**Sample Motions, Motions in Limine, Jury Instructions and Other Pleadings.**

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# Pre-Trial Motions Pleadings

Motion is: granted denied reserved

IN THE KING COUNTY DISTRICT COURT, WEST DIVISION SEATTLE COURTHOUSE, STATE OF WASHINGTON

2. Portable Breath Test

To suppress any breath test results performed on a portable breath test machine. Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923); Seattle v. Peterson, 39 Wn.App. 524 (1985); State v.

Cauthron, 120 Wn.2d 879 (1993); State v. Riker, 123 Wn.2d 351 (1994); Bokor v. Department

of Licensing, 74 Wn.App. 523 (1994); RCW 46.61.506(3); WAC 448-15 et. seq.

NO. C123456

STATE OF WASHINGTON,

Plaintiff,

vs.

JACK DANIELS,

Defendant.

DEFENDANT'S PRETRIAL MOTIONS AND ORDERS THEREON

COMES NOW JACK DANIELS, by and through his attorney, William K. Kirk, and hereby files for hearing the following motions:

1. SUPPRESSION/DISMISSAL
   1. Mandatory Filing

To dismiss based on the failure to comply with mandatory filing requirements of CrRLJ 2.1(d)(1) and (2), State v. Greenwood, 120 Wn.2d 585 (1993) and Seattle v. Bonifacio, 127

Wn.2d 482 (1995).

Motion is: granted denied reserved

1. Gaze Nystagmus

To suppress the results of any nystagmus "gaze test", to include both HGN and VGN administered to the Defendant in this matter. Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923); State v. Baity, 140 Wn.2d 1 (2000); Seattle v. Peterson, 39 Wn.App. 524 (1985); State v.

Cissne, 72 Wn.App. 677 (1994); RCW 46.61.506(3). In the alternative, the Defendant hereby moves for suppression of VGN for any purpose but to limit any evidence of HGN to demonstrate only consumption of alcohol pursuant to State v. Koch, 126 Wn.App 589, 103 P.3d 1280 (Div. 2 2005).

Motion is: granted denied reserved

1. Speed Measuring Device

To suppress all evidence gathered following the use of any speed measuring device (SMD) and/or radar as a basis for the stop of the defendant. Frye v. United States, 293 F.2d 1013 (D.C.

Cir. 1923); Seattle v. Peterson, 39 Wn.App. 524 (1985); State v. Cauthron, 120 Wn.2d 879

(1993); State v. Riker, 123 Wn.2d 351 (1994); CrRLJ 6.13(d).

138 Wn.2d 277 (1999); State v. Leupp, 96 Wn.App. 324 (1999); Seattle v. Personeus, 63

Wn.App. 461 (1991); Seattle v. Mesiani, 110 Wn.2d 454 (1988).

Motion is: granted denied reserved

Motion is: granted denied reserved

1. Pupil Dilation

To suppress any testimony regarding pupil dilation and/or reaction to light observations. Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923); State v. Baity, 140 Wn.2d 1 (2000); Seattle v.

Peterson, 39 Wn.App. 524 (1985); State v. Cauthron, 120 Wn.2d 879 (1993); State v. Riker, 123

Wn.2d 351 (1994).

Motion is: granted denied reserved

8. Admissibility of FST Refusal

To suppress all evidence of defendant’s refusal to perform voluntary Field Sobriety tests, in that it unfairly comments on a constitutional right to be free from a warrantless search. United States v. Thame, 846 F.2d 200, 206 (3rd Cir. 1988); United States v. Rapanos, 895 F. Supp. 165, 168 (E.D. Mich. 1995); United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978). Or in the alternative to suppress all evidence of defendant’s refusal to perform voluntary Field Sobriety tests based upon the probative value being substantially outweighed by the unfair prejudice pursuant to ER 403 and State v. Long, 113 Wn.2d 266 (1989); State v. Parker, 16 Wn. App. 632 (1976) and

Seattle v. Personeus, 63 Wn. App 461 (1991); State v. Zwicker, 105 Wn.2d 228 (1986); Seattle

v. Stalsbroten, 138 Wn.2d 277 (1999).

1. Probable Cause

To suppress evidence based on a violation of RCW 46.64.015, RCW 46.61.021 and Art. 1, § 7 of the Washington State Constitution in that there was a lack of probable cause to stop, detain, or arrest the defendant herein. Terry v. Ohio, 392 U.S. 1 (1968); State v. Prado, 183 P.2d 1186 (2008); State v. Gillenwater, 140 Wn.2d 1004 (2000); State v. Avery, 103 Wn.App. 527 (2000);

State v. Thornton, 41 Wn.App. 506 (1985); State v. Michaels, 60 Wn.2d 638 (1962); CrRLJ 3.6.

Motion is: granted denied reserved

1. Consent to FST's

To suppress physical tests for failure to obtain a valid consent from the defendant prior to the administration of said tests. Washington State Constitution Art. 1, § 7; Seattle v. Stalsbroten,

Motion is: granted denied reserved

1. Admissibility of FST's

To suppress all evidence obtained in the course of "field sobriety" or other physical agility tests administered to the Defendant herein. Washington Const. Art. I, § 7; U.S. Const. Amend. IV, Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923); Seattle v. Peterson, 39 Wn.App 524

(1985); State v. Cauthron, 120 Wn.2d 879 (1993); State v. Riker, 123 Wn.2d 351 (1994).

Motion is: granted denied reserved

1. Testimonial FST's

To suppress those physical tests which were testimonial in nature, not preceded by Miranda Warnings. CrRLJ 3.5 and Pennsylvania v. Muniz, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).

Motion is: granted denied reserved

To suppress all statements attributed to the defendant at the time of arrest. Edwards v. Arizona, 451 U.S. 477 (1981); State v. Easter, 130 Wn.2d 228 (1996); State v. Johnson, 48 Wn.App. 681 (1987), and for a pretrial hearing pursuant to CrRLJ 3.5.

Motion is: granted denied

reserved

1. Consent to DRE Examination

To suppress the DRE evaluation conducted by Cpl. Harnden for failure to obtain a valid consent from the defendant prior to the administration of said evaluation. Washington State Constitution Art. 1, § 7; Seattle v. Stalsbroten, 138 Wn.2d 277 (1999); State v. Leupp, 96 Wn.App. 324

(1999); Seattle v. Personeus, 63 Wn.App. 461 (1991); Seattle v. Mesiani, 110 Wn.2d 454 (1988).

Motion is: granted denied reserved

1. Corpus Delicti

To dismiss the charge on the grounds that the prosecution is unable to prove the required element of identification of the defendant as the driver, in that there is insufficient evidence of the *corpus delicti* of the crime independent of the defendant's statements, pursuant to State v. Hamrick, 19 Wn.App. 417 (1978), et. al.; Bremerton v. Corbett, 106 Wn.2d 569 (1986).

Motion is: granted denied

reserved

1. Right to Counsel: Privacy.

To dismiss or, in the alternative, suppress evidence due to violation of the right to counsel based on Wash. Const. Art. 1, § 22; U.S. Const. Amend. VI; State v. Fitzsimmons, 93 Wn.2d 436 (1980); Arizona v. Holland, 711 P.2d 592 (1985); State v. Templeton, 107 Wn.App. 141

(2001); and Spokane v. Kruger, 116 Wn.2d 135 (1991); State v. Prok, 107 Wn.2d 153 (1986);

Seattle v. Box, 29 Wn.App. 109 (1981); Seattle v. Koch, 53 Wn.App. 352 (1991), State v. Easter, 130 Wn.2d 228 (1996) and CrRLJ 3.1. Specifically, the Defendant asserts that he was denied access to counsel consistent with City of Tacoma v. Myhre, 32 Wn.App. 661 (1982).

Motion is: granted denied reserved

1. Right to Counsel

To dismiss or, in the alternative, suppress evidence due to violation of the right to counsel based on Wash. Const. Art. 1, § 22; U.S. Const. Amend. VI; State v. Fitzsimmons, 93 Wn.2d 436 (1980); Tacoma v. Myhre, 32 Wn.App. 661 (1982); Arizona v. Holland, 711 P.2d 592 (1985);

State v. Templeton, 107 Wn.App. 141 (2001); and Spokane v. Kruger, 116 Wn.2d 135 (1991);

State v. Prok, 107 Wn.2d 153 (1986); Seattle v. Box, 29 Wn.App. 109 (1981); Seattle v. Koch,

53 Wn.App. 352 (1991), State v. Easter, 130 Wn.2d 228 (1996) and CrRLJ 3.1.

13. Defendant's Statements

Motion is: granted

1. Refusal

reserved

denied reserved

To suppress any alleged refusal to perform any test pursuant to ER 403 and State v. Long, 113 Wn.2d 266 (1989); State v. Parker, 16 Wn.App. 632 (1976); Seattle v. Personeus, 63 Wn.App.

461 (1991) and Seattle v. Loyd Stalsbroten, 138 Wn.2d 277 (1999).

