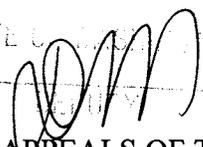


COURT OF APPEALS
DIVISION II

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NO. 38542-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAWN MARIE MARRAZZO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Roger Bennett, Judge

BRIEF OF APPELLANT

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P.M. 8-4-09

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A. ASSIGNMENTS OF ERROR

- 1. The trial court denied Ms. Marrazzo's right to a jury trial under the Sixth Amendment and Article I, Section 22 of the Washington State Constitution.**
- 2. The trial court erred in prohibiting Ms. Marrazzo from calling Washington State Patrol Sergeant Patty Langford as a defense witness.**
- 3. The trial court erred when, in refusing to allow Sgt. Langford to testify, it effectively ruled that a flawed chain of custody was inconsequential in criminal cases where blood analysis was essential to the state's case.**
- 4. The trial court erred when it limited Ms. Marrazzo's cross examination of toxicologist Brian Capron.**
- 5. The trial court erred in admitting exhibits 37, 38, 39, the test results of an absent toxicologist, in violation of the Confrontation Clause and *Crawford v. Washington*.**
- 6. The trial court erred in refusing to grant a mistrial after it first admitted medical blood results over Ms. Marrazzo's objection and then changed its mind and decided it wasn't admissible after all.**
- 7. The trial court erred in admitting the medical blood results.**
- 8. The trial court's limiting instruction, instruction 6A, telling the jury it could not consider the evidence of the medical blood results after the court had admitted the results was a comment on the evidence.**
- 9. Defense counsel provided ineffective counsel when he failed to object to the trial court's comment on the evidence in Instruction 6A.**

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. The federal and state right to trial includes the right to present evidence to refute the state's charges. Dawn Marrazzo is charged with vehicular assault. The linchpin of the state's case is blood test results. Did the trial court deny Ms. Marrazzo her right to trial by (1) not allowing her to call a witness to impeach the blood test results and (2) not allowing her to impeach the tester of the blood results? [Assignments of Error 1-4]**
- 2. Because of the Sixth Amendment's Confrontation Clause, blood test results prepared for criminal litigation by a non-testifying toxicologist are inadmissible at a defendant's trial. Paige Long, formally a WSP toxicologist, tested and prepared blood draw results in preparation for the prosecutor of Dawn Marrazzo. Long, who had never been subject to cross-examination on Ms. Marrazzo's blood results, did not testify at Ms. Marrazzo's trial. Yet, the trial court allowed Long's test results to be admitted into evidence. Was the admission a violation of Ms. Marrazzo's right of confrontation? [Assignment of Error 5]**
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- 4. If the court finds error in defense counsel's failure to object to Instruction 6A, is counsel ineffective?**

C. STATEMENT OF THE CASE

1. A summary of the proceedings.

Dawn Marrazzo was charged with two crimes: vehicular assault (count 1); and driving while her licensed was suspended or revoked in the second degree, "DWLS 2" (count 2). CP 1-2. The vehicular assault charge alleged that Ms. Marrazzo committed the charge under all its possible alternatives: while driving recklessly; while affected by alcohol; having a blood alcohol reading of .08 or higher within two hours of driving; and while driving with disregard for the safety of others. CP 1.

Ms. Marrazzo waived her right to a jury on the DWLS 2 charge. CP 55. The court heard the DWLS 2 testimony during breaks in Ms. Marrazzo's jury trial. 12BRP 698-701. The court found Ms. Marrazzo guilty of DWLS 2. 16RP 1004. The court dismissed the reckless driving prong of the vehicular assault for insufficient evidence. 12BRP 766. The jury did not find unanimity on the affected by prong or on the disregard for the safety of others prong. CP 299-301. The jury did unanimously find Ms. Marrazzo guilty of driving with an alcohol content of .08 or higher within two hours of driving.

After being sentenced, Ms. Marrazzo made this timely appeal. CP 309-331.

