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

NO. 44021-1-II

STATE OF WASHINGTON

Petitioner,

vs.

ASCENSION SALGADO-MENDOZA

Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 13-1-00105-1
(Dist. Court No. 8560)

APPELLANT'S BRIEF

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Date: November 19, 2014

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2. The court erred when it found the trial court abused its discretion when it limited an expert's testimony.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the Superior Court's ruling improper because it imputed a prosecution duty of discovery beyond that required by CrRLJ 4.7?
2. Whether the trial court properly limited Dr. Hlastala's testimony to opinion useful to the finder of fact?

C. STATEMENT OF THE CASE

Mr. Salgado-Mendoza was arrested on August 11, 2012, for Driving Under the Influence. Mr. Salgado-Mendoza gave breath samples of 0.103 and 0.104 BAC. CP 26b. He was booked for DUI.

The State filed its witness list on December 11, 2012, listing the eight Toxicologists employed by the State Toxicology Laboratory. CP 19c.

The trial began on May 9, 2013. The defense filed motions in limine seeking, among other issues, to exclude the State Toxicologist. CP 33a-f. The defense motion acknowledged that the prosecutor did not know which toxicologist would testify at trial and did not have the ability to compel the State Toxicologist to identify the specific toxicologist ahead of time. CP 33b-c. The motion was denied.

Dr. Hlastala testified on May 10, 2012. He described the human physiology and the diffusion process whereby alcohol in the bloodstream enters the air in the lungs. VRP 7-10. The State moved to exclude Dr. Hlastala's testimony based on ER 703(5) because the defense had not shown that his opinions were created for some purpose other than litigation. VRP 10-11. The court excused the jury and heard argument and additional testimony on this issue. VRP 11-36.

Dr. Hlastala described the human pulmonary system and how alcohol enters the air in the lungs. VRP 7-10. He related his experience and academic publications. VRP 10-12. He described his experiences with different breath testing equipment and human and animal studies. VRP 12-18. He testified he was familiar with the Datamaster CBM and understood its functioning. VRP 27.

In his testimony, Dr. Hlastala stated he assumed the Datamaster worked properly. VRP 35.

The trial court ruled that Dr. Hlastala was an expert in human physiology and the exchange of gases within the human body. The court also ruled that there had been no showing that Dr. Hlastala was an expert on the Datamaster machine, or that his expertise have been relied upon by any other experts in the field and excluded testimony by him regarding the Datamaster machine. VRP 36.

The jury found Mr. Salgado-Mendoza guilty of DUI and he was sentenced on May 13. 2013. CP 48b,c. He timely appealed to the Jefferson County Superior Court.

The Jefferson County Superior found the District Court abused its discretion by not suppressing the State Toxicologist's testimony due to State mismanagement of the case. In its opinion the Superior Court stated:

> "During pretrial proceedings, the State filed a witness list on December 11, 2012, listing 8 names of State Toxicologist witnesses who may be called to testify. Each expert had about a 20-page online resume. During the afternoon of May 8, 2013, less than 24 hours prior to trial, defense counsel received a list of 3 names out of the 8 who may testify at trial the next morning. On the morning of trial, still not knowing who the State would call as a state toxicologist

> witness, the defense moved to dismiss the charge or, alternatively, to exclude the testimony of the State's toxicology witness, alleging violation of the discovery rules under CrRLJ 4.7 and mismanagement by the State under CrRLJ 8.3(b)."

The State's timely motion for Discretionary Review was granted. This appeal timely followed.

D. ARGUMENT

1. STANDARD OF REVIEW

RALJ 9.1 governs appellate review of a superior court decision reviewing a decision of a district court *State v. Ford*, 110 Wn.2d 827, 829, 755 P.2d 806 (1988); *State v. Hodgson*, 60 Wn.App. 12, 15, 802 P.2d 129 (1990). Pursuant to RALJ 9.1(a), an appellate court shall review the decision of the district court to determine whether that court has committed any errors of law. A superior court reviews a district court decision under the same RALJ 9.1 appellate standards. *Ford*, 110 Wn.2d at 829-30, 755 P.2d 806.