Motion is: granted denied reserved

1. Refusal: Confusion Over Implied Consent Warnings

To suppress any alleged refusal to submit to the breath test pursuant to RCW

46.20.308 in that the Defendant clearly manifested confusion over said warnings and law enforcement failed in their affirmative duty to provide clarification of such warnings thus precluding the defendant from making a knowing and intelligent decision as it related to the breath test. RCW 46.20.308; State v. Trevino, 127 Wn.2d 735 (1995); Thompson v. DOL, 138 Wn.2d 783 (1999); Grewal v. DOL, 108 Wn.App. 815 (Div. 1 2001); Vance v. DOL, 116 Wn.App. 412 (Div. 1 2003);

Motion is: granted denied reserved

1. Implied Consent Warnings

To suppress the breath test on the grounds of failure to comply with the requirements of RCW

46.20.308 (Implied Consent Warnings) in that the officer directing the breath test did not have the reasonable grounds as required by RCW 46.20.308.

Motion is: granted denied reserved

1. Implied Consent/Minor/Erroneous Warnings

To suppress the breath test results on the grounds that the Implied Consent Warnings read to the defendant were erroneous and inaccurate in that a refusal to submit to the breath test cannot be used against them in a court of law. Furthermore, these warnings fail to warn a driver under arrest for Minor DUI that their refusal will automatically elevate the criminal charge. RCW 46.61.517; Bellevue v. Moffett, 87 Wn.App.144 (1997); State v. Bartels, 112 Wn.2d 882 (1989),

Spokane v. Holmberg, 50 Wn.App. 317, (1987), Cooper v. DOL, 61 Wn.App. 525 (1991);

Pattison v. DOL, 112 Wn.App. 670 (2002; Jury v. DOL, 114 Wn.App. 726 (2002).

Motion is: granted denied reserved

18. Implied Element

To dismiss the charges and/or suppress the breath test on the grounds of the State’s inability to establish the “Implied Element” of non-consumption of alcohol following the time of driving per State v. Crediford, 130 Wn.2d 747 (1996).

1. Implied Consent/Additional Language

To suppress results of the breath test on the grounds of inclusion of additional advisements in violation of the requirements of RCW 46.20.308 and the holdings of Thompson v. DOL, 91 Wn.App. 877 (1998); State v. Bartels, 112 Wn.2d 882 (1989), Spokane v. Holmberg, 50

Wn.App. 317 (1987) and Cooper v. DOL, 61 Wn.App. 525 (1991); State v. Bostrom, 127 Wn.2d

580 (1995).

Motion is: granted denied reserved

1. Fifteen Minute Rule

To suppress the results of the breath test administered herein based on the failure to comply with the fifteen minute rule requirements of RCW 46.61.506 and WAC 448-16-040. Smith v. DOL, 88 Wn.App. 875 (1997).

Motion is: granted denied reserved

1. Simulator Solution.

To suppress breath test for failure to comply with the requirements of the Washington Administrative Code (WAC 448-16 *et seq*.) and the protocols established by the Washington State Toxicologist. WAC 448-16; State v. Straka, 116 Wn.2d 859 (1991).

Motion is: granted denied reserved

1. Defective Charging Document

To dismiss based on a defective charging document. Auburn v. Brooke, 119 Wn.2d 623 (1992); State v. Leach, 113 Wn.2d 679 (1989); State v. Kjorsvik, 117 Wn.2d 93 (1991).

1. Improper Breath Test Procedure

To suppress the breath test for failure to follow the requirements of the Washington Administrative Code (WAC 448-16 *et seq*.) and the protocols established by the Washington State Toxicologist. RCW 46.61.506(3); State v. Straka, 116 Wn.2d 859 (1991).

Motion is: granted

denied reserved

Motion is: granted

denied

reserved

27. Insufficient Evidence

To dismiss for lack of facts sufficient to support a finding of guilt beyond a reasonable doubt of all elements necessary to convict the defendant of the charge(s) pending herein. State v.

Knapstad, 107 Wn.2d 346 (1986).

1. Independent Tests

To dismiss and/or suppress for interference with Defendant's right to obtain an independent test. RCW 46.20.308, RCW 46.61.506(5); State v. Anderson, 80 Wn.App. 384 (1996); State v.

Rivard, 80 Wn.App.633 (1996); and Blaine v. Suess, 93 Wn.2d 722 (1980).

Motion is: granted

denied reserved

Motion is: granted denied

* 1. 3.1 Motion

To dismiss, or in the alternative, suppress based on a violation of the right to counsel based on CrRLJ 3.1. State v. Templeton, 107 Wn.App. 141 (2001).

Seattle v. Personeous, 63 Wn.App. 461 (1991); Seattle v. Mesiani, 110 Wn.2d 454 (1988); Frye

v. United States, 293 F.2d 1013 (D.C. Cir 1923).

Motion is: granted denied reserved

Motion is: granted denied reserved

* 1. Double Jeopardy

Motion to dismiss based on the statute’s violation of double jeopardy in violation of Wash. Const. Art. 1, § 9, and U.S. Const Amend. V.

Motion is: granted denied reserved

* 1. Blood Test

To suppress the blood test for failure to follow the requirements of RCW 46.61.506; the Washington Administrative Code (WAC 448-14 *et seq.*) and the protocols established by the Washington State Toxicologist. State v. Straka, 116 Wn.2d 859 (1991); State v. Garrett, 80 Wn.App. 651(1996); State v. Bosio, 107 Wn.App. 462 (2001); State v. Hultenschmidt, 125

Wn.App. 259 (2004).

Motion is: granted denied reserved

DISCOVERY MOTIONS

1. Audio and Video Tapes

To compel production of any and all video and audio recordings of the defendant on the date in question. Said motion is based upon Brady v. Maryland, 373 U.s. 83 (1963); State v. Ramos, 83 Wn.App. 622 (1996); CrRLJ 4.7.

Motion is: granted denied reserved

1. 911 Tapes, etc.

To compel production of any recording, video tape, or tape recordings, including any radio transmissions between officers and dispatch, between officers, or 911 tapes, or to issue a subpoena duces tecum for same. Said motion is based upon Brady v. Maryland, 373 U.S. 83 (1963); State v. Ramos, 83 Wn.App. 622 (1996); CrRLJ 4.7.

31. Drug Recognition Evaluation

To suppress the Drug Recognition Evaluation [DRE] for failure to obtain a valid consent from the defendant prior to the administration of the evaluation, and for failure to comply with the required foundational requirements for administration of the DRE. Washington State Constitution Art. 1, § 7; State v. Baity, 140 Wn.2d 1 (2000); Seattle v. Stalsbroten, 138 Wn.2d

277 (1999); State v. Leupp, 96 Wn.App. 324 (1999);

Motion is: granted denied reserved

1. SMD Certificates

For production of an electronic speed measuring device (SMD) expert at motions and trial herein and objects to the admission of any certificate or affidavit in lieu of live testimony concerning the design, operation or construction of any such speed measuring device at motions hearing or trial. CrRLJ 6.13

Motion is: granted denied

reserved

1. Documentary Materials

To compel disclosure of those evidentiary materials and documents set forth in defendant's Demand for Discovery previously filed herein. CrRLJ 4.7; State v. Dunnivan, 65 Wn.App 728 (1992); CrRLJ 4.7(a)(d).

Motion is: granted denied

reserved

1. Police Reports/Field Notes

To compel production of any and all police or investigative reports, including field notes made by the involved officers, and statements of all potential witnesses, including production of all documentation of results of physical or mental examinations and/or scientific tests, experiments, or comparisons made in connection with the charge pending against the Defendant. CrRLJ 4.7 and State v. Campbell, 103 Wn.2d 1 (1984).

Motion is: granted denied reserved

1. DataMaster Records

To compel production of all documents and records of certifications, evaluations, maintenance, repairs, and telephone complaints for the DataMaster machine in question. RCW 46.61.506(6) and CrRLJ 4.7(d).

Motion is: granted denied reserved

1. Radio Frequency Interference

To compel disclosure of any information regarding presence of radios, microwaves, short waves, CB's, and any other transmitters or other such devices at or near the location of the DataMaster at the time of the test.

Motion is: granted denied reserved

1. Widmark's Formula

To compel disclosure of whether or not the prosecution intends to offer testimony regarding "retrograde extrapolation," or "Widmark's Formula," and, if so, to compel disclosure of the name(s) of the expert witness(es), his/her credentials, qualifications, education, training and experience, and disclosure of any documents, studies, reports, or other materials relied on or material to any aspect of such testimony, and for a summary of their testimony. RCW 46.61.506, CrRLJ 4.7(d).

Motion is: granted denied reserved

1. Identity of Experts

To compel disclosure of the identity of the specific breath test technician, simulator solution changer, and state toxicology lab technician the prosecution intends to call at trial, the subject of

their testimony, the basis of their expertise, including qualification, education, training and experience, and disclosure of any reports, documents, or studies upon which they intend to rely or make reference to in any aspect of their testimony. CrRLJ 4.7.

concentration. U.S. Constitution, Fourth and Fourteenth Amendments, Washington Constitution, art. 1 § 3. State v. Dunnivan, 65 Wn.App. 728 (1992), CrRLJ 4.7.

Motion is: granted denied reserved

|  |  |  |
| --- | --- | --- |
| Motion is: | granted |  |
|  | denied |  |
|  | reserved |  |

1. DataMaster Operator's Manual

To compel production of a copy of the BAC Verifier DataMaster Operator's Manual of the officer who administered the breath test, and any manual received or used by the officer who administered field tests, during training for administration of same or for issuance of subpoena duces tecum for said manuals for trial.

