

70043-0

70043-0

**NO. 70043-0-1**

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

---

STATE OF WASHINGTON  
Respondent,

v.

**JUAN PEDRO ORTIZ-VIVAR,**  
Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

---

**RESPONDENT’S BRIEF**

---

SKAGIT COUNTY PROSECUTING ATTORNEY  
RICHARD A. WEYRICH, PROSECUTOR

By: KAREN L. PINNELL, WSBA#35729  
Deputy Prosecuting Attorney  
Office Identification #91059

Courthouse Annex  
605 South Third  
Mount Vernon, WA 98273  
Ph: (360) 336-9460

FILED  
APR 11 2013  
COURT OF APPEALS  
DIVISION ONE  
MOUNT VERNON, WA  


ORIGINAL

## TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT .....	1
II. ISSUES .....	1
III. STATEMENT OF THE CASE.....	2
1. STATEMENT OF PROCEDURAL HISTORY .....	2
2. STATEMENT OF FACTS.....	2
IV. ARGUMENT .....	5
V. CONCLUSION .....	13

## TABLE OF AUTHORITIES

	<u>Page</u>
RCW 46.61.502.....	6
RCW 46.61.506(3).....	9
RCW 46.61.506(4)(b).....	5
RCW 46.61.506(4)(c).....	7
WAC 448-14-020(3)(b).....	1, 6, 9
<i>Hoffman v. Tracy</i> , 67 Wn.2d 31, 35, 406 P.2d 323 (1965).....	7
<i>State v. Bosio</i> , 107 Wn. App. 462, 468, 27 P.3d 636 (2001).....	5, 6, 8
<i>State v. Brown</i> , 145 Wn. App. 62, 69, 184 P.3d 1284 (2008).....	5, 7, 8, 9, 10, 11, 12, 13
<i>State v. Clark</i> , 62 Wn. App. 263, 270, 814 P.2d 222 (1991).....	6, 7
<i>State v. Davis</i> , 154 Wn.2d 291, 305, 111 P.3d 844 (2005), <i>aff'd</i> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) .....	12
<i>State v. Ecklund</i> , 30 Wn.App 313, 317-18, 633 P.2d 933 (1981).....	10
<i>State v. Garrett</i> , 80 Wn. App. 651, 654, 910 P.2d 552 (1996).....	6
<i>State v. Guloy</i> , 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).....	11
<i>State v. Hultenschmidt</i> , 125 Wn. App. 259, 264; 102 P.3d 192 (2005).....	5, 6, 7
<i>State v. Nation</i> , 110 Wn.App at 662-63, 41 P.3d 1204 (2002).....	10, 11
<i>State v. Schulze</i> , 116 Wn.2d 154, 167, 804 P.2d 566 (1991).....	9
<i>State v. Sponburgh</i> , 84 Wn.2d 203, 210, 525 P.2d 238 (1974).....	5

*State v. Straka*, 116 Wn.2d 859, 870, 810 P.2d 888 (1991).....9

*State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980) .....11

*State v. Wicker*, 66 Wn.App at 414, 832 P.2d 127 (1992),.....11

## **I. SUMMARY OF ARGUMENT**

The State has met its burden for a prima facie case for DUI with evidence of anticoagulants as well as poison enzymes in the vials which blood was collected into. The certification of compliance from the manufacturer of the vials was not made for testimony at trial, but rather to certify to the State Toxicologist that there are the proper chemicals in their vials that meet the standards under the WAC 448-14-020(3)(b). As the certification is not prepared solely for trial, and was supplemental to the toxicologist's opinion that the blood draw met the requirements under the WAC and admission was harmless error, not granting reversal.

## **II. ISSUES**

1. The trial court did not err in admitting the results of the blood test as there was adequate evidence from the toxicologist that the vials contained the proper chemicals as required by the Washington Administrative Code.
2. The certification in this case was not created by the prosecution, but rather by the manufacturer of the vials, and it was not created for the sole purpose of trial, nor relied on solely, but rather in support of the toxicologist's opinion that the blood draw met the requirements under WAC.

