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STATE OF WASHINGTON

2009 AUG -3 P 4: 00 NO. 82671-4

BY RONALD R. CARPENTER

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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ABDINASIR A. OSMAN,

Petitioner.

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STATE OF WASHINGTON  
*CR*

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

- 1. When a portion of the verbatim record on review is missing, RALJ 5.4 requires the trial court to determine whether that missing portion is “significant or material.” Portions of pre-trial hearings and rulings were missing from Osman’s trial, but the trial court determined that these portions were not “significant or material” because Osman prevailed in several rulings and because, as to those rulings where Osman lost, other sources of information preserved a record upon which appellate review could be conducted. Did the trial court correctly determine that a missing record is not “significant or material” under RALJ 5.4 if other sources of information will permit effective review?**
- 2. RALJ 5.4 requires a trial court to determine whether a missing verbatim record is “significant or material” subject to review by the superior court. A trial court is in the best position to decide questions of materiality of missing portions of the record because it has personally viewed the entire proceedings and has the greatest understanding of the context surrounding the missing portions. When the trial court is in the best position to decide significance or materiality, appellate courts review for abuse of discretion. Should this court use the abuse of discretion standard in deciding whether the trial court correctly ruled the missing portion of the record was neither material nor significant?**

**B. STATEMENT OF THE CASE**

The State incorporates by reference the statement of facts in the Court of Appeals opinion. State v. Osman, 147 Wn. App. 867, 871-76, 197 P.3d 1198 (2008); Amended Brief of Appellant at 1-6.

In short, the State charged Osman with driving under the influence. Osman pleaded not guilty and set the case for motions and trial. CP 2-5. At the motions hearing on January 12, 2005, the court heard testimony from Deputy Jeffries and Osman. See 1RP.<sup>1</sup> On February 24, 2005, Osman proceeded to jury trial and was found guilty of driving under the influence. CP 10, 12. In preparing for RALJ appeal, the parties discovered that a portion of the motions hearing was lost. The court docket detailing the events of the motion hearing including the court's findings and conclusions exists. CP 7-8. The District Court found in reviewing its notes from the motion hearing that the docket was sufficient so that the missing record was neither material nor significant. 2RP 5-7. The RALJ court, applying a *de novo* standard of review, reversed the District Court, finding the missing record material. 3RP 10. The Court of Appeals found that an abuse of discretion standard of review applies to the decision of a court of limited jurisdiction on whether a missing portion of the record is material or significant, and reversed the Superior Court decision. Osman, 147 Wn. App. at 879, 883.

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<sup>1</sup> 1RP (January 12, 2005 CrRLJ 3.5 and 3.6 Motion Hearing); 2RP (April 20, 2007 Remand Hearing); 3RP (June 22, 2007 RALJ Hearing).

The State disagrees with the following five factual assertions made in Osman's petition for review.

First, Osman states that the missing portion of the electronic record contained "the only record of the district court's findings and conclusions." Petition for Review at 2, 3. This assertion is incorrect; the court docket sets forth in detail the district court's findings and conclusions on the motion to suppress. CP 8-9.

Second, Osman states that the district court's decision was "inherently contradictory" as it found Osman understood his Miranda<sup>2</sup> warnings but did not understand his implied consent warnings. Petition for Review at 3. There is no contradiction. Miranda warnings are relatively straightforward and easy to understand whereas implied consent warnings focus on more complicated legal and administrative consequences of taking or refusing the breath alcohol test. Thus, a non-English speaker might understand his Miranda rights but fail to understand his implied consent warnings. Moreover, the record shows that Osman understood his Miranda warnings because he invoked his right to

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

counsel. CP 8; 1RP 36.<sup>3</sup> The district court's ruling is internally consistent.

Third, Osman states that Judge Yeatts "attempted to reconstruct the record from his notes." Petition for Review at 5. However, Judge Yeatts did not reconstruct the record. Rather, he compared his notes with the court docket to determine whether the missing portion was significant or material as he is required to do under RALJ 5.4. 2RP 5-7.