Motion is: granted

denied

reserved

44. Expert Physiological Effects

For discovery of the identity of any state expert witness concerning evidence of the physiological effects of alcohol or any drug on the defendant's ability to operate a motor vehicle.

U.S. Constitution, Fourth and Fourteenth Amendments; Washington Constitution, art. 1 § 3, State v. Dunnivan, 65 Wn.App. 728 (1992), CrRLJ 4.7.

Motion is: granted denied reserved

1. Subpoena Duces Tecum

For issuance of a Subpoena Duces Tecum directed to the Communications Division, Washington State Patrol Breath Test Section or any other applicable division or person within the Washington State Patrol for production of all records of complaints of malfunctions, operator error, or other communication in the Patrol's possession concerning operation of the BAC Verifier DataMaster used to test the Defendant's breath herein, CrRLJ 4.8(b).

Motion is: granted denied reserved

1. Expert/Breath or Blood Test

For discovery of the identity of any state expert witness concerning evidence of the defendant’s alleged breath concerning evidence of the defendant’s alleged breath or blood alcohol

1. Expert's Credentials

Defendant requests discovery of the education and training of any expert witness the prosecution intends to offer, both general and specific to the subject of his or her testimony, experience relative to the operation, maintenance, and theory of the instrument used to test the defendant's blood or breath, or simulator solution and a description of the place, date, and subject matter of all training taken by said witnesses regarding the instrument in question or the effects of alcohol or drugs on the human body and a full description of any experiments in which said witnesses have participated or about which he or she may testify, and any documents, studies, reports or other materials relied on or material to any aspect of his or her testimony.

Motion is: granted denied reserved

1. Objection to Certificates

Defendant hereby notes an objection to proof of any material fact at hearing or trial by affidavit or certificate, including any affidavits, certificates, declarations, or other documents relating to the breath test machine and/or thermometer certification and/or NIST certification. A certified BAC Verifier DataMaster technician and the person(s) who conducted any quality assurance tests as well as the person(s) responsible for preparing, storing and installing the simulator solution concerned herein IS HEREBY DEMANDED AT HEARING OR TRIAL, including any and all records pertaining to the preparation, checking and installation of the simulator solution used in this case, including the gas chromatograph charts regarding the solution in accordance with CrRLJ 6.13 and RCW 46.61.506(6), along with a copy of his or her permit.

Motion is: granted denied reserved

1. Complete Witness List and Rebuttal Witness List

Defendant hereby requests discovery of a complete witness list, including all possible rebuttal witnesses, which the State may intend to call at motions and/or trial. CrRLJ 4.7(a); State v. Brush, 32 Wn.App. 445 (1982); State v. Dunnivan, 65 Wn.App. 728 (1992); State v. Norby, 122

Wn.2d 258 (1993); Bartholomew v. Wood, 34 F.3d 870 (Wash. 1994).

Motion is: granted denied reserved

denied reserved

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the prosecution shall comply with all granted motions to compel no later than 4 p.m. on the day of

, 201 .

DONE IN OPEN COURT this day of , 201 .

JUDGE

Presented by:

William K. Kirk Attorney for Defendant WSBA# 28235

1. Specific Expert(s) Demanded at Trial

Defendant HEREBY DEMANDS that the SPECIFIC EXPERT used for all aspects of establishing the admissibility of the breath test instrument is produced for trial. Defendant demands that each and every individual, necessary for admission of the breath/blood test, pursuant to RCW 46.61.50(3)-(4) are compelled to testify. United States Const. Amend VI; ER 705; State v. Nation, 110 Wn.App. 651 (2002); State v. Neal, 144 Wn.2d 600 (2001); State v.

Maupin, 128 Wn.2d 918 (1996); State v. Martinez, 78 Wn.App. 870 (1995); State v. Anderson,

44 Wn.App. 644 (1986)..

Motion is: granted

## IN THE KING COUNTY DISTRICT COURT, WEST DIVISION SEATTLE COURTHOUSE, STATE OF WASHINGTON

**Motions In Limine**

**NO. C123456**

**DEFENDANT'S MOTIONS IN LIMINE AND ORDERS THEREON**

**STATE OF WASHINGTON,**

**Plaintiff,**

**vs.**

**JACK DANIELS,**

**Defendant.**

**Defendant JACK DANIELS, through his attorney, respectfully moves for an order in limine on the following motions:**

* 1. **Motion that during trial witnesses be excluded. ER 615.**

**Motion is .**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding the nystagmus gaze test conducted in this case.**

**Motion is .**

**Such tests fail to meet the foundation requirement of Frye v. US, 293 F. 1013 (D.C. Cir. 1923). Under Frye, the prosecution must show, first, that the nystagmus gaze test is a predictive theory of intoxication which is generally accepted by the relevant scientific community and, second, that the officer in fact properly employed techniques which have been generally accepted by the relevant scientific community for testing nystagmus gaze. No such foundation witnesses have been listed by the prosecution.**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding the portable breath test or PBT conducted in this case. Frye, supra.**

**Motion is .**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding pupil dilation, pupil observations, pupil reaction time, and any meaning the officer may derive from such observations in this case. Frye, supra.**

**Motion is .**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding the term "field sobriety tests".**

**Motion is .**

**Such testimony lacks relevance and any slight probative value is substantially outweighed by the danger of unfair prejudice. ER 401, 402, 403 and lack of foundation under Frye, supra.**

**These tests are little more than physical agility tests. Testimony which labels them "sobriety" tests is prejudicial in that it suggests any failure to perform up to the subjective standards of the testing officer is proof of lack of sobriety. Moreover, the prosecution has listed no expert witness to lay a foundation that, in fact, these tests are scientifically accepted as sobriety indicators.**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding the use of the "decision point" method of evaluating field sobriety test performances and any scores recorded.**

**Motion is .**

**Such testimony lacks relevance and any slight probative value is substantially outweighed by the danger of unfair prejudice. ER 401, 402, 403, and lack of foundation under Frye, supra.**

**The tests are little more than physical agility tests. Thus, any testimony on a point scoring system to determine "sobriety" is little more than subjective opinion in the guise of scientific methodology. The prosecution has listed no expert witness to lay a foundation that, in fact, these tests or any methodology of scoring them are scientifically accepted as sobriety indicators.**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury which labels or otherwise refers to witness**  **as a "victim" or other term which implies fault or guilt on the part of the defendant.**

**Motion is .**

**Such labels assume facts not in evidence since neither fault not guilt have been established in this case. Moreover, such labels lack relevance and are highly and unfairly prejudicial to the defendant.**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury which mentions drug use or otherwise suggests that the defendant was under the influence of drugs.**

**Motion is .**

**If there is no evidence of drug use, it is prosecutorial misconduct to ask or allow a police officer to testify that the defendant was under the influence of alcohol or drugs. See State v. Johnson, 1 Wn.App. 553, P.2d (1969).**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding the defendant's post-arrest silence.**

**Motion is .**

**The prosecutor may not make reference to a defendant's post-arrest silence either in argument or in the examination of any witness.**

**The use, for impeachment purposes, of defendant's silence following receipt of Miranda warnings is fundamentally unfair and therefore violates the due process clause of the Fourteenth Amendment since the giving of warnings implicitly assures the defendant that silence will carry no penalty.**

**State v. Belgarde, 110 Wn.2d 504, 511, P.2d (1988).**

**This constitutional protection applies to both the prosecution's case in chief and during cross examination of the defendant for impeachment purposes. State v. Guitierrez, 50 Wn.App. 584, , P.2d (1988).**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding the number of people the officer has arrested for DWI and/or the number of people the officer has stopped on suspicion of DWI.**

**Motion is .**

**Such testimony lacks relevance and any slight probative value is substantially outweighed by the danger of unfair prejudice. ER 401, 402, 403.**

**Such testimony is prejudicial in that it suggests a ratio of stops to arrests. This ratio raises a prejudicial inference of reliability on this officer's conclusion that the defendant's ability to drive was appreciably affected by alcohol at the time of the stop and arrest. This inference invades the province of the jury.**

**It further invades the province of the jury by suggesting that the officer only charges those who the officer is convinced is guilty of DWI.**

* 1. **Motion to suppress the officer's opinion testimony that the defendant's driving appeared consistent with intoxicated drivers the officer has stopped, arrested, or observed in the past.**

**Motion is .**

**Such testimony lacks relevance and any slight probative value is substantially outweighed by the danger of unfair prejudice. ER 401, 402, 403.**

* 1. **Motion to suppress the officer's opinion testimony that the defendant's ability to drive was lessened to an appreciable degree by alcohol, or that the defendant's alleged impairment was due to alcohol, or words that express the officer's opinion on the ultimate issue of whether the defendant's driving ability was impaired at the time of arrest. Washington Const. Art. 1, □ 22; U.S. Const. Amend. 6; State v. Black, 109 Wn.2d 336 (1987).**

**Motion is .**

**Such testimony invades the province of the jury and is a comment on the ultimate fact for the jury to decide. The prosecution must prove beyond a reasonable doubt that the defendant was under the influence of intoxicating liquor or drug while driving. These are elements of the criminal offense.**

**No witness may testify as to his or her opinion as to the guilt or innocence of the accused in a criminal trial. See State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967);**

