Supreme Court No. 95768-1

Court of Appeals No. 34494-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GLORIA MARIE MATHYER,

Petitioner.

ON REVIEW FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR OKANOGAN COUNTY

AMENDED PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Gloria Marie Mathyer, through her attorney, Sean M. Downs, requests the relief designated in Part B.

B. COURT OF APPEALS DECISION

Ms. Mathyer requests review of the unpublished opinion of the Court of Appeals in 34494-1-III, filed on March 22, 2018. A copy of the decision is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether this court should accept review of the trial court's denial of Ms. Mathyer's right to a fair trial by an impartial jury due to the court not replacing a biased juror.
2. Whether this court should accept review of the trial court's decision allowing Ms. Mathyer's right to counsel to be violated when the State was allowed to inquire about statements Ms. Mathyer made to the defense expert.

D. STATEMENT OF THE CASE

Ms. Mathyer was charged by information of one count of Vehicular Homicide regarding alleged victim James Stutzman, and one count of Vehicular Assault regarding alleged victim Cynthia Stutzman, both involving an incident alleged to have occurred on June 7, 2014. CP 341-343. Counts one and two alleged that Ms. Mathyer was under the

influence, drove in a reckless manner, or disregarded the safety of others. CP 341-343.

Trooper Connor Bruchman testified first that he responded to a report of a car versus motorcycle collision on SR 153. RP 66. The trooper had been commissioned for approximately three months before this call. RP 85. The road conditions were clear and dry. RP 67. Trp. Bruchman observed the car's driver's door was bent, the windshield had spider-web cracks, and the rear passenger door was pushed into the backseat. RP 71. The registered owner of the car was Gloria Mathyer and the registered owner of the motorcycle was James Stutzman. RP 73, 84. Trp. Bruchman explained through scene photos that vehicle one was travelling southbound, went onto the shoulder slightly, and then went across the roadway and came to rest on the shoulder of the northbound lane. RP 75. The driver of the motorcycle was identified as James Stutzman. RP 77. Mr. Stutzman at that time was conscious, on the ground on his back, being attended to and interacting with emergency personnel. RP 77. The passenger on the motorcycle was identified as Cynthia Stutzman and she was observed being wheeled into an ambulance. RP 78. Ms. Mathyer was identified as being associated with the car and she was seen lying on the ground next to the driver's side of the car. RP 78. Trp. Bruchman assisted emergency personnel place Ms. Mathyer in the ambulance. RP 79. Trp.

Bruchman observed that Ms. Mathyer was struggling to stay awake. RP 79. A MedStar helicopter service was called to transport Mr. Stutzman, but he passed away before he got to the hospital. RP 80. Trp. Bruchman completed a workup form for both vehicles involved in the collision and he completed a collision report. RP 81, 84.

After Trp. Bruchman's testimony, Juror No. 2 indicated that she realized that she knew Trp. Jeffery Eifert personally after Trp. Bruchman mentioned his name in testimony. RP 90, 95. Juror No. 2 indicated that she had gone to church with Trp. Eifert frequently about one year prior. RP 90. She indicated to the court that she did not think there was any concern about her being fair and impartial in the case. RP 90. The jury was excused for the day and trial reconvened the following day. RP 92, 94. The bailiff disclosed to the court that Juror No. 2 asked "Is it biased if I believe everything that Jeff Eifert said?". RP 95. Juror No. 2 confirmed that was the question that she asked the bailiff. RP 98. She indicated that she attended the same church as Trp. Eifert for a year and knew him to have integrity and would believe him. RP 98-99. Juror No. 2 wanted to know whether the court would consider it biased if she already considered him an honest and truthful witness. RP 99. Juror No. 2 further indicated that believed Trp. Eifert to be truthful, although anyone could be wrong. RP 99. She indicated that she believed she could hear all the evidence and

put Trp. Eifert says in context. RP 99. Juror No. 2 did not directly answer the court's question of whether her relationship with Trp. Eifert would affect her ability to be fair and impartial. RP 99. The court further asked Juror No. 2 that if she was the defendant whether she would want herself on the jury with her feelings about Trp. Eifert. RP 99-100. Juror No. 2 responded that she believed so. RP 100. The court decided to keep Juror No. 2 on the jury. RP 100.

