No. 90939-3

NO. 43937-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROMAN FEDOROV, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Roseanne Buckner

No. 12-1-00053-2

BRIEF OF RESPONDENT

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Table of Contents

A. ASSIGNMENTS OF ERROR.

1. The trial court erred when it concluded that because of defense counsel's request for privacy, Trooper Durbin afforded insufficient privacy to the defendant during his phone call with defense counsel prior to the administration of the breath test. CP 117 (Findings as to Disputed Facts, Finding No. 1). 1

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Whether the court properly denied the defendant's motion to suppress his DUI breath test results where any violation of his right of access to counsel was harmless and the result of the defendant's own resistive behavior, which created security concerns? [But see Respondent's assignment of Error 1 in section A above.] 1

2. Whether portions of the Trooper's dashcam video showing two knives found on the defendant were properly admitted where it was not other bad acts evidence, and in any case any prejudicial effect was outweighed by the probative value of showing the defendant's resistive behavior that created security concerns? 1

3. Whether the court properly admitted the testimony of Trooper Havnner as not violating the defendant's confrontation rights under ***Crawford*** where he testified as an expert regarding his opinion that the breath test machine produced reliable results even though he did not personally conduct the annual maintenance on the breath test machine? 2

C. STATEMENT OF THE CASE. 2

1. Procedure 2

2. Facts 4

D. ARGUMENT.....15

1. THE COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE BREATH TEST RESULTS WHERE THE DEFENDANT FAILED TO MEET HIS BURDEN TO SHOW PREJUDICE FROM THE ALLEGED VIOLATION OF HIS RIGHT TO COUNSEL.....15

2. THE COURT PROPERLY ADMITTED VIDEO FROM THE OFFICER'S DASHBOARD CAMERA WHERE THE CONTENT OF THE CHALLENGED PORTION OF THE VIDEO WAS NOT UNFAIRLY PREJUDICIAL TO THE DEFENDANT, AND IN ANY CASE ANY UNFAIR PREJUDICE DID NOT OUTWEIGH THE PROBATIVE VALUE OF THE EVIDENCE.....27

3. FEDOROV'S RIGHTS UNDER THE CONFRONTATION CLAUSE WERE NOT VIOLATED WHERE TROOPER HAVENNER'S TESTIMONY REGARDING THE MAINTENANCE OF THE BAC MACHINE WAS A PRELIMINARY QUESTION OF FACT TO ADMISSIBILITY THAT FELL UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE...37

E. CONCLUSION.....57

Table of Authorities

State Cases

Carson v. Fine, 123 Wn.2d 206, 225, 867 P.2d 610 (1994) 36, 37

City of Bellevue v. Ohlson, 60 Wn. App. 485, 489,
803 P.2d 1346 (1991) 21

City of Seattle v. Koch, 53 Wn. App. 352, 357,
767 P.2d 143 (1989) 20, 21

City of Spokane v. Kruger, 116 Wn.2d 135, 139,
803 P.2d 305 (1991) 20, 26

Henderson Homes, Inc v. City of Bothell, 124 Wn.2d 240,
877 P.2d 176 (1994) 15, 16

Hoke v. Stevens-Norton, Inc, 60 Wn.2d 775, 778,
375 P.2d 743 (1962) 16

Lockwood v. AC&S, Inc., 44 Wn. App. 330, 722 P.2d 826 (1986) 36

Ludvigsen v. City of Seattle, 162 Wn.2d 660, 678-82,
174 P.3d 43 (2007) 54, 55

Neil F. Lampson Equip. Rental & Sales,
Inc v. West Pasco Water Sys., Inc., 68 Wn.2d 172, 174,
412 P.2d 106 (1966) 16

Rickert v. Pub.Disclosure Comm'n, 161 Wn.2d 843, 847,
168 P.3d 826 (2007) 16

Seattle v. Sandholm, 65 Wn. App. 747, 751, 829 P.2d 1133 (1992) 21

State v. Aguilar, 153 Wn. App. 265, 273, 223 P.3d 1158 (2009) 28

State v. Bellerouche, 129 Wn. App. 912, 916-17,
120 P.3d 971 (2005) 43, 47

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) 15

State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) 21

State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).....30

State v. Doerflinger, 170 Wn. App. 650, 659-60,
285 P.3d 217 (2012) 46, 47

State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008).....16

State v. Fitzsimmons, 93 Wn.2d 436, 448, 610 P.2d 893 (1980), *vacated,*
449 U.S. 977, 101 S. Ct. 390, 66 L. Ed. 2d 240, *aff'd on remand,*
94 Wn.2d 858, 620 P.2d 999 21

State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).....15

State v. Iverson, 126 Wn. App. 329, 339-40, 108 P.3d 803 (2005).....47

State v. Jacobson, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).....16

State v. Jasper, 174 Wn.2d 96, 109, 271 P.3d 876 (2012).....39, 45, 46

State v. Kilgore, 147 Wn.2d 288, 294-95, 553 P.3d 974 (2002).....30

State v. Luther, 157 Wn.2d 63, 78, 134 P.3d 205 (2006) 16

State v. Maninon, 173 Wn. App. 610, 622-23, 295 P.3d 270 (2013).....51

State v. Mason, 127 Wn. App. 554, 565, 40126 P.3d 34 (2005) 56

State v. Mason, 160 Wn.2d 910, 917 n. 1,
162 P.3d 396 (2007) 40, 41, 42

State v. Moses, 129 Wn. App. 718, 732-33, 119 P.3d 906 (2005).....56

State v. O'Neill, 148 Wn.2d 564, 571, 62 p.3d 489 (2003).....16

State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995) 28, 29, 30

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994).....47

State v. Saenz, 156 Wn. App. 866, 873, 234 P.3d 336 (2010).....28, 29, 30

State v. Saltarelli, 98 Wn.2d 358 at 362-63, 655 P.2d 697 (1982) 30

State v. Sandoval, 137 Wn. App. 532, 154 P.3d 271 (2007) 40

State v. Saunders, 132 Wn. App. 592, 132 P.3d 743 (2006).....40, 56

State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006) 42

State v. Smith, 154 Wn. App. 695, 699, 226 P.3d 195 (2010).....16

State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997) 30

State v. Walker, 129 Wn. App. 258, 271, 118 P.3d 935 (2005).....56

State v. Whelchel, 115 Wn.2d 708, 801 P.2d 948 (1990).....40

State v. Yarbrough, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009).....29, 30

Federal and Other Jurisdiction

Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705, 2714-15, 180 L. Ed. 2d 610 (2011).....45, 46, 51

Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354; 158 L. Ed. 2d 177 (2004).....passim

Davis v. Washington, 1547 U.S. 813, 834, 26 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).....41, 42, 43

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 308-10, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).....37, 38, 44, 45, 46, 56

Michigan v. Bryant, ___ U.S.___, 131 S. Ct. 1143, 1157, 179 L. Ed. 2d 93 (2011).....44

Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985).....43

United States v. Dukagini, 326 F.3d 45, 59 (2nd Cir. 2003).....49

United States v. Gomez, No. 12-50018, Slip. Op. at 6 ___ F.3d ___, 2013 WL 3988705 (9th Cir. 2013).....48, 49

United States v. Johnson, 587 F.3d 625, 635 (4th Cir. 2009) 47

United States v. Lombardozzi, 491 F.3d 61, 72 (2nd Cir. 2007).....47

United States v. Maher, 454 F.3d , 23 (1st Cir. 2006).....49

United States v. Pablo, 696 F.3d 1280, 1289 (10th Cir. 2012).....49

Constitutional Provisions

Article I § 22, Washington State Constitution.....40

Sixth Amendment, United States Constitution.....39, 40, 42

Statutes

2004 Laws of Washington c. 68, § 4 53

2010 Laws of Washington C. 53, § 1 53

former WAC 448-13-020 54

RCW 46.61.502(3) 52

RCW 46.61.502(4) 52

RCW 46.61.506 52

RCW 46.61.506(2)(a) 52

RCW 46.61.506(4)(a)(i)-(viii).....55

RCW 5.45.020 46

RCW 69.51.502(1)(a) 52

WAC 448-13-060 54

WAC 448-13-110 54

WAC 448-16-020; 448-16-140 54

Rules and Regulations

CrR 3.1(a) 20

CrR 3.1(b)(1) 19

CrR3.1(b)(1) 19

CrRLJ 3.1 20

CrRLJ 3.1(a) 20

CrRLJ 3.1(b)(1) 19

ER 401 28

ER 402 28

ER 403 ..... 28, 35, 36, 37

ER 404(b) 28, 29, 30, 33, 34, 35, 36

ER 609 36

Other Authorities

Tegland, WASHINGTON PRACTICE, VOL. 5: EVIDENCE,
5TH ED. § 404.9 ..... 29, 36, 42, 47

A. ASSIGNMENTS OF ERROR

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B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the court properly denied the defendant's motion to suppress his DUI breath test results where any violation of his right of access to counsel was harmless and the result of the defendant's own resistive behavior, which created security concerns? [But see Respondent's assignment of Error 1 in section A above.]

