IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAWN M. MARRAZZO, Appellant.	No. 38542-2-II UNPUBLISHED OPINION

Armstrong, J. — Dawn Marrazzo appeals her vehicular assault conviction based on the jury's finding that her blood alcohol level was over .08 within two hours after driving. Marrazzo argues the trial court denied her right to present a defense when it (1) excluded testimony of the toxicology lab's internal auditor and (2) limited the cross-examination of one of the toxicologists who tested her blood for alcohol. She also argues that (3) a second toxicologist's report of her blood alcohol level was admitted in violation of her right to confront the toxicology witness and (4) the court's jury instructions were insufficient to cure a trial irregularity, warranting a mistrial. Finally, she argues (5) she was denied her right to effective counsel when trial counsel failed to object to the curative jury instruction. Finding no reversible error, we affirm.

FACTS

On August 24, 2006, Dawn Marrazzo and Michael Wagner's vehicles collided at a busy intersection in Vancouver, Washington. Marrazzo, who was making a left hand turn, failed to yield to oncoming traffic and struck Wagner's vehicle. Both Marrazzo and Wagner were seriously injured.

Paramedics transported Marrazzo to Legacy Emanuel Hospital in Portland, Oregon.

Following hospital protocol,[1] hospital staff drew a sample of Marrazzo's blood and screened it for alcohol (the "medical" sample/test). Report of Proceedings (RP) at 351, 357. The lab results showed a blood alcohol level of .219 mg/dL.[2] A short time later, John Shapland, a registered nurse at Legacy Emanuel, collected two vials of Marrazzo's blood for Deputy Sheriff Ryan Taylor, using a Washington State Patrol blood draw kit (the "legal" sample/test). RP at 326-27, 352-53.

Marrazzo's legal blood sample was tested twice by toxicologists in the state patrol crime toxicology lab in Seattle. Paige Long analyzed the first test on September 6, 2006, reporting a blood alcohol level of .16. Brian Capron completed a second test on May 10, 2007, which yielded the same results.

The State charged Marrazzo with vehicular assault and second degree driving while license suspended.[3] The State alleged that Marrazzo committed the assault by, among other means, having a blood alcohol level of .08 or higher within two hours of driving.

At trial, the court admitted all three blood test results. The State moved to exclude the testimony of Sergeant Patty Langford, offered by Marrazzo to challenge the accuracy and reliability of the lab's test results. Based on prior court testimony, Marrazzo anticipated that Langford, who conducted internal audits of the lab between 2004 and 2007, would testify to her lack of confidence in the integrity of the blood evidence kept in the lab's freezer in 2007. The

[1] Every patient admitted to the hospital automatically has their blood drawn and tested for alcohol.

[2] In Washington's measurement terms, the comparable blood alcohol level is .175-.19 g/100mL.

[3] Marrazo waived her right to a jury trial on the second degree driving while license suspended charge. The trial court found her guilty.

court excluded the proffered testimony on the grounds that Marrazzo failed to show that her own blood sample had been tainted or affected in any way. The court also limited the scope of Marrazzo's cross-examination of Capron, precluding questions about breath testing protocols and the enzyme levels used when collecting blood samples.

Just before jury deliberations, the court decided it had erred by admitting the results of the medical blood test. But instead of granting Marrazzo's motion for a mistrial, the court instructed the jury:

> Ladies and gentlemen, I have previously admitted Exhibit #36, which was a blood alcohol test result from Legacy Hospital. You also heard testimony from Mr. John Schapland [sic] and Mr. Capron of Washington State Patrol about that report.
>
> Upon reconsideration, I have decided to exclude that exhibit and the testimony about it, because it does not state by whom, when, or how the testing was done. You are to disregard the exhibit and testimony about it.
>
> By making this ruling, the court is not making any comment or suggestion about the reliability of any witness or evidence in this case.

Clerk's Papers (CP) at 281.

The jury found Marrazzo guilty of vehicular assault by having a blood alcohol level over .08 within two hours after driving.