Paula Evans-Duncan testified that she witnessed the collision on SR 153 on June 7, 2014 at 5:00pm. RP 113-114. Ms. Duncan was following a motorcycle in her vehicle for about one to two miles, travelling northbound. RP 114, 116. The vehicles came to a curve in the road and slowed to forty-five miles per hour. RP 117. The vehicles travelled along a curve to the right and then began to travel along a curve to the left. RP 115, 117. Another car in the oncoming lane swerved into the northbound lane and in front of the motorcycle. RP 117-118. Ms. Duncan did not observe this car prior to it coming into the oncoming lane. RP 125. The motorcycle's brake lights illuminated and then the motorcycle hit the side of the southbound car. RP 118. The car spun from the collision and travelled trunk-first into an embankment and the driver of the motorcycle and the motorcycle ended up in a ditch. RP 119. The car's driver's door came open upon impact. RP 119. Ms. Duncan contacted the

motorcycle passenger and she appeared dazed. CP 121. The motorcycle passenger scooted to the side of the road. RP 122. Ms. Duncan observed the driver of the motorcycle and he appeared to be unconscious but breathing. RP 123.

Cynthia Stutzman testified that she was riding a motorcycle as a passenger with her husband James Stutzman driving. RP 130. Ms. Stutzman observed a car travelling southbound go on to the shoulder of the road on its right side and then overcorrected and crossed across the centerline in front of their motorcycle. RP 130-131. There was no time to react. RP 131. Ms. Stutzman woke up in the middle of the road with fractures to her pelvis. RP 131. She later determined that she had eight broken ribs. RP 132. Ms. Stutzman had to take a month and a half off due to her injuries. RP 134.

A video deposition of Victoria Buzzard was then played for the jury. RP 142; CP 75-111. Ms. Buzzard testified that she worked as a paramedic for Aero Methow Rescue Service. CP 80. She responded to the collision scene on SR 153. CP 81. She attended to Mr. Stutzman, who had obvious significant injuries. CP 84-85. Mr. Stutzman was conscious and talking to Ms. Buzzard. CP 88-89. She observed that Mr. Stutzman's left foot was almost torn off, his left leg was deformed, and he had significant bleeding coming out of his right foot. CP 89. Mr. Stutzman was being

prepared to be evacuated from the scene by helicopter. CP 95. Mr. Stutzman passed away at approximately 7:00pm due to cardiac arrest caused by trauma before he was evacuated. CP 98-99, 106.

Theodore Shook testified that he was a trooper for the Washington State Patrol at the time of the incident. RP 151. He indicated that he was trained as a collision specialist. RP 152. Trp. Shook was dispatched to SR 153 and arrived on scene before any fire or other law enforcement personnel. RP 154, 159. Trp. Shook indicated that the tire marks indicated that the car was rotating counter-clockwise as it was travelling northbound. RP 163-164. The effect of the motorcycle striking the car was that the car then rotated clockwise. RP 165. Trp. Shook also determined that the driver of the car had travelled across the compartment of the car and struck the upper right part of the windshield. RP 178. Trp. Shook testified that based on a tire mark on the shoulder of the road, it appeared that some portion of the car was travelling over the fog line. RP 182.

Trooper Lex Lindquist testified that he was a drug recognition expert and he was called to respond to the collision. RP 210. He arrived on scene at 7:56pm. Trp. Lindquist described the roadway at the collision site as a sweeping curve with super elevation and grade to the curve. RP 212. Trp. Lindquist later travelled to Three Rivers Hospital and observed Trp. Eifert giving her a receipt for a blood draw taken of her. RP 214.

Sergeant Tony Hawley testified that he is a drug recognition expert and he responded to Three Rivers Hospital at approximately 8:55pm to contact Ms. Mathyer. RP 221-222. When he contact her, she was lying on a gurney with a neck brace on. RP 222. Sgt. Hawley noticed that Ms. Mathyer had bloodshot, watery eyes, and constricted pupils. RP 223. Constricted pupils could be an indicator of narcotic analgesics. RP 223. When asked if Ms. Mathyer had taken any medications, she responded that she had taken some ibuprofen. RP 224. Sgt. Hawley had been informed by hospital staff that Ms. Mathyer had been given four milligrams of morphine for pain. RP 226. Sgt. Hawley also noticed Ms. Mathyer had some slurred speech and seemed to have a dry mouth while talking, although these observations are not necessarily a sign of intoxication. RP 225. He also observed an odor of intoxicants in the room. RP 225.