**State v. Carlin, 40 Wn.App. 698, 700 P.2d 323 (1985). This rule is violated by the admission of evidence which even indirectly indicates a witness's opinion as to guilt. Admission of opinion testimony that an accused is guilty is presumed to be prejudicial. State v. Haga, 8 Wn.App. 481, 507 P.2d 159, rev. denied, 82 Wn.2d 1006 (1973).**

**In Carlin, supra, the trial court allowed the arresting officer to testify that his police dog located the defendant by tracking the defendant's fresh "guilt scent." The Court of Appeals ruled that such testimony was simply an implied conclusion by the officer that the defendant was guilty. It was held that such testimony was not only inadmissible under general evidentiary principles but also found that "the expression of an opinion as to a criminal defendant's guilt violated his constitutional rights to a jury trial, including the independent determination of facts by the jury." Carlin, 40 Wn.App. at 701.**

**In Haga, supra, a homicide prosecution, the Court of Appeals barred the opinion of an ambulance driver that the defendant's lack of grief over the death of the victim seemed "unusual." The court said that the opinion was tantamount to an opinion on the guilt of the defendant.**

**It was also error to admit a detective's testimony as to the reaction of the accused upon hearing of the victim's death. State v. Sargent, 40 Wn.App. 340, 698 P.2d 598 (1985). Finally, in a prosecution for conspiracy to defraud, the trial court erred by allowing two bankruptcy judges to testify that the defendant had conspired with a debtor to conceal funds; such testimony amounted to a conclusion that the defendant was guilty as charged. U.S. v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991).**

**Although ER 704 permits the court to allow a witness to give an opinion as to an ultimate factual issue1, this rule is not intended to permit a witness to give his opinion as to the guilt or innocence of the accused. K. Tegland, 5A Washington Practice □ 309, pp. 84- 85 (2d ed. 1982). As the court noted in Carlin, supra, 40 Wn.App. at 701:**

**The expression of an opinion as to the criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. . . . Thus, . . . a witness' opinion as to the defendant's guilt violates the defendant's jury trial rights by invading the province of the impartial fact finder.**

**Where the witness is a police officer, the error of allowing opinion testimony on the issue of guilt is even more serious because of the tendency of jurors to pay special heed to the testimony of such witnesses. Carlin, at 703; see also Haga, supra, 8 Wn.App. at 492.**

**In a DWI prosecution, testimony by an officer that, in his opinion, the defendant was intoxicated or that the defendant's driving ability was impaired by alcohol is tantamount to an opinion as to the guilt of the defendant. Such testimony is far more than the "implied conclusion" of guilt condemned in Carlin, supra.**

**Permitting an officer to give such opinion testimony invades the province of the jury and denies the defendant his right to be tried by an independent and impartial jury. The**

1 **ER 704 provides:**

**Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be declared by the trier of fact. (Emphasis added.)**

## officer's opinion testimony, if believed, is nothing more that an instruction for the jury to enter a directed verdict of guilty.

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding the results of the BAC Verifier Datamaster until and unless this court rules such results admissible under State v. Straka, 116 Wn.2d 859,**  **P.2d (1991).**

**Motion is .**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding either the results of the BAC Verifier Datamaster to the third decimal place or the higher of the two readings. WAC 448-13-065; ER 401; ER 402; ER 403.**

**Motion is .**

**Effective October, 1995, newly enacted WAC 448-13-065 established that, for criminal purposes, breath readings are to be (1) truncated to two digits and (2) the lower of the two readings is to be the presumed breath alcohol content:**

**WAC 448-13-065 Interpretation of breath test results. Once it is determined that a breath test has met all the above [WAC 448-13-060] criteria and is valid, the person's presumed breath alcohol content for the purposes of the interpretation of civil and criminal statutes shall be determined by taking the lower of the two subject sample breath test results, and truncating this to two decimal places. (E.g., if a person's two breath test results were 0.106 and 0.121, the person's presumed breath alcohol content would be 0.10 g/210L.)**

**WAC 448-13-065.**

**Since the Defendant's presumed alcohol content is the truncated two digit reading of his lower test result, testimony of three digit readings is both irrelevant and prejudicial.**

**This is especially true of the higher three-digit reading.**

* 1. **Motion that during trial the breath ticket be excluded from evidence. WAC 448-13- 065; ER 401; ER 402; ER 403.**

**Motion is .**

**Since WAC 448-13-065 establishes that, for criminal purposes, breath readings are to be (1) truncated to two digits and (2) the lower of the two readings is to be the presumed breath alcohol content, admission of the breath ticket which contains both readings to three digits is both irrelevant and prejudicial. Instead, should the court find the lower, truncated reading admissible, the State should be limited to having the officer verbally advise the jury of that reading.**

* 1. **Motion to bar the prosecution from asking any witness (including the defendant should he testify) to express an opinion as to whether or not a police officer or any other witness lied while giving testimony.**

**Motion is .**

**"Unquestionably, to ask a witness to express an opinion as to whether or not another witness is lying does invade the province of the jury. A stronger reason for barring such interrogation, however, is that it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying."**

**State v. Casteneda-Perez, 61 Wn.App. 354, 362-63, P.2d (1991) (citation omitted). See also State v. Stover, 67 Wn.App. 228, 231, P.2d (1992) (expanding the Casteneda- Perez holding to include non-police witnesses). See also State v. Wright, 76 Wn.App. 811, 821, P.2d (1995) (reaffirming the prior holdings but on a different basis: "it places irrelevant information before the jury and potentially prejudices the defendant What**

**one witness thinks of the credibility of another witness' testimony is simply irrelevant.") See also State v. Neidigh, 78 Wn.App. 71, P.2d (1995) ("It was misconduct for the prosecutor to ask [the defendant] whether the informant was 'absolutely lying', whether testimony was 'invented', and whether witnesses were 'conspiring to get [the defendant].'" Id. at 76.)**

* 1. **Motion to bar the prosecution from asking any witness (including the defendant should he testify) to express an opinion as to whether or not a police officer or any other witness was mistaken while giving testimony.**

**Motion is .**

**"Asking a witness whether another witness is lying is certainly more prejudicial than asking whether another witness is merely mistaken. In both situations, however, the questioning is designed to elicit testimony in the form of one witness' opinion as to the credibility or veracity of another witness, a determination which lies solely within the province of the jury." State v. Walden, 69 Wn.App. 183, 186-87, P.2d (Mar. 1993) (citing to and relying on the rationale underlying the Casteneda-Perez ruling).**

* 1. **Motion to bar the prosecution from asserting in closing argument that an acquittal is only possible if the jury concludes that a police officer or any witness lied while giving testimony. Casteneda-Perez, supra; Stover, supra; Wright, supra.**

**Motion is .**

**In State v. Barrow, 60 Wn.App. 869, 809 P.2d 209 (1991), the prosecutor argued in closing that to find the defendant not guilty the jury would have to believe the officers lied. The court found such argument improper:**

**[T]he jurors did not need to “completely disbelieve” the officers’ testimony in order to acquit Barrow; all that they need was to entertain a reasonable doubt that it was Barrow who made the sale [to the officer].**

**Barrow, at 875-76.**

* 1. **Motion to bar the prosecution from expressing in closing argument a personal opinion regarding the veracity of any witness.**

**Motion is .**

**The prosecution may not "vouch" for the credibility or any prosecution or defense witness or otherwise express an opinion on any witness' veracity. State v. Stover, 67 Wn.App. 228, P.2d (1992); State v. Sargent, 40 Wn.App. 340, P.2d (1985); State v. Martin, 41 Wn.App. 133, P.2d (1985); and RPC 3.4(f).**

* 1. **Motion to bar the prosecution from expressing in closing argument a personal opinion regarding the defendant's guilt.**

**Motion is .**

**It is clear prosecutorial misconduct for any prosecutor to express or imply a personal opinion as the defendant's guilt. State v. Sargent, 40 Wn.App. 340, P.2d (1985); State v. Robinson, 44 Wn.App. 611, P.2d (1986); and RPC 3.4(f).**

* 1. **Motion to bar the prosecution from attacking the veracity of the defendant or any defense witness.**

**Motion is .**

**The prosecutor may not refer to the defendant or any witness as "liars", "con- men", "manipulators", or any other label which amounts to an attack on the veracity of that defendant or witness. State v. Reed, 102 Wn.2d 140, P.2d (1980); see also State v. Stover, 67 Wn.App. 228, 231, P.2d (1992).**

* 1. **Motion to bar the prosecution from making improper comments regarding the role of the defense attorney.**

**Motion is .**

**The prosecution may not attack the defendant's theory of the case with comments regarding the defense attorney's role in representing the defendant. State v. Reed, 102 Wn.2d 140, P.2d (1984) ("Are you going to let a bunch of city lawyers come down here and make your decision?"); Bell v. State, 614 SW2d 122 (1981) (reference to defense attorney's duty to "see that his client gets off").**

* 1. **Motion to bar the prosecution from making comments which are intended to inflame the passion or prejudice of the jurors.**

**Motion is .**

**It is reversible error for the prosecution to make comments which tend to capitalize on the emotions of the jury towards the general topic of crime, or to attempt to inflame passion or prejudice. For example, a prosecutor's opening statement focus on "the war on**

**drugs" and a closing argument reference to that war "constituted egregious misconduct." State v. Echevarria, 71 Wn.App. 595, 598, P.2d (Nov. 1993) (emphasis in original). The court went on:**

