No. 90939-3

No. 43937-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROMAN M. FEDEROV,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Rosanne Buckner (trial judge)

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Irrelevant, highly prejudicial "propensity" evidence was admitted and the error was not harmless.

2. The trial court erred in refusing to suppress evidence of a breath test which was the result of a violation of appellant Roman Federov's rule-based rights to counsel.

3. Appellant assigns error to the trial court's Findings as to Disputed Fact 2 on the CrR 3.6 motion, which provided:

> The defendant has not proved actual prejudice as a result of the lack of privacy.

CP 118. He also assigns error to the court's conclusion that

> since the defendant has not demonstrated actual prejudice, the lack of privacy afforded to the defendant did not interfere with his right to counsel.

CP 119.

4. Federov's state and federal constitutional rights to confrontation were violated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Federov was charged with attempting to elude a pursuing police vehicle and driving under the influence. At trial, over defense objection, the officer who arrested Federov was allowed to testify about finding two unrelated knives in Federov's pocket at the time of the arrest.

   Did the trial court err and is reversal required because the admission of this irrelevant, highly prejudicial evidence cannot be deemed "harmless?"

2. Before deciding whether to take a breath test which would convey information to police about his blood alcohol level, Roman Federov asked to speak to an attorney. After the officer spoke on the phone with an on-call public defendant, the officer handed Federov the phone.

During the phone call, however, the office repeatedly refused requests from both counsel and Federov asking for privacy for the communication. Instead, the officer stayed in the same room, at most moving to the other side.

Although the trial court properly found that the officer failed to give sufficient privacy for the attorney-client communication, the court declined to suppress the evidence seized after that communication, finding that Federov had not shown "prejudice."

Did the trial court err making this finding when counsel specifically testified that the lack of privacy affected his ability to confer with and advise his client freely and that there were crucial questions he could not ask for fear of causing his client to give potentially incriminating information to the police officer standing nearby?

3. At trial, to establish the foundation for admission of the breath test evidence, in order to show that the breath test machine used to measure Fedorov's level of alcohol was working, accurate and reliable, the prosecution presented only the testimony of a machine technician who was familiar with the testing and certification used to ensure accuracy and reliability of the tests.

The witness, however, was not the person who had conducted such testing and certification of the machine used in this case, nor was he present when that testing and certification had occurred.

Did the trial court err and were Fedorov's rights to confrontation violated by admission of this out-of-court evidence, prepared for the purposes of litigation, which was used to prove facts at the trial against Federov even though Federov had no opportunity to cross-examine or confront the person who created the evidence and did the tests?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Roman Federov was charged by information with attempting to elude a pursuing police vehicle with an "endangerment" enhancement, as well as a separate count of driving under the influence of intoxicants. CP 1-2; RCW 9.94A.533(11); RCW 9.94A.834; RCW

46.61.024(1); RCW 46.61.502(1)(a)(b)(c); RCW 46.61.506.

After pretrial continuances before the Honorable Katherine Stolz on February 16, April 3, 17 and 26, May 23 and 24, 2012, suppression hearings were held before the Honorable Rosanne Buckner on May 29-30 and July 30, 2012, and a jury trial followed on July 31, August 1, 2 and 6, 2012.[1] Federov was convicted as charged and, on August 31, Judge Buckner ordered him to serve standard range sentences. 4RP 334-35. Findings and conclusions were later entered in support of the rulings on the motions to suppress. See CP 93-98, 114-19; 4RP 337-42.

Federov appealed and this pleading follows.

2. Testimony at trial

Trooper Ryan Durbin of the Washington State Patrol (WSP) was sitting in his patrol car with his lights off and his radar trained on southbound traffic on I-5 near Tacoma at about 11:42 on the night of January 2, 2012, when he saw a car come through traveling at 119 miles an hour. 4RP 152-59. As the vehicle passed, Durbin turned on his emergency lights and probably also his siren, then drove onto the freeway from where he had been hidden, accelerating to try to catch up to the other car. 4RP 163. According to Durbin, the other car was in the "HOV"

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[1]The verbatim report of proceedings consists of 9 volumes, some of which are chronologically paginated. The volumes will be referred to as follows:

proceedings of February 16, April 3, 17 and 26, May 23 and 24, 2012, as "1RP;"
May 29, 2012, as "2RP;"
May 30, 2012, as "3RP;"
the four chronologically paginated volumes containing the proceedings of July 30 and 31, August 1, 2 (morning) and 31 and September 14, 2012, as "4RP;"
the separately paginated proceedings of the afternoon of August 2, 2012, as "5RP;"
August 6, 2012, as "6RP."

carpool lane on the far left but moved over all of the right lanes and got on the right shoulder to pass vehicles, accelerating away. 4RP 164.

Durbin said that, when he is looking to determine "whether or not somebody might be impaired" while driving, he looks at things not using a turn signal, speeding, "excessive lane changes" and "aggressive driving." 4RP 156. At trial, Durbin did not recall if the driver of the other car used a turn signal when making those lane changes. 4RP 165. A "dash cam" camera mounted in the trooper's car recorded the incident, however, and the video indicated that the other vehicle had, in fact, used a turn signal when changing lanes. 4RP 177.

Durbin followed the other car, going "in excess of 130" himself. 4RP 165. The other car slowed down and took an exit and Durbin followed, getting closer as the other car slowed. 4RP 165. According to Durbin, as he followed, the other car turned right on a red light and then turned left right away. 4RP 165. Durbin said the other car's lights then turned off and that car went down Pacific Avenue "the wrong way" for a moment before pulling into a business parking lot. 4RP 166.

Durbin conceded that the traffic on Pacific Avenue at the time was "light," there were not "a lot of vehicles," and there were only some cars "off in the distance" that were headed the direction of the other vehicle before it pulled off. 4RP 166.

Durbin pulled into the parking lot behind the other vehicle. 4RP 167. Both the passenger and driver's side doors on the other car opened up and a man got out of the passenger side very quickly. 4RP 167. Another man, later identified as Roman Federov, started getting out of the

driver's side slowly. 4RP 167.

Durbin parked his car quickly, then got out with his gun drawn and pointed towards the two men. 4RP 167. Durbin thought the siren was still going and was loud. 4RP 167. Durbin started yelling at the two men to get down onto the ground. 4RP 167.

The officer described the two men as "slow to respond." 4RP 168. The officer admitted, however, that the men were talking to each other in another language, one Durbin did not understand. 4RP 168. Durbin testified at trial that he found this "threatening" because he could not tell if the men were planning to attack him or anything else. 4RP 168.

Durbin admitted that he did not know whether either of the two men actually spoke or understood English. 4RP 217. The officer also conceded that he never asked Federov if he needed an interpreter or what language he spoke. 4RP 232.

According to Durbin, Federov was not "complying" with Durbin's commands because he was not getting onto the wet ground as fast as the officer thought he should and was not laying out "fully," instead getting into a "half push-up position." 4RP 169, 216.

Gun still drawn, Durbin approached Federov. 4RP 169. Durbin said it seemed like Federov was trying to get up at one point, so Durbin kicked Federov "to get [him] back on the ground." 4RP 169. Durbin then got on top of Federov and put him in handcuffs. 4RP 169. Durbin thought the passenger was "kind of moving like he was going to get up," too, so the officer told that other man to stay on the ground. 4RP 169.

