NOTICE: SLIP OPINION
(not the court's final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court's final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously "unpublished" opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

For more information about precedential (published) opinions, nonprecedential (unpublished) opinions, slip opinions, and the official reports, see https://www.courts.wa.gov/opinions and the information that is linked there.

FILED
9/9/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. AHMED MOHAMUD WASUGE, Appellant.	No. 85286-8-I ORDER DENYING MOTION FOR RECONSIDERATION AND WITHDRAWING AND SUBSTITUTING OPINION

The appellant, Ahmed Mohamud Wasuge, has filed a motion for reconsideration of the opinion filed on August 12, 2024. The court has determined that the motion should be denied, but the opinion should be withdrawn, and a substitute opinion filed; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied; and it is further

ORDERED that the opinion filed on August 12, 2024 is withdrawn; and it is further

ORDERED that a substitute unpublished opinion shall be filed.

Feldman, J.

Chung, J.

Colum, J.

FILED
9/9/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. AHMED MOHAMUD WASUGE, Appellant.	No. 85286-8-I DIVISION ONE OPINION PUBLISHED IN PART

FELDMAN, J. — A jury convicted Ahmed Mohamud Wasuge of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor, operating a motor vehicle without a functioning ignition interlock device, and driving while his license was revoked. On appeal, Wasuge argues we should reverse his convictions and remand for a new trial due to several alleged evidentiary errors and prosecutorial misconduct. Wasuge also contends that the victim penalty assessment (VPA) should be stricken from his judgment and sentence, an issue that the State concedes.

In the published portion of this opinion, we conclude the trial court erred in admitting expert testimony that (a) the general population metabolizes alcohol at a rate of .01 to .02 percent per hour and (b) the American Medical Association (AMA) recommends that state legislatures lower the "per se" blood alcohol concentration

(BAC) limit for driving under the influence (DUI) offenses from .08 to .05 percent.[1] But we also conclude that these errors were harmless. In the unpublished portion of the opinion, we address Wasuge's remaining assignments of error. We remand for the trial court to strike the VPA from Wasuge's judgment and sentence but otherwise affirm.

I

On the morning of October 12, 2022, a 911 caller reported that a vehicle had abruptly stopped in the center of a residential road. Upon arriving at the scene at approximately 6:45 a.m., King County Sheriff's Office Deputies Andrew Farley and Andrew Robinson saw a stationary vehicle in the southbound lane of the road with its headlights and taillights illuminated. The officers noticed the vehicle's engine was running, the keys were in the ignition, and the transmission was in drive. The officers also observed Wasuge sitting in the reclined driver's seat asleep with his feet resting on the floorboard.

The officers decided to "box the vehicle in" by parking their vehicles in front of and behind Wasuge's vehicle. Farley then knocked on the front driver's side window and announced himself as a law enforcement officer. When Wasuge awoke, he looked at Farley and began rolling down the back driver's side window before rolling down the front driver's side window. Farley immediately smelled "an

[1] BAC can be expressed in terms of grams of alcohol per 100 milliliters of blood (i.e., .08 grams per 100 milliliters) or a percentage (i.e., .08 percent), and these terms are used interchangeably. *See State v. Reier*, 127 Wn. App. 753, 758, 112 P.3d 566 (2005). The "per se" BAC limit refers to the BAC level at which a person is guilty of driving or being in actual physical control of a motor vehicle while under the influence of alcohol under the per se prongs of RCW 46.61.502(1) and RCW 46.61.504(1), as discussed below.

odor of alcoholic beverages coming from the vehicle" and ordered Wasuge to put the gearshift in park and exit the vehicle, which he did.

When Farley asked Wasuge "why he was asleep in the middle of the roadway," Wasuge said he was waiting for a friend and pointed at different houses in multiple directions. Farley suspected that Wasuge had been drinking alcohol because his breath smelled of alcohol; his speech was slurred; his eyes were bloodshot, glassy, and watery; he was unbalanced when walking and standing; and he generally appeared "dazed and confused." Farley asked Wasuge if he had been drinking, which Wasuge denied. After Wasuge performed poorly on the field sobriety tests (FSTs),[2] Farley placed him under arrest for DUI. Farley then transported Wasuge to a hospital where a nurse drew his blood at 8:51 a.m. Later testing of this blood determined that Wasuge's BAC was .076 percent.

