

82671-4

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

NO. 60359-1-I

STATE OF WASHINGTON,

Petitioner,

v.

ABDINASIR OSMAN,

Respondent.

RESPONDENT'S BRIEF

CHRISTINE A. JACKSON
WSBA NO. 17192
Attorney for Respondent

The Defender Association
810 Third Avenue, Suite 800
Seattle, WA 98104
(206) 447-3900, ext. 704
chris.jackson@defender.org

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY -5 PM 4:52

TABLE OF CONTENTS

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 2

C. AUTHORITY 8

1. Under RALJ 5.4, the district court’s decision is “subject to review by the superior court upon motion.” Application of the rule to a set of facts is reviewed *de novo*. Nonetheless, the district court erred as a matter of law and abused its discretion. The superior court correctly determined the missing portion is significant to the appeal and correctly granted Osman a new trial pursuant to RALJ 5.4. 8

a. Standard of Review. The superior court properly reviewed the significance of the missing portion *de novo*. This is the proper standard for application of a court rule to the facts of the case. 10

b. Under either standard of review, the district court erred in ruling that the missing portion was insignificant. 13

2. The superior court had the authority to decide whether the missing portion of the record is significant and material. The superior court was not required to remand the case to the district court. The superior court’s decision may be affirmed on this ground. 22

D. CONCLUSION 25

TABLE OF AUTHORITIES

CASES

<u>Carrick v. Locke</u> , 125 Wn.2d 129, 882 P.2d 173 (1994)	19
<u>City of Seattle v. Agrellas</u> , 80 Wn.App. 130, 906 P.2d 995 (1995)	9
<u>City of Seattle v. Guay</u> , 150 Wn.2d 288, 76 P.3d 231 (2003)	18
<u>City of Seattle v. Hessler</u> , 98 Wn.2d 73, 653 P.2d 631 (1982)	23
<u>City of Seattle v. Wakefield</u> , 24 Wn.App. 48, 976 P.2d 5 (1979)	16
<u>Emwright v. King County</u> , 96 Wn.2d 538, 637 P.2d 656 (1981)	18
<u>In re Stenson</u> , 153 Wn.2d 137, 102 P.3d 151 (2004)	18
<u>Magnussen v. Tawney</u> , 109 Wn.App. 272, 34 P.3d 899 (2001)	12
<u>State v. Bobic</u> , 140 Wn.2d 250, 258, 996 P.2d 612 (2000)	22
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995)	15
<u>State v. Boyd</u> , 160 Wn.2d 424, 158 P.3d 54 (2007)	10
<u>State v. Brown</u> , 132 Wn.2d 529, 940 P.2d 546 (1997)	9
<u>State v. Classen</u> , 176 P.3d 582 (2008)	13
<u>State v. Dearbone</u> , 125 Wn.2d 173, 883 P.3d 303 (1994)	12
<u>State v. Downing</u> , 151 Wn.2d 265, 87 P.3d 1169 (2004)	11
<u>State v. Fitzpatrick</u> , 5 Wn.App. 661, 491 P.2d 262 (1971)	5
<u>State v. Frankenfield</u> , 112 Wn.App. 472, 49 P.3d 921 (2002)	12
<u>State v. Gray</u> , 64 Wn.2d 979, 395 P.2d 490 (1964)	11