Trp. Eifert testified that he responded to the scene of the collision. RP 232. He observed Ms. Mathyer lying on the ground with a neck brace on. RP 233. Trp. Eifert was later instructed to go to the hospital to try and ascertain whether any drugs or alcohol were involved with the driver of the car. RP 235. He made contact with Ms. Mathyer in her hospital room and observed the smell of alcohol on her breath, that she had bloodshot and watery eyes, that her speech was slurred, and that she had lethargic

movements. RP 236. Trp. Eifert acknowledged that these observations did not necessarily have to be related to signs of intoxication. RP 236. He was not able to do field sobriety tests due to the physical condition of Ms. Mathyer. RP 237. Trp. Eifert authored a search warrant for Ms. Mathyer's blood and received authorization telephonically. RP 238. Two vials of blood were drawn by nurse Chris Elder at 11:20pm and were labelled as evidence. RP 241, 244. Trp. Eifert gave Ms. Mathyer a receipt for the blood seizure, but she was unable to sign that due to her condition. RP 245.

Ms. Elder testified that Ms. Mathyer's blood alcohol level was at 0.22 at 7:50pm, as noted in her hospital medical records. RP 273. While drawing Ms. Mathyer's blood for law enforcement, Ms. Elder stated that she did not look for clots, she could not recall whether she inverted the vials after drawing blood and she did not know whether law enforcement protocols require inversion of the vials. RP 280.

David Temple testified that he worked as an investigator for the Washington State Patrol regarding motor vehicle collisions. RP 251-254. Mr. Temple was contacted to observe a test of the ball joint on the left front of a 1998 Honda. RP 255. The ball joint was tested to see if there was movement and it was discovered that the castle nut that held a portion of the lower control arm was loose. RP 256. Mr. Temple indicated that this

would have pre-dated the collision. 256-257. Mr. Temple stated that looseness in the castle nut would be reflected in the steering lash. RP 259. He explained that the steering lash is the amount of movement needed to turn the steering wheel before it influences the tires. RP 257. State statute allows up to two inches of movement, and Mr. Temple observed one and a quarter inches of movement in the examined car. RP 257-258. He opined that the marks observed in the roadway were not the result of a defective ball joint. RP 261. Mr. Temple indicated that ball joint problems would result in uneven tread wear on the tires. RP 265-266. He stated that he did not observe that type of wear on the examined car, although he did not know when the tires were installed on that vehicle. RP 266, 268.

Naiha Nuwayhid testified that she is a forensic toxicologist at the Washington State Patrol Toxicology Laboratory. RP 341. Ms. Nuwayhid explained that the vials used by the Washington State Patrol contain an enzyme poison to prevent the growth of microorganisms such as yeast. RP 345. The vials also contain anti-coagulants to prevent the blood from clotting. RP 345-346. It is recommended to mix the tube when the blood is drawn in order to prevent clotting or coagulation. RP 373. The measured blood alcohol level was 0.10. RP 351. Ms. Nuwayhid indicated that using retrograde extrapolation, the blood alcohol level at 7:20pm would be between 0.14 and 0.18. RP 354. She also explained that a hospital blood

draw uses different standards than the toxicology lab and their analysis does not go towards the legal standard of 0.08. RP 355. There was also methamphetamine detected in the blood at the level of 0.212 milligrams per liter. RP 364. She explained that the effects of methamphetamine are to initially stimulate alertness and the late effects are sleepiness and depression. RP 365-366.