The State charged Wasuge with three counts of violation of state motor vehicle laws: count 1 for DUI, count 2 for operating a vehicle without a functioning ignition interlock device, and count 3 for driving while his license was revoked. At trial, Wasuge stipulated that he was required to drive with a functioning ignition interlock device, that his license had been revoked, and that he had previously been convicted of a felony DUI offense (which elevated count 1 to a felony). Wasuge testified that before being discovered by police on the morning of October 12, 2022, he had drunk multiple beers with a friend in Seattle and had then attempted to drive to his home in Sammamish. Wasuge claimed that his car "broke down" near his

[2] Wasuge exhibited six of six clues on the horizontal gaze nystagmus test, five of eight clues on the walk-and-turn test, and four of four clues on the one leg stand test. *See State v. Mecham*, 186 Wn.2d 128, 132, 380 P.3d 414 (2016) (explaining procedure and significance of field sobriety tests). Wasuge was also unable to correctly count backward from 67 to 54.

home on the road where officers later found him and that he tried calling friends and family for assistance before eventually falling asleep.

The jury convicted Wasuge of counts 2 and 3 as charged, but it did not reach a unanimous verdict on count 1 and instead convicted Wasuge of the lesser included offense of being in actual physical control of a motor vehicle while under the influence. Wasuge was sentenced within the standard range. He appeals.

II

A. Expert testimony

Wasuge argues the trial court abused its discretion by admitting expert testimony from the State's toxicologist regarding (a) the rate at which the general population metabolizes alcohol and (b) the AMA's recommendation that state legislatures lower the per se BAC limit to .05 percent. We conclude the trial court erred in both respects but the errors were harmless.

Under ER 702, expert testimony is admissible if it "would be helpful to the trier of fact." *State v. Lewis*, 141 Wn. App. 367, 389, 166 P.3d 786 (2007). Expert testimony is helpful if "it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004). Moreover, the expert's testimony must be relevant, meaning it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401, 402. Speculative testimony is irrelevant, even if it comes from an expert. *Lewis*, 141 Wn. App. at 389. We review a trial court's evidentiary rulings for an abuse of discretion. *City of Seattle v.*

Pearson, 192 Wn. App. 802, 817, 369 P.3d 194 (2016). "A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *State v. Griffin*, _ Wn. App. 2d _, 544 P.3d 524, 529 (2024).

Our motor vehicle statutes prescribe two ways of showing that a person who was driving or in control of a vehicle was "under the influence" of intoxicating liquor. Under the "per se" prong, the State may simply prove that "the person has within two hours after driving [or after being in actual physical control of the vehicle], an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506." RCW 46.61.502(1)(a); RCW 46.61.504(1)(a). Alternatively, under the "affected by" prong, the State must prove that "the person is under the influence of or affected by intoxicating liquor" while driving or in actual physical control of the vehicle. RCW 46.61.502(1)(c); RCW 46.61.504(1)(c).

Here, the State elected to try Wasuge solely under the "affected by" prong and did not charge him with violating the "per se" prong. Accordingly, to convict Wasuge of either driving under the influence as charged in count 1 or its lesser included offense of being in actual physical control of a motor vehicle while under the influence, the jury—as instructed by the trial court—had to find that Wasuge was "under the influence of or affected by intoxicating liquor" when he was driving or in actual physical control of the motor vehicle. To satisfy this element of the charged offense, the court's instructions required the State to prove that Wasuge's

"ability to drive a motor vehicle [was] lessened in any appreciable degree." *See State v. Arndt*, 179 Wn. App. 373, 386, 320 P.3d 104 (2014).

At trial, the State sought to prove that Wasuge was under the influence of or affected by intoxicating liquor through its toxicologist, Stacy Dougher, who testified about the results of Wasuge's blood test and the general effects of alcohol on the body. Two aspects of Dougher's testimony are relevant on appeal. First, over Wasuge's objection, Dougher testified that after consuming alcohol a person's BAC will rise for a period of time that "varies from person to person and based on the circumstances" for "[g]enerally, anywhere from 20 minutes up to two hours," followed by an "elimination phase" during which the body metabolizes (or burns off) the alcohol at "a standard rate of .01 to .02 grams per 100 milliliter per hour for the general population." Second, when asked if "there is a blood alcohol level at which everyone is affected such that they shouldn't drive a vehicle," Dougher responded, "The per se in the state of Washington is 0.08 grams per 100 milliliters." And when asked, "What does the literature say about impairment at BACs of .05," Dougher replied, "There are several studies, particularly by the AMA . . . that talk about BAC in terms of that [.05] and recommending that potentially as a per se limit as it can be an indicator [of] impairment in the general population." Dougher continued, "They understand that people are potentially affected by alcohol at a level less than that .08, and so they recognize that likely predominantly or all individuals are impaired at a .05 instead, and they do recommend that as a better cutoff." Wasuge objected to this testimony as well.

