92316-7

SUPREME COURT NO:

COURT OF APPEALS NO: 45955-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOSEPH DEAN HUDSON,

Appellate,

v.

STATE OF WASHINGTON,

Respondent,

ON APPEAL FROM THE COURT OF APPEALS DIVISION II

PURSUANT RAP 13.5(1)(2)

MOTION FOR DISCRETIONARY REVIEW (PRV)

Joseph Dean Hudson #341716
BA-39-1L
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

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ASSIGNMENTS OF ERROR

AUTHORITIES

State Cases:

Federal Cases:

Statutes:

A. IDENTITY

Pro Se Appellante, Joseph Dean Hudson, is serving an exceptional sentence for Vehicular Homicide & Vehicular Assult while under the influence of alchohol. [Appendix A - J&S 1-11].

B. OPINION OF THE COURT OF APPEALS

The Court of Appeals, Division II, Affirmed convictions & sentence. [Appendix E - UNPUBLISHED OPINION].

C. ISSUES PRESENTED FOR REVIEW

I. WHETHER D.N.A. "CONCLUSIVELY ESTABLISHED" THE IDENTITY OF JOSEPH HUDSON, AND RE-SAMPLE VIOLATES DOUBLE JEOPARDY.

A. Respondent clearly admitted that Joseph Hudson's d.n.a. was the fruit of an "illegal arrest" and suppressed that resulted in reversing previous convictions. [BOR 5].

B. The State on re-trial, re-obtained a sample of Joseph Hudson's d.n.a. to replace sample that was suppressed. [BOR 5].

C. COA allowed re-provided d.n.a. sample to be un-corroborated

that violated Joseph Hudson's due process rights under the "confrontation clause".

II. WHETHER JOSEPH HUDSON CAN BE CONVICTED OF DRIVING UNDER THE INFLUENCE OF ALCHOHOL WITHOUT (BAC) TEST.

A. Joseph Hudson's blood alchohol level (BAC) was suppressed evidence. [BOA 6].

B. In the Judgment & Sentence of Joseph Hudson, "5.7 NO BAC TEST" is clearly evident. [J&S 8].

C. Joseph Hudson was convicted of driving under the influence (dui) only by witness saying defendant looked & smelled intoxicated. [BOR 3].

D. Trial court error prejudiced Joseph Hudson with respect to conviction of Vehicular Homicide & Assult by means of dui enhancement with only (1) prior within 10 years.

III. WHETHER LEON BUTLER CLIMBING OUT OF CRASHED VEHICLE AT THE TIME OF INCIDENT YELLING "TWO PEOPLE ARE MISSING" CONSTITUTES ACTUAL EVIDENCE.

A. State clearly provided as "factual history" that Ken Grover witnessed Leon Butler climbing out through driver's side rear door window hollering two people were missing. [BOR 1].

B. Ken Grover saw "Paula Charles" on ground near crashed vehicle and then "Tommy Underwood" next to a tree.

C. Jospeh Hudson was not identified until 2 hours later away from the scene of the accident.

IV. WHETHER EXCEPTIONAL SENTENCE WAS LAWFUL.

A. The State failed to prove beyond a reasonable doubt that egregious lack of remorse existed. [BOA 11,12,13,14].

B. Appellate Attorney sufficiently argued that "just saying no" does not meet the legal standard requiring exceptional be applied. [BOA 13,14,15,16,17].

V. WHETHER APPELLATE ATTORNEY NOT FILING REPLY BRIEF, NOR MOTION FOR DISCRETIONARY REVIEW, AND ALSO NOT CONTACTING JOSEPH HUDSON AFTER OPINION OF THE COA-II CONSTITUTES PREJUDICE.

D. STATEMENT OF THE CASE

Joseph Hudson was not physically identified by Ken Grover at the scene at the time of the accident. All evidence of the unlawful arrest was suppressed. The State manipulated the facts & admittedly used suppressed evidence in the re-trial to re-convict Appellant of driving under the influence of alchohol without any proof of a breathinalysis or blood test, thus Joseph Hudson did not get a fair trial on (2) consecutive occasions and obviously will not get a fair trial in the jurisdiction of the Grays Harbor Superior Court.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The 9th Circuit Court of Appeals reviews interpretations of sentencing guidelines -- de novo -- in the application of sentencing guidelines to the facts of care pursuant abuse of discretion for findings of clear error & legal conclusions in U.S. v. Dann, 652 F.3d 1160, 1171-75 (9th Cir. 2011).