Before handcuffing Federov, Durbin searched the other man,

something Durbin testified that he always did to make sure people did not have any "weapons or anything like that." 4RP 170. Durbin described pushing Federov and spreading his feet to get him off balance, saying that Federov pulled away from the officer when the officer went to pat down Federov's left pocket. 4RP 171. The officer then pushed Federov against the car "to keep him from getting away." 4RP 171. The officer testified that he was then "able to remove from his pocket two pocket knives." 4RP 171.[2]

At the time, Federov's hands were handcuffed behind his back. 4RP 224-25.

Durbin also said that, when he was handcuffing Federov, the officer could smell "the odor of intoxicants coming from his person." 4RP 170. The officer smelled the same odor coming from the passenger, later identified as Benjamin Gaidaichuk. 4RP 170, 215, 6RP 10. The trooper who transported Gaidaichuk from the scene also noted the man "smelled of intoxicants." 4RP 148-50, 255.

Durbin described Federov as having a "flush" face, "watery, blood-shot eyes" and only "fair" speech. 4RP 174. The officer also thought Federov's "coordination" appeared "poor." 4RP 174. On Durbin's report he marked the box for his opinion regarding level of intoxication, indicating "obvious." 4RP 237.

Durbin asked Federov if he had consumed any alcohol and why he had not stopped the car when the officer started following. 4RP 171. At

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[2]The propriety of the court's ruling admitting this evidence is discussed in the argument section, *infra*.

trial, Durbin did not originally remember what Federov said about the drinking but did recall Federov saying he had not seen the officer. 4RP 171. The officer's police report showed that Federov had said he had nothing to drink and had not seen the officer in his patrol car behind. 4RP 172-73, 229.

The officer admitted that the other car was fast and loud and appeared to have tinted windows, which can reduce visibility. 4RP 220.

Durbin testified that he did not conduct field sobriety tests because he did not feel that it was safe to do so under the circumstances. 4RP 175. Instead, he transported Federov to the Fife Police Department (FPD) to use their "BAC" or breath test machine. 4RP 175.

Once they arrived at FPD, Durbin gave Federov "Implied Consent Warnings" for a breath test. 4RP 183. Those warnings included that Federov could refuse the breath test but he would lose his license for a year and that his refusal could be used as evidence against him. 4RP 183. The release indicating that those warnings had been given out was not signed by Federov, but the officer said Federov was still handcuffed and thus could not sign. 4RP 185. On the release, the officer put the time of the warnings as "2358" and the year of 2011, although it was 2012. 4RP 184.

Ultimately, Federov agreed to submit to a breath test, so the officer checked Federov's mouth to make sure there were no foreign substances and then subjected Federov to an "observation period" for about 15 minutes. 4RP 186. There was a second mouth check and then another 15 minutes of "observation" during which the officer asked Federov multiple

questions. 4RP 187. One of the questions was whether Federov was driving the vehicle, to which the officer said Federov answered "yes." 4RP 189.

The officer admitted, however, that Federov also said he had consumed alcohol "since being stopped or the collision," something the officer knew was not true because the officer had been observing Federov that entire time. 4RP 190. Federov also said he had consumed a Bud Light since the stop - something else the officer knew could not be true. 4RP 190.

Federov did correctly answer some questions, like the time (about midnight), the direction he had been traveling, the day of the week, the date and the county. 4RP 191, 231-32.

According to the officer, Federov also said he had a Bud Light about an hour before the stop, at Stevens Pass, but that he did not believe his ability to drive had been affected. 4RP 191-92.

Justin Kinoy, a forensic toxicologist at Washington State Toxicology Lab, testified about preparing the "simulator solution" that was used in the BAC test given to Federov by the officer. 4RP 156-57, 276. Kinoy admitted he had no idea what happened with the solution at the agencies he sent it to and could not say whether at such places the solution is properly installed. 4RP 156-57, 276.

Trooper Al Havenner was certified as a "BAC technician" by the state toxicologist and explained the scientific principles behind the "BAC Data Master" and how it uses "infrared spectroscopy." 4RP 302-304. Havenner described the instrument as having several security systems built

in, such as the ability to "detect mouth alcohol," not printing a result when the test was "incomplete," certain filters and a feature which causes the machine to "abort" a test if there was "interference." 4RP 208. Havenner testified that the instruments were subjected to a "quality assurance procedure" involving a "series of tests" done to make sure the machine is running properly. 4RP 309-10.

After detailing those tests, the officer testified that the result of giving those tests is that they would "ensure the instrument is working accurately and properly." 4RP 310.

Havenner, however, was not the person who certified, maintained and repaired the BAC instrument in this case. 4RP 308-11. In fact, Havenner had only been certified in April of 2012, after the January 2012 date of Federov's breath test. 4RP 308. An officer other than Havenner apparently performed testing and certification on the relevant breath test machine on September 27, 2011, at least according to the "records of the instrument" someone had made. 4RP 310-11.

After detailing those tests and how they ensured "reliability" and accuracy, Havenner then told the jury that these tests had been run on the relevant machine and that the results were that "everything fell within the required parameters." 4RP 311.

A moment later, Havenner testified that the breath testing in this case showed Federov's first sample was .096 and his second was .095, above the legal limit. 4RP 320.

Benjamin Gaidaichuk and Roman Federov both testified that it was Gaidaichuk, not Federov, who drove the car that night. 6RP 12-13, 48.

Gaidaichuk testified that the two men had meant to get to a "German town" in the area to hang out with some of the youth from their church. 6RP 12-13. It was too snowy and the tires were slipping, however, so they instead stopped at the pass and hung out there for a little while. 6RP 15-18.

At the pass, Gaidaichuk had gone snowboarding and knew that Federov had gone to the bar but did not know how much Federov drank there, 6RP 13, 21. Gaidaichuk said, however, that Federov "didn't look drunk or nothing." 6RP 13. Gaidaichuk maintained that he himself had not had anything to drink, explaining that he "wasn't 21." 6RP 14, 19.

Gaidaichuk was speeding as they were driving back from the pass. 6RP 15. They decided to stop in Fife because they needed to get gas or "fill up." 6RP 15. Gaidaichuk also wanted to go to a McDonald's restaurant there, too. 6RP 15.

A photo the prosecutor showed of the area where the two men were ultimately stopped showed a McDonald's nearby. 6RP 22.

Gaidaichuk was clear that he never saw a police car behind them during the one to two minutes the officer was following. 6RP 16. Instead, Gaidaichuk said, it was only when the car pulled up that they noticed the officer's car as it "rolled up on us." 6RP 16.

Gaidaichuk admitted that he knew he was "driving kind of crazy." 6RP 16. He had been going about "90 to 110" down the freeway and said they were headed towards "Oaks Harbor or something like that in Tacoma." 6RP 21. He thought he was going to get arrested for "reckless driving or something" but, after the stop, he refused to say anything to

police that night. 6RP 16. He explained that he "didn't want to get in trouble right away." 6RP 16. He also explained that he did not want to say anything "to make it big and everybody goes to jail the same night and I didn't want to get in trouble right away." 6RP 17.

