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A. Statement of the Issues

1. Whether sufficient evidence supports the Defendant's conviction for felony DUI. (Appellant's Assignments of Error 1)
2. Whether the trial court properly permitted the State to make a "missing witness argument" during its closing arguments. (Appellant's Assignments of Error 2-3).
3. Whether the trial court properly admitted testimony that the Defendant refused to submit a breath sample at the police station. (Appellant's Assignments of Error 4).

B. Statement of the Case

Statement of the Facts

On April 11, 2008, Trooper Travis Beebe of the Washington State Patrol was driving Eastbound on State Route 101 when he observed an oncoming vehicle traveling at a high rate of speed. RP 113-15. The trooper activated his radar, which indicated that the speeding vehicle was traveling 62 m.p.h in a 45 m.p.h zone. RP 115.

Trooper Beebe turned around, activated his overhead emergency lights, and attempted to stop the vehicle. RP 115. The trooper pursued the vehicle for half a mile, during which time the vehicle passed around two other vehicles that had pulled over when they saw the trooper's emergency lights. RP 116. The speeding vehicle did not stop until the trooper finally activated his siren. RP 116.

The driver of the speeding vehicle was the Defendant, MIKLOS B. TOTH. When Trooper Beebe made contact with the Defendant, he smelled a strong odor of intoxicants coming from inside the vehicle. RP 116, 156. The trooper also noted that the Defendant's eyes were watery and bloodshot. RP 116.

Trooper Beebe informed the Defendant that he had stopped the vehicle for speeding. RP 116. The Defendant explained that he was unaware that he had been traveling above the posted speed limit and stated that he was headed to his family's fishing cabin. RP 117-18. Trooper Beebe noticed that the Defendant's speech was slurred. RP 117-18. The trooper then asked if the Defendant had had anything to drink, and the Defendant admitted that he had had a few beers. RP 118, 183.

Trooper Beebe asked the Defendant to step out of the vehicle, and the Defendant complied. RP 118. When the trooper requested the Defendant perform a field sobriety test, the Defendant refused but stated that he would "blow" instead.¹ RP 118, 121.

When the Defendant stepped from the vehicle, Trooper Beebe noticed that the Defendant was very unsteady on his feet. RP 122. The trooper also noticed that the Defendant swayed severely while speaking.

RP 122. Even outside the vehicle, the trooper noted a strong odor of intoxicants coming from the Defendant. RP 122, 156. The trooper decided to arrest the Defendant for driving under the influence, and placed him in the back of his patrol vehicle. RP 122, 160.

After Trooper Beebe placed the Defendant in his patrol vehicle, he read the Defendant his constitutional rights. RP 122. The Defendant stated that he understood his rights. RP 122-23.

When Trooper Beebe called a tow-truck to impound the stopped vehicle, the Defendant became belligerent and verbally abusive. RP 123. The Defendant then demanded that the trooper radio his supervisor. RP 123.

While Trooper Beebe waited for his supervisor, Sergeant Ken Przygocki, he conducted a search of the vehicle. RP 124. The trooper found several alcoholic containers, including four open beer cans and a half finished bottle of whiskey in the front passenger seat. RP 124.

When Sergeant Ken Przygocki responded to the scene, he contacted the Defendant. RP 124. The Sergeant also noted the strong odor of alcohol, slurred speech, severe sway, and flush complexion. RP 163-64.

¹The trial court instructed the State not to elicit any testimony that Trooper Beebe administered a portable breath test (PBT), or any statements the Defendant made after viewing the PBT results. RP 120-21.

After this contact, Trooper Beebe transported the Defendant to the local jail. RP 125.

At the jail, Trooper Beebe read the Defendant his constitutional rights a second time. RP 125. After each line, the Defendant said he understood his rights. RP 125. When the trooper finished reading the Defendant his rights, he asked a final time if the Defendant understood his rights. RP 125. The Defendant replied “nope” and burped defiantly. RP 125. Trooper Beebe proceeded to read a waiver of rights form. RP 125. When the trooper confirmed the Defendant’s understanding, the Defendant responded “sure,” “yeah,” and “nope.” RP 125.