ANALYSIS

I. Right to Present a Defense

A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). We review a trial court's evidentiary rulings for an abuse of discretion. *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009) A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *George*, 150 Wn. App. at

117.

We will reverse trial court error in admitting or rejecting evidence only if the ruling prejudices the defendant. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). And we will find prejudice only if the defendant can show a reasonable probability the trial court's ruling materially affected the trial outcome. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). But where an error excluding evidence infringes on a defendant's constitutional right, we presume prejudice and must reverse unless we are satisfied beyond a reasonable doubt that the jury would have convicted the defendant absent the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

A. Sergeant Langford's Testimony

Marrazzo argues she was denied her right to a jury trial when the trial court refused to allow Langford to testify. Marrazzo claims that by excluding this evidence the trial court prevented her from impeaching the blood test results.

The constitutional right to compulsory process is synonymous with a defendant's right to present a defense. U.S. Const. amend VI; Wash. Const. art. I, § 22; *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). But the right to present testimony of witnesses is not absolute, and a defendant has no right to offer testimony inadmissible under applicable evidence rules. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); *State v. Roberts*, 80 Wn. App. 342, 351, 908 P.2d 892 (1996). Evidence is relevant if it has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence. ER 401. The threshold to admit relevant evidence is very low; even minimally relevant

evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevant evidence may be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Langford's testimony from a prior trial, submitted to the court as a written offer of proof, described various problems with the lab's operation and procedures in 2004, such as loose tracking standards, cracked vials of blood samples, and fluctuation in freezer temperature levels. Langford reported that although some of the lab's procedures improved, a 2007 audit revealed that unrestricted, unrecorded access to the freezers was still a problem. She testified that this problem left her without confidence in the integrity and reliability of the blood evidence kept in the freezer at that time. At trial, Marrazzo argued that this evidence was sufficient to cast doubt on the accuracy of her blood test results even though there was no direct evidence that the lab tested the wrong sample. The trial court ruled:

> [I]t would be sheer speculation for the jury to extrapolate from perceived problems with tracking of samples and maintaining of samples, to extrapolate that that means there's problems with testing. In the absence of any evidence that there were problems with this specific sample, just a generalized concern about the door being left open and things moved around inside wherever they're kept, I think has no materiality; that is, it's so insufficient that it cannot possibly affect a rational jury, and therefore any presentation to the jury would be to invite the jury to speculate.

RP at 205-06.

We disagree that the defense's failure to establish "problems with this specific sample" precludes the proposed evidence. Before the trial court admits physical evidence, the State must establish a chain of custody, which includes the circumstances surrounding the preservation and custody of the evidence. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002) (a

chemist's malfeasance devastated the chain of custody and the credibility of the laboratory results). Evidence of the lab's procedures to preserve and maintain the integrity of blood samples is therefore relevant to the admissibility of the test results. *See Darden*, 145 Wn.2d at 621. Although not specific to the preservation and integrity of Marrazzo's blood sample, the lab's failure to meet Langford's audit standards raises some question as to the integrity of the lab's blood samples in general.

Moreover, the admissibility of evidence challenging the chain of custody must be considered in the context of who has the burden of proof. In a criminal case, the State has the burden of proving Marrazzo guilty by competent evidence beyond a reasonable doubt. *State v. Odom*, 83 Wn.2d 541, 545-46, 520 P.2d 152 (1974). As the proponent of the evidence, the State must show that the evidence is in substantially the same condition as when the crime was committed. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Accordingly, the State must prove that it properly preserved and tested Marrazzo's blood sample. Marrazzo had no burden at all; she need only raise questions about the State's case, including whether it properly preserved and tested her blood sample. To require her to prove that her specific blood sample was tainted shifts, however subtly, the State's burden to Marrazzo. We conclude that the testimony was relevant, and the trial court should have allowed Langford to testify.