Gaidaichuk was clear that he was the one driving the car that night. 6RP 17. He remembered telling the prosecutor in one interview that they were "both driving" but explained that meant Federov had driven "there" and Gaidaichuk was driving back. 6RP 17. Gaidaichuk conceded telling the prosecutor that he did not want to say what it meant when the prosecutor had asked at that previous interview. 6RP 19.

Gaidaichuk is originally from a place called Dagestan and his first language is Russian. 6RP 23. At the time of the incident he had only known English for about five years, since he was about 16. 6RP 23. He sometimes had trouble with understanding when people said things to him in English. 6RP 24.

Gaidaichuk got out of the passenger side of the vehicle because he jumped over the seats. 6RP 24. Gaidaichuk explained they did it "[b]ecause he was drunk and was drinking and basically we switched out right away when we kind of saw the cars behind the flashing light and stuff." 6RP 24. A moment later, however, he corrected himself and said Federov was "[n]ot drunk," but that they "didn't want to get in trouble." 6RP 25.

Like Gaidaichuk, Federov's first language was Russian. 6RP 39. Federov moved to the United States only when he was nine years old. 6RP 39. At the time of the incident, Federov had known Gaidaichuk about

a year and a half, having met him through church. 6RP 39.

Federov had a fast car, which was a six-speed manual with a "cold air intake to burst horse power" and "pretty dark" tinted windows. 6RP 40, 55. Indeed, Federov said, he had trouble backing up when driving the car, because he really could not see through the hatch due to both the tint and an "aftermarket spoiler" which was "[p]retty high" on the back window and blocked the rear view. 6RP 40. The car was small, with two seats in the front and two small seats in the back, as well as a "hatch back." 6RP 60.

On New Year's Day, the day before the incident, Federov had celebrated at church and it was announced that "the youth, younger people" from church would be meeting in Leavenworth, Washington, at about 3 p.m. that next day. 6RP 41. Federov had planned to work on his car that day instead but when the day came it was raining, so Federov talked with Gaidaichuk at about 4 or 4:30 and they decided to head to Leavenworth. 6RP 41. Gaidaichuk told Federov he would take along some snowboards and they could stop on the way to or from Leavenworth to snowboard. 6RP 42. Federov also knew his brother was already in Leavenworth. 6RP 42.

Gaidaichuk and Federov started out but as soon as they got into the mountains about 40 miles from Steven's Pass, it started to snow heavily. 6RP 42. Federov was concerned that the road conditions were hazardous and knew his car did not handle well in the snow, so they decided not to continue on and instead stopped at the pass. 6RP 43. Federov had not brought snow shoes or a hat or gloves and really did not have what he

needed to snowboard, so he stayed at the lodge in the bar and spoke with some people there who knew Gaidaichuk. 6RP 43. While there, Federov drank "some mixed drinks, vodka," although he did not remember exactly how much and could just say it was "two or more." 6RP 44, 58. He started drinking probably around 7 p.m. while Gaidaichuk, an avid snowboarder, was on the slopes. 6RP 44.

Federov was not really having much fun so, at about 8 that evening, he went up to the parking lot, wanting to leave. 6RP 44. Some acquaintances of Gaidaichuk then hung out in the parking lot, too, all waiting for Gaidaichuk to "get off the mountain." 6RP 44. When Gaidaichuk finally arrived at 9 p.m., the decision was made to try to go on to Leavenworth, so they headed that way but made it only about a quarter of a mile further east before deciding to turn around. 6RP 44.

Gaidaichuk was driving as they now headed west, listening to some Russian music he had downloaded onto his iPod through the car speakers. 6RP 45. It was "pretty slow" getting off the mountain because of how slippery it was, so Gaidaichuk was initially driving with caution. 6RP 46. The two men stopped at a convenience store in Monroe, along with the other friends of Gaidaichuk who had followed in their car. 6RP 46, 58. Gaidaichuk's friends bought some drinks at the store but Federov did not have any more. 6RP 47.

At the store, it was discussed that someone knew someone who lived at an apartment complex where there was a jacuzzi and a grill. 6RP 46-47. The others were thinking of going there and the initial idea was that Gaidaichuk and Federov would go with them, too. 6RP 47.

Gaidaichuk had a female friend, however, that he had been talking to and wanted to see, so he and Federov decided to go to Tacoma to visit her instead. 6RP 48.

As they headed out again, Gaidaichuk was still driving. 6RP 48. Federov conceded he was "pretty impaired at that time" from alcohol. 6RP 48. Given the driving conditions and how he felt, Federov said, he did not believe he could have gotten them off the mountain safely in his condition, so Gaidaichuk was the one "operating the vehicle." 6RP 48.

After they left Monroe and got on Interstate 5, however, Gaidaichuk was starting to drive a "little bit reckless" and speeding. 6RP 48. Federov did not look at the speed gauge but could tell Gaidaichuck was going fast. 6RP 48. Meanwhile, the car was running out of gas and both men were hungry. 6RP 49. They decided to pull off to go to McDonald's in Fife. 6RP 49, 60. As they pulled in towards the parking lot which had McDonald's and an Arby's, they saw flashing lights "in the back." 6RP 49. Gaidaichuk immediately "veered off" towards a Wendy's parking lot and pulled in. 6RP 50.

Gaidaichuk then had a moment of panic. 6RP 50. As soon as he stopped the car and put on the brake, Gaidaichuk jumped over Federov, out the passenger door and out of the car. 6RP 50. It was clear to Federov that Gaidaichuk was "scared." 6RP 50.

Federov knew Gaidaichuk was "impaired." 6RP 50. He also knew that Gaidaichuck was a lot younger - about 20 to Federov's 32 years of age. 6RP 50. Federov then made what he would call at trial a "terrible lapse in judgment" and a "horrible decision" to try to protect Gaidaichuk

by climbing over and getting out of the driver's side. 6RP 50.

Federov explained that Gaidaichuk was young and had never been in "any kind of trouble" before. 6RP 51. Federov also felt "sort of responsible" for the younger man. 6RP 51. Federov knew Gaidaichuk's family and said he thought Gaidaichuk's dad would probably have been angry at him for Gaidaichuk getting into trouble. 6RP 51.

After Federov got out of the car, he saw the officer with a gun "trained" on him and started to panic himself. 6RP 51. Federov admitted he then "tried to go back into the car," but that he then got onto the ground. 6RP 51-52. Federov was wearing a very thin jacket and a thin shirt and it was a cold January night. 6RP 52. Because it had rained, the ground was also wet. 6RP 52. Federov was reluctant to lay completely flat and told the officer that the ground was wet but the officer just kept ordering him to get "flat" on the ground anyway. 6RP 52.

Federov conceded that, when he spoke to the officer at the police station, he maintained the fiction that he was the driver. 6RP 53, 61. Federov had seen Gaidaichuk being led away from the scene in handcuffs and was worried "they might bring some charges on him," so Federov claimed to be the driver himself. 6RP 53.

Federov also told the officer about drinking a beer in the parking lot at Steven's Pass. 6RP 54, 59. Federov was nervous but said he still did not really know "how much trouble that I was in" when he did not tell the officer who was really driving. 6RP 54. Federov admitted he "thought it was pretty light and the worst would be DUI." 6RP 55. He he had not believed that he would be in that much trouble because he really did not

think he was over the limit. 6RP 55.

