IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN WESLEY JOHANSON, Appellant.	No. 42178-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found John Wesley Johanson guilty of felony driving while under the influence (DUI)—prior vehicular homicide or vehicular assault conviction. Johanson appeals, arguing that the trial court erred by preventing him from introducing evidence that the Pierce County Sheriff's Department had a financial interest in his conviction and that he was entitled to impeach the arresting officers by showing motive to fabricate their testimony in furtherance of their employer's financial interest. Because the officers had no personal financial interest in Johanson's conviction, we hold that the trial court did not abuse its discretion in disallowing the evidence and we affirm.

FACTS

On December 30, 2010, at approximately 3:30 pm, the owner of a business in Spanaway, Washington called 911 to report that a man had urinated in the middle of her parking lot. The

man, later identified as Johanson, "looked intoxicated" and "fumbled around in his vehicle," possibly using a cell phone. 1 Report of Proceedings (RP) at 121. The man was "nodding in and out and not very coherent" before he drove away. 1 RP at 121.

About an hour later, Deputy Brian Heimann of the Pierce County Sheriff's Department responded to an "unwanted person call." Clerk's Papers (CP) at 105. The caller, Susan McConnell, identified Johanson as the "unwanted person." CP at 105. McConnell had dated Johanson briefly but had not spoken to him for a couple months. It appears that from 7 pm on December 29, to 10 am on December 30, Johanson called McConnell repeatedly and sent more than 70 text messages to her cell phone despite her requests for him to stop contacting her.

Johanson's speech was "[e]xtremely slurred" at 7 pm on December 29, when he told McConnell he had been drinking. 2 RP at 172. His speech was still slurred at 10 am the next morning when he told McConnell he was "still drinking." 2 RP at 177. At approximately 4 pm, Johanson arrived at McConnell's home and peered into and pounded on her windows and door, yelling, "I know you're in there." 2 RP at 175. McConnell hid in her bathroom and called 911.

Deputy Heimann located Johanson driving on the oncoming-traffic side of a wide gravel road. Heimann activated his emergency lights, stopped Johanson's vehicle, and told Johanson he was stopped because of the "unwanted person" call. Heimann "detected a strong odor of intoxicants coming from" Johanson and suspected he was driving under the influence. CP at 106. Johanson "had watery, bloodshot eyes and slow, slurred speech." CP at 106. Johanson said he drank five or six beers that afternoon but denied being drunk.

Johanson refused to produce his driver's license but complied with Deputy Heimann's request to step out of his vehicle. Heimann noted Johanson had difficulty standing straight.

Heimann handcuffed Johanson and placed him in the back of the patrol vehicle. While Heimann checked Johanson's records and learned of his prior vehicular assault conviction and third degree license suspension, Johanson spontaneously yelled, "I am drunk, just take me to jail already." CP at 107.

Because Johanson agreed to perform voluntary field sobriety tests, Deputy Heimann removed Johanson from the patrol vehicle and removed the handcuffs. Johanson refused to perform the one-leg stand and walk-and-turn tests but agreed to the Horizontal Gaze Nystagmus test. While performing the test, Johanson urinated his pants, balled his right hand into a fist and said, "You know I am drunk, just take me to jail." 1 RP at 102. Heimann then arrested Johanson for driving under the influence and for driving while his license was third degree suspended.

Deputy Rodger Leach of the Pierce County Sheriff's Department arrived to transport Johanson to the South Hill Precinct. While en route, Johanson's demeanor fluctuated: he spontaneously yelled obscenities, would fall silent, and demanded to call his wife, a nurse, and to be taken to jail. Once in the blood/breath alcohol concentration (BAC) room, Johanson declined the breath test. Leach placed Johanson in a holding cell to await transport to jail. His demeanor continued to fluctuate "wildly" during that time. CP at 110.