> Joseph Hudson requests this Court review -- de novo -- legal conclusions of an "exceptional sentence" applied without (BAC) test, applied with suppressed dna, and jury instruction not proven beyond a reasonable doubt.

I. DOES A RE-SAMPLE OF PREVIOUSLY SUPPRESSED DNA VIOLATE DOUBLE JEOPARDY?

As a matter of fact & law, Joseph Hudson asks this Court if dna is "conclusive identity" that is always the same and does not change.

As a matter of Procedural History on page 5 [lines 21 - 26] of Brief of Respondent, the State clearly admits that a re-sample of Joseph Hudson's dna was obtained to replace previous sample, which was suppressed as the result of an illegal arrest, and therefore not admissble at new trial. [BOR 5].

Federal & State [double jeopardy] provisions afford the same protections-same protections, and are identical in thought, substance, and purpose (State v. Ervin, 158 Wash.2d 746 at 752, 147 P.3d 567 (2006) quoting In Re Davis, 142 Wash.2d 165 at 171, 12 P.3d 603 (2000).

> Will this Court review -- de novo -- that double jeopardy claim raises question of law under State v. Turner, 169 Wash.2d 448 at 454, 238 P.3d 461 (2010)?

II. DOES CONVICTING A DEFENDANT OF DRIVING UNDER THE INFLUENCE WITHOUT BREATINALYSIS OR BLOOD TEST VIOLATE DUE PROCESS?

Joseph Hudson's (BAC) test was suppressed as the fruit of an "illegal arrest", and in re-trial, Appellant was convicted of DUI by a statement of looking intoxicated.

On page 8 of Judgment & Sentence, 5.7 clearly notes "no BAC test was submitted as evidence pursuant vehicular homicide & assult conviction proximately caused by driving a vehicle while under the influence. [J&S 1, 8].

As a matter of Factual History, Joseph Hudson was convicted of dui because Appellant "appeared to be intoxicated". [BOR 3].

RCW 46.61.506 Persons under the influence of intoxicating liquor or drug - Evidence - Tests - Information concerning tests (3) Analysis of the person's blood or breath to be considered valid under RCW 46.61.502 Driving Under the Influence, shall have been performed according to methods approved by the State toxicologist and by an individual possessing a valid permit issued by the State toxicologist for this purpose.

Will this Court consider Fiore v, White, 121 S.Ct. 712, "it's a fundamental due process violation to convict a person of a crime without proof of all the elements"?

* dui enhancement was also impliment with only (1) prior within 10 years of 72 months instead of 24 months.

III. JOSEPH HUDSON ASKS THIS COURT TO CONSIDER EVIDENCE THAT WAS OVERLOOKED BY COA & TRIAL COURT.

On page 1 of Brief of Respondent [lines 14 - 21], the State presented Factual History that Ken Grover witnessed Leon Butler climbing out of crashed vehicle yelling "two people are missing" where Mr. Grover then saw "Paula Charles" and soon thereafter "Tommy Underwood".

Joseph Hudson was only allegedly heard and not physically discovered at the scene until two hours later away from the accident.

> Will this Court consider Vosgien v. Perrson, 742 F.3d 1131 at 1134 (9th Cir. 2014), "establishing actual innocence, although not required for the purpose of demonstrating that defendant actually could be innocent of any wrongdoing in order to overcome procedural default"?

IV. DID THE STATE FAIL TO MEET JURY INSTRUCTION AND PROVE AN EGREGIOUS LACK OF REMORSE BEYOND A REASONABLE DOUBT?

Joseph Hudson morevoer argues that (a) (b) (c) of jury instruction were not at all proven by the State. [COA 8]. And

Appellant furthermore relies on Argument of Appellant Attorney in Brief of Appellant. [BOA 13,14,15,16,17].