Outside the presence of the jury, the parties discussed the potential testimony of defense expert Trevor Newbery. RP 283. The State intended to call Mr. Newbery as a witness to discuss his interview of Ms. Mathyer regarding her driving, her statements about what happened around the time of the collision, and her consumption of alcohol. RP 284, 300-301, 304-305. Defense counsel indicated that Mr. Newbery's company expressed concern about him testifying as a fact witness when he is retained by the defense. RP 285. The defense also specifically objected on relevance and hearsay grounds, but was overruled. RP 306. The defense was allowed to make a standing objection to the line of questioning regarding Ms. Mathyer's statements. RP 309-311.

The defense called Mr. Newbery to testify. RP 382. He was retained by the defense to do traffic accident reconstruction and to do a mechanical exam on the car. RP 390-391. Upon inspecting the car, he discovered that the left front suspension ball joint was very loose. RP 397.

Mr. Newbery indicated that when he grabbed the steering wheel, there was excessive movement and there should not be that amount of movement. RP 397, 400. This defect indicates that the car may not be aligned and have difficulty going straight. RP 401. Mr. Newbery removed and opened the ball joint to reveal that there was an excessive gap between the ball joint stud and the lower control arm. RP 404-405. Based on that, Mr. Newbery opined that the steering would wander and go to the left or to the right, which would require constant corrections, and therefore was a contributing factor to the accident. RP 406-407. Mr. Newbery also calculated the speed of the car at the time of impact at fifty five miles per hour and her speed before that at sixty miles per hour. RP 418, 434. The State questioned Mr. Newbery about his conversations with Ms. Mathyer. RP 427. Mr. Newbery responded that Ms. Mathyer told him that she stopped in the roadway for about five seconds and pulled her emergency brake as the car was off. RP 427. Ms. Mathyer also indicated to Mr. Newbery that a family member had put tires on the car about six months prior to the collision, that she had consumed alcohol prior to the collision, and that even if she was not under the influence she would not have been able to control her car. RP 428-429. Mr. Newbery indicated that his opinions on this case are informed by the physical evidence, not what Ms. Mathyer told him. RP 433.

The State called Sergeant Kurt Adkinson on rebuttal. RP 449. Sgt. Adkinson testified that the coefficient of friction used by Mr. Newbery was lower than what is typically used. RP 452. Sgt. Adkinson believed that the speed of the car upon impact was seventy three miles per hour. RP 455.

The jury subsequently returned verdicts of guilty for Vehicular Homicide and Vehicular Assault, and made special findings that Ms. Mathyer was under the influence, driving in a reckless manner, and disregarding the safety of others at the time of both offenses. CP 64, 59, 63; RP 533-538.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Ms. Mathyer was denied her right to a fair trial by an impartial jury due to the court not replacing a biased juror.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to trial by an impartial jury. *See, e.g., State v. Chirinos*, 161 Wn. App. 844, 848 n.3, 255 P.3d 809 (2011); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The state constitutional provision does not provide greater protection than the federal constitutional provision. *State v. Fire*, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001). The constitutional right to trial by an impartial jury "focuses on the defendant's right to have unbiased jurors, whose prior

knowledge of the case or their prejudice does not taint the entire venire and render the defendant's trial unfair." *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). "[A]n essential element of a fair trial is an impartial trier of fact - a jury capable of deciding the case based on the evidence before it." *Id*. "The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. at 722.

The United States Supreme Court has long recognized the pernicious effect that juror bias can have on the fairness of the proceedings. "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155, 25 L.Ed. 244 (1878). "[I]t is difficult to conceive of a more effective obstruction to the judicial process than a juror who has prejudged the case." *In re Michael*, 326 U.S. 224, 228 (1945). "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin v. Dowd*, 366 U.S. at 727. Thus, the bias or prejudice of even a single juror denies an accused person his right to a fair trial. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (*en banc*) (citation omitted).

Actual bias is "'bias in fact'—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality."

United States v. Gonzalez, 214 F.3d 1009, 1112 (9th Cir. 2000) (citation omitted). Actual bias is usually established by a juror's express admission that she cannot be fair or impartial. Both actual and implied bias require a juror's removal. *Fields v. Woodford*, 309 F.3d 1095, 1103 (9th Cir. 2002); *see also State v. Cho*, 108 Wn. App. 315, 328-29, 30 P.3d 496 (2001) (considering question of implied bias for the first time on appeal, and holding the issue "goes to the impartiality of the factfinder, a right guaranteed by the Sixth Amendment and a touchstone of the constitutional guarantee of a fair trial"). Whether a juror's bias may be implied from the circumstances is a question of law. "Doubts regarding bias must be resolved against the juror." *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991); *Cho*, 108 Wn. App. at 330.

