IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66201-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
DAVID PHILIP OLSON,	)	
	)	
Appellant.	)	FILED: September 17, 2012
	)	

Leach, C.J. — David Olson appeals his vehicular assault conviction. He argues that because the State failed to comply strictly with the Washington Administrative Code regulations for blood alcohol testing, the court should have suppressed the blood test results. Because the State made a prima facie showing that the blood sample vials contained a "sufficient quantity" of enzyme poison and anticoagulant to properly preserve the sample, Olson's challenge to the amount of preservative used goes to the weight, not the admissibility, of this evidence. We affirm.

FACTS

David Olson was driving his Dodge Durango northbound on Burlington Boulevard in Burlington, Washington. While making a left turn at an intersection, he struck a motorcycle traveling in the opposite direction.[1] Officer

[1] The motorcycle driver had a green light. Olson may have also had a green light heading northbound, but he would have had to yield to oncoming traffic.

Todd Schwiesow responded to the 911 call and noticed that Olson had bloodshot eyes, indistinct speech, and smelled of alcohol. Olson admitted that he had just left a bar where he had been drinking and said he was on his way to get food when the accident occurred. After Olson failed three field sobriety tests, Schwiesow arrested him for driving under the influence of an intoxicant.

Schwiesow took Olson to Skagit Valley Hospital for a blood draw. Schwiesow provided the phlebotomist, Ruth McDonough, with gray-top vials containing a white powder for the test. He observed as McDonough sterilized Olson's skin with an alcohol-free antiseptic and drew two vials of blood. McDonough returned the filled vials to Schwiesow, who secured them in the trunk of his patrol car and transported them to the police department. Schwiesow placed the Styrofoam container holding the vials into an evidence locker, where they were stored until the evidence technician sent them to the Washington State Patrol toxicology laboratory for analysis five days later.

The test vials arrived at the laboratory on October 9. Brianne O'Reilly, a forensic toxicologist, tested their contents on October 14. O'Reilly testified that the gray-top vials that the state toxicology lab provides to police departments have been certified by the manufacturers to contain 25 milligrams of enzyme poison and 20 milligrams of anticoagulant per vial. She did not see any clots in the blood vials and indicated that those nominal amounts of additives would be

sufficient to preserve Olson's blood sample. Her test results showed Olson's blood alcohol level at the time of the accident was 0.22 grams of alcohol per 100 milliliters of blood, which is over the 0.08 legal limit for blood alcohol levels.[2]

The State charged Olson with vehicular assault. After the court denied his motion to suppress the blood evidence, a jury convicted him. Olson appeals.

ANALYSIS

Olson contends that the court should have suppressed his blood alcohol test results because the State failed to prove strict compliance with WAC blood testing regulations. We review a trial court's ruling on the admissibility of a blood alcohol test result for an abuse of discretion.[3] As the party challenging the evidence, Olson bears the burden of showing an abuse of discretion.[4] "A court abuses its discretion when it exercises it on untenable grounds or for untenable reasons."[5] Specifically, in the context of blood alcohol tests, "[t]he trial court abuses its discretion when it admits evidence of a blood test result in the face of insufficient prima facie evidence."[6] Under the blood alcohol test statute, "prima facie evidence" is "evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved."[7] When

[2] RCW 46.61.502(1)(a).

[3] State v. Brown, 145 Wn. App. 62, 69, 184 P.3d 1284 (2008) (citing State v. Hultenschmidt, 125 Wn. App. 259, 264, 102 P.3d 192 (2004)).

[4] Brown, 145 Wn. App. at 69.

[5] Hultenschmidt, 125 Wn. App. at 264.

[6] Brown, 145 Wn. App. at 69.

deciding a motion to suppress test results showing a person's alcohol concentration in an action arising out of an allegation of driving while under the influence, the trial court assumes the truth of the State's evidence and draws all reasonable inferences from it in the light most favorable to the State.[8]

The State has the burden of proving that the blood alcohol analysis was performed in compliance with WAC regulations.[9] Former WAC 448-14-020(3)(b) (1970) provides, "Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate." (Emphasis added.) Once the State makes a prima facie showing of WAC compliance, the court admits the test results, and the jury determines the weight to give this evidence.[10]

Washington case law clearly supports the trial court's determination that the State met its prima facie burden of proof. In State v. Brown,[11] the court held the State presented sufficient evidence that vials contained sufficient amounts of the required chemicals. There, the toxicologist testified the manufacturer of the

[7] RCW 46.61.506(4)(b).
[8] RCW 46.61.506(4)(b).
[9] State v. Reier, 127 Wn. App. 753, 756, 112 P.3d 566 (2005).
[10] RCW 46.61.506(4)(c).
[11] 145 Wn. App. 62, 76, 184 P.3d 1284 (2008).

blood sample vials includes a combination of sodium fluoride and potassium oxalate in each vial, and if those chemicals were not present, the blood would be clotted and no alcohol would be detected in the sample. He observed that the defendant's blood samples were not clotted and tested positive for alcohol, indicating that the chemicals were present and had worked as intended.[12]

In State v. Wilbur-Bobb,[13] this court held the State presented sufficient evidence that vials contained sodium fluoride. There, a toxicologist testified that sodium fluoride was the enzyme poison required by the WAC. A photograph of the label on the vials showed the vials contained sodium fluoride. We said no more is necessary to prove the vials contained the enzyme poison.

