

No. 42178-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN JOHANSON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Susan Serko, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

Appellant John Johanson's state and federal constitutional rights to meaningful confrontation, cross-examination and due process were violated when the trial court excluded evidence of potential bias, veracity and motive of the state's crucial witnesses.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The only question at trial was whether Johanson was intoxicated due to alcohol or was suffering the effects of a medical condition. The testimony of two officers was crucial to this question, as they observed Johanson on the night in question and gave their opinion that he was intoxicated.

It came up during trial that the officers had made a claim on behalf of their agency for money which is only paid under RCW 38.52.430 if the defendant is ultimately convicted of a DUI. On the claim form, the officers had said they spent far more time on the case than their report and testimony showed, which would mean a higher payment for their agency.

The trial court ruled that Johanson could not cross-examine the officers about 1) having made the claim which entitled the agency for money, 2) the fact that the claim would not be paid unless Johanson was found guilty of a DUI, 3) that the officers having misstated the time on the form would entitle their agency to more money, indicating that they were willing to misrepresent facts for that purpose, and 4) that they had been told to do so by a superior, thus clearly putting pressure on the officers to take steps to ensure that the agency got paid.

Did the exclusion of this evidence violate Johanson's rights to confront and cross-examine these crucial witnesses against him and his due process rights to a fair opportunity to defend himself because it prevented Johanson from fully exploring their potential bias, motives and truthfulness?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant John Johanson was charged by information with felony driving while under the influence. CP 1-2; RCW 46.61.502(1); RCW 46.61.502(6)(b); RCW 46.61.520(1)(a); RCW 46.61.522(1)(b).

Trial was held before the Honorable Susan Serko on May 16-18,

2011, after which the jury found Johanson guilty as charged. See RP 303; CP 84. On May 27, 2011, Judge Serko ordered Johanson to serve a standard range sentence of 17 months in custody, with credit for 143 days of time served.¹ RP 312; CP 87-88.

Johanson appealed and this pleading follows. See CP 101.

2. Testimony at trial

On December 30, 2010, at about 3:30 p.m., the owner of an automotive shop in Spanaway noticed a car pull into the parking lot and stop in the middle of the lot, after which a man got out, faced the highway and appeared to urinate. RP 118, 121. The man then got back into the car and sat in the driver's seat for a couple of minutes, seeming to be "playing with his cell phone." RP 119. He backed out and drove away down the highway. RP 119.

Brad Schwartfigure was working at the automotive shop that day. RP 121. Schwartfigure opined the man "looked intoxicated" because the man had "fumbled around in his vehicle and kind of seemed to be nodding in and out and not very coherent." RP 121. Schwartfigure then clarified that "looking intoxicated" to him meant the man was "fumbling and kind of in and out and rolling his head back and eyes closed and then open and then back and just not with it." RP 122. Schwartfigure said the man stayed like that for less than 10 minutes before he got the car into gear and drove away. RP 123.

Shwartfigure later identified the man, who was in his mid-50s, as

¹Because of the length of the sentence, a Motion for Accelerated Review is also being filed herewith.

John Johanson. RP 123. Schwartzfigure also got the license number which he gave to police when they were called. RP 124-25.

Susan McConnell testified that she had dated Johanson for a month but they had broken up by December of 2010. RP 170. On December 29th, a Saturday, Johanson had called her on the phone, wanting to get together. RP 171. McConnell had other plans so she declined, something she said made Johanson “agitated.” RP 171-72. Starting about 7 p.m., Johanson then started calling McConnell’s cell phone and sending “text” messages to her until she finally turned her phone off at about 1 a.m. that night. RP 170-73.

McConnell admitted that she and Johanson had been talking about getting back together only a few days earlier. RP 179.

McConnell described Johanson as having “extremely slurred speech” when she spoke to him on December 29th. RP 173. She testified that she had asked if he had been drinking and he had said, “[h]ell, yes.” RP 172. He also said he had been drinking for awhile. RP 172-73.

The next day, McConnell turned on her phone and saw there were some texts and messages from Johanson. RP 173. They spoke at 10 a.m. and he wanted to come over but she had things she wanted to do so she said no. RP 173. According to McConnell, during that phone call, Johanson told her he was still drinking, had been drinking all night and had not gone to bed. RP 177-78. She thought his speech was still “extremely slurred.” RP 178.

