NO. 45955-8-II

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

STATE OF WASHINGTON,
Respondent,

v.

JOSEPH D. HUDSON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County

BY: s/ Jason F. Walker
JASON F. WALKER
Chief Criminal Deputy
WSBA #44358

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Factual History

Ken Grover is a resident of Moclips. VRP at 87.[1] On April 5, 2009 Mr. Grover was in bed when he heard a big car crash. VRP at 88-89. Mr. Grover jumped out of bed and hollered out the window to find out if anyone was hurt. VRP at 89. A calm male voice replied "No." VRP at 90.

Mr. Grover dressed, acquired a cellular telephone and flashlight, and went out to the scene of the crash. VRP at 90. Mr. Grover saw a small station wagon 100 feet from his bedroom. VRP at 91. A man, later identified as Leon Butler, was climbing out through the driver's side rear door window. VRP at 91. Butler was hollering that two people were missing. VRP at 92. Mr. Grover saw a female with blood covering her face lying nearby. VRP at 92. Mr. Butler also heard someone gasping. VRP at 94. Mr. Grover walked over to the sound and found a person dying, apparently thrown into a small tree. VRP at 95. Mr. Grover called 911. VRP at 96.

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[1] The Verbatim Reports of Proceedings are paginated sequentially, except those from 11/12/2014 and 6/2/10, so the date will be omitted when not referring to those VRPs.

Trooper Ben Blankenship[2] responded to the collision from Elma at about 1:00 AM. VRP at 203. It took him at least an hour and a half to arrive. VRP at 204. Upon arrival Trooper Blankenship observed a purple station wagon on its wheels. VRP at 204. There were two occupants of the vehicle being treated in an aid car, and a deceased occupant in the brush. VRP at 205.

Sgt. Ramirez responded to the call a little after 1:00 in the morning from the area of Summit Lake. VRP at 128-129.[3] He stopped and contacted ambulances from the collision scene along the way. VRP at 129. He contacted a male and a female, each of whom were being treated in the back of the ambulance. VRP at 130. Sgt. Ramirez understood these patients as being from the collision. VRP at 131:9-10. He identified the male as Leon Butler. VRP at 131. He identified the female as Paula Charles. VRP at 132. After identifying the patients and verifying they had been drinking, he continued on to the scene. VRP at 136.

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[2] Ben Blankenship was retired at the time of the second trial, but will be referred to as "Trooper Blankenship" throughout for simplicity.

3 Volume I of the Verbatim Report of Proceedings appears to be erroneously marked "March 12, 2010" throughout, although it is clear from the cover and index page that it encompasses several dates in 2014 as well.

Trooper Mullins had been instructed to keep family members from entering the scene. VRP at 583. Trooper Mullins first observed Defendant at about 3:00 AM. VRP at 582. Defendant was walking southbound on the north shoulder of SR 109. VRP at 583.

Sgt. Ramirez had been at the scene about an hour before he noticed Defendant. VRP at 143. Sgt. Ramirez found out Defendant was present when a fight broke out. VRP at 143. This was at least an hour after Trooper Blankenship had arrived. VRP at 237-238. Trooper Blankenship heard a commotion, turned around, and saw Defendant. VRP at 206-207. Trooper Blankenship asked Defendant who he was, and Defendant gave his name and date of birth. VRP at 208. Trooper Blankenship also asked Defendant if he was involved in the collision, and Defendant denied it. VRP at 220. Defendant said that he just came in from the road and wanted to see what was going on. VRP at 224-225. Defendant appeared to be highly intoxicated, as Defendant's speech was slurred and there was an extreme odor of intoxicants. VRP at 208. Defendant had brush debris in his hair. VRP at 208. Trooper Blankenship was interacting with Defendant, and Sgt. Ramirez was mostly listening. VRP at 145.

Sgt. Ramirez ordered Trooper Blankenship to secure Defendant in a patrol car to keep him away from the other people at the scene. VRP at

148. The people had identified themselves as family members of the deceased. VRP at 209. The purpose of taking Defendant to the patrol car was to separate Defendant from the family members and the commotion. VRP at 214.

