IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28135-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
SHANE ALLAN CUMMINGS,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. — Shane A. Cummings appeals his conviction for vehicular homicide and his sentencing enhancement based on a prior conviction. He contends the trial court erred in admitting his blood test results and in responding to jury questions. In his statement of additional grounds for review, Mr. Cummings mainly contends ineffective assistance of counsel at sentencing. We affirm.

FACTS

Late on February 18, 2009, Shane A. Cummings drove straight off Hole in the Ground Road (a gravel road) at a curve without braking and went over a 21-foot embankment. The car rolled. Mr. Cummings' passenger, Travis McCay, died. Mr.

Cummings contacted nearby residents Michael and Linda Siler. The Silers called 911 and rendered assistance. The Silers smelled alcohol on Mr. Cummings.

Whitman County Deputy Sheriff Keith Cooper responded first. Deputy Cooper observed Mr. Cummings' eyes were bloodshot and watery and his speech was slurred. The deputy reported an overwhelming smell of intoxicants coming from Mr. Cummings. Mr. Cummings told the officer he had had a couple of drinks with Mr. McCay, starting at 3:00 p.m. Mr. McCay's blood alcohol later tested at .15. The deputy described Mr. Cummings' behavior as oscillating from calm to upset. The deputy saw beer cans and a beer box scattered about the scene. The deputy did not find swerve, skid, or evasive marks on the road when he investigated Mr. Cummings' report of swerving to avoid a deer; nor did he find evidence of a deer having been on the road.

Deputy Cooper asked emergency medical technician (EMT) Richard Lau to assist in a blood draw. Mr. Cummings does not challenge the chain of custody for the blood draw kit, but centers his concern on whether the blood samples were free from adulteration. Deputy Cooper had experience with blood draws. He related he utilized the standard gray-topped vials in the kit. He checked the vials for expiration dates and imperfections and found them normal. Deputy Cooper gave the vials to EMT Lau.

EMT Lau related that the gray-topped vials are solely used by law enforcement based on his experience working with the Washington State Patrol (WSP). EMT Lau did a normal blood draw following routine procedures after checking that the vials were complete and secure. EMT Lau drew the blood while Deputy Cooper observed. EMT

Lau returned the vials to Deputy Cooper, who sealed them in a package and had them sent by certified mail, with returned receipt, to the WSP's toxicology lab.

Asa Louis, a licensed forensic toxicologist at the toxicology lab who had performed about 7,000 blood alcohol tests, received the sealed certified package. It showed no evidence of tampering. Mr. Louis explained within his extensive training and experience that the gray-topped vials must contain an enzyme poison and an anticoagulant. These additives would prevent blood coagulation. He noted the blood had not coagulated, consistent with the presence of the necessary anticoagulant, so that Mr. Cummings' sample would give an accurate snapshot of the blood at the time of drawing. Mr. Louis testified he relies on manufacturer certifications on the vials that the necessary chemicals were present. He testified that State's exhibits 44 through 46, were photographic scans of the relevant tubes performed a few days before trial, partly showing the additives.

Over defense objection that Mr. Louis was relying on hearsay certifications, the trial court admitted the State's exhibits 44 through 46. The court initially reasoned the exhibits were offered at that time "for identification purposes." Report of Proceedings (RP) at 234. Mr. Louis then did not read the certifications, instead relating the information about particular chemicals he would expect to find on a Food and Drug Administration certified gray-topped vial. Over continued objection, the court allowed Mr. Louis' testimony that the manufacturer's labels will show the vials contained sodium fluoride as the enzyme poison and potassium oxylate as the anticoagulant. Mr.

Cummings' blood test was admitted showing .14 grams per 100 milliliters.

The vehicular homicide definition given to the jury included the element of "drives or operates a motor vehicle while under the influence of intoxicating liquor." Clerk's Papers (CP) at 37. The "to convict" instruction, partly stated Mr. Cummings had to be "driving the motor vehicle while under the influence of or affected by intoxicating liquor." CP at 38. Finally, the jury was instructed:

> "A person is under the influence of or affected by the use of intoxicating liquor when he or she has sufficient alcohol in his or her body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable analysis of the person's blood; or when the person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of the intoxicating liquor."

CP at 44.

At the end of the first day of trial, the court told the jurors that they could not "read, or view, or listen to anything" about the case and could not discuss it with any other person. RP at 117, 118. The court similarly admonished the jury on the second day of trial. At 6:05 p.m., during deliberations, the jury sent out a written question to the judge, "Question 'proximate' cause." CP at 52. The record does not show if the court notified the parties, but at 6:10 p.m., the court responded in writing with the following, "The jury will have to refer to the instructions for the answer to this question." CP at 52.