Following this uncooperative exchange, Trooper Beebe read the Defendant his “implied consent warning” pursuant to RCW 49.20.308(2).² RP 125. When the trooper asked if the Defendant understood the warning, the Defendant responded: “no, I gave you a breath test and now you want another.”³ RP 46-47, 56. Beebe asked if the Defendant would submit to

² RCW 49.20.308(2) provides:

The officer shall inform the person of his right to refuse the breath or blood test,... The officer shall warn the driver, in substantially the following language that: (b) If the driver refuses to take the test, the driver’s refusal to take the test may be used in a criminal trial

³ This State and Defense only elicited this testimony at the CrR 3.5, 3.6 hearing. At the same hearing, Trooper Beebe testified that the Defendant never expressed any confusion or that he didn’t understand his rights and warnings. RP 46.

the requisite formal breath alcohol concentration (BAC) test, to which the Defendant affirmatively stated “no.” RP 125. When the trooper tried to check the Defendant’s mouth in order to begin the necessary observation for the formal breath test, the Defendant refused to open his mouth. RP 126. Trooper Beebe subsequently recorded that the Defendant refused to submit to the formal BAC test. RP 126.

Procedural History

The State charged the Defendant, MIKLOS B. TOTH, with driving under the influence of intoxicants (DUI) under RCW 46.61.502(1).⁴ CP 18. Prior to trial, the Defendant moved to suppress any statement that the Defendant made when he refused to submit to the formal BAC test. RP 61-62. After the CrR 3.6 hearing, the trial judge denied the motion, finding that the Defendant knowingly and intelligently refused to take the BAC test. RP 69-70.

The case proceeded to a bifurcated trial. RP 88. The trial court required the State to prove first that the Defendant committed the crime of DUI. RP 88. If the jury convicted the Defendant of DUI, the trial court would permit the State to introduce evidence that the Defendant

⁴ The State also notes that it charged the Defendant with driving while license revoked in the second degree under RCW 46.20.342(1)(b). The Defendant pled guilty to this offense, and he does not challenge this conviction on appeal.

committed four prior DUI offenses and thereby committed felony DUI in the present case. RP 88-90.

During “Phase I” of the bifurcated trial, the State called two witnesses, Trooper Travis Beebe and Sergeant Ken Przygocki. RP 113-172. After the State rested its case, the Defendant testified in his defense. RP 176-189. The Defendant called no other witnesses to corroborate his testimony. RP 176-189.

Outside the presence of the jury, the State requested a “missing witness” instruction, which the trial court denied. RP 208-209. However, the trial court permitted the State to highlight the absence of testimony that would have corroborated the Defendant’s account of events that preceded his arrest. RP 209.

The trial court instructed the jury that the State had the burden of proving each element of the crime of DUI beyond a reasonable doubt, and that the Defendant has no burden to prove a reasonable doubt existed. RP 215. In closing arguments, the State and Defendant reviewed the testimony of the three witnesses. RP 218-234. On rebuttal, the State reminded the jury that the Defendant did not have a burden to present witnesses, and rhetorically asked where the evidence was to corroborate the story that the Defendant did not consume the beers and half bottle of whiskey that the trooper discovered in his car. RP 235-36. The Defendant

objected to the rhetorical question on the grounds that it was an improper comment on his right to remain silent. RP 235. The trial court overruled the objection because the Defendant actually testified and claimed that his brother and his brother's guests had consumed the alcohol and deposited the empty cans in his vehicle. RP 235.

The jury deliberated and found the Defendant guilty of DUI. RP 247.