Two cases illustrate the limits Washington courts have placed on the admissibility of expert testimony to prove a person's intoxication such as Dougher's testimony here. In the first case, *Gerlach v. Cove Apartments, LLC*, 196 Wn.2d 111, 115, 471 P.3d 181 (2020), the plaintiff successfully sued an apartment complex for negligence after she fell from a decaying balcony. On appeal, the apartment complex claimed the trial court erred in excluding evidence that would have shown the plaintiff was contributorily negligent due to her alcohol intoxication, such as blood test results showing she had a BAC of .219 percent approximately an hour after the fall and expert testimony that "'essentially everybody will be impaired'" at the plaintiff's BAC. *Id.* at 119-21. The Supreme Court rejected the argument and held this testimony was "merely 'speculative'" as to the plaintiff's behavior because it concerned "'population averages'" and the "general effects of intoxication" rather than "the effect it actually had on [the plaintiff]." *Id.* at 121-23. The court noted that the expert did not know what particular time the plaintiff consumed alcohol on the night in question or what her "'burn-off'" rate, "'absorption rate,'" or "'metabolic rate'" would be with regard to alcohol. *Id.* at 122.

In the second case, *Pearson*, the defendant was convicted of driving under the influence of cannabis after the State introduced a blood test showing the defendant had a tetrahydrocannabinol (THC) concentration of 20 nanograms. 192 Wn. App. at 806-09. The State also elicited testimony from a toxicologist that the per se THC limit is 5 nanograms even though that limit was not yet in effect when the defendant committed the alleged offense. *Id.* at 817-18 (citing RCW 46.61.502(1)(b)). On appeal, we held the trial court abused its discretion in

admitting this evidence because "[e]vidence of the per se legal THC limit not in effect when the offense occurred was irrelevant to the central question at trial—whether [the defendant's] ability to drive was lessened in any appreciable degree by her use of marijuana." *Id.* at 818.

Applying these legal principles here, the trial court abused its discretion in admitting the contested portions of Dougher's testimony. Like the expert in *Gerlach*, Dougher discussed the burn-off rate of .01 to .02 percent for the "general population" without discussing the rate at which Wasuge would have metabolized the alcohol. Other than the results of Wasuge's blood test, Dougher admittedly knew nothing about Wasuge, such as when he drank alcohol prior to his arrest, how much alcohol he drank, the rates at which his body absorbs and metabolizes alcohol, or the extent to which his driving was affected by alcohol. Nor did Dougher perform a retrograde extrapolation—a forensic technique in which a toxicologist uses a mathematical formula to calculate a person's BAC at a prior point in time using the person's later verified BAC. S*ee State v. Wilbur-Bobb*, 134 Wn. App. 627, 632-34, 141 P.3d 665 (2006). Without this testimony about how Wasuge's body would have metabolized alcohol, Dougher's testimony about the average metabolization rate impermissibly invited the jury to speculate about the amount of alcohol in Wasuge's blood at the time he was driving or in physical control of his vehicle. Thus, as in *Gerlach*, the testimony was "merely speculative as to [Wasuge's] behavior." 196 Wn.2d at 123. The trial court abused its discretion by admitting such testimony.

As to Dougher's testimony about the AMA's recommended lower per se BAC limit, like the expert in *Gerlach*, Dougher impermissibly testified that "predominantly or all individuals are impaired at a .05 instead" without specifying whether Wasuge would be impaired at this BAC level. And similar to the expert in *Pearson*, Dougher referred to a per se BAC limit that is not codified into Washington law as a "better cutoff" than the existing limit of .08 percent for determining whether a person's ability to drive is affected by alcohol. To paraphrase our holding in *Pearson*, "[e]vidence of the per se . . . limit not in effect when the offense occurred was irrelevant to the central question at trial—whether [Wasuge's] ability to drive was lessened in any appreciable degree by" his consumption of alcohol. 192 Wn. App. at 818. Because Dougher's testimony about this hypothetical per se BAC limit was not relevant to any issue in the trial, the trial court abused its discretion by admitting it.

The State contends that Dougher's testimony about the burn-off rate for the general population was permissible under *City of Seattle v. Personeus*, 63 Wn. App. 461, 819 P.2d 821 (1991). In *Personeus*, we held that expert testimony is necessary regarding the *rate* at which alcohol burns off because this topic, unlike the *fact* that alcohol burns off, is not a "matter of common knowledge about which inexperienced persons are capable of forming a correct judgment." *Id.* at 464 (quoting *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (1985)). We also stated that the expert's testimony in *Personeus* was relevant because it concerned the burn-off rate "for someone of Personeus' weight." *Id.* at 465. Because the State presented no evidence of the burn-off rate for someone of Wasuge's weight,

Personeus further supports our conclusion that Dougher's testimony about general burn-off rates was irrelevant and speculative.

