69613-1

69613-1

NO. 69613-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARK MECHAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The Fourth Amendment and Article I, section 7, protect individuals from unreasonable searches and seizures and unreasonable intrusions into their private affairs. The administration of roadside field sobriety tests is neither a search nor an unreasonable intrusion into private affairs, because it merely exposes physical characteristics in a way that can be formally assessed, much like a handwriting exemplar. Further, warrantless searches may be justified by investigation of a crime for which there is reasonable suspicion, by exigent circumstances, or by a search incident to arrest, all of which were present here. Accordingly, Mecham did not have a constitutional right to refuse consent to the administration of the tests. Did the trial court properly admit his refusal to perform field sobriety tests as substantive evidence of guilt?

2. Fifteen years ago, in State v. Meggyesy,[1] this Court denied a challenge to a jury instruction that advised the jury that it had a "duty" to convict if it found that the State had proven each element of the crime beyond a reasonable doubt. The jury in this case was instructed in the same language as that challenged in Meggyesy. Mecham has failed to prove that the holding of Meggyesy is incorrect and harmful as required

[1] 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

by In re Stranger Creek[2] to overturn this precedent. Should his challenge to the jury instructions on the same basis urged in Meggyesy be rejected?

3. A criminal defendant has the right to confront the witnesses against him. This right extends to all testimonial evidence. Business records, because they are created for the purpose of administering an entity's affairs, are not testimonial, nor are records created for a non-prosecutorial purpose. Here, the Department of Licensing revoked Mecham's license, mailed him an Order of Revocation, and contemporaneously prepared a certificate of mailing that it had done so. Eight months later, Mecham committed his offense. Did the trial court properly admit the certificate of mailing, because it was a business record not prepared for purpose of prosecution? If not, was the admission of the certificate harmless in that it was not prejudicial and was irrelevant to the elements of the crime?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On August 25, 2011, the State of Washington charged appellant Mark Tracy Mecham with one count of Felony Driving Under the Influence. CP 1. The Information was later amended to add charges of Driving While License Suspended or Revoked in the First Degree and

[2] 77 Wn.2d 649, 653, 466 P.2d 508 (1970).

Violation of Ignition Interlock. CP 45-46. The matter proceeded to trial before the Honorable Palmer Robinson. 1RP.[3]

Pretrial, Mecham moved to suppress the fact that he had refused to participate in field sobriety tests. CP 51-60; 1RP 64-74; 2RP 6-10, 39-45, 51-57. The trial court denied this motion, and the evidence was admitted. 1RP 70-74; 2RP 10-11, 45, 57; 3RP 21. The trial court further refused Mecham's invitation to instruct the jury that it could not consider Mecham's refusal to perform field sobriety tests as evidence of his guilt. CP 69; 4RP 95-98.

Mecham waived his right to a jury trial with respect to the two misdemeanors. CP 47-48; 1RP 135-42. The Felony DUI, however, was tried to a jury. 3RP 11. Mecham proposed a "to convict" jury instruction that differed from the standard WPIC instruction in that it did not inform the jury that it had a "duty" to convict if the State proved each element of the offense beyond a reasonable doubt. CP 71-86. Citing State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), the State objected. 4RP 82-89. The trial court declined to give Mecham's proposed instruction, and instead instructed the jury consistent with the standard WPIC. 4RP 89; CP 105; WPIC 92.02.

[3] This brief follows the same convention for referring to the five-volume Verbatim Report of Proceedings as adopted by Mecham. See Brief of Appellant at 3, n.2.

The jury convicted Mecham of Felony DUI after deliberating for less than thirty minutes. CP 87, __ [sub no. 89A at 17].

During the bench trial on the charges of Driving While License Suspended or Revoked in the First Degree and Violation of Ignition Interlock, the State called Abdul Qaasim, a Department of Licensing custodian of records, to authenticate business records, including Mecham's driving records. 5RP 120-38. Mecham objected to the admission of a portion of Exhibit 17, the Order of Revocation, on the basis that the certificate of mailing included in the exhibit violated his right to confront the witness who so certified. 5RP 134-35. This objection was overruled, and the exhibit admitted into evidence. 5RP 135; Ex. 17. The trial court found Mecham guilty of both misdemeanors. CP 147-49; 5RP 149-51.

The court imposed a standard range sentence on the felony, and imposed the maximum sentence on both misdemeanors, with each sentence to run consecutive to the others and to Mecham's other convictions. CP 127-37. This appeal timely followed. CP 114.

2. SUBSTANTIVE FACTS

On May 15, 2011, Bellevue Police Department Officer Scott Campbell observed Mecham driving in Bellevue. 3RP 12-15. He stopped Mecham's car after following it for a few hundred yards over the course of

about a minute. 3RP 16. Campbell testified he did not see Mecham drive unsafely or commit any traffic infractions during that short period. 3RP 15-16. After the stop, the officer identified Mecham and arrested him. 3RP 19-20. Mecham stipulated that his stop and arrest were lawful.[4] CP 50; 3RP 11.

As he was arresting him, Campbell noticed that Mecham had an odor of intoxicants coming from his breath, his movements were sluggish, his speech was slurred and repetitive, and overall appeared intoxicated. 3RP 20, 69. Campbell asked him to take field sobriety tests, but Mecham declined. 3RP 21.

Mecham's car was parked in a stall in a private lot, with the doors open and the keys still in the ignition. 3RP 23. Campbell offered to secure the car, but Mecham told the officer that he did not want him going into his car and that he did not need his keys. 3RP 23. So, Campbell just shut the door to Mecham's car. 3RP 23. As he was doing so, the officer noticed a beer can in the back of the car directly behind the passenger seat; the can was open and upright, with a straw in it. 3RP 23-24.