At 7:05 p.m., while the court was excusing the jury for the night, a juror inquired if the jury could look up words in a dictionary. The court replied, "No, you're not." And further admonished no "independent investigation" or "research" was allowed. RP at

400. Another juror asked whether they could take the instructions home, again the court said "[n]o" and reiterated that all deliberations must take place as a jury in the deliberation room. RP at 401. One or more jurors then indicated a continuing struggle with the term "proximate cause." RP at 402-03. The court told the jurors it would address the issue with the parties' counsel the next morning and could not further assist them in the meantime. The jury was dismissed and court recessed for the night at approximately 7:11 p.m. The record is silent regarding whether the parties were notified of the court's jury colloquy and it does not show any further instruction was provided to the jury. At 11:23 a.m., the jury found Mr. Cummings guilty of vehicular homicide.

Mr. Cummings' attorney argued the State could not prove a factual basis for a 2007 Oregon driving while intoxicated conviction or prove that the Shane Cummings convicted in Oregon was the same Shane Cummings here. The State provided eight sentencing exhibits, including a recorded version of the Oregon plea and sentencing hearing. The court found Mr. Cummings was the same man convicted in Oregon, and a factual basis was provided for that guilty plea. Mr. Cummings' standard range sentence was enhanced to 24 months based on his Oregon conviction. Mr. Cummings appealed.

ANALYSIS

A. Admissibility of Blood Test Results

The issue is whether the trial court erred in admitting exhibits 44 through 46 as

part of the evidence supporting the blood test results. Mr. Cummings contends the evidence does not establish he was under the influence of intoxicants because the State relied on certification hearsay that his blood samples contained an enzyme poison.

A trial court's ruling regarding the admission of a blood test is reviewed for abuse of discretion. *State v. Brown*, 145 Wn. App. 62, 69, 184 P.3d 1284 (2008), *review denied*, 165 Wn.2d 1014 (2009). Mr. Cummings has the burden of showing abuse of discretion. *Id*. The trial court abuses its discretion when it admits evidence of a blood test result in the face of insufficient prima facie evidence. *State v. Bosio*, 107 Wn. App. 462, 467-68, 27 P.3d 636 (2001). "Prima facie evidence" is defined under 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). In determining evidence sufficiency for foundational facts, we must assume the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. *Id*.

"Before blood alcohol test results can be admitted into evidence, the State must present prima facie proof that the test chemicals and the blood sample are free from adulteration that could conceivably introduce error to the test results." *State v. Wilbur-Bobb*, 134 Wn. App. 627, 630, 141 P.3d 665 (2006) (citing *State v. Clark*, 62 Wn. App. 263, 270, 814 P.2d 222 (1991)). For purposes of proof, a valid blood test is one that is performed in accordance with the methods approved by the state toxicologist. RCW

46.61.506(3). One regulation promulgated by the state toxicologist requires the use of an enzyme poison to preserve the blood sample for analysis:

> 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).

In *Wilbur-Bobb*, the toxicologist testified that sodium fluoride is the enzyme poison, and is used to prevent the creation or elimination of alcohol in the sample between the time it is taken and the time it is tested. *Wilbur-Bobb*, 134 Wn. App. at 631. At trial, the toxicologist brought a photograph of the vials that held the blood samples. *Id*. The trial judge looked at the pictures and determined that the labels on the vials stated they contained sodium fluoride. *Id*. The court reasoned the evidence revealed that sodium fluoride is an enzyme poison and the labels on the vials showed that they contained sodium fluoride; therefore, the prima facie threshold had been met. *Id*. Likewise, in *Brown*, the toxicologist testified he read the vials' labels that contained Mr. Brown's blood and they indicated the appropriate chemicals. *Brown*, 145 Wn. App. at 71. The court held that this was "comparable to the photographs in *Wilbur-Bobb*" and found that the prima facie threshold had been met. *Id.* at 73.

The toxicologist in *Brown* also testified, however, that if those chemicals were not present, the blood would be clotted and no alcohol would be detected in the samples and that the blood in Mr. Brown's samples was not clotted and that alcohol

was detected. *Id.* at 71. Mr. Cummings argues that this accompanying evidence, that "the chemicals did what they were designed to do," is necessary to establish a foundation for the presence of the required enzyme poison. Appellant's Br. at 17.

Mr. Cummings' argument fails for two reasons. First, such evidence was not required in *Wilbur-Bobb*. *Wilbur-Bobb*, 134 Wn. App. at 631-32. Second, the *Brown* court emphasizes "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 in a light most favorable to the State." *Brown*, 145 Wn. App. at 71 (emphasis added) (citing RCW 46.61.506(4)(b)).

Mr. Louis, in essence, testified he performed his examination in accordance with the methods approved by the state toxicologist and that the chemicals did what they were designed to do. WAC 448-14-020(3)(b). He testified if an anticoagulant were not present, the blood would clot up when exposed to air, and he observed Mr. Cummings' blood samples had not clotted. And, the enzyme poison would be sodium fluoride, for an accurate snapshot of the blood at the time of drawing. Inferably, without the enzyme poison, alcohol would not have been detected in Mr. Cummings' blood sample.