The State also argues that Dougher's testimony about per se BAC limits was permissible because our Supreme Court in *State v. Salgado-Mendoza*, 189 Wn.2d 420, 437, 403 P.3d 45 (2017), acknowledged that toxicologists can testify in DUI cases about "the effects of alcohol on the body, how blood-alcohol is measured, and procedures for roadside sobriety testing." The State's reliance on *Salgado-Mendoza* is misplaced because the court there did not permit a toxicologist to testify about suggested changes to a law under which the defendant was not charged. Moreover, the court's decision in *Salgado-Mendoza* predates its later decision in *Gerlach*, which limits the extent to which experts may testify about how the average person metabolizes alcohol or a person's impairment at a given BAC.

The State further claims that *Pearson* is distinguishable because that case concerned the ex-post facto application of a law whereas here "the State did not present the AMA's study about 0.05-percent alcohol concentration as the law of the state" but rather to discuss "the science of how alcohol—and how much alcohol—affects the human body and its ability to operate a motor vehicle." This argument ignores the portion of Dougher's testimony at issue, where Dougher explained that a prominent association of medical experts believes the legislature should amend a statutory provision—under which Wasuge was not charged—in such a manner that would automatically resolve the key issue in the trial: whether Wasuge was under the influence of or affected by intoxicating liquor. As in *Pearson*, this testimony "crosses into the forbidden territory in which testimony with an 'expert'

imprimatur opines on the ultimate issue of guilt, which is for the trier of fact alone." *See State v. Crow*, 8 Wn. App. 2d 480, 497, 438 P.3d 541 (2019) (quoting *United States v. Sosa*, 897 F.3d 615, 619 (5th Cir. 2018)).

The State's reliance on inadmissible testimony in this case is especially concerning, as it appears to be strategic. The State, as noted previously, did not seek to convict Wasuge under the "per se" prong of RCW 46.61.502(1)(a) or RCW 46.61.504(1)(a). Nor did it present a retrograde extrapolation, which might have been used to show that Wasuge's BAC was .08 percent or higher while he was driving or in actual physical control of the motor vehicle. *See* 32 LINDA M. CALLAHAN, WASHINGTON PRACTICE: WASHINGTON DUI PRACTICE MANUAL §§ 1.4 at 8-9, 2.5 at 105-06 (2023-24 ed.) (noting that the State may use retrograde extrapolation to show the defendant had a BAC of .08 percent or higher within two hours after driving or being in actual physical control of a vehicle). Because the State did not utilize this method of proving guilt, the trial court's jury instructions do not refer to a per se BAC limit or retrograde extrapolation.

Yet at the same time, the record repeatedly shows that the State attempted to persuade the jury to convict Wasuge of being "under the influence" by arguing that his BAC previously exceeded the per se limit. During voir dire, the State asked jurors about their opinions on "proposed legislation to lower the legal limit to .05 in the state of Washington." In that way, the jury was "primed to view the prosecution through a particular prism." *State v. Zamora*, 199 Wn.2d 698, 712, 512 P.3d 512 (2022). Then, when Dougher testified that the AMA "recommend[s] [.05 percent] potentially as a per se limit as it can be an indicator [of] impairment in the general

population," the prosecutor asked, "And just to clarify, what do they recommend," after which Dougher clarified that the AMA recommends .05 percent as a "better cutoff." The State candidly admits in its brief that Dougher's testimony about the AMA's recommendation was part of her "discussion of the science behind alcohol-impaired driving and *per-se legal limits*." (Emphasis added.)

The prosecutor then referred back to Dougher's testimony in closing argument, reminding jurors, "You also heard from Ms. Dougher that the [AMA] has literature that people can be impaired or unable to drive at a .05. I want you to take that into consideration." The prosecutor also reiterated that the "elimination for an average person is between .01 and .02" and asked the jury to apply that rate retroactively based on Wasuge's testimony that he stopped drinking at 3:30 a.m. on the morning he was arrested. And finally, the prosecutor emphasized that "everyone's unsafe to drive at .08. And Mr. Wasuge was at a .076. He was just below that limit." The State's dogged reliance on this evidence—relating to a statutory limit that does not apply here—runs counter to the principle that a prosecutor seeking to secure a conviction "may land 'hard blows,' but it may not land 'low ones.'" *State v. Arredondo*, 188 Wn.2d 244, 281, 394 P.3d 348 (2017) (González, J., dissenting) (quoting *Caro v. Smith*, 59 Cal. App. 4th 725, 739, 69 Cal. Rptr. 2d 306 (1997)).