<u>State v. Greenwood</u> , 120 Wn.2d 585, 845 P.2d 971 (1993)	18
<u>State v. Larson</u> , 62 Wn.2d 64, 381 P.2d 120 (1963)	9
<u>State v. Lodge</u> , 42 Wn.App. 380, 771 P.2d 1078 (1985)	11
<u>State v. Miller</u> , 40 Wn.App. 483, 698 P.2d 1123 (1985)	9
<u>State v. Mollichi</u> , 132 Wn.2d 80, 936 P.2d 408 (1997)	18
<u>State v. Parada</u> , 75 Wn.App. 224, 877 P.2d 231 (1994)	18
<u>State v. Punsalan</u> , 156 Wn.2d 875, 879, 133 P.3d 934 (2006)	18
<u>State v. Putman</u> , 65 Wn.App. 606, 610, 829 P.2d 787 (1992)	9, 22
<u>State v. Runquist</u> , 79 Wn.App. 786, 905 P.2d 922 (1995)	14
<u>State v. Staudenmaier</u> , 110 Wn.App. 841, 43 P.3d 43 (2002)	12
<u>State v. Tatum</u> , 74 Wn.App. 81, 871 P.2d 1123 (1994)	12
<u>State v. Thomas</u> , 70 Wn.App. 296, 300 (1993)	9
<u>State v. Tilton</u> , 149 Wn.2d 775, 72 P.3d 735 (2003)	13
<u>State v. Tomal</u> , 133 Wn.2d 985, 948 P.2d 833 (1997)	17
<u>State v. Uhthoff</u> , 45 Wn.App. 261, 724 P.2d 1103 (1986)	11
<u>State v. Van Woerden</u> , 93 Wn.App. 110, 967 P.2d 13 (1998).....	19
<u>State v. Wilson</u> , 75 Wn.2d 329, 450 P.2d 971 (1969)	17
<u>State v. Woods</u> , 72 Wn.App. 544, 865 P.2d 33 (1994)	9
<u>Williams v. Queen Fisheries, Inc.</u> , 2 Wn.App. 691, 469 P.2d 583 (1970)	11

COURT RULES, STATUTES, AND OTHER AUTHORITIES

CrR 3.5 21

CrR 3.6 21

CrRLJ 3.5 21

CrRLJ 3.6 21

RAP 2.5 9

RAP 9 9

RAP 10 9

RALJ 5.4 8, 9, 13, 21, 22-24

RALJ 6 9

RALJ 9.1 8, 21

BLACK'S LAW DICTIONARY (6TH ed. (1990)) 19

K. Tegland, 4B Wash. Pract., Rules Practice RALJ 5.4 (6th ed. 2002) 24

A. ISSUES PRESENTED

1. RALJ 5.4 requires a new trial when *any significant or material* portion of the electronic record is lost. The rule delegates to the district court whether “significant or material portions of the electronic record have been lost or damaged, *subject to review by the superior court.*” Application of a court rule to a set of facts is reviewed *de novo*. Did the superior court correctly determine the missing portion of the record –the remainder of the suppression hearing held pursuant to CrRLJ 3.6 and 3.5– was significant or material where that portion included: a 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 where the rulings 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, did the addition of the last sentence of the rule in

1995 remove that decision from the superior court to the district court?

B. 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 that the electronic recording of the end of the suppression hearing held pursuant to CrRLJ 3.6 and 3.5 on January 12, 2005 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 had offered to translate when the car was stopped at the scene.

Yet, no written findings and conclusions were required or filed. *See* CrRLJ 3.5, 3.6. The docket indicates that 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 a crucial portion of the record is missing, this contradiction cannot be subjected to appellate scrutiny. Also, the district court's decision to admit Exhibit D over defense counsel's objection and the court's decision on the motion to suppress 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 findings and conclusions listed in the docket do not answer these questions.¹

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

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. On October 26, 2006, the superior court considered the motion. VRP 1-16. The superior court was of the opinion that the lost portion was material under the rule and then granted the State's motion to continue the matter until after the *Brilliant* decision. VRP 11-14.

This court issued its decision in *Brilliant* on February 12, 2007. In *Brilliant*, this court held the determination of whether the lost or destroyed portion of the electronic record is significant is "in the first instance, for the district court." State v. Brilliant, 2007 Wash. App. LEXIS 220. *Brilliant* is

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

an unpublished decision and, thus, not binding authority. State v. Fitzpatrick, 5 Wn.App. 661, 668, 491 P.2d 262 (1971). Nonetheless, the superior court judge here was the same judge whose decision was reversed in *Brillant* and any review of his decision would be to the Court of Appeals Division I. Following the direction of the *Brillant* decision, the parties drafted an order and the superior court remanded the matter to the district court for that limited purpose. VRP 17, 20; CP 322-323.