**It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." The prosecutor's duty to act impartially derives from his or her position as a quasi-judicial officer.**

**Id. (citations omitted). See also ABA Standards for Criminal Justice, □ 3-5.8(c); State v. Reed, 102 Wn.2d 140, P.2d (1984); State v. Stover, 67 Wn.App. 228, 230-31, P.2d**

**(1992); North Carolina v. Scott, 333 SE.2d 296 (1985) (conviction reversed for argument by prosecutor that "there is a lot of public sentiment at this point against driving and drinking, causing accidents on the highway"). Accord, State v. Phifer, 150 SE.2d 353 (1929); Prado v. State, 626 S.W.2d 775 (Texas 1982).**

**The prosecutor's duty is to insure a verdict free of prejudice and based on reason.**

**State v. Claflin, 38 Wn.App. 847, 850, P.2d (1984); see also State v. Belgarde, 110 Wn.2d 504, P.2d (1988). See also Detention of Gaff, 90 Wn.App. 835, 842, P.2d**

**(Apr. 1998) ("A prosecutor may not properly invite the jury to decide any case based on emotional appeals.")**

* 1. **Motion to bar the prosecution from asking questions of witnesses designed to compel the witnesses to state legal conclusions.**

**Motion is .**

**"We hold that the prosecutor's gratuitous remarks concerning the defense witnesses' credibility and the cross examination designed to compel the witnesses to state legal conclusions were improper." State v. Stover, 67 Wn.App. 228, 231-32, P.2d (1992).**

* 1. **Motion to bar the prosecution from making personal comments regarding the defense counsel.**

**Motion is .**

**It is improper for the prosecutor to make any personal references regarding the defense counsel. State v. Peyton, 29 Wn.App. 701, 712, P.2d (1981) (prosecutor's comment "may have lead the jury to focus on the personality of [defense counsel] as opposed to the evidence at hand").**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding the defendant's failure to testify.**

**Motion is .**

**Any such reference, direct or otherwise, violates the defendant's right to remain silent under the Fifth Amendment to the U.S. Constitution and Art. I, □ 9 of the Washington Constitution. Griffin v. California, 14 L.Ed.2d 106, U.S. (1965); State v. Ashby, 77 Wn.2d 33, P.2d (1969).**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury regarding the defendant's failure to call witnesses.**

**Motion is .**

**A defendant has no duty to present any evidence. The state bears the entire burden of proving each element of its case beyond a reasonable doubt. The prosecutor's statements suggested that the defendant was obligated to call witnesses and thus to prove his innocence. There was no such duty It was not proper for the state to comment on a**

**failure of the defense to do what it has no duty to do.**

**State v. Traweek, 43 Wn.App. 99, 107, P.2d (1986); accord State v. Cleveland, 58 Wn.App. 634, P.2d (1990).**

* 1. **Motion that during trial no mention, comment, question, argument, or other reference whatsoever be made by the prosecution or their witnesses in the presence of the jury which appeals to the self-interest of the jurors as taxpayers.**

**Motion is .**

**The prosecutor may not make any reference to the efforts being made and money being spent in trying to deal with the problem of drunk driving. State v. Muscus, 109 NE.2d 15 (1952); State v. Hill, 370 NE.2d 775 (1977).**

**IT IS FURTHER ORDERED that the prosecution shall instruct all prosecution witnesses of these rulings prior to their being called as a witness before the jury in this matter.**

**Dated this 19th day of August, 2016.**

**Presented by:**

**William K. Kirk Attorney for Defendant WSBA# 28235**

**JUDGE**

IN THE KING COUNTY DISTRICT COURT WEST DIVISION, STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

NO. C123456

vs.

JACK DANIELS,

Defendant.

# Sample Jury Instructions

## DEFENDANT’S PROPOSED JURY INSTRUCTIONS (WITH CITATIONS)

William K. Kirk

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Attorney for Defendant

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NO.

Jurors have a duty to consult with one another and to deliberate with a view to reaching a unanimous verdict, if it can be done without violence to individual judgment. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, you should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. However, you should not surrender your honest convictions as to the weight of effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

WPIC 1.04

NO.

It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called a complaint, informing the defendant of the charge. You are not to consider the filing of the complaint or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence, which either was not admitted or which was stricken by the court. You will not be provided with a written copy of the testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys’ remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement or argument, which is not supported by the evidence or the law given to you by the court.

The attorneys have the right and the duty to make any objections which they deem appropriate. Such objections should not influence you, and you should make no presumption because of objections by the attorneys.

The law does not permit me to comment on the evidence in any way and I have not intentionally done so. By a comment on the evidence, I mean some expression or indication from me as to my opinion on the value of the evidence or the weight of it. If it appears to you that I have so

commented, during either the trial or the giving of these instructions, you must disregard such comment entirely.

You have nothing whatever to do with the punishment to be inflicted in case of a violation of law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence you.

WPIC 1.02A

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which he or she has directly observed or perceived thought the senses. Circumstantial evidence consists of proof of facts or circumstances which, according to common experience permit a reasonable inference that other facts existed or did not exist. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

Authority: WIPIC 5.01

State v. Tucker, 32 Wn.App. 83, 645 P.2d 711 (1982)

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreman to act as chairman. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions and a verdict form.

You must fill in the blank provided in verdict form the words "not guilty" or the word "guilty".

Since this is a criminal case, all six of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The foreman will sign it and notify the bailiff who will conduct you into court to declare your verdict.

WPIC 151.00

The defendant, JACK DANIELS, has entered a plea of not guilty, which puts in issue every element of the crime charged. The State of Washington, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The Defendant has no burden of proving that a reasonable doubt exists.

The Defendant is to be presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason can be given and may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

WPIC 4.01A

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

WPIC 6.0l

The defendant is not compelled to testify, and the fact that he has not testified cannot be used to infer guilt and should not prejudice him in any way.

WPIC 6.31

A witness, who has special training, education, or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of that witness, the reasons given for the opinion, the sources of the witness’ information, together with the factors already given you for evaluating the testimony of any other witness.

Authority: WPIC 6.51

NO.

To convict the Defendant of the crime of Driving While Under the Influence of Intoxicating Liquor, each of the following elements of the crime must be proved beyond a reasonable doubt.

* + 1. That on or about \_December 1, 2015 , the Defendant drove a motor vehicle;
    2. That either:
       1. while driving that vehicle, the defendant was under the influence of or affected by intoxicating liquor; or
       2. that the defendant had in his system at the time of driving an amount of alcohol sufficient to cause a measurement of breath to register 0.08 percent or greater within two

1. hours after driving; and;
2. That the driving occurred in King County, Washington.
3. If you find from the evidence that elements 1, 2 and 3 have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
4. On the other hand, if, after weighing all of the evidence, you have reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Authority: WPIC 50.06

SMC 11.56.020

State v. Crediford, 130 Wn.2d 747, 756 (1996). ([W]e must, therefore assume that a logically and legally required, albeit implied, element of the offense described in RCW 46.61.502 is that an amount of alcohol sufficient to cause a measurement of breath or blood of a defendant to register 0.10 percent or greater within two hours of driving was present in the defendant’s system **while he or she was driving**. at p. 755 (emphasis in original)).

NO.

Absence of observable symptoms of alcohol intoxication is relevant to the issue of whether a driver was under the influence of intoxicating liquor at the time he or she was driving. It is also relevant to the issue of whether a breath test result of 0.08 or more accurately establishes a breath alcohol concentration equivalent to one or more grams of alcohol per 210 liters of exhaled breath.

State v. Franco, 96 Wn.2d 816, 636 P.2d 1320 (1982)

State v. Clark, 593 P.2d 123 (Ore. 1979)

Absence of observable symptoms of alcohol intoxication is relevant on the issue of whether a motor vehicle driver was under the influence of intoxicating liquor and is also relevant on the issue of whether a breath test result is accurate.

State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982)

State v. Clark, 593 P.2d 123 (1979)

The term “calibrate” as used in these instructions means to check, adjust, or standardize systematically the graduations of a quantitative measuring instrument.

Webster’s New Riverside University Dictionary

If you find that there is such a difference between the breath test result and the other facts in evidence that you believe that the test was in some way defective or inaccurate, you are entitled to reject the results of that test, even if it should appear that the test was otherwise properly conducted.

State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982)

State v. Clark, 593 P.2d 123 (Ore. 1979)

By law, technicians authorized per WAC 448-013-170 and 448-13-180 shall carry out on a regular periodic basis a quality assurance program which shall include recalibration, and checks of components and function of every BAC Verifier DataMaster instrument used for evidential breath testing purposes in the state of Washington. The protocol which shall be followed for quality assurance will be that protocol currently approved and authorized by the state toxicologist pursuant to WAC 448-13-130.

Upon successfully meeting all the requirements of the quality assurance program, the instrument is approved by the state toxicologist for use over a period of not more than one year, or until such time as one of the following operations is required: Replacement of the central processing unit (CPU) board, replacement of the infrared detector, replacement of the infrared detector block, replacement of the infrared detector board, replacement or updating of the software, disassembly and then reassembly of the sample chamber, or recalibration. On successful completion of the quality assurance procedure the instrument is approved for use for a further one-year period. As the quality assurance procedure includes all the elements of the procedure previously known as “certification,” the use of BAC Verifier DataMaster Certification documents described in CrRLJ

6.13 is recommended by the state toxicologist to indicate compliance with this quality assurance program.

