

No. 84197-7

J.M. JOHNSON, J. (dissenting)—An appellate court should uphold a conviction if there are sufficient grounds to sustain the judgment even if the trial judge has made an erroneous legal interpretation. In this case, the State met its burden to prove by a preponderance of evidence that the RCW 46.20.308 warning of right to a second blood test was given. Even if the State did not meet its burden, the admission of the blood test results here was harmless error. Thus, I would uphold the conviction of Jose Morales.

Marilyn Robertson and her elderly mother were driving north on State Route 507 when a vehicle driven by Morales hit their car. Morales, who later admitted to consuming beer before driving, had just driven through a stop sign into their lane of travel.

Ms. Robertson and her mother found themselves in a ditch. Ms. Robertson suffered injuries to her knees, shoulders, neck, and forehead.

Her mother suffered a fractured ankle and a twisted foot. Morales drove on, leaving his front bumper behind with the license plate attached. Morales did not pull over until his heavily damaged car became inoperable.

A retired police officer and his brother were in the area and realized what had transpired. The retired officer detained Morales, and the brother called for assistance. The retired officer told Morales he should have stayed at the accident scene. Morales replied, in English, “I don’t care about the people in the accident.” 2 Verbatim Report of Proceedings (Sept. 11, 2007) at 158.

Washington State Trooper Todd Thornburg arrived and conversed with Morales in English.<sup>1</sup> Thornburg smelled an “obvious odor of intoxicants” emanating from Morales and his vehicle, and he observed that Morales’ eyes were watery and bloodshot. *Id.* at 174. Another officer noted that Morales’ pupils were dilated, which he later testified could indicate someone was under the influence of drugs or alcohol. Trooper Thornburg arrested Morales for driving under the influence and for committing a hit and run. Later, during a lawful search of Morales’ vehicle, five beer cans were found inside the

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<sup>1</sup> At this time, Morales said he had consumed one beer before driving. *State v. Morales*, 154 Wn. App. 26, 32, 225 P.3d 311 (2010).

vehicle, two of them empty. One of the empty beer cans was found on the front passenger seat. Because the majority nevertheless reverses these convictions due to the disputed admission of blood alcohol test results, I respectfully dissent.

### Analysis

The warning requirement found in RCW 46.20.308 is merely a statutory right, and there is no evidence that the requirement is grounded in due process. In this case, the State satisfied its burden of proving that, more likely than not, Morales was informed of his statutory right to have additional blood tests administered by any qualified person of his choosing. Alternatively, the Court of Appeals was correct to hold that this case can be resolved on harmless error grounds. *State v. Morales*, 154 Wn. App. 26, 44-45, 225 P.3d 311 (2010).

A. The State Met Its Burden of Proving That Morales Was Informed of His Right to Independent Testing

It is our duty to affirm “[i]f the judgment of the trial court can be sustained upon any ground, whether [it is based on] the grounds stated by the trial court or not.” *State v. Carroll*, 81 Wn.2d 95, 101, 500 P.2d 115 (1972). Although the trial judge may have misinterpreted the law, ER 104(a) would

allow otherwise inadmissible hearsay evidence from Trooper Brunstad to be considered by the trial judge. “It is well established that a trial court is ‘not bound by the Rules of Evidence’ when it determines questions concerning the admissibility of evidence.” *State v. Jones*, 112 Wn.2d 488, 493, 772 P.2d 496 (1989) (quoting ER 104(a)). The State must then prove satisfaction of the warning requirement by a preponderance of the evidence.

Here, the State met its burden of proving that Morales was, more likely than not, informed of his right to have additional blood tests administered by any qualified person of his choosing. The record indicates that the police officer contacted a Spanish-English interpreter who worked in a hospital emergency room, gave the interpreter the forms containing the required statutory notice, instructed the interpreter to read the statutory notice to Morales, and observed the interpreter reading the notice to Morales, who appeared to understand, who signed the form, and who did not ask any questions. Only then was Morales’ blood drawn.

This sequence of events is not at all like the situation in *State v. Turpin*, 94 Wn.2d 820, 620 P.2d 990 (1980). In that case, a police officer instructed a nurse to draw a blood sample from a woman arrested for negligent homicide

but did not inform the defendant until three days later that a blood alcohol sample had been taken. *Id.* at 822. The officer never informed Ms. Turpin of her statutory right to an independent blood test. *Id.*

Here, the police officer recognized that Morales spoke Spanish and made a good faith effort to secure his rights before obtaining evidence that could be used in a legal proceeding.<sup>2</sup> Not only was a good faith effort made, but the State proved it more likely than not that the officer informed Morales of his rights. This preliminary question of fact concerning the admissibility of evidence was properly before the court, regardless of whether the officer's testimony was hearsay or admitted to prove something other than the truth of the matter asserted.<sup>3</sup> It is not necessary to overrule *Turpin* in this case because there were enough facts in the record for the State to meet its burden of proving that the appropriate warning was given.

The legislature may even eliminate the warning requirement in RCW 46.20.308, which is a statutory right and not a matter of constitutional due

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<sup>2</sup> See RCW 2.43.010 (announcing a state policy to provide qualified interpreters to non-English speakers in legal proceedings).

<sup>3</sup> See ER 104(a) (“Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . [i]n making its determination it is not bound by the Rules of Evidence except with respect to privileges.”).

process.

B. Harmless Error

We also review potentially erroneous rulings of admissibility under the nonconstitutional harmless error standard. *See State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). An erroneous ruling of admissibility is harmless if it does not materially affect the outcome of the trial. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); *see also State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997) (citing *Smith*, 106 Wn.2d at 780). The outcome of a trial is materially affected if the jury would have reached a different verdict had the error not occurred. *State v. Hardy*, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997).

Here, Morales was driving with empty beer cans in his vehicle, an “obvious odor of intoxicants” emanated from both him and his vehicle, his eyes were bloodshot and watery, his pupils were dilated, and he failed to stop at a stop sign, causing the collision from which he fled. He also said in English, “I don’t care about the people in the accident.” Ms. Robertson suffered injuries to her knees, shoulders, neck, and forehead. Her elderly mother suffered a fractured ankle and a twisted foot. Given this evidence, it

is unlikely the jury would have reached a different verdict had the trial court excluded the evidence about Morales' blood alcohol content.<sup>4</sup>

### Conclusion

The evidence fully supports the jury's verdict, and any evidentiary error was harmless. The State also satisfied its burden to prove Morales was informed of his right to have an independent blood test before the test was admitted into evidence. It is not necessary to remand this case for further proceedings. I respectfully dissent.

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<sup>4</sup> A person is guilty of driving under the influence if the person drives a vehicle while the person is under the influence of or affected by intoxicating liquor. RCW 46.61.502(1)(b). No specific blood-level alcohol concentration is required to convict. *Id.* A person is guilty of vehicular assault by driving under the influence if the person drives any vehicle while under the influence of intoxicating liquor and causes substantial bodily harm to another. RCW 46.61.522(1)(b). A person is guilty of vehicular assault by reckless driving if the person drives any vehicle in a reckless manner and causes substantial bodily harm to another. RCW 46.61.522(1)(a). To operate a motor vehicle in a reckless manner means "to drive in a rash or heedless manner, indifferent to the consequences." Clerk's Papers at 41 (Juror Instruction 15). The above evidence supports the jury's verdict.

AUTHOR:

Justice James M. Johnson

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WE CONCUR:

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