A trial court's decision to excuse a juror is reviewed for abuse of discretion. *State v. Jorden*, 103 Wn. App. 221, 226, 11 P.3d 866 (2000). "A trial court abuses its discretion when it bases its decision on untenable grounds or reasons." *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). The remedy for denial of the constitutional right to trial by an impartial jury is reversal. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002).

CrR 6.5, the criminal court rule governing alternate jurors, also protects the right to an impartial jury. *See Jorden*, 103 Wn. App. at 227

(acknowledging that CrR 6.5 "place[s] a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror."). The rule provides that "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged and the clerk shall draw the name of an alternate who shall take the juror's place on the jury." CrR 6.5.

In the instant case, after testimony had begun, Juror No. 2 informed the court that she personally knew one of the State's witnesses, Trp. Eifert, and specifically asked the court bailiff "Is it biased if I believe everything that Jeff Eifert said?". RP 95. Juror No. 2 attended church with Trp. Eifert for a year and knew him to have integrity and would believe him. 98-99. The court went through a colloquy with Juror No. 2 and at no point did she indicate that she could set aside her relationship with Trp. Eifert. She indicated that she would take his testimony in consideration with the other testimony, but she did not say that her relationship would not affect her view of how she would assess evidence presented by Trp. Eifert. In essence, Juror No. 2 acted as through Trp. Eifert was above reproach and that he could not be considered untruthful or dishonest based on her relationship with him. This is all the more problematic as Trp. Eifert was the State's main witness to testify regarding alleged observations of intoxication of Ms. Mathyer. Juror No. 2 had a clear actual

bias that should have led to her being excused as a juror. The court had an obligation to replace Juror No. 2 with an alternate under CrR 6.5.

The trial court abused its discretion in failing to replace Juror No. 2 and as a result Ms. Mathyer was denied her right to a fair trial by an impartial jury. Therefore, her convictions must be reversed and remanded for a new trial. *See Gonzales*, 111 Wn. App. at 282 (setting forth this remedy for a constitutional violation). This issue involves a significant question of law under the Constitution of the State of Washington and the United States Constitution. RAP 13.4(b)(3).

2. Ms. Mathyer's right to counsel was violated when the State was allowed to inquire about statements Ms. Mathyer made to the defense expert.

A criminal defendant has the constitutional right to the effective assistance of counsel in a criminal proceeding. *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55, 77 L.Ed. 158 (1932); U.S. Const. Amend. VI; Art. I, sec. 22. "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317

U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). The effectuation of this right imposes a duty to fully investigate known potential defenses, and where necessary, to retain qualified experts to assist in the preparation of that defense. *See, e.g.*, *In re Personal Restraint Petition of Brett*, 142 Wn.2d 868, 880, 16 P.3d 601 (2001) (counsel ineffective for failing to investigate and retain experts for potential mental defense).

A "prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant." *State v. Garza*, 99 Wn. App. 291, 299, 994 P.3d 868 (2000) (citing *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995)). In Washington, the attorney-client privilege is codified in RCW 5.60.060(2), which reads:

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

RCW 5.60.060(2).

The attorney-client privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997) (citing *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 832, 394 P.2d 681 (1964);

Pappas v. Holloway, 114 Wn.2d 198, 203, 787 P.2d 30 (1990)). The privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. *Dietz*, 131 Wn.2d at 842 (citing *Pappas*, 114 Wn.2d at 203). The attorney-client privilege operates independently of the work product rule and vice versa. 5A K. Tegland, Wash.Prac., Evidence § 501.9, at 145 (5th ed. 2007).