2. **Ms. Marrazzo is injured in a car accident and taken to the hospital.**

On August 24, 2006, Dawn Marrazzo was on her way to pick up a friend to go with her to the Portland airport to get Ms. Marrazzo's mother. 10RP 251; 12BRP 783, 811. Around 5:30 p.m., at a busy Vancouver intersection, the trucks driven by Ms. Marrazzo and Michael Wagner collided. 10RP 251, 255; 11ARP 323; 11B 533; 12BRP 814-15. Both Ms. Marrazzo and Mr. Wagner were seriously injured in the accident. 11BRP 539-544; 12BRP 806-08.

When the accident happened, Ms. Marrazzo was driving her mother's full-sized Dodge pickup. 12ARP 593. Michael Wagner was driving a Clark County PUD truck. 11BRP 533-34. A Clark County Sheriff's Office accident reconstructionist opined that Ms. Marrazzo was making a left turn when Wagner, who was traveling 43 to 46 miles per hour in the 40 mile per hour zone, struck Ms. Marrazzo. 12BRP 720, 758. Both drivers were alone in their trucks. 10RP 255, 259. Both drivers were taken by aid units to a hospital. 10RP 258; 11ARP 319. Wagner spent two weeks in the hospital with a broken leg, a crushed foot, a burn on his thigh, and an obstructed bowel. 11BRP 539-544. Ms. Marrazzo

suffered a brain injury and debilitating damage to her leg. 12BRP 806-08.

3. **Full cans of beer are discovered in Ms. Marrazzo's truck and blood is drawn at the hospital.**

When the police were investigating the accident scene, they found one unopened beer can in Ms. Marrazzo's truck and another on the ground near the truck. 11ARP 316. A medic who stabilized Ms. Marrazzo when she was being transported to Legacy Emmanuel Hospital in Portland saw no indication that Ms. Marrazzo was intoxicated. 11ARP 309. Shortly thereafter, Clark County Deputy Ryan Taylor contacted Ms. Marrazzo in a treatment room at the hospital. 11ARP 323. He testified that he could detect the odor of alcohol coming from her person. 11ARP 323. He read the unconscious Ms. Marrazzo her implied consent warning. 11ARP 325. Nurse John Shapland collected a legal blood sample for Deputy Taylor using vials that Deputy Taylor provided from a Washington State Patrol (WSP) DUI kit. 11ARP 322, 349.

4. **"Medical" blood results are admitted into evidence over Ms. Marrazzo's objection.**

Nurse Shapland was not involved in the taking or testing of "medical" blood from Ms. Marrazzo. No one who drew the blood, or tested the blood, testified. Yet, over strong objection from Ms. Marrazzo, nurse Shapland testified that Ms. Marrazzo's "legal" blood level was .219

milligrams per deciliter. 11ARP 379. In Washington measurement terms, the Oregon medical blood reading was comparable to a .175-.19 reading. RP 516. 11BRP 516.

5. **Ms. Marrazzo's "legal" blood is tested twice and twice objected to at trial.**

Ms. Marrazzo's "legal" blood, the samples taken at the hospital using the WSP DUI kit, were twice tested by the Washington State Patrol Crime Toxicology Lab in Seattle. 11BRP 498, 472-76. The first test was completed on September 6, 2006, by analyst Paige Long. See Exhibit 37 (Supp. Designation of Clerk's Papers). Ms. Long did not testify at the trial. Ms. Marrazzo vigorously objected to the admission of Ms. Long's lab test results. 11BRP 472-476. The court overruled the objection and allowed the results in: 0.16 g/100mL. Exhibit 37 (Supp. Designation of Clerk's Papers). 13RP 891. The court also admitted Exhibits 38 and 39, the graphs supporting Exhibit 37. (Supp. Designation of Clerk's Papers.) The objection was made on various grounds to include that its admission is a violation of *Crawford v. Washington*. 11B 476.

WSP Toxicology Lab analyst Brian Capron retested the blood on May 10, 2007. 11BRP 479. Ms. Marrazzo strongly objected to the admission of Capron's test results because of the limitation on cross-examination of Capron imposed by the court. 11BRP 482 -93. The court

allowed the 0.16 g/100mL results of Capron's retest into evidence. 11BRP 498, 520.

