alcohol breath test, were inadmissible. Osman asserted that he did not understand English and the arresting officer did not ask him if he understood his constitutional rights or the implied consent warnings for a breath test.

The hearing on Osman's motion to suppress took place on January 12, 2005. King County Deputy David L. Jeffries and Osman testified. Osman testified with the assistance of a Somali interpreter.

Deputy Jeffries testified that he had worked for the King County Sheriff's Department for approximately 15 years, he had been a member of the DUI squad for approximately 10 years, he had participated in approximately 5,000 DUI investigations, and had made approximately 1,400 DUI arrests. Deputy Jeffries also

said that he was an alcohol breath test instructor and a DUI field training officer.

Deputy Jeffries testified that at approximately 2:50 a.m. on October 17, 2003, he observed a car in the White Center area weaving between two lanes of traffic on South 200th Street. Deputy Jeffries said that the car was crossing over the lane dividers, and on two different occasions, crossed the centerline. According to Deputy Jeffries, the driver had his right turn signal on at an intersection. However, the driver did not turn, but went straight onto the freeway. After the car drove onto the shoulder of the freeway and across the fog line, Deputy Jeffries pulled the car over. Deputy Jeffries asked the driver for his license, registration, and proof of insurance. Deputy Jeffries testified that the driver, Abdinasir Osman, had "a strong odor of intoxicants on his breath, red, watery, bloodshot eyes, slurred speech, and . . . slow, lethargic movements." Deputy Jeffries also said there were two other people in the car and he noticed four open beer containers in the front passenger seat.

According to Deputy Jeffries, Osman voluntarily agreed to perform some field sobriety tests. Deputy Jeffries said that as Osman got out of the car, he used the side of the car to steady himself. Based on the "horizontal gaze nystagmus" test, Deputy Jeffries concluded that Osman had consumed alcohol. When Deputy Jeffries asked Osman if he wanted to perform the "walk and turn" test, Osman said he was fine and he did not need to do another test. Deputy Jeffries then arrested Osman and read him his constitutional rights. Deputy Jeffries testified that Osman told him that he understood those rights. Deputy Jeffries said that he also read Osman the implied consent warnings for an alcohol breath test and that Osman told him that he

understood the warnings. Deputy Jeffries testified that Osman continued to insist that he was fine and "he told me that he had only drank two beers And that he was okay to drive." Deputy Jeffries also testified that four open beer containers in the car were still "cold and wet to the touch" after the car was impounded.

Deputy Jeffries testified that he read Osman his rights and the implied consent warnings for the breath alcohol test again at the SeaTac Police Station. Osman refused to sign the "Constitutional Rights and Implied Consent Warning for Breath" form, and asked to speak to his attorney. Because Osman would not provide the name of his attorney, Deputy Jeffries contacted a public defender for him. After Osman spoke with the public defender, Osman told Deputy Jeffries he did not want to take the alcohol breath test.

Deputy Jeffries testified that Osman communicated with him in English the entire time. In his DUI report, Officer Jeffries wrote that Osman's native language was English. On cross examination, Deputy Jeffries said that both Osman and the two passengers spoke to him in English that night.

Osman testified that he was from Somalia, had only been in the United States for three years, and had never formally learned English. Osman said that he and his two friends had attended a Somali wedding in downtown Seattle that night. Osman disagreed with Deputy Jeffries's account of what occurred after Deputy Jeffries pulled him over. Osman testified that he did not understand Deputy Jeffries and that when Deputy Jeffries stopped the car, one of the passengers, Chambe Hailesellase, translated for him. Osman also said that he asked Deputy Jeffries for a Somali

interpreter several times. Osman denied using English when he spoke to Deputy Jeffries, and denied telling Deputy Jeffries that he only had two beers and was okay to drive. Osman testified that Deputy Jeffries did not read him his rights when he was arrested or later at the police station.