"The work product doctrine protects from discovery an attorney's work product, so that attorneys can 'work with a certain degree of privacy and plan strategy without undue interference.'" *State v. Pawlyk*, 115 Wn.2d 457, 475, 800 P.2d 338 (1990). In the criminal law context, the work product doctrine applies to the "'research [,] records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies.'" *Pawlyk*, 115 Wn.2d at 477 (quoting CrR 4.7(f)(1)). The *Pawlyk* Court specifically found the reference to "investigating ... agencies" to be "broad enough to include defense work product," as well as prosecution work product. *Id*.

Where a violation of the right to counsel is found, reversal is required, and prejudice is presumed. *See Garza*, 99 Wn. App. at 299-300; *Shillinger*, 70 F.3d at 1134 (finding where the State purposely intrudes

into the attorney-client relationship, the "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.") (citing *Strickland*, 466 U.S. at 692). Constitutional errors that "affect substantial rights" cannot be considered harmless. *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In the event that this court finds that this issue is raised for the first time on appeal, this court should nevertheless review the issue because it is a manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). This error affects the attorney-client privilege, which is "truly of constitutional magnitude" and there is actual prejudice, as discussed below. *Id*.

In the instant case, Mr. Newbery was retained by the defense to do an accident reconstruction and to inspect Ms. Mathyer's car and Mr. Stutzman's motorcycle. Mr. Newbery came to his conclusions regarding how fast he believed Ms. Mathyer's vehicle was travelling and the conditions of the defective ball joint based on his inspection of the car, his review of police reports, and his review of photographs. His opinion did not rely on anything that Ms. Mathyer told him about what she believed happened. The State was impermissibly allowed to invade the attorney-client privilege and violate the work product doctrine by questioning Mr. Newbery about statements that Ms. Mathyer made to him. This violation

is further compounded due to the fact that Ms. Mathyer chose not to testify and she also did not make any statements to law enforcement. Ms. Mathyer was prejudiced because her statements to Mr. Newbery allowed the jury to believe there was consciousness of guilt due to her statements that were contradicted by the defense's own expert.

Because the testimony of Mr. Newbery regarding statements that Ms. Mathyer made to him violated her constitutional and statutory rights, prejudice is presumed and reversal is required. This issue involves a significant question of law under the Constitution of the State of Washington and the United States Constitution. RAP 13.4(b)(3).

F. CONCLUSION

Given the foregoing, Petitioner respectfully requests this court to grant review.

DATED this 1st day of May, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Okanogan County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on May 1, 2018 to email addresses bplatter@co.okanogan.wa.us and sfield@co.okanogan.wa.us. Service was made by email pursuant to the Respondent's consent. I also served Petitioner, Gloria Mathyer, a true and correct copy of the document to which this certification is affixed via first class mail postage prepaid to Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

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APPENDIX A

Court of Appeals Unpublished Opinion

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. GLORIA MARIE MATHYER, Appellant.	)	No. 34494-1-III UNPUBLISHED OPINION

PENNELL, J. — Gloria Mathyer was convicted of vehicular assault and vehicular homicide after her car collided with a motorcycle. One of the motorcycle's occupants died and the other was injured. Ms. Mathyer appeals her conviction, raising issues of juror bias, deprivation of the right to counsel, insufficiency of evidence and instructional error. We affirm.

FACTS AND BACKGROUND

We recount the facts and procedural history of Ms. Mathyer's case only as necessary to address the arguments raised on appeal. Our summary is taken entirely from the testimony at trial.

The law enforcement investigation

Ms. Mathyer's collision was first reported to law enforcement at 5:41 p.m. By the time officers arrived at the scene, Ms. Mathyer and the two victims were in various stages of medical care and hospital transport. Law enforcement did not speak with Ms. Mathyer at the scene or conduct any field sobriety testing.