A hearing was held in King County District Court on April 20, 2007. CP 342-349. Osman was represented by appointed counsel Kurt Boehl.² He argued that the missing portions were material and significant because of the court's duty to make a record findings and conclusions in support of its decisions pursuant to CrRLJ 3.5. CP 345-46. Contrary to the State's suggestion, 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

²Undersigned appointed appellate counsel does not have a contract with the King County Office of Public Defense (OPD) to represent defendants in the district courts located in the Bellevue or Redmond. Thus, OPD at undersigned counsel's request appointed Osman counsel for the remand hearing.

decision under RALJ 5.4. The district court judge devoted the bulk of his ruling to reciting information from his notes and the docket entry. CP 345-48. Instead of determining whether the missing portion was material, the district court judge attempted to re-construct the record from his notes and the docket entries. The district court made his notes an exhibit. Even if this had been the appropriate procedure, the district court did not adequately seek input from Osman's original trial counsel (who was present, but was not appointed to represent Osman) or the trial prosecutor to complete the court's written recollection of the testimony and his rulings. The judge's recollection and notes are obviously not complete, particularly of the missing portion of the proceedings. CP 347.

Moreover, the district court judge seemed to believe the missing portion of the record was not material because some of the court's rulings were in Osman's favor and the adverse decisions were "quite simple" and preserved in his written notes and the docket. The district court also relied on the fact that Ms. Osman had a full jury trial. CP 347-48. The judge also thought that Osman's admission to drinking two beers was "beneficial to the

defendant.” CP But overall, the district court was focused on making a record and not determining whether the missing portions were material or substantial.³

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 that the missing portions of the record were material and remanded the case for a new trial. CP 354-363. This court granted the State’s motion for discretionary review.

³ After reading his notes, the district court briefly offered an explanation for his decision. CP 347

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.

C. AUTHORITY

1. Under RALJ 5.4, the district court's decision is "subject to review by the superior court upon motion." Application of the rule to a set of facts is reviewed *de novo*. Nonetheless, the district court erred as a matter of law and abused its discretion. The superior court correctly determined the missing portion is significant to the appeal and correctly granted Osman a new trial pursuant to RALJ 5.4.

Under the RALJ, an appellant is entitled to a new trial when the electronic record is lost or damaged, as long as the loss is not attributable to the appellant. 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.) If a significant or material portion of the record is lost or damaged, the matter is remanded for a new trial.⁴

⁴ The 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),

This rule is a significant departure from the RAPs. The RAPs have no rule comparable to RALJ 5.4.⁵ Instead the RAPs direct the parties to reconstruct the missing portion. RALJ 5.4 does not authorize a reconstruction of the record. Yet, that is what the district court apparently 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 destroyed. In any event, the district court's decision that the missing portion is not significant to the appeal is not

RALJ 7 with RAP 10 and RAP 2.5. The rules for the record on review 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).

⁵ Due process requires an appellate record of "significant completeness" to allow for review. State v. Brown, 132 Wn.2d 529, 592, 940 P.2d 546 (1997). Where 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) (court reporter's notes lost, leading to reversal of conviction); State v. Woods, 72 Wn.App. 544, 865 P.2d 33 (1994) (paternity action reversed where sufficiency of the evidence was at issue). Reversal is not the remedy where the missing portion is not material. State v. Miller, 40 Wn.App. 483, 698 P.2d 1123 (1985) (response to court to jury question). Nonetheless, reconstruction of the record may only be done where 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.

defensible under the law and the facts of this case.

- a. **Standard of Review.** The superior court properly reviewed the significance of the missing portion *de novo*. This is the proper standard for application of a court rule to the facts of the case.

The State claims that the district court had the authority to craft a “preferred procedure” for making this decision and should be reviewed only for an abuse of discretion. Amended Brief of Appellant at 8-9. The State cites no authority for this proposition. The State also does not explain what “preferred procedure” is necessary to resolve the basic question posed by the rule: are the missing portions material or significant? Instead, the State attempts to support its position by citation to cases where a trial court’s materiality decisions are reviewed for abuse of discretion. In each of these cases, 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, 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) (both court rule and statute expressly grant 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. Uhthoff, 45 Wn.App. 261, 268-69, 724 P.2d 1103 (1986) (trial court expressly granted discretion to balance the competing interests in determining whether a confidential informant’s identity will be provided to the 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) (Pursuant to RCW 10.55.060 a court “may” certify that an out-of-state witness is material for purposes of issuing 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) (the trial court “may” exclude even relevant and otherwise admissible evidence and deference will be given to those evidentiary decisions). 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. At issue here is whether that record is sufficient for appellate review.