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B. STATEMENT OF THE CASE.

1. Procedure

On January 4, 2012, based on an incident that occurred two days earlier, the State charged Fedorov with Count I, attempting to elude a pursuing police vehicle; and Count II, driving under the influence of intoxicants. CP 1-2.

On May 30, 2012 the defense filed a motion to suppress evidence based upon a claim that defendant had been denied his right to counsel where he requested to speak to an attorney, and was put into contact with one, however, because of the small size of the breath test room the officer was nearby when he spoke to his attorney, causing him to limit his conversation with his attorney. CP 14-21. The State filed its response on July 30, 2012. CP 24-37.

The court heard the motion on July 30, 2012 prior to the commencement of trial. 1RP p. 4-111. The court denied the motion. 1 RP 109, p. 10-19; CP 114-119.

The case proceeded to trial before the Honorable Judge Roseanne Buckner, and a jury was empaneled on August 1, 2012. 3RP 128, ln. 24 to p. 129, ln. 25. During trial, the defense objected to the admission of portions of the Trooper's dash cam video of the defendant. 3RP 146, ln. 8 to p. 150, ln. 16. The court overruled the defense objection and allowed all of the proffered video footage to be admitted into evidence. 3RP 146, ln. 17-20. During trial the defense also objected to testimony by the State's witness, Al Havenner, a technician for the BAC machine, because Mr. Havenner had not personally performed the maintenance and certification on the machine that produced the defendant's BAC result. 4RP 288, ln. 22 to p. 300, ln. 22. The court admitted Al Havenner's testimony over the defense objection. 4RP 299, ln. 20 to p. 300, ln. 3.

On August 6, 2012, the jury returned verdicts finding the defendant guilty of both counts, and also finding in a special verdict as to Count I, that persons other than the defendant and pursuing law enforcement officers were threatened with physical injury or harm while he committed the crime. CP 88, 89, 90.

On August 31, 2012, the court Fedorov to a total of 41 months on count I. CP 99-111. The court separately sentenced Fedorov to 364 days in jail on Count II, concurrent to count I. CP 112-13.

On September 17, 2012, the defendant timely filed a notice of appeal. CP 120.

2. Facts

a. Facts at Suppression Hearing.

The following contains the determinations the court made at the suppression hearing and are taken directly from the court's findings and conclusions. CP 114-119

THE UNDISPUTED FACTS

1. On January 2, 2012, at approximately 11:45 pm, Washington State Patrol Trooper Ryan Durbin arrested the defendant, ROMAN M. FEDOROV, for Felony Eluding and DUI.

2. After the defendant's arrest, Trooper Durbin transported the defendant to the closest BAC facility, the Fife Police Department, to process the defendant for driving under the influence.

3. While at the Fife Police Department, Trooper Durbin advised the defendant of his Implied Consent Warnings for breath. The defendant stated he understood his rights and would submit to the breath test. Trooper Durbin began the 15 minute observation period and asked

the defendant if he would answer the voluntary questions on the DUI Interview portion of the DUI Arrest Packet. The defendant stated he would and answered the questions.

4. After answering the question, the defendant requested to speak to an attorney. Trooper Durbin called the Department of Assigned Counsel for the defendant and the defendant spoke to DAC Attorney Nicholas Andrews. The Trooper noted that the conversation lasted approximately 13 minutes. Trooper Durbin does not recall if the defendant requested privacy during his phone call, but indicated that had the defendant requested privacy, he would have gone to the other side of the room. The Fife BAC room's dimensions are approximately 27 feet by 19 feet.

5. When Trooper Durbin dialed the Department of Assigned Counsel number, he reached attorney Nicholas Andrews. Trooper Durbin did not leave the room, but indicated that if he requested privacy, he would have walked away from the defendant when/if the defendant requested privacy.

6. Trooper Durbin testified that if he was at the other end of the room, he would not have been able to hear the defendant's conversation.

7. Mr. Andrews stated he requested complete privacy on two occasions. Trooper Durbin's response was that he could not accommodate his requests because of the specific location of the phone and (Fife Police Headquarters) where the BAC instrument was located.

8. Mr. Andrews testified that his client, the defendant, was free to ask questions and that speaker phone was not used.

9. Mr. Andrews testified that he advised his client of his right to remain silent, including the right not to answer questions and the right to decline to perform any physical tests.

10. Mr. Andrews indicated that he was able to determine that the defendant did not have any DUI/Physical control convictions or charges within the past 7 years, and that his client was not currently on, or had ever been on a deferred prosecution. Mr. Andrews also learned that his client did not have a commercial driver's license.

11. Mr. Andrews indicated that was able to ask the defendant a series of questions and advise him of multiple rights and consequences of refusing a breath test, including the administrative and criminal conviction consequences.

12. Mr. Andrews advised the defendant, and the defendant understood, that all the tests and questions were voluntary.

13. Mr. Andrews advised the defendant of the right to have additional tests, such as a blood test at a hospital, and that although the defendant did not desire an additional test, he could pay for it.

14. Mr. Andrews indicated that because of the lack of privacy, he was not able to ask the defendant the following questions:

a. How much have you had to drink?

b. What type of alcohol?

c. How big were the drinks?

d. How much alcohol was in them?

e. When was your last drink?

f. When did you start drinking?

g. When did you last eat?

h. What did you eat?

15. However, Mr. Andrews testified that it was possible to ask those questions with a series of "yes or no" answers, but it was not feasible to ask the questions in the allotted time.

16. Mr. Andrews testified that the decision to submit to the test if [sic] ultimately up to the client and that he did not advise the defendant as to what his decision should be (submit to the breath test or refuse).

17. After consulting with Mr. Andrews, the defendant again agreed to take the BAC test. The defendant's results of the BAC test were

.096 and .095 g/210L. Mr. Andrews also informed Trooper Durbin of his client's intent to take the breath test.

18. On the Implied Consent Warnings for Breath, Trooper Durbin noted that the defendant did not express any confusion regarding the warnings that been read to him.

19. The incident described by Trooper Durbin occurred in Pierce County, Washington.

20. Trooper Durbin identified the defendant in open court as the person he arrested for Felony Eluding and DUI on January 2, 2012.

THE DISPUTED FACTS

1. Whether or not Trooper Durbin provided the defendant with sufficient privacy by remaining in the room while the defendant was on the telephone?

2. If sufficient privacy was not provided, whether or not the defendant has demonstrated specific prejudice.

FINDINGS AS TO DISPUTED FACTS

1. Trooper Durbin could not recall if there was a request for privacy, but Mr. Andrews indicated that there were two requests for privacy. The Court found that there was a request for privacy in this case

and as a result, there was insufficient privacy afforded to the defendant during his phone call with Mr. Andrews.

2. The defendant has not proved actual prejudice as a result of the lack of privacy.

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE AND CONCLUSIONS OF LAW

1. Trooper Durbin and Mr. Andrews were credible.

2. Mr. Andrews testified that the defendant was free to answer questions.

3. Mr. Andrews testified that he was able to advise the defendant of all of his rights and the consequences of either submitting or refusing a breath test despite the lack of privacy

4. The only questions Mr. Andrews indicated he did not ask related to the defendant's consumption. Mr. Andrews admitted that he could have asked these questions using a series of "yes or no" questions.

5. The defendant has not demonstrated that as a result of the consumption questions not being asked/answered, his decision to submit to the breath test was prejudiced in any way.

6. This Court concludes that since the defendant has not demonstrated actual prejudice, the lack of privacy afforded to the defendant did not interfere with his right to counsel.

As such, the defendant's breath test is admissible.

b. Facts at Trial

On January 2, 2012 at about 11:42 p.m. Washington State Patrol Trooper Ryan Durbin was on patrol at Southbound I-5 at mile marker 139, approaching the Fife City Limits, and had just begun checking the speed of vehicles when he observed a vehicle traveling at a high rate of speed that he measured at 119 miles per hour. 3RP 157, ln. 8 to p. 158, ln. 3; p. 162, ln. 3-10; p. 163, ln. 18-23. Trooper Durbin pulled behind the vehicle, however, as soon as he did so it shot over to the right lanes and as it caught up to traffic it had to get onto the right shoulder, continuing to accelerate beyond the initial 119 mph speed. 3RP 164, ln. 9 to p. 165, ln. 7. Trooper Durbin had to travel in excess of 130 mph in an attempt to catch up to the vehicle and was barely able to keep up with it. 3RP 165, ln. 11-15.

The vehicle took the off-ramp at 54th Avenue. 3RP 165, ln. 13-15. That exit is a short ramp with a pretty good curve, so the vehicle had to slow down, allowing Trooper Durbin to catch up to it. 3RP 165, ln. 18-23. There was a red light at the intersection at the end of the ramp and the

vehicle ran the red light, and made a right-hand turn onto 54th street and then immediately turned left onto Pacific Avenue. 3RP 165, ln. 20-25.