A hospital nurse attending to Ms. Mathyer took a medical blood draw at 7:50 p.m. The nurse noted Ms. Mathyer's breath smelled of alcohol. The sample procured by the nurse revealed a high blood alcohol concentration (BAC) of "220." 2 Report of Proceedings (RP) (June 8, 2016) at 273-74.[1]

The first substantive contact between Ms. Mathyer and law enforcement occurred at the hospital. At approximately 8:55 p.m., a sheriff's deputy went to Ms. Mathyer's room and noted Ms. Mathyer had bloodshot and watery eyes, and constricted pupils. Ms. Mathyer's speech was slurred, it appeared she had dry mouth, and she smelled of

[1] Ms. Mathyer agrees that the nurse's testimony should be interpreted to mean the test revealed a BAC of 0.22 grams per 100 milliliters. Appellant's Opening Br. at 9.

intoxicants. A second officer, Trooper Jeffrey Eifert, confirmed these observations. Neither officer conducted any sobriety testing at the hospital due to Ms. Mathyer's fragile medical condition. At 11:20 p.m., a sample of Ms. Mathyer's blood was collected pursuant to a search warrant. This sample revealed a BAC of 0.10 grams per 100 milliliters.

Developments during trial

At trial, the State's toxicologist testified about the significance of Ms. Mathyer's second blood sample (the sample procured via the search warrant). Using retrograde extrapolation, the toxicologist testified Ms. Mathyer's BAC would have been significantly higher than 0.10 within two hours of the collision. Specifically, the toxicologist determined Ms. Mathyer would have had a BAC between 0.14 and 0.18 at 7:20 p.m. The toxicologist also testified that Ms. Mathyer's blood sample showed the presence of methamphetamine.

At trial, both the State and defense sought to elicit testimony from Trevor Newbery, who had been retained by the defense as an accident reconstruction expert. The State wanted to call Mr. Newbery as a fact witness regarding statements made to him by Ms. Mathyer. Of interest to the State were descriptions of the accident by Ms. Mathyer and her admission that she had consumed alcohol prior to the collision. Mr. Newbery had considered Ms. Mathyer's statements in preparing his accident reconstruction report. The

substance of the statements had been disclosed during pretrial discovery. The trial court permitted the State's line of inquiry.[2]

At the close of the first day of trial, a juror advised the court she knew one of the State's witnesses, Trooper Eifert, from church. During a follow-up colloquy the next morning,[3] the juror indicated she did not know Trooper Eifert well, but she knew he had integrity and would tend to believe him. The trial judge asked the juror if she could base her decision on the evidence at trial, not her familiarity with Trooper Eifert. The juror responded she could. The juror said she understood Trooper Eifert could be wrong "because obviously everyone can be wrong." 1 RP (June 8, 2016) at 99. The juror explained she believed Trooper Eifert to be truthful, but she would be able to "hear all of the evidence and put what he says in context." *Id*. Then the court asked the juror, "if you were the defendant, would you want you, with these feelings, as a juror?" *Id.* at 99-100. The juror responded in the affirmative. The court subsequently determined the juror should remain on the case. Defense counsel did not object.

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[2] The court considered allowing Mr. Newbery to testify during the State's case-in-chief. However, the court ultimately decided the State would be able to make its inquiry of Mr. Newbery through cross-examination during the defense case. If, despite assurances from the defense that it planned to call Mr. Newbery, the defense ultimately opted not to present Mr. Newbery's testimony, the court ruled it would allow the State to reopen its case-in-chief and present testimony from Mr. Newbery.

[3] The follow-up was prompted by the juror's question to the bailiff of whether she would be biased if she believed everything Trooper Eifert said.

The conclusion of trial

After the close of the evidence, the jury was provided a set of instructions, including one based on a pattern instruction that is utilized when a defendant is (1) charged with vehicular homicide or vehicular assault, and (2) alleged to have committed the crime while under the influence. The instruction stated:

> A person is under the influence or affected by the use of intoxicating liquor or any drug when he or she has sufficient alcohol in his or her body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable analysis of the person's blood; or the person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of intoxicating liquor or any drug or the combined influence or affected by intoxicating liquor or drug.

Clerk's Papers at 16; *see* 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 90.06, at 274 (4th ed. 2016). Not surprisingly, defense counsel did not object to this instruction, as it was also included in the defense's proposed jury instructions.[4]

The jury found Ms. Mathyer guilty of vehicular homicide and vehicular assault. It also found by special verdict that Ms. Mathyer was under the influence of intoxicating liquor or drugs, operated her vehicle in a reckless manner, and operated her vehicle with disregard for the safety of others. The court sentenced Ms. Mathyer to 173 months of

[4] The State requested the same instruction.

total confinement and 18 months of community custody. Ms. Mathyer appeals.