But we are satisfied the error was harmless. Langford's proposed testimony would have had little if any effect on the reliability of Marrazzo's test results. *Roche*, 114 Wn. App. at 436 (minor discrepancies in an object's chain of custody generally affect the weight of the evidence). There was no evidence that Marrazzo's blood samples were improperly labeled, contaminated, or

that the tests themselves were inaccurate. At best, the evidence shows that a lab employee, other than the two analysts who tested the sample, had access to the sample while stored in the freezer. The issue in the 2007 audit was unrestricted access and not mislabeling of the blood samples. Thus, although Langford's general concern regarding the lab's procedures and operations was admissible evidence, its exclusion did not undermine the reliability of the duplicative test results. We are satisfied the jury would have convicted Marrazzo even if the trial court had permitted Langford's testimony.

B. Capron's Cross-Examination

Marrazzo also claims she was denied her jury trial right when the court limited the scope of Capron's cross-examination. Marrazzo specifically argues she should have been allowed to question Capron about (1) instances where he backdated test results of breath testing solutions and (2) whether enzyme levels in the blood samples were sufficiently high to prevent inaccurate test readings.

The right to cross-examine adverse witnesses is guaranteed by the state and federal constitutions. U.S. Const. amend VI; Wash. Const. art. I, § 22; *Darden*, 145 Wn.2d at 620. But again, this right is not absolute and it is within the discretion of the trial court to deny cross-examination where the evidence sought is vague, argumentative, or speculative. *Darden*, 145 Wn.2d at 620-21. The right to confrontation is also limited by general considerations of relevance. *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). A witness cannot be impeached on matters collateral to the principle issue being tried. *State v. Oswalt*, 62 Wn.2d 118, 120, 381 P.2d 617 (1963).

In her offer of proof, Marrazzo examined Capron about instances where he changed the date on test results of solutions used in calibrating breath testing machines. Capron explained that the dates in the database were entered automatically, and often incorrectly, requiring that he manually correct a number of testing dates. After confirming that the issue did not pertain to any blood samples, the court foreclosed any inquiry into the backdating of these test results.

Contrary to Marrazzo's allegations, Capron's testimony during the offer of proof did not suggest a "willful manipulation of test results" that put into question the accuracy of his lab work. Br. of Appellant at 13. Capron testified to rectifying the accuracy of test results. Moreover, the breath testing procedures are unrelated to the integrity of the blood samples, or the accuracy of the blood tests. The trial court properly exercised its discretion in excluding the evidence as an irrelevant, collateral matter.

Marrazzo also sought to question Capron about whether the blood sample was properly preserved. In her offer of proof, Marrazzo attempted to impeach the lab's standard amount of sodium fluoride used to preserve samples with an article from the National Committee on Clinical Laboratory Standards Group that recommended higher amounts. In response, Capron testified that as a toxicology lab, they do not follow clinical laboratory guidelines. The trial court ruled that Marrazzo failed to show that the document relied upon was admissible for any purpose.

Statements contained in scientific periodicals, if established as authority, are exceptions to the hearsay rule when used to examine or cross-examine an expert witness. ER 803(a)(18). When the text is used during cross-examination, the burden of proving its authority, either by admission of the expert witness, by other expert testimony, or by judicial notice, is upon the cross-

examiner. *Miller v. Peterson*, 42 Wn. App. 822, 828, 714 P.2d 695 (1986). Here, Capron testified that although the article's guidelines may be authoritative for clinical laboratories, he did not recognize them as authoritative in his field. Marrazzo did not meet her burden of proving the article's authority, a necessary condition for its use on cross-examination, or that it was admissible for any other purpose. The trial court did not abuse its discretion in excluding this line of inquiry.

II. Admissibility of Lab Results

Marrazzo argues the trial court erred in admitting the blood results prepared by former state patrol toxicologist Paige Long. According to Marrazzo, evidence of Long's test results were admitted in violation of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), because the State did not call her as a witness at trial. Marrazzo also argues that under *Melendez-Diaz v. Massachusetts*, 57 U.S. ---, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), analysts' affidavits of test results are testimonial statements for the purposes of *Crawford* and the Sixth Amendment.