After turning onto Pacific Avenue the vehicle's headlights turned off in an apparent effort to make the vehicle harder to see. 3RP 165, ln. 23 to p. 166, ln. 7. With its lights off, the vehicle traveled down Pacific Avenue the wrong direction against traffic and then pulled into a business parking lot that happened to be a dead-end, so Trooper Durbin was able to catch up to the vehicle and stop it. 3RP 166, ln. 7-11.

The passenger and driver doors opened up immediately upon stopping. 3RP 167, ln. 13-14. The passenger got out very quickly, while the driver got out really slowly. 3RP 167, ln. 13 to p. 168, ln. 4. The driver of the vehicle was the defendant. 3RP 157, ln. 18 to p. 158, ln. 1; p. 162, ln. 8-10; p. 167, ln. 15-16; p. 168, ln. 5-6. Officer Durbin got out quickly, had his gun drawn and was yelling at the driver and passenger to get down on the ground. 3RP 167, ln. 16-20; p. 168, ln. 9-17. However, they were slow to respond. 3RP 168, ln. 16-17. They were also speaking in a language Trooper Durbin didn't understand, which was threatening to him because he didn't know if they were planning something to attack him, or what else might be going on. 3RP 168, ln. 17-21.

When he did begin to comply, the defendant failed to immediately get on the ground as directed, instead going down to a half-pushup

position, which caused Trooper Durbin to be nervous that he might be able to get up quickly and either attack or take off running. 3RP 168, ln. 25 to 169, ln. 7. As Trooper Durbin approached the defendant, he did in fact attempt to get up and get away, so Trooper Durbin basically kicked the defendant to stop him and get him back on the ground. 3RP 169, ln. 10-16. Trooper Durbin got on top of him to handcuff him but struggled to get handcuffs on the defendant. 3RP 169, ln. 12-17. While Trooper Durbin attempted to get handcuffs on him, the defendant was rocking back and forth, but Trooper Durbin was trying to get the handcuffs on the defendant. 3RP 169, ln. 24 to p. 170, ln. 3.

As he was doing so, the passenger, who was just to their right, started moving like he was going to get up, so Trooper Durbin told him to stay on the ground. 3RP 169, ln. 14-18. Back-up had not arrived so Trooper Durbin was attempting to get the two under control on his own. 3RP 169, ln. 19-20. After getting the defendant handcuffed, he was then able to handcuff the passenger, who also smelled intoxicated. 3RP 170, ln. 4-8.

Fife Police arrived and detained the passenger in a separate patrol car while Trooper Durbin brought the defendant to the Trooper's vehicle and advised him of his Miranda rights. 3RP 170, ln. 13-16. Trooper Durbin then directed the defendant toward the defendant's vehicle, spread

his legs apart to keep him slightly off-balance to minimize the risk of resistance. 3RP 171, ln. 1-5. As Trooper Durbin went to pat down the defendant's left pocket, the defendant pulled away from him so that Trooper Durbin had to push the defendant against the car to keep him from getting away. 3RP 171, ln. 5-8. Once he did that, he was able to remove two pocket knives from the defendant. 3RP 171, ln. 8-9.

Trooper Durbin asked the defendant why he didn't stop and about his drinking, and the defendant claimed that he didn't have anything to drink and didn't stop because he didn't see the Trooper. 3RP 171, ln. 16 to p. 172, ln. 20. When asked why he turned his lights off, the defendant claimed that he didn't. 3RP 172, ln. 24 to p. 173, ln. 4.

Trooper Durbin's vehicle had an in-dash camera which recorded portions of the high-speed pursuit and arrest of the defendant. 3RP 175, ln. 18 to p. 176, ln. 25; Ex. 7. The video contained footage showing when the Trooper was trying to frisk the defendant for weapons, the defendant pulled away, the Trooper had to push him against the car and ultimately found the two knives on him. 3RP 178, ln. 18-20; Ex. 7. The video was played for the jury. 3RP 177, ln. 1 to p. 178, ln. 24.

Trooper Durbin began to investigate the defendant for DUI and observed that the defendant's face was flushed and that he had watery, blood-shot eyes, his speech was fair, and his coordination was poor. 3RP

173, ln. 23 to p. 174, ln. 4. Because of the circumstances of the arrest with the defendant first eluding in his vehicle, then resisting being handcuffed, as well as the defendant's attempt to pull away after being handcuffed, Trooper Durbin did not conduct field sobriety tests. 3RP 174, ln. 22 to p. 4.

Trooper Durbin then transported the defendant to the Fife Police Department, which was nearby and had a BAC machine. 3RP 175, ln. 11-15. The Trooper advised him of his implied consent warnings. 3RP 181, ln. 21-23. Because of safety concerns, Trooper Durbin kept the defendant handcuffed while he advised the defendant of the warnings. 3RP 184, ln. 23 to p. 185, ln. 9. The defendant consented to providing a breath test sample. 3RP 185, ln. 14-16. The defendant's breath samples produced results of .096 and .095. 3RP 321, ln. 18-22; Ex. 8.

C. ARGUMENT.

1. THE COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE BREATH TEST RESULTS WHERE THE DEFENDANT FAILED TO MEET HIS BURDEN TO SHOW PREJUDICE FROM THE ALLEGED VIOLATION OF HIS RIGHT TO COUNSEL.

a. The Trial Court's Unchallenged Findings Of Fact Are Verities On Appeal.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. ***State v. Hill***, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. ***Hill***, 123 Wn.2d at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. ***Hill***, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In ***Henderson Homes, Inc v. City of Bothell***, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings

were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

> It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also* ***State v. Jacobson***, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

A finding of fact that is erroneously denominated as a conclusion of law will be treated as a finding of fact. ***Rickert v. Pub.Disclosure Comm'n***, 161 Wn.2d 843, 847, 168 P.3d 826 (2007) (citing ***State v. Luther***, 157 Wn.2d 63, 78, 134 P.3d 205 (2006)). *See* ***Hoke v. Stevens-Norton, Inc***, 60 Wn.2d 775, 778, 375 P.2d 743 (1962).

Similarly, where conclusions of law are incorrectly denominated as findings of fact, the court still treats them as conclusions of law. ***Neil F. Lampson Equip. Rental & Sales, Inc v. West Pasco Water Sys., Inc.***, 68 Wn.2d 172, 174, 412 P.2d 106 (1966). The court reviews conclusions of law ***de novo***. ***State v. Smith***, 154 Wn. App. 695, 699, 226 P.3d 195 (2010) (citing ***State v. O'Neill***, 148 Wn.2d 564, 571, 62 p.3d 489 (2003); ***State v. Eisfeldt***, 163 Wn.2d 628, 634, 185 P.3d 580 (2008)).

Here, the defense has not assigned error to any of the trial court's findings. Br. App. 1; CP 114-119. The State has assigned error to the trial court's Finding as to Disputed Facts No. 2. However, that assignment of error is not based upon a lack of sufficiency of the evidence, but rather on a claim that the finding is actually an incorrectly denominated conclusion of law. *See* section 1.b below. Accordingly, the trial court's remaining findings are now verities.

b. The Trial Court Erred When It Entered What It Denominated A Findings As To Disputed Fact Number 1 Where The Compound Finding Contains What Is Actually A Conclusion Of Law, And That Conclusion Is In Error.

The trial court's "Findings as to Disputed Facts contained two findings. The court's finding no. 1 as to disputed facts was:

> 1. Trooper Durbin could not recall if there was a request for privacy, but Mr. Andrews indicated that there were two requests for privacy. The Court found that there was a request for privacy in this case and as a result, there was insufficient privacy afforded to the defendant during his phone call with Mr. Andrews.

CP 117 (Findings as to Disputed Facts no. 1). This "finding" contains two sentences. The State specifically takes issue with, and assigns error to, the portion of the statement that says, "...and as a result, there was insufficient

privacy afforded to the defendant during his phone call with Mr. Andrews."

This statement is actually a conclusion of law and not a finding of fact. The court is drawing a conclusion as to the legal sufficiency of the privacy afforded to the defendant when he communicated by telephone with the on-call attorney.

That this statement is a conclusion of law is further reinforced by the court's finding no. 2 as to disputed facts which states that "The defendant has not proved actual prejudice as a result of the lack of privacy." CP 117 (Findings As to Disputed Facts, finding no. 2.) This "finding" too is an obvious conclusion of law as is indicated by its reference to the defendant's burden of proof, and an insufficient showing of prejudice.

The second finding that is actually a conclusion reinforces the fact that the statement challenged by the State is also a conclusion because the issue of whether the defendant showed sufficient prejudice is only an issue if he was not afforded legally sufficient privacy to contact his attorney so that his right to counsel was violated.

That as conclusion of law is mistakenly denominated as a finding of fact is of no great consequence because, as explained in section 1.a

above, the reviewing court will simply treat a conclusion mistakenly denominated as findings as a conclusion.

However, here, that conclusion is in legal error. That is because the court fails to account for the limited nature of a defendant's right to counsel at such a preliminary stage. As is explained further in section 1.c below, the defendant's right to counsel may be further limited by the defendant's own conduct, particularly where the defendant's conduct creates a security concern. Such was the case here, and because of those security concerns, Trooper Durbin did not fail to provide the defendant with sufficient privacy. Accordingly, the trial court's conclusion to the contrary is error.

c. The Defendant's Right To Counsel Was Not Violated

The defendant claims that his right to counsel under CrR 3.1(b)(1) was violated and that the breath test results should have been suppressed as a result. Br. App. 27, 30.

