IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26789-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
FREDERICK DAVID RUSSELL,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — Frederick David Russell appeals his 2008 Whitman County convictions for three counts of vehicular homicide and three counts of vehicular assault. Mr. Russell drove his Chevrolet Blazer sport utility vehicle (SUV) into three cars, killing three people and injuring three others in June 2001 on the Moscow-Pullman Highway near the Washington-Idaho border.

Mr. Russell contends the trial court erred in multiple ways. We conclude that the trial court committed no error as to the convictions. Accordingly, we affirm them. We remand for the limited purpose of awarding credit for time served in confinement while Mr. Russell challenged extradition in Ireland.

FACTS

Mr. Russell was arrested on June 5, 2001, and charged by amended information with three counts of vehicular homicide and three counts of vehicular assault as a result of a multi-car accident on June 4. He posted bail and his trial was scheduled for November 5, 2001. Mr. Russell then fled the jurisdiction and failed to appear for a pretrial hearing on October 26. He was eventually captured in Ireland in 2005 and then extradited to the United States in 2006. Venue was changed from Whitman County to Cowlitz County due to media publicity. Trial started in October 2007.

The following facts relate mainly to trial testimony and evidence pertaining to circumstances surrounding the accident, its investigation, and evidence of Mr. Russell's intoxication. Facts pertaining to Mr. Russell's other challenges on appeal are set forth in the analyses.

Collision. At trial, Robert Hart testified that at approximately 10:35 p.m. on June 4, 2001, he was driving his Subaru Brat about 55 m.p.h. eastbound on State Route (SR) 270 from Pullman to his workplace at a motel in Moscow. The sky was clear and the roads were bare and dry. The highway is one lane in each direction, with a 55 m.p.h. speed limit.

Mr. Hart noticed a vehicle, later identified as Mr. Russell's vehicle, advancing from behind him "very, very rapidly" and repeatedly blinking its high beam/low beam headlights. Report of Proceedings (RP) at 3590. He monitored the vehicle, an SUV, until it was behind him an estimated 8 to 10 feet. Mr. Hart then swerved onto the right shoulder and stopped across the fog line. He momentarily lost sight of the SUV in his rear and side view mirrors before seeing it swerve onto the westbound shoulder and then proceed in the westbound lane parallel to the fog line. Mr. Hart believed the SUV was going at least 90 m.p.h. He saw headlights cresting the top of a hill up ahead, and the SUV that had gone around him appeared to speed up in an attempt to return to the eastbound lane. Mr. Hart had not returned to the lane of travel and was stopped on the shoulder when he observed the SUV sideswipe a westbound car, a green Geo driven by Alecia Lundt, before colliding with another westbound vehicle behind the Geo, a white 1978 Cadillac driven by Brandon Clements.

Mr. Russell's SUV was a Chevrolet Blazer that had been modified with a four-inch lift kit so that it sat higher than a normal sized car. Jacob McFarland was a passenger.

Ms. Lundt's Geo was the first car in a line of four westbound vehicles. Jill Baird was driving her Honda about 50 m.p.h. immediately behind the Geo and managed to veer

to the shoulder and avoid collision. Ms. Baird was in her own lane prior to the collision. The third car in line was Mr. Clements' Cadillac. Mr. Russell's SUV's initial point of impact with the green Geo occurred on the crest of a hill in a no passing zone, 3½ feet inside the westbound lane. Mr. Russell's SUV's subsequent impact with the Cadillac sliced off its front and rear driver's side and obliterated the vehicle. Mr. Clements and his passengers Stacy Morrow and Ryan Sorensen died instantly. Three more passengers in the Cadillac, Sameer Ranade, Kara Eichelsdoerfer, and John Matthew Wagner, all sustained extensive serious and permanent injuries. Mr. Ranade sustained multiple rib fractures, a pelvic fracture, a kidney laceration, and a life-threatening ruptured thoracic aorta. Following emergency surgery, he was flown to Harborview Medical Center for additional surgery, spent two weeks on a ventilator in intensive care and then six weeks in a nursing home.

Ms. Eichelsdoerfer suffered four broken ribs, pubic and tail bone fractures, heart and lung contusions, a brain injury impairing her motor functioning for one year and facial lacerations causing permanent scarring. After hospital care in Pullman, she too was flown to Harborview for surgery. She required three months of 24-hour care.

Mr. Wagner suffered a bruised kidney, seven broken transverse processes, a scraped cornea and a fractured collar bone requiring surgery and hospitalization for two

weeks. His vision remains impaired. Mr. Wagner testified he initially saw an oncoming car pull out and strike the vehicle in front of them, go back into its lane and then come back into their lane. He noticed on the speedometer that the Cadillac was travelling about 50 m.p.h.

Eric Haynes was the seventh occupant of the Cadillac. He was seated in the front seat passenger side. He and the front middle passenger, Mr. Wagner, both saw the first collision with the Geo and an SUV emitting blue sparks from the front driver's side wheel as the SUV came directly toward them. Mr. Haynes said Mr. Clements instantly swerved to the right shoulder but had no time to avoid collision with Mr. Russell's SUV.

The force of the impact shoved the Cadillac counterclockwise into a rock wall. Mr. Russell's SUV then careened backwards and collided with Vihn Tran's red Geo—the fourth car in the westbound line. Mr. Russell's SUV and the red Geo both burst into flames after the occupants exited. Mr. Tran, who was traveling about 50 m.p.h., only saw the SUV come suddenly out of a dust cloud and into his lane before they collided.

Investigation. Washington State Patrol (WSP) detectives and accident reconstruction experts David Fenn and Ron Snowden investigated the scene. They used a total station instrument to take measurements and produce a diagram of their findings. There was no evidence of braking by Mr. Russell's SUV before initial impact with the

green Geo. The impact tore Mr. Russell's SUV's left front tire from the wheel and canted the right front tire and wheel inward. Gouge marks in the westbound lane starting near the initial impact point showed that pavement drag on the left-hand side of the SUV caused it to rotate out of control counterclockwise and gradually swerve left as it continued eastbound. The total station measurements showed that from Mr. Russell's SUV's initial point of impact with the green Geo, approximately 3½ feet inside the westbound lane, Mr. Russell's SUV then traveled 208+ feet to the point of impact with the Cadillac on the westbound lane/shoulder, before traveling another 60 feet and colliding with the Mr. Tran's Geo.

Detective Fenn opined that the severity of the damage to the Cadillac indicated Mr. Russell's SUV was traveling well over the 55 m.p.h. speed limit. Detective Snowden likewise testified that "obviously speed" was probably the most important factor in the magnitude of damage to the Cadillac. RP at 3925. He said that in hundreds of collision scene investigations, he had never seen damage that extensive to a vehicle other than when a semi truck or train was involved. Detective Fenn testified, however, that speeds of the vehicles could not be competently calculated because there was no evidence from which it could be determined beyond a reasonable doubt that Mr. Russell's SUV was braking after the initial impact with the green Geo. He said the evidence suggested Mr.

Russell's SUV was not braking and that the impact with the Geo did not cause it to slow down because the collision induced no change of direction in Mr. Russell's SUV.

The defense accident reconstruction expert Richard Chapman agreed that Mr. Russell was exceeding the speed limit. Mr. Chapman disagreed, however, that speeds could not be mathematically calculated. He calculated that Mr. Russell was traveling 67 m.p.h. upon impact with the green Geo, and his speed was reduced to 30 m.p.h. at the point of impact with the Cadillac. He calculated the Cadillac's speed at 42 m.p.h. upon impact with Mr. Russell's SUV.[1]

The State's rebuttal expert witness Detective Ryan Spangler agreed with Mr. Chapman's formulas and thought processes, but stated that Mr. Chapman made mathematical errors in his calculations. Detective Spangler explained that under the Chapman formulas, Mr. Russell's speed at impact with the green Geo would have been 79 m.p.h. to 80 m.p.h., and 58 m.p.h. at impact with the Cadillac. But Detective Spangler said he would not have performed a speed analysis of this collision because it would require too many assumptions about factors such as westbound vehicle speeds, road friction, and difficulty in calculating change in Mr. Russell's SUV's change of velocity

[1] Mr. Chapman's testimony supported a defense theory that the accident severity was due less to speed and more to the fact the SUV's lift kit turned the vehicle into an out-of-control cutting instrument after it lost a tire in the initial collision with Ms. Lundt's Geo.

given the damage in the first two collisions followed by its burning in a fire. Another State's rebuttal expert, Geoffrey Genther, likewise testified that an accurate speed analysis was not possible under the circumstances of the chain of collisions. Mr. Genther had conducted his analysis in 2001 after visiting the accident scene. He also found no evidence that Mr. Russell's SUV took any evasive action prior to any of the collisions.

Immediately after the accident, Mr. Hart, who had no first responder or first aid/CPR[2] training, began flagging down vehicles and telling others to call 911. He approached Mr. Russell and asked what he was thinking; Mr. Russell did not answer. Brad Raymond and his wife Kami were westbound when they arrived at the accident scene. Ms. Raymond is a trained first responder. Mr. Raymond called 911 and Ms. Raymond spoke with an unidentified man who asked if everyone was okay and then went back over to the other side of the road. Mr. Hart testified that after learning that 911 was called and speaking with a woman on the other side of the road who said she had first aid, he realized he was late for work and proceeded to Moscow to his motel job. The shift change left waiting motel customers and he helped them before calling police to relay what he had witnessed. An officer came to the motel and took his written statement.

Mr. Russell sustained a cut lip and other relatively minor injuries in the accident.

[2] Cardiopulmonary resuscitation.

Several people at the accident scene said he smelled of alcohol. Kayce Ramirez offered Mr. Russell and Mr. McFarland a seat in her car. She testified the odor of alcohol was so strong, particularly in the front seat where Mr. Russell sat, that she had to exit the vehicle. Fire fighter/emergency medical technician (EMT) Brian Parrish smelled alcohol when Mr. Russell spoke. So did Mr. Raymond. Ms. Raymond said that she told Mr. Russell "it sucks that your vehicle is burning." RP at 2890. He responded, "that's alright. I needed a new one anyways." RP at 2892. Fire fighter/EMT Anthony Catt, who transported Mr. Russell and Mr. McFarland to Gritman Medical Center in Moscow said Mr. Russell smelled heavily of alcohol.

WSP Trooper Michael Murphy arrived soon after the accident. He assessed the collision scene, spoke with witnesses, and then followed the ambulance that was transporting Mr. Russell and Mr. McFarland to the hospital.

In describing the accident, Mr. Russell told several individuals at the scene and en-route to the hospital that he looked up, saw headlights coming at him, and swerved to avoid a small sporty car that was in his lane. He said he lost control when he struck that vehicle. At the hospital, he repeated a similar statement two or three times to Trooper Murphy. But when Trooper Murphy sought clarification about his swerving to the right, Mr. Russell then said he could not remember how the accident occurred. Trooper

Murphy smelled intoxicants on Mr. Russell's person and asked if he had been drinking. Mr. Russell said he drank one or maybe one and one-half beers.

Mr. Russell earlier told EMT Catt that he had consumed two beers. At the emergency room, he told treating physician Dr. Randall Kloepfer it was two and one-fourth beers. Mr. Russell later told his ex-girlfriend Cristin Capwell it was one beer. Mr. Russell had also brought a full half-gallon bottle of vodka to a party in Moscow sometime between 7:00 p.m. and 7:30 p.m. on June 4. Mr. Russell, Mr. McFarland, and five others consumed the entire bottle in less than two hours, drinking vodka slushies. The amount each person drank was unknown. Mr. Russell and Mr. McFarland left the party for My Office Tavern in Pullman, where Mr. Russell was served two pints of Guinness. The bartender testified Mr. Russell did not appear intoxicated when he arrived at approximately 8:30 p.m., or when he left at about 10:00 to 10:30 p.m., and that Mr. Russell even caught an error in the amount of change he received when paying his tab.

The accident occurred shortly after Mr. Russell and Mr. McFarland left the tavern to take Mr. McFarland back to Moscow. Mr. McFarland thought Mr. Russell was fine to drive. Mr. McFarland testified that he drank regularly with Mr. Russell and that Mr. Russell could hold his liquor. Ms. Capwell likewise testified that Mr. Russell drank frequently, and she believed she had seen him consume six or more drinks in one evening

without exhibiting outward signs of drunkenness. Dr. Kloepfer testified that Mr. Russell was alert; his speech was coherent; he was oriented to time, place, persons, and events; and his face was not flushed. But Dr. Kloepfer also testified that, medically speaking, a person can be intoxicated yet show little or no obvious signs of intoxication.

Toxicology. Given Mr. Russell's statement that he had consumed alcohol, Dr. Kloepfer ordered a medical (serum) blood draw by a registered nurse at 12:30 a.m. on June 5. Dr. Judi Clark, PhD analyzed the sample using a TDx machine that employs the fluorescent polarization method generally accepted in the scientific community. The results showed a blood alcohol level of .128 grams per one 100 milliliters of serum.[3] Dr. Clark said the machine was self-calibrating, had been recently serviced, and appeared to be working properly.

Trooper Murphy's prior review of the accident scene indicated the initial impact did not occur as Mr. Russell had claimed during their emergency room conversation, so he telephoned troopers still at the scene to confirm details. After also talking by telephone with Mr. Hart, Trooper Murphy believed he had probable cause to arrest Mr.

[3] The medical blood test results were seized from Gritman Medical Center pursuant to a search warrant issued on June 26, 2001.

Russell for vehicular homicide. In the emergency room, Trooper Murphy then advised Mr. Russell he was under arrest. Trooper Murphy read Mr. Russell his *Miranda*[4] rights and special evidence warnings, and then advised Mr. Russell that he would take a blood sample.

Trooper Murphy retrieved a blood draw kit provided by the Washington State Toxicology Laboratory (State Lab) from the locked trunk of his patrol vehicle and handed the kit to Dr. Clark. She drew two vials of blood at 1:34 a.m. Trooper Murphy secured the vials, left the hospital, and went to the Pullman Police Department to apply for an arrest warrant. Mr. Russell left the hospital with his father. Trooper Murphy obtained an arrest warrant and arrested Mr. Russell at his residence in Pullman later in the morning on June 5. Trooper Murphy also personally gave the blood vials to Detective Fenn on June 5. Detective Fenn placed them in the evidence locker at the WSP district office in Spokane, and from there they were sent to the State Lab.

On June 8, 2001, toxicologist Eugene Schwilke of the State Lab tested the blood sample per standard laboratory procedures and issued a report. The test results admitted in evidence at trial showed Mr. Russell's blood alcohol level was .12 grams per 100 milliliters of whole blood. Prior to trial, the court had denied motions by Mr. Russell to

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

dismiss the charges or suppress the forensic blood test results after his blood samples were inadvertently destroyed at the State Lab by Manager Ann Marie Gordon on July 11, 2004.