These evidentiary errors would warrant reversal if this were a close case. But it is not. Under the nonconstitutional harmless error standard applicable to evidentiary errors, Wasuge is not entitled to a new trial unless he shows that "'within reasonable probabilities, had the error not occurred, the outcome of the trial would

have been materially affected.'" *State v. Goggin*, 185 Wn. App. 59, 69, 339 P.3d 983 (2014) (quoting *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997)). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Given the overwhelming evidence that Wasuge was under the influence of or affected by intoxicating liquor, we are unable to conclude, as required to grant relief, that within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. Police found Wasuge asleep behind the wheel of a vehicle sitting in the lane of travel with the engine idling and the gearshift in drive. Farley testified that he believed Wasuge was intoxicated because he smelled the "strong, obvious odor" of alcohol on Wasuge's breath and observed that Wasuge's balance was unsteady, his speech was slurred, and his eyes were glassy, bloodshot, and watery. Robinson also testified that he could smell alcohol on Wasuge's breath and that he believed Wasuge was intoxicated. Wasuge performed poorly on the FSTs, which Dougher testified are a reliable indicator of alcohol consumption. Lastly, Wasuge admitted to drinking multiple beers before driving the vehicle, and he had a BAC of .076 percent about two hours after he was first discovered behind the wheel of his vehicle. *See* RCW 46.61.504(4)(a) (blood test results showing "an alcohol concentration above 0.00 may be used as evidence that a person was under the influence or affected by

intoxicating liquor").[3] Because Wasuge has not shown that within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected, he is not entitled to a new trial on this basis.[4]

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. *See* RCW 2.06.040.

B. Blood test results

Wasuge argues the trial court abused its discretion by admitting the test results of his blood without proper foundation. We disagree.

Under RCW 46.61.506(3), a blood alcohol test must be "performed according to methods approved by the state toxicologist." These approved methods are described in WAC 448-14-020(3), which requires that the blood be preserved (a) in a "chemically clean dry container" and (b) with "an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration." The regulation clarifies, "Suitable preservatives and

[3] Although Wasuge argues that his statements and the blood test results were erroneously admitted, we conclude the trial court did not err in admitting this evidence for the reasons discussed in parts II(B) and II(D) below.

[4] Citing *State v. Quaale*, 182 Wn.2d 191, 340 P.3d 213 (2014), Wasuge argues for the first time in a motion for reconsideration that we should apply constitutional harmless error review rather than the nonconstitutional harmless error standard applicable to evidentiary errors. Unlike the expert witness in *Quaale*, Dougher's opinion did not parrot the legal standard for determining guilt under the court's jury instructions or testify that Wasuge would be guilty under those instructions. Instead, like the expert witness in *Pearson,* Dougher improperly attempted to show that Wasuge's BAC exceeded an inapplicable BAC limit. Notably, *Pearson* applied the nonconstitutional harmless error standard applicable to evidentiary errors. 192 Wn. App. at 817. But even if the constitutional error standard were applicable here, we likewise conclude, for the reasons discussed above, that the State has established beyond a reasonable doubt that any reasonable juror would have reached the same result absent Dougher's improper testimony given the overwhelming evidence of Wasuge's guilt. *See Quaale*, 182 Wn.2d at 202 ("Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error.").

anticoagulants include the combination of sodium fluoride and potassium oxalate." WAC 448-14-020(3)(b). To admit the blood test results, the State must present "prima facie proof that the test chemicals and the blood sample are free from adulteration that could conceivably introduce error to the test results." *Wilbur-Bobb*, 134 Wn. App. at 630. Under this "relaxed standard," the court "assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State." *State v. Brown*, 145 Wn. App. 62, 71, 184 P.3d 1284 (2008) (citing RCW 46.61.506(4)(b)). We review a trial court's rulings on the admissibility of blood tests for an abuse of discretion. *Id.*

Here, the State presented prima facie proof that Wasuge's blood was preserved in a chemically clean dry container. Farley testified that he removed the vials from a sealed container provided by the evidence department, that the vials had "white powder in the bottom of them," that the vials were not expired, that he handed the vials to a resident nurse, Emma Peers, and watched her draw Wasuge's blood into the vials, and that the blood did not leak from the vials. Peers then testified that she followed her standard protocol for conducting a blood draw, which included inspecting the condition of the vials and observing that they "have the powdery substance in the bottom." Moreover, the vials of Wasuge's blood were affixed with a manufacturer's label stating the vials were "sterile." The existence of a powder in these sterile vials indicates they were chemically clean and dry.

The State further presented prima facie proof that Wasuge's blood was preserved with an anticoagulant and enzyme poison. Dougher answered "Yes" to the prosecutor's question, "And in this particular case, did the tubes contain an

anticoagulant and enzyme poison?" Dougher testified that the gray cap on the vials signifies they contain sodium fluoride and potassium oxalate, which are premixed and added into the vials by the manufacturer. The label on the vials also states that they contain a combination of sodium fluoride and potassium oxalate. Dougher further testified that Wasuge's blood would have clotted and been untestable if the anticoagulant was not present in the sample. Assuming the truth of this evidence and taking all reasonable inferences therefrom in the light most favorable to the State, the State satisfied the foundational requirements of WAC 448-14-020(3).