When speaking to the officer that night, Federov admitted to trying to "minimize" things by telling the officer that he had only one beer earlier. 6RP 62. Federov conceded that he had been convicted of some crimes in King County when he was 17 years old, after a single incident which occurred in one night. 6RP 51, 63-64.

Federov said that Gaidaichuk was actually drinking during the last hour of the drive, while the other man was driving the car. 6RP 59.

D. ARGUMENT

1. IMPROPER, PREJUDICIAL EVIDENCE WAS ADMITTED AND THE ERROR WAS NOT HARMLESS

Neither the state nor the federal due process clauses guarantee a "perfect trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). At a minimum, however, both clauses require that any trial in a criminal case must comport with basic norms of fairness. See Miles, 73 Wn. 2d at 70. Here, the trial fell short of these standards, because the trial court improperly admitted highly prejudicial, inflammatory evidence of weapons completely irrelevant to the crimes. Further, the admission of the evidence cannot be deemed "harmless."

a. Relevant facts

During trial, when the prosecutor tried to introduce the full-length video from the officer's "dash cam," counsel objected that there was a portion which was prejudicial and not probative. 4RP 146. Specifically, he did not agree with showing "where the defendant is simply in handcuffs and he's been searched." 4RP 146.

In addition, counsel argued that evidence that a pocket knife was found during the search was "irrelevant." 4RP 147. Counsel returned to this subject a few minutes later, arguing against admission of the knife:

> I do believe that the fact that there was a pocket knife in his pocket could be seen as - - could be prejudicial to the defendant's case. It could be seen as indicative of something more to the jury. Clearly, in this case, there was nothing illegal about what was in his pocket. He didn't try to use whatever was in his pocket. I simply think there's a prejudicial effect that outweighs whatever probative value the State may be proposing from that particular portion of the video.

4RP 150. The court found that the "prejudice is outweighed by the relevancy to the issue of intoxication," overruling the objection. 4RP 150.

Havenner was then allowed to testify, in front of the jury, that, after he had secured Fedorov the officer was then "able to remove from his pocket two pocket knives." 4RP 171.

When the officer narrated what was depicted in the "dash cam" video which the jury was seeing, the officer's declared that Federov was "pulling away" from the officer as the officer was "going into his pocket, which is where the pocket knives are." 4RP 178.

b. The evidence was improper, prejudicial "propensity" evidence and reversal is required

The trial court erred and reversal is required, because admission of the evidence that Federov was carrying two knives completely unrelated to the charged crimes was improper and cannot in any way be deemed "harmless."

First, there can be no question that the evidence of the knives was completely irrelevant. Evidence is only relevant when it makes a fact which is of issue in the case more or less probable. See ER 401, 402.

Evidence which is irrelevant must be excluded, especially where it is highly likely to incite the jury to decide guilt based upon an improper basis. See, e.g., State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571 (1984).

Here, there was no claim that a knife was used in either of the charged crimes in any way shape or form. Nor was there any claim that any knives were even displayed. The knives had no relevance to the crimes charged.

Second, the trial court did not conduct a proper analysis. In finding the evidence admissible, the trial court focused on how the evidence showed "intoxication" - presumably referring to the acts of the defendant portrayed on the tape, rather than the unrelated weapons. 4RP 150. The court found the probative value for "intoxication" outweighed the prejudice.

Before the trial court was permitted to introduce the knives under ER 404(b), however, the court was required to not only identify the purpose for which the evidence will be admitted but also find that evidence "materially relevant to that purpose." State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). There was no explanation of why the defendant's unrelated possession of weapons was relevant to "intoxication," nor was there any finding that the knives were somehow "materially relevant" to that purpose.

Further, it is well-recognized that "[e]vidence of weapons is highly prejudicial, and courts have 'uniformly condemned. . . evidence of. . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.'" State v. Freeburg, 105

Wn. App. 492, 501, 20 P.3d 984 (2001). Indeed, introduction of a knife unrelated to the crime when the crime involved a knife is "of highly questionable relevance" and improper, in part because it "tended to impugn the defendant's character[.]" See State v. Oughton, 26 Wn. App. 74, 83-84, 612 P.2d 812, review denied, 94 Wn.2d 1005 (1980).

Evidence such as the weapons improperly admitted in the case is improper "propensity" evidence because it essentially tells the jury that the defendant is probably guilty because of his "propensity" or "character," not who he is. See, e.g., State v. Herzog, 73 Wn. App. 34, 49, 867 P.2d 648 (1994). Further, where improperly admitted evidence is "propensity" evidence, it is the kind which cannot be erased from juror's minds. See Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed 168 (1948).

Reversal is required. Where, as here, the court admits evidence over defense objection, reversal will be required if there is a reasonable probability that the error had an effect on the outcome of the case. See, e.g., State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984). Here, the crucial question was whether the jury believed Federov when he said he had not been driving and that it had in fact been Gaidaichuck.

There is more than a substantial likelihood that the admission of the improper evidence of completely unrelated knives had just such a likelihood here. The improper evidence was exactly the kind of evidence which cannot be erased from jurors' minds, because it was "propensity" evidence under ER 404(b), highly prejudicial and likely to cause the jury to "prejudge" the defendant, thus denying him a fair opportunity to defend

against the state's case. See Michelson, 335 U.S. at 475-76. Such evidence is akin to "superglue" in jurors' minds, so likely to stick in their memory and cause them to convict the defendant based upon the belief he is a bad person who is "by propensity" a probable perpetrator of the crime. Id.; see also, State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984). That is why there are such stringent requirements before such evidence is admissible even when relevant. See Kilgore, 147 Wn.2d at 292; see, State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995) (must not just be "relevant" but in fact have "substantial probative value" to prove a necessary part of the state's case).

Here, there was no evidence that the knives found in Federov's pockets when he was arrested were relevant to prove a "necessary part of the state's case" - or even at all. Nor was there any explanation of how the knives were relevant to "intoxication." But a "trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." Miles, 73 Wn. 2d at 70. Federov was entitled to be tried for the conduct he was accused of committing without having the jury tainted in their ability to fairly and impartially decide the case based on the evidence.

Reversal is required and this Court should so hold.

2. APPELLANT'S RIGHTS TO COUNSEL WERE VIOLATED AND THE COURT ERRED IN FAILING TO SUPPRESS THE BREATH TEST WHICH RESULTED

Effective representation "requires that a criminal defendant be permitted to confer in private with his or her attorney." State v. Garza, 99 Wn. App. 291, 994 P.2d 868, review denied, 141 Wn.2d 1014 (2000).

Further, intrusion into the privacy of attorney-client communications may violate due process. See State v. Cory, 62 Wn.2d 371, 373-74, 382 P.2d 1019 (1963). In this case, this Court should reverse, because the trial court erred in failing to suppress the breath test which was gathered after a violation of Federov's rule-based rights to counsel.

a. Relevant facts

At the suppression, Trooper Durbin, the trooper who first saw the car and ended up arresting Federov, testified about taking Federov to the Fife Police Department, which the trooper thought was the closest police station with a "BAC." 4RP 20. Durbin said that, once he got to the department, he knew Federov was still going to be Durbin's responsibility. 4RP 22. The two men were in a room that was only "29 paces by. . .17 paces" in size and had a "little seating area." 4RP 22. The BAC machine was on one end. 4RP 22.