V. WAS JOSEPH HUDSON PREJUDICED WHEN APPELLANT ATTORNEY DID NOT FILE REPLY BRIEF OR MOTION FOR DISCRETIONARY REVIEW?

Appellant Attorney did not file a rebuttal to Brief of Respondent and did not file a Motion for discretionary Review and did not contact Joseph Hudson to protect Appellant of the right to exhaust issues at the State level pursuant a Habeas Corpus.

To prevail an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant (Strickland v. Washington, 466 U.S. 668 at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Martinez v. Ryan, 132 S.Ct. 1309 (2012), "The United States Supreme Court decided that remand was required to determine whether Attorney in the 1st State collateral proceeding was ineffective & whether defendant was prejudiced".

> Will this Court review -- de novo -- claim of ineffective assistance of counsel under State v. Sutherby, 165 Wash.2d 870 at 883, 204 P.3d 916 (2009)?

F. CONCLUSION

Based on facts, matters & laws, Joseph Hudson respectfully requests this Court accept Review and provide a Decision of "Release with Prejudice" or "remand for change of venue re-trial" or "remand for re-sentencing to 41 - 54 months concurrent with 12+ - 14 months" without legally erroneous dui enhancement.

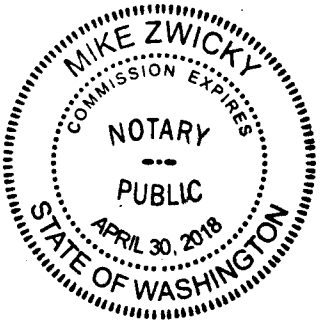
I, Joseph Hudson, dipose and say, that I am the Pro Se Petitioner, and that the foregoing Motion for Discretionary Review is true & correct to the best of my abilities.

Signed Joseph Hudson and dated this 20th day of Oct. 2105

NOTARY PUBLIC in and for the State of Washington

Residing at: Connell, WA

My appointment expires: 4/30/2018



APPENDIX "A"

Superior Court of Washington
County of Grays Harbor

State of Washington, Plaintiff, vs. JOSEPH DEAN HUDSON, Defendant. PCN: SID: DOB: 07-12-1970	**No. 09-1-172-6** **Felony Judgment and Sentence -- Prison (FJS)** ☒ **Clerk's Action Required, para 2.1, 4.1, 4.3, 4.8, 5.2, 5.3, 5.5 and 5.7** ☒ **Defendant Used Motor Vehicle** [ ] **Juvenile Decline** [ ] **Mandatory** [ ] **Discretionary**

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, David L. Mistachkin, and (deputy) prosecuting attorney, Jason F. Walker, were present.

II. Findings

2.1 **Current Offenses**: The defendant is guilty of the following offenses, based upon jury-verdict: January 10, 2014.

Count	Crime	RCW (w/subsection)	Class	Date of Crime
I	VEHICULAR HOMICIDE		A	04-23-2009
II	VEHICULAR ASSAULT		B	04-23-2009

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)

☒ The defendant committed ☒ **vehicular homicide** ☒ **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.

☒ Count I & II is a felony in the commission of which the defendant used a **motor vehicle**. RCW46.20.285.