6. **The court prohibits defense witness testimony and cross examination.**

The defense offered the testimony of WSP Sergeant Patty Langford to describe the disarray at the WSP Toxicology Laboratory in Seattle, its chain of custody problems, and her lack of confidence in the lack of integrity or reliability of blood tested there in 2007. 10RP 199-206; CP 56-271. The court granted the state's motion in limine and excluded the testimony. 10RP 205. The court also sided with the state in refusing to allow cross examination of toxicologist Brian Capron about his prior misrepresentations on lab work and the need for extra chemical solution to stabilize blood if it is not tested within 48 hours of having been drawn. 11BRP 482.

7. **The court concedes error on the admission of the medical blood, Ms. Marrazzo's request for a mistrial is denied, and the court gives a limiting instruction commenting on the evidence.**

After allowing the medical blood results to be admitted into evidence, the court changed course and held, as Ms. Marrazzo argued, that

there was insufficient foundation to enter the medical blood results into evidence and that it would be reversible error to do so.¹ 13RP 893-95.

Ms. Marrazzo moved for a mistrial. 13RP 896. The court denied that remedy and instead gave a limiting instruction²:

INSTRUCTION 6A

Ladies and gentlemen, I have previously admitted Exhibit #36, which was a blood alcohol test result from Legacy Hospital. You also heard testimony from Mr. John Schapland and Mr. Capron of Washington State Patrol about that report.

Upon consideration, I have decided to exclude that exhibit and the testimony about it, because it does not state by whom, when, or how the testing was done. You are to disregard the exhibit and testimony about it.

By making this ruling, the court is not making any comment or suggestion about the reliability of any witness or evidence in the case.

CP 281.

D. ARGUMENT

1. THE TRIAL COURT DENIED DAWN MARRAZZO HER FEDERAL AND STATE RIGHT TO A JURY TRIAL.

a. Ms. Marrazzo has a federal and state right to a jury trial.

The Sixth Amendment and Article I, Section 22 of the Washington State Constitution provide that an accused has the right to compel the attendance of witnesses and present a defense. U.S. Const. Amend VI;

¹ The medical blood results were Exhibit 36 which was withdrawn.

² No one objected to this instruction.

Wash. Const. Article I, Section 22; *Douglas v. Alabama*, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); see also, RCW 10.52.040; CrR 6.12. Under the Sixth Amendment and Article I, Section 22, an accused person has the right to present her version of the facts to the jury so that it may decide “where the truth lies.” *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The United States Supreme Court has described the importance of the right:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. The right is a fundamental element of the due process of law.

Washington v. Texas, 388 U.S. at 19, cited with approval in *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984) (*Smith I*).

b. The trial court denied Ms. Marazzo her jury trial right by preventing her from presenting relevant evidence.

An accused person thus has a constitutional right to present a defense consisting of relevant, admissible evidence. *State v. Rehak*, 67

Wn.App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993); *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987) (“Due process demands that a defendant be entitled to present evidence that is relevant and of consequence to his or her theory of the case.”)

To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably than it would be without the evidence.” ER 401. Relevant evidence is generally admissible. ER 401. Only minimal relevance is necessary to warrant admission. *State v. Bebb*, 44 Wn. App. 803, 814, 723 P.2d 512 (1986). The right to present admissible evidence “may be counterbalanced by the state’s interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the factfinding process. *Hudlow*, 99 Wn.2d at 15.

1. WSP Sergeant Patty Langford’s³ testimony promised to impeach the state’s blood test results.

Ms. Marraazzo sought to call Sergeant Patty Langford in her case in chief. There was a written offer of proof as to the sergeant’s anticipated

³ The spelling of the sergeant’s last name is unclear. In this record, it is Langford.” In the offer of proof filed by Ms. Marraazzo, it is “Lankford.” See Offer of Proof, CP 56-271.

testimony. In essence, Sgt. Langford is an internal auditor for WSP. CP 71. From 2004 to November 2007, she audited the toxicology lab in Seattle. CP 85. What she found were loose standards that failed to preserve the chain of custody for items coming into and going out of the lab. CP 85. Although she attempted to work with the toxicology lab to overcome its problems, by 2007, she had no confidence about whose hands touched the evidence and no confidence in the reliability of the blood evidence that was in the freezer in 2007. CP 170.