Johanson persisted trying to get together with McConnell that day and McConnell responded to his multiple texts and phone calls by telling

him to leave her alone, yelling it into the phone at one point. RP 174. At some point, he called her from a local store. RP 171-79.

Johanson arrived at her house sometime around 4 and started pounding on the door and window, trying to peek inside and saying he knew she was there. RP 175. McConnell watched Johanson and called police. RP 175-79. According to McConnell, Johanson got in and out of his car a few times, kicked some things, yelled a little, pounded his steering wheel and even once started to drive off. RP 175-76. Johanson left after less than 10 minutes and police had not arrived. RP 175-79.

Pierce County Sheriff's Department deputy Brian Heimann responded to McConnell's "unwanted person" call at about 4:29 that afternoon. RP 82, 85, 87. H also said that, at about 3:24, someone had reported the same vehicle as the one associated with the "unwanted person" as "all over the road." RP 104.

Heimann said he was driving on a "gravel pothole" road and saw a vehicle driving on his side of the road around the corner. RP 82, 85, 87. The vehicle then pulled back into its own lane and Heimann activated his overhead lights and the two vehicles stopped. RP 87.

Heiman admitted that the road they on was over 20 feet wide and had lots of potholes so that both cars were going very slow, only about 10 miles per hour. RP 110. The road also had no lane or shoulder markings. RP 110-11.

Heimann approached and said he noticed "an overwhelming odor of intoxicants" coming from Johanson when Heimann asked Johanson for his license, registration and proof of insurance. RP 90. Johanson provided

his registration but then stopped and looked at Heimann. RP 90. Heimann said Johanson's eyes were "bloodshot" and "very watery" and that Johanson had "very slurred speech." RP 90. According to the officer, he asked Johanson if he had anything to drink that day and Johanson said, "[y]es, I've had five or six." RP 90-91. On further interrogation, Johanson said he had been drinking beer. RP 91.

According to Heimann, Johanson refused to give his license. RP 91. Heimann was sure that Johanson was "tracking" the conversation and understood what was going on. RP 91. Heimann had Johanson turn off the car and step out, telling Johanson that he was suspected in an "unwanted person" call and that Heimann also suspected him of driving under the influence. RP 92. Heimann testified that Johanson responded, "she called in on me, bullshit, this is bullshit." RP 92.

When he got out of the car, the officer said, Johanson was "[s]waying side to side" and appeared to have "very great difficulty in standing up," having to steady himself on the car. RP 91-92. The officer put Johanson into the back of the patrol car and started asking Johanson his name and other information so the officer could "run" him through "records." RP 93. He was then advised that Johanson had a prior conviction for vehicular assault "DUI" and that his license was suspended. RP 93. During the time the officer was talking to "records," Heimann said, Johanson just started yelling, "I am drunk, just take me to jail already." RP 94.

Johanson agreed to do some "voluntary field sobriety tests" and Heimann administered them, taking Johanson to the front of the patrol car

for that purpose. RP 95. Two of the tests, Johanson would not do - the walk and turn and the one legged stand. RP 95. Johanson did the horizontal gaze nystagmus test and Heimann said he saw "nystagmus" and there was "slow pursuit" and "lack of smooth pursuit" with Johanson's left eye. RP 95-96, 101. Heimann said Johanson then stopped the test and Heimann thought Johanson urinated on himself, too. RP 101-102. Johanson also "balled up a fist" and Heimann said something to him about calming down. RP 102. Johanson again said, "[t]his is bullshit. You know I am drunk, just take me to jail." RP 102.

Heimann admitted that there were other causes of nystagmus besides intoxication. RP 114.

PCSD Officer Rodger Leach responded to Heimann's request for "backup" and ended up taking Johanson to jail. RP 126, 131. Leach said that, when he arrived, he noticed that the front of Johanson's pants was wet and he smelled of urine. RP 131. Leach said that, during the drive to the precinct, Johanson's demeanor "wildly varied" between "calm and mellow to where he'd be screaming obscenities and doing short rapid breathing for a little while and then back again. RP 131-32. Leach also said Johanson was screaming "fuck" a lot and wanted to go see a nurse or call his wife. RP 132.