During "Phase II," the State introduced four certified documents to prove the Defendant committed four prior DUI offenses.⁵ RP 251-252; Supp. CP, Exhibits 1, 2, 3, 4. The State argued these documents proved that the named defendants in the four conviction documents were the same Defendant presently before the trial court. RP 252-55. The State supported this contention with the testimony of the Clallam County Deputy Prosecutor who tried the Defendant for DUI in 2005. RP 252-54. The deputy identified the Defendant and testified that she prepared the judgment and sentence, noting that the judgment included the Defendant's signature, date of birth, and physical description. RP 252-54. In addition, the State called the jury's attention to the fact that the three remaining

⁵ The four documents include: a 2007 King County Judgment for DUI; a 2005 Clallam County Judgment and Sentence for DUI; a 2004 Pacific County Order Granting Deferred Prosecution for DUI; and a 2000 Jefferson County Judgment and Sentence for DUI. Supp. CP, Exhibits 1, 2, 3, 4.

documents included similar information as the Clallam County judgment: distinct name, signature, and date of birth. RP 257-59.

The Defendant never presented sworn testimony that he was not the person who had committed the four prior DUI's. See RP 251-258. In closing arguments, the Defendant submitted that the State had not offered enough evidence to tie him to any of the prior DUI's, except the 2005 conviction in Clallam County. RP 257.

Shortly after the jury started to deliberate the charge of felony DUI, it inquired if they should "disregard lack of signature [on the Jefferson County Judgment and Sentence] and decide with evidence presented?" RP 263. The trial court informed the jury that they had all the evidence necessary to reach a decision. RP 264. The jury returned a Special Verdict Form, stating that the State proved beyond a reasonable doubt that the Defendant committed four prior DUI's within ten years of his present arrest. RP 265.

Prior to the verdict, the Defendant moved to dismiss the felony charge. RP 260. The Defendant argued that his name on the certified court documents was insufficient to prove he was the individual who committed the four prior DUI's. RP 260. The trial court required additional time to consider the matter. RP 263. The trial court ultimately denied the Defendant's motion, carefully articulating that the State had established a

prima facie case of identity based on the evidence contained within each of the certified documents. RP 273-278.

The trial court sentenced the Defendant to sixty (60) months in prison. CP 6. The Defendant timely appealed. CP 5.

C. Argument

1. The evidence is sufficient to prove beyond a reasonable doubt that the Defendant had four prior DUI convictions.

This Court finds that evidence is sufficient to support a conviction if, when viewed in a light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Wofford, 148 Wn. App. 870, 884, 201 P.3d 389 (2009) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). When a defendant claims that evidence is insufficient to support a conviction, he or she admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id. This Court defers "to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the *persuasiveness of the evidence*." Id. (citing State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997) (emphasis added)). The State need not convince this Court of the defendant's guilty beyond a reasonable doubt, but that substantial evidence supports the conviction. Id.

(citing State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). This Court considers circumstantial and direct evidence equally reliable. Id. (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Felony DUI is a Class C felony. RCW 46.61.502(6)(a). A defendant is guilty of felony DUI if, at the time of his arrest, “[t]he person has four or more prior offenses within ten years as defined in RCW 46.61.5055.” RCW 46.61.502(6)(a).

To show the existence of prior convictions, the State must prove that the person named in the prior conviction documents is the same person involved in the present trial. Wofford, 148 Wn. App. at 884. (citing State v. Brezillac, 19 Wn. App. 11, 12, 573 P.2d 1343 (1978). “That the defendant in the present charge has the same name as the defendant in the earlier conviction is sufficient proof of a prior conviction *unless* the defendant declares under oath that he is not the same person named in the prior conviction.” Id. (citing State v. Ammons, 105 Wn.2d 175, 190, 713 P.2d 719 (1986), *superseded by statute on other grounds*, as recognized in In re Pers. Restraint of Runyan, 121 Wn.2d 432, 449-50, 853 P.2d 424 (1993) (emphasis added). If the defendant disputes the State’s contention, the State must produce independent evidence of identity. Brezillac, 19 Wn. App. at 13 (citing State v. Harkness, 1 Wn.2d 530, 96 P.2d 460 (1939); Wofford, 148 Wn. App. at 884.