The state did not want Sgt. Langford's testimony in evidence and moved in limine to exclude it, arguing that it was irrelevant. 10RP 199-202. Ms. Marrazzo challenged what was going on at the lab, especially in April 2007, when Ms. Marrazzo's blood was tested for a second time by toxicologist Brian Capron. 10RP 204-05. Although there was no proof that Ms. Marrazzo's blood sample was tainted by the lab's loose protocols and lack of fixed chain of custody standards, the state had an obligation to provide accurate and reliable testing. 10RP 205. Evidence of malfeasance at a state lab is not merely impeaching but is critical to the tester's credibility, the validity of the testing, and the chain of custody. *State v. Roche*, 114 Wn. App. 424-438, 59 P.3d 682 (2002).

Ultimately, the court excluded Sgt. Langford's relevant testimony. The exclusion was is error especially when you consider that the court

invited the jurors to consider the type of evidence that Sgt. Langford would have provided had she been allowed to testify. The court, in Instruction 6, told the jury to scrutinize everything about the blood evidence:

In determining the accuracy and reliability of a blood test, you may consider the testing procedures used, the reliability and functioning of a testing instrument, maintenance procedures applied to a testing instrument, and any other factors that bear on the accuracy of and reliability of the test.

CP 280. Although Sgt. Langford could have given the jurors information to use in applying the directives of Instruction 6, the court refused, in error, to allow it. In so doing, the court prevented Ms. Marrazzo from impeaching the blood test results. It was the blood test results that the jury unanimously agreed upon in convicting Ms. Marrazzo. To limit Ms. Marrazzo's offered impeachment evidence was to deny her a defense.

2. *Cross examination of state toxicologist Brian Capron would have called his results into question.*

The State objected to the cross-examination of toxicologist Brian Capron on several topics. In an offer of proof, with Capron testifying, his practice of misdating official actions on breath testing solutions was called into question by Ms. Marrazzo. 11ARP 391-400. Capron acknowledged the misdating and attempted to explain it away. 11ARP 395-98. Ms. Marrazzo argued that Capron's actions reflected on the accuracy of his lab

work. 11ARP 398. Although Capron's answers to the offer of proof suggested willful manipulation of records, the court found, erroneously, that Capron would only manipulate breath test results and not blood test results. 11ARP 400. The court refused to allow Ms. Marrazzo to question Capron about the accuracy of his testing results in front of the jury even though Capron admitted willful manipulation of test results, 11ARP 400, and signed untruthful declarations attesting to the accuracy of his work, 11BRP 496-97.

Similarly, the court would not let Capron be questioned in front of the jury about whether the enzyme levels in the test tubes containing blood samples was sufficiently high to prevent inaccurate test readings. 11BRP 484-97.

But both topics, made off-guard by the court, strike at the essential issue in the case: whether Ms. Marrazzo's blood test results were accurate. The court's limitation on Ms. Marrazzo's cross examination prevented her from fully exploring her defense and denied her the right to a jury trial.

Ms. Marrazzo's vehicular assault conviction should be reversed.

2. THE TRIAL COURT ERRED IN ADMITTING THE BLOOD TEST RESULTS PREPARED BY PAIGE LONG.

Former WSP toxicologist Paige Long did not testify at Ms. Marrazzo's trial. Yet, over a *Crawford* objection, the court admitted into

evidence the test results Ms. Long prepared on September 6, 2006. See Exhibits 37-39. The *Crawford* objection should have been granted and the exhibits not admitted.

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” In *Crawford v. Washington*, after reviewing the Confrontation Clause’s historic underpinnings, we held that it guarantees a defendant’s right to confront those “who ‘bear testimony’ ” against him. 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). A witness’s testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 54.

As noted, toxicologist Long did not testify at the trial. Additionally, there was no suggestion that she had been previously subjected to cross examination on Ms. Marrazzo’s blood test results.

Up until very recently, there was some question about whether laboratory reports prepared for the purpose of criminal litigation was testimonial and whether the person through whom the evidence was sought to be admitted must appear in person and be confronted about the test results. The United States Supreme Court recently answered that question in the affirmative under facts very similar to our own..