ANALYSIS

Juror bias

Ms. Mathyer argues she was denied her constitutional right to a fair and impartial jury as a result of the trial court's failure to replace or excuse the juror who expressed familiarity with Trooper Eifert. We review the trial court's decision to retain the juror for abuse of discretion. *State v. Ashcroft*, 71 Wn. App. 444, 461, 859 P.2d 60 (1993).

We disagree with Ms. Mathyer's assessment that the juror in question was impermissibly biased. Although the juror initially made some statements suggestive of bias, the court's colloquy confirmed the juror would be able to set aside her preconceived ideas about Trooper Eifert and assess the case according to the evidence produced at trial. We would note that the testimony elicited from Trooper Eifert was of limited significance and was not contested.[5] The record does not support Ms. Mathyer's claim that she was deprived of her right to a fair and impartial jury.

Right to counsel

Ms. Mathyer claims the statements she made to Mr. Newbery were protected by attorney-client privilege. Accordingly, she argues the court should not have permitted the

[5] Defense counsel only asked five questions of Trooper Eifert.

State to question Mr. Newbery about those statements at trial.

Ms. Mathyer misapprehends the nature of attorney-client privilege. A defense expert is not an attorney or an agent of the attorney and statements by the defendant to his or her expert are not protected by the attorney-client privilege. *State v. Pawlyk*, 115 Wn.2d 457, 463-64, 800 P.2d 338 (1990).

Nor were Ms. Mathyer's statements to Mr. Newbery protected as work product. In the criminal context, work product does not shield the defense from disclosing information from a defense expert except to the extent the expert has been privy to defense *counsel's* opinions, theories, or conclusions. *Id*. at 478-79. Furthermore, even when the work product doctrine applies, its privilege may be waived. *United States v. Nobles*, 422 U.S. 225, 239-40, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).

It is doubtful Ms. Mathyer's statements to Mr. Newbery ever qualified for work product protection. But to the extent they did, the privilege was waived. Once it learned of Ms. Mathyer's statements to Mr. Newbery through pretrial discovery, the State was entitled to call Mr. Newbery as a witness to Ms. Mathyer's party-opponent statements under ER 801(d)(2). The trial court did not err in permitting this testimony.

Insufficiency of the evidence and instructional challenge

Both Ms. Mathyer's crimes of conviction required proof she was under the influence of drugs or alcohol. RCW 46.61.520(1)(a), .522(1)(b). Under Washington law,

intoxication can be shown by proving a "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." RCW 46.61.502(1)(a).

The evidence was more than sufficient to show Ms. Mathyer's BAC was over 0.08 within two hours of the collision. According to the State's toxicologist, retrograde extrapolation showed Ms. Mathyer's BAC would have been between 0.14 and 0.18 within two hours of the collision.[6] There was nothing inappropriate about this testimony. RCW 46.61.502(4)(a); *State v. Wilbur-Bobb*, 134 Wn. App. 627, 632-33, 141 P.3d 665 (2006). The toxicologist's testimony need not have been based on a blood test performed within two hours of Ms. Mathyer's offense conduct. The whole point of retrograde extrapolation testimony is to allow the State to introduce evidence of a defendant's intoxication level when a test has been performed outside the two-hour window.

The toxicologist's retrograde extrapolation testimony provided the State sufficient evidence to show Ms. Mathyer was intoxicated. It also justified providing the jury with an instruction, explaining how intoxication can be established by proof of BAC.[7] Ms.

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[6] As previously noted, the accident took place at approximately 5:41 p.m. The toxicologist was able to use retrograde extrapolation to determine Ms. Mathyer's BAC at 7:20 p.m.

[7] Because the jury instruction was proposed by both the defense and the State, the trial result would not have been different had defense counsel declined to request the instruction.

Mathyer has not shown any cognizable error on appeal.

CONCLUSION

The judgment and sentence is affirmed. Ms. Mathyer's request to deny appellate costs is deferred to consideration by the court commissioner should the State seek costs.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Fearing, C.J.

Siddoway, J.

GRECCO DOWNS, PLLC

May 01, 2018 - 4:19 PM

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