- (a) The evidence is sufficient because the Defendant did not testify that he was not the same person as the defendants in the prior convictions.

In the present case, the Defendant failed to submit a written declaration or testify under oath that he was not the same person named in the four prior DUI convictions. See RP 194-207; 251-258. Furthermore, and with respect to the State’s certified conviction documents, the Defendant stated that he would “like the weight of the evidence to stand for itself.” RP 245. Thus, this Court should find that same distinct name on the certified documents is sufficient proof that the “Miklos Toth” in the prior DUI convictions is the same “Miklos Toth” in the present matter. See Ammons, 105 Wn.2d at 190; Wofford, 148 Wn. App. at 884.

- (b) There is independent proof that the present Defendant and the defendants named in the prior convictions documents are the same person.

Even if the Defendant properly disputed his association with the “Miklos Toth” in the four prior convictions, there is independent proof that he and the defendants named in the certified documents are the same person.

The Defendant’s brief relies on State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005), to support his argument that the State produced insufficient evidence to merit a felony DUI conviction. In Huber, the State

originally charged the Defendant with two counts: violating a protection order and tampering with a witness. 129 Wn. App. at 500. The trial court released the defendant and ordered him to appear at a subsequent hearing. Id. When the defendant failed to appear, the trial court issued a bench warrant. Id. The State subsequently charged the defendant with bail jumping. Id. At trial, the trial court tried the bail jump separately. Id. In its case in chief, the State introduced certain certified court documents. Id. at 500-01. The State made no effort to call witnesses or show how the exhibits related to the same individual presently before the tribunal. Id. at 501. The defense elected not to make an opening statement or present any evidence, but argued that even though the State proved that a person with the same name as the defendant jumped bail, it had not identified that the person who committed the crime was the individual before the court. Id. This Court reversed the resulting bail jump conviction, stating that “the State does not meet its burden merely because the defense opts not to present evidence; if the State presents insufficient evidence, the defendant’s election not to rebut it does not suddenly cause it to become sufficient.” Id. at 503.

In State v. Wofford, this Court again considered whether the State produced sufficient evidence regarding a defendant’s prior convictions. In Wofford, a commissioner executed a no-contact order that prohibited the

defendant from having contact with the victim. 148 Wn. App. at 873. One year later, law enforcement stopped the defendant for speeding and found him in the presence of the victim. Id. The State charged the defendant with one count of violating a domestic violence no-contact order. Id. Because the Defendant had two prior convictions for violating no contact orders, the state sought a felony conviction. Id. To prove the prior convictions, the State presented charging documents that the an individual with the same name as the Defendant had twice been convicted of violating no-contact orders. Id. The charging documents provided the physical characteristics and date of birth for the defendant of the prior crimes. Id. This Court noted that the current no-contact order provided the same physical characteristics and birth date. Id. Further, the State called the law enforcement officers who arrested the Defendant, and he identified the Defendant as the individual they arrested. Id. at 874. Based on these facts, this Court said that there was sufficient evidence to support a conviction: the jury reviewed the name and the physical characteristics contained in the prior conviction documents and could compare them with the individual they observed in the courtroom. Id. at 884.

In State v. Brezillac, the State provided conviction documents containing (1) the same name as the defendant, and (2) a prison record containing a photograph of the defendant and a written description of his

physical characteristics (age, weight, build, eye, and skin color). 19 Wn. App. 11, 13, 573 P.2d 1343 (1978). The appellate court determined that the State properly identified the defendant because the trial court had an opportunity to compare the booking photo and the listed physical characteristics to the man sitting in court, which enabled “enabled the trial judge to conclude by observation that, beyond a reasonable doubt, he was the same [defendant] as in the supporting documents.” Id. at 13-14.