Campbell transported Mecham to the Bellevue booking facility. 3RP 27. Once there, he advised him of his implied consent warnings and

[4] Campbell stopped and arrested Mecham because of an outstanding warrant and the fact that he was driving while his license was revoked. 1RP 49-52. This information was not presented to the jury, because it was irrelevant to the limited issues it was to decide once Mecham stipulated to a bench trial on two counts.

asked him to submit to a breath test. 3RP 27-31. Mecham refused. 3RP 31-33. Campbell then sought the assistance of another officer, Darrell Moore, to obtain a search warrant for Mecham's blood. 3RP 33; 4RP 10-14. Moore observed that Mecham had a medium odor of intoxicants on his breath, that he had slurred speech, and that his eyes were glazed, bloodshot, and had dilated pupils despite the brightness of the room. 4RP 16, 42.

Once they had obtained the search warrant, Officers Campbell and Moore took Mecham to Overlake Hospital for a blood draw. 3RP 33-35. The blood draw was accomplished at 9:13 p.m., nearly three hours after the initial stop. 3RP 18, 35. Debra McArthur, the lab assistant who drew Mecham's blood, testified that Mecham was uncooperative with and unpleasant to the officers, although his mood improved during the course of their interaction. 3RP 122-24, 135-40. She also noticed that Mecham's clothing was unkempt. 3RP 143.

Taking into account all of his observations during the course of their interaction on May 15, 2011, Campbell opined that Mecham was impaired, and that he would not have allowed him to drive. 3RP 35-36. Moore agreed. 4RP 36.

Mecham's blood was later analyzed by Rebecca Flaherty, a forensic toxicologist. 5RP 7-10. She reported that he had a blood alcohol

content of .050 grams per 100 milliliters. 5RP 19. Flaherty testified that, based on the rate of alcohol elimination from the body, Mecham likely had a blood alcohol level of approximately .065 two hours after he stopped driving (or one hour before his blood was drawn), and possibly as high as .08. 5RP 28-35. She also discussed at length the effects of alcohol on a person's cognitive abilities, judgment, motor function, vision, and balance, and explained that most people were unsafe to drive with a blood alcohol level of .05. 5RP 20-28.

Mecham stipulated that, as of May 15, 2011, he had previously been convicted of four or more prior offenses within ten years pursuant to RCW 46.61.5055(14)(a). CP 49; 3RP 11.

Outside the presence of the jury, for the purposes of the bench trial on counts II and III, Officer Campbell testified without objection that Mecham's license to drive was suspended in the first degree, and that he did not observe an ignition interlock device inside of Mecham's car as required. 3RP 104-05. Abdul Qaasim, a Department of Licensing custodian of records, testified for the court that he performed a search of the Department's records relating to Mecham, and determined that his privilege to drive was revoked as of May 15, 2011, because he was a habitual traffic offender. 5RP 121-38; Ex. 17.

C. ARGUMENT

1. THE COURT PROPERLY ADMITTED MECHAM'S REFUSAL TO PERFORM FIELD SOBRIETY TESTS AS SUBSTANTIVE EVIDENCE OF GUILT.

Mecham complains that the trial court erred by admitting into evidence the fact that he refused to perform field sobriety tests. Specifically, he claims that such tests constitute a search, that there was neither a warrant nor a valid exception to the warrant requirement justifying the search, and admission of his refusal to consent was an improper comment on his exercise of a constitutional right. But the administration of field sobriety tests does not constitute a search. If it does, it is justified by three exceptions to the warrant requirement: an investigation within the scope of a Terry stop; exigent circumstances; and search incident to arrest. Because the search, if it was one, did not depend on Mecham's consent for its validity, his refusal to submit to the testing was admissible as substantive evidence of guilt. His arguments to the contrary should be rejected.

On review of a denial of a motion to suppress evidence pursuant to CrR 3.6, unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Challenged findings of fact are reviewed for substantial evidence. Id. at 647. Evidence is substantial when it is enough to persuade a fair-minded person of the truth of the

stated premise. Id. at 644. Conclusions of law are reviewed de novo. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010).

A defendant has a constitutional right to be free from unreasonable searches and seizures. The Fourth Amendment provides, in relevant part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. "A search occurs for Fourth Amendment purposes when 'an expectation of privacy that society is prepared to consider reasonable is infringed.'" State v. Young, 123 Wn.2d 173, 189, 867 P.2d 593 (1994) (citations omitted).

Article I, section 7 of the Washington constitution provides greater protection in some areas than does the federal constitution. State v. Surge, 160 Wn.2d 65, 70, 156 P.3d 208 (2007). That provision reads, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. Under Article I, section 7, a search occurs when there is an intrusion into a person's private affairs, specifically "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." State v. Rose, 128 Wn.2d 388, 400, 909 P.2d 280 (1996) (citations and internal quotation marks omitted). Stated differently, private affairs include information that would reveal intimate details of a

person's life. State v. Jorden, 160 Wn.2d 121, 126, 156 P.3d 893 (2007). Further, for the intrusion to constitute a search, it must be an unreasonable intrusion. State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990).

Under either of these standards, the performance of roadside field sobriety tests is not a search. First, no Washington appellate court has ever held that the administration of field sobriety tests constitutes a search. To the contrary, in Heinemann v. Whitman County, District Court, 105 Wn.2d 796, 809, 718 P.2d 789 (1986), the Supreme Court conducted a broad-ranging analysis of barriers to the admissibility of field sobriety tests, examining the application of the Fourth, Fifth, and Sixth Amendments, parallel provisions in the Washington constitution, and a court rule. Id. at 799. At the conclusion of that analysis, the court characterized the tests as a seizure, not as a search, and deemed them admissible under each of the examined provisions. Id. at 809 ("To summarize, defendant has failed to prove any basis for the suppression of the field sobriety tests in this case.").