Defendant was not under arrest as Trooper Blankenship escorted Defendant back to his patrol car. VRP at 214. As Trooper Blankenship was walking Defendant back to his patrol car he asked Defendant if he was injured. VRP at 214. Defendant said his back was sore. VRP at 210. Trooper Blankenship placed Defendant in his patrol car, but did not place him under arrest. VRP at 214. As Trooper Blankenship was walking back from his patrol car to the scene Sgt. Ramirez told him to arrest Defendant. VRP at 215. Sgt. Ramirez gave the order to arrest everyone they believed had been in the car. VRP at 149. Trooper Mullins was instructed to go to the hospital and arrest the two subjects there. VRP at 586.

Detective Dan Presba[4] arrived at the scene about 5:00 AM. VRP at 245. He saw the body of Tommy Underwood where it lay. VRP at

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[4] Dan Presba, like Ben Blankenship, was retired at the time of the second trial, but will be referred to as "Detective" for simplicity.

172:1-3. Detective Presba later performed a collision reconstruction on the crash. VRP at 166.

Procedural History

Defendant was previously convicted of Vehicular Homicide and Vehicular Assault, but the conviction was overturned. *See State of Washington v. Joseph Dean Hudson*, 2012 WL 1941796 at *1 (not reported at 168 Wash. App 1023 (2012).) Defendant argued, for the first time on appeal, that his arrest was without probable cause and therefore evidence gathered as a result of that arrest should not have been admitted. *Id.* at *2. This court agreed, saying that, "...the police had no reason to suspect that any particular one of the surviving occupants of the vehicle had been the driver." *Id.* at *4. Because Defendant was arrested without individualized probable cause, and admittance of the evidence was not harmless beyond a reasonable doubt, the conviction was reversed and the case remanded for a new trial. *Id.* at *5.

The State moved to obtain a sample of Defendant's DNA on November 12, 2013. Supp. CP at 120. This was to replace the previous sample, which was obtained as a result of Defendant's arrest, and therefore would not be admissible at a new trial. The motion was granted. VRP 11/12/2014 at 8.

Defendant moved *in limine* to exclude evidence suppressed by the Court of Appeals. CP at 031 – 033. The motion was granted, as there was no disagreement between the parties as to what was inadmissible. VRP at 57-58. Defendant also filed a motion to suppress Detective Presba's opinion that Defendant was driving. *See* Supp. CP at 132-135. Defendant argued that Detective Presba could not come to the same conclusion without the suppressed evidence. *Id.* The State made an offer of proof with Detective Presba's testimony. VRP at 166-194. After the testimony the Court denied Defendant's motion to exclude Detective Presba's opinion. VRP at 197.

Defendant moved for a mistrial during the testimony of Trooper Blankenship outside the presence of the jury on the basis that the witness had referred to suppressed evidence. VRP 210-211. To resolve the factual issue the court heard testimony and argument outside the presence of the jury. VRP at 213. Trooper Blankenship then gave additional testimony concerning what Defendant said, and when he said it, relative to the arrest. *Id.* at 214-17. At the end of the testimony Defendant's trial counsel indicated that he "was satisfied" and the court denied the motion for a mistrial. *Id.* at 217.

The jury returned a verdict of guilty to both counts, and found that Defendant had demonstrated or displayed an egregious lack of remorse. CP at 86-91. This appeal follows.

RESPONSE TO ASSIGNMENTS OF ERROR

1. No suppressed evidence was introduced, as the record and the findings of the trial court demonstrate.

The State does not dispute Defendant's legal conclusion that this case is the same litigation as the previous trial, or that the law of the case suppressed all post-arrest evidence. However, Defendant's factual conclusion that some of the testimony concerned suppressed evidence is mistaken.

Specifically, Defendant claims that introduction of the following evidence was in contravention of this court's previous decision and the motion *in limine*:

a) Defendant's pre-arrest statements to Trooper Blankenship;

b) Sgt. Ramirez' initial observations of Defendant; and

c) Detective Presba's collision reconstruction, because it utilized a post-arrest DNA sample.