Authority: WC 448-13-110

You may disregard the results of the test of the defendant’s breath if you entertain a reasonable doubt as to the accuracy of the test and the results thereof.

State v. Franco, 96 Wn.2d 816 (1982)

State v. Keller, 36 Wn. App. 110 (1983)

Under the laws of the state of Washington, a person has the right to refuse to submit to breath testing, also known as physical sobriety tests.

The fact that a person has exercised this right does not require you to conclude that the person therefore must be guilty of DUI. It is evidence that you may consider with other competent evidence presented in this case to determine whether the State has proved each element of the crime beyond a reasonable doubt.

WPIC 46.20.308

State v. Staheli, 102 Wn.2d 305 (1984)

To be considered valid, analysis of the breath must have been performed according to methods and techniques approved by the State Toxicologist and by an individual possessing a valid permit by the State Toxicologist for this purpose.

Authority: RCW 46.61.506(3)

State v. Watson, 51 Wn. App. 947 (1988)

State v. Straka, 116 Wn.2d 859 (1991)

In a criminal case the burden of proof is always upon the prosecution to prove each element of the crime charged by competent evidence beyond a reasonable doubt.

This burden never shifts to the Defendant, for the law never imposes upon a defendant the burden or duty of calling any witness or producing any evidence.

Mullaney v. Wilbur, 42l U.S. 684 (l975) In Re Winship, 397 U.S. 358 (l970)

State v. Bryant, 73 Wn.2d l68, 437 P.2d 398 (l968) State v. McHenry, l3 Wn.App. 42l, 535 P.2d 843 (l975) RCW 9A.04.l00

You are to consider the results of the breath test only in deciding if the prosecution has proven beyond a reasonable doubt that the concentration of alcohol on the defendant's breath within two hours of driving was .08 grams per 210 liters of breath or higher. You may not consider the alleged test result in deciding whether the Defendant's ability to drive was appreciably diminished.

State v. Brayman, 110 Wn.2d 183 (1988)

RCW 46.61.506(1)

The term “appreciable” as used in these instructions means capable of being appreciated, weighed, or judged; great enough to be estimated or measured; perceptible.

Webster's International Dictionary

Under the laws of the state of Washington, a person has the right to refuse to submit to roadside testing, also known as physical sobriety tests.

The fact that a person has exercised this right does not require you to conclude that the person therefore must be guilty of DUI. It is evidence that you may consider with other competent evidence presented in this case to determine whether the State has proved each element of the crime beyond a reasonable doubt.

Authority: Seattle v. Personeus, 63 Wn. App. 461 (1991).

“Methods and techniques”, as used in the previous instruction, refers to all procedures approved by the Washington State Toxicologist in the Washington State Patrol Breath Test Program.

Authority: State v. Straka, 116 Wn.2d 859 (1991)

If the prosecution does not produce the testimony of a witness who is within the control of the prosecution, and as a matter of reasonable probability it appears naturally in the interest of the prosecution to produce the witness, and if the prosecution fails to satisfactorily explain why it has not called the witness, you may infer that the testimony which the witness would have given would have been unfavorable to the prosecution, if you believe such inference is warranted under all the circumstances of the case.

Authority: WPIC 5.20 (modified)

State v. Davis, 73 Wn.2d 271, 438 P.2d 185 (1968)

It is not unlawful for a person to consume alcohol and drive. The law recognizes that a person may have consumed alcohol and yet not be under the influence of it. It is not enough to prove merely that a driver had consumed alcohol.

State v. Hurd, 5 Wn.2d 308, 105 P.2d 59 (1940)

State v. Hansen, 15 Wn.App. 95, 546 P.2d 1242 (1976)

State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982)

A person commits the crime of Driving Under the Influence of Intoxicants when he or she drives a vehicle while under the influence of, or affected by intoxicating liquor.

Authority: RCW 46.61.502

It is not unlawful for a person to consume alcohol and drive. The law recognizes that a person may have consumed alcohol and yet not be under the influence of it. You may not conclude that Mr. JACK DANIELS is guilty merely because he drove after consuming alcohol.

State v. Straka, 116 Wn.2d 859 (1991)

State v. Hansen, 15 Wn.App. 95 (1976)

RCW 46.61.502

A person commits the crime of Driving While Under the Influence of Alcohol when he or she drives a motor vehicle and at the time of driving either:

1. has sufficient alcohol in his or her system to have an alcohol concentration of 0.08 or higher within two (2) hours after driving; and/or
2. was under the influence of affected by intoxicating liquor.

Authority: RCW 46.61.502

Seattle v. Crediford, 130 Wn.2d 747 (1996)

You are instructed that the prosecution has the burden of proving beyond a reasonable doubt that the breath test result was accurate and reliable.

In considering what weight to give to the test results, you may take into account all evidence bearing on both the test's accuracy and reliability as well as the degree to which it proves the Defendant’s actual breath alcohol concentration within two hours of the actual time of driving.

Seattle v. Gellein, 112 Wn.2d 58, 62 (1989). "...The second principle is a holding of State v. Franco, 96 Wn.2d 816, 828, 639 P.2d 1320 (1982): "[T]he State always has the burden of proving beyond a reasonable doubt to the jury that the 0.10 percent [Breathalyzer] reading was a correct one." Thus, the State (or in Gellein's case, the City of Seattle) must not only prove 0.10 percent or more by weight of alcohol in defendant's blood, it must also prove beyond a reasonable doubt that the reading is accurate."

State v. Ford,110 Wn.2d 827, 833 "...The ultimate concern of the judiciary is that the methods approved result in an accurate test, competently administered, so that a defendant is assured that the test results do in fact reflect a **reliable and accurate** measure of his or her breath content."

State v. Straka, 116 Wn.2d 859 (1991)

Willful means acting intentionally and purposely, and not accidentally or inadvertently.

Wanton means acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm the person or property of another.

WPIC 95.10

By law, the breath test you are to consider in this case is the lower of the two readings truncated to two digits. A Truncated BAC means that you are to drop the third digit off of the lower reading without rounding the remaining number either up or down.

Authority: WAC 448-13-065

The Oxford Concise Dictionary, 7th Edition

Under the laws of this State, the phrases “under the influence of” and “affected by”, as used in the complaint herein with reference to intoxicating liquor, have the same significance, import, and breadth of meaning.

For the purposes of this case, the defendant may be said to have been either “under the influence of” or “affected by” intoxicating liquor, if, at the time of the alleged unlawful operation of his automobile, evidence beyond a reasonable doubt establishes that intoxicating liquor has so far affected his nervous system, brain, or muscles, so as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinary, prudent, and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like circumstances.

The question of whether or not the driver of an automobile is under the influence or affected by intoxicating liquor is one solely for the jury to determine from the evidence. The law recognizes that a person may have drunk liquor and not be under the influence of it. It is not enough to prove merely that a driver had taken liquor.

State v. Engstrom, 79 Wn.2d 469 (1971)

State v. Hurd, 5 Wn.2d 308 (1940)

State v. Hansen, 15 Wn. App. 95 (1976)

State v. Sprout, 5 Wn. App. 897 (1971)

State v. Franco, 96 Wn.2c 816 (1982)

The phrase "while under the influence of, or affected by" intoxicating liquor, means an abnormal mental or physical condition due to the influence of alcoholic liquors, a visible impairment of the judgment or a derangement, or impairment of mental or physical functions or energies arising there from, and that a person's ability to drive has been diminished to an appreciable degree.

State v. Hurd, 5 Wn.2d 308, l05 P.2d 59 (l940) State v. Melcher, 33 Wn.App. 357 (l982) State v. Hansen, 15 Wn.App. 95 (1976))

IN THE KING COUNTY DISTRICT COURT WEST DIVISION, STATE OF WASHINGTON

# Sample Trial Brief(s)

STATE OF WASHINGTON,

Plaintiff,

NO. C123456

vs.

JACK DANIELS,

Defendant.

We, the jury, find the defendant, JACK DANIELS, (write in not guilty or guilty) of the crime of Driving While Under the Influence of Intoxicating Liquor as charged.

FOREPERSON

The defense would like to discuss, compare and contrast the legal criminal standard of proof (beyond a reasonable doubt) to other legal standards of proof (clear and convincing, preponderance, probable cause, reasonable suspicion, and scintilla) with the jury during voir dire and in closing arguments.

This image cannot currently be displayed .



IN THE KING COUNTY DISTRICT COURT, WEST DIVISION SEATTLE COURTHOUSE, STATE OF WASHINGTON

NO.

STATE OF WASHINGTON,

Plaintiff,

vs.

LEO M. BACKER,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S DESIRE TO DISCUSS AND CONTRAST VARYING LEVELS OF PROOF DURING VOIR DIRE AND CLOSING ARGUMENTS

(C)8

This would be an accurate discussion and presentation of the law and would assist jurors to understand their responsibilities and the high standard of reasonable doubt in this criminal case.

4 **Probable cause** “exists when an individual is aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable person to believe a crime has been committed.” *State v. Mance*, 82 Wn. App. 539, 541, 918 P.2d 527 (1996).

As this court is well aware, there are numerous levels of proof in the legal and judicial arena. We have ascending levels of proof, which are listed as follows: scintilla2, reasonable suspicion3, probable cause4, preponderance5, clear and convincing6, and reasonable doubt7.