Wasuge argues the State did not make this prima facie showing because Peers did not specifically remember the blood draw of Wasuge and did not know the amount or chemical properties of the white powder in the vials. This argument fails because the person who administers the blood draw does not need to know these specific details so long as another witness can confirm the vials contained the anticoagulant and enzyme poison. *See Brown*, 145 Wn. App. at 71 (recognizing that WAC 448-14-020 does not require that a person "with firsthand knowledge testif[y] as to what was contained in the vials used for [the defendant's] blood sample prior to the blood draw"). Here, Dougher confirmed that the vials contained the anticoagulant and enzyme poison.

Lastly, Wasuge analogizes his case to other cases in which the State failed to meet its foundational burden in admitting blood test results. Wasuge's reliance on these cases is misplaced because in those cases the State failed to present any evidence that the vials contained one of the chemicals required by WAC 448-14-

020(3).[5] Because the State here presented prima facie evidence that the vials contained both of these necessary chemicals, the trial court did not abuse its discretion in admitting the blood test results.

C. Hearsay

Wasuge argues the trial court erroneously admitted a hearsay statement made by an unknown individual who told Wasuge during a jail phone call "[y]ou shouldn't be driving people, you know what I mean?" We disagree.

Before Wasuge's trial, the State indicated it would seek to admit a phone conversation between Wasuge and an unknown third party that occurred while Wasuge was in jail. During the call, the third party says, "But you shouldn't be driving people, you know what I mean?" Wasuge responds, "Yeah-yeah, I wasn't even drivin' nobody." Wasuge objected to the third party's statement on hearsay grounds, arguing that his response to the statement "doesn't necessarily mean that he's adopted the truth of what's asserted" because it could also mean "Whatever." The trial court overruled the objection because "a reasonable inference that also arises from this is that [Wasuge] was acknowledging that he was driving but saying 'Hey, I wasn't driving anybody.'" Further clarifying its ruling, the trial court added that "the jury needs to be instructed that what the other person says can't be accepted for the truth of what they say; it can only be used as context for what the defendant says. But I think, arguably, he's making an admission there that he was the driver."

[5] *See State v. Hultenschmidt*, 125 Wn. App. 259, 266, 102 P.3d 192 (2004) (toxicologist testified that enzyme poison was not required); *State v. Bosio*, 107 Wn. App. 462, 468, 27 P.3d 636 (2001) (no evidence that sample contained enzyme poison); *State v. Garrett*, 80 Wn. App. 651, 653, 910 P.2d 552 (1996) (no evidence that sample contained anticoagulant).

The issue here is whether the third party's statement—"But you shouldn't be driving people, you know what I mean?"—is inadmissible hearsay. A statement is hearsay only if offered "to prove the truth of the matter asserted." ER 801(c). Additionally, a party-opponent's statement offered against that party is not hearsay. ER 801(d)(2). If the proponent uses a third party's statement made during a conversation with the party-opponent to add "context" to a party-opponent's statement that otherwise "would not make sense," the third party's statement is not offered for the truth of the matter asserted and, therefore, not hearsay. *State v. Athan*, 160 Wn.2d 354, 385, 158 P.3d 27 (2007); *see also In re Pers. Restraint of Lui*, 188 Wn.2d 525, 555, 397 P.3d 90 (2017) (a testifying officer "may repeat statements made during interrogation accusing a defendant of lying if such testimony provides context for the interrogation"). We review de novo whether a statement constitutes hearsay. *State v. Carte*, 27 Wn. App. 2d 861, 876-78, 534 P.3d 378 (2023).

Applying these legal principles to the third party's statement at issue here, we agree with the trial court that the statement was not hearsay. The State offered the speaker's statement "you shouldn't be driving people" not to prove the truth of the matter asserted (i.e., that Wasuge should not have been driving with other people in the vehicle), but rather to explain why Wasuge felt compelled to respond, "I wasn't even drivin' nobody." Without the context of the other person's statement, Wasuge's response denying that he drove other people before being discovered by police would not make sense. Therefore, the trial court did not err in admitting

the third party's statement to add context to Wasuge's statement. As the trial court correctly ruled, such a statement is not hearsay.[6]

Moreover, even if the trial court erred in admitting the third party's statement, any error was harmless. *See State v. Hill*, 6 Wn. App. 2d 629, 647, 431 P.3d 1044 (2018) (hearsay rulings subject to harmless error review). Here, there is ample evidence that Wasuge was driving the vehicle. Wasuge himself admitted on the very same phone call that "they got me uh-uh drivin' uh without a license." *See Saldivar v. Momah*, 145 Wn. App. 365, 400, 186 P.3d 1117 (2008) (an admission by a party-opponent under ER 801(d)(2) may be used as substantive evidence). Wasuge also testified at trial that he drove the vehicle to the location where he was discovered by police. Farley testified that he found Wasuge sitting in the driver's seat of the vehicle with the key in the ignition and the gearshift in drive. Accordingly, Wasuge was not prejudiced by any error in admitting the alleged hearsay evidence.