Once they got to the precinct, Leach took Johanson to the "BAC" room where they have a breathalyzer machine "where we process the DUIs." RP 132. Leach said Johanson's movements were "slow and deliberate" and his eyes were "red and glassy." RP 132-35. Leach read Johanson the warnings for the breath test, which also said that Johanson

had the right to refuse the test and, if he did, his license would be suspended and that evidence could be used against him, RP 134. It was then about 5:45 p.m. and, after thinking about it for a minute, Johanson said, "kind of rhetorically," that since his license was already suspended "why should he submit to the test." RP 137. Leach processed the "refusal" by starting the machine and printing out "a refusal ticket." RP 138.

Leach admitted that he entered the wrong time into the machine in order to override a requirement of the machine that a certain time period pass before a test occurs. RP 139. He falsified the time because, he said, without a breath test he did not need to wait that time period and he did not want to waste time. RP 140-41. He explained that this was why his report indicated a different time than the printout on the machine. RP 141-42. In submitting Johanson for processing, Leach "checked" on a form "mood swings and argumentative," "poor" coordination, soiled clothing, watery and bloodshot eyes, flushed facial color, repetitive and slurred speech, and strong odor of intoxicants on breath. RP 143. On the form the officer was asked to give his opinion of "the individual's intoxication" and Leach checked the box marked "extreme." RP 143. Leach testified that he did not think it would have been "safe" to release Johanson to drive off. RP 144. At one point, when Johanson was in a cell, Leach said, the officer would hear nothing but then there was screaming and then it would go quiet. RP 146.

Records showed that Leach did not arrive with Johanson at the precinct until 5:36 but Leach put into the machine that the testing started at

5:30, before they had even arrived. RP 148. He acknowledged that the machine does not let you override most parts of the test and that the time period he had actively overridden was a “safeguard” of the machine. RP 149. He said he enters false information in every case where there is a refusal for the same reason. RP 149.

A state toxicologist testified about the effects of central nervous system depressants like alcohol and how they slows down ability to perceive and focus, balance and make judgments and utilize motor skills. RP 186-87. He conceded that alcohol does not affect everyone the same way and people can build up a “tolerance.” RP 192. He also said a person could drink over time but not get any more drunk because of the “elimination” of alcohol from the body. RP 196.

The symptoms of alcohol intoxication in general were described and the state’s expert admitted that there were other causes for all of those same symptoms. RP 199. On the intake form at the jail, there was a question for whether the inmate had recently taken any drugs or alcohol and Johanson reported to the nurse “45 minutes ago, ten beers.” RP 242. Someone else wrote “Dts,” which appeared to refer to “delirium tremens,” which don’t happen very often and would not happen within 45 minutes of drinking. RP 258.

At the time Johanson said he had consumed “ten beers” 45 minutes earlier, Johanson had already been in police custody for longer than that time. RP 237, 258.

Dr. Miguel Balderrama, who works at the Pierce County Jail, treated Johanson after his arrest and said Johanson suffered from multiple

conditions. RP 231-32. Johanson has cirrhosis, advanced liver disease, which meant his liver malfunctioned and was “unable to do most of the processes that a liver is supposed to do.” RP 232. He also had elevated blood sugar and blood pressure and a history of diabetes and hypertension. RP 232. The doctor testified that Johanson had all of these medical conditions at the time of the incident. RP 232-33.

The doctor explained that, for people with Johanson’s condition, there can be a “high” chance the person will suffer from withdrawal, called the “shakes,” where people get very excited and trembling. RP 243. There can also be changes in personality or mood and, rarely, hallucinations. RP 243. Because it can be a very serious condition, the doctor said, they follow people very carefully when admitted with this condition. RP 244. On the intake form it said “tremors without withdrawal” and the doctor said that someone would not experience “withdrawal” with a high ammonia level. RP 244. Another form said Johanson admitted he had been “drinking more than usual daily for a while.” RP 248.