The present case is closer to Wofford and Brezillac than it is to Huber. Here, unlike Huber, the State offered independent evidence in addition to the name listed on the certified conviction documents. The State presented the testimony of a Clallam County deputy prosecuting attorney who prosecuted the Defendant for DUI in 2005. RP 252-54. The deputy identified the Defendant, and testified that she prepared the 2005 Clallam County judgment and sentence. RP 252-54. After reviewing the 2005 judgment and sentence, the jury was able to learn the Defendant’s birth date and view his distinct signature in two places. Supp CP, Exhibit 3.

The Jefferson County conviction document bears the same name as the Defendant. Supp CP, Exhibit 2. While the Jefferson County document does not have the Defendant’s signature, it does bear the same DOB reflected in the 2005 Clallam County judgment. Supp CP, Exhibit 2. This

Court should find that the exact same birth date in the two documents is independent and sufficient evidence to show that the defendant in the Jefferson County case and the defendant in the two Clallam county cases are one and the same.

Again, the 2007 King County judgment and the 2004 Pacific County deferred prosecution document include the same name as the Defendant. Supp CP, Exhibits 1, 4. While the judgment and order do not include the Defendant's birth date, they do contain the same distinct signature as the one in the 2005 Clallam County judgment and sentence.⁶ Supp CP, Exhibits 1, 4. This Court should find that these similar signatures constitute independent and sufficient evidence to show the defendant in the King County and Pacific County cases were the same person before the Clallam County superior court for DUI in 2005 and 2008.

Moreover, the uncommon name and the similarity of the crimes are further indicia that the Defendant in the present case is the same person described in each of the certified court documents. The four certified convictions documents bear the same distinct name as the present Defendant, were for the exact same crimes (DUI and Driving While

⁶ The State concedes that no handwriting analysis was performed on the signature. However, as the trial court recognized, the signatures in all certified documents "are practically identical from a layman's view." RP 276-77.

License was Suspended), and show that each offense occurred in neighboring Western Washington counties. Supp CP, Exhibits 1, 2, 3, 4.

The State did more than present documents bearing the same distinct name. The State conclusively established that the defendant in the 2005 conviction was the same person before the court in 2008. Furthermore, the information within the 2005 conviction documents was included in the other three conviction documents. In light of this evidence, chances are remote that each case involved a different individual.⁷

After reviewing the evidence in a light most favorable to the State, this Court should hold that there is sufficient independent evidence to establish that the Defendant in the present case is the same person who received four prior DUI convictions. See Wofford, 148 Wn. App. at 874; Brezillac, 19 Wn. App. at 13. This Court should affirm the defendant's conviction for felony DUI.

2. The trial court did not err when it allowed the State to make a "missing witness" argument on rebuttal.

The appellate courts review a trial court's rulings on improper prosecutorial argument for abuse of discretion. State v. Montgomery, 163

⁷ As the Brezillac Court noted, "[a]t some point in the process of proof, a prima facie case is established and the defendant must come forth with evidence to verify his unspoken premise that an amazing coincidence has occurred, and he is being mistaken for another." 19 Wn. App. at 14.

Wn.2d 577, 598, 183 P.3d 267 (2008) (citing State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003)). A trial court abuses its discretion when the “decision is manifestly unreasonable or is based on untenable reasons or grounds.” Id.

A criminal defendant does not have a burden to present evidence, and it is an error for the State to suggest otherwise. Montgomery, 163 Wn.2d at 598. However, the missing witness doctrine recognizes that the defendant’s theory of the case is subject to the same scrutiny as the State’s. Id. The doctrine applies if (1) the potential testimony is material and not cumulative; (2) the missing witness is particularly under the control of the defendant rather than being equally available to both parties; (3) the witness’s absence is not satisfactorily explained; and (4) the criminal defendant’s right to remain silent is not impermissibly infringed or the State seeks to shift the burden of proof. Id. at 598-99. When there are facts to satisfy this criteria, the State may argue, and the jury may infer, that the absent witness’s testimony would have been unfavorable to the defendant. Id. at 598.