### **III. STATEMENT OF THE CASE**

#### **1. Statement of Procedural History**

<sup>1</sup>The State filed an information charging Juan Ortiz-Vivar with possession of a controlled substance, cocaine, and dui on January 5, 2012 for an incident occurring on September 2, 2011. Mr. Ortiz-Vivar was arraigned on those charges on February 2, 2012. Trial in this case began on February 11, 2013. The jury returned with a verdict of guilty for driving while under the influence of intoxicating liquor and was unable to reach a verdict on the crime of possession of a controlled substance. Sentencing in this matter was scheduled for February 14, 2013. Notice of appeal in this case was filed on March 4, 2013. Sentence was stayed by the court on March 21, 2013 pending the result of a re-trial of the possession of a controlled substance case commencing on April 29, 2013.

#### **2. Statement of Facts**

On September 2, 2011, the defendant entered an Ace Hardware store in Mount Vernon, Washington. Rosa Rodriguez was working at Ace Hardware as a cashier on September 2, 2011. RP 4. Ms. Rodriguez noticed Juan Ortiz-Vivar as he entered the store because he was not walking okay – he was stumbling. RP 4-5. When Mr. Ortiz-Vivar was checking out through

---

<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case are as follows:

“DATE RP NAME OF HEARING.

Ms. Rodriguez's cashier lane, he was slurring quite a bit. RP 5. Mr. Ortiz-Vivar was speaking English but didn't appear to be making any sense, grinning, swaying a lot, fumbling for money and slurring his words. RP 5-6. Ms. Rodriguez observed Mr. Ortiz-Vivar exit the store stumbling so she followed him out to see where he was going. RP 6. Mr. Ortiz-Vivar stumbled to his van and stumbled getting into his van. RP 6. Ms. Rodriguez called the police at that point. RP 6. Mr. Ortiz-Vivar almost hit a car while pulling out of the parking spot and drove as far as the light at the end of the parking lot before police stopped him. RP 6-7.

Officer Martinez responded to interpret for Mr. Ortiz-Vivar and Officer Cohen as Mr. Ortiz-Vivar was speaking Spanish. RP 18. Mr. Ortiz-Vivar admitted to using drugs. RP 20. Mr. Ortiz-Vivar was taken to the hospital for safety check since he had consumed drugs. RP 20-21. At the Hospital, Mr. Ortiz-Vivar was read implied consent warnings for blood draw and consented to a blood draw. RP 22.

Officer Martinez indicated that gray top vials were used to take Mr. Ortiz-Vivar's blood; these vials are supplied from the Washington State Patrol Lab and contain chemicals for preserving the blood. RP 29-30. Officer Cohen retrieved the gray top vials from Officer Martinez's car and took them to the phlebotomist. RP 46. The gray top vials used were not expired. RP 58. Phlebotomist Jaime O'Donohue drew blood from Mr.

Ortiz-Vivar and used gray top vials which were supplied by Officer Cohen. RP 62-63. The gray top vials had a white powder substance in them to prevent clotting and so that they can be analyzed by the crime lab. RP 63. Ms. O'Donohue drew Mr. Ortiz-Vivar's blood according to Washington State protocol. RP 62-65.

Chris Johnston, Forensic Toxicologist for the Washington State Toxicology Lab, testified that the gray top vials in this case contained an enzyme preserve anticoagulant. RP 83-84. The gray topped vials in this case were approved through the method of the State Toxicologist. RP 84. The State Toxicologist testified that "there is enzyme preserve anticoagulant in all our gray top tubes that is being sealed in those tubes. The blood does not go into that tube unless the vacuum is attached with anticoagulant in it. When we receive those blood vials back if that anticoagulant is not in that tube that blood is very difficult to analyze. And it's something very easy to spot, specifically if it were to happen in a police case we would expect the blood to come back liquid with the anticoagulant in it. If that's not the case I make a note." RP 84. The certificate from the manufacture of the gray top vials indicates that they contain an enzyme preservative and anticoagulant. RP 85. The certificate of compliance lists which lot numbers of vials are certified on the certificate and this certificate matches the lot numbers on the vials received in this case from the evidence technician. RP 85. The jury,

after deliberations, found Mr. Ortiz-Vivar guilty of driving while under the influence of intoxicating liquor. RP 126-127.