The doctor testified that, if untreated, diabetes causes increased thirst and increased urination, leading ultimately to coma and death. RP 233. Prior to the coma stage, a person can have serious changes in mental status, including difficulty in concentration and “somnolence.” RP 233. For cirrhosis, many patients start feeling fatigue but the symptoms can affect “the mental status” and make people “spacey” and forgetful, as well as resulting in the liver being unable to “clean substances.” RP 234.

In particular, the liver becomes unable to process alcohol correctly.

RP 234. The liver is the “biggest filter and processor of alcohol.” RP 235. For people with cirrhosis like Johanson, a very small amount of alcohol consumption will cause intoxication. RP 234-35. In addition, the alcohol stays in someone’s system longer when they have that condition. RP 235.

A person with cirrhosis can get something called “increased ammonia levels” not only if they drink but even if they are not consuming alcohol. RP 235. The doctor testified that, since he started treating Johanson in jail, almost every month there were “episodes where he has had wide elevations of ammonia.” RP 236. Indeed, the doctor said, Johanson’s ammonia level had been “quite difficult to control” and had gone up as high on a scale where normal was 30 all the way up to 200, which the doctor said was “extremely high numbers for this substance.” RP 236.

In short, the doctor said, Johanson’s body had no ability to eliminate ammonia on his own and was dependent upon the medication because the functioning was so low. RP 238. High ammonia levels, like alcohol consumption, will “impair the central nervous system” and create changes in mental status and function. RP 248. A person with the conditions who drank and was not taking medication would have elevated ammonia levels. RP 249.

The doctor had personally observed Johanson when his ammonia levels were too high and described Johanson as basically confused, which meant he was “not following commands,” was confused about what he was doing or what you wanted him to do and just “stares at you in total confusion.” RP 236. The doctor said that, when Johanson’s ammonia

levels were high he was “unable to eat, unable to drink, unable to hold a glass of water” and sometimes had “ataxia,” which meant his walk was “not very steady.” RP 237. Johanson’s coordination was also bad. RP 238. The doctor also described episodes of elevation of Johanson’s blood sugar while he was in custody, which had to be treated with insulin. RP 239.

Dr. Balderrama testified that the symptoms of high ammonia level and alcohol intoxication are so similar that, “[i]n general, if you’re confronted with a patient that you’ve seen with the symptoms, it is very difficult in clinical basis without laboratory testing to decide” whether someone is suffering from high ammonia or intoxication, “if the patient is exhibiting the same symptoms.” RP 261-62.

D. ARGUMENT

JOHANSON’S STATE AND FEDERAL RIGHTS TO DUE PROCESS, CONFRONTATION AND CROSS-EXAMINATION WERE VIOLATED

Both the state and federal constitutions guarantee the right of a defendant to confront the witnesses against him. See Davis v. Alaska, 415 U.S. 308, 315-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 51 (1983), limited on other grounds by State v. Darden, 145 Wn.2d 612, 615, 41 P.3d 1189 (2002). As part of those rights, defendants are entitled to meaningful cross-examination of witnesses, especially relating to their truthfulness, motives and bias. See, State v. Buss, 76 Wn. App. 780, 787, 887 P.2d 920 (1995), overruled in part and on other grounds by State v. Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999).

Further, under both constitutions, due process mandates a “fair opportunity to defend against the State’s accusations,” which includes the right to present evidence in their defense. See Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed. 2d 297 (1973). Reversal is required for these constitutional errors unless the prosecution can prove them harmless beyond a reasonable doubt. See State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010).

In this case, this Court should reverse, because the trial court erred in refusing to allow Mr. Johanson to cross-examine the two crucial police officer witnesses about their bias, motive and truthfulness and that error was a violation of Johanson’s confrontation clause and due process rights.

a. Relevant facts

During trial, the prosecutor moved to preclude the defense from impeaching Heimann and Leach with evidence that they had lied on forms they had filled out about the incident. RP 105. Because there is a statute which allows the department to request “costs” from a defendant who is convicted of a DUI offense, the prosecutor said, officers keep track of the time they are “processing a DUI.” RP 105. The officers told the prosecutor they had been told by their superior to include report-writing time but some municipalities had decided only to award time the deputy was actually out in the field. RP 105-106. The prosecution moved to exclude the evidence that the officers had reported much more time than they had testified they took in the arrest, arguing that evidence was “irrelevant” and “collateral.” RP 106.