☒ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

2.2 Criminal History (RCW 9.94A.525):

Crime	*Date of Sentence*	*Sentencing Court (County & State)*	*A or J Adult or Juvenile*	*Type of Crime*	*Points*	*DV**
Driving Suspended 2nd Degree	7/28/2005	Clallum county District Court, cause #CR21738	A	Misd	0	No
Obstructing Justice	6/17/2004	Olympia Municipal Court, cause #CR197234	A	Misd	0	No
Possession of a Dangerous Weapon	4/12/2004	Fife Municipal Court, cause #C19543	A	Misd	0	No
Possess Marijuana <40gr & Obstruct Law Enforcement	1/20/2004	Aberdeen Municipal Court, cause #C46985	A	Misd	0	No
Driving While Suspended 3rd	1/20/2004	Aberdeen Municipal Court, cause #C46984	A	Misd	0	No
Driving While Suspended 3rd	6/23/2003	Grays Harbor District Court, cause #CR37115	A	Misd	0	No
Driving While Suspended 3rd	10/4/2001	Clallum District Court, cause #CR20377	A	Misd	0	No
DUI	7/27/2004	Mason County District Court, cause #CR3722	A	Misd	0	No
DUI & Driving Suspended 3rd	2/4/1998	Grays Harbor District Court, cause #C76537	A	Misd	0	No
Possession of Drug Paraphernalia	9/5/1996	Clallum District Court, cause #CR17515	A	Misd	0	No
DUI	2/27/1996	Grays Harbor District Court, cause #C9168	A	Misd	0	No
DV Assault 4th Degree	10/10/1994	Aberdeen Municipal Court, cause #94-022307	A	Misd	0	No
Malicious Mischief 3rd	2/14/1996	Grays Harbor District Court, cause #23936	A	Misd	0	No
Criminal Trespass 1st Degree	2/14/1996	Grays Harbor District Court, cause #23935	A	Misd	0	No
Disorderly Conduct	4/23/1992	Aberdeen Municipal Court, cause #911470	A	Misd	0	No

*DV: Domestic Violence was pled and proved.

[ ] Additional criminal history is attached in Appendix 2.2.

[ ] The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

[ ] The prior convictions listed as number(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

[X] The prior convictions listed as number(s) 8, 9, 11, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	*Offender Score*	*Seriousness Level*	*Standard Range (not including enhancements)*	*Plus Enhancements**	*Total Standard Range (including enhancements)*	*Maximum Term*
I	2	IX	41 to 54 months	72 months	113 to 126 months	life/$50,000
II	2	IV	12+ to 14 months	72 months	84 to 86 months	10 yrs/$20,000

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12), (P16) Passenger(s) under age 16.

[ ] Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are [ ] attached [ ] as follows: _____.

2.4 [X] **Exceptional Sentence.** The court finds substantial and compelling reasons that justify an exceptional sentence:

[ ] below the standard range for Count(s) _____.

[ ] above the standard range for Count(s) _____.

[ ] the defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[X] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [X] found by jury, by special interrogatory.

[ ] within the standard range for Count(s) _____, but served consecutively to Count(s) _____.

Findings of fact and conclusions of law are attached in Appendix 2.4. [X] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 **Legal Financial Obligations/Restitution.** The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____

[ ] The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

[ ] (Name of Agency) _____'s costs for its emergency response are reasonable. RCW 38.52.430 (effective August 1, 2012).

2.6 [ ] **Felony Firearm Offender Registration.** The defendant committed a felony firearm offense as defined in RCW 9.41.010.

[ ] The court considered the following factors:

[ ] the defendant's criminal history.

[ ] whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

[ ] evidence of the defendant's propensity for violence that would likely endanger persons.

[ ] other: _____.

[ ] The court decided the defendant [ ] should [ ] should not register as a felony firearm offender

III. Judgment

3.1 The defendant is *guilty* of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

IV. Sentence and Order

It is ordered:

4.1 **Confinement**. The court sentences the defendant to total confinement as follows:

(a) *Confinement.* RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

120 months on Count I

24 months on Count II

Count 1 & 2 Concurrent

[ ] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

[ ] The confinement time on Count_____ includes _____ months as enhancement for:
[ ] firearm [ ] deadly weapon [ ] VUCSA in a protected zone
[ ] manufacture of methamphetamine with juvenile present.

Actual number of months of total confinement ordered is: ONE HUNDRED TWENTY MONTHS.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

This sentence shall run consecutively with the sentence in the following cause number(s) (see RCW 9.94A.589(3)): _____

Confinement shall commence immediately unless otherwise set forth here:_____

(b) *Credit for Time Served.* The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served.

(c) [ ] *Work Ethic Program*. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of confinement.

4.2 **Community Custody**. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)
(A) The defendant shall be on community custody for:

Count(s)_____ 36 months for Serious Violent Offenses
Count(s) I & II 18 months for Violent Offenses
Count(s)_____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody.

The court orders that during the period of supervision the defendant shall:

[X] consume no alcohol.

[ ] have no contact with: _____

[ ] remain [ ] within [ ] outside of a specified geographical boundary, to wit:

_____

[ ] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age.