1. A **scintilla of evidence** is evidence that is merely colorable, or evidence that is not significantly probative. *Seiber v. Poulsbo Marine Center, Inc.*, 136 Wn. App. 731, 150 P.3d 633, 635 (Div. 2 2007);

*Alpine Industries Computers, Inc. v. Cowles Pub. Co.*, 114 Wn. App. 371, 57 P.3d 1178, 1183 (Div. 3 2002),

opinion amended, 64 P.3d 49 (Wash. Ct. App. Div. 3 2003).

1. A **reasonable suspicion** is an articulable suspicion or "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) [citing 3 Wayne R. LaFave, *Search and Seizure* §9.2, at 65 (1978)] [Emphasis added]. “Reasonable suspicion” cannot be supported by an “instinct” or “inarticulate hunch.” *State v. Thompson*, 93 Wn.2d 838, 842, 613 P.2d 525 (1980).
2. A “**preponderance of the evidence**” means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true. WPI 160.02; WPI 21.01; *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005).
3. **Clear and convincing** is evidence that must be substantial enough to conclude that allegations are “highly probable.” *In re A.V.D.*, 62 Wn. App. 562, 815 P.2d 277 (1991); RCW 13.34.190.
4. **Reasonable doubt** is a doubt for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. WPIC 4.01.
5. Copyright: National College for DUI Defense (NCDD). This image was reproduced with the express permission of the NCDD for the specific use by William Kirk with his clients. The rights for others to use this image may be obtained by contacting the NCDD (http://ncdd.com).

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring).

*Addington v. Texas*, 441 U.S. 418, 423-24, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

In *Fuller v. State*, 363 S.W.3d 583 (2012), the Court of Criminal Appeals of Texas ruled that the trial court abused its discretion in denying the defendant's request that he be permitted to ask members of venire panel whether they understood that standard of proof beyond a reasonable doubt constituted level of confidence under law that was higher than both preponderance of evidence and clear and convincing evidence standards. The court went on to say that it was appropriate for a defendant to explain and contrast among the various standards of proof in a case, in that that it was at least relevant to, if not altogether dispositive of, legitimate defense potential challenges for cause.

It is essential that the jury understand the prosecution’s burden of proof in a criminal trial. “Because of the extraordinarily high stakes in criminal trials, it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.” *Victor v. Nebraska*, 511 U.S. 1, 29, 114 S. Ct. 1239 (1994) (Blackmun, J., concurring in part and dissenting in part) (internal quotations and citations removed). Reasonable doubt is the “bedrock upon which the criminal justice system stands.” *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

Courts and the drafters of jury instruction have long struggled with a definition for reasonable doubt. *See, e.g.*, *Victor v. Nebraska*, 511 U.S. 1, 25, 114 S. Ct. 1239 (1994) (Ginsburg, J., concurring and dissenting in part) (noting that the difficulty of defining reasonable doubt has led some courts to avoid providing the jury with a definition. Indeed, studies have shown that jurors are often confused about the meaning of “reasonable doubt.” *Id.* [citing Note, Defining Reasonable Doubt, 90 Colum. L. Rev. 1716, 1723 (1990)].

Reasonable doubt is now not a totally undefinable concept, although various states and Federal Courts have different definitions. Comparing the criminal burden of proof to the civil burden of proof is one, if not the best, way to help define reasonable doubt for the jury to better understand the degree of confidence he or she must have in the correctness of their decision. The Federal Judicial Center’s Pattern Criminal Jury Instructions, as used in this state, reads:

[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Federal Judicial Center, Pattern Criminal Jury Instructions, at 17-18 (instruction 21). The defense wishes to do no more than just contextualize and define reasonable doubt using similar terms and analysis from other jurisdictions within this state. It is evident that if a potential juror has prior jury experience in a different state, or even the federal system within this state, that definitions can and are different than that used in this Washington State system of justice.

In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804 (1979), the Supreme Court determined that due to the fact that a person’s liberty interests are at stake in a civil commitment proceeding that jurors need to be instructed that that the ‘clear and convincing’ standard of proof, within that state, must be greater than the ‘preponderance-of-the-evidence’ standard applicable to other categories of civil cases within that state. In this case potential jurors must also be inquired of, and educated that the proof of ‘beyond a reasonable doubt’ must be greater than the standard applicable to other categories of cases, because of this particular defendant’s liberty interests.

Current and prospective Washington jurors have access to the definitions of the different burdens of proof before, during, and after trial. Perhaps recognizing that jurors may seek out assistance to understand their role as a juror, the Washington Courts have even provided a glossary of terms to prospective jurors on their website. That glossary includes terms that also defined, such as “probable cause,” “preponderance,” and “reasonable doubt.”

[<http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.termguide>]

**Probable Cause:** Reasonable cause; having more evidence for than against; a reasonable belief that a crime has or is being committed; the basis for all lawful searches, seizures, and arrests.

**Preponderance of Evidence:** The general standard of proof in civil cases. The weight of evidence presented by one side is more convincing to the trier of facts than the evidence presented by the opposing side.

**Reasonable Doubt:** If, in the minds of the jury, a doubt exists which may have arisen from the evidence, or lack of evidence, a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence, or lack of evidence.

The defense should also be allowed to draw upon these same court resources to prevent the jurors from diluting the prosecution’s burden in this criminal case in order to help define and understand this bedrock principle for the jury to better understand the degree of confidence he or she must have in their decision with this case and this defendant. Cf. *State v. Warren*, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008) [“[I]t is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt.]; *State v. Johnson,* 258 Wn. App. 677, 685, 243 P.3d 936 (2010), *review denied,* 171 Wn.2d 1013 (2011) [“[M]inimizing, or ‘trivialize[ing]’ the law regarding the burden of proof can be improper”].

The defense, in this case, should be allowed to inquire of, discuss, and educate, potential jurors as it relates to their understanding, and reaffirm with seated jurors, that the mere fact that a person has been arrested, by a law enforcement officer, upon the standard of “probable cause” does not carry over to meet the high burden of “beyond a reasonable doubt” to render a verdict in this case. *Cf. State v. Quaale,* 177 Wn. App. 603, 312 P.3d 726, 731 (2013) [Where a police officer was not allowed to give an opinion of impairment because a “[p]olice officer’s area of expertise ‘is in determining when an arrest is justified, not in determining when there is guilt beyond a reasonable doubt.’”].

This same website, referenced earlier in this memorandum, from the Washington Courts also leads jurors to information about the different levels of proof between a civil and criminal proceeding in this state.

[[http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo\_jury.display&altMenu=Citi&folde](http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.display&amp;altMenu=Citi&amp;folde) rID=jury\_guide&fileID=types]

**TYPES OF CASES**

**Civil**

Decisions are based upon a *preponderance of evidence*. The party suing (*plaintiff*) must prove his or her case by presenting evidence that is more persuading to the *trier of fact* (*judge* or *jury*) than the opposing *evidence*.

## Criminal

Criminal cases are brought by the government against individuals or corporations accused of committing a crime. The government makes the charge because a crime is considered an act against all of society. The prosecuting attorney prosecutes the charge against the accused person (*defendant*) on behalf of the government (*plaintiff*). The prosecution must prove to the judge or jury that the defendant is guilty beyond a *reasonable doubt*.

The more serious crimes are called *felonies* and are punishable by more than a year’s confinement in a state prison. Examples are arson, assault, larceny, burglary, murder, and rape.

Lesser crimes are called misdemeanors and *gross misdemeanors*. Both are punishable by confinement in a city or county jail. Examples of gross misdemeanors are theft of property or services valued at up to $250 and driving while under the influence (DUI) of alcohol or drugs. Among the many types of misdemeanors are disorderly conduct, prostitution, and possession of less than 40 grams of marijuana.

SEATTLE MUNICIPAL COURT: This glossary of terms is also available to current and prospective jurors from the Seattle Municipal Court website. On the webpage that directly addresses potential and current jurors’ in frequently asked questions [<http://www.seattle.gov/courts/jury/faq.htm>], under a tab entitled “Jury Service at Seattle Municipal Court Frequently Asked Questions,” there is a link available entitled

“Washington State Courts Jury Guide” where a potential and current juror who follows that link would have access to the same glossary of terms on the Washington State Courts’ Jury Service webpage.

KING COUNTY DISTRICT COURT: This same glossary of terms and access to the different levels of proof in a civil and criminal proceeding, in our state system of justice, can be accessed through the King County District Court webpage [<http://www.kingcounty.gov/courts/DistrictCourt/About/Jury.aspx>]. The King County District Court website refers prospective and current jurors to the state website, where they, again, have access, as well, to the glossary of terms mentioned earlier in this memorandum.

In overturning convictions for possession of cocaine, possession of cocaine with intent to distribute, and distribution of cocaine, in *State v. Oates*, 246 N.J.Super. 261, 268, 587 A.2d 298 (1991) the court ruled that the judge9 did not cover certain areas which were deemed essential to a proper examination of prospective jurors, in every criminal case, by asking whether any juror had ever served on a civil trial jury; and if so, explaining the different burdens of proof in civil and criminal cases.