For the limited purpose of the CrRLJ 3.5 and CrRLJ 3.6 hearing, the court admitted Exhibit A, the advice of constitutional rights and the implied consent warnings for a breath test; Exhibit B, Osman's driver's license; Exhibit C, King County Department of Adult Detention (KCDAD) screening information; and Exhibit D, a judgment and sentence in King County District Court for a previous reckless driving conviction of Osman in 2004. Exhibits C and D were admitted over defense objection. Exhibit C indicates that KCDAD interviewed Osman in 2003 to verify his residential and employment history. According to the information in Exhibit C, Osman moved to Washington from California and had been employed as a shuttle driver for two years. Exhibit D, the 2004 judgment and sentence, imposes a number of conditions on Osman, including a requirement to attend Alcohol Information School.

At the conclusion of the hearing, the court ruled that Deputy Jeffries had probable cause to stop and to arrest Osman and that Osman's statement that he had two beers and was okay to drive was admissible. However, the court granted Osman's motion to suppress the statements that he made after he refused to sign the advice of rights form and he invoked his right to an attorney. The court also suppressed evidence of Osman's refusal to submit to the alcohol breath test.

The trial took place on February 24, 2005. Deputy Jeffries and one of the

passengers in Osman's car, Hailesallase, testified at trial.¹ A jury found Osman guilty of driving while under the influence of alcohol. The court imposed a one-year suspended sentence and ordered Osman to participate in alcohol treatment. Osman filed an appeal in King County Superior Court. Under the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ), the superior court sits in an appellate capacity for all final decisions in courts of limited jurisdiction.

In preparing Osman's appeal, his attorney discovered that a portion of the electronic record from the pretrial CrRLJ 3.5 and CrRLJ 3.6 hearing was missing. Osman filed a motion under RALJ 5.4, arguing that he was entitled to a new trial because the missing portion of the record was significant or material. The superior court remanded to the district court to determine whether the missing portion of the electronic record was significant or material. The order states, "RALJ 5.4 delegates to the court of limited jurisdiction the authority to determine . . . whether the lost portion of the record is material and significant, given the rulings from that lost portion are reflected in the docket."

It is undisputed that the end of the State's cross examination of Osman, the redirect of Osman, the court's ruling on the admission of Exhibit D, the lawyers' arguments, and the court's oral decision and rulings on the motion to suppress were not electronically recorded. The transcript indicates that the motion to suppress hearing began at 10:20 a.m. and there is a "[Break in recording from 11:47:47 a.m.]."

¹ The parties did not designate the transcript of the trial on appeal. However, the table of contents of the transcript indicates that at trial Deputy Jeffries testified about reading Osman his rights and the court ruled on the "Miranda rights and the implied consent warnings."

The transcript of the electronic record resumes at "1:00:30 p.m." The hearing concluded at 1:13 p.m., "[Session ends at 1:13 p.m.]."

The court docket reflects the court's rulings on the CrRLJ 3.5 and CrRLJ 3.6 motion to suppress, followed by the State's request that Osman be taken into custody. According to the docket, the court noted that Osman was charged with a new DUI, ordered him taken into custody, and set bail. At Osman's request, the court also authorized funds for additional interpreter fees. When the electronic recording resumes, the court is considering Osman's motion to continue the trial.²

On the remand from superior court, the district court judge compared his notes from the CrRLJ 3.5 and CrRLJ 3.6 hearing with the court docket to determine whether the missing portion of the electronic record was significant or material and required a new trial. In doing so, the judge noted that the court docket "is I think quite extensive compared to many dockets in other courts in terms of memorializing the reasons and decisions." In response to Osman's insistence that "the court has a duty to make a record," the judge read his notes into the record. The notes describe Deputy Jeffries's and Osman's testimony at the suppression hearing, the exhibits that were admitted, and the court's rulings. The district court judge ruled that the missing portions of the electronic record were not significant or material.

Osman filed a motion in superior court to review the district court's determination that the missing portion was not significant or material under RALJ 5.4. Osman argued that "[i]nstead of merely determining whether the missing portion was

² Over the State's objection, the court continued the trial to February 18, 2005.

material, the district court judge attempted to re-construct the record from his notes and the docket entries.” The superior court reversed the district court’s determination and remanded “for a new trial pursuant to RALJ 5.4.” The superior court ruled that “[h]aving considered the briefing and arguments of both sides the court in this instance does find the missing portions of the transcript to be material.”³

A commissioner of this court granted the State’s motion for discretionary review to address the question of what standard of review applies when the superior court reviews a district court’s determination of whether missing portions of the electronic record are significant or material under RALJ 5.4.