Fourth, Osman states that Judge Yeatts "did not seek input from Osman's original trial counsel." Petition for Review at 5. However, after reading his notes into the record -- at the insistence of Osman's counsel -- Judge Yeatts asked Osman's trial counsel, "Ms. Friese if there's anything that you think I misstated, you're welcome to jump in." 2RP 8. At which point, Osman's trial counsel responded, "Not at this time unless Mr. Boehl has some questions for me, I didn't." Id.

Finally, Osman states "the judge's recollection and notes were incomplete." Petition for Review at 5. A summary is always less than the original, but Osman does not say what "material" information is lacking.

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C. **ARGUMENT**

1. **UNDER ANY STANDARD, THE MISSING PORTION OF THE RECORD IS NEITHER MATERIAL NOR SIGNIFICANT BECAUSE THE RECORD AS A WHOLE IS SUFFICIENT FOR APPELLATE REVIEW.**

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion. State ex. rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court abuses its discretion where its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Id. "An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court." State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

Here, the trial court concluded that the missing portions of the record in Osman's case were not material or significant because other sources of information made the record in his case adequate for the appellate issues Osman could potentially raise. Under any standard of review, this Court should affirm that decision.

The purpose of appellate review is to ascertain whether a defendant had a fair trial. Article 1, section 22 of the Washington

Constitution entitles a criminal defendant to a "record of sufficient completeness" to allow appellate review of potential errors. State v. Classen, 143 Wn. App. 45, 54, 176 P.3d 582 (quoting State v. Larson, 62 Wn.2d 64, 66, 381 P.2d 120 (1963)). "A record of sufficient completeness does not translate automatically into a complete verbatim transcript." State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). Thus, when a portion of the record is missing, the significance and materiality of that portion should be determined by asking whether other information is sufficient to allow review for trial error. RALJ 5.4 preserves these rights:

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.

To determine whether a missing record meets this standard, this Court must ascertain the meaning of the phrase "significant or material." As the trial court implicitly concluded, the only reasonable interpretation of this phrase is that a missing record is "material or significant" if that portion of the record was important to the case and there is no other reliable means to determine what occurred during the proceedings. This interpretation best

effectuates the purpose of the rule, which is to facilitate appellate review, not to simply grant a new trial whenever a recording device fails at an important stage of the proceedings.

The ordinary dictionary definitions of "material" and "significant" support the trial court's conclusion. When a statutory term is undefined, the term is given its ordinary dictionary meaning. State v. Edwards, 84 Wn. App. 5, 10, 924 P.2d 397 (1996). 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 (8<sup>th</sup> ed. 2004). Webster's Dictionary defines "significant" as "having or likely to have influence or effect." Webster's Third New International Dictionary 2116 (1966).

Here, the missing portion of the record is a 73-minute portion of the January 12, 2005 CrRLJ 3.5 and 3.6 motion hearing. That portion includes the end of the State's cross examination of Osman, Osman's redirect, the argument of counsel, and the court's rulings. CP 8; 1RP 72. The court's oral findings and conclusions on the CrRLJ 3.5 and 3.6 motions are reflected in the court docket, which 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 of 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 defendant's driving observed by Officer Jeffries.

Court finds probable cause to arrest defendant.

CP 8-9. Osman has not disputed the accuracy of this recount of the rulings, even when given the opportunity in the trial court. 2RP 8.

Only two of these rulings were adverse to Osman: the decision that Osman's post-arrest statement that he "had two beers and was okay to drive" was admissible, and the decision that Deputy Jeffries had probable cause to stop the car and arrest Osman. The first ruling will be subject to adequate appellate review because the district court's admission of Osman's "two beers" statement was necessarily based on a credibility determination. That is, the district court must have found that Deputy Jeffries'

testimony that he read Osman his constitutional rights and that Osman understood his rights was more credible than Osman's testimony to the contrary. See CP 8-9; 1RP 28-35, 63-4, 71. "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). Thus, the lost portion of the recording will not impact an appellate court's ability to effectively decide that claimed error. For appellate purposes, the absence of that portion of the decision is not material or significant.