Mr. Schwilke also explained during his trial testimony that the .128 serum blood result obtained by the hospital converted into a whole blood result of .10. He said that .08 (the legal limit in Washington) is the level where everyone is affected such that they should not drive a motor vehicle. He also testified the .12 result meant Mr. Russell had the equivalent of just over six one-ounce shots of alcohol in his system at the time his blood was drawn, and that his blood alcohol level within two hours of driving would have been .13 to .14 per 100 milliliters of whole blood. He concluded that based upon alcohol tolerance, absorption, and metabolism rates, Mr. Russell's driving would have been adversely affected by alcohol at the time of the accident.[5]

Jury Verdict. The jury found Mr. Russell guilty of all counts. With respect to each vehicular homicide count, the jury unanimously found beyond a reasonable doubt by

[5] The court gave the jury an oral limiting instruction with respect to Mr. Schwilke's testimony that it was permitted to consider the results of the medical blood test conducted at the hospital laboratory only in determining whether Mr. Russell was under the influence of or affected by intoxicating liquor while driving a vehicle, and that it was not permitted to consider Mr. Schwilke's testimony in determining whether Mr. Russell had within two hours after driving an alcohol concentration of 0.08 or higher as shown by analysis of his blood. The court gave a similar written limiting instruction.

special interrogatory that at the time of causing the injury which resulted in death, Mr. Russell was operating a motor vehicle (1) while under the influence of intoxicating liquor and (2) with disregard for the safety of others.

The jury did not find Mr. Russell operated his vehicle in a reckless manner. Thus, the jury found Mr. Russell guilty of three counts of vehicular assault for proximately causing serious bodily injury to another while operating a motor vehicle while under the influence of intoxicating liquor.

The jury thus rejected defense theories that the medical and forensic blood test results were unreliable and that there was no other evidence that Mr. Russell was intoxicated. The jury was not persuaded that the State's investigators were biased or that the investigators ignored evidence that Mr. Hart's driving forced Mr. Russell to spontaneously veer into oncoming traffic and collide with Ms. Lundt's Geo, thus rejecting that Mr. Hart's actions were the superseding intervening cause of the accident. The defense theorized that Mr. Hart realized it was he who caused the accident and fled to work instead of remaining at the scene.

Sentence. The court imposed concurrent sentences of 171 months for each vehicular homicide count and 84 months for each vehicular assault count. The court denied Mr. Russell credit for 384 days of pretrial detention served in Ireland while he

challenged extradition proceedings. Mr. Russell appeals.

Mr. Russell makes 17 assignments of error asserting that (1) he was unlawfully arrested in an Idaho hospital by a WSP trooper; (2) medical blood alcohol test results were (a) unlawfully seized under a search warrant, and (b) improperly admitted for lack of adequate foundation; (3) forensic blood test results should have been suppressed because his blood samples were destroyed due to mismanagement at the State Lab; (4) he was denied his right to public trial because juror hardship discussions were held outside the courtroom; (5) his right to a fair and impartial jury was denied when the court (a) overruled his challenge to the State's use of peremptory challenges to strike minority female jurors, and (b) denied his challenges to certain jurors for cause; (6) the prosecutor committed prejudicial misconduct during opening statements; (7) forensic blood test results were improperly admitted into evidence because the State failed to (a) present adequate foundation evidence, and (b) establish chain of custody for the blood sample; (8) jury instructions pertaining to superseding intervening cause unconstitutionally reduced the State's burden of proof on proximate cause of the accident; (9) the court erred by allowing the State to present rebuttal expert testimony from an accident investigator (Geoffrey Genther) hired by Mr. Russell's prior attorney, in violation of the attorney-client privilege and attorney work product rule; (10) a State's expert witness

improperly vouched for the credibility of detectives who conducted the accident investigation;

(11) cumulative error denied him a fair trial; and (12) the court erred by denying him credit for pretrial detention in Ireland while he contested extradition to the United States. Mr. Russell also raises several issues in a statement of additional grounds for review.

ANALYSIS

Arrest-Blood Draw. Before the trial date in 2001, Mr. Russell challenged the legality of his warrantless arrest in the Idaho emergency room. He argued that Trooper Murphy lacked authority to enter Idaho to perform a criminal investigation or to make an arrest. Mr. Russell sought suppression of the forensic blood draw evidence obtained by Trooper Murphy. The court denied the motion, concluding that Trooper Murphy was in lawful fresh pursuit and that he was also acting under a valid Interstate Mutual Aid Agreement (IMAA) between the Washington and Idaho State Patrols.

Mr. Russell broadly contends that the trial court erred in upholding the validity of his warrantless arrest in the Idaho hospital under (1) the Washington fresh pursuit doctrine, and (2) the IMAA. He argues that since both arrest grounds are invalid, only the common law fresh pursuit doctrine remains and it requires that the suspect was attempting to escape or avoid arrest, or at least know he was being pursued. *State v.*

Barker, 98 Wn. App. 439, 447, 990 P.2d 438 (1999), *rev'd on other grounds*, 143 Wn.2d 915, 25 P.3d 423 (2001); *City of Wenatchee v. Durham*, 43 Wn. App. 547, 550-51, 718 P.2d 819 (1986). Mr. Russell contends there is no such evidence here because he was being transported from the accident scene in an ambulance.

The State argues that the trial court correctly concluded that the Idaho fresh pursuit statute, Idaho Code (IC) § 19-701, and the IMAA each independently authorized Mr. Russell's arrest in Idaho. Therefore, the common law fresh pursuit doctrine is not applicable.

1. Statutory Fresh Pursuit

The Fourth Amendment and article I, section 7 of the Washington Constitution require a law enforcement officer to act under lawful authority. *State v. Plaggemeier*, 93 Wn. App. 472, 476, 969 P.2d 519 (1999) (citing *Durham*, 43 Wn. App. at 549-50). An arrest made beyond an arresting officer's jurisdiction is equivalent to an arrest without probable cause. *Id.* (citing *State v. Rasmussen*, 70 Wn. App. 853, 855, 855 P.2d 1206 (1993)). But the Fresh Pursuit Act, codified in chapter 10.89 RCW and IC §§ 19-701 through 19-707 provides exceptions to the rule.

First, Mr. Russell is correct that Washington's Fresh Pursuit Act is inapplicable to arrests made in other states. *In re License Suspension of Monte Lee Richie*, 127 Wn.

App. 935, 940, 113 P.3d 1045 (2005). He thus contends the trial court erred in relying on the Washington Fresh Pursuit Act to uphold the validity of Mr. Russell's Idaho arrest. The record is clear, however, that while the court did mention the Washington Fresh Pursuit Act, it relied on the Idaho fresh pursuit statute as the basis to uphold the validity of the hospital arrest.

IC § 19-701 provides:

> Any member of a duly organized state, county, or municipal peace unit of another state of the United States who enters this state in fresh pursuit and continues within this state in such fresh pursuit, of a person in order to arrest him on the ground that he is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county or municipal peace unit of this state, to arrest and hold in custody a person on the ground that he is believed to have committed a felony in this state.

Similarly, IC § 19-705 provides:

> The term "fresh pursuit" as used in this act shall include fresh pursuit as defined by the common law, *and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony*. . . . Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

(Emphasis added.)

Mr. Russell specifically contends his Idaho arrest was invalid because Trooper Murphy failed to comply with IC § 19-702 by taking him before an Idaho magistrate after the blood draw. The statute provides:

> If an arrest is made in this state by an officer of another state in accordance with the provisions of section 1 of this act *he shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made*, *who shall conduct a hearing for the purpose of determining the lawfulness of the arrest.* If the magistrate determines that the arrest was lawful he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state or admit him to bail for such purpose. If the magistrate determines that the arrest was unlawful he shall discharge the person arrested.

IC § 19-702 (emphasis added).

The court in *Steinbrunn* rejected the same argument under the Washington statute, RCW 10.89.020, which contains the same uniform provision as IC § 19-702. *State v. Steinbrunn*, 54 Wn. App. 506, 512, 774 P.2d 55 (1989). In *Steinbrunn*, a Washington trooper advised the defendant in an Oregon hospital that he was under arrest for vehicular homicide, obtained a blood sample, and then left the hospital. The defendant argued that the trooper did not follow the provisions of the Washington Fresh Pursuit Act because he did not take the defendant before an Oregon magistrate to determine the lawfulness of the arrest. *Id.* The court explained that the procedure did not apply because the trooper's purpose was to obtain a blood sample and he did not keep the defendant in custody. The arrest was therefore lawful. *Id.*

The same is true here. Upon determining that Mr. Russell might be intoxicated, Trooper Murphy advised him he was under arrest, obtained a blood sample, and then left

the hospital. Trooper Murphy had no intention of keeping Mr. Russell in custody, and, in fact, Mr. Russell went home from the emergency room with his father. The procedures in IC § 19-702 for taking the arrestee before a magistrate therefore do not apply in this case.

Mr. Russell otherwise makes no showing that the trial court erred by determining that Trooper Murphy followed the ambulance carrying him and Mr. McFarland from Washington to Idaho based upon reasonable suspicion that an occupant of the ambulance had committed a felony and that he was, therefore, engaged in lawful fresh pursuit under the Idaho statute.

The trial court did not err by concluding that the Idaho fresh pursuit statute provided an independent legal basis for Trooper Murphy's authority to enter Idaho, conduct an investigation, and arrest Mr. Russell to take a blood draw from him. *See also State v. Turpin*, 25 Wn. App. 493, 500, 607 P.2d 885 (officer may make arrest for limited purpose of obtaining forensic blood draw under the implied consent statute), *rev'd on other grounds*, 94 Wn.2d 820, 620 P.2d 990 (1980).

2. Interstate Mutual Aid Agreement

In his 2001 suppression motion, Mr. Russell contended that no mutual aid agreement existed between the states of Washington and Idaho. The State then supplied a copy of the IMAA between the WSP and Idaho State Patrol (ISP) that was in effect on

June 4, 2001. The agreement is authorized by chapters 10.93 and 39.34 RCW,

and

IC §§ 67-2328 and 19-701. Section 3 of the agreement provided:

> Consent to Extension of Peace Officer Authority.
>
> The respective Chief Law Enforcement Officer of each of the Parties hereby severally consent that the authority as a peace officer of the officers . . . of each and every other Party hereto is extended into the jurisdiction or territory of such consenting Chief Law Enforcement Officer either:
>
> (a) when requested by such Chief Law Enforcement Officer; or
>
> (b) upon the recognition by any such officers of a situation or circumstance with the jurisdiction or territory of the Parties to this agreement which requires immediate law enforcement action, or other emergency action. The Party whose officer is performing such voluntary assistance shall notify the Party with whose territory or jurisdiction the voluntary assistance is being rendered who will thereupon assume the general control authorized in Section 5 of this agreement.
>
> . . . .
>
> All assistance rendered under the authority of this section shall be limited to that area within fifty (50) statute miles of any point along the common border but within the states of Idaho or Washington.

Clerk's Papers (CP) at 160-61. Mr. Russell responded that the agreement violated the extradition clauses of the federal constitution and Idaho law, and if not, then Washington authorities failed to comply with the notice and general control provision of section 3(b). The court rejected his arguments. In a brief filed in 2007, Mr. Russell's new counsel made no mention of the IMAA.

In his statement of additional grounds for review, Mr. Russell raises the IMAA.

He contends the IMAA did not provide valid authority for his warrantless arrest by Trooper Murphy in Idaho. He says Washington law cannot validate the IMAA in his case or for any other arrest made in Idaho. He further states that the Idaho legislature never intended to allow a compact agreement to trump the Idaho code (including fresh pursuit statutes), which required that he be taken before an Idaho magistrate to determine the validity of his warrantless arrest. Moreover, the State presented no evidence that the IMAA was properly recorded with appropriate governing bodies in Idaho. Furthermore, Idaho has no statute resembling Washington's implied consent law authorizing limited arrest for purposes of taking a blood draw. Mr. Russell concludes the IMAA is invalid and cannot in any way be construed to validate his unlawful warrantless arrest.

Like the fresh pursuit statutes, the mutual aid peace officers powers act of 1985, chapter 10.93 RCW, modifies common law restrictions on officer authority to enforce the law outside their jurisdiction. RCW 10.93.100 (intent of legislature to modify artificial barriers to mutual aid and cooperative enforcement of laws among general authority local, state and federal agencies); *see Plaggemeier*, 93 Wn. App. at 476-77. One circumstance under which a law enforcement officer may enforce criminal and traffic laws outside the officer's jurisdiction is pursuant to a mutual law enforcement assistance agreement. RCW 10.93.070(3). The statute provides in pertinent part:

> In addition to any other powers vested by law, a general authority Washington peace officer who possesses a certificate of basic law enforcement training or a certificate of equivalency . . . may enforce the traffic or criminal laws of this state throughout the territorial bounds of this state, under the following enumerated circumstances:
>
> . . . .
>
> (3) In response to a request for assistance pursuant to a mutual law enforcement assistance agreement with the agency of primary territorial jurisdiction or in response to the request of a peace officer with enforcement authority.

RCW 10.93.070(3).

Mr. Russell now contends for the first time on appeal that the IMAA between the WSP and ISP is invalid because there is no indication the IMAA was recorded with the county auditor or approved by legislative authority as required by RCW 39.34.040. He thus claims the arrest in Idaho exceeded Trooper Murphy's jurisdiction and is equivalent to an arrest without probable cause. *Plaggemeier*, 93 Wn. App. at 476-80.

But the State is correct that Mr. Russell failed to preserve the issue for appeal by not raising it at trial. Moreover, the IMAA document does reflect that it was duly executed by authorized officials at both the ISP and WSP, and was approved by the Washington Office of Budget and Fiscal Services. Mr. Russell's conclusory claims that the IMAA was never recorded with the county auditor or had proper legislative approval

do not warrant further review. RAP 2.5(a); *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). Moreover, he can show no prejudice even if the IMAA was not valid because, as discussed above, the independent legal basis of fresh pursuit under the Idaho statute is itself sufficient to uphold the Idaho arrest.

Even addressing the merits, Mr. Russell still shows no error by the trial court. In *Plaggemeier*, the court determined that a mutual aid agreement was invalid to the extent it had not been ratified by a city's legislative body or filed with the county auditor as required by chapter 39.34 RCW. *Plaggemeier*, 93 Wn. App. at 481. The court nevertheless held that the consent provision in the agreement was severable and, therefore, independently enforceable because it could be viewed as separate from the agreement's invalid administrative provisions not properly ratified under chapter 39.34 RCW. The court reasoned the consent agreement involving cross-border law enforcement authority did not require legislative approval because it was not concerned with the allocation of fiscal resources, but rather with extra jurisdictional arrests. *Plaggemeier*, 93 Wn. App. at 483.

Here, the IMAA contains administrative, fiscal, and consent provisions. Consistent with *Plaggemeier*, the consent provisions in the IMAA are valid, and Mr. Russell makes no showing that the court erred by determining that the IMAA provided an

independent legal basis to uphold the arrest.

Mr. Russell additionally argues that Trooper Murphy did not fully comply with the consent terms of the IMAA because even though an ISP trooper was on standby, it does not appear from the record that that trooper did anything further in conjunction with the investigation or arrest. The argument lacks merit when there was no need for an ISP trooper to assume any control over the arrest and blood draw after which Mr. Russell was free to leave the hospital.

Finally, given that the arrest was valid under the Idaho fresh pursuit statute, which expressly provides that it is in addition to the common law (*see* IC § 19-705), Mr. Russell's argument that common law should be used to fill the statutory void is without merit.

In summary, Mr. Russell's arrest in the Idaho emergency room was valid under the Idaho fresh pursuit statutes. The arrest can be upheld on that basis alone. Mr. Russell waived his IMAA claim and, in any event, makes no showing that the court erred in also upholding the arrest based upon the IMAA. His common law fresh pursuit arguments are unpersuasive.

Seizure of Medical (Serum) Blood Test Results. The warrant affidavit requested that a search warrant be issued for the seizure of:

> All medical records pertaining to Frederick D. Russell, for his treatment from an auto collision on June 4th, 2001 to discharge. These reports should include: the emergency room report/notes, chart notes, doctor's notes and discharge summary.