On January 4, 2011, the State charged Johanson by information with felony DUI—prior vehicular homicide or vehicular assault conviction.[1] RCW 46.61.502(1), (6)(b), 520(1)(a), .522(1)(b). A jury trial began on May 17. The State objected to the relevance of a "Pierce County Sheriff Department DUI Response – Cost Recovery" form Johanson intended to use to impeach the deputies. Ex. 13. The form calculates the cost to a public agency that responds to

[1] On October 11, 2000, Johanson pleaded guilty to one count of vehicular assault.

an emergency caused by a person later convicted of driving while intoxicated.[2] RCW 38.52.430. At his supervisor's direction, Deputy Leach had included about an hour and a half of report-writing time on the form.[3]

Johanson argued that because the sheriff's department received reimbursement only if he was convicted of the DUI charge, the form was relevant as to the deputies' credibility. In other words, Johanson argued that the department's financial interest in his conviction formed a motive for the deputies to fabricate their testimony. The State countered that because the funds were deposited into a general fund, reimbursement was an irrelevant collateral issue. The trial court excluded what it referred to as the "money issue" evidence as irrelevant but allowed Johanson to offer the recordkeeping timing discrepancy to impeach the officer's testimony. 1 RP at 108.

On May 19, a jury found Johanson guilty as charged. The sentencing court sentenced Johanson to 17 months confinement with a 143-day credit for time served. Johanson timely appeals.

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[2] RCW 38.52.430 provides, in relevant part,

> A person whose intoxication causes an incident resulting in an appropriate emergency response, and who, in connection with the incident, has been found guilty of . . . driving while under the influence of intoxicating liquor or any drug, RCW 46.61.502, . . . is liable for the expense of an emergency response by a public agency to the incident.
>
> The expense of an emergency response is a charge against the person liable for expenses under this section. The charge constitutes a debt of that person and is *collectible by the public agency incurring those costs* in the same manner as in the case of an obligation under a contract, expressed or implied.

(Emphasis added.)

[3] Deputy Leach testified he reentered service at 7:29 pm; the form notes Leach's "end time" at 9 pm.

DISCUSSION

Johanson asserts that the trial court's exclusion of the "money issue" evidence denied him his rights to confrontation, cross-examination, and due process. The State responds, asserting that Johanson has failed to preserve the evidentiary issue for appeal or, alternatively, if preserved, that the trial court did not err by excluding the irrelevant "money issue" evidence. Because the deputies had no personal financial interest in Johanson's conviction, we hold that the trial court did not abuse its discretion in excluding the irrelevant evidence and affirm.

Issue Preservation

As an initial matter, we note as meritless the State's assertion that Johanson waived this evidentiary challenge because he did not seek a final ruling on the trial court's "tentative" evidentiary ruling on the admissibility of the "money issue" evidence. A defendant waives challenges to an alleged evidentiary error by failing to seek a final ruling on a trial court's tentative ruling on a motion in limine. *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994); *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991) (citing *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 621-23, 762 P.2d 1156 (1988)), *review denied*, 120 Wn.2d 1022 (1993). Here, the trial court expressly ruled, "I'm not going to allow the money issue." 1 RP at 108. The trial court then admitted the timing evidence in the reports as potentially relevant as to whether the police report and the reimbursement form were inconsistent. Thus, the record clearly shows that the trial court's ruling on the "money issue" matter was final and Johanson did not waive this challenge by not seeking a second final ruling. *Carlson*, 61 Wn. App. at 875.

Offer of Proof

The State's next assertion that Johanson "did not make an offer of proof as to how he

believed the deputies would respond if questioned about their department's implementation of RCW 38.52.430" is equally meritless. Br. of Resp't at 7 (footnote omitted). An offer of proof is necessary to assist the trial court in evaluating the admissibility of the evidence and to ensure the appellate court has an adequate record to review the merits of the issue. ER 103(a)(2); *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The record must indicate what information the proponent expects the evidence will provide and why the evidence is admissible.

Here, after the State's objection, Johanson argued the "money issue" evidence was relevant because the sheriff's department stood "to gain financially upon a DUI conviction." 1 RP at 106. Johanson asserted that supervisors had instructed Deputy Leach to include report-writing time on the form, thereby increasing the department's financial reimbursement on his conviction. The instruction, Johanson argued, demonstrated a credibility issue as to the deputies' testimony. Thus, contrary to the State's assertion, the record before us shows that Johanson made, albeit unsuccessfully, an offer of proof sufficient to apprise the trial court of the nature and purpose of the anticipated evidence. ER 103(a)(2); *Ray*, 116 Wn.2d at 538. Johanson identified the information he sought to admit and argued its relevance as to witness bias and credibility. *Ray*, 116 Wn.2d at 538.