Wasuge contends that he was prejudiced by the introduction of the third party's statement because (1) the trial court failed to instruct the jury not to use the third party's statement as substantive evidence and (2) the State used the statement as substantive evidence during closing argument. Wasuge's first argument is unconvincing because he did not request such a limiting instruction

[6] Wasuge also relies on nonbinding federal authority to argue that the third party's statement was inadmissible. Those cases do not alter our analysis here because federal courts utilize a similar approach to Washington courts in analyzing whether a third party's statement can be admitted as context for the defendant's statement. *See United States v. Montez*, 858 F.3d 1085, 1089-90 (7th Cir. 2017) (third party's statements on wiretapped phone call with defendant were admissible "because they were offered irrespective of their truth to explain [defendant's] response"); *United States v. Smith*, 816 F.3d 479, 481-82 (7th Cir. 2016) (confidential informant's statements to defendant during phone call were admissible in corruption trial "to show what [defendant] himself understood the transaction to entail"). Additionally, because we agree with the trial court that the third party's statement is not hearsay, we need not reach the State's alternative argument that the trial court may have admitted the statement as an adoptive admission under ER 801(d)(2)(ii).

and cites no case law holding that the trial court must give such an instruction in the absence of a request to do so. And Wasuge's second argument fails because the prosecutor did not use the statement in closing argument as substantive evidence but rather to impeach Wasuge's credibility by arguing, "[W]hy doesn't he explain that there's car trouble?" Because there was no error here in admitting the third party's statement, and because any alleged error was harmless, Wasuge is not entitled to a new trial on this basis.

D. Motion to suppress

Wasuge argues the trial court erroneously denied his CrR 3.5 motion to suppress the statements he made to Farley—that he had not been drinking and that he was waiting for a friend—before he was advised of his *Miranda*[7] rights. We disagree.

If a law enforcement officer does not provide *Miranda* warnings to a suspect before conducting a custodial interrogation, statements made by the suspect during the interrogation cannot be used as evidence in a criminal prosecution. *State v. Escalante*, 195 Wn.2d 526, 529, 461 P.3d 1183 (2020). A person is in custody for *Miranda* purposes if "a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). To determine whether a person is in custody to a degree associated with formal arrest, courts examine the totality of the circumstances, including "the nature of the surroundings, the extent of police control over the surroundings, the degree of physical restraint placed on

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

the suspect, and the duration and character of the questioning." *Escalante*, 195 Wn.2d at 533-34. Moreover, in analyzing whether *Miranda* warnings are required where a defendant is temporarily detained and questioned on the basis of reasonable suspicion of involvement in criminal activity, courts consider whether the police employ coercive or deceptive interrogation practices. *Heinemann v. Whitman County of Wash., Dist. Court*, 105 Wn.2d 796, 804-06, 718 P.2d 789 (1986). Whether Wasuge was in custody is a question of law we review de novo. *Escalante*, 195 Wn.2d at 531.

Here, a reasonable person in Wasuge's position would not believe they were in police custody to a degree associated with formal arrest when Wasuge made the statements at issue. The questioning occurred on a public street in view of other motorists. Before asking Wasuge to perform the FSTs, Farley informed him these tests were voluntary. Approximately 20 minutes elapsed between when the officers initially encountered Wasuge and when Farley read him his *Miranda* rights. Nothing in the record indicates the officers engaged in coercive or deceptive interrogation tactics. Under these circumstances, Wasuge was not in custody for *Miranda* purposes when he made the statements at issue.

To establish that he was in police custody to a degree associated with formal arrest, Wasuge avers that the officers imposed a significant degree of physical restraint by boxing in his vehicle with their emergency lights activated. While that evidence might establish that Wasuge was "seized" for Fourth Amendment purposes, the United States Supreme Court has squarely rejected the argument that when police temporarily detain a suspect during a traffic stop for suspected

DUI, the suspect is necessarily in custody for *Miranda* purposes. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). Washington courts have routinely applied *Berkemer* in cases involving police questioning of motorists.[8] Moreover, boxing in Wasuge's vehicle was necessary to protect the officers' safety given that Wasuge could have accidentally accelerated the vehicle upon being awoken by Farley. *See Escalante*, 195 Wn.2d at 537 (noting that officers may take reasonably necessary steps during a *Terry*[9] stop to protect their personal safety). Contrary to Wasuge's argument, boxing in his vehicle during this brief DUI investigation did not elevate a traffic stop to a formal arrest.