CP at 986. The search warrant, issued by an Idaho magistrate, authorized the seizure of:

> Any and all records pertaining to Frederick D. Russell, dob 12-20-78, regarding or related to a motor vehicle collision on June 4, 2001, including, [without limitation], emergency department reports and notes, chart notes, doctor's notes and discharge summary *which detail or identify Russell's injuries and any medications administered by Gritman Hospital personnel or attending physicians*.

CP at 988 (emphasis added). The issuing magistrate struck out the above-bracketed words "without limitation" and added the above-italicized words.

The search warrant was timely executed at the hospital on June 26, 2001. The State seized Mr. Russell's emergency department patient records, emergency department reports and outpatient reports, all pertaining to the June 4 vehicle accident.

Mr. Russell moved to suppress the medical records seized as outside the scope of the search warrant. The court issued written findings and concluded, "All records seized pursuant to the search warrant . . . on June 26, 2001, including those records documenting the medical blood draw results, are within the scope of the search warrant and are therefore admissible." CP at 995.

The Fourth Amendment to the United States Constitution prohibits the issuance of any warrant except one "'particularly describing the place to be searched and the persons or things to be seized.'" *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). Article I, section 17 of the Idaho Constitution contains a like requirement. *See State v. Teal*, 145 Idaho 985, 989, 188 P.3d 927 (2008). Article I, section 7 of the Washington Constitution contains a similar requirement. *See State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984).[6]

A search pursuant to a warrant exceeds the scope authorized if officers seize property not specifically described in the warrant. *Teal*, 145 Idaho at 989; *State v. Kelley*, 52 Wn. App. 581, 585, 762 P.2d 20 (1988). But warrants should be viewed in a common sense and realistic fashion with doubts resolved in favor of the warrant. *State v. Holman*, 109 Idaho 382, 388, 707 P.2d 493 (1985) (quoting *United States v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965); *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). The issue of whether a warrant is overbroad or lacks sufficient particularity is a legal question reviewed de novo. *Teal*, 145 Idaho at 990; *State v. Stenson*, 132 Wn.2d 668, 691, 940 P.2d 1239 (1997).

[6] Mr. Russell cites to Idaho law on the warrant issue and it appears that Idaho cases apply. The State cites to both Idaho and Washington law. There is no material difference between the two.

Within the document entitled "Emergency Department Report," the treating physician describes Mr. Russell's injuries and the medications administered to him. CP at 35-39. Under the heading "Laboratory Data" is the treating physician's statement that Mr. Russell's alcohol level was drawn and the numerical results. CP at 38. The document entitled "Outpatient Summary Report" issued at 6:30 a.m. and 10:34 a.m. on June 5 also states the results of Mr. Russell's blood draw taken at 12:38 a.m. on June 5. CP at 43-44. Thus, the blood alcohol data was interspersed in the reports along with the treating physician's descriptions of Mr. Russell's injuries and medications he received.

The search warrant specifically authorized the seizure of "[a]ny and all records . . . regarding or related to a motor vehicle collision on June 4, 2001." CP at 988. This expressly included emergency department reports and discharge reports. Mr. Russell was discharged on June 5—after the emergency department report and outpatient summary report were completed. Mr. Russell's blood alcohol test results are contained on documents that are within the particularized description of records to be seized. The technical imprecision in the warrant's description does not invalidate the seizure here. *See Ventresca*, 380 U.S. at 108 (practical accuracy, rather than technical precision, controls the interpretation of warrants). And the *Warden* "mere evidence" rule precluding seizure of non-specified "mere evidence" is not helpful to Mr. Russell in this situation.

Warden, *Maryland Penitentiary v. Hayden*, 387 U.S. 294, 308, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967).

We conclude that the trial court properly denied the motion to suppress Mr. Russell's medical records.

Admission of Blood Test Results. Mr. Russell challenges the admission at trial of the serum blood test results. Since the serum or medical blood draw occurred prior to Trooper Murphy arresting Mr. Russell, the implied consent statute, RCW 46.20.308, is not applicable because it does not control the admissibility of blood alcohol evidence taken by a physician from an individual not under arrest. *State v. Smith*, 84 Wn. App. 813, 818-19, 929 P.2d 1191 (1997). Nevertheless, such evidence may be seized in accordance with general search and seizure law and may be admitted at trial. *Id*. at 819-20. Such is the case here. The focus then turns to Mr. Russell's foundational challenges.

The court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). ER 803(a)(6) provides that records of regularly conducted activity are not inadmissible as hearsay. The rule references chapter 5.45 RCW, which is the uniform business records as evidence act (UBRA). RCW 5.45.020 provides:

> 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.

(Emphasis added.)

With respect to admission of medical and hospital records under ER 803(a)(6):

> The courts tend to allow the admission of medical records maintained by a physician, even though the records consist partly of laboratory reports and other information supplied by persons who are not part of the physician's business. The courts have emphasized the likelihood that the records are trustworthy. *See*, *e.g.*, *State v. Sellers*, 39 Wn. App. 799, 695 P.2d 1014 (1985).

5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Evidence, ch. 5, at 436, cmt. (6) (2010-2011).

Likewise, in *Tennant v. Roys*, 44 Wn. App. 305, 312, 722 P.2d 848 (1986), the court held that medical blood alcohol tests are admissible as a business record under RCW 5.45.020. The court reasoned that medical tests are "presumed to be particularly trustworthy because the hospital relies on its staff members to competently perform their duties when making often crucial life and death decisions." *Id.* In addition, the UBRA contains five requirements for admissibility designed to ensure reliability. The evidence must be (1) in record form; (2) an act, condition, or statement; (3) made in the regular course of business; (4) made at or near the time of the act, condition, or event; and (5) the

court must be satisfied sources of information, method, and time of preparation justify admitting the evidence. *Id.*

Here, as discussed, the medical blood test results were contained in Mr. Russell's emergency room hospital records. Mr. Russell objected to the admission of the records, Plaintiff's Exhibit 1 at trial, on grounds that the treating physician Dr. Kloepfer was not the custodian of the records and that the document did not meet the RCW 5.45.020 foundational requirements. After the examination of Dr. Kloepfer, the court cited to the above-quoted Tegland passage and *Tennant* as authority for admitting Exhibit 1 under the business records exception in RCW 5.45.020 and ER 803(a)(6). The court also overruled Mr. Russell's foundation objection under ER 702 and ER 703. Mr. Russell does not appeal the court's decisions on any of these grounds.

The focus of Mr. Russell's contentions on appeal that the medical blood evidence fails admissibility requirements is placed in context by first examining the elements of the vehicular homicide statute, RCW 46.61.520:

> (1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:
> (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
> (b) In a reckless manner; or
> (c) With disregard for the safety of others.

The referenced driving while under the influence of intoxicating liquor or any drug (DUI) statute, RCW 46.61.502 provides in pertinent part:

> (1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
> (b) While the person is under the influence of or affected by intoxicating liquor or any drug; or
> (c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.
> . . . .
> (4) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, *and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(b) or (c) of this section*.

(Emphasis added.)

The first prong of the DUI statute is commonly referred to as the "per se" prong, while the other two prongs are known as the "non per se" or "other evidence" prongs. *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 44, 93 P.3d 141 (2004); *State v. Charley*, 136 Wn. App. 58, 63, 147 P.3d 634 (2006). Mr. Russell was tried under all three vehicular homicide alternatives and under DUI prongs (a) and (b).

Mr. Russell cites to *State v. Hultenschmidt*, 125 Wn. App. 259, 270, 102 P.3d 192

(2004) as authority that to admit blood alcohol evidence under the "per se" prong, the offering party must lay the foundation statutorily mandated by RCW 46.61.506(3) and promulgated in WAC 448-14-020(3)(b). Included are requirements that the test be performed according to methods approved by the State toxicologist and by an individual possessing a valid permit issued by the State toxicologist. *See State v. Donahue*, 105 Wn. App. 67, 74, 18 P.3d 608 (2001). In a written pretrial motion in limine, Mr. Russell did seek to exclude the medical blood results from evidence under the per se prong because the test in the Idaho hospital laboratory did not comply with RCW 46.61.506(3). The State conceded that point at trial.

The critical point now is that the State instead proffered the medical blood test evidence under RCW 46.61.502(4), which authorizes admission of medical blood alcohol tests obtained in an out-of-state hospital as "other competent evidence" of intoxication under the non per se prongs, even when the test did not comply with approved State toxicologist's methods as set forth in RCW 46.61.506(3). *See Donahue*, 105 Wn. App. at 74-75; *Charley*, 136 Wn. App. at 65-66 (hospital's medical blood draw and test results admissible as "other evidence" under non per se DUI prong notwithstanding that test failed to comply with foundational requirements for admitting forensic blood test).

Thus, under *Donahue* and *Charley*, Mr. Russell's foundational challenges based

upon testing in an out-of-state hospital by a registered nurse who did not possess a valid permit issued by the State toxicologist are without merit.

Mr. Russell's foundational challenge then boils down to his claim of uncertainty as to what substance was used to swab his arm and possible contamination if alcohol was used. The State contends that Mr. Russell failed to preserve this challenge by not raising it in the trial court. The State is correct; Mr. Russell only raised this as a matter of weight on cross-examination.

Dr. Kloepfer testified that he ordered an alcohol blood draw as standard protocol because Mr. Russell had consumed alcohol. Dr. Kloepfer stated that before the needle is inserted the skin is prepared or cleaned with either alcohol or betadine (iodine). He said betadine was typically used in trauma situations in 2001. On cross-examination, Dr. Kloepfer admitted he did not personally know which substance was used on Mr. Russell. On redirect, Dr. Kloepfer reiterated that iodine was being used to treat the skin in medical blood draws in 2001, and that the staff was trained to clean the skin in that way. Dr. Kloepfer also testified that he considered the test results reliable and those results influence the patient's course of treatment. Mr. Russell points to no evidence that the substance used to clean his skin could have contaminated his medical blood draw so as to produce unreliable results.

Mr. Russell makes no other argument that the admission of the medical blood evidence failed to comport with the foundational or reliability requirements set out in *Tennant*.

The trial court did not abuse its discretion by admitting the medical blood evidence.

Destruction of Blood Samples. Mr. Russell next challenges the trial court's denial of his motion to suppress forensic blood tests either for bad faith or because the blood samples were destroyed.

At a pretrial suppression hearing in 2007, the court heard testimony from Washington State Toxicologist Dr. Barry Logan; the State Lab's Manager Ann Marie Gordon; State toxicologists Jayne Thatcher and Ed Formoso; and Sergeant Patricia Lankford of the WSP Risk Management Division. Since the court's findings from that hearing are unchallenged, they are verities on appeal. *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

The findings reflect the following facts. The laboratory received Mr. Russell's forensic blood sample on June 8, 2001, and per regular procedures assigned custody and testing of the sample to State toxicologist Eugene Schwilke. He opened a file, entered pertinent information into the State Lab's computerized data base, and analyzed and

tested the blood for alcohol content. He issued a written report documenting a blood alcohol level of 0.12. He then placed Mr. Russell's blood samples in a test tube rack in a long-term storage freezer.

In 2001, the State Lab's internal policy of retaining blood samples for nine months was altered when a toxicologist unexpectedly died. The State Lab then began to retain samples for a longer period to allow for retesting of samples that had been assigned to the deceased toxicologist if required for court proceedings. On February 17, 2004, Whitman County deputy prosecutor Carol LaVerne requested the State Lab in writing to retain Mr. Russell's blood sample indefinitely. Ms. Gordon advised Ms. LaVerne that the sample would be retained for one year, but that Ms. LaVerne could request a further extension prior to February 17, 2005. By this time, Mr. Schwilke was no longer employed at the State Lab. Ms. LaVerne was the only person to request the State Lab to preserve Mr. Russell's blood sample. Neither Mr. Russell nor any defense representative had made any requests to the State Lab to test or preserve the blood sample.

Ms. LaVerne's February 2004 request to preserve Mr. Russell's sample was forwarded from the State Lab's quality control manager Dora Schranz to State toxicologist Edward Formoso. Pursuant to unwritten policy, Mr. Formoso pulled Mr. Russell's sample from the storage freezer and applied numbered red "save" stickers to the

vials and to Mr. Russell's file. CP at 1052. But Mr. Formoso did not transfer the tubes into a separate storage freezer containing only "saved" samples. CP at 1053. Instead, per modified procedure adopted in 2004 by Ms. Gordon and Dr. Logan, he returned Mr. Russell's samples to their original storage freezer that contained mostly general population 2001 samples not designated for retention. Mr. Formoso noted the date of retention on Ms. LaVerne's letter and placed it in Mr. Russell's file. An additional "save" entry made on the State Lab's Excel spreadsheet did not indicate which freezer contained Mr. Russell's sample.

By 2004, blood samples were rapidly piling up in the State Lab's freezers. Ms. Gordon and Dr. Logan agreed they should begin destroying older samples, starting with those received and tested in 2001. As manager, Ms. Gordon was not the person who normally destroyed samples. But due to concerns the staff was overworked, she began the destruction process herself on July 11, 2004—a Sunday—with no one else present. The State Lab had no written procedures for destruction of samples. Ms. Gordon knew there were saved samples commingled in the general population of samples to be destroyed. She admittedly failed to consult the Excel spreadsheet when destroying samples. Instead, she pulled 72-tube racks of samples from the freezer, visually inspected the top and outside of each rack for red "save" stickers without pulling tubes from the

rack, and relocated the "save" samples to a separate freezer. She then dumped the remaining samples into a biohazardous waste container. She occasionally observed she had a dumped a tube with a "save" label. She retrieved those tubes and placed them in the freezer for saved samples. She destroyed approximately 4,500 samples on July 11, and returned on July 25 to destroy an additional 2,600 samples. On each date, she prepared an interoffice memo documenting the destruction and stating that all saved samples were relocated to "save" sample racks in permanent storage. Mr. Russell's two blood vials were labeled with a State Lab number that was within the range of the batch of samples that Ms. Gordon destroyed on July 11, 2004.

In November 2004, Ms. Schranz conducted a quarterly audit of the State Lab's blood samples. Ms. Gordon requested the audit include all saved samples because the State lab was subject to an upcoming WSP audit. Ms. Schranz's December 28, 2004 audit report indicated that all saved samples were in fact saved and did not show Mr. Russell's sample missing. In January 2005, Ms. LaVerne renewed her request to save Mr. Russell's sample. Based upon the December audit report, Ms. Gordon informed Ms. LaVerne that the sample had been saved and would not be discarded. Ms. Schranz retained no paperwork to support her audit report. The court found that the audit was likely in error as pertains to Mr. Russell's blood sample.

On February 16, 2005, Ms. Gordon went to the saved sample freezer to pull Mr. Russell's sample for retesting and discovered it missing for the first time. The sample was not found in a comprehensive search of the State Lab by Ms. Gordon and Ms. Thatcher. Ms. Thatcher also discovered during the search that a saved sample for one other individual was missing and had also probably been destroyed. By letter dated February 16, Ms. Gordon informed a Whitman County prosecuting attorney that the State Lab no longer had Mr. Russell's blood samples and that they were most likely destroyed on July 11, 2004.

The court found that based upon the substantial weight of the evidence, more likely than not, Mr. Russell's blood sample was inadvertently discarded when Ms. Gordon conducted the 2001 sample destruction on July 11, 2004.