Relevancy

We next address the merits of Johanson's assignments of error. First, Johanson asserts that the trial court erred in finding the "money issue" irrelevant. Specifically, Johanson argues that the trial court need not have found that the deputies stood to gain personally to find the evidence relevant. The State responds, arguing in the alternative that the issue is collateral and that the evidence is irrelevant to the felony DUI charged. Because the deputies did not stand to

gain personally from the department's reimbursement, we hold that the trial court did not abuse its discretion by excluding the "money issue" evidence on relevance grounds.

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). A court abuses its discretion when its evidentiary ruling is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). We may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports. *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. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006) (quoting ER 401). The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. *Gregory*, 158 Wn.2d at 835 (citing *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)). Here, at his supervisor's direction, Deputy Leach included about an hour and a half of report-writing time in the cost recovery form. The parties agree that RCW 38.52.430 appears to permit inclusion of such report-writing time. Recovered funds are deposited in a general fund for the public agency, not disbursed directly to report-writing officers. *See* RCW 38.52.100, .430. Thus, neither deputy stood to gain personally if a jury found Johanson guilty of the DUI charge and the sheriff's department was reimbursed under RCW 38.52.430.

Johanson does not cite to legal authority to support his proposition that a government employee with no personal financial stake in the outcome of a case but whose employer-agency

may be later reimbursed is a biased or interested witness. RAP 10.3(a)(6). We presume he has none. Absent legal authority suggesting otherwise, we cannot hold that the attenuated connection between Johanson's arrest and the department's financial reimbursement casts doubt on the deputies' credibility any more than any other general legal financial obligation imposed after a conviction.[4] RCW 9.94A.760. Because the deputies' testimonies were not motivated by personal financial gain, the trial court did not abuse its discretion in excluding the "money issue" evidence as irrelevant. *Gregory*, 158 Wn.2d at 835 (citing *Bell v. State*, 147 Wn.2d 166, 181-82, 52 P.3d 503 (2002)); *see Carlson*, 61 Wn. App. at 876.

Cross-Examination and Confrontation

Second, Johanson asserts that the trial court erred in denying him the opportunity to cross-examine the deputies as to their employer's reimbursement claim, that the reimbursement is contingent on his conviction, that the report-writing time inclusion increased the reimbursement amount, and that Deputy Leach's supervisor directed him to include the additional time. We disagree.

"The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions." *Darden*, 145 Wn.2d at 620 (citing U.S. Const. amend. 6; Wash. Const. art. I, § 22; *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019

[4] Our legislature has authorized several state and local agencies to collect reimbursement after criminal convictions and civil penalties after statutory violations to be used for related purposes by the collecting agency. *Compare* RCW 7.68.030 (federal funds providing financial assistance to state crime victim compensation programs are deposited in the state general fund), *with* RCW 7.68.120 (person convicted of a criminal act resulting in victim compensation must reimburse the Department of Labor and Industries for such compensation); *see* RCW 26.50.060(1)(g) (court may order person found to have committed acts of domestic violence to reimburse county or municipality administrative court costs and service fees); *see also* RCW 77.12.170 (Department of Fish and Wildlife may collect administrative penalties, fees, and compensation for damage to department property or wildlife losses).

(1967); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). "However, the right to cross-examine adverse witnesses is not absolute." *Darden*, 145 Wn.2d at 620 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). "Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative." *Darden*, 145 Wn.2d at 620-21 (citing *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)). Because "cross-examination is at the heart of the confrontation clause, it follows that the confrontation right is also not absolute. The confrontation right and associated cross-examination are limited by general considerations of relevance." *Darden*, 145 Wn.2d at 621 (citing ER 401, 403; *Hudlow*, 99 Wn.2d at 15). We review a trial court's limitation on the scope of cross-examination for manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985).