Counsel argued that it was not collateral or irrelevant to cross-

examine the officers about their potential bias and motive. RP 106. He pointed out that, under the relevant statute, the police could only get “emergency cost recovery” - for which the officers had filed - if Johanson was actually convicted for DUI. RP 106-107. At the suppression hearing, Deputy Leach had testified that he was activated at 16:40 hours and returned back to service after completing this call at 19:29 hours, but on the document requesting the financial recovery he had billed for more time, writing that he had not gone back into service until 21:00, about an hour and a half later. RP 107. That calculation was “computed in a rate” and the amount would be paid, but only if Johanson was convicted of DUI. RP 107.

The prosecutor admitted that the money would go to the agency but said the officers would not personally get paid. RP 108. Without explaining its reasoning, the court ruled that Johanson could not cross-examine the witnesses about the “money issue” evidence, although they could be asked about the discrepancies in the amount of time they said they took with the case. RP 108.

b. The exclusion of the evidence violated Johanson’s constitutional rights

The trial court violated Johanson’s due process rights and confrontation clause rights to meaningful cross-examination in making this ruling. Taking the latter issue first, the ruling violated Johanson’s constitutional rights to confrontation by depriving him of meaningful cross-examination of the two most crucial state’s witnesses. The rights to confrontation are violated if a court prevents a defendant from placing

facts before the jury from which bias or prejudice of a crucial state's witness may be inferred. State v. Brooks, 25 Wn. App. 550, 552, 611 P.2d 1274, review denied, 93 Wn.2d 1030 (1980).

Thus, in Davis, when the defendant wanted to question a key witness about his status on probation which could have indicated he was under some pressure from police in his own life and thus had a motive to testify a particular way, the trial court's ruling preventing that cross-examination was a violation of Sixth Amendment confrontation clause rights. Davis, 415 U.S. at 317. In reaching that conclusion, the U.S. Supreme Court declared that "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." 415 U.S. at 316-17. Further, the Court declared, cross-examination is "the principal means" by which the system tests "the believability of a witness and the truth of his testimony." 415 U.S. at 316. As a result, the Davis Court found, preventing cross-examination in such a way that precluded the defendant from establishing the factual record needed to support his theory of bias or motive was a violation of confrontation clause rights. 415 U.S. at 317.

Washington courts have similarly recognized that a defendant "has a right to confront the witnesses against him with bias evidence so long as the evidence is at least minimally relevant." Hudlow, 99 Wn.2d at 16. Further, while the rights to cross-examination and confrontation do not prohibit all limits on cross-examination, "great latitude must be allowed in cross-examining a key prosecution witness," to show "motive for his testimony." Brooks, 25 Wn. App. at 551-52. In addition, "the more

essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." Darden, 145 Wn.2d at 619.

Although the trial court gave no reason for its ruling below, it asked a question which indicates that its belief was that, because the officers themselves would not personally get handed a check for the "emergency response" funds, the cross-examination/evidence was somehow irrelevant. See RP 107-108.

That conclusion, however, was in error. It was not necessary to show that the officers would directly receive a payment; bias, motive or credibility issues are not solely based in money. The officers specifically made a claim for such funds on their employer's behalf, based upon their activities in this case. They specifically misrepresented the time on the claim form, apparently at their employer's behest in order to ask for money someone thought they were being unfairly denied by courts. Those misrepresentations would allow their employer to receive even more funds. But **nothing** would be paid on the claim unless and until Johanson was convicted of DUI. See RP 107-108.

Clearly, these facts were relevant to bias, motive or credibility of the officers. Indeed, the very fact that they sought the money was relevant, because it could not be paid unless the jury found that Johanson had in fact been intoxicated, as the officers opined. Further, the fact that the officers had been willing to misstate the timing on the claim form when asked to by their superiors not only casts doubt on their credibility but also

highlights that the officers obviously knew the interests of their employer in getting as large a payment as possible.