[ ] participate in the following crime-related treatment or counseling services:

_____

[ ] undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management, and fully comply with all recommended treatment.

[ ] comply with the following crime-related prohibitions: _____

_____

_____

[ ] Other conditions:

- Do not commit any criminal acts;
- Do not consume alcohol, marijuana, or illegal drugs for the remainder of Defendant's life; and
- Do not possess, own, or control firearms pursuant to RCW 9.41.040.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3 **Legal Financial Obligations**: The defendant shall pay to the clerk of this court:

JASS CODE			
PCV	$ 500.00	Victim assessment	RCW 7.68.035
CRC	$ 200.00	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
	$ 549.72	Witness costs	WFR
	$ TBD	Other: ATTORNEY FEES FOR ORLANDO TAMAYO, AS BILLED.	
CLF	$ 100.00	Crime lab fee [ ] suspended due to indigency	RCW 43.43.690
	$ 100.00	DNA collection fee [ ] not imposed due to hardship.	RCW 43.43.7541
	$	Other fines or costs for: _____	
DEF	$ 1,000.00	Emergency response costs ($1,000 maximum, $2,500 max. effective Aug. 1, 2012.) Agency: WASHINGTON STATE PATROL	RCW 38.52.430

RTN/RJN $ 6,180.00 Restitution to: **Crime Victim's Compensation, Department of Labor and Industries, P.O. Box 44520, Olympia, WA 98504-4520, Claim Number: VN25070**

$_____ *Total* RCW 9.94A.760

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:
[ ] shall be set by the prosecutor.
[ ] is scheduled for_____(date).
[ ] The defendant waives any right to be present at any restitution hearing (sign initials): _____.

[ ] ***Restitution*** Schedule attached.

[X] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[ ] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than $_____ per month commencing _____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

[ ] The court orders the defendant to pay costs of incarceration at the rate of $_____ per day, (actual costs not to exceed $100 per day). (*JLR*) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.4 **DNA Testing.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

[ ] ***HIV Testing.*** The defendant shall submit to HIV testing. RCW 70.24.340.

[X] **The defendant must report to the Grays Harbor County Jail within 72 hours of sentence and provide a DNA sample.**

4.5 **No Contact:**

[ ] The defendant shall not have contact with , including, but not limited to, personal, verbal, telephonic, written or contact through a third party until _____ (which does not exceed the maximum statutory sentence).

[ ] The defendant is excluded or prohibited from coming within _____ (distance) of:

[ ] _____ (name of protected person's(s') [ ] home/residence

[ ] work place [ ] school [ ] (other location(s))_____

_____, or

[ ] other location _____,or

until _____ (which does not exceed the maximum statutory sentence).

[ ] A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Stalking No-contact order is filed concurrent with this Judgment and Sentence.

4.6 **Other**:

- **Do not commit any criminal acts;**
- **Do not consume alcohol, marijuana, or illegal drugs for the remainder of Defendant's life; and**
- **Do not possess, own, or control firearms pursuant to RCW 9.41.040.**

4.7 **Off-Limits Order**. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

_____

4.8 **Exoneration**: The Court hereby exonerates any bail, bond and/or personal recognizance conditions.

V. Notices and Signatures

5.1 **Collateral Attack on Judgment**. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100.
RCW 10.73.090.

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **Community Custody Violation.**

a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 **Firearms. You may not own, use or possess any firearm, and under federal law any firearm or ammunition,** unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. **You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.5b [ ] **Felony Firearm Offender Registration.** The defendant is required to register as a felony firearm offender. The specific registration requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Reserved

5.7 [X] **Department of Licensing Notice**: The court finds that Count 1 & 2 is a felony in the commission of which a motor vehicle was used. **Clerk's Action** - The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.285.

Findings for DUI, Physical Control, Felony DUI or Physical Control, Vehicular Assault, or Vehicular Homicide (ACR information) (Check all that apply):

[ ] Within two hours after driving or being in physical control of a vehicle, the defendant had an alcohol concentration of breath or blood (BAC) of _____;

[X] No BAC test result.

[ ] BAC Refused. The defendant refused to take a test offered pursuant to RCW 46.20.308.