1. At at that time in New Jersey only the judge conducted voir dire in conformance with their Supreme Court adopted *R.* 1:8–3(a) “Examination of Jurors. For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the court's interrogation in its discretion ”

This case is also a criminal case where it is essential to a proper examination of prospective jurors to ask whether any juror has ever served on a civil trial jury; and if so, explaining the different burdens of proof in civil and criminal cases.

It is beyond peradventure10 that the prosecution will attempt to cloud this issue and dissuade the court from allowing the defense to discuss, compare and contrast the various levels of proof by referencing to *State v. Ellsworth*, 40 Wn.2d 375, 377, 242 P.2d 1019 (1952); *State v. Estill*, 80

Wn.2d 196, 199, 492 P.2d 1037 (1972); *State v. Davenport,* 100 Wn.2d 757, 760, 675 P.2d 1213

(1984); and possibly *State v. Souther*, 100 Wn. App. 701, 714, 998 P.2d 350 (2000).

In *Ellsworth*, the defendant was charged from a 1909 criminal code where there were five different methods of committing grand larceny. One method of committing grand larceny was stealing property of any value by taking the same from the person; another was stealing property of a value of more than $25. Stealing property of a value less than $25 was petit larceny, with a lesser punishment. Ellsworth was solely charged with the former mode of committing grand larceny, and not with property in value of more than $25, so the value of the item taken directly from the person was not an issue for conviction under the law. The defense wished to argue the value of the item to the jury and the enhanced penalty for grand larceny versus petit larceny. In upholding the trial court’s denial of the defense request to make such an argument is when the court ruled, at page 377, “…the address to the jury upon the law must be confined to the law as set forth in the instructions of the court,” as referenced by the prosecutor in their memorandum. *Ellsworth*, in part, only reaffirmed what is written in WPIC 1.02: “You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.” *Ellsworth* has nothing to do with the defense discussing, comparing, and contrasting the various levels of proof as an essential and proper examination of prospective jurors, and reminding them of their responsibility, in closing arguments, in rendering a verdict in a high-stakes situation where a person’s liberty is at risk.

In *Estill*, at that time, under RCW 9.26A.030(2), when a person possessed two or more credit cards in another person’s name, they were presumed guilty of credit card or identification card theft. This was a rebuttable presumption, by law, the jury was instructed of the same, yet the prosecutor, in closing argument, misinterpreted the law and the court’s instructions to the jury, and demanded the jury convict, based upon this being a conclusive presumption. In upholding that the prosecutor’s argument was improper yet not prejudicial to the defendant, is where the court in *Estill* wrote, at page 199, “[i]t is the rule in this state that statements by the prosecutor or defense to the jury upon the law must be confined to the law as set forth in the instructions of the court,” as referenced by the prosecutor in their memorandum. *Estill* has nothing to do with the defense discussing, comparing, and contrasting the various levels of proof as an essential and proper examination of prospective jurors, and reminding them of their responsibility, in closing arguments, in rendering a verdict in a high-stakes situation where a person’s liberty is at risk.

In *Davenport*, the defendant was charged with burglary. The State neither charged Davenport as an accomplice, under RCW 9A.08.020, nor sought a jury instruction on accomplice liability yet at the close of the case, in rebuttal argument, the prosecution stated, “it doesn't make any difference actually who went into the house ... they are accomplices.” In overturning the conviction and ruling that the prosecutor's comment was improper is when the court wrote, at page 760, “[s]tatements by the prosecution or defense to the jury upon the law, must be confined to the law as set forth in the instructions given by the court,” as referenced by the prosecutor in their memorandum. *Davenport* involved an overzealous prosecutor presenting an inappropriate closing argument to convict a defendant of a crime that completely derogated from the charges, charging document, and elements of the crime for which the defendant was accused. *Davenport* has nothing to do with the defense discussing, comparing, and contrasting the various levels of proof as an essential and proper examination of prospective jurors, and reminding them of their responsibility, in closing arguments, in rendering a verdict in a high-stakes situation where a person’s liberty is at risk.

In *Souther*, the defendant was charged with vehicular homicide. The issue in the case was whether the actions of the other vehicle were an intervening cause, a superseding cause, or a concurring cause to shield the defendant from responsibility. The court ruled that contributory negligence is not intervening, but concurring, and thus not a defense. The prosecution, in closing argument, in essence, stated that even if the jury were to find the victim ninety-nine-percent responsible for the collision, the defendant was guilty. The appellate court found that the prosecutor’s comment was not a misstatement of the law, and that is where they wrote, at page 714 (while citing to *Davenport, supra*), “[s]tatements made during the closing argument that pertain to the law must be confined to the law as set forth in the instructions,” as referenced by the prosecutor in their memorandum. *Souther* has nothing to do with the defense discussing, comparing, and contrasting the various levels of proof as an essential and proper examination of prospective jurors, and reminding them of their responsibility, in closing arguments, in rendering a verdict in a high-stakes situation where a person’s liberty is at risk.

**CONCLUSION**

Based upon the above, the defense should be allowed to discuss, compare and contrast the various levels of proof with potential jurors during voir dire, as well as comparing and contrasting the various levels of proof with the jury during closing argument in order to assist the jurors to understand the degree of confidence he or she must have in the correctness of their decision for this particular type of adjudication, a criminal prosecution. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068 (1970); *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328 (1990).

Dated this 10th day of March, 2014.

1. Uncertainty or doubt as to whether something is the case.

WILLIAM K. KIRK

WILLIAM MANCHESTER,

Defendant.

Attorney for Defendant WSBA# 28235

The Defendant, WILLIAM MANCHESTER, by and through his attorney of record, William Kirk, HEREBY MOVES THIS COURT IN LIMINE to exclude opinion testimony regarding the “intoxication” and/or “impairment” of the Defendant. This motion is based upon the record and authorities filed herein.

This author wishes to thank and acknowledge attorneys from the Associated Counsel for the Accused (ACA), The Defender Association (TDA), the Washington Association of Criminal Defense Lawyers (WACDL), the Washington Foundation for Criminal Justice (WFCJ), George Bianchi and Bob Wayne for their efforts, research, and sharing of their briefing on this issue. Much of the information in this memorandum was reproduced from their efforts.

IN THE SEATTLE MUNICIPAL COURT KING COUNTY, STATE OF WASHINGTON

Dated this 13th day of May, 2014.

WILLIAM K. KIRK

Attorney for Defendant WSBA# 28235

NO.

CITY OF SEATTLE,

Plaintiff,

vs.

MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE OFFICER'S TESTIMONY AS TO UTLIMATE ISSUE TO BE DECIDED BY JURY

## ARGUMENT

The Defendant, William Manchester, is charged with one count of Driving Under the Influence of Alcohol and/or Drugs arising from his arrest by Officer B. Schmitt of the Seattle Police Department on April 10, 2013.

The Defendant was arrested by Officer Anderson, and it is anticipated that during the course of trial, the City will elicit testimony from Officer Anderson that he believed that, in his opinion, the Defendant was impaired by alcohol and/or intoxicated. The City’s witness may also opine that Mr. Manchester’s ability to drive a car was affected to an appreciable degree. This memorandum is in support of the Defendant’s motion in limine to exclude this testimony.

## NO WITNESS MAY OFFER TESTIMONY IN THE FORM OF AN OPINION REGARDING THE GUILT OF THE DEFENDANT.

In all DUI cases, the trier of fact must ultimately decide whether the Defendant was over the legal limit or “under the influence of or affected by an intoxicating liquor or drug.” RCW

46.61.502. This is reflected in WPIC 92.01:

To convict the Defendant of driving under the influence, each of the following elements must be proven beyond a reasonable doubt:

1. That on or about , the Defendant drove a motor vehicle;
2. That the defendant, at the time of driving a motor vehicle
   1. Was under the influence or affected by intoxicating liquor or drugs, or;
   2. Was under the combined influence of or affected by intoxicating liquor and/or drugs, or;
   3. Had sufficient alcohol in his body to have a alcohol concentration of

0.08 or higher within 2 hours of driving as shown by an accurate and reliable test of the defendant’s breath, and;

1. The acts occurred in Seattle, King County, Washington.

Neither a lay nor an expert may witness may testify to his/her opinion as to the guilt of the Defendant, whether by direct statement or inference. State v. King, 167 Wn.2d 324 (2009). In King, the Defendant was convicted of Reckless Driving and on appeal challenged, amongst other things, the Officer’s opinion testimony that Mr. King’s driving was “reckless in my view point.” Id. at 328. In reversing Mr. King’s conviction, the Supreme Court analyzed the Officer’s opinion testimony on the issue of whether the driving was “reckless” and stated:

Generally, no witness may offer testimony in the form of an opinion regarding the guilt of veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.

Id. at 331. The Court further noted the particular prejudice with Police testimony because it is an expression by the Police Officer that goes to the guilt of the Defendant:

A law enforcement officer’s opinion testimony may be especially prejudicial because the “officer’s testimony often carries a special aura of reliability.”

Id. at 331.

In the present case, it would be improper and prejudicial to allow the arresting officer to give an opinion as to whether Mr. Stiebler was under the influence of or affected by alcohol.

## CONCLUSION

Any such testimony would invade the province of the jury and be in direct conflict with the clear limitations and holdings of State v. King. The Defendant therefore moves to exclude any and all such opinion testimony.

Dated this 7th day of May, 2014.

WILLIAM K. KIRK

Attorney for Defendant WSBA# 28235