#### IV. ARGUMENT

##### 1. The trial court did not abuse its discretion by admitting the blood alcohol evidence at trial.

A trial court's ruling on the admission of a blood alcohol test result is reviewed for an abuse of discretion. *State v. Brown*, 145 Wn. App. 62, 69, 184 P.3d 1284 (2008); *State v. Hultenschmidt*, 125 Wn. App. 259, 264; 102 P.3d 192 (2005). A defendant challenging admission of the test result bears the burden of showing an abuse of discretion. *Brown*, 145 Wn. App. at 69; *State v. Sponburgh*, 84 Wn.2d 203, 210, 525 P.2d 238 (1974). “The trial court abuses its discretion when it admits evidence of a blood test result in the face of insufficient prima facie evidence.” *Brown*, 145 Wn. App. At 69 (citing *State v. Bosio*, 107 Wn. App. 462, 468, 27 P.3d 636 (2001)).

“Prima facie evidence” is defined under the driving under the influence of an intoxicant statute as “evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved.” RCW 46.61.506(4)(b). To determine the sufficiency of the evidence of foundational facts, the court must assume the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. *State v. Brown, Id.*

In order to admit blood alcohol test results, “the State must present prima facie proof that the test chemicals and the blood sample are free from any adulteration which could conceivably introduce error to the test results.” *State v. Clark*, 62 Wn. App. 263, 270, 814 P.2d 222 (1991). “[A] blood sample analysis is admissible to show intoxication under RCW 46.61.502 only when it is performed according to WAC [Washington Administrative Code] requirements.” *Hultenschmidt*, 125 Wn. App. at 265.

The WAC requires:

“Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.”

WAC 448-14-020(3)(b).

The purpose of requiring the use of anticoagulants and enzyme poison in the blood sample is to prevent clotting and/or loss of alcohol concentration in the sample. *Clark*, 62 Wn. App. at 270. Fulfillment of the requirements of WAC 448-14-020(3)(b) is mandatory, notwithstanding the State's ability to establish a prima facie case that the sample was unadulterated. *Bosio*, 107 Wn. App. at 468; *State v. Garrett*, 80 Wn. App. 651, 654, 910 P.2d 552 (1996). Once a prima facie showing is made, it is for the jury to determine

the weight to be attached to the evidence. RCW 46.61.506(4)(c); *Hoffman v. Tracy*, 67 Wn.2d 31, 35, 406 P.2d 323 (1965).

*State v. Brown*, 145 Wn. App. at 69-70 (footnote omitted).

In the present case, the Forensic Toxicologist testified that the vials in this case contained an enzyme preserve anticoagulant and that they complied with the method of the State Toxicology requirements. RP 83-85. The phlebotomist Jaime O'Donohue drew blood from Mr. Ortiz-Vivar and used gray top vials which were supplied by Officer Cohen. RP 62-63. The gray top vials had a white powder substance in them to prevent clotting and so that they can be analyzed by the crime lab. RP 63. The Forensic Toxicologist also testified that the certificate from the manufacturer of the vials indicated that they contain enzyme preservative and anticoagulant. RP 85. The Toxicologist also testified that the certificate of compliance was specific to the vials in this case used for Mr. Ortiz-Vivar's blood by matching the lot numbers on the certificate to the tubes that were tested. RP 85; CP Supp \_\_\_\_\_, Sub. No. 60, Exhibit 11.

The requirements of the WAC were met in the present case, satisfying Judge Rickert that there was sufficient evidence for admissibility of the blood draw of Mr. Ortiz-Vivar. *State v. Clark*, 62 Wn. App. 263, 270, 814 P.2d 222 (1991), *State v. Hultenschmidt*, 125 Wn. App. 259, 264; 102 P.3d 192 (2005). It is then up to the jury to determine the weight to give

such evidence. *State v. Brown*, 145 Wn. App. At 69 (citing *State v. Bosio*, 107 Wn. App. 462, 468, 27 P.3d 636 (2001)).