Second, the administration of field sobriety tests is not qualitatively different from the collection of voice recordings or handwriting exemplars, neither of which constitutes a search. United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973); United States v. Mara, 410 U.S. 19, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973);

State v. Collins, 152 Wn. App. 429, 438-40, 216 P.3d 463 (2009). The taking of fingerprint impressions is likewise not a search, see Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969), nor is an examination of the soles of a suspect's shoes. State v. Selvidge, 30 Wn. App. 406, 635 P.2d 736 (1981). Field sobriety tests are similar to each of these in that they merely expose to the investigating officer some characteristics of the suspect, such as balance and coordination.[5] Balance and coordination are not intimate details of a person's life, but are routinely exposed to the public whenever one ventures outside the home, as Mecham did. Indeed, the Supreme Court has analogized field sobriety tests to a defendant's appearance at a police lineup or other physical actions, such as providing fingerprints or voice or writing samples. City of Seattle v. Stalsbroten, 138 Wn.2d 227, 233, 978 P.2d 1059 (1999).

Even if the administration of field sobriety tests does constitute a search, however, such a search is permissible under both the Fourth Amendment and Article I, section 7. Under the U.S. Constitution, a search is permissible if it is "reasonable." U.S. CONST. amend. IV;

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[5] It should be of no moment that a formalized protocol is used to observe the relevant physical characteristics, as opposed to the officer merely watching the suspect's gait and balance as the two naturally interact. Handwriting exemplars do not involve a suspect merely turning over a previously created writing, such as a grocery list; instead, the suspect follows specific directions to produce a writing that reveals particular characteristics capable of comparison. The collection of voice recordings are similarly formalized, and fingerprinting is also subject to established protocols.

State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). Under Article I, section 7, a warrantless search is allowed where authority of law justifies the intrusion—either a warrant or an exception to the warrant requirement.[6] Valdez, 167 Wn.2d at 772 (citing York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 307, 178 P.3d 995 (2008)). Both criteria are met here, because the administration of field sobriety tests was justified by (1) an investigation based upon reasonable suspicion that Mecham was driving under the influence of alcohol, (2) exigent circumstances, and (3) the fact that Mecham was already under arrest.

First, in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the U.S. Supreme Court approved limited warrantless stops and searches for the purposes of investigating crime. Such intrusions are justified—they are reasonable—when there are specific and articulable facts that, when taken together with rational inferences from those facts, reasonably warrant the intrusion. Id. at 21. Washington courts have adopted this exception to the warrant requirement for purposes of Article I, section 7 of the Washington constitution. E.g., State v. Little, 116 Wn. 2d 488, 498, 806 P.2d 749 (1991); State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). Under Terry, there are a number of

[6] One indicator that the administration of field sobriety tests does not constitute a search is the practical impossibility of obtaining the performance of such tests through a warrant. While a court may issue such a warrant, it is unclear how the State could possibly execute one without the suspect's cooperation.

factors to be considered in determining whether the intrusion is permissible: the purpose of the stop; the amount of physical intrusion upon the suspect's liberty; the length of time the suspect is detained; the appropriateness of the degree of intrusion to the type of crime under investigation; and the probable dangerousness of the suspect. State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987) (citing State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984)). Here, each factor supports the conclusion that the administration of field sobriety tests is a permissible search under the Fourth Amendment and Article I, section 7, if there is reasonable suspicion that the suspect is driving under the influence.

The purpose of the stop in the ordinary driving under the influence case is to investigate whether a particular driver is under the influence of intoxicants. Here, of course, Mecham was stopped and arrested due to the existence of an outstanding warrant for his arrest and the fact that he was driving on a suspended license.[7] 1RP 49-52. Nonetheless, during the course of the stop, Officer Campbell developed reasonable suspicion that Mecham had been driving under the influence, a conclusion that is not challenged here. The request to perform field sobriety tests was directly related to the further investigation of that suspicion. Indeed, both Officer

[7] This information was elicited during pre-trial proceedings; it was not presented to the jury.

Campbell and Officer Moore explained how the performance of the field sobriety tests would further such an investigation. 3RP 21-22; 4RP 24-36.

Moreover, the administration of field sobriety tests is both brief and minimally intrusive. As discussed above, the tests are so unintrusive that they should not qualify as a search. If they do, however, the tests primarily examine a person's balance and coordination, neither of which are private. The suspect is merely asked to perform routine tasks, such as walking, turning, balancing, and gazing, in a formalized way so that impairment can be evaluated. 4RP 24-36. And, the tests can be accomplished in a matter of a few minutes. 4RP 24-31.

Finally, it is well recognized that the intoxicated driver presents a danger to the public as great as that posed by a suspect illegally concealing a gun. E.g., South Dakota v. Neville, 459 U.S. 553, 558, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) ("The carnage caused by drunk drivers is well documented and needs no detailed recitation here." (providing a detailed recitation nonetheless)); State v. Superior Court, Cochise Cnty., 718 P.2d 171, 176 (Ariz. 1986). Indeed, it was just this danger that prompted the Washington legislature to stiffen the penalties faced by those individuals who drive while intoxicated by providing for the impoundment of their vehicles. RCW 46.55.350(1)(a) ("The legislature finds that: Despite every effort, the problem of driving or controlling a vehicle while under

the influence of alcohol or drugs remains a great threat to the lives and safety of citizens. Over five hundred people are killed by traffic accidents in Washington each year and impaired vehicle drivers account for almost forty-five percent, or over two hundred deaths per year. That is, impairment is the leading cause of traffic deaths in this state . . . .").