Based upon Ms. Gordon's testimony, the court found she had attempted to be conscientious in the destruction process, and that she did not intend to discard any saved samples. But her procedures were grossly inadequate to prevent the loss and destruction of at least a small number of saved samples that had been commingled with the general population of 2001 samples.

The court made several additional unchallenged findings pertaining to evidence handling, lack of chain of custody problems, and deficiencies in the State Lab's policies

and procedures bearing on the State Lab's incompetency and mismanagement in handling and destroying Mr. Russell's blood samples. The court ultimately concluded that there was no showing of bad faith on the part of laboratory personnel with respect to destruction of Mr. Russell's blood samples. The court also denied Mr. Russell's motion for a suppression remedy under CrR 8.3(a), reasoning that the rule did not apply to mismanagement by State actors who were not under the control of the prosecutor, and even if the rule did apply, Mr. Russell made no showing that destruction of the blood samples prejudiced his right to a fair trial.

Due process requires the court to dismiss criminal charges if the State fails to preserve "material exculpatory evidence." *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (citing *California v. Trombetta*, 467 U.S. 479, 486, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). A due process violation also occurs if the defendant can show bad faith on the part of the State in failing to preserve "potentially useful" evidence. *Youngblood*, 488 U.S. at 58. Washington adopted these principles in *State v. Wittenbarger*, 124 Wn.2d 467, 880 P.2d 517 (1994). Material exculpatory evidence is evidence that possesses an exculpatory value that was apparent before it was destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Wittenbarger*, 124 Wn.2d at

475 (citing *Trombetta*, 467 U.S. at 489). Evidence that fails to meet this two-part test is only potentially useful. *Wittenbarger*, 124 Wn.2d at 477 (citing *Youngblood*, 488 U.S. at 58). The focus for determining bad faith by a State actor is set forth in *Youngblood*:

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, *those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant*.

Youngblood, 488 U.S. at 58 (emphasis added).

CrR 8.3(b) provides in pertinent part:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

Denial of a motion to dismiss under this rule is reviewed for an abuse of discretion. *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). To support dismissal, the defendant must (1) show arbitrary action or governmental misconduct, and (2) demonstrate that the arbitrary action or misconduct resulted in prejudice affecting his right to a fair trial. *Id*. at 239-40. The arbitrary action or mismanagement need not be evil or dishonest; simple mismanagement is enough. *Id.* at 239 (quoting *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). The extraordinary remedy of

dismissal is not justified when suppression of evidence will eliminate whatever prejudice is caused by the arbitrary action or misconduct. *City of Seattle v. Orwick*, 113 Wn.2d 823, 829-30, 784 P.2d 161 (1989); *see also City of Seattle v. Holifield*, 170 Wn.2d 230, 240 P.3d 1162 (2010) (quoting *State v. Marks*, 114 Wn.2d 724, 730, 790 P.2d 138 (1990)).

In his motion to dismiss the charges or suppress the forensic blood test results, Mr. Russell contended that the evidence was potentially useful, not that it was materially exculpatory. Thus, to show a due process violation and gain a remedy under *Wittenbarger*, he must show bad faith destruction by the State Lab. To gain suppression under CrR 8.3(b), he must show that mismanagement at the State Lab prejudiced his right to a fair trial.

1. Bad Faith

When reviewing a motion to suppress, we determine whether substantial evidence exists to support the trial court's findings of fact and whether those findings support the conclusions of law. *State v. Ross*, 106 Wn. App. 876, 880, 26 P.3d 298 (2001). Unchallenged findings are verities on appeal. *Gaines*, 154 Wn.2d at 716. We review de novo the court's conclusions of law. *See State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

At issue here is the trial court's legal determination, based upon its unchallenged findings, that there was no showing of bad faith by State Lab personnel in the destruction of Mr. Russell's blood sample.

The trial court did not find bad faith. The court first reasoned that the test results indicating an inculpatory 0.12 blood alcohol level provided no reason for State Lab personnel to believe Mr. Russell's blood sample was favorable to him or could potentially exonerate him from criminal liability. Nor was there reason to doubt the accuracy or reliability of the 2001 test result.

The court did recognize abundant substantial evidence bearing on the State Lab's incompetency and mismanagement generally and in the handling and destroying of Mr. Russell's sample. The court explained, however, that aside from the evidence of widespread mismanagement at the State Lab, there was no evidence presented that the State Lab destroyed Mr. Russell's sample purposely, intentionally, or with any improper motive. Ms. Gordon was not related to or acquainted with Mr. Russell and was unaware of any details about his case until after the sample was discovered missing. Nor was there evidence that any other laboratory personnel had any relation or connection to the case outside their general duties relating to the testing and handling of blood samples. The court concluded that the problems at the State Lab resulting in destruction of Mr.

Russell's blood sample were, at worst, the result of a pattern of negligence and not bad faith. There was no showing that these problems were designed to deny Mr. Russell or any other criminal defendant access to potentially useful evidence.

Mr. Russell offers no contrary evidence of bad faith. The court expressly accepted as credible Ms. Gordon's testimony at the suppression hearing that her destruction of Mr. Russell's sample was inadvertent. That determination is not disturbed on appeal. *State v. Hill*, 123 Wn.2d 641, 646-47, 870 P.2d 313 (1994). Again, when the forensic blood test results of 0.12 were consistent with the medical blood draw result of .128, the blood evidence was at best "potentially useful" and its negligent destruction does not rise to the level of a due process violation under *Youngblood* and *Wittenbarger*.

The trial court did not err by finding no bad faith in the destruction of Mr. Russell's forensic blood sample.

2. CrR 8.3(b)

Contrary to the State's contentions and the trial court's ruling here, application of CrR 8.3(b) is not limited to governmental misconduct or mismanagement by the prosecutor. *Holifield*, 170 Wn.2d at 238-39. In *Holifield*, the defendant was charged with DUI based, in part, on the results of a breath test. The machine used to determine the defendant's blood alcohol content had been calibrated using a control alcohol solution

certified by State Lab Manager Ann Marie Gordon. Ms. Gordon resigned from her position after it came to light she certified solutions that she did not independently test and that other State Lab workers falsified records to cover up the misconduct. The Supreme Court upheld the trial court's ruling that the governmental misconduct and prejudice materially affected the defendant's right to a fair trial and that suppression of the breathalyzer evidence, as opposed to outright dismissal, was the proper remedy under CrRLJ 8.3(b). *Holifield*, 170 Wn.2d at 239; *see also State v. Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000) (applying CrR 8.3(b) in context of jail officials seizing and examining criminal defendants' legal documents).

Thus, mismanagement by the State Lab is sufficient to satisfy *Michielli*'s "arbitrary action or governmental misconduct" prong. *Michielli*, 132 Wn.2d at 239. Here, the trial court erred to the extent it relied on *State v. Koerber*, 85 Wn. App. 1, 4-5, 931 P.2d 904 (1996) and *State v. Duggins*, 68 Wn. App. 396, 401-02, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993) to rule that only misconduct or mismanagement within the control of the prosecutor may warrant relief. But the trial court was correct in ruling that even if the State Lab's mismanagement invoked consideration under the rule, Mr. Russell has shown no prejudice to his right to a fair trial. As discussed, the forensic test results showed a blood alcohol level of 0.12, while

the .128 medical serum blood test results were likewise inculpatory. In addition, no one from the defense sought retesting or independent analysis of the forensic blood sample between June 8, 2001 when the State Lab received the sample and October 2001 when the case was ready for trial at the time Mr. Russell fled. The trial court thus concluded, "Again, it is difficult for the court to now give credibility to defendant's claim of the importance and materiality of this evidence or of the claimed prejudice caused by its destruction, when the defendant made no effort to obtain the evidence six years ago when it remained in existence from the time of his arrest through the date of his previously scheduled trial." CP at 1070-71. We agree.

Furthermore, Mr. Russell does not explain how the trial court's denial under ER 608 of his motion to call Ms. Gordon as a trial witness for the sole purpose of attacking her credibility is relevant to the ultimate question of prejudice under *Michielli*. The trial court did find credible Ms. Gordon's suppression hearing testimony on the question of bad faith that her destruction of Mr. Russell's sample was inadvertent. Mr. Russell points to nothing potentially exculpatory about the blood test results that would further implicate Ms. Gordon's credibility.

In the final analysis, the trial court did not abuse its discretion by denying any relief under CrR 8.3(b).

The court did not err by denying Mr. Russell's motion to suppress the forensic blood evidence.

Public Trial. Mr. Russell contends the court violated his right to a public trial by holding juror hardship discussions outside the open courtroom without first applying the five-part balancing test in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

Prior to the initial panel of 76 prospective jurors being brought into the courtroom on the first day of jury selection, the trial judge stated on the record in open court that when the juror questionnaires were submitted, the court would meet with counsel and Mr. Russell in the jury room to discuss hardship cases. The court then recessed. After the recess, the court stated on the record in open court that it had met with counsel and Mr. Russell and reviewed the juror questionnaires for "severe hardship" issues that would result in those jurors being automatically excused from service. The court then read the names of 14 jurors excused for hardship. The court then informed the remaining panel that other jurors who listed possible hardships would be individually questioned before the court made a decision on their requests. After administering the juror oath, the court questioned those jurors in open court and dismissed several for hardship, but deferred decision on others. The court then advised on the record that it would step out into the hallway for a bench conference with the attorneys and Mr. Russell to discuss the

remaining hardship requests. The court held the hallway conference on the record. The court then resumed questioning in open court in the presence of the jury panel and dismissed two additional jurors for hardship. Mr. Russell was present at all times.

An additional 15 prospective jurors were summoned the following morning. In the presence of Mr. Russell, the court stated on the record in open court, "Why don't we do like we did yesterday, retire to the . . . jury room briefly and try to sort out the hardship requests, it looks like we may have some and try to weed those out first."
RP at 1570. The court then recessed for that purpose. After the recess, the court explained to the jury panel in open court with Mr. Russell present that hardship requests of the newly-called jurors were reviewed with counsel. The court then excused seven more jurors and resolved additional hardship questions in open court. After all hardship matters were addressed, the court again administered the juror oath and the State commenced individual juror voir dire regarding qualifications to serve as a fair and impartial juror—on the record and in open court.

Judicial proceedings, including the jury selection process, are presumptively open to the public. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). The defendant is guaranteed a right to a public trial by both article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution.

State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The court may close a portion of a trial, including jury selection, to the public if the court openly engages in the five-part balancing test stated in *Bone-Club*. The five factors are: (1) the proponent of closure must make a showing of compelling need, (2) any person present when the motion is made must be given an opportunity to object, (3) the means of curtailing open access must be the least restrictive means available for protecting the threatened interests, (4) the court must weigh the competing interests of the public and of the closure, and (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wn.2d at 258-59. A court errs when it closes jury selection without first applying the *Bone-Club* test. *State v. Strode*, 167 Wn.2d 222, 228, 217 P.3d 310 (2009) (quoting *Brightman,* 155 Wn.2d at 515-16). Whether a trial court procedure violates the right to a public trial is a question of law reviewed de novo. *Brightman*, 155 Wn.2d at 514.

A defendant's constitutional right to a public trial applies to the evidentiary phases of the trial and to other "'adversary proceedings.'" *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (quoting *State v. Rivera*, 108 Wn.2d 645, 652, 32 P.3d 292 (2001)). Because the right to a public trial is linked to the defendant's constitutional right to be present during all critical phases, the defendant has the right to an open court

whenever evidence is taken and during suppression hearings, voir dire, and the jury selection process. *Rivera*, 108 Wn. App. at 653. But "[a] defendant does not . . . have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *Sadler*, 147 Wn. App. at 114; *see Rivera*, 108 Wn. App. at 653.

RCW 2.36.100(1) provides that the trial court may excuse jurors "upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary." As applied to the venire selection process, this statute grants the trial court "broad discretion in excusing jurors." *State v. Rice*, 120 Wn.2d 549, 562, 844 P.2d 416 (1993). If the selection process substantially complied with the jury selection statutes, the defendant must show prejudice; if there is a material departure from the statutes, prejudice is presumed. *See State v. Tingdale*, 117 Wn.2d 595, 600-02, 817 P.2d 850 (1991).

Consistent with RCW 2.36.100, GR 28(b)(1) authorizes a judge to "delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service." A judge "may not delegate decision-making authority over any grounds for peremptory challenges or challenges for cause." GR 28(b)(3). But GR 28(c)(1) provides that "[p]ostponement of service for personal or work-related

inconvenience should be liberally granted when requested in a timely manner."

Aside from the public trial claim, Mr. Russell makes no contention that the trial court's excusing of jurors for hardship failed to comport with the jury selection statutes and court rule. And he cites no case from Washington or elsewhere that holds public trial rights are implicated when juror hardship discussions are held outside the open courtroom prior to individual juror voir dire focused on qualifications to serve as a fair and impartial juror.

Here, the proceedings each day were in an open courtroom when the trial court explained on the record all of its procedures pertinent to juror hardship matters. The court's resolution of hardship requests outside the open courtroom in the jury room, in chambers, or in the hallway during a sidebar conference were not adversary proceedings and did not concern the excused jurors' qualifications to serve impartially. The discussions pertained solely to hardship matters governed by the court's discretion and did not involve resolution of disputed facts. The discussions were most akin to the court's discussion of legal matters in chambers or during a sidebar, the substance to which the defendant and members of the public have traditionally not been privy. *Cf. In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 483-84, 965 P.2d 593 (1998) (defendant's presence not required for in-chambers discussion of jury sequestration, wording of jury

instructions, and ministerial matters); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (defendant's presence not required for in-chambers or bench conferences between court and counsel on legal matters); *State v. Sublett*, 156 Wn. App. 160, 181-82, 231 P.3d 231 (public trial right inapplicable to court's conference with counsel regarding jury's purely legal question submitted during deliberations), *review granted*, 170 Wn.2d 1016 (2010); *State v. Bremer*, 98 Wn. App. 832, 834-35, 991 P.2d 118 (2000) (defendant had no right to be present during in-chambers conference for legal inquiry about jury instruction).

In his sixth statement of additional authorities, Mr. Russell cites our Supreme Court's recent decision in *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). But that case is distinguishable. In *Irby*, the parties agreed to the trial court's suggestion that neither party attend the first day of jury selection, during which the court administered prospective jurors their oath and then gave them a questionnaire. After all of the jurors submitted filled-out questionnaires, the trial judge sent an e-mail to the prosecuting attorney and Mr. Irby's counsel suggesting that 10 particular jurors be removed from the panel—four who had been excused after one week by the court administrator, one who home schools, one with a business hardship, and four who had a parent murdered. Both counsel stipulated to the release of seven jurors identified in the e-mail; the prosecutor

objected to the release of three of the four jurors who indicated they had a parent murdered. The judge responded with an e-mail to both counsel that the seven jurors whom they jointly agreed to release would be notified they would not need to appear the next day. The clerk's minutes read, "'In chambers not on the record. Counsel stipulate to excusing the following jurors for cause: [enumerated jurors].'" *Id.* at 798. The minutes also indicated that Mr. Irby was in custody at the time and the record also provided no indication that he was consulted about the dismissal of any of the jurors who had taken the juror's oath.