RALJ 9.1(a) states that the superior court reviews the lower court ruling to determine if there are any errors of law. In the course of its review, the superior court "shall accept those factual determinations supported by *substantial evidence in the record*

(1) which were expressly made by the court of limited jurisdiction, or (2) that may *reasonably be inferred from the judgment* of the court of limited jurisdiction." RALJ 9.1(b). *The superior court does not consider the evidence de novo. State v. Basson*, 105 Wn.2d 314, 317, 714 P.2d 1188 (1986).

2. ISSUE 1: VIOLATION OF COURT DISCOVERY RULE

The Superior Court reversed Mr. Ascension Salgado-Mendoza's conviction partly because it determined the prosecutor failed to disclose the name of the State Toxicologist until the day of trial even though the prosecutor identified all of the State Toxicologists who might be called to testify 5 months prior to the trial and affirmed the name of the one who would testify on the day of the trial.

The Superior Court's decision is in conflict with the position of the Washington Court of Appeals that "The prosecutor's general discovery obligation is limited, however, 'to material and information within the *knowledge, possession or control* of members of the prosecuting attorney's staff,' " under CrR 4.7(a)(4). *State v. Brooks,* 149 Wn.App. 373, 203 P.3d 397

(2009), quoting *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993).

The Superior Court quotes CrRLJ 4.7(a)(i) focusing on the duty of the prosecutor to provide the names and addresses of those he or she intends to call at trial and describes the difficulties faced by defendants when the prosecutor brings forth new information at trial. However, the Superior Court ignores CrRLJ 4.7(a)(4) which states:

> "The prosecuting authority's obligation under this section is limited to material and information within the actual knowledge, possession, or control of members of his or her staff."

It is undisputed that the prosecutor or his staff did not have knowledge of which State Toxicologist would testify before the day of trial.

a. Was there Prosecutorial Misconduct?

The first question is whether there was prosecutorial misconduct during discovery. CrR 4.7(a)(1) states that the prosecuting attorney shall disclose to the defendant "the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing: ... (vi) any record or prior criminal convictions known to the prosecuting

attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial."

However, "The prosecuting attorney's obligation under this section is limited to material and information within the *knowledge, possession or control* of members of the prosecuting attorney's staff." CrR 4.7(a)(4).

It is the long settled policy in this State to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are "to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process...." To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense. *State v. Dunivin*, 65 Wn.App. 728, 733, 829 P.2d 799 (citation omitted), *review denied*, 120 Wn.2d 1016, 844 P.2d 436 (1992).

Under RCW 46.61.506 the State Toxicologist is responsible for certifying the breath test equipment used by all police forces to test the breath of people suspected of driving under the influence.

When a county prosecutor subpoenas a toxicologist to testify in a DUI trial it subpoenas the State Toxicologist. It is well

known that trials are seldom held on the date originally scheduled. The State Toxicologist responds to subpoenas only when the trial date is certain. To do otherwise would result in government mismanagement of their resources.

The prosecutor gave the defense a witness list that included all eight toxicologists employed by the State in December 2012. CP 19c. The defense counsel had *five months* to interview those toxicologists. CP 33a-f. Mr. Salgado-Mendoza had ample opportunity to review the witness' data, request personnel files, disciplinary notices, and interview any or all of the toxicologists.

Here, it is undisputed that the Prosecutor's office did not learn the name of the State Toxicologist who would testify at trial until the day of the trial. Since the prosecutor only learned the witness' name on the day of trial, the Prosecutor did not have an obligation, or the ability, to disclose it earlier.

The Superior Court's decision is in conflict with the position of the Washington Court of Appeals in *Brooks* and the Washington Supreme Court in *Blackwell* and the State requests its decision be reversed.

b. If the State Toxicologist's Policy Constitutes Prosecutorial Misconduct, was it Prejudicial?

"A new trial may be granted if a defendant's substantial right has been materially affected by prosecutorial misconduct. *State v. Perez*, 77 Wn.App. 372, 375, 891 P.2d 42, review denied, 127 Wn.2d 1014, 902 P.2d 164 (1995). "[P]rosecutorial misconduct requires a new trial only if the misconduct was prejudicial." *State v. Stith*, 71 Wn.App. 14, 19, 856 P.2d 415 (1993) (citing *State v. Graham*, 59 Wn.App. 418, 426, 798 P.2d 314 (1990)). "Misconduct is prejudicial when, in context, there is 'a substantial likelihood' that the misconduct 'affected the jury's verdict.' " *Stith*, 71 Wn.App. at 19, 856 P.2d 415 (quoting *State v. Barrow*, 60 Wn.App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007, 822 P.2d 288 (1991)). "The defendant bears the burden of proof on this issue." *Stith*, 71 Wn.App. at 19, 856 P.2d 415 (citing *Barrow*, 60 Wn.App. at 876, 809 P.2d 209).