Taking all of these factors into account, it is apparent that, if the administration of field sobriety tests is a search, it is one that is authorized as within the scope of a legitimate Terry stop. Indeed, nearly every court to have determined that field sobriety tests implicate the Fourth Amendment or a parallel provision of its state constitution has likewise concluded that such a search, if preceded by reasonable suspicion, is constitutional on this rationale. E.g., McCormick v. Municipality of Anchorage, 999 P.2d 155 (Alaska 2000); Cochise Cnty., 718 P.2d 171; State v. Lamme, 563 A.2d 1372 (Conn. App. Ct. 1989), aff'd, 579 A.2d 484 (Conn. 1990); State v. Taylor, 648 So. 2d 701 (Fla. 1995); State v. Golden, 318 S.E.2d 693, 696 (Ga. Ct. App. 1984); State v. Wyatt, 687 P.2d 544 (Haw. 1984); State v. Ferreira, 98 P.2d 700 (Idaho Ct. App. 1999); People v. Walter, 872 N.E.2d 104 (Ill. App. Ct. 2007); State v. Stevens, 394 N.W.2d 388, 391 (Iowa 1986); State v. Little, 468 A.2d 615 (Me. 1983); Blasi v. State, 893 A.2d 1152 (Md. Ct. Spec. App. 2006);

Commonwealth v. Blais, 701 N.E.2d 314 (Mass. 1998); Hulse v. State, 961 P.2d 75 (Mont. 1998); State v. Lamb, 789 N.W.2d 918, 927 (Neb. 2010); Dixon v. State, 737 P.2d 1162, 1163 (Nev. 1987); State v. Anderson, 359 N.W.2d 887 (S.D. 1984); State v. Gray, 552 A.2d 1190 (Vt. 1988); but see State v. Carlson, 677 P.2d 310 (Colo. 1984) (requiring field sobriety tests to be supported by probable cause, not merely reasonable suspicion), and State v. Nagel, 880 P.2d 451 (Or. 1994) (same, although concluding that the exigent circumstances exception to the warrant requirement could justify administration of the tests).

Second, in addition to reasonable suspicion, exigent circumstances present another exception to the warrant requirement applicable here. Illinois v. McArthur, 531 U.S. 326, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001); Hendrickson, 129 Wn.2d at 71. The exigent circumstances exception applies where, among other things, obtaining a warrant is not practical because the delay in obtaining it would permit the destruction of evidence. State v. Tibbles, 169 Wn.2d 364, 370, 236 P.3d 885 (2010). It is well established that the dissipation of alcohol in a suspect's blood may constitute exigent circumstances justifying a warrantless search. Schmerber v. California, 384 U.S. 757, 771, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); see also 4RP 18. Such dissipation does not create an exigency per se; rather, whether exigent circumstances exist is determined based on

the totality of the circumstances. Missouri v. McNeely, __ U.S. __, 133 S. Ct. 1552, 1559, 185 L. Ed. 2d 696 (2013).

Here, the activities of the police themselves demonstrate that there was inadequate time to obtain a warrant before the evidence of Mecham's level of intoxication dissipated, because the officers actually sought and obtained a warrant, albeit for Mecham's blood. By the time they obtained that warrant, more than two hours had elapsed. 3RP 18 (stop at 6:20 p.m.); CP __ [sub no. 88, App. A] (warrant issued after 8:30 p.m.). By the time it was executed, nearly three hours had passed, and Mecham's blood alcohol level had diminished to .050 grams per 100 milliliters. 5RP 19. Moreover, Mecham's blood alcohol level at the time of his driving could be reasonably calculated after the fact, because the rate of alcohol elimination from the body is known. 5RP 28-35. The same cannot be said for the level of a person's impairment, which is critical information for an officer determining whether someone should be allowed to drive, and is the gravamen of the offense for a defendant charged with Driving Under the Influence, especially in the absence of a BAC result over .08 g/100mL. RCW 46.61.502(1)(c), (d). Thus, exigent circumstances provide a basis for the administration of field sobriety tests, if a search, in the absence of a warrant. See Nagel, 320 Or. at 33.

Third, because Mecham was under arrest at the time that the field sobriety tests were offered, he had a diminished expectation of privacy. State v. White, 44 Wn. App. 276, 278, 722 P.2d 118 (1986). Thus, arrestees are subject to broad searches of their person and their immediate effects. Id.; State v. Jordan, 92 Wn. App. 25, 960 P.2d 949 (1998). Their property, once seized, can be searched again at a later time. State v. Cheatam, 150 Wn.2d 626, 81 P.3d 830 (2003). And, the search of an arrestee need not be limited to evidence of the crime of arrest. Id.; State v. Doleshall, 53 Wn. App. 69, 71-74, 765 P.2d 344 (1988). Thus, because Mecham was already under arrest at the time that Officer Campbell asked him to perform field sobriety tests, the administration of those tests was justified as a search incident to arrest.

Because the administration of field sobriety tests, if a search, was warranted either because it was within the scope of a legitimate Terry stop, by exigent circumstances, or as a search incident to arrest, there is no basis to suppress Mecham's refusal to submit to the search. This issue was settled, albeit in the Fifth Amendment context, in Stalsbroten, 138 Wn.2d 227. There, the Supreme Court held that, because the State could legally require suspects to perform field sobriety tests, it may attach

penalties to the refusal to perform such tests, even in the absence of a statute like the implied consent law. Id. at 236-37. Thus, because the administration of the tests is legally authorized, Mecham's refusal to perform them is admissible. See State v. Baldwin, 109 Wn. App. 516, 528, 37 P.3d 1220 (2001) (observing that a blood draw is a search, and admitting the refusal to submit to one); State v. Long, 113 Wn.2d 266, 271-72, 778 P.2d 1027 (1989) (holding there are no constitutional barriers prohibiting the admission into evidence of a suspect's refusal to submit to a breath test after being given implied consent warnings (citing State v. Zwicker, 105 Wn.2d 228, 713 P.2d 1101 (1986))).