The *Irby* court considered the e-mail exchange to be a portion of the jury selection process because it did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in that particular case. *Id.* at 800. The court explained that the fact jurors "were being evaluated individually and dismissed for cause distinguishes this proceeding from other, ostensibly similar proceedings that courts have held a defendant does not have the right to attend." *Id*. The court concluded this decision making was clearly a part of the jury selection process that Mr. Irby did not agree to miss. *Id.* The court thus held that conducting a portion of jury selection in Mr. Irby's absence violated his Fourteenth Amendment due process right to be present at a critical stage of his trial and his right under the Washington Constitution "'to appear and

defend in person.'" *Id.* at 801-02 (quoting Const. art. I, § 22). The court found it unnecessary to decide Mr. Irby's additional claim that the trial court violated his right to a public trial. *Id.* at 803.

Unlike in *Irby*, Mr. Russell was personally present during all stages of jury selection. He makes no claim that he was denied his right to be present at a critical stage or to appear and defend in person—his presence for all jury selection matters fully comports with *Irby*. And in Mr. Russell's case, any members of the press or public who may have been present when the court explained its procedures with respect to hardship could see that Mr. Russell was being treated in an open and fair manner. *See Presley v. Georgia*, __U.S.__, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010) ("'public-trial guarantee [is] one created for the benefit of the defendant'") (quoting *Gannett Co. v. De Pasquale*, 443 U.S. 368, 380, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979)); *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010). We conclude there was no courtroom closure that implicated Mr. Russell's public trial rights. The *Bone-Club* factors therefore do not apply. *See Rivera*, 108 Wn. App. at 652-53.

Moreover, once the hardship matters were resolved, it is undisputed that the courtroom was fully open, and Mr. Russell was present for all voir dire pertaining to juror qualifications and juror selection. This renders distinguishable the several cases cited in

Mr. Russell's reply brief and first five statements of additional authorities, which all involved actual courtroom closures during the postjuror hardship phase of jury selection.

Peremptory Challenges. Mr. Russell next contends that the court erred by overruling his *Batson*[7] challenges to the State's peremptory striking of minority female jurors. After hardship exclusions, the venire panel consisted of 16 men and 23 women. The State used peremptory challenges to strike five women and one man—jurors 3, 25, 27, 31, 38, and 39. It used alternate peremptory challenges to strike one man and one woman—jurors 50 and 66. Mr. Russell exercised his peremptory challenges to strike three men and three women—jurors 1, 16, 21, 24, 32, and 41. He used alternate peremptory challenges to strike two women—jurors 48 and 49.

Under *Batson*, courts apply a three-part test to determine the propriety of a peremptory challenge. *Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *State v. Vreen*, 143 Wn.2d 923, 926-27, 26 P.3d 236 (2001) (quoting *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)). First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination. *Vreen*, 143 Wn.2d at 926-27 (quoting *Purkett*, 514 U.S. at 767). Second, if the opponent to the challenge can make the prima facie showing, the party exercising

[7] *Batson v. Kentucky*, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

the peremptory challenge must provide a race-neutral explanation for the challenge. *Id.* Third, once the challenging party tenders an explanation, the trial court must determine whether the opponent of the challenge has proved purposeful racial discrimination. *Id.* The same analysis applies to claimed discriminatory peremptory challenges based upon gender. *State v. Burch*, 65 Wn. App. 828, 834, 830 P.2d 357 (1992).

Review of a trial court's ruling on a *Batson* challenge is highly deferential; the court's decision will be upheld "'unless clearly erroneous.'" *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008) (quoting *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960 (1995)).

Juror 39 was the only African American on the venire panel. It was on that basis that Mr. Russell made a *Batson* challenge to the State's striking of her from the panel. The prosecutor responded that the striking of juror 39 was not race-based; it was because she had made clear throughout the proceedings that she did not want to be at the trial. Mr. Russell countered that seated juror 18 had also made clear that he did not want to be on the jury, yet the State did not strike him. Thus, taking equal each juror's desire not to be there, the striking of the only African American was race-based. The State countered that juror 18 did give a reason—that he was busy with work—while juror 39 raised concern for the State because she gave no particular reason for not wanting to serve.

Defense counsel then interjected, "Well just for the record also, I think you also struck [juror 25] who is a woman of color, a minority. I don't know if she's African-American; but she looks Hispanic or some other." RP at 2708. Defense counsel thus contended there was a pattern by the State of excluding minority females relevant to the *Batson* challenge for striking juror 39. But juror 25's race was not further discussed or specified in the record.

The court ruled, "I'm not convinced at all that the peremptory . . . exercised here against . . . [juror 39] was racially motivated. . . . [O]ther than the fact of her race I don't – I'm just not convinced that that's the reason." RP at 2709. The court thus implicitly rejected the notion that the striking of juror 25 furthered a race-based *Batson* challenge.

After the jury was already empanelled and sent home for the day, Mr. Russell raised the subject of juror 31 being a minority for *Batson* purposes. The record establishes only her married name. Mr. Russell did not further pursue the question of her minority status, which was never determined on the record. The ethnicity of juror 31 thus cannot be reviewed for *Batson* purposes.

The *Batson* analysis boils down to Mr. Russell's contention that the court clearly erred when it found no discriminatory motive in the prosecutor's use of a peremptory challenge to strike the sole African American on the panel, juror 39, instead of choosing

that strike from male jurors 18 or 53, who likewise preferred not to serve on the jury. In this situation, the potential relevance for *Batson* prima facie case purposes is reflected in *State v. Wright* factor eight (similarities between those individuals who remain on the jury and those who have been struck). *State v. Wright*, 78 Wn. App. 93, 100, 896 P.2d 713 (1995).

As the State contends, the record reflects that juror 39 gave no particular reason for not wanting to be on the jury other than she is selfish. She stated that reason repeatedly. She said she would rather be doing her "daily non-business things." RP at 1889. She did say that if chosen she would be "fair, as fair as I could be." RP at 1889.

Juror 18 said he did not want to be there because he is fidgety and would rather be at work. He acknowledged that if seated as a juror, he was sure he would be able to set aside thoughts of work and pay close attention. Nothing made him uncomfortable about sitting and listening to the evidence; he would just rather be at work.

Juror 53 was not mentioned in Mr. Russell's *Batson* challenge. During individual voir dire, juror 53 said he had served on five prior juries. He felt it was a citizen's responsibility to serve if called upon, even if a person was not necessarily happy about it. He later stated that he did not want to be there because his work demands as a certified public accountant would make jury service inconvenient, although not a hardship. He

said that work-related issues would not impact his ability to sit as a juror.

The court made no finding that a prima facie case of discrimination had been made due to the State's use of a peremptory challenge to remove juror 39. In any event, when, as here, the State has nonetheless offered a race-neutral explanation, the proper focus for an appellate court's deferential review is the trial court's ultimate ruling on the *Batson* challenge. *Hicks*, 163 Wn.2d at 492-93 (whether defendant established a prima facie case is not necessary to decide on review).

The State offered the race/gender neutral reason that it struck juror 39 for her stated reason that she did not want to be there because she was selfish. This is different than the work-related reasons for not wanting to be there stated by jurors 18 and 53. Moreover, another relevant factor is that juror 53 had prior jury experience in Cowlitz County. *See State v. Rhone*, 168 Wn.2d 645, 656-57, 229 P.3d 752 (reasonable to infer nondiscriminatory motive in choosing non-African American juror with prior jury experience over African American juror with no prior jury experience) *cert. denied*, 131 S. Ct. 522 (2010). And as further explained in *Hicks*, the high level of deference to trial court findings on the issue of discriminatory intent in the *Batson* context makes particular sense because the finding will turn largely on the trial court's evaluation of the prosecutor's credibility—a determination peculiarly within the trial judge's province.

Hicks, 163 Wn.2d at 493 (quoting *Hernandez v. New York*, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)); *see Rhone*, 168 Wn.2d at 657.

Here, in ruling it was not convinced that the peremptory challenge exercised against juror 39 was racially motivated, the trial court obviously accepted the prosecutor's race-neutral explanation as credible. That determination is not disturbed on appeal.

The trial court's denial of the *Batson* challenge was not clearly erroneous.

Challenges for Cause. Mr. Russell challenged jurors 8 and 16 for cause; the State opposed their removal. The court denied the challenges. Mr. Russell contends the denial violated his constitutional right to a fair and impartial jury. His challenge to juror 8 was based upon that juror's responses (1) that he believed one drink was sufficient to impair someone; (2) impairment implies that a person, including himself, would not be able to operate a vehicle at 100 percent if he had one beer or drink; and (3) impairment means a person loses some of his/her functions to a degree that can differ based upon a person's body chemistry and tolerance, but everybody would be affected to some degree.

Juror 8 did not, however, claim that a person could not or should not drive after consuming alcohol. He also denied any bias. This is illustrated in the initial exchange between defense counsel and juror 8:

MR. VARGAS [Defense Counsel]: . . . And you believe that one

> drink is—would impair anybody. Would that be fair to say?
>
> JUROR NO. 8: Right. Now the—severity of the impairment is open for discussion but—
>
> MR. VARGAS: Okay. But one drink would be sufficient to impair somebody?
>
> JUROR NO. 8: Yeah.
>
> MR. VARGAS: And so do you think if you heard that somebody had a drink and drove and you had to decide if they were impaired—that you would be more biased to say they were impaired because of your belief?
>
> JUROR NO. 8: [N]o. . . . I would, again, have to know all of the facts—to know if the person—the individual was like and—
>
> . . . .
>
> MR. VARGAS: [I]t seems like you have a strong personal opinion because of the experiences with your dad?
>
> JUROR NO. 8: Yes. Yeah.
>
> MR. VARGAS: Okay. So I think you'd have very strong feelings about that situation?
>
> JUROR NO. 8: [Y]eah. Although . . . my dad's always drove better with six beers in him actually than—
>
> MR. VARGAS: Okay. [B]ut it seems to me like you'd have a pretty strong anti-drink or anti-consuming alcohol position. Would that be fair to say?
>
> . . . .
>
> . . . Because of that?
>
> JUROR NO. 8: Uh . . . personally—but the driving thing, maybe not—not so much. I—you know, honestly my dad could consume—many alcoholic beverages and do just fine so—I mean, everybody is different.

RP at 2597-98.

Juror 8 also stated that he harbored no ill feeling toward people who consume alcohol. He repeatedly assured that if picked as a juror he would be fair and impartial and that he would put aside any personal beliefs or biases and "absolutely" follow the

law. RP at 2612.

Subsequently, on inquiry by the prosecutor, juror 8 reiterated that people are affected differently by alcohol and he would follow the law regardless of personal beliefs:

> MS. WEINMANN [Prosecutor]: [Juror 8] when we were questioning you earlier about your beliefs about having one beer did you mean that applies to any person, anybody who has one beer should not be able to drive?
>
> JUROR NO. 8: [N]o. I did not say that any person that has one beer should not be able to drive. Nor do I mean that.
>
> MS. WEINMANN: Okay. Then explain to me what you meant.
>
> JUROR NO. 8: . . . It impairs everybody differently—and I don't know the severity of it, you know, it depends on the individual. Like I said, honestly my father could drink and drive and he was fine. He did it for many years.
>
> . . . .
>
> MS. WEINMANN: Do you believe then that anybody who has one drink is necessarily impaired to a degree that they cannot drive well?
>
> JUROR NO. 8: I don't think that it's right and I don't think that one beer would impair a person to drive well. Again, it depends on the—
>
> . . . .
>
> MS. WEINMANN: And the Judge instructs on what the law is in a criminal case—
>
> JUROR NO. 8: . . . [Affirmative].
>
> MS. WEINMANN: —and if the law is different than your beliefs or your belief system, how will that affect you?
>
> JUROR NO. 8: [I]t won't. You know, . . . you have to see through that and do what the law says, what you're instructed to do.

RP at 2638-40.

Mr. Russell's challenge to juror 16 was based upon that juror's response that he

thinks it is illegal to drink and drive; in his opinion, one drink would impair somebody; and his statement, "I don't think that people should be drinking and driving period." RP at 2621. He also acknowledged knowing the law is different. He said, "I know they allow a .08 or whatever . . . [a]s being impaired." RP at 2621. But juror 16 also made clear that if chosen, he would set aside his personal beliefs and follow the law as given in the court's instructions.

Mr. Russell used a peremptory challenge to strike juror 16. He used all six of his peremptory challenges. Juror 8 was seated on the jury.

Under the Sixth Amendment and article I, section 22 of the Washington Constitution, a defendant is guaranteed the right to a fair and impartial jury. *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). A juror may be challenged by a party for cause. CrR 6.4(c); RCW 4.44.170. We review a trial court's denial of a challenge for cause for a manifest abuse of discretion. *State v. Noltie*, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). "[T]he trial court is in the best position to determine a juror's ability to be fair and impartial." *Id.* at 839. Specifically, "[t]he trial judge is able to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial." *Rupe*, 108 Wn.2d at 749. "If a juror should have been excused for cause, but was not, the remedy is reversal."

City of Cheney v. Grunewald, 55 Wn. App. 807, 810, 780 P.2d 1332 (1989).

Actual bias supports a challenge for cause. RCW 4.44.170(2). "Actual bias" is "the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Actual bias must be established by proof. *Noltie*, 116 Wn.2d at 838. "[E]quivocal answers alone do not require a juror to be removed when challenged for cause, rather, the question is whether a juror with preconceived ideas can set them aside." *Id.* at 839. More than a possibility of prejudice must be shown. *Id.* at 840 (quoting 14 Lewis Orland & Karl Tegland, Washington Practice: Trial Practice § 202, at 331 (4th ed. (1986)).

In *State v. Fire*, the court followed the reasoning from *United States v. Martinez-Salazar*, 528 U.S. 304, 307, 315-16, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) in holding that the forced use of a peremptory challenge is not a deprivation or loss of a challenge but is merely an exercise of the challenge. *State v. Fire*, 145 Wn.2d 152, 154, 162, 34 P.3d 1218 (2001). The *Fire* court concluded:

> [I]f a defendant through the use of a peremptory challenge elects to cure a trial court's error in not excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted.

Id. at 165.

Thus, under *Fire*, Mr. Russell's use of a peremptory challenge to strike allegedly biased juror 16 was merely an exercise of a challenge in an attempt to cure error, if any, by the trial court. Consequently, this court need not examine the merits of the challenge for cause of juror 16. The only question is whether a biased juror sat on Mr. Russell's jury; that is, did the court abuse its discretion in refusing to strike juror 8 for cause? *See Fire*, 145 Wn.2d 152 (court may determine second issue without reaching the first).

According to Mr. Russell, juror 8's fixed opinion that a person should not drive even after one drink exhibited actual bias that required dismissal for cause. He claims prejudice because the trial evidence would clearly establish that he consumed more than one drink.

Juror 8 did state that one drink impairs any person's ability to function fully at 100 percent. But juror 8 clarified that he did not believe that anybody who has one drink is necessarily impaired to a degree that they cannot drive well. The record demonstrates that juror 8 believed impairment levels affecting the ability to drive vary among individuals. The court was particularly mindful of the distinction between consumption of alcohol and legal standards for intoxication by denying Mr. Russell's motion to strike juror 8 for cause. The court obviously accepted as credible juror 8's assurances that he

was not biased against people who drink, that he would be fair and impartial, and that he would set aside any personal beliefs and follow the court's instructions.

Actual bias must be established by proof of more than a mere possibility of prejudice. *Noltie*, 116 Wn.2d at 838, 840. Mr. Russell fails that burden. The court did not abuse its discretion by denying Mr. Russell's motion to strike juror 8 for cause.