Washington court rules provide that, "[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody. CrR3.1(b)(1); CrRLJ 3.1(b)(1). "The right to a lawyer shall extend to all criminal proceedings for the offenses punishable by loss of liberty

regardless of their denomination as felonies, misdemeanors, or otherwise." CrR 3.1(a); CrRLJ 3.1(a).

For purposes of the analysis under the facts of this case, the relevant portions of the language in the two rules are identical, so that cases interpreting one rule would be equally applicable to identical language under the other rule. Indeed, it appears that all of the cases interpreting the language of the rule under facts analogous to this case arise under CrRLJ 3.1, which is not surprising given that the great majority of cases will arise from misdemeanor DUI prosecutions in courts of limited jurisdiction.

A driver's right to counsel normally accrues as soon as the driver is arrested and placed into a patrol car. ***City of Spokane v. Kruger***, 116 Wn.2d 135, 139, 803 P.2d 305 (1991).

However, a defendant's rights at the stage immediately after arrest are limited under the court rule. ***City of Seattle v. Koch***, 53 Wn. App. 352, 357, 767 P.2d 143 (1989). Because the right to counsel is a limited one, it will be significant if a defendant who has not made a specific request for privacy, and it is also significant if a defendant cannot make a showing of prejudice. ***Koch***, 53 Wn. App. at 357-58.

A DUI defendant's rights at the stage immediately after arrest are limited under the court rule, and often a telephone conversation alone will

be sufficient. ***Koch***, 53 Wn. App. at 357 (citing ***State v. Fitzsimmons***, 93 Wn.2d 436, 448, 610 P.2d 893 (1980), *vacated*, 449 U.S. 977, 101 S. Ct. 390, 66 L. Ed. 2d 240, *aff'd on remand*, 94 Wn.2d 858, 620 P.2d 999).

Defendants in DUI cases have no right to have an attorney physically present when they take the breath test. ***City of Bellevue v. Ohlson***, 60 Wn. App. 485, 489, 803 P.2d 1346 (1991). The rule does not provide for access to counsel of defendant's choice. ***Seattle v. Sandholm***, 65 Wn. App. 747, 751, 829 P.2d 1133 (1992).

Nor are police required to grant every request of a DUI suspect that they be afforded increased privacy while engaging in consultation with their attorneys on the telephone. ***City of Seattle v. Koch***, 53 Wn. App. 352, 767 P.2d 143 (1989). Even where a request for privacy is made, the police are not required to grant increased privacy. ***Koch***, 53 Wn. App. at 358 n. 7.

Indeed, whether a defendant's request for additional privacy must be granted depends upon a number of factors that include unique security and safety problems presented by particularly uncooperative, intoxicated suspects. ***Koch***, 53 Wn. App. at 358 n. 7.

The court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, the court concluded that the defendant's right to privacy was violated. CP 117 (Findings as to Disputed Facts, no. 1). However, that conclusion is in error where it failed to consider the unique security problems that existed in light of the safety problems posed by the defendant's resistive behavior.

Trooper Durbin testified at the suppression hearing that he had safety concerns upon contacting the defendant's vehicle because of the high-speed chase, the defendant running intersections, turning off all his lights so someone wouldn't be able to see, him, then going the wrong way down the street, all of that was a huge safety concern. 1RP p. 13, ln. 21 to p. 14, ln. 2.

Once the vehicle stopped at the dead end, the passenger jumped out right away, the defendant slowly got out of the driver's door and the two kind of looked at each other, while Trooper Durbin got out of his car. 1RP 14, ln. 12-15. Trooper Durbin was yelling at both of them to get down on the ground, and as the two look at each other, they were talking in a language Trooper Durbin didn't understand. 1RP 14, ln. 15-19. He was concerned that the two were formulating a plan against him because he was still by himself at that point. 1RP 15, ln. 5-10.

Trooper Drubin gave them commands to get down on the ground, but they only did so slowly, and the defendant only went down to a half

push-up position as Trooper Durbin approached the defendant with his gun drawn. 1RP 14, ln. 19-23. As Trooper Durbin was about to get close to him, the defendant pops up like he's going to take off running. 1RP 23-24. So Trooper Durbin kicks the defendant's leg to keep him from getting up and got on top of the defendant to handcuff him. 1RP 14, ln. 25 to p. 15, ln. 1.

As Trooper Durbin attempted to handcuff him, the defendant was kind of moving around and Trooper Durbin was still trying to keep his eyes on the still unsecured passenger for safety reasons. 1RP 16, ln. 16-18. Trooper Drubin was still the only officer on scene. 1RP 16, ln. 19.

Shortly after he secured the defendant and the passenger in handcuffs, Fife Police officers arrived on scene. 1RP 17, ln. 18-20. Trooper Durbin picked the defendant up and moved him over to the defendant's vehicle and started to search his person to make sure he didn't have any weapons. 1RP 17, ln. 23-25.

He had the defendant spread his feet apart, which allowed Trooper Durbin a position of advantage to conduct the search so that the defendant didn't kick him or anything like that. 1RP 18, ln. 1-4. While doing that, the defendant pulled away from Trooper Durbin as he was trying to pat the defendant down. 1RP 18, ln. 4-5. As a result, Trooper Durbin had to push

the defendant against the car to isolate him and keep him from struggling against the Trooper. 1RP 18, ln. 5-7.

This happened as Trooper Durbin was going to the defendant's pocket. 1RP 18, ln. 10-11. Trooper Durbin removed two pocket knives from the pocket. 1RP 17,ln. 25 to p. 18, ln. 1; p. 19,ln. 9-11.

Trooper Durbin further testified that he took the defendant to the Fife Police Department to use the breath test machine there because it was the closest location with one. 1RP 20, ln. 3-12. The Fife Police Department was only a minute or two away from where Trooper Durbin arrested the defendant. 1RP 21, ln. 1-3.

Trooper Durbin testified that the Fife jailer had to let him into the room with the breath test machine. 1RP 30, ln. 20-22. He stated that he would never leave the room if he was watching his suspect. 1RP 30, l. 23-25. It is understood at the Fife jail that the officers who bring in a suspect are responsible for that suspect because the Fife jail officers have other responsibilities that they need to attend to with regard to the jail inmates. 1RP 31, ln. 9-12. Trooper Durbin didn't have a key to go in or out of the room with the breath test machine, so depending on what the jailer would be doing, the Trooper wouldn't be able to get in or out of the room. 1RP 31, ln. 13-15.

For that reason, even if he walked to the other side of the room he would keep some kind of visual contact on the defendant. 1RP 31, ln. 16-20. However, if someone was trying to talk to an attorney, Trooper Durbin would try to go to the other side of the room in order to give them privacy. 1RP 29, ln. 21 to p. 30, ln. 5. From that side of the room, the defendant would have to be speaking pretty loud for Trooper Durbin to be able to hear it. 1RP 30, ln. 6-10.

Here, given the defendant's resistance when he was arrested, including his attempt to get to his feet to run away, as well as his pushing against Trooper Durbin while the Trooper frisked him for weapons, Trooper Durbin had a reasonable safety concern regarding the defendant while the defendant was talking to his attorney over the telephone.

For this reason, it was not unreasonable for Trooper Durbin to remove himself to the far side of the room to afford the defendant some privacy, but not to completely remove himself from the room. This is especially so where if he left the room he would be locked out and unable to reenter until the jailer was available to use his key to admit Trooper Durbin. Trooper Durbin's safety concerns pertain not only to preventing assaults by a suspect on the Trooper or some other party, and not only possible attempts to escape from custody, but also the possibility that the

defendant might attempt to harm himself, or have an unanticipated medical emergency making the Trooper's assistance necessary.

Trooper Durbin did not violate the defendant's right to privacy where he put the defendant in touch with an attorney by telephone, removed himself to the far side of the room, but remained in the room out of valid safety concerns. Accordingly, the trial court erred when it concluded that Trooper Durbin did not afford the defendant sufficient privacy while he spoke with his attorney.

d. Even Assuming The Defendant's Right To Counsel Were Violated, He Has Failed To Show Any Prejudice Therefrom.

Even so, the trial court held that the defendant failed to show any prejudice from the violation that the court concluded did occur because the defendant was unable to show any prejudice from the claimed violation. CP 117 (Findings as to Disputed Facts, finding no. 2).

Even where a defendant's right to counsel has been violated, and that violation results in prejudice such that the defendant is entitled to relief, the remedy is suppression of any tainted evidence, not dismissal of the case. ***Kruger***, 116 Wn.2d at 147. Here, there was no tainted evidence. The court found that the only questions that the on-call attorney was not

able to ask the defendant were the eight questions about alcohol consumption listed in undisputed fact number 14.a to f. CP 116.