Here, neither does the record contain any evidence of prejudice, nor has there been any showing that the prosecutor's inability to identify the specific toxicologist that would testify before the trial caused Mr. Salgado-Mendoza any prejudice. The

Superior Court erred in reversing Mr. Salgado-Mendoza's conviction and should be reversed.

3. ISSUE 2 : THE TRIAL COURT PROPERLY LIMITED AN EXPERT'S OPINION TESTIMONY TO THAT USEFUL TO THE FINDER OF FACT

The Superior Court found that the District Court impermissibly limited a Defense expert witness' testimony.

"The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned on appeal absent a *manifest abuse of discretion.*" *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983).

Two statutes are relevant. First, in RCW 46.61.502(1), the Legislature has determined that a driver is guilty of the crime of DUI if "the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506." Second, in RCW 46.61.506(3), the Legislature has delegated to the State Toxicologist the responsibility for approving methods for performing the breath analysis and determining a valid breath test.

As directed by the Legislature, the State Toxicologist has approved the DataMaster machines. *State v. Wittenbarger,* 124 Wn.2d 467, 486, 880 P.2d 517 (1994).

Since RCW 46.61.502 prohibits driving a vehicle when the concentration of alcohol in the breath is .08 or greater, it is irrelevant to the finder of fact how the alcohol entered the breath. Dr. Hlastala told the court that he would explain the mechanism whereby the alcohol enters the breath and bodily variables which affect that mechanism.

ER 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." If those facts or data are of "a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," those facts or data need not be admissible in evidence. ER 703. Because ER 703 is concerned with the trustworthiness of the resulting opinion, the trial court should not allow the opinion if the expert can show only that he customarily relies on such material and if the data are relied on only in preparing for litigation. *State v. Nation*, 110 Wn.App. 651, 663, 41 P.3d 1204 (2002). "The proponent of the testimony must show that experts in the witness's field, in general, reasonably

rely upon such material in their own work; i.e., for purposes other than litigation." 5D Karl B. Tegland, Courtroom Handbook on Washington Evidence, Rule 703 at 391 (2012–13 ed.). The word "reasonably" in ER 703 gives trial courts discretion in determining whether the underlying information is sufficiently reliable to form the basis of an expert's opinion. *5B Karl B. Tegland, Washington Practice: Evidence Law and Practice,* § 703.1 at 226 (5th ed.2007).

Here, after hearing testimony from Dr. Hlastala, the trial court ruled that there had been no showing that Dr. Hlastala was an expert on the Datamaster machine, or that his expertise have been relied upon by any other experts in the field and excluded testimony by him regarding the Datamaster machine. VRP 36.

The court also noted that Dr. Hlastala testified that he assumed the Datamaster machine worked properly. Since RCW 46.61.502 prohibits driving when ones breath alcohol concentration is 0.08 or greater, and the Datamaster machine has been approved by the State Toxicologist, then Dr. Hlastala's testimony about how consumed alcohol diffuses into the breath the Datamaster measures would not have been helpful to the finder of fact and it was properly excluded. The Superior Court

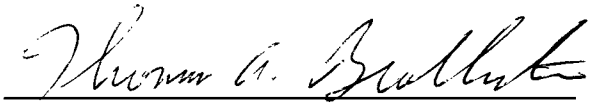
erred when it reversed Mr. Salgado-Mendoza's conviction and it should be reversed.

F. CONCLUSION

The State requests this court to reverse of the Superior Court's decision because the prosecution met its discovery duties, there was no mismanagement by the State, and the expert witness' testimony was properly limited to that which was useful to the finder of fact.

Respectfully submitted on November 19, 2014.

SCOTT ROSEKRANS
Jefferson County Prosecutor

by: 

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PROOF OF SERVICE

I, Wendy M. Davis, certify that on this date, November 20, 2014,

I filed the State's Appellant Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Townsend, Washington on November 20, 2014

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