Prosecutorial Misconduct. Mr. Russell made a pretrial motion in limine to exclude the medical blood test results based upon legal grounds and also as a CrR 4.7 discovery sanction for the prosecutor's alleged withholding of materials pertinent to the medical blood draw. As discussed earlier, the trial court ruled that the medical blood test results would be admitted subject to the State establishing proper foundation during trial. The court thus stated it would bar the prosecutor in opening statement from giving the result. The court then ruled that the State had committed no discovery violation because both sides knew the test results and the prosecutor had no greater access than did the defense to the medical blood evidence seized as a result of the search warrant.

To support his prosecutorial misconduct claim, Mr. Russell cites to the following exchange during opening statements:

> [MR. DUARTE (Defense Counsel):] And then they're going to talk to you about a medical blood test. They're going to tell you look, this means that he was under the influence and you should hold him responsible for this, right? They're going to tell you this. And yet they haven't disclosed and you will find out

> . . . what machines they used for the testing, what procedures they followed—
>
> MS. TRATNIK [Prosecutor]: Your Honor this is inappropriate. This is a legal judgment. The Court has already made in the State's favor. That is a misrepresentation.
>
> . . . .
>
> MR. DUARTE: Your Honor I have to take issue with this particular attorney, prosecutor, telling this jury right now that that's a misrepresentation when in fact we know what the truth is.
>
> THE COURT: Alright. At this time . . . I'm going to ask the jury to disregard—Ms. Tratnik's statement but—I am going to ask Mr. Duarte to move on to a different line of his statement here.
>
> MR. DUARTE: . . . Whatever I say to you is not evidence and what I'm telling you now is a summary of what I expect you will be hearing today and for the following days and maybe for the following weeks.
>
> . . . .
>
> [I]n this trial we intend to present evidence to you that no information has been provided about the method used at that hospital, the procedures they were supposed to follow.
>
> MS. TRATNIK: Your Honor I'm going to renew my objection. This is a discovery ruling. He's doing exactly what you just said he couldn't do.
>
> . . . .
>
> THE COURT: No. . . . I'm going to overrule and allow him to proceed in the manner you are.

RP at 2823-25.

A defendant claiming prosecutorial misconduct during opening statements bears the burden of establishing that the challenged conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727,

77 P.3d 681 (2003)); *see State v. Echevarria*, 71 Wn. App. 595, 597, 860 P.2d 420 (1993). The conduct is prejudicial only if there is a substantial likelihood it affected the jury's verdict. *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Given the context of the court's pretrial rulings, the gist of the prosecutor's comments in direct response to a plausible interpretation of defense counsel's statements was that the State had in fact disclosed everything it was bound to disclose. Contrary to Mr. Russell's contention, the State was not tacitly attempting to tell the jury that the blood test results were reliable.

In these circumstances, even if the prosecutor's objections and references to a legal judgment, misrepresentation and discovery ruling are viewed as improper, Mr. Russell makes no showing of likely impact on the verdict. He says the prejudice is self-evident but offers no explanation of how he was prejudiced. Moreover, the court ultimately ruled that the State established foundation for admission of the medical blood test results. The State's opening statements in no way undercut Mr. Russell's ability to challenge foundation and then attack the reliability of the medical blood evidence as a matter of weight, which he did during trial.

Admission of Forensic Blood Test Results. Pretrial, the court ruled the forensic blood test results would be admitted if the State established foundational requirements

through witness testimony before the jury. Mr. Russell contends the State failed to present such evidence.

At trial, Trooper Murphy testified that once he advised Mr. Russell of his *Miranda* rights in the emergency room and gave him the special evidence warnings to take a blood sample, he handed the nurse (Dr. Clark) a sealed packet or kit with two vials to take the blood draw. The State Lab supplies the kits. Trooper Murphy keeps the kits in the trunk of his patrol car at all times. He described the vials themselves as gray topped with a white label on the side. Each vial contains a white powdery substance. He verified that the vials were within the expiration date and had not been previously opened or tampered with in any way. He watched Dr. Clark swab Mr. Russell's arm with iodine and draw his blood into the two vials at 1:34 a.m. on June 5. Dr. Clark then gave the vials to Trooper Murphy, who labeled them with Mr. Russell's name and date of birth, the time and date, his badge number, and the case number. Nothing was added to the vials except for Mr. Russell's blood. Trooper Murphy secured the vials and locked them in his patrol car until he personally handed them to Detective Fenn later in the day on June 5.

Dr. Clark testified she received the unopened, standard industry kit containing the vials from Trooper Murphy and drew Mr. Russell's blood at the trooper's request. She described the vials as containing a white powder and a gray leak-proof stopper/top.

Based upon her training and experience, she knew that the gray top designates that the powder is sodium fluoride and potassium oxalate. She said the vacuated (air-free) vials cannot be opened ahead of time. The vials used for Mr. Russell's blood draw were clean and dry, and the powder was appropriately fluffy and moisture free. She cleaned Mr. Russell's skin with betadine (an iodine derivative), drew the blood, and labeled and sealed each vial so that the stopper could not be opened by anyone but the toxicologist. She then labeled, initialed, and sealed the outer box containing the blood samples. The defense made no objection to Dr. Clark's testimony.

Toxicologist Eugene Schwilke tested Mr. Russell's blood sample. He said the two vials were received via certified mail at the State Lab on June 8, 2001, and did not appear to have been tampered with when he received them. He stated that the vials were manufactured by Becton Dickinson and contained a gray top leak-proof rubber cap. The gray top is color coding for the presence of substances inserted in the vials by the manufacturer—the anticoagulant (potassium oxalate) and a preservative or enzyme poison (sodium fluoride). He said the laboratory receives these vials from the manufacturer and creates the specimen collection kits for distribution to law enforcement agencies for the explicit purpose of collecting blood samples.

Mr. Russell then objected that Mr. Schwilke lacked personal knowledge that Mr.

Russell's vials actually contained potassium oxalate and sodium fluoride. On defense counsel's voir dire, Mr. Schwilke acknowledged he was not involved in the manufacture of the vials or the adding of preservatives. He said he relied on information provided by others to form his basis of knowledge, specifically the manufacturer's certificates of compliance stating what substances the vials contain. He had no documentation to confirm a lot number for the vials in this case to compare with a certificate of compliance, nor did he know the expiration date of the vials. He did state, however, in answer to the prosecutor's question that he had knowledge of what was in the vials by the "manufacturer's—certificate of compliance that is—available whenever we receive a shipment." RP at 4110. The court overruled Mr. Russell's objection on the basis it goes to weight.

Mr. Schwilke then testified that the substances in the vials were potassium oxalate and sodium fluoride. The sodium fluoride is an enzyme poison preservative that maintains the integrity of the sample by preventing degradation of the alcohol in the vial, while the potassium oxalate prevents clotting or coagulating of the blood. Mr. Schwilke saw no evidence of clotting when he tested Mr. Russell's blood sample. He said the vials had previously been properly chemically cleaned and dried. He labeled them and tested the contents for ethanol. He recorded the test results in terms of grams of ethanol per 100

milliliters of blood. Based on this testimony, the State then moved to admit the test results. Defense counsel made a two-fold objection; first, based upon an earlier standing objection to the prosecutor's asking leading questions whether the State Lab's testing procedures in this case complied with Washington administrative code requirements, and, second, to Mr. Schwilke's lack of personal knowledge of what was in the vials. The court overruled the objection. Mr. Schwilke then testified that the result of Mr. Russell's blood alcohol test was 0.12.

A trial court's ruling on the admission of a blood alcohol test result is reviewed for an abuse of discretion. *State v. Brown*, 145 Wn. App. 62, 69, 184 P.3d 1284 (2008); *Hultenschmidt*, 125 Wn. App. at 264. A defendant challenging admission of the test result bears the burden of showing an abuse of discretion. *Brown*, 145 Wn. App. at 69; *State v. Sponburgh*, 84 Wn.2d 203, 210, 525 P.2d 238 (1974). "The trial court abuses its discretion when it admits evidence of a blood test result in the face of insufficient prima facie evidence." *Brown*, 145 Wn. App. at 69 (citing *State v. Bosio*, 107 Wn. App. 462, 468, 27 P.3d 636 (2001)).

Well settled foundational requirements are reiterated in *Brown*:

> "Prima facie evidence" is defined under the driving under the influence of an intoxicant statute as "evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved." RCW 46.61.506(4)(b). To determine the sufficiency of the evidence of foundational facts, the court must assume the truth of the

> State's evidence and all reasonable inferences from it in a light most favorable to the State. *Id.*
>
> In order to admit blood alcohol test results, "the State must present prima facie proof that the test chemicals and the blood sample are free from any adulteration which could conceivably introduce error to the test results." *State v. Clark*, 62 Wn. App. 263, 270, 814 P.2d 222 (1991). "[A] blood sample analysis is admissible to show intoxication under RCW 46.61.502 only when it is performed according to WAC [Washington Administrative Code] requirements." *Hultenschmidt*, 125 Wn. App. at 265.
>
> The WAC requires:
>
> > 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."
>
> WAC 448-14-020(3)(b).
>
> The purpose of requiring the use of anticoagulants and enzyme poison in the blood sample is to prevent clotting and/or loss of alcohol concentration in the sample. *Clark*, 62 Wn. App. at 270. Fulfillment of the requirements of WAC 448-14-020(3)(b) is mandatory, notwithstanding the State's ability to establish a prima facie case that the sample was unadulterated. *Bosio*, 107 Wn. App. at 468; *State v. Garrett*, 80 Wn. App. 651, 654, 910 P.2d 552 (1996). Once a prima facie showing is made, it is for the jury to determine the weight to be attached to the evidence. RCW 46.61.506(4)(c); *Hoffman v. Tracy*, 67 Wn.2d 31, 35, 406 P.2d 323 (1965).

Brown, 145 Wn. App. at 69-70 (footnote omitted).

In *Brown*, the court explained that the WAC regulation does not require anyone with firsthand knowledge to testify as to what was contained in the vials used for a blood sample prior to the blood draw. *Id.* at 71. Instead, the regulation requires only that the blood samples "'be preserved with an anticoagulant and an enzyme poison sufficient in

amount to prevent clotting and stabilize the alcohol concentration.'" *Id.* (quoting WAC 448-14-020(3)(b)). Further, there is a relaxed standard for foundational facts under the blood alcohol statute in that the court assumes the truth of the State's evidence and all reasonable inferences from it are viewed in a light most favorable to the State. *Id*. (citing RCW 46.61.506(4)(b)).

Here, Trooper Murphy observed that the vials contained a white powder and that nothing was added to the vials other than Mr. Russell's blood. Dr. Clark, relying on her education and experience, testified without objection that she believed the gray-topped vials in the standardized kit she received from Trooper Murphy contained a white powder that is a combination of potassium oxalate and sodium fluoride. Mr. Schwilke testified that the vials he analyzed were standardized vials provided by manufacturer Becton Dickinson for the specific purpose of collecting blood samples for this type of forensic analysis. He explained that the gray top is a color coding used to designate that the vials contain potassium oxalate and sodium fluoride. He explained that the sodium fluoride is an enzyme poison and preservative which maintains the integrity of the sample and prevents degradation of the alcohol concentration and that the potassium oxalate is an anticoagulant that prevents clotting after the blood sample is collected. He testified that he did not observe any clotting in Mr. Russell's samples at the time he tested them.

Defense counsel asked Mr. Schwilke what information he used to know what substances were in the vials. Mr. Schwilke answered that he used certificates of compliance provided by the manufacturer in the shipment.

Mr. Russell is correct that under *Brown* and *State v. Nation*, the certificates of compliance are inadmissible hearsay. *See Brown*, 145 Wn. App. at 74-75 (citing *State v. Nation*, 110 Wn. App. 651, 663, 41 P.3d 1204 (2002)). But the certificates were not admitted into evidence and were not necessary in view of reasonable inferences from the testimony of Dr. Clark and Mr. Schwilke that the vials contained potassium oxalate and sodium fluoride, and Mr. Schwilke's testimony that Mr. Russell's blood sample had not clotted at the time of the test positive for alcohol. Instead, consistent with *Brown*, the trial court properly relied on Mr. Schwilke's reference to the certificates for limited foundational purposes under ER 104(a) and ER 1101(c)(1). *Brown*, 145 Wn. App. at 75.

In these circumstances, the court did not err by ruling that the State established the required foundation for admission of the test results. The court's ruling is also consistent with other cases upholding admission of forensic blood test results based upon a toxicologist's knowledge regarding expected contents of standardized vials in conjunction with other factors to establish a prima facie case. *See State v. Wilbur-Bobb*, 134 Wn. App. 627, 631-32, 141 P.3d 665 (2006); *Steinbrunn*, 54 Wn. App. at 512-13; *State v.*

Barefield, 47 Wn. App. 444, 458, 735 P.2d 1339 (1987), *aff'd*, 110 Wn.2d 728, 756 P.2d 731 (1988).

And the State did not further refer to the manufacturer certificates on direct examination of Mr. Schwilke. On cross-examination, defense counsel attacked the weight of the evidence by confirming that particular certificates of compliance Mr. Schwilke had reviewed did not specify how much chemical was put into Mr. Russell's vials, yet the certificates require ranges of 22.5 to 28.8 milligrams of sodium fluoride and 17.5 to 23 milligrams of potassium oxalate. The certificates also state that the vacuum vials are set to draw blood in the range of 9.30 to 10.7 milliliters—an amount greater than the 8 milliliters contained in Mr. Russell's vials. Mr. Schwilke denied, however, that this deviation in the proportion of blood to chemicals would materially impact the test results. On the State's redirect examination, Mr. Schwilke testified that the chemical ranges discussed on cross-examination were sufficient in amount to prevent clotting and stabilize the alcohol concentration in Mr. Russell's blood and that the 8 milliliters of blood in his vials was an appropriate amount in terms of the preservatives used to test the blood alcohol concentration.

Mr. Russell did not object to testimony regarding contents of certificates of compliance, and he solicited the information from Mr. Schwilke. He thus waived his

challenge to Mr. Schwilke's testimony about the contents of the certificates. And his hearsay and confrontation challenges based upon *Brown*, *Nation*, and *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) fall by the wayside.

In both *Brown* and *Nation*, the court erred by admitting hearsay evidence that did not fall within any ER 703 or ER 705 exception, although the error was harmless in *Brown*. Similarly, in *Melendez-Diaz*, the Court held it was error under the confrontation clause to admit testimonial certificates of analysis showing results of forensic analysis performed on controlled substances when the analysts themselves did not testify at trial. *Melendez-Diaz*, 129 S. Ct. at 2532. Here, other than for foundational purposes, the only substantive reference to the certificates of compliance was brought by the defense. Mr. Russell's arguments all fail.

Chain of Custody for Forensic Blood Samples. The State is correct that Mr. Russell did not make a chain of custody objection at trial. His foundation objection was to Mr. Schwilke's alleged lack of personal knowledge regarding contents of the vials. Error may not be predicated on a ruling admitting evidence unless a timely objection is made "stating the specific ground of objection." ER 103(a)(1). Thus, a general lack of foundation objection will not preserve a chain of custody objection for appeal. *City of*

Seattle v. Carnell, 79 Wn. App. 400, 403, 902 P.2d 186 (1995). Mr. Russell's chain of custody challenge is waived on appeal. And his argument fails in any event.

"'Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed.'" *State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336 (1998) (quoting *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984)). A trial court's decision regarding sufficiency of chain of custody is reviewed for an abuse of discretion. *Campbell*, 103 Wn.2d at 21.