ANALYSIS

The parties dispute whether the superior court applied the correct standard of review when reversing the district court’s determination that the missing portion of the CrRLJ 3.5 and CrRLJ 3.6 hearing was not significant or material.

As a general rule, all proceedings in a court of limited jurisdiction “shall be recorded by electronic means.” RALJ 5.1. Under RALJ 4.1, the superior court has the authority to perform all acts necessary to review a case on appeal.⁴ After an appeal is filed, the district court only has authority to act as provided in the RALJ

³ The order also states that “this missing portion of the record is material.”

⁴ RALJ 4.1 provides:

(a) Superior Court. After a notice of appeal has been filed, the superior court has authority to perform all acts necessary to secure the fair and orderly review of the case.

(b) Court of Limited Jurisdiction. After a notice of appeal has been filed, and while the case is on appeal, the court of limited jurisdiction has authority to act in a case only to the extent provided in these rules, unless the superior court limits or expands that authority in a particular case.

rules. RALJ 4.1. RALJ 5.4 delegates to the court of limited jurisdiction the authority to determine whether the missing portions of the electronic record are material or significant:

In the event of loss or damage of the electronic record, or any significant or material portion thereof, the appellant, upon motion to the superior court, shall be entitled to a new trial, but only if the loss or damage of the record is not attributable to the appellant's malfeasance. In lieu of a new trial, the parties may stipulate to a nonelectronic record as provided in rule 6.1(b). The court of limited jurisdiction shall have the authority to determine whether or not significant or material portions of the electronic record have been lost or damaged, subject to review by the superior court upon motion.

The State contends that the superior court erred in reversing the district court's determination that the missing portion of the record was significant or material based on a de novo standard of review. The State asserts that because RALJ 5.4 expressly delegates that determination to the trial court, the standard of review is abuse of discretion. Citing cases holding that the application of a court rule to a particular set of facts is subject to de novo review, Osman argues that the standard of review for the district court's determination under RALJ 5.4 is de novo. Osman also asserts that the superior court correctly found the missing portion of the record was significant or material under RALJ 5.4.

The interpretation of a court rule is a question of law that we review de novo. State v. Robinson, 153 Wn.2d 689, 693, 107 P.3d 90 (2005). When interpreting a court rule, we apply the rules of statutory construction. In re Pers. Restraint of Stenson, 153 Wn.2d 137, 147, 102 P.3d 151 (2004). If the language of a court rule is plain and unambiguous, the court must give effect to that plain meaning. In re

Stenson, 153 Wn.2d at 146. The use of the word “shall” is presumptively mandatory. State v. Mollich, 132 Wn.2d 80, 86, 936 P.2d 408 (1997). Court rules must also be interpreted “so that ‘no word, clause or sentence is superfluous, void or insignificant.’” State v. Dassow, 95 Wn. App. 454, 458, 975 P.2d 559 (1993) (quoting State v. Raper, 47 Wn. App. 530, 536, 736 P.2d 680 (1987)).

We conclude the language of RALJ 5.4 is clear and unambiguous. Under the plain language of RALJ 5.4, an appellant is entitled to a new trial if a “significant or material portion” of the electronic record is lost or damaged.⁵ But the rule expressly delegates to the district court the authority to determine whether the lost or damaged portion of the electronic record justifies a new trial. This makes sense because the trial court is in the best position to determine if the missing portion is significant or material and is grounds for a new trial.⁶

Using a de novo standard of review for the trial court’s determination of whether the missing portions of the electronic record are significant or material is contrary to the clear language of the rule that mandates remand to the court of limited jurisdiction to make that determination. The cases Osman cites such as State v. Frankenfield, 112 Wn. App. 472, 475, 49 P.3d 921 (2002), City of College Place v. Staudenmaier, 110 Wn. App. 841, 43 P.3d 43 (2002), and State v. Dearbone, 125

⁵ RALJ 5.4 does not require a new trial if the loss or damage is attributable to the appellant. Here, there is no dispute that the loss was not attributable to Osman.