Once there, Federov was sitting on a metal chair which had a clip to which one of Federov's arms was secured by handcuff. 4RP 23. There was a desk and normally the officer would be sitting there. 4RP 25. There was also a little "work space" and a washing machine, as well as a rack of clothing with clothes the inmates dressed in. 4RP 26.

When Federov was secure, Durbin began the 15-minute "observation," asking Federov questions from the DUI packet. 4RP 27. After he was advised of his rights Federov asked to speak to an attorney. 4RP 28. The officer, who was sitting to the right of Federov, dialed the "after-hours pager" for the Department of Assigned Counsel (DAC), the local public defender. 4RP 28. They waited a few minutes until a DAC

attorney called back. 4RP 28.

As usual, the attorney asked the officer some questions. 4RP 28. The standard questions the officer said the attorneys ask in that situation are things like the name of the suspect, the alleged crime, whether any field sobriety tests were done, whether the suspect will be booked and whether or not they are cooperative. 4RP 29.

At that point, the officer admitted, he would either give the phone to the arrested person or would put the phone on "speaker" if that was "the only option." 4RP 29. Durbin said he would then "give them as much privacy as I can." 4RP 29. The trooper admitted that this just meant he would "go to the other side of the room." 4RP 29.

Durbin denied recalling whether Federov "requested additional privacy" during the call. 4RP 29. The officer thought that Federov would have to be "speaking pretty loud" for the officer to hear. 4RP 30. Durbin also testified that he did not remember hearing any of the conversation. 4RP 30. He thought he recalled standing "back over by the washing machine" and writing on paperwork during the call. 4RP 36.

Durbin admitted that he had used this room before and that some of the other nearby facilities which had been available to him had "BAC rooms" with doors that had small windows on them so an officer could keep an eye on a suspect without having to be in the same room. 4RP 25, 33. Durbin maintained that he would never leave the room if he was watching a suspect, because the others there were busy and it was "understood when you come to the Fife jail, you're responsible for your subject[.]" 4RP 30-31.

Nicholas Andrews, the DAC attorney on call that night, returned Durbin's "page" and spoke to the trooper in order to get preliminary information like the suspect's name. 4RP 42. After getting that information, Andrews specifically asked the trooper "for privacy." 4RP 42. The attorney also advised the officer not to ask the suspect any more questions and not to perform any more tests. 4RP 43.

When the attorney asked the trooper to give the attorney and Federov "complete privacy," the trooper responded, "I can't give you privacy, you know, because of where we're at, generally." 4RP 43.

Andrews had heard this claim before, in reference to the same facility. 4RP 44. By the time of the suppression hearing, however, Andrews had noticed that, even at that same police station in Fife, troopers were no longer staying in the room and were instead leaving to let the client be alone when attorney-client communication occurred. 4RP 44.

Andrews made two requests for privacy. 4RP 45. Each time, the trooper refused the attorney's request to leave the room and allow Federov to speak freely. 4RP 45. As a result, Andrews specifically wrote on his report form for the phone call that "[t]he officer is present. Stayed in the room." 4RP 45.

Despite the circumstances, Andrews tried to gather as much information from Federov as he could "without having him answer in a verbal manner which could in fact incriminate himself or give the officer any information that may be detrimental for him." 4RP 45. The attorney also said he told his client "I don't want you to answer anything out loud unless I specifically request" because he did not want Federov to

accidentally give the officer any information. 4RP 46. Andrews also told his client to answer questions only with a "yes or no" for that very same reason. 4RP 46.

At that point, Andrews said, he usually tells a defendant their rights regarding testing and usually discusses whether or not the client wants to take the test. 4RP 46. The point is for the attorney to try to be able to advise his client based on the facts, so Andrews would try to get answers to some yes or no questions without compromising his client's rights further. 4RP 46-50.

Andrews stated that he was not able to ask questions which were "fairly important" in order to be able to properly advise his client. 4RP 47. For example, he could not ask how much Federov had consumed, a question which was important because the attorney believed that PBT's usually "run high" and, if the PBT had a low amount, the defendant might well be under the legal limit and thus want to take a test. 4RP 47-60.

The attorney was clear that his "calculation of whether or not they are over/under the limit" would change what legal advice he would give a client about taking the breath test. 4RP 47. If he thought someone was likely to "blow under the limit," he would recommend that they take the test. 4RP 47. If he thought the person was likely to "blow over," he would recommend that further testing would be refused. 4RP 47. Andrews said, "[i]f you saw how many cases where a person blew over on a PBT and you never charged it because it was under, you would be shocked." 4RP 59.

With Federov, Andrews was able to ask a few questions, such as

whether Federov had a suspended license, whether he was in a deferred prosecution, whether he had a commercial driver's license and whether he had prior DUI convictions. 4RP 57-67. The attorney was able to glean some information from the officer, such as the offense, that the PBT indicated results of .107 and whether Federov was going to be booked. 4RP 59-61.

Due to not having privacy to converse with his client freely, however, Andrews could not gather all the information he needed to give Federov his advice on that decision. 4RP 48. Instead, the attorney was limited in how he could help, because not having the privacy to ask the questions and not being able to get the information made him unable to "make a completely accurate decision" about what to advise his client to do. 4RP 48.

On his report, the attorney noted, there were a series of questions he was supposed to ask but had to write down, "[c]ould not ask due to no privacy." 4RP 71. The attorney also indicated "could not discuss consumption due to privacy." 4RP 74.

Andrews was frank in his opinion that the lack of privacy that occurred in this case affected his ability to give full and complete legal advice to Federov and that, as a result, Federov was "not being given attorney/client privilege." 4RP 48. While the attorney was able to give some advice on the consequences of refusal to submit to breath or blood tests in general, his ability to give his client adequate advice was hampered by the lack of privacy. 4RP 67, 70.

Roman Federov testified that he personally asked the officer to

give him privacy. 4RP 87. Andrews had asked Federov where the officer was and, when he learned the officer was still in the room, the attorney asked his client to ask the officer to leave. 4RP 87.

From where the officer was standing, Federov felt that the officer could hear what Federov was saying. 4RP 89. The room was not, in fact, loud but rather "very quiet.' 4RP 89. Federov testified that he did not feel free to ask detailed questions of his attorney during the conversation. 4RP 89.

In argument on the motion to suppress, the prosecutor argued that Federov's right to an attorney was not violated because that right does not include the right to complete privacy for attorney/client communications. 4RP 98. The prosecutor also said that Federov had not proved prejudice. 4RP 99. Counsel argued there was insufficient privacy, given the circumstances. 4RP 104. He also argued that there was prejudice because Andrews specifically testified that he was not able to ask important questions of Federov which could have changed his advice to his client. 4RP 105. Counsel argued that was "prejudice within itself" for counsel to be so limited in his ability to communicate with his client freely. 4RP 105. He pointed out that Federov's full ability to be advised of all of his rights and make a voluntary and intelligent decision about whether to take the breath test were violated. 4RP 106.