Likewise, effective appellate review of the second set of decisions -- the probable cause findings -- is not threatened by the loss of the recording. On appeal of a 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. 866, 880, 26 P.3d 298 (2001).

Here, the court docket contains the district court's findings and conclusions and the record contains all of Deputy Jeffries' testimony, Osman's direct examination, and nearly all of Osman's cross examination. See CP 7-9, 1RP. Based on Judge Yeatts's notes, Osman did not testify to any of his conduct that preceded the stop. See 2RP 7. Instead, Osman's direct testimony focused

on his claim that he had understood very little during his contact with Deputy Jeffries, that he had required a Somali interpreter, and that he had suffered police brutality. 1RP 60-67. The cross examination continued along that line of questioning: he testified that he took the test for his driver's license with a Somali interpreter, was familiar with DUI investigations from prior incidents and knew that a DUI would lead to license suspension. 2RP 7. Likewise, on redirect, Osman testified that he had been through a previous DUI trial and that there was a Prok<sup>4</sup> issue in that case as well. 2RP 7.

Osman has provided no reason to believe that the short portion of the electronic record that is missing is material to Osman's ability to challenge the basis for the initial stop or arrest on appeal.

Given the evidence in the preserved portion of the record, the court's findings and conclusions detailed in the docket, and the trial court's recollection of the missing portion of the record, the missing portion is neither material nor significant to Osman's ability to appeal the rulings that went against him. This is true even under a *de novo* review standard, let alone review for abuse of discretion.

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<sup>4</sup> State v. Prok, 107 Wn.2d 153, 727 P.2d 652 (1986) (Suppression of evidence was appropriate where the Miranda warning was not "made in words easily

Osman essentially argues that a missing verbatim report is "material or significant" whenever it deals with a subject that was important to the trial regardless of whether that missing portion will be significant or material to appellate review. Under his interpretation, a new trial is required every time an electronic recording fails, even if another means of preserving the hearing was available. For example, under Osman's argument, a new trial would be required even if a private party had independently recorded the hearing, or even if one party had hired a stenographer to record every word spoken at the hearing. That interpretation of the rule is absurd, as it would require a new trial even if appellate review could be conducted based on one of the alternatives. The drafters of RALJ 5.4 could not have intended such an absurdity. The more reasonable interpretation of the rule would be that the trial court can decide the significance and materiality of a missing record to the appeal, based on the entire available record.

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understood" because they were given in English, yet Prok spoke only Cambodian.).

2. **THE ABUSE OF DISCRETION STANDARD SHOULD APPLY TO A TRIAL COURT'S DECISION THAT MISSING TRIAL COURT RECORDS ARE NEITHER MATERIAL NOR SIGNIFICANT TO THE APPEAL.**

Court rules are interpreted pursuant to the rules of statutory construction. In re Stenson, 153 Wn.2d 137, 146, 102 P.3d 151 (2004). Where a court rule is unambiguous, it is not subject to construction. Id. The language of a court rule is unambiguous if it is not "susceptible to more than one reasonable meaning." Id. The use of the word "shall" is presumptively mandatory. State v. Mollichi, 132 Wn.2d 80, 86, 936 P.2d 408 (1997). Court rules must also be interpreted such that "no word, clause or sentence is superfluous, void or insignificant." State v. Raper, 47 Wn. App. 530, 536, 736 P.2d 680 (1987). The interpretation of a court rule is a question of law that is reviewed *de novo*. State v. Robinson, 153 Wn.2d 689, 693, 107 P.3d 90 (2005).

RALJ 5.4 entitles appellants to new trials when significant or material portions of the electronic record have been lost, but leaves the decision on materiality up to the court of limited jurisdiction:

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.

After designating the materiality and significance determination to the court of limited jurisdiction, RALJ 5.4 does not specify a procedure for making that determination. Instead, the rule leaves to the discretion of the court of limited jurisdiction, the manner in which it will make that determination. The fact that the court of limited jurisdiction has authority to make the materiality determination, combined with the fact that the court of limited jurisdiction is left to determine the procedures for making the determination of materiality, suggests that the determination of materiality should be reviewed for abuse of discretion.