⁶ The RALJ rules do not define “significant” or “material.” When a term is undefined, we may look to the dictionary for its ordinary meaning. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998). Black’s Law Dictionary defines “material” as “of such a nature that knowledge of the item would affect a person’s decision-making; significant; essential.” Black’s Law Dictionary 998 (8th ed. 2004). Webster’s Dictionary defines “significant” as “having or likely to have influence or effect.” Webster’s Third New International Dictionary 2116 (1966).

Wn.2d 173, 178-79, 883 P.2d 303 (1994), are inapposite. Those cases stand for the proposition that when the trial court bases an otherwise discretionary decision solely on the application of a court rule to particular facts, the decision is reviewed de novo as a question of law. Here, the court did not just apply the rule to a particular set of facts, but rather exercised its discretion under RALJ 5.4 in determining whether the missing portion was significant or material in the context of the trial.

We conclude that an abuse of discretion standard of review applies to the decision of a court of limited jurisdiction of whether missing portion of the record is significant or material under RALJ 5.4. Consequently, we hold that the superior court erred in applying a de novo standard of review and impermissibly exceeded its authority by substituting its judgment for that of the district court and finding the missing portion of the record was significant and material under RALJ 5.4. Glaefke v. Reichow, 51 Wn. App. 613, 614-15, 754 P.2d 1037 (1988) (if the superior court substitutes its judgment for the district court, it exceeds its limited scope of review).

Even if the correct standard of review of the decision under RALJ 5.4 is abuse of discretion, Osman contends the district court's determination that the missing portion of the pretrial suppression hearing is not significant or material was an abuse of discretion. A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

First, Osman contends that in deciding whether the missing portion of the record was significant or material, the district court impermissibly reconstructed the

record. We disagree. The record reveals that the district court judge did not reconstruct the record, but rather compared his notes with the court docket to determine whether the missing portion was significant and material under RALJ 5.4.

RALJ 5.4 does not address a preferred procedure for a court of limited jurisdiction to determine whether the missing portion of an electronic record is significant or material. However, by delegating that determination to the court of limited jurisdiction, the rule recognizes the trial court's critical role in making that decision and accordingly gives the court discretion to fashion an appropriate procedure. Here, the court docket sets forth in detail the district court's findings and conclusions on the motion to suppress under CrRLJ 3.5 and CrRLJ 3.6. The court did not abuse its discretion by reviewing the court docket and the judge's notes from the hearing to determine whether the missing portion of the record was significant or material.

Osman also contends that the district court erred because the missing portion of the record that contains the court's findings and oral decision on the CrRLJ 3.5 and CrRLJ 3.6 motion to suppress is significant and material for purposes of the RALJ appeal. We disagree.

As reflected in the court docket, the court ruled that Deputy Jeffries had probable cause to stop the car and to arrest Osman and that Osman's statement that he had two beers and was okay to drive was admissible, but any statements that Osman made after he invoked his right to an attorney were suppressed, and Osman's refusal to submit to the breath alcohol test was suppressed. The court docket states:

Court finds defendant was read his rights in the field and

understood his rights in the field. Statements made thereafter are admissible. Statements made are a waiver by conduct that includes the fact that he stated he had 2 beers and was okay to drive.

Court finds that the defendant was read his rights at the SeaTac facility and that he invoked his rights and any statements made after the second reading of rights are suppressed.

Court finds implied consent warnings for breath were read to defendant in the field and at the SeaTac facility. Court is not satisfied that defendant understood his rights. Therefore, BAC refusal is suppressed.

Court finds that there was probable cause to stop defendant based on the defendant's driving observed by Officer Jeffries.

Court finds probable cause to arrest defendant.