The knowledge of the officers that their employer would get extra money if Johanson was convicted, their knowledge that it would get nothing if he was **not** convicted, and their efforts to increase the amount their employer would get by misstating the facts was incredibly relevant to the credibility, bias, and possible motive of the officers for their testimony that, in their opinion, Johanson was intoxicated on alcohol. An officer's potential motive or bias is certainly relevant to his investigation and testimony in criminal case. See State v. Jones, 25 Wn. App. 746, 750, 610 P.2d 934 (1980). And more than 100 years ago, the Supreme Court declared it a rule "as old as the law itself" that a party's "fraud in preparation or presentation" of a case is admissible "as a circumstance tending to prove that his cause lacks honesty and truth." State v. Constantine, 48 Wash. 218, 221, 93 P. 317 (1908).

Notably, the evidence and cross-examination precluded here was not about the acts of the officers in some unrelated case; it was all about this defendant and this incident. A reasonable juror would have found this evidence not only minimally but in fact highly relevant to the credibility of the officers, not only as to their claims of what happened but their willingness to misrepresent the facts to get a financial benefit for their employer. Johanson was entitled to question the officers "to illustrate whether [they] had an interest in the outcome of the case." See, e.g., Comm v. Sullivan, 485 Pa. 392, 394, 402 A.2d 1019 (1979). The refusal

to allow him to do so here was a violation of his state and federal confrontation clause rights.

The trial court's ruling preventing meaningful cross-examination and admission of the evidence also violated Johanson's state and federal due process rights. Under both constitutions, due process mandates a "fair opportunity to defend against the State's accusations," which includes the right to present evidence in their defense. See Chambers, 410 U.S. at 294; Jones, 168 Wn.2d at 720. Although a defendant has no right to present *irrelevant* evidence, evidence need only be of "minimal relevance" in order for the burden to shift to the state to establish that it should be excluded because its admission would be "so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 620; see Jones, 168 Wn.2d at 720-21. And "[t]he threshold" of relevancy for admission of evidence "is very low." Darden, 145 Wn.2d at 621.

The burden the state must shoulder when evidence is at least minimally relevant is not light, given the strength of the interests against which it is weighed. As the Supreme Court recently noted in Jones,

The State's interest in excluding prejudicial evidence must also be "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need.. . **We must remember that "the integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations.**

168 Wn.2d at 720 (emphasis added).

The crucial question in this case was whether Johanson was intoxicated on alcohol or was instead suffering the effects of his medical

condition and elevated levels of ammonia. The evidence the court prevented Johanson from admitting or asking about would have shown that there was a potential motive for the officers to be biased in favor of the former. And it would have shown that they were willing to misrepresent the facts (i.e., the amount of time they actually spent in the field on the case) in order to maximize the financial benefit to their employer - in relation to this specific case. It is difficult to conceive how such evidence could not be seen as relevant to potential bias, interest or motive.

Nor could anyone plausibly claim that the officers' testimony and credibility were not of grave importance to the state's case. Their opinions that Johanson was drunk were specifically elicited by the prosecution only after the prosecution had established that the officers had "training and experience," were "trained to note" signs of intoxication, and had "training regarding whether or not someone might be under the influence of intoxicants." RP 90; see RP 103, 128-30.

Further, the importance of the testimony of the officers and their opinions to the prosecution's case is clear from the great pains the prosecutor went to in order to establish their credibility. Heimann was portrayed as someone who tries to patrol for DUIs and "aggressive drivers" in his "off-duty time," who owned his own business and was in the Air Force prior to becoming an officer. RP 83. In fact, Heimann was painted as especially qualified on the crucial issue of whether someone is drunk, with his credentials as a member of "Task Force Zero," one of "31 members that specifically look for DUIs and aggressive driving" in his

“off-duty time.” RP 83. He also said he was a part of “Party Intervention Patrol and had 18 hours of specialized “DUI enforcement” training. RP 83-84. Similarly, Leach was described as having “specialized training in detecting whether or not somebody might be under the influence.” RP 128. All of this could only add to the serious weight jurors are already likely to give testimony from law-enforcement officers.