Despite the court's conclusion that Trooper Durbin failed to provide the defendant with sufficient privacy, the on-call attorney was able to advise the defendant of his rights and the consequences of either submitting or refusing a breath test. CP 118 (Reason for Admissibility no. 3). The defendant failed to demonstrate that his decision to submit to the breath test was prejudiced in any way as a result of the consumption questions not being asked and answered. CP 118 (Reason for Admissibility no. 5).

Having failed to demonstrate any prejudice, the defendant is not entitled to suppression of his breath test results.

2. THE COURT PROPERLY ADMITTED VIDEO FROM THE OFFICER'S DASHBOARD CAMERA WHERE THE CONTENT OF THE CHALLENGED PORTION OF THE VIDEO WAS NOT UNFAIRLY PREJUDICIAL TO THE DEFENDANT, AND IN ANY CASE ANY UNFAIR PREJUDICE DID NOT OUTWEIGH THE PROBATIVE VALUE OF THE EVIDENCE.

The defendant claims on appeal that the court improperly admitted prejudicial evidence that consisted of a portion of the video from Trooper Durbin's dashboard camera showing him doing a pat-down frisk for weapons and finding two knives in the defendant's pocket. Br. App. 17.

The claim is without merit where the two pocket knives were not unfairly prejudicial, and where the video shows the defendant as resistive and not following instructions, which was relevant as evidence of his intoxication.

Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. ***State v. Powell***, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Evidence is relevant if, it has "...any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ***State v. Saenz***, 156 Wn. App. 866, 873, 234 P.3d 336 (2010) (quoting ER 401). Relevant evidence is generally admissible, while irrelevant evidence is not. ***Saenz***, 156 Wn. App. at 873 (citing ER 402). However, relevant evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. ***Saenz***, 156 Wn. App. at 873 (citing ER 403). Still, the threshold for the admissibility of relevant evidence is very low and even minimally relevant evidence is admissible. ***State v. Aguilar***, 153 Wn. App. 265, 273, 223 P.3d 1158 (2009).

Evidence of other wrongs or acts is generally inadmissible to prove character of a person to show action in conformity therewith. ***Saenz***, 156 Wn. App. at 873 (citing ER 404(b)). However, evidence of other bad acts may be admissible for other purposes, such as "motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Saenz***, 156 Wn. App. at 873 (quoting ER 404(b)). Such other purposes are often mistakenly referred to as exceptions, but are in fact merely types of evidence that is not barred by the rule because it falls outside the rule insofar as it is not offered to prove conformity therewith. *See* Tegland, WASHINGTON PRACTICE, VOL. 5: EVIDENCE, 5TH ED. § 404.9

Even when motive is not itself an element of the crime charged, it is nonetheless relevant as circumstantial evidence of other essential elements of the crime. *See* ***State v. Yarbrough***, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009).

> Under ER 404(b) evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith. However, when demonstrated, such evidence may be admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident". If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged.

Powell, 126 Wn.2d at 258 (citations omitted). However, more relevant here is the sentence which follows the language above.

> Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable.

Powell, 126 Wn.2d at 259 (citing ***State v. Dennison***, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); ***State v. Saltarelli***, 98 Wn.2d 358 at 362-63, 655 P.2d 697 (1982)).

A trial court's decision to admit evidence under ER 404(b) is reviewed for a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. ***Saenz***, 156 Wn. App. at 873 (citing ***State v. Stenson***, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)); ***Yarbrough***, 151 Wn. App. at 81. The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. ***Saenz***, 156 Wn. App. at 873.

Normally, before a trial court may admit evidence of other bad acts, it must 1) find by a preponderance of the evidence that the misconduct [other bad acts] occurred; 2) identify the purpose for which the evidence is sought to be introduced; 3) determine whether the evidence is relevant to an element of the crime charged; and 4) weigh the probative value against the prejudicial effect. ***Saenz***, 156 Wn. App. at 873. The court may rely on a summary of the expected evidence provided by the Deputy Prosecuting Attorney as an offer of proof. *See* ***State v. Kilgore***, 147 Wn.2d 288, 294-95, 553 P.3d 974 (2002).

Here, the State sought to admit approximately six minutes of video from Trooper Durbin's dashboard camera, running from the point where

the trooper sees the defendant's vehicle speeding to the point where the Trooper secures the defendant and is walking him back to the patrol car. 3RP 146, ln. 8-13. Defense counsel had no objection to the admission of the first three minutes and 50 seconds of the video. 3RP 146, ln. 24 to p. 147, ln. 2. The defense objection was to the remaining portion of the video after that point which shows the defendant while he is being arrested and in-custody. 3RP 146, ln. 21 to p. 147, ln. 4. This is video showing the defendant leaned up against the car and being searched. 3RP 147, ln. 8-9. This is the point at which Trooper Durbin frisked the defendant for safety, the defendant pulled away, Trooper Durbin pushed the defendant up against the car and found two pocket knives in the defendant's pocket. 3RP 147, ln. 7-12; p. 171, ln. 5-9. The defense felt that portion of the video has no demonstrative value, wasn't necessary and not relevant. 3RP 147, ln. 21-13. This was particularly so where the two knives found did not lead to any charges. 3RP 147, ln. 10-12.

The State argued in response that in seeking to introduce the challenged portion of the video because it provided evidence of the defendant's demeanor and failure to follow instructions, and the defendant not cooperating, which the State intended to use as additional evidence of the defendant's intoxication. 3RP 147, ln. 21 to p. 148, ln. 7; p. 149, ln. 8-21.

After reviewing the evidence, the court held that any prejudice was outweighed by the relevance of the challenged evidence on the issue of the defendant's intoxication. 3RP 150, ln. 17-19; Ex. 7. Accordingly, the court overruled the defense objection and allowed the evidence to be admitted. 3RP 150, ln. 19-20.

a. There Was No Improper Other Bad Acts Evidence That Was Prejudicial To The Defendant Where The Defendant Merely Possessed Pocket Knives.

The defense relies on the knives as being improper, prejudicial evidence. However, the knives were repeatedly referred to as pocket knives, and before the jury Trooper Durbin referred to them as pocket knives as well. 3RP 147, ln. 12; p. 150, ln. 3, ln. 4; p. 171, ln. 9; p. 178, ln. 20. The knives were never referred to as deadly weapons. And while Trooper Durbin talked about the need for officer safety, and never knowing which defendants will pose a safety risk and which will not, he never referred to the pocket knives as a safety concern. *See* 3RP 238, ln. 21-25.

It is not unlawful to possess pocket knives. While virtually any item could be used as some form of weapon the pocket knives, despite being knives are not inherently a weapon. Rather, they are tools. Thus,

the defendant's reference to them as weapons for the first time on appeal is without merit. *See* Br. App. 18.

The fact that the two pocket knives were found in the defendant's pocket was not evidence of other bad acts, nor was it evidence that should prejudice the jury against the defendant.

The defense claims for the first time on appeal that the pocket knives were inadmissible under ER 404(b). However, the defense made no such claim in the trial court.

At trial, the defense merely argued that the probative value of the challenged video portion was very small, and argued that there was a great prejudicial effect from "a prolonged portion of the video where the defendant is simply in handcuffs and he's been searched." 3RP 146, ln. 17-20. Defense counsel continued, "I don't know what that particular portion demonstrated, beyond the fact that the defendant is in custody and being arrested." 3RP 146, ln. 21-23. When specifically referencing the knives, defense counsel said, "Frankly, Your Honor, given the fact that he doesn't actually get any charges for any things that was found in his pocket, in this case I believe it's a pocket knife, I don't know the relevance of that being offered to the jury." 3RP 147, ln. 10-13.

After the court and parties reviewed the video, defense counsel did go on to make the following argument.

> Defendant is not charged with resisting arrest, not charged with obstruction of justice or obstruction of a police office. The only charges here are eluding and the charges of DUI. I don't believe there's enough behavior there to be indicative of anything beyond the fact that a search went on, which ultimately produced a pocket knife that came out of his pocket. I do believe that the fact that there was a pocket knife in his pocket could be seen as -- could be prejudicial to the defendant's case. It could be seen as indicative of something more to the jury. Clearly, in this case, there was nothing illegal about what was in his pocket. He didn't try to use whatever was in his pocket. I simply think there's a prejudicial effect that outweighs whatever probative value the State may be proposing from that particular portion of the video. If they want to show that he was arrested, they clearly have that at the three minutes and 50 second mark. I don't believe any of the rest of that is probative enough to be shown to the jury.

3RP 149, ln. 22 to p. 150, ln. 15.

ER 404(b) prohibit the use of evidence of other crimes, wrongs or acts as evidence to prove the character of a person in order to show action in conformity therewith. *See* ER 404(b). The knife evidence wasn't used in that manner here. It wasn't even addressed by the parties as character evidence.

While defense counsel did not articulate a particular basis in the rules for excluding the evidence, he referred to the balancing of prejudicial effect against what he referred to as the limited relevance of the challenged portion of the video. The defense challenged the entire portion of the video after the defendant was under arrest as prejudical, not just the

discovery of the knives. This is consistent with a challenge under ER 403, under which prejudicial effect is balanced against probative value.