Here, the State established a sufficient chain of custody for the forensic blood evidence. Trooper Murphy testified that the State Lab provides him with sealed blood test kits that he keeps in the locked trunk of his patrol car. He gave Dr. Clark an untampered-with kit containing two vials to take Mr. Russell's blood draw. He watched Dr. Clark draw Mr. Russell's blood into the two vials and observed that nothing but the blood was added to the vials. He then took the vials back from Dr. Clark, labeled them with Mr. Russell's name and date of birth, the time and date, his badge number, and the case number. Trooper Murphy secured the vials and locked them in his patrol car until he personally handed them to Detective Fenn late in the day on June 5. Dr. Clark testified that nothing was added to the vials except Mr. Russell's blood. After drawing the blood,

she labeled and sealed each tube so that the stopper could not be opened by anyone but the toxicologist. She then labeled, initialed and sealed the outer box containing the blood samples.

Detective Fenn testified that he received the two vials of Mr. Russell's blood from Trooper Murphy and personally transported them to the WSP district office. There, he filled out identifying paperwork and secured the vials and paperwork in a locked box so that the evidence officer could mail the vials to the State Lab for testing. Mr. Schwilke testified that he believed Mr. Russell's blood samples were received by certified mail at the State Lab on June 8, 2001, and did not appear to have been tampered with in any way at the time he received them for testing.

Mr. Russell waived the chain of custody issue and the State established it in any event.

Jury Instructions 14 and 20—Superseding Intervening Cause. Mr. Russell argued that substantial evidence showed the driving of Mr. Hart was the superseding intervening cause of the accident. Specifically, he contends that the evidence would allow the jury to find that Mr. Hart was not on the highway shoulder as Mr. Russell was passing but was, instead, stopped in the lane of travel, thus invoking an automatic avoidance response by Mr. Russell to steer away from Mr. Hart's vehicle into oncoming traffic. Such avoidance

response would not necessarily be impacted by what a person had to drink. Moreover, a driver engaged in avoidance response would accelerate in an attempt to pass Mr. Hart's vehicle and return to the correct lane as soon as possible.

According to Mr. Russell, an appropriate proximate cause analysis could then indicate (1) the victim's deaths and injuries resulted from the collision between Mr. Russell's SUV and the Cadillac; (2) the collision between the Cadillac and Mr. Russell's SUV occurred due to the loss of the left front tire of Mr. Russell's SUV, the inward cant of the right front tire, and the loss of steering control; (3) the damage to Mr. Russell's SUV resulting in loss of steering control was caused by the impact with Ms. Lundt's Geo; the condition of Mr. Russell's SUV following the impact with Ms. Lundt's Geo created a high-speed cutting instrument due to the lift kit on the SUV's front end. Mr. Russell's SUV sliced open and demolished the Cadillac; and (4) the impact with Ms. Lundt's Geo can be attributed to any one or more of the following: (a) Mr. Hart's actions, (b) the speed of Mr. Russell's SUV, and/or (c) the fact Mr. Russell had been drinking.

Mr. Russell contends the court erred by refusing to give his proposed proximate cause instruction 7. Proposed instruction 7 states:

> An intoxicated defendant may avoid responsibility for the death or substantial bodily harm to another, which results from his driving if the death or the substantial bodily harm is caused by a superseding, intervening event.

CP at 1187.

11A *Washington Practice: Washington Pattern Jury Instructions: Criminal* 90.08, at 261 (3d ed. 2008) (WPIC) states:

> VEHICULAR HOMICIDE AND ASSAULT—CONDUCT OF ANOTHER
>
> If you are satisfied beyond a reasonable doubt that the *[[act] [or] [omission]] [driving]* of the defendant was a proximate cause of *[the death] [substantial bodily harm to another]*, it is not a defense that the *[conduct] [driving]* of *[the deceased] [or] [another]* may also have been a proximate cause of the *[death] [substantial bodily harm]*.
>
> [However, if a proximate cause of *[the death] [substantial bodily harm]* was a new independent intervening act of *[the deceased] [the injured person] [or] [another]* which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the *[death] [substantial bodily harm]*. An intervening cause is an action that actively operates to produce harm to another after the defendant's *[act] [or] [omission]* has been committed *[or begun]*.]
>
> [However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the *[death] [substantial bodily harm]* fall within the general field of danger which the defendant should have reasonably anticipated.]

Here, the court reworked WPIC 90.08 by modifying paragraphs one and two to create instructions 14 and 20. Paragraph three remained unchanged. Instruction 14 provides:

> With respect to a charge of Vehicular Homicide, conduct of a defendant is not a "proximate cause" of death if death is caused by a

> superseding, intervening event.
>
> A superseding, intervening event is a new, independent intervening act of another person, which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen. An intervening cause is an action that actively operates to produce harm to another after the defendant's act has been committed or began.
>
> However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act, and the defendant's act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that death fall within the general field of danger which the defendant should have reasonably anticipated.

CP at 1224. Instruction 20 is identical to instruction 14 except that it refers to vehicular assault and serious bodily injury.

Although Mr. Russell objected to inclusion of paragraph three in instructions 14 and 20 at trial, he does not challenge it on appeal.

Jury instructions are sufficient when they allow the parties to argue their case theory, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010) (quoting *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)). A court's specific wording of jury instructions is reviewed for an abuse of discretion. *State v. Trout*, 125 Wn. App. 403, 416, 105 P.3d 69 (2005) (citing *State v. Harris*, 97 Wn. App. 865, 870, 989 P.2d 553 (1999)). Alleged error in jury instructions is reviewed de novo.

State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008). Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). It is reversible error if the instructions relieve the State of that burden. *Id.*

Instructions 14 and 20 define superseding intervening event, the existence of which, according to those instructions, precludes Mr. Russell's conduct from being a proximate cause of the death or serious bodily injury. Proximate cause is defined in instructions 13 and 19. Instruction 13 provides:

> To constitute vehicular homicide, there must be a causal connection between the death of a human being and the driving of a defendant so that the act done or omitted was a proximate cause of the resulting death.
>
> The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.
>
> There may be more than one proximate cause of a death.

CP at 1223. Instruction 19 was identical to instruction 13 except that it refers to vehicular assault and serious bodily injury.

Thus, in combination, the instructions defined both superseding intervening event and proximate cause so as to inform the jury under what circumstances Mr. Russell's

conduct may or may not be considered a proximate cause of the deaths and injuries. As the State argues, given the combination of instructions 13 and 19 (properly defining proximate cause) and instructions 14 and 20 (explaining that the proximate cause element is lacking if a new independent cause breaks the direct sequence between the act and the death or substantial bodily harm), Mr. Russell's proposed instruction 7 was duplicative and properly rejected by the trial court.

Most critically, instruction 5 informed the jury that the State had the burden of proving each element of the crime beyond a reasonable doubt. And proximate cause was properly included as part of the elements in all three vehicular homicide and all three vehicular assault "to convict" instructions, which required the jury to find each element of the crime beyond a reasonable doubt. The instructions in no way precluded Mr. Russell from arguing his theory of the case that reasonable doubt as to proximate cause existed due to intervening actions of Mr. Hart that superseded any cause attributable to Mr. Russell's speeding or alcohol consumption. In fact, defense counsel articulated these points to the jury in closing.

We conclude the instructions comported with the law and did not lessen the State's burden of proving proximate cause beyond a reasonable doubt. Mr. Russell shows no abuse of discretion by the court in the wording of the instructions. He shows no manifest

error affecting a constitutional right and thus waived his challenge to instructions 14 and 20. The court did not err by refusing Mr. Russell's proposed instruction 7.

Attorney-Client Privilege. Mr. Russell asserts that the work product doctrine or the attorney-client privilege were violated by the court allowing the State to present rebuttal expert testimony from Geoffrey Genther who was originally hired by Mr. Russell's first attorney in 2001 as an accident reconstruction consultant. Mr. Russell's first attorney provided Mr. Genther's report to the State in discovery prior to the 2001 scheduled trial. Mr. Russell obtained new counsel in 2006 after his extradition to the United States. His new attorneys hired accident reconstruction expert Richard Chapman, who testified for Mr. Russell at trial. The defense did not intend to call Mr. Genther at the 2007 trial, nor was he personally named on the witness list for the 2001 scheduled trial. Over Mr. Russell's objections for violation of the attorney work product doctrine and the attorney-client privilege, the court allowed the State to call Mr. Genther as a rebuttal witness.

Mr. Genther, an expert in speed analysis, testified as to his findings regarding the accident. He agreed with the State's experts that speed of the vehicles involved in the crash was affected by too many variables to be competently calculated. He also testified he found no evidence that Mr. Russell had taken evasive action at any point in the

collision chain; or, that the vehicle in front of Mr. Russell's SUV, Mr. Hart's vehicle, had swerved to the shoulder and back onto the road into Mr. Russell's path. Mr. Genther also said that had Mr. Russell taken an evasive maneuver prior to hitting the green Geo, Mr. Genther would have expected to find a critical speed yaw mark in the road; or, if Mr. Hart's vehicle was passed at 67 m.p.h. to 70 m.p.h. and had suddenly stopped in the roadway, a rear-end collision would be expected. The jury was not told who previously hired Mr. Genther as a consultant.

Rebuttal evidence generally is admitted to answer new matters raised by the defense. *State v. Swan*, 114 Wn.2d 613, 652-53, 790 P.2d 610 (1990) (quoting *State v. White*, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968)). It is not simply a reiteration of the evidence in chief. *White*, 74 Wn.2d at 394-95. Ascertaining when rebuttal evidence is in reply to new matters may be difficult, and often genuine rebuttal evidence will overlap the evidence in chief. *Id.* at 395. Consequently, the admissibility of evidence on rebuttal is subject to the discretion of the trial court and will be reversed only on a showing of a manifest abuse of discretion. *Id.* The court's application of the work product doctrine in deciding whether to allow a witness to testify is likewise reviewed for an abuse of discretion. *Harris v. Drake*, 152 Wn.2d 480, 492, 99 P.3d 872 (2004). An incorrect legal analysis or other legal error can constitute an abuse of discretion. *State v. Tobin*,

161 Wn.2d 517, 523, 166 P.3d 1167 (2007). Mr. Russell shows no error here.

Preliminarily, the record is clear that Mr. Genther was at least considered a consulting expert when he was retained in 2001. Therefore, Mr. Genther was an expert within the contemplation of CrR 4.7(a)(1)(iv) and CrR 4.7(g).

"The work product doctrine protects from discovery an attorney's work product, so that attorneys can 'work with a certain degree of privacy and plan strategy without undue interference.'" *State v. Pawlyk*, 115 Wn.2d 457, 475, 800 P.2d 338 (1990) (quoting *Coburn v. Seda*, 101 Wn.2d 270, 274, 677 P.2d 173 (1984)). In the criminal law context, the doctrine applies to the "'research[,] records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies." *Pawlyk*, 115 Wn.2d at 477 (quoting CrR 4.7(f)(1)).

However, the court in *Pawlyk* explained that the work product protection in CrR 4.7(f)(1) does not extend to certain reports and testimony of experts:

> The exception noted in the rule, CrR 4.7(a)(1)(iv), directs disclosure by the prosecution of "any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons." CrR 4.7(g) similarly allows discovery of such information from the defense, although, as noted above, this section pertains to such materials to be relied upon by defendant at trial. The point to be made is, however, that CrR 4.7 plainly contemplates that such information is not protected by the work product doctrine.

Pawlyk, 115 Wn.2d at 478.

The *Pawlyk* court thus held that the State was entitled to discovery of the written reports and opinions of a psychiatrist who examined the defendant for purposes of a possible insanity defense regardless of whether the defense intended to call that expert as a witness. *Id.* The court reasoned that because the defense had put the question of insanity at issue, the State had an exceptional need for evidence to rebut the insanity defense and neither constitutional principles nor the attorney-client privilege provided protection from disclosure. In *State v. Hamlet*, 133 Wn.2d 314, 319-25, 944 P.2d 1026 (1997), the court extended the *Pawlyk* holding to a psychiatrist who examined the defendant for the purpose of a possible diminished capacity defense.

Here, in allowing the State to present Mr. Genther's rebuttal testimony, the court reasoned that *Pawlyk* and *Hamlet* appeared to authorize the State's discovery of his report. But even if not, the work product rule was waived by prior counsel's disclosure and there is no rule in the criminal context that waiver can only be made by the defendant. The court also explained that the attorney-client privilege does not apply when the communications disclosed by former defense counsel to the State were not between the client (Mr. Russell) and his attorney.

In any event, whether Mr. Genther was going to be called to testify is not

dispositive under *Pawlyk*, so long as the State needed Mr. Genther's testimony to rebut Mr. Russell's expert's claims. *See Pawlyk*, 115 Wn.2d at 478. Mr. Russell did object at trial under ER 403 that Mr. Genther's rebuttal testimony would be cumulative of two other State's witnesses regarding inability to do speed calculations for vehicles involved in the accident. The State argued the evidence was needed because Mr. Genther was the only non-WSP investigator who also actually conducted an analysis at the accident site. The court overruled Mr. Russell's objection. On appeal, Mr. Russell makes no argument that the rebuttal evidence was merely cumulative. He does not discuss any of the rebuttal testimony, nor does he attempt to show prejudice. Any cumulative evidence/ER 403 issues are therefore waived.

We conclude the trial court did not commit prejudicial error by admitting Mr. Genther's rebuttal testimony under *Pawlyk*. Further, the trial court correctly ruled that the work product doctrine was waived in any event when prior defense counsel gave Mr. Genther's report to the prosecutor pending the 2001 scheduled trial. As the court stated in *Limstrom v. Ladenburg*:

> [G]enerally, a party can waive the attorney work product privilege as a result of its own actions. *United States v. Nobles*, 422 U.S. 225, 239, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975). If a party discloses documents to other persons with the intention that an adversary can see the documents, waiver generally results. *In re Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981).

Limstrom v. Ladenburg, 110 Wn. App. 133, 145, 39 P.3d 351 (2002). These principles apply here.

Mr. Russell's citation to *Soter v. Cowles Publishing Company*, 131 Wn. App. 882, 893, 130 P.3d 840 (2006), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007) is misplaced. By citing *Soter*, Mr. Russell apparently suggests that under CR 26(b)(5)(B), the State must demonstrate exceptional circumstances before disclosure of Mr. Genther's work product and admission of his testimony may be had.[8] But as the State explains, "the civil rules by their very terms apply only to civil cases" and not to criminal procedure. *State v. Gonzalez*, 110 Wn.2d 738, 744, 757 P.2d 925 (1988). As *Gonzalez* states, "'CrR 4.7 sets out the exact obligations of the prosecutor and defendant in engaging in discovery, the detail of which suggests to us that no further supplementation should be sought from the civil rules.'" *Pawlyk*, 115 Wn.2d at 476 (quoting *Gonzalez* 110 Wn.2d at 744).

The attorney-client privilege is also not applicable here. "The attorney-client privilege, codified in RCW 5.60.060, protects confidential attorney-client communications from discovery so clients will not hesitate to fully inform their attorneys

[8] In relevant part, CR 26(b)(5)(B), which applies to facts and opinions acquired or developed in anticipation of litigation, provides that a party may obtain facts known or opinions held by an expert who is not expected to be called as a witness only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

of all relevant facts." *Barry v. USAA*, 98 Wn. App. 199, 204, 989 P.2d 1172 (1999). The attorney-client privilege operates independently of the work product rule and vice versa. 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 501.9, at 145 (5th ed. 2007). The privilege is generally limited to communications between attorney and client. It does not ordinarily extend to "communications between an attorney and a third party on a client's behalf, nor does it protect materials compiled by an attorney from outside sources on a client's behalf. Such communications may be protected by the work product rule, but not the privilege." Tegland, *supra*, § 501.10, at 145-46.