Mecham relies on State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013), for the proposition that admission of refusal-to-consent evidence "violates the constitution by improperly penalizing the individual for the lawful exercise of a constitutional right." Brief of Appellant at 20. But Gauthier is easily distinguished. In that case, the Supreme Court held that the defendant's refusal to consent to a cheek swab for purposes of DNA testing was inadmissible as substantive evidence of guilt. However, the only basis presented in Gauthier for the State to acquire the cheek

swab was the defendant's consent. If, by contrast, the State had obtained a warrant for Gauthier's DNA, his refusal to cooperate in providing a sample would surely have been admissible against him. E.g., State v. Nordlund, 113 Wn. App. 171, 188-89, 53 P.3d 520 (2002) (admitting the refusal to provide a hair sample in defiance of a court order as substantive evidence of guilty knowledge). Similarly, where an officer conducts a lawful frisk for weapons but the suspect resists, or a detained suspect refuses to cooperate with a lawful show-up identification procedure, the suspect's conduct would plainly be admissible as evidence of guilty knowledge at a subsequent proceeding. Compare People v. Larson, 782 P.2d 840, 841-42 (Colo. App. 1989). In other words, Gauthier applies only where the search relies on consent—a waiver by the defendant of the warrant requirement.

Here, the search—if it is one—is lawful without regard to whether Mecham waived the warrant requirement or not. Stated differently, evidence of Mecham's lack of consent is not improper evidence of his exercise of a constitutional right because no such right existed. There is no basis to exclude from evidence the fact that Mecham refused a lawful

search.[8] Compare State ex rel. Verburg v. Jones, 121 P.3d 1283, 1285-86 (Ariz. Ct. App. 2005); State v. Greenough, 173 P.3d 1227, 1229-30 (Or. Ct. App. 2007); Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1450 (9th Cir. 1986) (observing that, where there is no constitutional right to refuse a search, a refusal to submit is admissible). Thus, his refusal to perform field sobriety tests was properly admitted as substantive evidence of guilt.

2. MECHAM HAS FAILED TO SHOW THAT THE PATTERN "TO CONVICT" JURY INSTRUCTIONS ARE UNCONSTITUTIONAL.

Mecham contends that language in the "to convict" jury instruction misstated the law and violated his right to a jury trial under the state and federal constitutions. Specifically, he argues that the "to convict" instruction was incorrect because it told the jury that it had a duty to

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[8] Mecham's refusal to allow Officer Campbell to enter his car to retrieve his car keys is admissible for the same reason. The authorization for Campbell's entry into the car was not predicated on Mecham's consent, but on the officer's community caretaking function. Community caretaking occurs when an officer, as part of his duties, provides assistance beyond that of the detection and investigation of crime and the acquisition of evidence. State v. Acrey, 148 Wn.2d 738, 749, 64 P.3d 594 (2003) (citing Cady v. Dombrowski, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)). Thus, inventory searches as well as entries into automobiles in order to protect their valuable contents are permissible even absent a warrant. E.g., South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). Here, Mecham's car was not going to be impounded, but it was parked with the doors wide open and the keys in the ignition, exposing it to theft. 1RP 57-58; 3RP 23. Officer Campbell did not seek consent to search the car; rather, he offered to retrieve the keys for Mecham to protect the car—clearly an act appropriately characterized as community caretaking. 1RP 57-58; 3RP 23. Mecham refused. 3RP 23. Because the search proposed by Officer Campbell did not rely on consent, Mecham's refusal should be admissible.

convict if it concluded that the State had proven each element of the crime beyond a reasonable doubt.[9] The language he complains of is included in every "to convict" jury instruction in the state. WPIC 4.21. Mecham's argument has been repeatedly rejected, first in Meggyesy, and the Supreme Court has consistently denied review.[10] Mecham acknowledges Meggyesy, but argues it was wrongly decided. Under the principles of stare decisis, a court cannot overturn a prior holding unless it is shown by clear evidence that it is incorrect or harmful. See In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Mecham has failed to make any new arguments sufficient to meet this burden.

Mecham makes the same basic argument that Meggyesy did: the language that the jury had a duty to convict if it found beyond a reasonable doubt each element of the crime had been proven violates a defendant's

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[9] Mecham's jury was instructed:

> If you find from the evidence that elements (1), (2), (3), and (4) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

CP 105. The language challenged mirrors the pattern jury instruction. WPIC 92.02.

[10] State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005); State v. Fleming, 140 Wn. App. 132, 170 P.3d 50 (2007), rev. denied, 163 Wn.2d 1047 (2008); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005); State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), rev. denied, 137 Wn.2d 1024 (1999). There are also several unpublished decisions adhering to Meggyesy and its progeny; to date, the Supreme Court has always denied review. E.g., State v. Ovidio-Mejia, 167 Wn. App. 1008, rev. denied, 175 Wn.2d 1002 (2012); State v. Mullins, 133 Wn. App. 1028 (2006), rev. denied, 159 Wn.2d 1020 (2007).

right to a jury trial under the federal and state constitutions. A criminal defendant has a right under both constitutions to a trial by jury. U.S. CONST. Art. III, § 2, and amend VI; WASH. CONST. Art. I, §§ 21, 22. This includes the right to have a jury determine every element of the crime charged, State v. Polo, 169 Wn. App. 750, 282 P.3d 1116 (2012), and to have the jury be the sole judge of credibility of witnesses, State v. Elmore, 154 Wn. App. 885, 897, 228 P.3d 760, rev. denied, 169 Wn.2d 1018 (2010). But Mecham cites no case that holds that the federal or state constitutional right to a jury trial encompasses a right to jury nullification.[11]

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[11] Mecham cites three federal cases to suggest that the federal constitution prohibits the kind of instruction given here. They are not on point. United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975), addressed an instruction that read, "If, after consideration of all of the evidence you have a reasonable doubt whether the defendants were present at the time and place the alleged offenses was committed, you should acquit the defendants, otherwise you should convict them." Id. at 1238. But not only did Atkinson affirm the trial court, but the instruction there was in no way similar to the one challenged here. Rather, the Atkinson instruction is flawed because it appears to allow the jury to convict if the defendant was merely present for the criminal act, rather than requiring the government to prove beyond a reasonable doubt all of the elements of the crime, including an act and the relevant mental state.