The district court's decision that Osman's statement that he had two beers and was okay to drive was admissible and that Deputy Jeffries had probable cause to stop the car and arrest Osman are the only rulings adverse to Osman. It is clear from the record that the district court admitted Osman's statement based on finding Deputy Jeffries's testimony that he read Osman his constitutional rights and that Osman understood his rights more credible than Osman's testimony.⁷ "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The only other pretrial decisions subject to a RALJ appeal are the district court's rulings that Deputy Jeffries had probable cause to stop and to arrest Osman. On appeal of denial of a motion to suppress, findings are reviewed for substantial evidence and the conclusions of law derived from those findings are reviewed de novo. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).⁸ A de novo

⁷ In addition, Osman's statement would still be admissible as a statement against interest under ER 804(b)(3).

⁸ The Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) do not require the district court to enter written findings. See CrRLJ 3.6.

standard of review also applies to the question of whether the stop was valid. State v. Byrd, 110 Wn. App. 259, 262 n.2, 39 P.3d 1010 (2002).

To justify an investigative stop of an automobile, the police officer must have reasonable and articulable suspicion that the person is engaging in criminal activity. State v. Kennedy, 107 Wn.2d 1, 5, 726 P.2d 445 (1986). The analysis focuses on “the reasonableness of the officer’s activities with respect to the privacy rights invaded.” Kennedy, 107 Wn.2d at 6. A court must evaluate the reasonableness of the officer’s suspicion under the totality of the circumstances known to the officer at the time of the stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

A police officer may arrest a person without a warrant based on probable cause to believe that the person has violated a traffic law such as reckless driving or driving while intoxicated. O’Neill v. Dep’t of Licensing, 62 Wn. App. 112, 116, 813 P.2d 166 (1991). Probable cause to arrest exists if, under the circumstances, a reasonably cautious person would believe an offense is being committed. O’Neill, 62 Wn. App. at 116-17. Courts give consideration to the arresting officer’s special expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980).

Here, the court docket contains the district court’s findings and conclusions and the record contains all of Deputy Jeffries’s testimony, Osman’s direct examination, and nearly all of Osman’s cross examination. This record allows Osman to challenge whether Deputy Jeffries had probable cause to stop and to arrest.

Osman also argues that the district court abused its discretion in ruling that the missing portion of the transcript is not significant or material because there is an

inherent contradiction created by the district court's decision that Osman understood the Miranda⁹ warnings but did not understand the implied consent warnings for an alcohol breath test. We disagree. While the Miranda warnings are straightforward and easy to understand, the implied consent warnings are not. The record also shows that because Osman exercised his right to an attorney after Officer Jeffries read the Miranda warnings, he understood those rights.

Last, Osman contends that without the missing portions of the record, his attorney cannot provide effective assistance of counsel on appeal. Due process requires a record "of sufficient completeness" to properly consider the assignments of error on appeal. Draper v. Washington, 372 U.S. 487, 497, 83 S.Ct. 774, 9 L.Ed.2d 889 (1963); State v. Larson, 62 Wn.2d 64, 66-67, 381 P.2d 120 (1963). Whether the record is sufficient for appellate review is a separate question from whether a missing portion of the record is significant or material under RALJ 5.4. The absence of a portion of the record does not violate due process unless Osman can demonstrate prejudice. State v. Miller, 40 Wn. App. 483, 488, 698 P.2d 1123 (1985). On remand, Osman must demonstrate how in the absence of the missing portion of the record, he is prejudiced.

We reverse the superior court decision finding the missing portion of the record is significant and material under RALJ 5.4 and remand.



⁹ Miranda v. Arizona, 396 U.S. 868, 90 S.Ct. 140, 24 L.Ed.2d 122 (1969).

No. 60359-1-I/16

WE CONCUR:

Elmington, J.

Becker, J.

APPENDIX 2

RULE 5.4
LOSS OR DAMAGE OF ELECTRONIC RECORD

In the event of loss or damage of the electronic record, or any significant or material portion thereof, the appellant, upon motion to the superior court, shall be entitled to a new trial, but only if the loss or damage of the record is not attributable to the appellant's malfeasance. In lieu of a new trial, the parties may stipulate to a nonelectronic record as provided in rule 6.1(b). The court of limited jurisdiction shall have the authority to determine whether or not significant or material portions of the electronic record have been lost or damaged, subject to review by the superior court upon motion.