In ruling on the issue, the court noted that the trooper did not recall if there was a "request for privacy," in contrast to Andrews' testimony, which was clear. 4RP 109. The court noted that the attorney had requested privacy twice and that the trooper refused and stayed in the

room. 4RP 109. The court concluded that the officer had not provided sufficient privacy for Federov to have attorney/client communication. 4RP 109. The court found, however, that Federov had not shown "actual prejudice" because there was evidence that Federov was "free to ask questions" and that Federov had ultimately decided to take the breath test. 4RP 109.

b. Federov's rule-based right to counsel was violated and the breath test should have been suppressed as a result

The trial court erred in refusing to suppress the breath test despite finding that there was insufficient lack of privacy, because the test was gathered in violation of Federov's rule-based right to counsel.

State v. Koch, 53 Wn. App. 352, 767 P.2d 143, review denied, 112 Wn.2d 1022 (1989), is instructive. In Koch, Division One asked the question of whether the right to counsel under the Sixth Amendment or CrRLJ 3.1(c)(3) is denied when there is a police officer present in the room and that presence "arguably limits privacy during a telephone conversation with counsel." 53 Wn. App. at 353. In that case, two different defendants were separately arrested in different cases involving for driving while intoxicated and each had asked to speak to an attorney. For the first defendant, Hanson, the arresting officer called a defense attorney and handed the phone to Hanson, who spoke on the phone for about 10 minutes. 53 Wn. App. at 353-54. The arresting officer was 5-10 feet away, behind a brick wall with an open window, and another officer was walking in and out during the call. 53 Wn. App. at 354.

At trial, the arresting officer testified that he could not make out

what Hanson was saying and only observed her to make sure she did not put anything in her mouth, for her safety and for his own. Id. Hanson testified that she turned her back to the officer and whispered in an effort to get some privacy. Id. Hanson also said that she felt the attorney on the other end of the line could not hear her "properly" so her "ability to discuss her case was affected." 53 Wn. App. at 354.

There was no testimony, however, that Hanson ever requested "additional privacy" for the call. Id.

The second defendant, Koch, was in a room with an officer when she asked to talk to counsel. While Koch talked on the phone, the officer was seated in the same room, about 10-15 feet away. 53 Wn. App. at 354-55. The officer testified that he could hear Koch's voice but not distinguish the words Koch was saying. Koch testified that she turned her face from the officer but he told her to turn back so that she could be kept under observation. 53 Wn. App. at 355.

Koch also testified that, depending on how loud she spoke, she thought the officer could hear her. At some point during the call, her attorney asked her if the officer was near enough to hear and Koch responded that he was. 53 Wn. App. at 355. After that, the attorney told Koch to answer only "yes" or "no" to the attorney's questions. Id.

Again, however, there was no evidence that either Koch or her attorney ever asked the officer to leave the room or move further away. Id.

The trial courts for both cases dismissed the charges against each defendant, with the courts finding that Hanson had not received adequate counsel and that Koch had been denied "meaningful access to counsel."

Id. On appeal, the Court noted that the Sixth Amendment right to counsel had not yet attached because neither defendant had been cited at the time. 53 Wn. App. at 356.

The court then turned to the right to counsel under the relevant rule, CrRLJ 3.1. Id. That rule provided, in relevant part, that a defendant's right to counsel in criminal proceedings accrues "as soon as feasible after the defendant has been arrested, appears before a committing magistrate, or is formally charged, whichever occurs earliest." Id. Noting that the rule had been construed as providing more of an "opportunity" to communicate with a lawyer than with guaranteeing "actual communication," the Court found that the defendant's rule-based rights at the stage immediately after arrest "are limited," so that "often telephone consultation alone will be sufficient." 53 Wn. App. at 357.

The Court then concluded:

> Since the right to counsel at this stage of a DWI investigation is a limited one, we conclude that **the fact that neither Hanson nor Koch made a specific request for additional privacy is significant**. This fact alone would be sufficient to distinguish their cases from one upon which they [the two defendants] both rely, State v. Holland, 147 Ariz. 453, 711 P.2d 592 (1985), wherein the officer refused to comply with a direct request from counsel that he leave the room during the defendant's phone conversation so that the consultation could be confidential.

Koch, 53 Wn. App. at 357-58 (emphasis added).

Further significant for the Koch Court was another fact - that in Holland "counsel testified that the denial of his request made him unable to properly advise [the] defendant on how to proceed," whereas neither Hanson nor Koch (nor their attorneys) had made any claim of such specific

prejudice. Koch, 53 Wn. App. at 357-58.

Here, just as in Koch, Federov had a rule-based right to counsel under CrR 3.1(b)(1), the state version of the limited jurisdiction rule construed in Koch. Under CrR 3.1(b)(1), like the rule in Koch, "[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody." The right to counsel under this language accrues when the defendant is arrested for DUI and facing the decision whether to take a breath test. See, e.g., Spokane v. Kruger, 116 Wn.2d 135, 803 P.2d 305 (1991).

Unlike in Koch, however, here there was evidence that not only did Mr. Federov ask the police officer for privacy during the attorney-client phone call, the *attorney himself* also made such a request. Not only that, the officer specifically refused the attorney's repeated requests because the station the officer had chosen to go to had insufficient facilities for a private conversation to occur.

Further, unlike in Koch, here the attorney testified that his ability to advise his client fully was hampered and he was unable to ask crucial questions which could well have affected his advice about whether his client should take or refuse the breath test.

Thus, there can be no question the trial court properly found that there was insufficient privacy and a violation of the rule-based right to counsel here. The court's error was instead in concluding that Federov had not shown "prejudice" caused by that violation. The court based that conclusion on the fact that it thought there was evidence that Federov was "free to ask questions" and because Federov had ultimately decided to

agree to the breath test. 4RP 109.

_____But the fact that Federov was hypothetically "free to ask questions" did not change the fact that, due to the officer's presence, anything Federov asked could possibly be overheard by the officer. It is unclear how that potential risk of self-incrimination made Federov actually "free" to ask questions - instead he was "free" to do so *if he did not mind potentially giving the officer evidence against him*. And Federov's counsel specifically testified that he was unable to ask crucial questions such as what his client had consumed, etc., which would have potentially changed counsel's advice about taking the test. 4RP 42-43.

As Andrews testified, the attorney was forced to try to gather as much information from Federov as he could "without having him answer in a verbal manner which could in fact incriminate himself or give the officer any information that may be detrimental for him." 4RP 45. The attorney also said he told his client "I don't want you to answer anything out loud unless I specifically request" because Andrews did not want Federov to accidentally give the officer any information. 4RP 46. At that point, the communication then devolved into telling Federov not to say anything but "yes or no." 4RP 46.

Andrews stated that he was not able to ask questions which were "fairly important" in order to be able to properly advise his client. 4RP 47. The attorney was clear that his "calculation of whether or not they are over/under the limit" was affected by this inability to ask questions which could change what legal advice he would give them about giving the breath test. 4RP 47. Due to not having privacy to converse with his client

freely, however, Andrews said, he could not gather all the information he needed to give Federov his advice on that decision. 4RP 48. Instead, the attorney was limited in how he could help, because not having the privacy to ask the questions and not being able to get the information made him unable to "make a completely accurate decision" about what to advise his client to do. 4RP 48.

Federov himself testified that he did not feel free to ask detailed questions of his attorney during the conversation, because of the lack of privacy. 4RP 89.