In United States v. Garaway, 425 F.2d 185 (9th Cir. 1970), the trial court improperly directed a verdict of guilt. It told the jury, "I, therefore, instruct you it is your duty as jurors to return a verdict of guilt. You may consider this matter and you may disregard my instructions, but I am instructing you as a matter of law that it is your duty to return a verdict of guilty as charged in the indictment." This instruction is so different from the instruction at issue in this case as to be irrelevant.

Finally, in United States v. Bejar-Matrecios, 618 F.2d 81, 85 (9th Cir. 1980), the Ninth Circuit merely observed that an instruction telling the jury that it had a "duty to convict" if it believed beyond a reasonable doubt that the defendant was guilty did not improperly order the jury to return a verdict of guilty, as in Garaway. It did not find such an instruction to violate the right to a jury trial.

Moreover, there is no reason to read the state constitution as providing a right to jury nullification. Although the state constitutional right to a jury trial is not coterminous with the parallel federal right, that does not end the inquiry. State v. Hobble, 126 Wn.2d 283, 892 P.2d 85 (1995). Rather, the question of whether a state constitutional provision provides an additional protection beyond the federal constitution is one that is decided issue by issue, after applying a Gunwall analysis. E.g., id. at 298-303 (concluding that, although the right to trial by jury under the Washington constitution is not coextensive with the federal right, the Washington constitution provides no greater protection in the context of direct contempt proceedings). In State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), the court adopted a framework to ensure principled determinations of whether the state constitution affords broader protections than its federal counterpart. A court must be guided in deciding whether to conduct an independent analysis under the state constitution by six factors: (1) the language of the Washington Constitution, (2) differences between the state and federal language, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Id. at 61-62. None of these factors support a claim that the state constitution's right to a jury trial was violated here.

First, looking at the language of the state constitution and comparing it to the federal constitution, there is nothing that addresses the particular concern raised by Mecham. Article I, section 21 of the Washington Constitution provides, in pertinent part, that "[t]he right to trial by jury shall remain inviolate." Section 22[12] further provides that the defendant in a criminal case "shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." Nothing in this language suggests that it is improper, or an invasion of the right to a jury trial, to instruct a jury that it has a duty to convict if it finds that the State has proved every element beyond a reasonable doubt. Compare Meggyesy, 90 Wn. App. at 701 ("Nothing in the language of these constitutional provisions addresses the question presented.").

Second, the Sixth Amendment to the U.S. Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." The language of the Sixth Amendment and Article I, section 22 are substantially similar. State v. Brown, 132 Wn.2d 529, 595, 940 P.2d 546 (1997). While the language of Article I, section 21 is clearly different and has no federal counterpart, it is

[12] Article I, section 22, was amended in 1922, but the amendment did not alter the relevant language. Amend. X.

of little relevance as it provides no guidance on the issue raised by Mecham. Compare Hobble, 126 Wn.2d 283 (holding that language of Article I, section 21 does not provide a right to jury trial in direct contempt proceedings); State v. Schaaf, 109 Wn.2d 1, 743 P.2d 240 (1987) (concluding that Article I, section 21 does not guarantee the right to a jury trial in juvenile proceedings); see also Meggyesy, 90 Wn. App. at 702.

Third, state constitutional history also does not support an argument that the state constitution provides a broader right to trial by jury than does the federal right. The pertinent language of Article I, section 22, was adopted without amendment or reported debate. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 at 510-12 (Beverly P. Rosenow ed. 1962, reprint 1999). Similarly, the only reported debate with respect to Article I, section 21, pertained to a portion of the provision not pertinent here—the possibility of a verdict by a non-unanimous jury in civil cases. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 at 510. The Supreme Court has previously held that "the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right," particularly in certain contexts. Brown, 132 Wn.2d at 596; see also Meggyesy, 90 Wn. App. at 702.

Fourth, as the Meggyesy court observed, preexisting state law does not aid Mecham. Id. The Supreme Court has held that Article I, section 21 preserved the scope of the right to trial by jury as it existed at the time the state constitution was adopted, but there are no cases predating the constitution that prohibit the language Mecham challenges. Id.

Mecham argues that language in Leonard v. Territory, 2 Wash. Terr. 381, 7 P. 872 (1885), proves that preconstitutional courts instructed juries that they may convict if the elements were proven beyond a reasonable doubt, not that they must. The Meggyesy court properly rejected this argument. Leonard was convicted of murder and sentenced to death. He challenged a great number of the jury instructions provided in his case on a variety of grounds—none of which, the Meggyesy court noted, involved the legal challenge made here. Further, all of the jury instructions challenged in Leonard were general instructions dealing with the burden of proof and defenses, and every single instruction addressed in the opinion was found to misstate the law. It is abundantly clear from the opinion that the instructions were crafted by the trial court and were not a type of standard jury instruction used in other cases, such as the pattern instruction at issue here. Thus, there is nothing in Leonard, or anything

else Mecham cites herein, that demonstrates the actual standard practice at the time regarding the issue raised here.

Nor does Mecham address State v. Wilson, 9 Wash. 16, 36 P. 967 (1894), discussed in Meggyesy. Wilson complained of an instruction that stated that if the jury found the elements of the crime, the jury "must" find the defendant guilty. Wilson, 9 Wash. at 21. The Supreme Court affirmed, stating that taking all the language in context, "it clearly appears that all the court intended to say was that, if they found from the evidence that all the acts necessary to constitute the crime had been committed by the defendant, the law made it their duty to find him guilty." Id.

Fifth, the differences in the structures of the federal and state constitutions support an independent analysis in every case. Meggyesy, 90 Wn. App. at 703. The U.S. Constitution is a grant of limited power to the federal government, while the state constitution limits the otherwise plenary power of the state. State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992). However, analysis of this factor does not shed any light on whether the state constitution is more protective than the federal constitution except in the most general sense. Id.