The record will demonstrate this is not the case. The trial court made specific factual findings that Trooper Blankenship's testimony and

Detective Presba's opinion were admissible. As to Sgt. Ramirez' testimony, the record is clear that he testified only of his initial observations of Defendant, pre-arrest. There was no objection.

This court suppressed only post-arrest evidence.

Defendant argued for the first time on appeal that he was arrested without probable cause, and that the evidence obtained after his arrest should be suppressed. *See Hudson* at *2. This court agreed and suppressed all evidence obtained from Defendant's arrest, and gave an incomplete list of such evidence. *Id.* at *4. On that list was, "Hudson's evasive and inconsistent statements to Trooper Blankenship." *Id.* However, the opinion is clear on its face that the reason for suppression is the arrest. As the trial court said, "…the fact that [Sgt. Ramirez] ordered the arrest of two other people illustrated that there wasn't probable cause - particular probable cause to arrest the defendant." VRP at 212-213.

At the second trial the pre-arrest observations of the officers became more important, and both the trial court and the parties were careful ensure no suppressed evidence was introduced, as the record and findings of the court demonstrate.

Trooper Blankenship's testimony was all pre-arrest, as the trial court ruled.

Defendant appears to have confused the "evasive and inconsistent" statements" that Defendant made to Trooper Blankenship *after* arrest[5] with the limited conversation Trooper Blankenship testified to at this trial. This is contrary to the record and to the trial court's factual findings.

Appellate courts "review a trial court's findings of fact to determine whether they are supported by substantial evidence. *State v. Dobbs*, 180 Wn. 2d 1, 10, 320 P.3d 705, 709 (2014) (citing *State v. Hill,* 123 Wash.2d 641, 644–47, 870 P.2d 313 (1994).) "We review trial court decisions on the admissibility of evidence for abuse of discretion. *Id.* (citing *State v. Powell,* 126 Wash.2d 244, 258, 893 P.2d 615 (1995).) "A trial court abuses its discretion when its decision 'is manifestly unreasonable or based upon untenable grounds or reasons.'" *Id.* (quoting *Powell.*)

In the instant case Defendant objected and requested a mistrial, claiming that Trooper Blankenship had referred to suppressed evidence. VRP at 210-211. The court took lengthy testimony from Trooper Blankenship in order to "to clarify for the record when the order and arrest

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[5] *See Hudson* at *1.

of all three of them took place." VRP at 213. Trooper Blankenship testified that he had not placed Defendant under arrest when he escorted Defendant to the patrol car, that he was separating Defendant from the commotion at the scene. VRP at 214. Trooper Blankenship also explained that the statements he testified to were not made after he arrested Defendant. VRP at 215.

Defense counsel cross examined, and Trooper Blankenship clarified that Defendant complained of a back injury after arrest, but he had complained of back *soreness* as they were walking back to the patrol car. VRP at 216-217. At the end of the testimony defense counsel indicated that he was "satisfied" and the court denied the motion for mistrial. VRP at 217.

Because the uncontested evidence indicated that Trooper Blankenship's testimony was confined to his observations and interactions with Defendant pre-arrest there was no abuse of discretion. Defendant's conviction should be upheld.

Sgt. Ramirez testified to only pre-arrest observations.

The record is clear that Sgt. Ramirez testified only to his observations of Defendant *before* Defendant was arrested. Defendant did not object to the testimony (presumably because there was no reason to

object) so this issue is not preserved for appeal, and there is no prejudice, because Trooper Blankenship's testimony of the same observations was ruled admissible.