Judge Rickert did not abuse his discretion when he found that the testing of Mr. Ortiz-Vivar's blood was performed according to the WAC and there was sufficient evidence based upon testimony of an expert in the field of toxicology that the WAC requirements were met, and admitted the blood draws and the results into evidence.

There was no indication from the evidence in the present case that there were deficiencies in the record pertaining to the existence of enzyme preservatives and anticoagulants to further address admissibility of the blood tests as other evidence for proving intoxication.

**2. The Certificate of Compliance was not offered to prove the truth of the matter asserted – but rather to confirm the Toxicologists' opinion that the blood vials contained sufficient enzyme preservatives and anticoagulants under WAC. The admission of the certificate was harmless error and does not warrant reversal under the confrontation clause.**

In *Brown*, the court explained that the WAC regulation does not require anyone with firsthand knowledge to testify as to what was contained in the vials used for a blood sample prior to the blood draw. *Id.* at 71. Instead, the regulation requires only that the blood samples “be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent

clotting and stabilize the alcohol concentration.” *Id.* (quoting WAC 448-14-020(3)(b)). Further, there is a relaxed standard for foundational facts under the blood alcohol statute in that the court assumes the truth of the State's evidence and all reasonable inferences from it are viewed in a light most favorable to the State. *Id.* (citing RCW 46.61.506(4)b)).

The regulations require that any testing method must meet “strict standards for precision, accuracy, and specificity.” *State v. Schulze*, 116 Wn.2d 154, 167, 804 P.2d 566 (1991). If the testing method meets the requirements of the WAC regulations, “there is sufficient assurance of accuracy and reliability of test results to allow for general admissibility of test results.” *State v. Straka*, 116 Wn.2d 859, 870, 810 P.2d 888 (1991). “Compliance with the regulations in WAC 448-14 meets the requirements of RCW 46.61.506(3), and a ‘cookbook’ detailing of every step of the authorized testing procedure is not necessary.” *Schulze*, 116 Wn.2d at 166, 804 P.2d 566 (1991).

As in *Brown* the assertion that the manufacturer’s certificate should not have been admitted is agreed, but like *Brown* the admission does not affect the sufficiency of the evidence for the admission of the blood test. *State v. Brown*, 145 Wn. App. At 71. Hearsay is generally inadmissible. *ER 803*. “ ‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

matter asserted.” *ER 801(c)*. The court in *Brown* held that the “toxicologist’s testimony, in conjunction with the certificate, showed the certification officer from the manufacturer *agreed* with his conclusion that the chemicals were present in the vials. But even according to the toxicologist, the certification was not needed—the toxicologist testified that if the chemicals were not present, the sample would be clotted and the alcohol would not be detected.” *State v. Brown, Id.* The court in *Brown* also looked at *ER 705* that grants the trial court discretion to allow an expert to relate hearsay or otherwise inadmissible evidence to the trier of fact to explain the reasons for his or her expert opinion, subject to appropriate limiting instructions; as well as *ER 703* which allows a trial court to admit an expert's testimony that is based on facts or data which are not otherwise admissible, if those facts or data are of the type reasonably relied upon by experts in that field in forming opinions other than for the purposes of litigation. *Brown, Id.*, relying on *State v. Nation*, 110 Wn.App at 662-63, 41 P.3d 1204 (2002); *State v. Ecklund*, 30 Wn.App 313, 317-18, 633 P.2d 933 (1981). The *Brown* court held that the certificate wasn’t necessary in their case because the toxicologist concluded from the label and the sample's appearance that the anticoagulant was used and he also concluded from the test positive for the presence of alcohol that the enzyme poison was used. There is also no testimony that others outside of the crime lab rely upon the

certificate for purposes other than preparation for litigation. The toxicologist did not refer to the certificate to assist the jury in understanding his forensic conclusions regarding the evidence he tested. Therefore, his statement was not admissible as an exception to the hearsay rule under *ER 703* or *ER 705*. The trial court erred when it allowed the statement and subsequently refused to strike it from the record. *State v. Brown*, 145 Wn. App. 69.