However, improper application of the missing witness doctrine may be harmless error so long as the jury is properly instructed on the State’s burden of proof. Montgomery, 163 Wn.2d at 600 (citing State v. Frost, 160 Wn.2d 765, 780, 161 P.3d 361 (2007)).

(a) The State properly invoked the missing witness doctrine.

In the present case, the Defendant testified that he only had two beers and a swig of whiskey at his brother's birthday party, and that the other attendees were responsible for consuming half the bottle of whiskey in his vehicle. RP 180. The Defendant's appears to argue that he was not driving under the influence or affected by alcohol because he did not have enough to drink. See RP 180. This proffered defense is subject to the jury's scrutiny. See Montgomery, 163 Wn.2d at 598.

The Defendant relies on State v. Montgomery to support his argument that State improperly shifted the burden of proof during closing arguments, claiming that the missing witness doctrine was inapplicable. In Montgomery, the State charged the defendant with possession of pseudoephedrine with intent to manufacture methamphetamine. 163 Wn.2d at 586. At trial, the defendant argued that certain items in his possession were to clean his dog's wound and make repairs to his trailer, not to manufacture methamphetamine. Id. at 585-86. The prosecutor questioned the defendant about the whereabouts of his grandson, for whom the defendant served as the primary caregiver, who could corroborate the defendant's explanation for the purchases. Id. at 584-85, 596. The defendant responded that his grandson was at school, but provided his daughter as a corroborating witness. Id. at 596. The daughter

testified that the grandson was in school, that the defendant's dog was injured, and that the trailer was in need of repair. Id. During closing arguments, the State made repeated reference to the defendant's failure to call his grandson to corroborate his defense. Id. at 597. The Supreme Court held that the missing witness instruction/argument constituted reversible error. Id. at 600. The Supreme Court reasoned that the instruction/argument was unnecessary because the grandson's was not a key witness and his testimony would have been cumulative because the daughter already corroborated the defense. Id. at 599.

Here, the facts are different than they were in Montgomery. In Montgomery, the appellate court found that the grandson's testimony would have been cumulative because the defendant's daughter was able to testify to the same facts favorable to the defense. 163 Wn.2d at 596. In contrast, the Defendant in the present case was the only person to testify in his defense at trial. See RP 179-92. In Montgomery, the defendant explained why his grandson was not able to appear at trial. 163 Wn.2d at 596. In contrast, the Defendant never sought to explain the absence of his brother or any of the attendees. See RP 179-92.

In addition, the missing witnesses in the present case are not equally available to the State. The Defendant never provided the names of the people who attended his brother's party. RP 178-79.

This Court should find that the State's brief reference to the absence of witnesses did not shift the burden of proof. The State confined its closing arguments and rebuttal primarily to Trooper Beebe's testimony and the Defendant's admission that he did consume alcohol on the night in question. See RP 218-25, 234-242.

(b) Any error in the State's application of the missing witness doctrine was harmless.

Should this court find that the "missing witness" argument was improper, it should still affirm the Defendant's conviction for felony DUI because the trial court properly instructed the jury that the State had the burden to prove each element of the crime beyond a reasonable doubt. See Montgomery, 163 Wn.2d at 600; Frost, 160 Wn.2d 765. Furthermore, appellate courts presume that jurors are intelligent, capable of understanding and applying instructions to the facts of the case. Montgomery, 163 Wn.2d at 605 (J.M. Johnson, J. concurring and citing People v. Carey, 41 Cal. 4th 109, 130, 158 P.3d 743, 59 Cal. Rptr. 3d 172 (2007)).

In the present case, the trial court explicitly told the jury that the State had to prove each element of the crime beyond a reasonable doubt. RP 210, 215. In addition, the Defendant's attorney reminded the jury that the State had the burden and then employed an extensive analogy to illustrate the difficulty of such a burden. RP 226-34. This Court should

affirm the Defendant's conviction for felony DUI, finding that the jury knew that the State had the burden to prove each element of the crime beyond a reasonable doubt and evaluated the evidence accordingly. Any improper comment on the absence of witnesses was harmless.