Where the trial attorney below did not specifically raise a claim under ER 404(b), where the possession of pocket knives is not character evidence, and where the State never argued the pocket knives as character evidence, the trial court was not obligated to conduct an analysis under ER 404(b).

b. The Court Properly Determined That The Prejudicial Effect Of The Challenged Portion Of The Video Was Outweighed By Its Probative Value.

Again, the trial court's decision to admit or exclude evidence is reviewed for a manifest abuse of discretion. The defense failed to articulate any significant prejudicial effect from the challenged portion of the video. Although the defense challenged all of the post-arrest portion of the video as prejudicial, the only prejudice articulated was the possible effect that the finding of the pocket knives might have on the jury. However, that effect was negligible where they were pocket knives, and Trooper Durbin referred to them as such.

In fact, the main defense argument against the admissibility of the challenged portion of the video was that it simply wasn't relevant. The State countered that the defendant's demeanor, conduct and failure to

follow directions was evidence of the defendant's intoxication. After reviewing the video, the trial court agreed with the State and concluded that the any prejudice was outweighed by the probative value of the challenged portion of the video. The court's doing so was consistent with ER 403.

Under ER 403, there is a presumption of admissibility, and the burden is on the party seeking to exclude the evidence. Tegland, vol. 5, § 403.2, p. 435 (citing ***Carson v. Fine***, 123 Wn.2d 206, 225, 867 P.2d 610 (1994)). Evidence should only be excluded when the probative value of the evidence is "substantially outweighed" by the prejudicial effect. Tegland, vol. 5, § 403.2, p. 435. When the balance is even, the evidence should be admitted. Tegland, vol. 5 § 403.2, p. 435 (citing ***Lockwood v. AC&S, Inc.***, 44 Wn. App. 330, 722 P.2d 826 (1986)).

"[T]he rationale for requiring the trial court to weigh its decision on the record under ER 404(b) and ER 609 is not present in the case of an ER 403 objection." ***Carson***, 123 Wn.2d at 223.

"By necessity, the trial court's ruling must be based in part upon the judge's own subjective assessment of the evidence." Tegland, vol. 5, § 403.2, p. 437. The courts have rejected any suggestion that the judge's determination must be made according to an objective standard. Tegland, vol. 5, § 403.2, p. 437-38.

"Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion. ***Carson***, 123 Wn.2d at 226.

There is no basis for this court to hold that the trial court manifestly abused its discretion. Even if this court were to so hold, the defendant can show no meaningful prejudice from the admission of the challenged portion of the video, such that even if there were error, any such error is harmless.

Accordingly, the defendant's claim on this issue should be denied as without merit.

3. FEDOROV'S RIGHTS UNDER THE CONFRONTATION CLAUSE WERE NOT VIOLATED WHERE TROOPER HAVENNER'S TESTIMONY REGARDING THE MAINTENANCE OF THE BAC MACHINE WAS A PRELIMINARY QUESTION OF FACT TO ADMISSIBILITY THAT FELL UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The defendant claims that the testimony of Trooper Havenner violated the defendant's right to confront witnesses against him as guaranteed by under ***Crawford v. Washington***, and ***Melendez-Diaz v. Massachusetts***. Br. App. 37-38 (citing ***Crawford v. Washington***, 541

U.S. 36, 51, 124 S. Ct. 1354; 158 L. Ed. 2d 177 (2004); ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 308-10, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)). As a result, the defendant asks the court to suppress the evidence of the breath test that was allegedly admitted in violation of his confrontation rights. Br. App. at 42.

At trial court, prior to the testimony of Trooper Havenner regarding the maintenance of the breath test machine, defense counsel objected to the testimony of Trooper Havenner on the ground that he did not perform the maintenance and testing on the machine about which he would be testifying. 4RP 289, ln. 8-14. Defense counsel argued that the Trooper's testimony would violate the defendant's right to confront witnesses against him, contrary to the United States Supreme Court's holdings in ***Crawford***, and ***Melendez-Diaz***. 4RP 289, ln. 15-18. Defense counsel specifically argued that the testimony would not be a business records exception under which the Trooper could properly testify. 4RP 289, ln. 17-18. The court overruled the defense objection and admitted the testimony of Trooper Havenner. 4RP 299, ln. 20 to p. 300, ln. 3.

The defendant's claim is without merit where Trooper Havenner's testimony consisted of giving his opinion as an expert that the results of the breath ticket were reliable. While Trooper Havenner relied upon the annual maintenance records as a business record, he did so as foundational

material that provided the basis for his expert opinion. As such, his testimony did not violate the defendant's confrontation rights under ***Crawford*** where Trooper Havenner was available for cross-examination as to the basis for his opinion.

Moreover, the defendant is not entitled to relief where the admissibility of the breath test results did not depend upon Trooper Havenner's testimony. Finally, even if the court were to hold that some of Trooper Havenner's testimony did violate the defendant's confrontation rights under Crawford, any error was minimal and harmless.

a. The Defendant's Right To Confront Witnesses Against Him Under Crawford Does Not Apply To Expert Opinion Testimony Or To Business Records, Both Of Which Are Non-Testimonial.

The Sixth Amendment's confrontation clause confers upon the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. As reflected in the constitutional text, the right "applies to witnesses against the accused—in other words, those who bear testimony." ***State v. Jasper***, 174 Wn.2d 96, 109, 271 P.3d 876 (2012) (quoting ***Crawford***, 541 U.S. at 51). "Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." ***Jasper***, 174 Wn.2d at 109 (citing ***Crawford v.***

Washington, 541 U.S. 36, 51, 124 S. Ct. 1354; 158 L. Ed. 2d 177 (2004)) (internal quotations omitted). An alleged violation of the confrontation clause is reviewed *de novo*.

In ***Crawford v. Washington***, the United States Supreme Court held that Sixth Amendment right to confront witnesses meant that out-of-court testimonial statements were not admissible against a criminal defendant unless the declarant was available for cross examination by the defendant (either at trial, or at some prior opportunity). ***Crawford***, 541 U.S. at 50-51. No Washington courts have held that protections granted by Article I § 22 of the Washington Constitution are greater than those provided under the federal constitution. ***State v. Sandoval***, 137 Wn. App. 532, 154 P.3d 271 (2007); ***State v. Saunders***, 132 Wn. App. 592, 132 P.3d 743 (2006); ***State v. Whelchel***, 115 Wn.2d 708, 801 P.2d 948 (1990). *But see* ***State v. Mason***, 160 Wn.2d 910, 917 n. 1, 162 P.3d 396 (2007) (stating that they did not reach the issue because it was not adequately briefed, thereby possibly implying that it remains an open question).

The court in ***Crawford*** "left for another day any effort to spell out a comprehensive definition of 'testimonial.'" ***Crawford***, 541 U.S. at 68. While the definition of "testimonial," remains subject to refinement, the Court, however, gave guidance on the issue by noting various formulations of the "core class" of testimonial statements at which the

Confrontation Clause was directed. The court identified one formulation of "testimonial" as, "affidavits, custodial examinations, prior testimony [...], or similar pretrial statements that declarants would reasonably expect to be used prosecutorially." ***Crawford***, 541 U.S. at 51. A second description given by the court was, "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. ***Crawford***, 541 U.S. at 51-52.

A third description was "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at later trial.'" ***Crawford***, 541 U.S. at 51-52.

Nonetheless, the court's formulation in ***Crawford*** has left some ambiguity in the definition of "testimonial" that remains subject to further clarification. ***Crawford***, 541 U.S. at 75-76 (Rehquist, CJ., dissenting); ***State v. Mason***, 160 Wn.2d 910, 918-19, 162 P.3d 396 (2007) (citing ***Davis v. Washington***, 547 U.S. 813, 834, 26 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (Thomsas, J., dissenting).

The three different descriptions have lead to two different tests: the "subjective" test, wherein the perceived intent and expectations of the out-of-court declarant determine whether a statement is testimonial; and the "objective" test, wherein whether a statement is testimonial if a

reasonable witness would expect the statement to be used as evidence. *See* Tegland, EVIDENCE LAW AND PRACTICE, WASHINGTON PRACTICE, vol. 5C § 1300.10, (including 2008 pocket part supplement), c. 2007, 2008. Washington initially followed a subjective test in ***State v. Shafer***. ***State v. Shafer***, 156 Wn.2d 381, 128 P.3d 87 (2006).

Notwithstanding earlier opinions to the contrary, the court in ***Mason*** appeared to indicate in *dictum* that an objective test is now the standard as identified in ***Davis***. ***Mason***, 160 Wn.2d at 919-20. (The court's statement in ***Mason*** is *dictum* on this matter because the court never reached the issue of whether the statements were testimonial where it held that the appellant had waived the right to cross examine the defendant because he had subsequently killed the defendant.) ***Mason***, 160 Wn.2d at 922. In 2011, without explicitly saying so, the court seemed to follow an objective test when it considered a child's statements to a sexual assault nurse, and the court considered only the nurse's purpose in conducting the interview and examination and never mentioned the child's state of mind. *See* Tegland, vol. 5C, 2012 pocket part, § 1300.10, p. 51.