In fact, the State's assertion 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 for purposes of setting the time for trial). *See also* State v. Staudenmaier, 110 Wn.App. 841, 43 P.3d 43 (2002) (reviewed *de novo* superior court's decision to decide 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 determination there existed "good cause" to extend time to serve accused with the death petition is reviewed *de novo*; definition of "good cause" is a legal issue and the finding of good cause is a mixed issue of law and fact and both are 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.”). “Significant or material” is the applicable legal threshold or prerequisite for determining whether a missing portion of the electronic record requires a new trial. The finding that a missing portion meets that standard is, at best, a mixed question of law and fact. Review of that decision is *de novo*.

This decision is analogous to that made by the appellate courts when determining whether the reconstructed record is sufficient for appellate review. See State v. Classen, 176 P.3d 582 (2008) and State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003).

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

Here the district court erred as a matter of law and abused its discretion. 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 its decision is not supported by tenable rationale. A court

abuses its discretion if it acts on untenable grounds; such grounds include factual findings unsupported by the record; use of an incorrect standard or the facts do not meet the requirements of the correct standard; or if its decision is outside the range of acceptable choices given the facts and the legal standard. State v. Runquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995).

In this case, a portion of the proceedings has been lost. The lost portion of the trial was the remainder of Osman's testimony at the suppression hearing contesting many of the arresting officer's claims, arguments of counsel and the district court's findings of fact and conclusions of law. This portion of the proceedings is clearly material and significant to the appeal. The district court's factual findings and the evidence upon which those findings were made were not preserved. This portion contained decisions that Osman is entitled to challenge on appeal. This portion is in no way immaterial simply because the district court thought that the suppression decision was simple or straightforward. It is clear from the district court's attempt to reconstruct the record that the decisions made—but not preserved-- were material in that there was substantial information

considered and ruled upon and that those decisions determined the evidence that was admissible at trial.

While the district court's conclusions of law were recorded in the docket, those conclusions are unsupported by any findings of fact. CP 8. Those are the very findings and conclusions that Osman is entitled and required to raise in his first appeal as of right. 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).

In addition, the rationale that the district gave for its 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. These factual findings lead to the inconsistent decision to deny suppression of Osman's admission in the field that he drank two beers, but to suppress the refusal. The district court opined that the admission of the consumption of alcohol was somehow beneficial to Osman. In fact, such an admission relieves the government of proving an

essential fact of the case. This is particularly true where there is no breath test or refusal. *Compare City of Seattle v. Wakefield*, 24 Wn.App. 48, 976 P.2d 5 (1979) (erroneous failure to suppress admission to drinking in DUI was harmless where the overwhelming untainted evidence included the arresting officer's observations that driver was drinking from a beer can, and there was a breath test and videotape of the driver). Thus, any error in the district court's suppression decisions is clearly significant.

Also, Osman disputed much of the arresting officer's claims, particularly those claims that whether Osman understood the officer, that his friend did not offer to translate and that the rights were read at certain points.

The existing record provides no indication how the district court resolved these disputed facts. The district court erred as a matter of law and abused its discretion by deciding that these decisions and rulings, which are not reflected in the docket or the judge's notes, were immaterial and insignificant.

The loss of Osman's testimony is also significant. It is apparent that the district court believed at least some of his testimony because the district court suppressed his post-Miranda statements in response to the *Prok* motion.

Thus, the district court must have believed or given some weight to his testimony. If the court made any credibility determinations or resolved disputed facts, such decisions are clearly “material or significant.” It is not at all clear why the district court admitted Exhibit B –Osman prior reckless driving judgment and sentence-- or what use the judge made of the piece of evidence. In addition, the entirety of the pretrial proceedings may be necessary and useful to evaluate the performance of trial counsel for purpose of an ineffective assistance of counsel claim. Errors made during trial may have been presaged by counsel’s performance or arguments in the pretrial motions.