In similar contexts, a trial court's decision as to "materiality" is reviewed for abuse of discretion. For instance, CrR 7.5(a) permits the court to grant a new trial where "it affirmatively appears that a substantial right of the defendant was materially affected." (emphasis added). The rule provides a list of bases upon which the trial court may grant a new trial, including "newly discovered evidence material for the defendant, which the defendant could not

have discovered with reasonable diligence and produced at trial." CrR 7.5(a)(3) (emphasis added). The grant or denial of a motion for a new trial under this rule is reviewed under the abuse of discretion standard. See State v. Taylor, 60 Wn.2d 32, 40, 371 P.2d 617 (1962); State v. Hutcheson, 62 Wn. App. 282, 297, 813 P.2d 1283 (1991); State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (2002). Deference is warranted as the trial judge is in a "peculiarly favorable position for determining justly the question whether or not the defendant has been accorded a fair trial." Taylor, 60 Wn.2d at 40. The trial judge hears the testimony, observes the jurors, and has the unique opportunity of testing the truth of the defendant's statements by noticing his demeanor. Id.

Likewise, deferring to the court of limited jurisdiction is appropriate because that court, like any trial court considering a motion for mistrial or a new trial, is in the best position to judge the significance of part of the proceedings it has conducted. The court of limited jurisdiction heard the missing portion of the record as well as the surrounding testimony and argument. Thus, the court of limited jurisdiction is in the best position to know what portions of the record were material or significant role in its resulting rulings.

Moreover, it would be a waste of time and judicial resources to remand to give the court of limited jurisdiction the opportunity to make the materiality and significance determination subject to *de novo* review by the superior court. If the court of limited jurisdiction is entitled to no deference, there is no reason to remand instead of having the superior court make that determination in the first instance in its appellate capacity. This is especially true if, as Osman argues, the court of limited jurisdiction is not permitted to supplement the record with other information.

Osman contends, however, that RALJ 5.4 does not permit remand to the court of limited jurisdiction for a materiality determination. He argues that RALJ 5.4 confers no more authority on the district court than is necessary to determine whether a portion of the record is *actually* lost or missing and not whether such a portion is "significant or material." But to convey Osman's proposed meaning, RALJ 5.4 would need to say only that the district court has "the authority to determine whether or not portions of the electronic record have been lost or damaged." Thus, Osman's reading of RALJ 5.4 renders the words "significant or

material," as used in the second sentence of RALJ 5.4,<sup>5</sup>  
superfluous.

Further, Osman's reliance on legislative history to support his argument is misplaced where the language of the rule is plain and unambiguous. The rule expressly delegates -- to the court of limited jurisdiction -- the authority to determine whether the lost or damaged portion of the record justifies a new trial. Osman has failed to point to any word or phrase in RALJ 5.4 that introduces any ambiguity; thus, resort to the legislative history is unwarranted. "Judicial investigation of legislative history has a tendency to become . . . an exercise in 'looking over a crowd and picking out your friends.'" Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568, 125 S.Ct. 2611 (2005) (citations omitted). Moreover, "judicial reliance on legislative materials like committee reports . . . may give unrepresentative committee members -- or, worse yet, unelected staffers and lobbyists -- both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." Id. For this reason, when a statute is unambiguous, courts

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<sup>5</sup> "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."

“may not look beyond the language nor consider the legislative history.” State v. Watson, 146 Wn.2d 947, 955, 51 P.3d 66 (2002). A statute is ambiguous only “if it can be reasonably interpreted in more than one way.” Id. A statute is not ambiguous “simply because different interpretations are conceivable.” Id. In any event, as explained above, Osman’s interpretation makes no practical sense whereas the State’s interpretation best effectuates judicial review.