Sixth, while criminal law is generally a matter of state and local concern, there is nothing about this concern that would suggest that the right to a jury trial in Washington forbids instructing the jury that it has a

duty to convict once it has found every element proven beyond a reasonable doubt. Compare id. Further, Mecham has not shown any particular local or state concern regarding the propriety of the challenged instruction. Meggyesy, 90 Wn. App. at 703.

Accordingly, there is no support for the contention that either the federal or state constitutional right to a jury trial prohibit the instruction challenged here. Moreover, the challenged instruction was correct. Jury instructions are sufficient if they are not misleading, permit the parties to argue their theories of the case, and correctly inform the jury of the applicable law. Id. at 698. As the Meggyesy court observed in examining nearly identical language, the instruction appropriately directed the jury to consider the evidence and to determine whether the State had proven each element of the offenses beyond a reasonable doubt. Id. at 699. Further, this instruction does not invade the province of the jury, direct a verdict of guilty, or express an opinion as to the accused's guilt. Id.

Indeed, the instruction at issue is consistent with the other instructions provided to the jury, none of which Mecham challenges on appeal. For instance, the jury was instructed it must decide the facts, accept the law as provided by the court, then apply the law to the facts and "in this way decide the case." CP 89. It was also instructed that its decisions "must be made solely upon the evidence presented," and that it

could not render a decision based "on sympathy, prejudice, or personal preference." CP 89, 91. The direction that the jury has a duty to convict if it finds the elements proven beyond a reasonable doubt is entirely consistent with the directions to decide the case on the law and evidence, not on sympathy, prejudice, or personal preference.

Finally, while a jury may have the power to acquit against the evidence, a power which is inherent in a general verdict, id. at 700, that power "is not an applicable law to be applied" in a felony driving under the influence case. State v. Brown, 130 Wn. App. 767, 771, 124 P.3d 663 (2005).

In short, there is no right to jury nullification. The fact that a jury has power to nullify, and that courts have no power to coerce a jury into a particular verdict—or even to follow the law—does not mean that an instruction that the jury has a duty to return a verdict of guilty if it finds that the State has proven every element of the crime beyond a reasonable doubt is incorrect, or violates the constitutional right to a jury trial. Mecham's arguments to the contrary should be rejected.

3. THE TRIAL COURT'S ADMISSION OF EXHIBIT 17 INTO EVIDENCE DID NOT VIOLATE MECHAM'S CONFRONTATION RIGHTS BECAUSE IT WAS A NON-TESTIMONIAL BUSINESS RECORD.

Mecham complains that his confrontation rights were violated by the admission of Exhibit 17, an order of the Department of Licensing revoking his Washington driver's license. Specifically, he claims that the certification of mailing included on the order was testimonial, and that he had the right to confront the person who prepared it. But the certification of mailing was prepared in the ordinary course of business in order to comply with the Department's statutory obligations. And, it was prepared at the time of the mailing, months before Mecham committed his crime, so it was not prepared for the purpose of litigation. Accordingly, the certification was not testimonial. Even if it were, however, the certification was not relevant to any element of the crime of Driving While License Revoked in the First Degree. As such, its admission, if error, was harmless. His conviction should be affirmed.

A criminal defendant has a constitutional right to confront the witnesses against him. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. This right bars the admission into evidence of testimonial statements of a witness who does not appear at trial unless he is unavailable and the

defendant had a prior opportunity to cross-examine him. Crawford v. Washington, 541 U.S. 36, 59, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Confrontation clause challenges to the admission of evidence are reviewed de novo. State v. Sandoval, 137 Wn. App. 532, 537, 154 P.3d 271 (2007).

Testimonial statements, while not defined by Crawford, include prior testimony—such as at a preliminary hearing or before a grand jury—and police interrogations. Id. at 68. Documents created solely for an evidentiary purpose, such as laboratory reports of forensic examinations made to aid a police investigation, are likewise testimonial. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 321-22, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

Business records, however, are not testimonial, because they are created for the administration of an entity's affairs rather than for the purpose of establishing some fact at a trial. Crawford, 541 U.S. at 56; Melendez-Diaz, 557 U.S. at 324. Further, statements not offered for the truth of the matter asserted do not implicate the Confrontation Clause. Williams v. Illinois, __ U.S. __, 132 S. Ct. 2221, 2227-28, 183 L. Ed. 2d 89 (2012).

Here, Mecham claims that the certification of mailing contained in the Order of Revocation is testimonial. At trial, he objected specifically to

that portion of the document being admitted; in the alternative, he asked for it to be redacted. The portion at issue reads:

> I certify under penalty of perjury under the laws of the state of Washington that I caused to be placed in a U.S. Postal Service mail box, a true and accurate copy of this document to the person named herein at the address shown which is the last address of record. Postage prepaid on September 14, 2010 in Olympia, Washington.
> Elizabeth A. L[illegible]
> Agent for the Department of Licensing

Ex. 17.

The trial court did not err in overruling Mecham's objection to the admission of the document in its entirety, because the portion of the document that Mecham challenges is not testimonial evidence. Rather, it is a business record. The document was admitted as a business record, and Mecham makes no challenge to the admission into evidence of the remainder of the document. Nor could he; Qaasim's testimony definitively established that Exhibit 17 was kept in the ordinary course of business by the Department of Licensing. 5RP 120-34.

Moreover, the certification of mailing is required by statute. RCW 46.20.245(1) directs the Department of Licensing to give notice to a person whose driving privilege is to be revoked either by personal service or through the United States mail, postage prepaid. Further, the time at which the proposed revocation is to commence is prescribed by reference

to the date on which the revocation notice is deposited in the mail. RCW 46.20.245(1); see also RCW 46.65.065 (adding additional requirements with respect to habitual traffic offenders). Thus, the language Mecham complains of is merely a business record memorializing that the Department did what the Department is required by statute to do. Compare State v. Phillips, 94 Wn. App. 829, 974 P.2d 1245 (1999) (holding pre-Crawford that a proof of service of a domestic violence order is admissible as a public record).