Without these portions of the record, undersigned counsel cannot provide effective assistance to Osman. State v. Tomal, 133 Wn.2d 985, 948 P.2d 833 (1997). She is neither inclined nor required to accept the district court’s characterization of the missing decisions or record, nor its import of the appeal. The appeal must be made on the record. Matters outside the record cannot be challenged. State v. Wilson, 75 Wn.2d 329, 450 P.2d 971 (1969). Also, the appellant has the obligation to produce the record for the

appeal. RALJ 6.2, 6.3.1. Counsel cannot competently prosecute the appeal without the missing portions of the record.

Osman is "entitled to a new trial" because the missing portion is "significant or material." The superior court did not err in finding for Osman on this issue and granting a new trial. The superior court's decision is supported by a plain reading of the rule.

Court rules are interpreted under ordinary rules of statutory construction. In re Stenson, 153 Wn.2d 137, 146, 102 P.3d 151 (2004) City of Seattle v. Guay, 150 Wn.2d 288, 300, 76 P.3d 231 (2003); State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). An unambiguous court rule or statute needs no construction and will be accorded its plain meaning. State v. Punsalan, 156 Wn.2d 875, 879, 133 P.3d 934 (2006); State v. Parada, 75 Wn.App. 224, 877 P.2d 231 (1994). Where a rule or statute uses the term "shall," the meaning is presumptively mandatory. State v. Mollichi, 132 Wn.2d 80, 86, 936 P.2d 408 (1997); Emwright v. King County, 96 Wn.2d 538, 543-44, 637 P.2d 656 (1981). The presumption is even stronger in these circumstances, where the rule uses both the mandatory term

"shall" and the permissive term "may," because the terms have different meanings. Carrick v. Locke, 125 Wn.2d 129, 142, 882 P.2d 173 (1994).

Neither "significant" nor "material" are defined by the rule and should be given their common meaning. When a statutory term is undefined, the court can resort to the dictionary for its ordinary meaning. State v. Van Woerden, 93 Wn.App. 110, 116-17, 967 P.2d 13 (1998) (court relied upon the definition of "illness" found in Black's Law Dictionary). Black's Law Dictionary defines *material* as

Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form.

BLACK'S LAW DICTIONARY at 976 (6TH ed. (1990)). This definition is consistent with the common, everyday usage. Significant and material are generally synonymous, although the former also indicates size or amount as well as importance. See WEBSTER'S II New Riverside Dictionary at 430 (Material: 4. Substantial [a *material* difference]. 5. Important : Relevant [*material* evidence] Significant: 2. Important : Weighty).

The rule does not operate where an inconsequential or small portion

of the proceedings is unavailable. An 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. For example, the missing portion of the electronic proceeding contains the district court's revocation of Osman's pretrial release. This portion is not "significant or material" to the appeal because that issue is moot and cannot be addressed on direct appeal. If such portions of the trial proceedings came up missing, remand for a new trial would not be automatic.

But portions missing here are material and significant. The district court failed to preserve portions of the suppression hearing. The record is missing a portion of Osman's testimony, arguments of counsel, and—most significantly—the district court's findings of fact and conclusions of law. 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 3.5⁶, 3.6⁷ with CrRLJ 3.5⁸, 3.6.⁹ Thus, without the court's oral rulings (as well as the evidence upon which those rulings were based), this court cannot review the lower court's decision. Acting as an appellate court, the superior court is charged with determining whether the lower court's factual findings are supported by the record 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 for a new trial in this circumstance. If this case had been on appeal from a criminal trial in superior court, review could be

⁶"Duty of Court to Make Record. . . . the court shall set for *in writing*: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefor." CrR 3.5 (c) (emphasis added).

⁷"Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter *written* findings of fact and conclusions of law." CrR 3.6(b) (emphasis added).

⁸"Duty of Court to Make a Record. After the hearing, the court shall state its findings of fact and conclusions of law as to the admissibility or inadmissibility of the statement." CrRLJ 3.5(c).