There is little doubt that the documents at issue in this case fall within the “core class of testimonial statements” thus described. Our description of that category mentions affidavits twice. See also *White v.*

Illinois, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., concurring in part and concurring in judgment) (“[T]he Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”). The documents at issue here, while denominated by Massachusetts law “certificates,” are quite plainly affidavits: “declaration [s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.” Black’s Law Dictionary 62 (8th ed.2004). They are incontrovertibly a “ ‘solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ ” *Crawford, supra*, at 51, 124 S.Ct. 1354 (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The “certificates” are functionally identical to live, in-court testimony, doing “precisely what a witness does on direct examination.” *Davis v. Washington*, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (emphasis deleted).

Here, moreover, not only were the affidavits “ ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ ” *Crawford, supra*, at 52, 124 S.Ct. 1354, but under Massachusetts law the *sole purpose* of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance, Mass. Gen. Laws, ch. 111, § 13. We can safely assume that the analysts were aware of the affidavits’ evidentiary purpose, since that purpose—as stated in the relevant state-law provision—was reprinted on the affidavits themselves. See App. to Pet. for Cert. 25a, 27a, 29a.

In short, under our decision in *Crawford* the analysts’ affidavits were testimonial statements, and the analysts were “witnesses” for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to “ ‘be confronted with’ ” the analysts at trial. *Crawford, supra*, at 54, 124 S.Ct. 1354.

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2532 (U.S. Mass., 2009).

At issue in *Melendez-Diaz*, were certificates of state laboratory analysts stating that the material seized by police and connected to the defendant was cocaine of a certain quantity. The certificates were sworn before a notary public and were submitted as prima facia evidence of what they asserted. See equivalent in CrR 6.13(b), Test Report by Expert. *Melendez-Diaz* controls the issue before this court and settles any issues regarding the admissibility of toxicologist Long's blood test report. It was error to admit it.

3. MS. MARRAZZO WAS ENTITLED TO A MISTRIAL AFTER THE TRIAL COURT DECIDED TO EXCLUDE THE ALREADY-ADMITTED MEDICAL BLOOD RESULT. THE COURT'S LIMITING INSTRUCTION DID NOT CURE THE COURT'S ERROR AND, IN FACT, ONLY MADE IT WORSE.

When Ms. Marrazzo was at Legacy Emmanuel Hospital after her accident, the hospital drew her blood for purely medical reasons. The state discovered the results of the medical blood draw to include its alleged alcohol content. Over Mr. Marrazzo's repeated objection, the court admitted the evidence of the medical blood and even allowed it to be translated to a figure guessed to be equivalent to a legal blood draw in Washington. At the end of the case and just before the jury was instructed, the court had a spontaneous change of heart about the medical blood realizing that its admission was likely prejudicial reversible error. The

court declined to grant Ms. Marrazzo's motion for a mistrial. Instead, the court included the following instruction in the jury instructions.

INSTRUCTION 6A

Ladies and gentlemen, I have previously admitted Exhibit #36, which was a blood alcohol test result from Legacy Hospital. You also heard testimony from Mr. John Schapland and Mr. Capron of Washington State Patrol about that report.

Upon consideration, I have decided to exclude that exhibit and the testimony about it, because it does not state by whom, when, or how the testing was done. You are to disregard the exhibit and testimony about it.

By making this ruling, the court is not making any comment or suggestion about the reliability of any witness or evidence in the case.

CP 281. Defense counsel did not object to this jury instruction.

The substantive issue is whether the court's action in striking the testimony, when viewed against the backdrop of all the evidence, so prejudiced the jury that Ms. Marrazzo was denied her right to a fair trial. If it did prejudice the jury, the remark warranted a mistrial. *See State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In looking at a trial irregularity to determine whether it may have influenced the jury, the *Weber* court considered, without setting forth a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an

instruction which a jury is presumed to follow. *Weber*, 99 Wn.2d at 165-66, 659 P.2d 1102 (1983). Since the trial judge is best suited to determine the prejudice of the statements, the appellate court reviews the decision to grant or not to grant a mistrial under an abuse of discretion standard. *Weber*, 99 Wn.2d at 166.