Further, Qaasim testified that Exhibit 17 was created at or near the time of the revocation, that is, in September of 2010. Ex. 17; 5RP 133. Mecham did not drive in violation of the revocation—he did not commit the crime at issue—until May 15, 2011. 3RP 14. Accordingly, the document was not created for the purposes of prosecution, because the Department did not and could not know, at the time of the document's creation, that Mecham would violate the order. Compare Williams, 132 S. Ct. at 2243 (holding that a DNA report prepared to identify an unknown rapist, rather than to use as evidence against a particular person at trial, is not testimonial). As no crime had yet been committed, the document could not have been prepared for testimonial purposes.

Even if the portion of the document to which Mecham objected is testimonial, however, its admission into evidence was harmless. Evidence admitted in violation of the Confrontation Clause may nonetheless be harmless error. State v. Mares, 160 Wn. App. 558, 562, 248 P.3d 140 (2011). A constitutional error is harmless if the State proves beyond a reasonable doubt that any reasonable factfinder would have reached the same result in the absence of the error. Id. Here, any error was harmless for two reasons.

First, the evidence objected to—the portion of the document containing the certificate of mailing—was irrelevant to the elements of the crime. The elements of the crime of Driving While License Suspended or Revoked in the First Degree, as charged in this case, are that the defendant was driving in Washington, that his privilege to drive was revoked at the time of the driving, and that the revocation was based on the defendant's status as a habitual traffic offender. RCW 46.20.342(1)(a); CP 45-46; see also State v. Jasper, 158 Wn. App. 518, 536, 245 P.3d 228, 237 (2010), aff'd, 174 Wn.2d 96 (2012). The fact that the Order of Revocation, Exhibit 17, was mailed to Mecham on a particular date was orthogonal to the question of whether his license was revoked on a later

date.[13] Because the certificate of mailing was wholly irrelevant to the question of whether Mecham's privilege to drive was revoked due to his being a habitual offender as of May 15, 2011, its admission could have no effect on the outcome of the trial.[14]

Second, the other evidence admitted was overwhelming and uncontested. Specifically, Qaasim testified that he reviewed Mecham's driving records, that Mecham was a habitual traffic offender, that an order revoking Mecham's driving privilege was generated on or about

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[13] Citing State v. Dolson, 138 Wn.2d 773, 777, 982 P.2d 100 (1999), superseded by statute on other grounds by Laws of 1999, ch. 6, § 24, Mecham contends that "the State must prove beyond a reasonable doubt that the revocation complied with due process." Brief of Appellant at 38. He is correct insofar that, if challenged, the State must show that a driver was afforded notice and an opportunity to be heard before any suspension or revocation became effective. State v. Smith, 144 Wn.2d 665, 677, 30 P.3d 1245 (2001), superseded by statute on other grounds by Laws of 2002, ch. 107, § 1. But Dolson does not stand for the proposition that the State must prove to the trier of fact that the Order of Revocation was mailed to the driver whose privilege to drive is affected, nor does Dolson mention the standard of proof. Rather, a defendant may raise a legal challenge to a revocation on the grounds of a due process violation, and the State then bears the burden of proving to the court that the defendant was afforded due process. See, e.g., Smith, 144 Wn.2d at 677-78 & n.4; State v. Storhoff, 133 Wn.2d 523, 527-28, 946 P.2d 783 (1997); see also State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005) (holding that the validity of a court order is a legal question for the court, not an element of the crime, in a prosecution for violation of a court order). Indeed, Mecham made exactly this due process challenge during pretrial hearings, 1RP 93-105, and he does not assign error to the trial court's failure to enter a finding that the State proved beyond a reasonable doubt as an element of the crime the fact that the revocation complied with due process. CP 147-49.

The procedure of attacking the revocation in a pretrial hearing comports with the principle that constitutional questions, such as whether due process has been satisfied, is a question of law, not fact. E.g., City of Redmond v. Moore, 151 Wn.2d 664, 668, 91 P.3d 875 (2004) ("Constitutional challenges are questions of law and are also reviewed de novo."). Because the validity of Mecham's license revocation was a preliminary legal determination, the Confrontation Clause does not apply. State v. Fortun-Cebada, 158 Wn. App. 158, 172-73, 241 P.3d 800 (2010) (citing numerous Supreme Court cases).

[14] There is no claim—nor could there be—that the admitted evidence was unfairly prejudicial.

September 14, 2010, and that the revocation went into effect on October 29, 2010. 5RP 127, 130, 132-33. Further, the revocation was effective until August 11, 2013, at the earliest, and was in effect on May 15, 2011. 5RP 134. The portion of Exhibit 17 to which Mecham did not object was to similar effect. Additionally, Officer Campbell testified without objection that Mecham's license was suspended in the first degree, and Mecham stipulated to the police reports contained in Exhibit 3 as additional evidence for the court to consider. 1RP 105-07, 135-42; 3RP 9, 104-05. Exhibit 3 contained information that Mecham's license was suspended in the first degree. Ex. 3 at 6. Finally, during closing argument, Mecham argued that the State had failed to prove identity, that is, that Qaasim's testimony and Exhibit 17 were not proven to relate to Mecham. He did not argue in closing, as he had during pretrial hearings, that the revocation was in any way defective.

Accordingly, even if the certificate of mailing contained in Exhibit 17 was testimonial, its admission into evidence was harmless. Mecham's conviction for Driving While License Revoked in the First Degree should be affirmed.

D. CONCLUSION

For all of the foregoing reasons, Mecham's convictions for Felony Driving Under the Influence and Driving While License Suspended in the First Degree should be affirmed.

DATED this 14th day of August, 2013.

Respectfully submitted,

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Certificate by Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. MARK MECHAM, Cause No. 69613-1-I -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 15 day of August, 2013

Name
Done in Seattle, Washington