Osman further contends that under “well established law,” the appropriate standard of review is *de novo*. Petition for Review at 12. In support of this contention, Osman cites to a number of cases that apply a *de novo* standard for reviewing a trial court’s application of a court rule or statute to a specific set of facts. Petition for Review at 12-3. However, the cases cited by Osman stand for the proposition that when the trial court bases an otherwise discretionary ruling solely on the application of a court rule to a particular set of facts, the decision is reviewed *de novo* as a question of law. Under RALJ 5.4, the court does not simply apply the rule to a particular set of facts, but rather exercises discretion in determining whether the missing portion of the record is significant

or material to the appeal in the context of the entire proceedings it presided over.

Moreover, appellate courts routinely review materiality determinations for an abuse of discretion. State v. Boyd, 160 Wn.2d 424, 431, 158 P.3d 54 (2007) (discretionary disclosure upon a showing of materiality under CrR 4.7(e) reviewed for an abuse of discretion); State v. Downing, 151 Wn.2d 265, 237, 87 P.3d 1169 (2004) (grant or denial of a continuance based in part upon materiality reviewed for an abuse of discretion); State v. Uthoff, 45 Wn. App. 261, 268-69, 724 P.2d 1103 (1986) (grant or denial of order disclosing informant's identity upon requisite showing of materiality of informant's testimony reviewed for an abuse of discretion); State v. Lodge, 42 Wn. App. 380, 391, 711 P.2d 1078 (1985) (grant or denial of motion to compel attendance of out-of-state witness upon requisite showing of materiality reviewed for an abuse of discretion); Williams v. Queen Fisheries, Inc., 2 Wn. App. 691, 699, 469 P.2d 583 (1970) (questions of relevancy and materiality of evidence ordinarily within the discretion of the trial judge); State v. Gray, 64 Wn.2d 979, 984, 395 P.2d 490 (1964) (same). Likewise, the district court's determination of materiality and significance under RALJ 5.4 should be reviewed for an abuse

of discretion. There is no "well settled law" that could require *de novo* review under RALJ 5.4.

**D. CONCLUSION**

For these reasons, the State respectfully asks this Court to affirm the Court of Appeals decision reversing the Superior Court finding that the missing portion of the record was material and significant. Even though the question should be reviewed for an abuse of discretion, the record is sufficient to permit appellate review of Osman's conviction under any standard of review.

DATED this \_\_\_\_\_ day of August, 2009.

RESPECTFULLY submitted,

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Prosecuting Attorney

By: \_\_\_\_\_  
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WSBA Office #91002

Certificate of Service by Mail

Today I sent by electronic mail directed to Christine Jackson, at The Defender Association, 810 3<sup>rd</sup> Avenue, Floor 8, Seattle, WA 98104, a copy of the Supplemental Brief of Respondent, in STATE V. ABDINASIR OSMAN, Cause No. 82671-4, Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

\_\_\_\_\_  
Name Christina Miyamasu  
Done in Seattle, Washington

\_\_\_\_\_  
Date 8/3/09

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**To:** Miyamasu, Christina  
**Subject:** RE: Supplemental Brief and Certificate of Service: State v. Osman 82671-4

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**From:** Miyamasu, Christina [mailto:Christina.Miyamasu@kingcounty.gov]  
**Sent:** Monday, August 03, 2009 3:58 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Christine Jackson  
**Subject:** Supplemental Brief and Certificate of Service: State v. Osman 82671-4

Dear Supreme Court Clerk,

Attached is the Supplemental Brief of Respondent and Certificate of Service in State v. Abdinasir Osman, No. 82671-4. Defense counsel is copied on this message. Please let me know if there are any difficulties with this filing.

Christina Miyamasu, WSBA No. 36634

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**From:** Christine Jackson [mailto:jacksonc@defender.org]  
**Sent:** Monday, August 03, 2009 3:54 PM  
**To:** supreme@courts.wa.gov; Miyamasu, Christina; Christine Jackson  
**Subject:** Supplemental Brief State v. Osman 82671-4

Please find attached for filing the Supplemental Brief of Petitioner Osman in State v. Osman 82671-4.

--

Chris Jackson  
Supervisor for Misdemeanors & Appeals

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