"Appellate courts typically will not consider an issue raised for the first time on appeal." *State v. Ford*, 171 Wn. 2d 185, 188, 250 P.3d 97, 99 (2011) (citing RAP 2.5(a) & *State v. Kirkman,* 159 Wash.2d 918, 926, 155 P.3d 125 (2007).) "However, an error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right." *Id.* "To demonstrate such an error, the defendant must show that the error actually prejudiced his rights at trial." *Id.*

Sgt. Ramirez testified that he noticed Defendant when a fight broke out. VRP at 143. Sgt. Ramirez testified that he did not know if Defendant was injured, that he could smell intoxicants, and that he could hear some "words garbled." VRP at 145. Sgt. Ramirez testified that he saw some signs of intoxication in Defendant such as odor of intoxicants, difficult speech and having to be asked things repeatedly before asking Trooper Blankenship to secure Defendant in a patrol car. VRP at 147-148. Sgt. Ramirez testified that he was only listening to interactions between Defendant and Trooper Blankenship from a few feet away. VRP at 145. Defendant did not object to this line of testimony.

Trooper Blankenship later testified that Defendant appeared intoxicated. VRP at 208. He also reiterated that Defendant was placed in a patrol car to separate Defendant from the family members of the deceased, but he was not under arrest. VRP at 214. Trooper Blankenship testified that Defendant had been in the patrol car for at least five minutes before he arrested Defendant. VRP at 215.

In the instant case no such demonstration is possible because A) Sgt. Ramirez' testimony was clearly of his *pre*-arrest observations; and b) his testimony was essentially the same as Trooper Blankenship's, which the court ruled was admissible.

As the record demonstrates, no post-arrest observations were introduced at trial. Even had they been, the issue was not preserved for appeal. This court should disagree with Defendant's assignment of error and affirm the conviction.

Detective Presba's opinion was ruled admissible by the trial court, and was based upon a new, untainted DNA sample.

Defendant claims that Detective Presba's opinion must have been based on a suppressed DNA sample because "eliminating the others' DNA would not lead to the conclusion that Hudson was the driver unless there was some DNA placing Hudson in the driver's seat." Brief of Appellant at 10. Defendant's argument ignores the facts that a) the State obtained a

new DNA sample from Defendant on November 12, 2014, and b) Detective Presba testified that his reconstruction was based upon injuries to the other three occupants, which eliminated everyone else from being in the driver's seat.

On November 12, 2013 the State requested that the court compel Defendant to provide a sample of his DNA. VRP 11/12/13 at 1; *also see* Supp. CP. At 128-131. The State's motion included probable cause based upon information that was obtained before Defendant's arrest, or obtained independently, and therefore not suppressed by this court's opinion. Supp. CP at 129. The trial court granted the motion. VRP 11/12/2014 at 8; Supp. CP at 120. Detective Joi Haner took the sample from Defendant. VRP at 156. Defense stipulated to the sample. VRP at 156-157.

At trial one of the State's witnesses, Kari O'Neill, testified that she located blood droplets of the kick plate of the crashed Subaru, which could only have been deposited when the door was open. VRP 454-455. Ms. O'Neill testified that she was able to match the DNA profile from that blood to Defendant. VRP at 455. Ms. O'Neill testified that she matched the blood to a sample she received on November 15, 2013. VRP at 456. Obviously, this was the sample collected from Defendant three days earlier, nearly four and a half years after Defendant's arrest.

Because the DNA sample that was used at the trial was not the DNA sample obtained as a fruit of the illegal arrest of Defendant it was not suppressed, and it was admissible at trial.

The trial court ruled that Detective Presba's opinion was admissible because it was based upon admissible evidence.

Defendant moved to exclude Detective Presba's opinion that Defendant was driving. Supp. CP at 132. On the morning of the second day of trial the State made an offer of proof concerning Detective Presba's opinion. VRP at 165-194.

Detective Presba testified that he was familiar with the evidentiary consequences of this court's previous opinion concerning this case. VRP at 166-167. He testified that, using the physical evidence at the scene and the injuries of the three other vehicle occupants he could still render an opinion as to where everyone was sitting. VRP at 167.