Although the certificate was found to be admitted in error in *Brown*, that court did not find that the admission warranted reversal. *Brown*, *Id.* “It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be so insignificant as to be harmless.” *Brown*, citing *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Id.*; accord *State v. Wicker*, 66 Wn.App at 414, 832 P.2d 127 (1992); *Nation*, 110 Wn.App. at 666, 41, P.3d 1204 (2002). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *Brown*, *Id.*, citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980); *Guloy*, 104 Wn.2d at 425, 705 P.2d 1182.

The appellate court uses the “overwhelming untainted evidence” test in its harmless error analysis. *Guloy*, 104 Wn.2d at 426, 705 P.2d 1182.

Under that test, we look only to the untainted evidence to determine whether the untainted evidence is so overwhelming that it “necessarily leads to a finding of guilt.” *Id.*; see also *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005), *aff’d*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The *Court in Brown* held that Mr. Brown has failed to show that, had the court properly denied admission of the toxicologist's testimony regarding the manufacturer's certificate, the outcome of the trial would have been different, finding that there was other sufficient evidence proving that the vials contained the stabilizer and preservative and found no reversible error. *State v. Brown, Id.*

In our case, the State Toxicologist testified that the procedures promulgated by WAC 448-14-020(3)(b) were followed, that there was sufficient enzyme poison and anticoagulants to preserve the blood alcohol and to prevent clotting in the sample tubes and further, that “there is enzyme preserve anticoagulant in all our gray top tubes that is being sealed in those tubes. The blood does not go into that tube unless the vacuum is attached with anticoagulant in it. When we receive those blood vials back if that anticoagulant is not in that tube that blood is very difficult to analyze. And it's something very easy to spot, specifically if it were to happen in a police case we would expect the blood to come back liquid with the anticoagulant in it. If that's not the case I make a note.” RP 84. The Toxicologist went on

to testify that “we have very specific kinds of vials that we use. We provide those to the various police agencies. They will fill those vials, send them back to us. They are the ones that are all established by the State Toxicologist...” RP 84-85. Also, Officer Martinez indicated that gray top vials were used to take Mr. Ortiz-Vivar’s blood; these vials are supplied from the Washington State Patrol Lab and contain chemicals for preserving the blood. RP 29-30. Officer Cohen retrieved the gray top vials from Officer Martinez’s car and took them to the phlebotomist. RP 46. The gray top vials used were not expired. RP 58. Phlebotomist Jaime O’Donohue drew blood from Mr. Ortiz-Vivar and used gray top vials which were supplied by Officer Cohen. RP 62-63. The gray top vials had a white powder substance in them to prevent clotting and so that they can be analyzed by the crime lab. RP 63.

Taking this altogether, there would be no prejudice to Mr. Ortiz-Vivar in admitting the certificate of compliance as there was sufficient evidence outside of the certificate that indicated the WAC was followed and the blood test was valid under the WAC protocol. *State v. Brown, Id.*

## **V. CONCLUSION**

The State requests that this appeal be dismissed under the fugitive disentitlement doctrine. If the Court finds dismissal is not appropriate, find that the State has met its burden in this case and deny the appeal.

The State has met its burden in this case. There was sufficient evidence presented by the State to show that there was sufficient enzyme poisons and anticoagulants present in Mr. Ortiz-Vivar's blood draw to meet the WAC requirements. Judge Rickert did not abuse his discretion in finding, after hearing the evidence, that the blood vials should be introduced into evidence, and that the State had met its prima facie evidence to meet the WAC requirements. There was no error in the admission of the blood draw; if this Court determines that there was error, it was not prejudicial to require a reversal. The Appeal should be denied and the jury verdict should remain undisturbed.

DATED this 2 day of December, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: Karen L. Pinnell  
KAREN L. PINNELL, WSBA#35729  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ X ] United States Postal Service; [ ] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Thomas M. Kummerow, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 2 day of December, 2013.

Karen R. Wallace  
KAREN R. WALLACE, DECLARANT