Such is the case here. The report from Mr. Genther was not a protected communication made by Mr. Russell. Protections, if any, were under the work product rule, which was waived in this case.

Finally, Mr. Russell's citation to *Dietz v. Doe*, 131 Wn.2d 835, 846, 935 P.2d 611 (1997), as authority that the attorney-client privilege protects Mr. Genther's report and precludes his testimony because the privilege applies to any information generated by a request for legal advice is misplaced. The passage Mr. Russell refers to in *Dietz* pertains to situations where disclosure of a client's identity is protected by the attorney-client privilege. *Id*. at 846-47. Further, although Mr. Russell is correct that only the client may

waive the attorney-client privilege,[9] the trial court correctly observed that the privilege does not apply to the materials Mr. Genther gave to former defense counsel.

Vouching. Mr. Russell contends that the court erred by allowing Detective Ryan Spangler to vouch for the credibility of two other detectives. During the State's rebuttal testimony of Detective Spangler with regard to the defense expert Mr. Chapman's testimony about vehicle speed calculations, Detective Spangler testified that some of Mr. Chapman's mathematical calculations were incorrect but that he (Detective Spangler) would not have even done speed calculations because there are "simply too many assumptions that have to be made." RP at 4859. Detective Spangler said that for him to make assumptions about certain factors and do calculations of them for an official report to be submitted to the court "I believe that I would be sacrificing my integrity." RP at 4863. On cross-examination, defense counsel explored the subject of potential bias, including why similarly trained patrol detectives conducting an accident investigation would, or would not, see the need to collect information on determining speed. Detective Spangler said that if the investigation showed the need for speed analysis and there were not too many assumptions to be made, he would absolutely do the analysis. Defense counsel then asked whether he agreed that it would be improper to allow investigative

[9] *State v. Emmanuel*, 42 Wn.2d 799, 815, 259 P.2d 845 (1953).

bias to play a role in an investigation. Detective Spangler answered, "Absolutely." RP at 4887.

On redirect, Detective Spangler acknowledged reviewing all of the case materials compiled by Detective Fenn. The prosecutor then asked, "And based upon your review of those materials do you believe investigative bias played a role in that investigation?" RP at 4889. Defense counsel objected on grounds of speculation because Detective Spangler was not with Detective Fenn during the investigation. The court overruled the objection. Detective Spangler then responded that "Detective Fenn and Detective Snowden exercised efforts to avoid investigative bias because they chose to exercise integrity and not make calculations based on assumptions." RP at 4890. Mr. Russell did not object to the response, move to strike, or request a curative instruction.

Instead, Detective Spangler clarified in response to defense counsel's questions on re-cross that he was making absolutely no inference that Mr. Chapman lacked honesty or integrity. He said that Mr. Chapman was using acceptable methodology and that his assumptions were an honest determination, but that assumptions were more appropriately used in civil matters where the necessity is to show facts by a preponderance of the evidence as opposed to proof beyond a reasonable doubt. Detective Spangler explained that he presents facts based upon as few assumptions as possible in a criminal case.

"The State cannot indirectly vouch for a witness by eliciting testimony from an expert or a police officer concerning the credibility of a crucial witness." *State v. Chavez*, 76 Wn. App. 293, 299, 884 P.2d 624 (1994). "Such an opinion invades the province of the jury." *Id*. (citing *State v. Walden*, 69 Wn. App. 183, 186, 847 P.2d 956 (1993)). Impermissible opinion testimony violates a defendant's constitutional right to a jury trial, including the independent determination of the facts by the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (quoting *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993)).

The State is correct that Mr. Russell did not object on the basis of vouching; but as Mr. Russell points out, invading the province of the jury is an error of constitutional dimension. In any event, when placed in full context, it is apparent from Detective Spangler's testimony that he was not vouching for the other detectives' credibility when he said they exercised efforts to avoid investigative bias by choosing to exercise integrity and not make calculations based upon assumptions.

First, defense counsel opened the door on the topic of investigative bias, and it was appropriate for the State to elicit a response on redirect. *State v. Gallagher*, 112 Wn. App. 601, 610, 51 P.3d 100 (2002). Second, it was defense counsel who elicited

clarification from Detective Spangler on the concept of integrity as referring not to witness credibility, but to the soundness of factual analysis not based upon assumptions. In essence, Detective Spangler vouched only for the other detective's *methodology* over that of Mr. Chapman. Moreover, Mr. Russell articulates no prejudice from any testimony that may be interpreted as improper. *Chavez*, 76 Wn. App. at 299. His contentions are unpersuasive.

Cumulative Error. The cumulative error doctrine allows a defendant a new trial if multiple errors rendered the trial fundamentally unfair. *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). Based upon the above analyses, there is no accumulation of errors that deprived Mr. Russell of a fair trial.

Credit for Time Served. Mr. Russell was charged with the vehicular homicide and vehicular assault crimes by amended information filed June 18, 2001. He was released on bail pending trial, but failed to appear for a readiness hearing on October 26, 2001. A nationwide bench warrant was issued that day. On November 5, 2001, the United States Attorney's Office filed a complaint charging Mr. Russell with unlawful flight to avoid prosecution and issued a federal arrest warrant. He was charged with bail jumping on

November 7, 2001, and a nationwide bench warrant was also issued for that crime. On March 6, 2002, he was charged in Whitman County with forgery and second degree theft for allegedly taking a $1,300 check from his father and cashing it. A nationwide arrest warrant was issued in that matter.

On October 23, 2005, Mr. Russell was located in Ireland. He spent 384 days in confinement in Ireland fighting his extradition to the United States. Irish authorities notified Whitman County that bail jumping is not an extraditable offense under the Irish extradition treaty, and that the Irish government would not consider extraditing Mr. Russell to the United States unless Whitman County agreed to drop the bail jumping charge. The Whitman County prosecutor agreed not prosecute that charge and later dropped the charge. On October 25, 2006, the Irish High Court issued an order returning Mr. Russell to the United States. On November 9, 2006, after Mr. Russell arrived in the United States, the federal unlawful flight to avoid prosecution charge was dismissed because that also was not an extraditable offense under the terms of the extradition treaty.

On January 2, 2008, Mr. Russell was sentenced to 171 months for his vehicular homicide and vehicular assault convictions. The court gave him credit for 363 days served in the Whitman County Jail while awaiting trial on these charges but denied him credit for 384 days spent in confinement in Ireland while fighting extradition. Also on

January 2, 2008, after the court signed the judgment and sentence, the court granted the State's motion to dismiss the forgery and second degree theft charges for inability to prove those charges.

With regard to the 384 days of confinement in Ireland, the court found Mr. Russell was not held there on the state bail jumping or federal unlawful flight charges, nor was he fulfilling any confinement obligation for any sentence resulting from conviction for any offense. The court reasoned, however, that he was not confined solely because of the vehicular homicide and assault charges but also because of the Washington forgery and theft charges. The court thus reasoned it had discretion under RCW 9.94A.505(6)[10] to deny him credit for time served in Ireland because he was held there on more than one charge.

RCW 9.94A.505(6) provides:

> The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was *solely in regard to the offense for which the offender is being sentenced*.

(Emphasis added.)

Mr. Russell contends the sentencing court misapplied this statute by not giving him credit for his confinement time in Ireland when additional charges in all other federal

[10] The version of the statute in effect at the time of Mr. Russell's crime was former RCW 9.94A.120(17) (2000). The language in each version is identical.

and state cause numbers were ultimately dismissed.

Statutory interpretation involves questions of law reviewed de novo. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). A court's primary objective when interpreting a statute is to determine the legislature's intent. *Id.* If a statute's meaning is plain on its face, we must give effect to that plain meaning as the expression of legislative intent. *Id.* (quoting *Dep't of Ecology v. Campbell & Gwinn*, *L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). In ascertaining the plain meaning of a statute, we look not only to the ordinary meaning of the language at issue, but also to the general context of the statute, related provisions, and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600. We also construe statutes consistent with their underlying purposes while avoiding constitutional deficiencies. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). If a statutory provision is subject to more than one reasonable interpretation, it is ambiguous and the rule of lenity requires us to interpret the statute in favor of the defendant. *Jacobs*, 154 Wn.2d at 600-01. In construing a statute, we presume the legislature did not intend absurd results. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003)).

Case law and constitutional mandate require that an offender receive credit for all pretrial detention served. *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992).

"Failure to allow such credit violates due process, denies equal protection, and offends the prohibition against multiple punishments." *In re Pers. Restraint of Costello*, 131 Wn. App. 828, 832, 129 P.3d 827 (2006).

In *Costello*, the court stated that former RCW 9.94A.120(17) (now renumbered as RCW 9.94A.505(6)) "'simply represents the codification of the constitutional requirement that an offender is entitled to credit for time served prior to sentencing.'" *Costello*, 131 Wn. App. at 833 (quoting *State v. Williams*, 59 Wn. App. 379, 382, 796 P.2d 1301 (1990)). But credit is not allowed for time served on other charges. *In re Pers. Restraint of Phelan*, 97 Wn.2d 590, 597, 647 P.2d 1026 (1982).

Here, the State reads RCW 9.94A.505(6) to literally mean that Mr. Russell is not entitled to credit for time served in Ireland for the vehicular homicide and assault charges because he was also being held there on other pending charges. In other words, since he was incarcerated also *in regard* to the warrants for forgery and theft charges and, according to the State also on the warrants for unlawful flight and bail jumping, he was not being held *solely in regard* to the vehicular homicide and assault crimes for which he was sentenced. The State asserts that Mr. Russell's analysis is faulty because he ignores the word "solely."

But the State's interpretation fails to consider the statute in proper context given

that no other sentence resulting from any other conviction is involved. All of the other charges were dropped, so there is no other offense subject to sentencing. And as observed in Washington Practice commentary:

> Credit is . . . not allowed for time served on other charges, even if the sentence is concurrent with the sentence on those charges. If, however, the offender is confined on two charges simultaneously, any time not credited towards one charge must be credited towards the other.

13B Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law, ch. 36, § 3603, at 320 (2d ed.1998) (footnotes omitted). Cases involving the pertinent statute (which has been renumbered several times and is now RCW 9.94A.505(6))—are consistent with these principles and illustrate a two-fold purpose of the statute—to follow the constitutional mandate of day-for-day credit, while not allowing double credit toward any sentence arising from any conviction.

For example, in *Williams*, Richard Williams was a parolee at the time he committed a robbery. *Williams*, 59 Wn. App. at 380. His parole was immediately suspended upon his arrest. The court denied his request under former RCW 9.94A.120(12) (now RCW 9.94A.505(6)) for 70 days presentence jail credit from the date of arrest until sentencing on the robbery. *Williams*, 59 Wn. App. at 382-83. The robbery sentence ran consecutive to the prior sentence, and since Mr. Williams received the 70 days' credit toward the prior revoked parole sentence, the court explained that the

legislature would not have intended the absurd result of his receiving double credit for jail time pending the robbery trial and sentencing. *Id.* at 381. The court concluded that because Mr. Williams was detained based on suspension of his parole, he was not confined "solely" on the robbery charge during the time he was in jail and, thus, he was not entitled to jail credit for the robbery conviction. *Id*. at 382-83. It is clear, however, that the court in *Williams* was following the constitutional mandate of day-for-day credit when it awarded 70 days' credit for one conviction or the other, but not both. *Id*. at 381-82.

Similarly, in *Costello*, Tony Costello was sentenced for crimes in 2001, and subsequently received a consecutive sentence for other crimes under a separate cause number in 2002. *Costello*, 131 Wn. App. at 831. County jail staff certified 317 days of credit for time served and 158 days of good time credit on each cause number for a single time period. *Id.* Mindful of the constitutional mandate of day-for-day credit as reflected in former RCW 9.94A.120(17) (now RCW 9.94A.505(6)), the court held that an offender serving multiple consecutive sentences is not entitled to have credit for a discrete period of confinement applied to each consecutive sentence, as this would result in a multiple award of credit. *Costello*, 131 Wn. App. at 832-35. Thus, Mr. Costello was entitled to credit toward the 2001 sentence, but not the 2002 sentence because he was never

confined solely in regard to the 2002 convictions. *Id.* at 834.

In Mr. Russell's cited case *State v. Brown*, 55 Wn. App. 738, 741, 780 P.2d 880 (1989), Monte Brown was arrested in California, living under an assumed name, several months after the information was filed. He spent 83 days confined in California jails while contesting his extradition to Washington. The court determined that Mr. Brown's time served in California was "attributable only to the offenses for which he was convicted and sentenced; they were the sole reason for his confinement." *Id.* at 757. Thus, the plain language of the statute required that credit be given for time served in California. *Id.* *Brown* thus stands for the proposition that contesting the legality of extradition does not preclude the award of credit for time served.

The common theme in the case law is that a defendant always receives constitutionally mandated day-for-day credit for a discrete time period, but only toward one sentence. RCW 9.94A.505(6) serves to preclude double credit toward the sentence for any offense. There was no double credit issue here because there was no other offense and, hence, no other sentence from which double credit could stem. Even though the forgery and theft charges were not formally dismissed until after the judgment was signed, had those charges been pursued to conviction and sentence, Mr. Russell would still receive credit for time served in Ireland on one cause number or the other but not

both. The same is true for any of the other dropped charges had he instead been convicted and sentenced. The State cites no case, and none is found, where a defendant convicted and sentenced under a single cause number, and not subject to any other sentence, was denied pretrial detention credit for his convictions.

The State also cites no authority for the proposition that the court's decision whether to grant credit for time served under RCW 9.94A.505(6) is discretionary. To the contrary, the language in RCW 9.94A.505(6) that the "sentencing court shall give the offender credit" indicates it is mandatory that the court give credit for confinement time to which the offender is entitled. *See*, *e.g.*, *Kabbae v. Dep't of Social & Health Servs*., 144 Wn. App. 432, 442, 192 P.3d 903 (2008) (statute's use of "shall" ordinarily means some action is mandatory).

Mr. Russell correctly argues that if the trial court's conclusions are accepted, an anomaly exists in that a person could be convicted of multiple offenses under multiple cause numbers and never receive credit for any time served as to any single cause number. This would be an absurd result not intended by the legislature. To the extent that the constitutional mandate of day-for-day credit is not clear from the language and context of RCW 9.94A.505(6), and the statute can be interpreted to deprive Mr. Russell of pretrial credit as the State suggests, the rule of lenity resolves any ambiguity in Mr.

Russell's favor. *State v. Van Woerden*, 93 Wn. App. 110, 116, 967 P.2d 14 (1998).

We conclude the court erred by denying Mr. Russell credit for time served in Ireland.

Mr. Russell submits a statement of additional grounds for review. He asserts errors based on his *Miranda* warnings, the IMAA, the forensic blood draw, destruction of blood samples, *Batson* challenges, admission of testimony, and jury instructions. To the extent we have not already disposed of these issues herein, we conclude they are without merit.

In conclusion, we affirm the convictions for vehicular homicide and vehicular assault and the sentences except we remand to the trial court for the limited purpose of awarding credit for total confinement time served in Ireland.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Sweeney, J.

Brown, J.