Detective Presba testified that there was evidence of where Paula Charles was sitting, namely a windshield strike, an "A" pillar post strike, and Ms. Charles' injuries. VRP at 167. He testified that he could place Leon Butler in the right rear seat based on Butler's injuries or lack of injuries, and Ken Grover's statements. VRP at 168. Detective Presba placed Tommy Underwood in the left rear seat, based upon the fact that Underwood was ejected, and what opportunity there was to eject a

passenger, based upon his reconstruction of the vehicle roll. VRP at 173. Finally, Detective Presba testified that he had reviewed the 2013 DNA report from Ms. O'Neill. VRP at 174. This report was based on a recent DNA sample, not the suppressed sample. VRP at 456. Detective Presba concluded that the blood deposited on the inside of the door frame, which was Defendant's, was deposited when the door was open. VRP at 175. Based upon the above enumerated evidence, Detective Presba opined that Defendant was the driver. VRP at 175.

After hearing Detective Presba's testimony the court denied the motion and allowed the opinion. VRP at 197. The trial court explained "... that there's, at least in his analysis, he honestly believes that he has enough to reach his opinion..." VRP at 198.

Like Trooper Blankenship's testimony there was no abuse of discretion, and this court should affirm that decision and uphold Defendant's conviction.

2. The jury's finding that Defendant exhibited an egregious lack of remorse should be left undisturbed because substantial evidence supports that finding.

Finally, Defendant claims that there is insufficient evidence to support the finding of an egregious lack of remorse. However, this is a factual determination supported by evidence presented at trial.

Additionally, there is no remedy because the trial court imposed a standard range sentence, despite the finding.

This court should uphold the jury's factual determination.

Appellate courts "review a jury's special verdict finding the existence of an aggravating circumstance under the sufficiency of the evidence standard." *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144, 163 (2011) (citing *State v. Stubbs,* 170 Wash.2d 117, 123, 240 P.3d 143 (2010) and RCW 9.94A.585(4).) "Under this standard, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *Id.* (citing *State v. Yates,* 161 Wash.2d 714, 752, 168 P.3d 359 (2007).)

In the instant case the jury heard that, after the crash Mr. Grover asked if anyone was hurt, and heard a calm male voice reply, "No." VRP at 89-90. Mr. Grover would go on to describe Butler as excited and frantic. VRP at 92. This would imply that the voice was Defendant's, the only other male survivor of the crash. The jury could have reasonably attributed the "no" to Defendant, and concluded he was more concerned about escaping the scene than the condition of his friends.

Further, the jury heard that, when Defendant reappeared he claimed "he just came up from the road, and wanted to know what was going on with all the lights," and denied being involved in the crash. VRP at 225. Again, based upon these facts the jury could have concluded that Defendant did not care about what had happened to the other occupants of the vehicle he was driving.

From his denial that anyone was hurt, which delayed aid, and his denial that he was involved, the jury could reasonably conclude that Defendant demonstrated or displayed an egregious lack of remorse. This court should find that the special verdict is supported by substantial evidence and leave it undisturbed.

Defendant received a standard range sentence, despite the finding by the jury.

Defendant can claim no prejudice from the finding because he received a standard range sentence. *See* CP at 107-108. A reversal of the jury's special finding will not change Defendant's sentence. This court should deny Defendant's request to remand for resentencing.

CONCLUSION

There is no dispute that the law of the case suppressed all post-arrest evidence, or that this case is the same litigation as the prior case.

The record is clear that all parties agreed on what was suppressed. However, Defendant is clearly mistaken about the evidence that was produced at the second trial. The officers' testimony was all of their pre-arrest observations, which were not affected by the illegal arrest that would follow. Further, the DNA sample and the resulting report was untainted by the arrest, and was acquired pursuant to a discovery demand. No evidence used to convict Defendant the second time had been suppressed. The law of the case was not violated.

Finally, a second jury found that Defendant displayed an egregious lack of remorse, even though the judge did not see fit to impose an exceptional sentence. This is a question of fact that should be left to a jury's sound judgment.

Defendant was given a fair trial, using all untainted evidence, and he was convicted again. This court should uphold that conviction and his sentence.

DATED this 25th day of March, 2015.

Respectfully Submitted,

BY: s/ Jason F. Walker
JASON F. WALKER
Chief Criminal Deputy
WSBA # 44358

GRAYS HARBOR COUNTY PROSECUTOR

March 25, 2015 - 6:47 PM

Transmittal Letter

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