[ ] Drug Related. The defendant was under the influence of or affected by any drug.

[ ] THC level was _____ within two hours after driving.

[ ] Passenger under age 16. The defendant committed the offense while a passenger under the age of sixteen was in the vehicle.

Vehicle Info.: [ ] Commercial Veh. [ ] 16 Passenger Veh. [ ] Hazmat Veh.

5.8 Other: _____

_____

Done in Open Court and in the presence of the defendant this date: 2/7/14

F. Mark McCauley

Judge ~~Gordon L. Godfrey~~ / F. Mark McCauley / ~~David L. Edwards~~

Deputy Prosecuting Attorney	Attorney for Defendant	Defendant
WSBA # 44358	WSBA # 34063	
Print Name:	Print Name	Print Name:
JASON F. WALKER	DAVID L. MISTACHKIN	FRANK ANDREW WIRSHUP

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of the Department of Corrections (not serving a sentence of confinement in the custody of the Department of Corrections and not subject to community custody as defined by in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: Joseph D. Hudson SR

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

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

Signed at Montesano, Washington, on _____.

_____ _____

Interpreter Print Name

I, _____, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____

Clerk of the Court of said county and state, by: _____, Deputy Clerk

VI. IDENTIFICATION OF THE DEFENDANT

SID No. _____ Date of Birth: 07-12-1970

(If no SID complete a separate Applicant card (Form FD-258) for State Patrol)

FBI No. _____ Local ID No. _____

PCN No. _____ Other: DOC No.

Alias name, DOB: _____

Race:	**Ethnicity:**	**Sex:**
[] Asian/Pacific Islander [] Black/African-American [] Caucasian	[] Hispanic	[X] Male
	[] Non-Hispanic	[] Female
[X] Native American [] Other: _____		

Fingerprints: I attest that I saw the defendant who appeared in court on this document affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk _____ Dated: _____

The defendant's signature: J Joseph D. Hunter SR

Address: 2611 Lower Hoh Rd Forks Wa 98331

Phone Number: 360 374 3360

Left four fingers taken simultaneously	Left Thumb	Right Thumb	Right four fingers taken simultaneously

APPENDIX "B"

NO. 45955-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH HUDSON
Appellant.

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

The Honorable Mark McCauley, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

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WSB #20955

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B. ASSIGNMENTS OF ERROR

1. The trial court violated the law of the case doctrine by admitting evidence suppressed by this Court following appeal of Hudson's first trial and conviction.

2. Based on Hudson responding "no" to a question asking if anyone was injured immediately following the accident, the state failed to prove beyond a reasonable doubt the aggravating factor for an exceptional sentence, egregious lack of remorse.

Issues Presented on Appeal

1. Did the trial court violate the law of the case doctrine by admitting evidence suppressed by this Court following appeal of Hudson's first trial and conviction?

2. Did the state fail to prove beyond a reasonable doubt the aggravating factor for an exceptional sentence, egregious lack of remorse based on Hudson responding "no" to a question asking if anyone was injured, immediately following the accident?

B. STATEMENT OF THE CASE

Hudson was charged and convicted by a jury of vehicular assault and vehicular homicide committed while intoxicated and while driving in a reckless manner and after committing the crime

exhibited an egregious lack of remorse. RP 859-863; CP 20-21, 86-91. This timely appeal follows. CP__

Close to 1:00A.M., Ken Grover heard what sounded like a car crash near his home. RP 88-89, 91. Grover called down to the road to ask if any one was hurt and heard a "no" in response. RP 89-90. Grover believed the voice sounded male, but could not identify the voice. RP 90, 105. Grover immediately got dressed and went to investigate to determine if anyone needed help. RP 90. Five minutes elapsed while he was getting dressed and looking for a flashlight and his cell phone. RP 101, 104. When Grover arrived on scene five minutes after hearing the crash, he saw a man later identified as Leon Butler, climbing out of the rear driver's side window. RP 91, 101. Grover called 911 as soon as he saw Butler getting out of the car. RP 96.

Butler was hollering frantically that two people were missing. RP 92. Butler fell to the ground and Grover heard nearby in the brush, a person gasping in the last moments of his life. RP 92-95. A woman who was lying on the ground got up and then collapsed without saying anything to Grover. RP 97.