"[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object..." ***Crawford***, 541 U.S. at 53. The court noted that, while there have always been exceptions to the general rule of exclusion of hearsay evidence, "there is scant evidence that

the exceptions were invoked to admit testimonial statements against the accused in criminal cases." ***Crawford***, 541 U.S. at 55-56 [emphasis added]. The court also noted that most hearsay exceptions covered statements that by their nature were not testimonial, and specifically refers to the business records exception, and the exception for statements in furtherance of a conspiracy. ***Crawford***, 541 U.S. at 56. Following the express language in ***Crawford*** itself, the Washington court of appeals has held that business records are a valid hearsay exception that fall outside of the confrontation right enunciated in ***Crawford***. ***State v. Bellerouche***, 129 Wn. App. 912, 916-17, 120 P.3d 971 (2005) (citing ***Crawford***, 541 U.S. at 56).

The court in ***Crawford*** also held that the Confrontation Clause does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted. ***Crawford***, 541 U.S. at 59 (citing ***Tennessee v. Street***, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)).

The Supreme Court has also recognized that statements are not testimonial when made under circumstances objectively indicating that their primary purpose is to enable police assistance to meet an ongoing emergency. ***Davis v. Washington***, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). The existence of an ongoing emergency is

relevant in determining the primary purpose of such statements because the emergency focuses the declarants on something other than "prov[ing] past events potentially relevant to later ... prosecution[s]." ***Michigan v. Bryant***, ___ U.S.___, 131 S. Ct. 1143, 1157, 179 L. Ed. 2d 93 (2011).

The Court has also recognized that "there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony," and that "[w]here no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the [c]onfrontation [c]lause." ***Bryant***, 131 S. Ct. at 1155, 1166–67.

On the other hand the admission of a written certification in lieu of testimony does violate the right to confront witnesses under ***Crawford***. In ***Melendez-Diaz v. Massachusetts*** the United States Supreme Court held that "certificates of analysis" showing the results of a forensic analysis performed on seized drugs were testimonial. ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 308-10, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). The technicians who analyzed the drugs were not called as witnesses, with a certificate of the test results being admitted in the place of their testimony in order to prove the test results. ***Melendez-Diaz***, 557 U.S. at 308-09. The Court held that admission of the certificate violated

the defendant's confrontation clause rights under ***Crawford***. ***Melendez-Diaz***, 557 U.S. at 329.

In ***Bullcoming v. New Mexico*** the U.S. Supreme Court went a step further with regard to testing certifications and held that testimony by a blood alcohol analyst who did not perform the test, who testified based on a certification created by a colleague who did perform the test to determine the blood alcohol content also violated the defendant's right to confrontation under ***Crawford***. ***Bullcoming v. New Mexico***, ___ U.S. ___, 131 S. Ct. 2705, 2714-15, 180 L. Ed. 2d 610 (2011). The certification indicated that the analyst who performed the test received the blood sample intact, that he checked that the numbers corresponded and that he performed a particular test, adhering to a precise protocol. ***Bullcoming***, 131 S. Ct. at 2714.

The United States Supreme Court held that this "surrogate testimony" could not convey the same information as would have been supplied by the analyst who performed the actual test. ***Bullcoming***, 131 S. Ct. at 2715. Ultimately, the Court held that Bullcoming's right to confrontation required the testimony of the testing analyst pursuant to ***Melendez-Diaz***. ***Bullcoming***, 131 S. Ct. at 2716.

Following on ***Melendez-Diaz***, in ***Jasper***, the Washington Supreme Court held that a Department of Licensing certification by a records

custodian, affirming that the custodian had performed a diligent search of the department's records was an affidavit, falling within the "core class of testimonial statements" described in ***Crawford*** and ***Melendez-Diaz***. ***Jasper***, 174 Wn.2d at 115.

The certified statements held to be testimonial statements in ***Melendez–Diaz***, ***Bullcoming***, and ***Jasper*** were created for the sole purpose of providing factual evidence against those defendants. *See* ***State v. Doerflinger***, 170 Wn. App. 650, 659-60, 285 P.3d 217 (2012).

In contrast, business records that have been "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial" are not testimonial and therefore are not subject to the confrontation clause. ***Melendez-Diaz***, 557 U.S. at 324. A trial court's decision to admit or exclude business records will be reversed only if it was a manifest abuse of discretion. ***Doerflinger***, 170 Wn. App. at 661. As provided in RCW 5.45.020, hearsay evidence contained in business records is competent evidence:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Doerflinger, 170 Wn. App. at 661-62. Business records are presumptively reliable if they are made in the regular course of business and with no apparent motive to falsify. ***Doerflinger***, 170 Wn. App. at 662. Indeed, Washington courts have held that even a police department record that it previously issued a trespass notice to a defendant was a business record, was therefore not testimonial and was thus admissible under ***Crawford***. *See* ***Bellerouche***, 129 Wn. App. at 917. *See also* ***State v. Iverson***, 126 Wn. App. 329, 339-40, 108 P.3d 803 (2005) (jail booking records admissible as business records where witnesses were familiar with the booking system and used to record data in the regular course of business)

Moreover, an expert may provide an opinion in reliance upon information upon which the defendant has not had an opportunity to confront the underlying witness. *See* Tegland, vol. 5B, § 703.10 n. 3, p. 255 (citing ***State v. Russell***, 125 Wn.2d 24, 882 P.2d 747 (1994)). So long as the expert is subject to cross examination, no violation of the defendant's right to confront witnesses under ***Crawford*** has occurred. *See* Tegland, vol. 5B, § 703.10, p. 255. *See also* ***United States v. Johnson***, 587 F.3d 625, 635 (4th Cir. 2009); ***United States v. Lombardozzi***, 491 F.3d 61, 72 (2nd Cir. 2007).

As the court in Johnson analyzed the issue,

> An expert witness's reliance on evidence that ***Crawford*** would bar if offered directly only becomes a problem where the witness is used as little more than a conduit or transmitter for testimonial hearsay, rather than as a true expert whose considered opinion sheds light on some specialized factual situation. Allowing a witness simply to parrot "out-of-court testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of expert opinion" would provide an end run around ***Crawford***. ***United States v. Lombardozzi***, 491 F.3d 61, 72 (2d Cir.2007). For this reason, an expert's use of testimonial hearsay is a matter of degree. The question is whether the expert is, in essence, giving an independent judgment or merely acting as a transmitter for testimonial hearsay. As long as he is applying his training and experience to the sources before him and reaching an independent judgment, there will typically be no ***Crawford*** problem. The expert's opinion will be an original product that can be tested through cross-examination.
> ***Johnson***, 587 F.3d at 635.

In quoting this passage from Johnson, the 9th Circuit adopted the same analysis in the context of a case where an officer testified about the activities of drug organizations based upon the officer's experience, which included testimonial statements from prior witness interviews. ***United States v. Gomez***, No. 12-50018, Slip. Op. at 6 ___ F.3d ___, 2013 WL 3988705 (9th Cir. 2013). Even where one question posed the officer related to what he learned from prior interviews, the court noted that the questions nonetheless called for some level of independent judgment on the part of the officer, were not so clear a violation of the confrontation clause that the court should have recognized any violation ***sua sponte***, and

if there was any error, it was harmless where the statements were neither damning, nor of great force as they did not pertain to the defendant directly. ***Gomez***, No. 12-50018, Slip Op. at 6-7. The court in ***Gomez*** also noted that the line between appropriate expert testimony and inadmissible testimony is often blurry. ***Gomez***, No. 12-50018, Slip. Op. at 6 (citing ***United States v. Pablo***, 696 F.3d 1280, 1289 (10th Cir. 2012); ***United States v. Maher***, 454 F.3d , 23 (1st Cir. 2006); ***United States v. Dukagini***, 326 F.3d 45, 59 (2nd Cir. 2003)).

However, that blurry line is not at issue here where Trooper Havenner relied upon the maintenance records for the BAC machine, which were independently admissible and not subject to confrontation under ***Crawford*** because they fell under the business records exception.

Here, Trooper Havenner testified that in early 2012 he took 144 hours of specialty training and was currently certified by the State Toxicologist as BAC technician. 4RP 302, ln. 3-9; p. 309, ln. 2-6. As such, he is certified to maintain and repair the BAC instrument. 4RP 308, ln. 19-21. He also testified that as a technician he performs maintenance and repair of the machines, and that anytime they make repairs on the machine they generate records and that he is a custodian of those repair records. 4RP 303, ln. 12-16. Trooper Havenner also testified that as the custodian of records he had access to the records pertaining to a particular

BAC machine, and that he would rely on those records as a BAC technician. 4RP 309, ln. 7-14.

As to the machine at issue in this case, 949184, Trooper Havenner testified that the records for that instrument indicated that an annual quality assurance procedure (QAP) had been performed on that machine on September 27, 2011. 4RP 310, ln. 17 to p. 311, ln. 9. Trooper Havenner did not perform the annual QAP on the machine. 4RP 314, ln. 15-18. Rather, the QAP was performed by another BAC tech, Trooper Stumph.[1] Trooper Havenner further testified that the records indicated that the annual QAP testing performed by Trooper Stumph fell within the required parameters. 4RP 311, ln. 10-12.