⁹"Decision. The court shall state findings of fact and conclusions of law." CrRLJ 3.6(b).

based on or 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).

2. The superior court had the authority to decide whether the missing portion of the record is significant and material. The superior court was not required to remand the case to the district court. The superior court's decision may be affirmed on this ground.

This court may affirm the superior court on any basis supported by the law and the record. State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (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 for a new trial where a portion of the record was lost was addressed solely to the superior court.

Added in 1995, the last sentence of the rule provides for remand to the lower court when necessary to determine whether the substantial or material portions are actually *lost*, not whether the lost portions are *significant* or

material. The former reading requires remand only in those limited circumstances when the parties dispute whether portions are lost or damaged, i.e., the tapes are really inaudible or the electronic record is truly missing. The latter reading of the rule, advanced by the State, would require remand in every instance where a portion of the proceeding is missing, to determine if the portion is substantial or material. That is the superior court's function, however. RALJ 6.3.1(d)(3) states that the superior court shall decide disputes concerning the "completeness or accuracy of the transcript."

To the extent that the rule is ambiguous, the court should look to the rule's history to discern the supreme court's intent in adopting the rule. The Washington Supreme Court adopted rule 5.4 when it first promulgated the RALJ in 1981 without the last sentence. 127 Wn.2d at 1133. *See also City of Seattle v. Hessler*, 98 Wn.2d 73, 76-80, 653 P.2d 631 (1982). In 1995, the rule was amended to add the last sentence. 127 Wn.2d 1130-34, 1133, Appendix 1. The Washington Supreme Court adopted the amendment as

recommended by the Washington State Bar Association Rules Committee.¹⁰

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.*

K. Tegland, 4B Wash. Pract., Rules Practice RALJ 5.4 (6th ed. 2002)

(emphasis added).¹¹ CP 314-18.

¹⁰One of the official duties of the Bar Association is to recommend court rules and procedures. GR 12(b)(3). By court rule, 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).

¹¹At the time of the amendment, the courts of limited jurisdiction primarily used audio tapes to record proceedings.

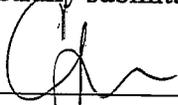
The amendment shows that the rule's last sentence was intended to permit the trial court to determine whether a transcriber could hear the record and understand what was being said. From a practical perspective this makes sense, because the trial court, not the reviewing court, should be responsible for maintaining a system that ensures the production of legible records. It would hardly be fair to require overworked superior court RALJ judges to listen to inadequate electronic records caused by a trial court's defective recording equipment. The rule's last sentence properly gives trial courts incentive to maintain testimonial records in a fashion that prevents disputes. After all, courts of limited jurisdiction are still "courts of record."

Since there is no dispute as to whether the missing portion is *lost*, the superior court had the authority to determine in the first instance whether the portion is *significant or material* and grant Osman a new trial.

D. CONCLUSION

The superior court's decision to grant a new trial pursuant to RALJ 5.4 is supported by the plain language of the rule and the applicable case law and may also be affirmed on other grounds. The superior court should be affirmed.

Respectfully submitted this 5th day of May, 2008,



Christine A. Jackson WSBA #17192
Attorney for Respondent

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Petitioner,

v.

ABDINASIR OSMAN,

Respondent.

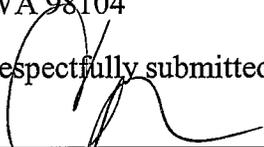
No. 60359-1-I

PROOF OF SERVICE

I certify that I caused to be delivered a copy of the Brief of Respondent and this proof of service, both dated May 5, 2008 to the Respondent by delivering the documents by U.S. Postal Service with adequate postage to the following address.

Attorney for State of Washington, Respondent
Deanna Fuller, Senior Deputy Prosecuting Attorney
Christina Miyamasu, Deputy Prosecuting Attorney
King County Prosecutor's Office
5th Floor
King County Courthouse
Third & James
Seattle, WA 98104

Respectfully submitted, May 5, 2008,


Christine A. Jackson
WSBA #17192
Attorney for Respondent

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY -5 PM 4:52