Tommy Underwood died by the time the medics arrived, 20-

30 minutes after receiving their dispatch. RP 108. Leon Butler's testimony was introduced through a transcript from the first trial in this case. 1RP 3-19. Butler was Tommy Underwood's cousin and both were drinking at the Seagate Bar before the accident with Nancy Underwood, Leon Butler, Joe Hudson and Paula Charles, who were also drinking. RP 4. David Pickernell, Nancy Underwood's boyfriend had 6-9 beers during the evening with Tommy Underwood. RP 630-631.

Paula Charles, Hudson's girlfriend had enough to drink that she could not remember who drove the car away from the Seagate and did not remember the accident. RP 402-406. The crime lab toxicologist registered Underwood's blood alcohol level at .28. RP 558-559. Sergeant Ramirez, an officer who arrived at the crash site, determined that Leon Butler and the woman at the scene had been drinking. RP 132.

According to Nancy Underwood, at the scene, Charles told her that Hudson was the driver, but Charles told Presba that she did not remember who was driving. RP 408-409, 522-523. According to Presba, Charles told him that Hudson was the driver but Charles also would not provide a written statement to this effect and Presba

conceded that intoxication can effect perception. RP 414, 419, 428. Presba admitted that twice while under oath, Charles said that she could not remember who was driving when the accident occurred and never said under oath that Hudson was the driver. RP 427-428. Butler and Charles were taken to the hospital to be treated and for a statutory blood draw to determine their alcohol level. RP 588, 591. Both were charged with vehicular assault and vehicular homicide. RP 586.

Leon Butler's prior trial testimony indicated that he, Tommy Underwood and Paula Charles got into a car with Hudson driving after all had been drinking. RP 5. During trial, Butler placed Hudson in the driver's seat, Charles in the front passenger seat, Underwood behind the driver and himself behind the front passenger. 1RP 5. In the hospital, Butler told Mullins that Tommy Underwood was the driver, but during trial, Butler denied telling trooper Mullins that Hudson was not the driver. . RP 743-44; 1RP 19.

The state's accident reconstructionist placed Hudson in the driver's seat, Charles in the front passenger seat and Underwood and Butler in the back seat. RP 312, 315, 317, 318. The defense accident reconstructionist explained that while it was possible that this was the

seating configuration, there was insufficient evidence to render an opinion that this was accurate; and Presba's opinion was based on an incorrect mathematical formula. RP 644, 660, 687, 689, 700.

Presba testified that although he did not place any notes in his police report, Charles told Presba that she could not remember many parts of the evening involving the accident. RP 414.

a. Egregious Lack of Remorse.

Even though Grover could not identify the male voice he heard say "no" when he called out asking if anyone was hurt, Grover testified that when he later met Butler, he was certain the voice was not Butler's. RP 90, 96, 105. Based on this information, the state alleged and the jury considered the voice to be Hudson's and imposed an exceptional sentence based on egregious lack of remorse for Hudson allegedly not informing Grover that there were injured people at the crash site. RP 90, 96. Grover testified that he did not delay based on the response to his question, and could not have arrived at the crash site sooner. RP 90, 96. There was police testimony that Hudson may have been disoriented. RP 227-228

The jury found Hudson guilty as charged of vehicular assault and vehicular homicide committed while intoxicated and while driving

in a reckless manner and after committing the crime exhibited an egregious lack of remorse. RP 859-863. The sole evidence in support of egregious lack of remorse was limited to Grover testifying that immediately after the accident, he heard an unidentified man respond "no" when asked if anyone was hurt. RP 82, 84. The court entered findings and conclusions that simply stated the jury answered yes to the special verdict regarding the aggravating factor, but no facts were noted in the findings and conclusions to support the jury's verdict. CP 27-29.

b. Court of Appeals Unpublished Opinion Suppressing Evidence.