Here, the trial court permitted the defense to cross-examine the deputies on timing discrepancies between the incident report and the DUI Cost Recovery Form. As we discussed above, the trial court did not abuse its discretion by disallowing cross-examination on the "money issue" matter because the evidence was too attenuated to be relevant to the charged crime of felony driving while under the influence. ER 401; *Darden*, 145 Wn.2d at 620-21; *Campbell*, 103 Wn.2d at 20. Introduction of the "money issue" evidence would result in nothing more than mere speculation as to bias or motive to fabricate testimony. *Carlson*, 61 Wn. App. at 876 (a court may exclude extrinsic impeachment evidence on a collateral issue that has an indirect bearing on motive, bias, or prejudice (citing *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (a court may reject cross-examination that tends only remotely to show bias or prejudice))); *cf. State v. Jones*, 25 Wn. App. 746, 750-51, 610 P.2d 934 (1980) (evidence of actual police bias

against a criminal defendant is admissible to impeach an officer).

Due Process

Third, Johanson asserts that the trial court's exclusion of the "money issue" evidence violated his right to a fair opportunity to present a defense. Again, we disagree. "Under both the state and federal constitutions, due process in criminal prosecutions requires fundamental fairness and a meaningful opportunity to present a complete defense." *State v. Burden*, 104 Wn. App. 507, 511, 17 P.3d 1211 (2001). A criminal defendant has a constitutional right to present relevant, admissible evidence in his defense. *State v. Sublett*, 156 Wn. App. 160, 198, 231 P.3d 231 (citing *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993)), *review granted*, 170 Wn.2d 1016 (2010). But this right is not unfettered and the refusal to admit evidence lies largely within the trial court's sound discretion. *Sublett*, 156 Wn. App. at 198 (citing *Rehak*, 67 Wn. App. at 162).

Here, Johanson's defense theory was that he suffered from the effects of a medical condition rather than alcohol intoxication. To that end, Johanson called Miguel Balderrama, M.D., who testified that Johanson suffers from cirrhosis, a liver disease that can cause ammonia levels to rise to toxic levels. Balderrama testified that increased ammonia levels cause patients to experience "mental changes in status where the patient will be somnolent, can be actually spacey, cannot remember things that they have done." 2 RP at 234. Balderrama further testified that Johanson experienced extremely high ammonia levels causing him

> confusion, the patient cannot really -- is not following commands, he's confused about actions that you ask the patient to do and the patient stares at you in total confusion. He's unable to eat, unable to drink, unable to hold a glass of water. Sometimes there is another -- we can observe ataxia meaning that the walk is not very steady.

2 RP at 236-37. Last, Dr. Balderrama testified that Johanson's behavior before, during, and after arrest were consistent with high ammonia levels and alcohol withdrawal symptoms in cirrhosis patients.

The record shows that Johanson had a full and fair opportunity to present evidence as to his medical condition. *Burden*, 104 Wn. App. at 511. Again, because the "money issue" evidence was irrelevant, the trial court did not abuse its discretion by disallowing Johanson from offering it as part of his defense. *Powell*, 126 Wn.2d at 258; *Sublett*, 156 Wn. App. at 198 (citing *Rehak*, 67 Wn. App. at 162).

Even if we were to hold that the "money issue" evidence had some relevance and that the trial court's exclusion affected Johanson's right to present a defense, on the evidence appearing in the record, the error would be harmless. "[E]ven a constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of their error." *State v. Saunders*, 120 Wn. App. 800, 813, 86 P.3d 232 (2004) (citing *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)). Here, in addition to the deputies' testimonies, the jury heard evidence from an independent civilian witness that Johanson had "[e]xtremely slurred speech" the night before his arrest and had continued to drink beer throughout the night. 2 RP at 172. Two other witnesses testified that 30 minutes before Johanson arrived at McConnell's home, he stopped to urinate in the middle of a business's parking lot, "looked intoxicated," and did not appear "very coherent." 1 RP at 121. Last, the jury heard that Johanson drove to and from both the business and McConnell's home.

Overwhelming untainted evidence of Johanson's intoxication and operation of his vehicle

supports his conviction. *Saunders*, 120 Wn. App. at 813 (citing *Guloy*, 104 Wn.2d at 425-26). Any reasonable jury would have found Johanson guilty of the charged felony DUI on these facts. We hold that the trial court did not err by excluding the irrelevant "money issue" evidence and

that Johanson's rights to cross-examination, confrontation, and a fair trial were not denied. Accordingly, we affirm Johanson's felony driving while under the influence conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

WORSWICK, A.C.J.