Subject to notice requirements, CrR 6.13(b) provides for the admissibility of test reports by expert witnesses. Where the State has given proper notice of the report, a defendant waives the right to confront the witness unless the defendant serves a written demand to produce the witness at least seven days prior to trial. CrR 6.13(b)(3). In *Melendez-Diaz*, the United States Supreme Court affirmed that the right to confrontation may be waived, including by failure to object to the offending evidence. *Melendez-Diaz*, 129 S. Ct. at 2534 n.3. The court also noted that procedural rules, such as notice and demand statutes limiting the time in which a defendant has to object, do not violate this constitutional right. *Melendez-Diaz*, 129 S. Ct. at 2541.

Marrazzo received a copy of Long's test results, exhibit 37, more than a year before trial. She concedes she never demanded that the State produce Long as an expert witness. Given that the State met the notice requirements of CrR 6.13, Marrazzo waived her right to confront the expert author of exhibit 37.

Exhibits 38 and 39, printouts of the underlying data, were not disclosed to Marrazzo prior to trial. Accordingly, the court did not admit these exhibits under CrR 6.13, but under the business records exception to the hearsay rule. In admitting these documents, the court concluded that the simple printouts containing raw data were not testimonial under *Crawford*.

The error in admitting 38 and 39, if any, is harmless. Without deciding whether printouts of the data underlying Long's test results are testimonial, it is clear that the outcome of trial was not affected. First, the properly admitted test results were based on an analysis of the underlying data. *See* CrR 6.13(b)(1) (official written test reports admissible without further proof or foundation). Thus, the information in these exhibits is cumulative. Second, Capron's test results showing the same blood alcohol level were also admitted into evidence. We are satisfied that a reasonable jury would have convicted Marrazzo even if the court had excluded these exhibits.

III. Motion for a Mistrial

Marrazzo next argues the trial court should have granted a mistrial after it conceded to admitting the medical blood tests in error. Marrazzo claims that the court's instruction to the jury to disregard the evidence was insufficient to cure the resulting prejudice. Marrazzo further claims the evidence excluded was not cumulative and that the wording of the instruction implied that the test was accurate, but excluded on a technicality.

In reviewing this trial irregularity, we consider its seriousness, whether the excluded evidence was cumulative of properly admitted evidence, and whether the irregularity could have been cured by an instruction to the jury. *State v. Esclona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Absent a showing to the contrary, a jury is presumed to follow the court's instructions. *State v. Davenport*, 100 Wn.2d 757, 763-64, 674 P.2d 1213 (1984). A jury instruction constitutes an impermissible comment on the evidence if the judge's attitude towards the merits of the case or the court's evaluation of the disputed evidence is inferable from the instruction. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). We review a trial court's decision to grant or deny a motion for a mistrial based on a trial irregularity for an abuse of discretion. *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

Here, the trial court did not abuse its discretion in denying a mistrial. First, although the results of the medical blood test were not the same as the results of the legal blood test, the evidence duplicated other evidence that Marrazzo's blood alcohol level was over .08. Any discrepancy in the results does not negate the fact that two other admissible test results were over the threshold level required for the State to meet its burden of proof.

Second, there is no evidence on the record that the jury did not follow the court's instruction. Although Marrazzo maintains the jury instruction insinuated that the medical blood test was accurate, the instructions to disregard the test results were unequivocal. The court also stated it was not making any comment on the reliability of evidence in the case. We find that the jury instruction was sufficient to cure the trial irregularity and that the trial court did not abuse its discretion in denying the motion for a mistrial.

IV. Ineffective Assistance of Counsel

Finally, Marrazzo claims that her counsel ineffectively represented her by failing to object to the court's curative jury instruction.

We review de novo a claim that counsel ineffectively represented the defendant. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish that counsel was ineffective, the defendant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense, i.e., there is a reasonable probability that but for the deficient performance the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). To establish prejudice, a defendant must show that if counsel had made the objections or arguments now embraced, they would likely have succeeded. *See State v. McFarland*, 127 Wn.2d 322, 337 n.4, 899 P.2d 1251 (1995). But, as we have discussed, the court did not err in instructing the jury on the disallowed evidence. Thus, Marrazzo cannot show that counsel could have successfully objected to the court's instruction.

Affirmed.

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 pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.