The trial court correctly concluded that Federov's right to speak freely with his attorney was violated by the officer's refusal to give Federov privacy to speak with his attorney on the phone prior to deciding whether to take the breath test. The trial court should have then found that there was prejudice based upon the facts of the case. Had the court suppressed the evidence, the result of the trial could well have been different. This Court should reverse and remand with instructions to suppress the breath test in this case.

3. APPELLANT'S RIGHTS TO CONFRONTATION WERE VIOLATED

Under the Sixth Amendment, the accused has the right to confront the witness against him. See, Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). Similarly, Article I, § 22 of the Washington constitution protects the rights of the accused "to meet the witnesses against him face to face." See State v. Shafer, 156 Wn.2d 381, 128 P.3d 87, cert. denied, 549 U.S. 1019 (2006). In this case, the

convictions should be reversed, because the trial court admitted evidence in violation of Federov's rights to confrontation and the error cannot be deemed harmless.

a. Relevant facts

During trial, counsel objected to the testimony of Al Havenner, noting that Havenner had not performed the procedures to certify the breath test machine in this case. 4RP 288-89. Counsel argued that the evidence was "testimonial" and that Federov's right to confrontation would be violated by the admission of the testimony. 4RP 290.

The prosecutor argued that counsel could cross-examine Havenner about not being the one that performed the relevant tasks to certify the machine as reliable, but said that his testimony was an expert opinion based on a business record. 4RP 297. Counsel responded that the records were clearly prepared in anticipation of trial because "the entire Breathalyzer system is in place in order to potentially try someone or prosecute someone for DUI." 4RP 297-98. Counsel also argued that the prosecution had to show the machine was in proper working order and the maintenance was being properly done to the machine, but that the only person who could testify about that was not being called as a witness. 4RP 298.

The court overruled the objection, citing to a case called State v. Lui. 4RP 299. Counsel then argued that, in Lui, the medical examiner who testified had conducted some independent review of the evidence and reached a conclusion, which was why there was no confrontation clause violation in that case. 4RP 300. The court said it thought "the better

ruling would be to allow Havenner [to] testify, even though Trooper Stump was actually involved with the machine in this case." 4RP 300.

Havenner was then allowed to testify about being certified as a "BAC technician" by the state toxicologist and all of his training and experience. 4RP 302-305. He talked about the scientific principle behind the "BAC Data Master" and how it uses "infrared spectroscopy." 4RP 304. He talked about how the instrument had several security systems built in, such as the ability to "detect mouth alcohol," not printing a result when the test was "incomplete," how the filters work and that the machine would "abort" a test if there was "interference." 4RP 208.

Havenner admitted he had only been certified to maintain and repair BAC instruments since April 26, 2012. 4RP 308. He said he had "access to information" about instruments through the record and would "rely upon those records as a BAC tech." 4RP 309. He also said that instruments are subjected to a "quality assurance procedure" which involved a "series of tests" they do to make sure the machine is running properly. 4RP 309-10. He described the test as running "four different solutions" through the machine "ten times each" and also running "a few other tests" to see whether the machine would pass. 4RP 310.

At that point, Havenner then also said that these tests would "ensure the instrument is working accurately and properly." 4RP 310. He said it was "required" to perform these tests a "minimum of once a year" or more if needed when "repairs" needed to be done. 4RP 311.

Havenner did not himself perform these tests on the machine used in this case. 4RP 310. He relied on the "records of the instrument" as

showing that the tests were performed on September 27, 2011, by someone else. 4RP 310-11. Havenner then told the jury that the results of that testing were that "everything fell within the required parameters." 4RP 311. He said that the "breath test document" printed out by someone else showed that a "simulator solution" was attached which "basically assures that [the] instrument is still testing accurately." 4RP 312.

Havenner admitted that the solution used with the machine has to be changed every sixty days in order to be accurate. 4RP 312. He also said that, as a BAC technician, he would "examine to make sure that the evidence tape" securing the solution "hasn't been tampered with," and that the technician was required to look for a certain "range" of .072 to .088 in order to be "considered usable." 4RP 313. He said that a machine with a solution outside that range would "put itself out of service." 4RP 313. At that point, someone was "required to go and figure out what's wrong with it," testing it to make sure that someone did not just turn it off or something. 4RP 313. He said if the machine was "out of range," a technician would "replace it with new solution." 4RP 313.

Havenner did not attach the solution to this particular machine but said that was done on November 22, 2011. 4RP 314. He was not the one who performed the tests to ensure accuracy, either - instead it was all done by another trooper, Trooper Stump, who was now working in a nearby county. 4RP 314.

Havenner conceded that this particular machine had been "maintenanced" on September 26, 2011, by Stump, and was having a problem with its memory at that point so it had to be repaired as a result.

4RP 322. Havenner himself had to service the machine on July 25 to replace a breath tube. 4RP 323. Havenner did not conduct the September repairs and could only say "by going by the notes" what he thought had happened. 4RP 324. He said that "[f]or whatever reason" the machine "lost all the information stored on that data chip" in September. 4RP 324. He although thought it would have turned itself off and would "display and error code." 4RP 325.

Havenner was then asked if he had reviewed the information that the other officer had noted and "assuming that the simulator solution was prepared properly," Havenner would reach his opinions about the "accuracy and reliability of the results" of the breath test in this case. 4RP 315. Havenner admitted that he had to "assume that the officer" conducting the test "performed what we call the mouth check." 4RP 315. The trooper also admitted that he had to "assume. . . they have done the 15-minute observation period." 4RP 315.

Finally, Havenner admitted, he was also having to assume that the officer who conducted the test "did check the simulator temperature and it's where it's supposed to be." 4RP 316. Based on those assumptions and the information Havenner said the other trooper had written down about the testing and other things done on the machine, Havenner said "all eight tests are in place and proper." 4RP 316. The officer also said his opinion about this particular breath test was that "[i]t's accurate and reliable." 4RP 320. He then read the results of the tests into the record. 4RP 320-21.

In closing argument, the prosecutor relied on the "breath ticket"

and what Havenner had testified it said as showing "per se defendant is guilty of DUI." 6RP 87.

b. Appellant's confrontation clause rights were violated and reversal is required

The trial court erred and violated Federov's state and federal confrontation clause rights by admitting the "evidence" that the machine had undergone the required tests through a statement

Where, as here, there is a argument that the defendant's rights to confrontation were violated, this Court engages in de novo review. See Lilly v. Virginia, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999).

The U.S. Supreme Court's 2004 decision in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), enacted a sea change in our jurisprudence on the right to confrontation. In Crawford, the Court distinguished between "testimonial" and "nontestimonial" hearsay, holding that states have "flexibility in their development of hearsay law" for such hearsay. 541 U.S. at 58-59. Where, however, hearsay is "testimonial," the Crawford Court held, it is a violation of the Confrontation Clause for the evidence to be admitted unless the declarant is "unavailable" and the defendant had a prior opportunity for cross-examination. Id..

As a result, since Crawford, merely examining whether something is admissible under the rules of evidence is insufficient to answer the question of whether the evidence violated the defendant's rights to cross-examination.