Trooper Havenner was ultimately asked as an expert if he had an opinion as to the accuracy and reliability of the results printed on the breath ticket, Exhibit 8. 4RP 315, ln. 10 to p. 320, ln. 11; CP 126-27; Ex. 8. His opinion was that the result was accurate and reliable. 4RP 320, ln. 12. Immediately prior to Trooper Havenner rendering his opinion, defense counsel asked that his continuing objection be noted. 4RP 320, ln. 15-16.

[1] The transcript reflects the spelling as "Stump", however, the correct spelling is actually "Stumph." *See* Ex. 15.

None of this was improper. Trooper Havenner was not acting as a conduit by which to admit otherwise inadmissible fact evidence. Rather, he was testifying as an expert as to whether the test results in this case were reliable, and he was doing so based on the maintenance records that fell under the business records exception. Indeed, Trooper Havenner did not relate the actual results of Trooper Stumph's QAP testing. Rather, he stated a general opinion that the results (in the aggregate) fell within the required parameters.

Indeed, the Washington State Court of Appeals recently noted that the confrontation clause only applies to testimonial statements or materials, and that an expert may rely upon the work of others where the expert is expressing an independent opinion. *See* ***State v. Maninon***, 173 Wn. App. 610, 622-23, 295 P.3d 270 (2013) (citing ***Bullcoming***, ___ U.S. ___, 131 S. Ct. at 2722 (Sotomayor, J., concurring)).

Here, Trooper Havenner's testimony was properly admitted as an independent expert opinion on the reliability of the breath test results. His reference to and reliance upon the maintenance records in rendering that opinion was not improper where those records fall under the business records exception, are therefore not testimonial, and thus do not fall under ***Crawford***.

b. Trooper Havenner's Testimony Was Not Necessary Foundation To The Admissibility Of The Breath Test Results, So That Exclusion Of The Breath Test Results Is Not A Proper Remedy

The State may prove a *per se* violation of the DUI statute by a showing that the defendant's alcohol level was a 0.08 based on an analysis of the person's breath. RCW 69.51.502(1)(a) (citing RCW 46.61.506). The breath analysis is based on grams of alcohol per two hundred ten liters of breath. RCW 46.61.506(2)(a). To be considered valid, the test must be performed according to the methods approved by the state toxicologist. RCW 46.61.502(3).

RCW 46.61.502(4) specifically provides:

> (a) A breath test performed by any instrument approved by the state toxicologist shall be admissible at trial or in an administrative proceeding if the prosecution or department produces prima facie evidence of the following:
> (i) The person who performed the test was authorized to perform such test by the state toxicologist;
> (ii) The person being tested did not vomit or have anything to eat, drink, or smoke for at least fifteen minutes prior to administration of the test;
> (iii) The person being tested did not have any foreign substances, not to include dental work, fixed or removable, in his or her mouth at the beginning of the fifteen-minute observation period;
> (iv) Prior to the start of the test, the temperature of any liquid simulator solution utilized as an external standard, as measured by a thermometer approved of by the state toxicologist was thirty-four degrees centigrade plus or minus 0.3 degrees centigrade;

> (v) The internal standard test resulted in the message "verified";
>
> (vi) The two breath samples agree to within plus or minus ten percent of their mean to be determined by the method approved by the state toxicologist;
>
> (vii) The result of the test of the liquid simulator solution external standard or dry gas external standard result did lie between .072 to .088 inclusive; and
>
> (viii) All blank tests gave results of .000.
>
> (b) For purposes of this section, "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.
>
> (c) Nothing in this section shall be deemed to prevent the subject of the test from challenging the reliability or accuracy of the test, the reliability or functioning of the instrument, or any maintenance procedures. Such challenges, however, shall not preclude the admissibility of the test once the prosecution or department has made a prima facie showing of the requirements contained in (a) of this subsection. Instead, such challenges may be considered by the trier of fact in determining what weight to give to the test result.

These foundational requirements were specified by statutory amendment in 2004. 2004 Laws of Washington c. 68, § 4. Since the initial adoption, the requirements have undergone one other minimal modification to their current form by a subsequent statutory amendment. *See* 2010 Laws of Washington C. 53, § 1.

These foundational requirements do not mandate that the breath test machine be annually certified. Nor does the State Toxicologist have a requirement that the machines be annually certified in order for the results to be admissible or valid. *See* WAC 448-16-020; 448-16-140. *See* generally, Chapter 448-16 WAC. While there may have been such a requirement at one time, any such requirement was repealed. *See* former WAC 448-13-020; WAC 448-13-060; WAC 448-13-110. *See also* ***Ludvigsen v. City of Seattle***, 162 Wn.2d 660, 678-82.

These issues have been discussed at great length, and the current statutorily based foundational requirements have been approved by the Washington Supreme Court. See ***Ludvigsen v. City of Seattle***, 162 Wn.2d 660, 678-82, 174 P.3d 43 (2007).

> As amended in 2004, RCW 46.61.506(4) prohibits the suppression of breath test results based on technical deficiencies that do not adversely affect the accuracy or reliability of the test result. Breath tests now are treated like other scientific evidence: once the State satisfies the foundational requirements, test results generally are admissible.

Ludvigsen, 162 Wn.2d at 681-82. Indeed a trial court only has authority to exclude breath test results based upon deviation from machine maintenance protocols where such deviations are so serious as to render the test results unreliable. ***Ludvigsen***, 162 Wn.2d at 682. "However,

ordinarily such deviations go to the weight, not the admissibility, of the test results. ***Ludvigsen***, 162 Wn.2d at 682.

Because the date of the defendant's criminal violation at issue in this case occurred after the 2004 legislative amendment of the foundational requirements for the admissibility of the breath test results, the State had no obligation to prove an annual certification of the breath test machine because such certification is not a foundational requirement to the admissibility of the breath test results.

However, Trooper Havenner's testimony was not necessary to establish any of the foundational requirements under RCW 46.61.506(4)(a)(i)-(viii). That evidence was developed through other witnesses. Trooper Durbin testified to each of the foundational requirements. *See* 3RP 193, ln. 8 to p. 200, ln. 14. Therefore, even if the court were to hold, contrary to the State's argument in section 3.a above, that Trooper Havenner's testimony did violate the confrontation clause, there is nonetheless no basis for excluding the breath test results, which were admissible based upon the prima facie showing established by Trooper Durbin's testimony.

c. Even If The Court Were To Hold That Some Of Trooper Havenner's Testimony Did Violate The Right Of Confrontation, Any Error Was Harmless.

As noted in section 3.a above, Trooper Havenner did not testify to the actual test results of the QAP testing as listed in the maintenance records. He merely testified to the fact that they fell within the required parameters. As such, his testimony did not function as a conduit for facts in violation of ***Crawford***. However, even if the court were to hold that his statement that the results fell within the required parameters did violate ***Crawford***, any error was harmless because the BAC results were already independently admissible based on the testimony of Trooper Durbin, and Trooper Havenner's statement that the results fell within the required parameters was minimal at best. *See* ***State v. Saunders***, 132 Wn. App. 592, 604, 132 P.3d 743 (2006); ***State v. Walker***, 129 Wn. App. 258, 271, 118 P.3d 935 (2005); ***State v. Moses***, 129 Wn. App. 718, 732-33, 119 P.3d 906 (2005); ***State v. Mason***, 127 Wn. App. 554, 565, 40126 P.3d 34 (2005).

Defendant's reliance on ***Melendez-Diaz*** is incorrect. As noted above, ***Melendez-Diaz*** involved a blood analyst certification admitted at trial in lieu of testimony. Trooper Havenner testified as an expert who rendered an opinion on the reliability of the breath test results based on his

review of the certification records maintained in the ordinary course of business. This did not violate the defendant's right to confront witnesses against him as guaranteed by ***Crawford***.

D. CONCLUSION.

The defendant's right to counsel was not violated where he posed a security risk so that it was necessary for Trooper Durbin to observe him while he was communicating with the attorney by telephone. Additionally, even if the court were to hold that the Trooper's actions violated the defendant's rights under the rule, the defendant has failed to show any prejudice, and is therefore not entitled to any relief.

The court properly admitted the dashcam video without further redaction where it was relevant to how the officer conducted the stop, including his security concerns, the knives in the defendant's pocket were not other bad acts evidence, and any prejudicial effect was minimal and outweighed by the probative value of the evidence.

The defendant's confrontation right was not violated where Trooper Havenner's testimony regarding the certification of the BAC machine relied upon business records to establish a preliminary question of fact.

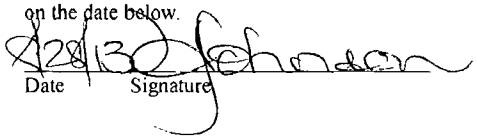
Where the defendant's claims are without merit, they should be denied.

DATED: August 28, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



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