Wasuge also cites our Supreme Court's decision in *State v. Sum*, 199 Wn.2d 627, 631, 511 P.3d 92 (2022), notes that he is Black, and argues the trial court "failed to consider whether Mr. Wasuge would have felt he was in custody under a 'totality of the circumstances analysis,' from the perspective of 'an objective observer' who 'is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and other People of Color (BIPOC) in Washington.'" This argument fails because Wasuge never asked the trial court to consider this issue and, thus, there is no record upon which we may meaningfully review such a claim. The trial court did not err in denying Wasuge's CrR 3.5 motion to suppress the statements at issue.

[8] *See, e.g., State v. Ferguson*, 76 Wn. App. 560, 566-67, 886 P.2d 1164 (1995) (defendant not in custody for *Miranda* purposes during questioning at the scene of an accident); *Heinemann*, 105 Wn.2d at 806-08 (defendant not in custody for *Miranda* purposes when performing FSTs during traffic stop for suspected DUI).
[9] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

E. Prosecutorial misconduct

Wasuge argues he is entitled to a new trial because the prosecutor committed misconduct during closing argument by presenting evidence that the trial court had excluded. We disagree.

Before trial, the court, at Wasuge's request, ordered the State to redact a portion of the audio and transcript of the 911 call in which the caller states that Wasuge's car was located "a little past Elizabeth Blackwell Elementary." Contrary to that order, the prosecutor played the unredacted audio to the jury during closing argument. When defense counsel interjected, "Your Honor, can the audio be stopped," the trial court responded, "Please don't object during closing" and told the prosecutor, "Go ahead." Before the prosecutor gave his rebuttal closing argument, the trial court apologized to defense counsel "for telling you not to interrupt" and said "I messed up what you were objecting to." After telling the prosecutor, "don't play anything that's not admitted into evidence," the court ruled that the prosecutor's conduct was not "prejudicial enough to grant a mistrial" because defense counsel "did object well enough that the jury didn't hear elementary school, do you follow me? Your ears were quick enough that I think you prevented it from being heard."

To prevail on a prosecutorial misconduct claim where, as here, the defendant objected at trial, the defendant must first show that the prosecutor's statements were improper. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). As the State correctly concedes, it was wholly improper for the prosecutor to play the unredacted audio because it presented the jury with evidence that the trial court had excluded. *See State v. Gregory*, 158 Wn.2d 759, 865-66, 147 P.3d

1201 (2006), *overruled on other grounds* by *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) (prosecutor's reference to excluded evidence during closing was a "blatant[]" violation of a pretrial ruling and "strongly suggests that the argument was flagrant and ill-intentioned").

But even where a prosecutor's conduct was improper, as it was in this case, the defendant also "bears the burden of proving that the prosecutor's conduct was . . . prejudicial." *Emery*, 174 Wn.2d at 756. The ultimate inquiry in this prejudice analysis is, "has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" *Id.* at 762 (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932)). We examine the impropriety in the context of the total argument, issues in the case, evidence, and instructions given to the jury. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). Moreover, we recognize that "[t]he trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997) (quoting *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995)).

Here, any prejudice from the introduction of the unredacted audio was mitigated in multiple ways. According to the trial court, defense counsel's "well timed" objection drowned out the excluded statement and "prevented it from being heard." We may properly defer to this determination by the trial court. *See Stenson*, 132 Wn.2d at 719. Additionally, the audio recording and transcript of the 911 call that were admitted into evidence both redacted the excluded statement about the elementary school. Lastly, whether Wasuge's vehicle was located near

a school was not a material fact or an element of the charged offenses; the key issue was whether Wasuge was driving or physically controlling his vehicle while under the influence of intoxicating liquor. On this record, Wasuge fails to show, as he must, that the prosecutor's improper conduct was prejudicial so as to entitle him to a new trial.

F. Victim penalty assessment

Wasuge asks us to remand for the trial court to strike from his judgment and sentence the $500 VPA. He correctly argues that recent amendments to RCW 7.68.035 provide that the VPA shall not be imposed against a defendant who is indigent at the time of sentencing. LAWS OF 2023, ch. 449, § 1. The State does not object to a remand for purposes of striking the VPA. We accept the State's concession and, accordingly, remand for the trial court to strike the VPA from Wasuge's judgment and sentence.

In all other respects, we affirm.

Feldman, J.

WE CONCUR:

Chung, J.

Colum, J.