3. The trial court did not err when it denied the Defendant's motion to suppress his breath test refusal.

This Court reviews a trial court's decision to admit evidence under an abuse of discretion standard. City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009) (citing State v. Noltie, 116 Wn.2d 831, 852, 809 P.2d 190 (1991)). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds, or its discretion is exercised for untenable reasons. State v. Cohen, 125 Wn. App. 220, 223, 104 P.3d 70 (2005).

Under RCW 46.20.308, "[a]ny person who operates a motor vehicle within this state is deemed to have given consent... to a test of his breath or blood," when law enforcement has reasonable grounds to believe the person driving is under the influence of alcohol or drugs. RCW 46.20.308(1). If the driver refuses to submit to a test that determines the present alcohol or drug concentration in the person's blood or breath, the

trial court may admit said refusal into evidence at the subsequent criminal trial. RCW 46.61.517. See also RCW 46.20.308(2)(b).

The refusal to take such a test demonstrates the driver's consciousness of guilt, a relevant fact at trial. Cohen, 125 Wn. App. at 224. Because the Defendant affirmatively refused to submit to a formal BAC test at the police station, the trial court did not abuse its discretion when it admitted the refusal into evidence.

(a) The Defendant impliedly consented to a formal BAC test at the police station, and his refusal to submit to this test is admissible evidence.

The meaning of statutes and regulations are questions of law, and the appellate courts review them de novo. City of Seattle v. Clark-Munoz, 152 Wn.2d 39, 43, 93 P.3d 141 (2004). The appellate courts construe the provisions 46.20 and 46.61 RCW to effect their intended purpose and avoid unlikely, absurd, or strained consequences. See State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) (citing State v. Richardson, 81 Wn.2d 111, 499 P.2d 1264 (1972)).

When grounds exist for law enforcement to suspect that a person is driving a motor vehicle under the influence of alcohol, state law provides that the driver consents to a breath test subject to the provisions of RCW 46.61.506. RCW 46.20.308(1). RCW 46.61.506 requires that a valid breath analysis conform to the methods that the state toxicologist

approved. RCW 46.61.506(3), (4). If the driver refuses to submit to a breath alcohol concentration test, that refusal constitutes admissible evidence at trial. RCW 46.61.517.

With respect to DUI crimes, the State is required to produce competent evidence of the defendant's intoxication. RCW 46.61.502. The State proves a violation of RCW 46.61.502 in two different ways: (1) by showing the defendant's blood alcohol level was at least .08 within two hours after the incident, or (2) by testimony tending to show that the defendant was under the influence of alcohol and or other drugs. The State's only means to prove conclusively that a defendant is over the .08 limit is to introduce the formal results of his or her BAC test at the police station. RCW 46.61.502, .506. See also State v. Smith, 130 Wn.2d 215, 222, 922 P.2d 811 (1996) ("the result garnered from the PBT [portable breath test] is inadmissible for any purpose").

The State concedes that the relevant statutes do not *explicitly* require the defendant to submit a breath sample at a police station. However, the purpose of the statutes is to compel the driver to produce an accurate result of his or her intoxication. See RCW 46.20.308, RCW 46.61.502, .506, .517. As Division I recognized in State v. Cohen:

The United States Supreme Court has noted that states want drivers to choose to take the test, and want the test to be valid, because evidence of intoxication is far stronger

where there is a positive blood (or breath) alcohol test, rather than just a refusal to take the test. South Dakota v. Neville, 459 U.S. 553, 564, 103 S. Ct. 916, 74 L. Ed 748 (1983).