Applying the Weber factors to Ms. Marrazzo's case, first, this is a serious irregularity. The court conceded that to keep the medical blood in evidence is to create reversible error. Second, the evidence statement was not cumulative of any other evidence in the case: it was worse. Not only did the court erroneously admit the medical blood result, but it let toxicologist Capron guess – and give a number – for what the medical blood reading translated to by Washington standards. Finally, the error certainly cannot be cured by the instruction given by the court. Although a jury is presumed to follow the court's instruction to disregard certain evidence⁴, that would be difficult to do if the jury read the court's Instruction 6A. The middle paragraph is particularly worth repeating:

Upon consideration, I have decided to exclude that exhibit and the testimony about it, *because it does not state by whom, when, or how the testing was done*. You are to disregard the exhibit and testimony about it. (Emphasis added).

⁴ *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

CP 281. What the instruction tells the jury is that the court is excluding the evidence on a technicality *because it does not state by whom, when, or how the testing was done*. The implication of the court's opinion about the evidence is clear: the medical blood reading was fine but I have to otherwise exclude it because of a loophole. How is this bell unrung? Under these facts, it is simply not possible. The trial court abused its discretion when it failed to grant the mistrial.

Additionally, Article IV, Section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. Art. IV, § 16. "Because the jury is the sole judge of the weight of the testimony, a trial court violates this prohibition when it instructs the jury as to the weight that should be given certain evidence." *In re Detention of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999).

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to this discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900).

A jury instruction constitutes an impermissible comment on the evidence if the judge's attitude toward the merits of the case or the court's evaluation relative to the disputed issues is inferable from the instruction. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." *Id.*

The court reviews the propriety of jury instruction de novo. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Here the trial court's attitude about the evidence is overwhelming. The judge literally tells the jury that he believes the medical blood testimony but that he as to take it out of the evidence because of a legal technicality. And as the judge liked this particular evidence, and is not telling the jury to disregard the other blood evidence, it must mean that the judge likes that evidence too. The blood evidence strikes at the heart of the case. Without it, the state cannot prove that Ms. Marrazzo was driving under the influence.

4. IF THE COURT FINDS ERROR IN DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE ABOVE INSTRUCTION, COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of

Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). It is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

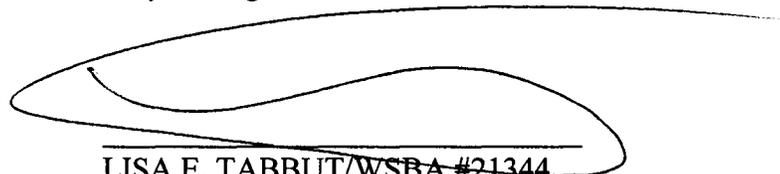
An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). To prevail on a claim of ineffective assistance, an appellant must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have

differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668.; see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720(2006). There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d 130.

E. CONCLUSION

Ms. Marrazzo did not receive a fair trial. She was not allowed to attack the toxicology lab test results through her witness, Sgt. Langford. She was not allowed to cast doubt on Cabron’s blood tests through cross examination. The toxicology lab blood results from Paige Long were admitted in violation of Ms. Marrazzo’s confrontation right. The court improperly admitted the medical blood reading without an adequate foundation. The court told the jury in Instruction 6A that it agreed with the medical blood results but had his hands tied by a technicality. Ms. Marrazzo deserves (legally) a second try at a fair trial.

Respectfully submitted this 4th day of August, 2009.



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CERTIFICATE OF MAILING

State of Washington, Respondent, v. Dawn Marie Marrazzo, Appellant
Court of Appeals No. 38542-2-II

I certify that I mailed Appellant's Brief to:

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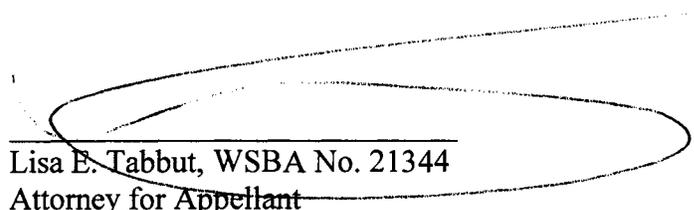
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All postage prepaid, on August 4, 2009

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

Signed at Longview, Washington, on August 4, 2009.



Lisa E. Tabbut, WSBA No. 21344
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