The trial court’s ruling deprived Johanson of his due process and confrontation clause rights and this Court should so hold. Further, these constitutional errors compel reversal. Where the defendant is improperly limited in his cross-examination of a witness, the U.S. Supreme Court has rejected the suggestion that a defendant must show “outcome determinative” prejudice, i.e., that “the particular limitation on cross-examination created a reasonable possibility that the jury returned an inaccurate guilty verdict.” Delaware v. Van Arsdall, 475 U.S. 673, 679-80, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Instead, the question is whether a reasonable jury could have relied on the excluded evidence/testimony in drawing inferences “relating to the reliability of the witness.” Davis, 415 U.S. at 318; Delaware, 475 U.S. at 683-84. This is because, the Court noted, when the defendant is “denied an opportunity to cast doubt on the testimony of an adverse witness,” the prosecution is then “able to introduce evidence that was not subject to constitutionally adequate cross-examination.” Davis, 415 U.S. at 318; Delaware, 475 U.S. at 679-80.

To determine whether the error is constitutionally harmless, the reviewing court assumes that “the damaging potential of the cross-

examination w[as] fully realized,” then consider factors such as 1) the importance of the witness to the prosecution’s case, 2) whether the testimony of the witness was cumulative, 3) whether there was evidence corroborating or contradicting the testimony of the witness on material points, 4) the extent to which the witness was cross-examined otherwise and, 5) “of course, the overall strength of the prosecution’s case.”

Delaware, 475 U.S. at 684.

Here, assuming the “damaging potential” of the excluded examination and looking at all the facts, Johanson suffered prejudice. The officers were crucial to the prosecution’s case. They were the ones who gave the “expert” opinion on the only question in the case - whether Johanson was drunk, not suffering the effects of his medical condition and ammonia levels. While their opinions were cumulative of each other, they were not cumulative of anyone else, except perhaps McConnell, a woman who clearly had issues with Johanson and had dated him at one point.

Further, the other impeachment allowed was wholly insufficient, both in quantity and in quality. The only other impeachment allowed was to ask the officers about having filled out the claim form using the wrong information, and Leach’s being confronted having changed the time on the breath-test machine so he did not have to wait to process Johanson’s refusal to take the test. But as “impeachment,” these things were mostly toothless. Leach gave a plausible and understandable claim for his act which, while it showed bad judgment or not following the rules, was not likely to be seen in a bad light by jurors who might themselves have ways of getting around systems that waste time and need reworking.

And standing alone the fact that the officers reported spending more time in the field on the form rather than they indicated otherwise is at best weak impeachment. It is only coupled with the excluded evidence - that the additional time would gain their employer more money, that the officers had been told to misstate the actual time by their employer, that they made those misstatements for the purpose of benefitting their employer and, most important, that the employer they made those misstatements for **would not get any money at all unless Johanson was convicted** - that the evidence of the misstatements has its actual, full and real impeachment value.

This is thus not a case where the defendant was allowed to expose to the jury “the specific reasons why [the witness’] . . . testimony might be biased” but was limited in presenting certain facts. See State v. Fisher, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). Instead, this is a case where the defendant, who “has a right to put specific reasons motivating a witness’ bias before the jury,” was precluded from presenting those reasons altogether- i.e., the potential benefit the employer stood to gain and the obvious indication to the officers by the employer that they should inflate their time in order to increase that amount, as well as the fact that the employer would not get the benefit it wanted them to get it unless and until Johanson was convicted.

Finally, the prosecution’s case was not particularly strong. Much of the behavior and symptoms described by the state’s witnesses could have been explained by the symptoms of the ammonia issue. Indeed,

Johanson's own confusion and declarations that he was drunk could have been so caused.

The prosecution thus cannot show the errors "harmless" under the applicable rule, because, taking the evidence in the light of its full potential for damage, and examining the relevant "factors," there can be no question that a reasonable juror could have relied on the excluded evidence/testimony in drawing inferences "relating to the reliability" of the two officers and whether their opinions that Johanson was drunk should be given weight. See Davis, 415 U.S. at 318. Because the trial court violated Johanson's state and federal constitutional rights to due process, confrontation and meaningful cross-examination, reversal and remand for a new trial is required, and this Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial at which Mr. Johanson's rights to confrontation, meaningful cross-examination and due process are not violated.

DATED this 27th day of September, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant as follows: to opposing counsel by efileing this date at pcpatccf@co.pierce.wa.us, and to appellant John Johanson, by depositing the same in the United States Mail, first class postage pre-paid, as follows: DOC 820534, Stafford Creek Correction Center, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 27th day of September, 2011.

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