In State v. Steinbrunn,[14] Division Three held the following evidence sufficiently established a prima facie case that blood samples were free of adulteration and tested in accordance with the WAC: a nurse testified that the hospital supplied the vial, and the toxicologist testified that the vial manufacturer always put anticoagulants in the type of vials it sent to hospitals.

And in State v. Barefield,[15] we held the following evidence sufficient: the toxicologist testified that the vial manufacturer always put anticoagulants in the vials and that the blood sample was unadulterated when he ran the tests.

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[12] Brown, 145 Wn. App. at 71.
[13] 134 Wn. App. 627, 630-32, 141 P.3d 665 (2006).
[14] 54 Wn. App. 506, 513, 774 P.2d 55 (1989).
[15] 47 Wn. App. 444, 458, 735 P.2d 1339 (1987).

Here, both Schwiesow and McDonough testified that the vials contained a white powder. O'Reilly testified that both anticoagulant and enzyme poison were present in the test vials and that in her opinion, both chemicals were present in sufficient amount to properly preserve the sample. She also confirmed that these required additives were white powdery substances. Though Olson confronted O'Reilly at trial with several medical treatises that recommend a certain minimum weight of preservative be used per vial, O'Reilly noted a difference of opinions within the scientific community. Assuming the truth of the State's evidence and drawing all reasonable inferences from it, the trial court correctly determined that the State presented prima facie proof that the gray-top vials contained sufficient additives to preserve the blood sample. Olson was entitled to challenge the validity of the test results, but all the evidence elicited from O'Reilly on cross-examination regarding her laboratory procedures and conflicting scientific recommendations for blood additives went to the weight, not the admissibility, of the evidence.

Olson relies on a series of cases involving the State's failure to prove WAC compliance. In State v. Garrett,[16] the court affirmed the vacation of a conviction where the State conceded it did not preserve the defendant's blood sample with an anticoagulant, as required by statute and regulation. In State v.

[16] 80 Wn. App. 651, 653, 910 P.2d 552 (1996).

Bosio,[17] the State presented evidence that anticoagulant was added to the blood sample but did not prove the presence of any enzyme poison. Similarly, in State v. Hultenschmidt,[18] the court reversed a vehicular homicide conviction where the State did not offer evidence that the defendant's blood sample contained an enzyme poison.[19] In fact, the crime lab toxicologist who tested Hultenschmidt's blood sample testified that enzyme poison was not required.[20]

From these cases, Olson argues that the regulation language "sufficient in amount" requires the State to prove a specific, quantified amount of preservative. Relying upon several scientific treatises, he claims this amount to be 10 milligrams of preservative per milliliter of blood. However, neither RCW 46.61.506 nor the related WAC provisions require a specific quantity of chemicals that must be present. The state toxicologist promulgated regulations governing blood alcohol testing procedures. These regulations set forth analytical and reporting procedures for blood tests,[21] standards for sample containers and preservation,[22] and qualifications for blood alcohol analysts.[23] "[I]t is not the court's function to substitute our judgment for that of the state

[17] 107 Wn. App. 462, 468, 27 P.3d 636 (2001).
[18] 125 Wn. App. 259, 269, 102 P.3d 192 (2004).
[19] Hultenschmidt, 125 Wn. App. at 266-67.
[20] Hultenschmidt, 125 Wn. App. at 266-67.
[21] WAC 448-14-020.
[22] WAC 448-14-020.
[23] WAC 448-14-030.

toxicologist."[24] Because the State presented prima facie evidence of WAC compliance, the court properly admitted the blood evidence.[25]

CONCLUSION

Because the State made a prima facie showing that the blood alcohol test complied with state regulations, the trial court properly admitted the evidence at trial. We affirm Olson's conviction for vehicular assault.

Leach, C.J.

WE CONCUR:

Ann, J.

Becker, J.

[24] State v. Schulze, 116 Wn.2d 154, 167, 804 P.2d 566 (1991).

[25] Olson also argues that the court applied an incorrect legal standard when deciding whether to admit the blood alcohol results because the court used the words "reasonable finder of fact." However, from the record, it appears that despite the misstatement, the court did in fact apply the prima facie standard. And even if the judge's oral ruling was error, the error was harmless since the court would have admitted the evidence under the proper standard.