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the Court applied the Crawford holding in the context of a certificate from a laboratory analyst. The certificate was prepared by an expert who conducted tests and concluded that, as a result of those scientific tests, the substance in question contained cocaine. 557 U.S. at 308. Rejecting the idea that statements by scientific experts should be treated differently, the Melendez-Diaz Court found that the evidence of the certificate was "testimonial" and that the expert whose work was being presented was a witness for whom the right to confrontation existed. 557 U.S. at 310-12.

Put simply, the U.S. Supreme Court concluded, "[t]he Sixth Amendment does not permit the prosecution to prove its case via ex parte out-of-court affidavits[.]" 557 U.S. at 329.

Our highest Court addressed Melendez-Diaz in 2012, in State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012). In Jasper, the Supreme Court addressed whether certifications attesting that public records either existed or did not exist were "testimonial statements subject to the demands of the confrontation clause." 174 Wn.2d at 100. The Jasper Court noted that, prior to Melendez-Diaz, our highest court had held that it was not a violation of the confrontation clause to admit such evidence. Jasper, 174 Wn.2d at 100. The Jasper Court then noted that the "teaching of Melendez-Diaz" was that such certifications were, in fact, "testimonial statements, which may not be introduced into evidence absent confrontation." Jasper, 174 Wn.2d at 100.

Williams v. Illinois, __ U.S. __, 132 S. Ct. 2221, 183 L. Ed. 2d 89

(2012), however, issued after Jasper, cast some doubt on whether Melendez-Diaz meant that *all* such evidence was inadmissible. In what Justice Kagan called a "fractured" decision (132 S. Ct. 2265), with four justices writing to express differing views, the Williams majority appears to have rejected the idea, put forth in one opinion, that out-of-court statements relied on by an expert witness will not offend the confrontation clause if they are "not offered for the truth of the matter asserted."

In Williams, the police obtained a vaginal swab from the victim and sent it to a lab which produced a DNA profile and report. Williams, 132 S. Ct. at 2229. This was done before the ultimate defendant, Williams, was under suspicion for the crime. Later, a forensic specialist who compared that profile and report to one from the defendant testified over objection that the known profile matched the profile from Williams. 132 S. Ct. at 2229-30. Five justices rejected the state court's reasoning that the evidence of the results of the DNA profile and report which the expert discussed was admissible because it was not offered for the truth of the matter asserted but just as a basis for the expert's opinion. Justice Kagan, writing for four Justices, noted that the truth of the out-of-court statement on which the expert relies is, in fact, a part of the jury's determination of "the validity of the witness's conclusion." 132 S. Ct. 2268. Justice Thomas, concurring in this point but writing separately, declared there was "no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing the statement for its truth." 132 S. Ct. at 2257.

Four justices, led by Justice Kagan, also rejected the idea that

testimonial statements are limited to those targeted at a particular person, in contrast to Justice Alito's theory that the statements made in the DNA report were not "testimonial" because they only had the "primary purpose" of gathering evidence for investigation but not to "obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time." 132 S. Ct. at 2243. Alito said a statement is not testimonial if made to "resolve an ongoing emergency," rather than gather evidence against a particular person. 132 S. Ct. at 2243.

Indeed, Justice Kagan noted, it is misleading to say that Justice Alito's decision is a "plurality," because every part of his reasoning and explanation was in fact rejected by five Justices and the only thing that was agreed upon was Alito's result, not his reasoning. 132 S. Ct. at 2254. Thus, Williams failed to provide further clarity and instead simply muddied the already frothy waters of recent confrontation clause holdings.

In this case, the lower court believed that the issue was controlled by State v. Lui, 153 Wn. App. 304, 221 P.3d 948, review granted, 168 Wn.2d 1018 (2010). In Lui, the lower appellate court held that Melendez-Diaz did not "preclude a qualified expert" from forming their own opinion and testifying about it, even if that opinion relied on "another expert's work product." Lui, 153 Wn. App. at 318-19. The medical examiner who had conducted an autopsy had moved to another state and her supervisor, the Chief Medical Examiner, had co-signed the autopsy report which he said meant he had reviewed "the report, the photographs, the materials collected, as evidence. . .discussed the case with the principal pathologist" and reached his own conclusions. 153 Wn. App. at 307-308. He also

testified that he had discussed the work at the time it was being done and that he recalled seeing the body himself. Id

_____A DNA expert also testified about tests that were done by someone else. 153 Wn. App. at 309. She had reviewed the notes and reports of others and explained the general technology, chain of custody procedures and "other quality assurance measures" and, based on that "independent review of the testing results" testified that the defendant could not be excluded as the source of DNA (unlike 99.7 percent of the population). 153 Wn. App. at 311-12. After first noting that Melendez-Diaz had held that lab analysts can be subject to confrontation clause requirements, and that their testimony was not the result of tests so "neutral" or "scientific" that such confrontation would be unhelpful, the Lui Court found Melendez-Diaz "distinguishable." Lui, 153 Wn. App. at 318-19. According to the Lui Court, it was significant that the reports performed by others "were not offered in lieu of live testimony" or admitted as evidence but rather on the basis of showing how the experts had formed their opinion i.e., the opinion that they testified about and were subject to examination about at trial. Lui, 153 Wn. App. at 319-20.

The Lui Court rejected the idea that the statements in the reports were "testimonial" and the witnesses were "simply acting as surrogates for the true witnesses against him" whom the defemdant could not confront. Id. Instead, the Court was swayed by the medical examiner's testimony based on his own "independent review" of the evidence, and the DNA expert having conducted her "own interpretation" of the data which resulted from the DNA test. 153 Wn. App. at 320-21. Because experts

did not have to have personal knowledge of all of the evidence upon which they rely in forming their opinion, the Lui Court was convinced that there was no confrontation clause problem in that case.

Lui is on direct review in our Supreme Court on this very issue. Further, since Lui, another U.S. Supreme Court case has come out on this issue. In Bullcoming v. New Mexico, __ U.S. __, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), a defendant charged with DUI was given a blood alcohol test but the person who conducted the test did not testify. Instead, the testimony was from another analyst who was "familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." The U.S. Supreme Court majority found that the in-court testimony of the scientist who neither signed the certification nor performed or observed the test violated the confrontation clause rights of the defendant because such "surrogate" testimony could not "expose any lapses or lies on the certifying analyst's part." 131 S. Ct. at 2715.

Here, the testimony from the officer about whether the breath test had been properly calibrated and thus the test was "reliable and accurate" when performed on Federov was just such "surrogate" testimony. With that evidence, the prosecution was trying to show the truth of the matter asserted i.e., that all of the required tests were done and the machine was thus certified and accurate when used on Federov. But the prosecution did not present the evidence of the person who had done those tests and made that certifications. As in Bullcoming, the surrogate testimony of the officer who did not conduct the tests could not "expose any lapses or lies

on the certifying analyst's part." 131 S. Ct. at 2715.

The evidence of the breath test was admitted in violation of Federov's rights to confront and cross-examine the witnesses against him. And that evidence was crucial in order to convict. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 19th day of April , 2013.

Respectfully submitted,

Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
P.O. Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Mr. Roman Federov, DOC 791256, Coyote Ridge CC, PO Box 769, Connell, WA. 99326.

DATED this 19th day of April , 2013.

Respectfully submitted,

Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
P.O. Box 31017
Seattle, Washington 98103
(206) 782-3353

RUSSELL SELK LAW OFFICES

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