125 Wn. App. at 225.

The Defendant argues that he met his RCW 46.20.308 obligation when he agreed to submit to a PBT, which does not provide the same assurances as the formal BAC test at the police station. If this Court holds that RCW 46.20.308 only requires an intoxicated driver to consent to a PBT, which is inadmissible at trial, criminal defendants will always refuse the more reliable, formal BAC test. This is an absurd result, and it is contrary to the Legislature's intent: to compel drivers to submit to those tests that produce reliable and admissible evidence of intoxication.

The Defendant cites City of Seattle v. Clark-Munoz to support the argument that RCW 46.20.308 does not guarantee the State that any test result will be admissible in a subsequent trial. In Clark-Munoz, the Supreme Court affirmed the trial court decision to exclude results from a formal BAC analysis because law enforcement did not perform regular testing to ensure its machines produced accurate results. 152 Wn.2d 39, 42, 93 P.3d 141 (2004). Thus, Clark-Munoz stands for the proposition that breath tests must be reliable in order to ensure the safety of our streets and the just application of the law. Id. at 41-42.

This Court should find that drivers of motor vehicles impliedly consent to submit to the reliable and formal BAC test at the police station. Because the Defendant refused to submit to the more formal BAC test, the trial court did not abuse its discretion when it admitted the refusal into evidence.

(b) The Defendant knowingly and intelligently refused to submit to a breath alcohol concentration test.

When law enforcement arrests an individual for driving a motor vehicle under the influence of intoxicating liquors, the drivers is deemed to have consented to a formal BAC test at the police station. RCW 46.20.308(1). A driver can refuse to submit to a breath test; however, the trial court may admit that refusal into evidence at the subsequent criminal trial. RCW 46.20.308(2); See also RCW 46.61.517.

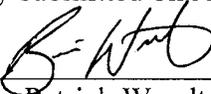
Before an officer conducts the breath test, the officer must warn the suspected DUI offender of the consequences of his or her refusal to submit to the test. RCW 46.20.308(2); State v. Trevino, 127 Wn.2d. 735, 747, 903 P.2d 447 (1995). The purpose of this warning is to give the suspect the right to make a knowing and intelligent decision whether or not to submit to the formal test. Trevino, 127 Wn.2d at 747. If the officer fails to give a proper warning, the failure will result in the suppression of the reliable BAC results. Id.

In the present case, Trooper Beebe read the Defendant his implied consent warning. RP 125. The Trooper asked if the Defendant understood the warning, and the Defendant responded “no, I gave you a breath test and now you want another.” RP 46-47, 56. While the response arguably was a compound answer, it is clear that the Defendant understood what the trooper was requesting – that he submit to a formal BAC test. When Trooper Beebe asked if the Defendant would submit to the formal BAC test, after he had already informed the Defendant of the consequences his refusal may carry, the Defendant affirmatively stated “no.” RP 125. This Court should hold that the trial court did not err when it denied the Defendant’s motion to suppress his refusal, finding that he knowingly and intelligently refused to submit to the breath test that the law requires. This Court should affirm the Defendant’s conviction for DUI, finding that the trial court did not err when it denied the Defendant’s motion to suppress his breath test refusal.

A. Conclusion

For the foregoing reasons, the State requests that this Court affirm the Defendant’s conviction for felony DUI.

Respectfully submitted on April 13, 2009.



Brian Patrick Wendt, WSBA No. 40537
Attorney for Respondent

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COURT OF APPEALS
DIVISION II

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

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STATE OF WASHINGTON

BY [Signature]
DEPUTY

NO. 38223-7-II

STATE OF WASHINGTON,
Respondent,
vs.
MIKLOS B. TOTH,
Appellant.

AFFIDAVIT OF SERVICE BY MAIL

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STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 13th day of April, 2009, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the *Brief of Respondent*, addressed as follows:

MR. DAVID C. PONZOHA, CLERK
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[Signature: Doreen Hamrick]
Doreen Hamrick

SUBSCRIBED AND SWORN TO before me this 13th day of April, 2009

[Signature: Tina Hendrickson]
(PRINTED NAME:) Tina Hendrickson
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 12-15-11

AFFIDAVIT OF SERVICE