Hearsay is generally inadmissible. ER 803. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Manufacturer certifications alone are inadmissible hearsay under ER 803. *Brown*, 145 Wn. App. at 73-74. However, like the toxicologist in *Brown*, Mr. Louis essentially testified "if the

chemicals were not present, the sample would be clotted and the alcohol would not be detected." *Id.* at 74. The certificate was as unnecessary here as it was found to be in *Brown*. *Id.* at 75.

In sum, the hearsay admission does not affect the sufficiency of the evidence for admission of the blood test. The trial court did not abuse its discretion and properly admitted the blood test results. While we do not reach harmless error, we acknowledge the State's argument that sufficient independent evidence regarding his appearance and behavior likely shows Mr. Cummings was under the influence of alcohol to render the error harmless.

B. Jury Questions

The issue is whether the trial court deprived Mr. Cummings of his right to meaningful representation by handling questions from the jury outside his presence.

The discussion of a jury inquiry is a critical stage of a criminal proceeding at which a defendant has the right to meaningful representation. *Rogers v. United States*, 422 U.S. 35, 39, 95 S. Ct. 2091, 2145 L. Ed. 2d 1 (1975); CrR 3.4(a); U.S. Const. amend. VI; Wash. Const. art. 1, § 22. Therefore, a trial court commits error when it communicates with the jury without notice to the defendant or counsel. *State v. Caliguri*, 99 Wn.2d 501, 508-09, 664 P.2d 466 (1983); *State v. Allen*, 50 Wn. App. 412, 419, 749 P.2d 702 (1988). CrR 6.15(f)(1) requires that the trial court involve the

defendant and his counsel when the jury asks a question:

> (1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

Violation of the rule against ex parte judicial communications with a jury requires reversal unless the State proves that the error was harmless beyond a reasonable doubt. *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980).

The State concedes error but argues it was harmless because the trial court has the discretion whether to respond to a jury inquiry, and the trial court's responses were negative or neutral in nature. If an appellate court concludes that the error is harmless beyond a reasonable doubt, then no reversal is warranted. *Id.* "[E]x parte communication by a trial judge to a jury which is negative in nature and conveys no affirmative information is not prejudicial." *Id*. In that case, the jury sought clarification of one instruction to which the judge responded that "the instruction meant exactly what was written." *Id*. The bailiff communicated the judge's answer to the jury. *Id*. The appellate court partly reasoned the answer was neutral as it did not define or explain an instruction.

A neutral ex parte response by the court does not lead to reversible error. *State v. Langdon*, 42 Wn. App. 715, 716-18, 713 P.2d 120 (1986). In *Langdon*, the jury sent out a question, and the court responded ex parte that the jury was bound by the instructions that were already provided. *Id*. at 717. Once again, the appellate court found the trial court's response was neutral and harmless beyond a reasonable doubt. *Id*. at 717-18. It is within the trial court's discretion whether to provide further instructions; the court therefore had no duty to answer the question. *Id*. at 718. In a case similar to *Langdon*, an appellate court once again found a jury inquiry that was answered ex parte by a court with "read your instructions and continue with your deliberations," was neutral, and that the court was not obligated to answer the jury's inquiry. *Allen*, 50 Wn. App. at 419-20.

Here, the written jury inquiry was followed by the judge's written response, "The jury will have to refer to the instructions for the answer to this question." CP at 52. This response was neutral, conveying no affirmative information; therefore, the error was harmless beyond a reasonable doubt. Similarly, regarding the end of the day questions concerning the dictionary, taking the jury instructions home, and proximate cause, the court provided a negative or neutral answer without any further instruction on the law.

In sum, the court's responses were neutral and conveyed no affirmative information, and therefore were harmless beyond a reasonable doubt.

C. Statement of Additional Grounds for Review (SAG)

First, Mr. Cummings, pro se, claims ineffective assistance of counsel because

his counsel failed to object at the sentencing hearing to the admission of a previous driving under the influence (DUI) conviction in Oregon. He admits the Oregon "DWI . . . did happen" and solely disagrees with the stated intoxication level. SAG at 1. This does not show his counsel was deficient by failing to object to the conviction. And, Mr. Cummings fails to point out how he was prejudiced. Mr. Cummings must show both deficient performance and prejudice. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007). His ineffective assistance claim necessarily fails. In passing, we note the conviction for the Oregon DUI did not specify breath levels, but simply states a blood alcohol concentration of 0.08 or higher.

Second, Mr. Cummings reargues his position that weather conditions caused the accident. But we defer to the fact-finder on matters relating to the credibility of witnesses and the weight to be given to the evidence. *State v. Walton*, 64 Wn. App. 410, 416, 824 P.2d 533 (1992).

Affirmed.

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.

_____
Brown, J.

WE CONCUR:

_____

Korsmo, A.C.J.

_____

Siddoway, J.