On May 30, 2012, the Court of Appeals reversed Hudson's conviction because the police arrested Hudson without probable cause and illegally obtained evidence therefrom. CP 16-18; Exhibit A-1; RP 73, 199-200. (*State v. Hudson,* 168 Wn.App *Unpublished Opinion*. 1023). This Court suppressed the following evidence obtained from the "fruit of Hudson's" illegal arrest:

> (1) Hudson's evasive and inconsistent statements to Trooper Blankenship, (2) his blood-alcohol level, (3) his admission of guilt and statement that his stomach hurt to Detective Presba, (4) photographs of and testimony about Hudson's injuries, and (5) a recording of Hudson's phone call from the jail.

Unpublished Opinion at page 4-5. The trial court ruled that all evidence suppressed by the Court of Appeals May 2012 decision was to be suppressed in the present case. RP 73, 199-200.

Mullins and Ramirez were present along with trooper Blankenship when Hudson arrived on scene. RP 207. In violation of this Court's order on remand, the trial court admitted the following suppressed evidence. Blankenship asked Hudson to identify himself, which he did. RP 207-208. Blankenship described Hudson as being highly intoxicated. RP 208. First, Blankenship testified that Hudson had brush in his hair but did not appear to be injured. RP 208. Second. as Blankenship was escorting Hudson to the back of the patrol car he asked Hudson if he was injured, to which Hudson responded "no". RP 209-210, 216. Third, after Blankenship placed Hudson in the back of his patrol car, Hudson said that his back hurt. RP 209-210, 217. Fourth, the prosecutor also asked Blankenship if Hudson had any visible injuries or bleeding, which drew objections that were sustained as violating the motions in limine. RP 208-209.

When given the opportunity, the defense moved for a mistrial based on the officer's references to Hudson's equivocation and

injuries which were the suppressed by this Court in Court of Appeals Unpublished Opinion in *State v. Hudson*, issued May 30, 2012). RP 73; 209-211; Exhibit A-1.

The defense argued the law of the case and argued that Hudson was in custody when placed in the patrol car and the state argued he was not in custody until informed he was under arrest a few minutes later. RP 211-218. The trial court denied the motion for a mistrial, and permitted Hudson's comments and the police testimony regarding Hudson's injuries and equivocation. RP 217-218.

C. ARGUMENTS

1. THE TRIAL COURT VIOLATED THE LAW OF THE CASE DOCTRINE BY ADMITTING EVIDENCE SUPPRESSED BY THE COURT OF APPEALS.

The trial court ordered in limine that all evidence previously suppressed by this court was to be suppressed during trial. RP 73, 199-200. (May 30, 2012 *State v. Hudson*, 40915-3-II Unpublished Opinion). Exhibit A-1. Later during trial, the trial court permitted the suppressed statements ruling that the Court of Appeals did not mean to suppress the statements made by Hudson regarding his equivocation or injuries or any statements made prior to formal arrest. RP 211-212, 216-218.

The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation. *State v. Schwab, Jr.* 163 Wn.2d 664, 762, 185 P.3d 1151 (2007); *Roberson v. Perez*, 156 Wn.2d 33, 41 P.3d 844 (2007); *Cook v. Brateng*, 180 Wn.App. 368, 373, 321 P.3d 1255 (2014). The purpose of the doctrine "seeks to promote finality and efficiency in the judicial process," *Schwab*, 163 Wn.2d at 672,(*quoting*, *Roberson*, 156 Wn.2d at 41.

For purposes of the law of the case doctrine both of Hudson's trials were the same litigation because: (1) the charges were the same; (2) the state presented the same evidence in both trials; and (3) Hudson's second trial commenced following this Court's order on remand.

Here, in relevant part, the law of the case doctrine prevented the trial court from reconsidering this Court's May 30, 2012 opinion directing suppression of the following evidence on remand: (1) Hudson's evasive and inconsistent statements to Trooper Blankenship, (2) his statement that his stomach hurt to Detective Presba, and (3) photographs of and testimony about Hudson's injuries. Unpublished Opinion at page 5.

The trial court disregarded the law of the case and instead permitted the state to introduce evidence that: (1) Hudson's evasive statements to Trooper Blankenship about being injured; (2) Blankenship's observations of Hudson's injuries and appearance; and (3) Hudson's statements about injuries made to Blankenship after he was placed in the patrol car, but before he was formally arrested. RP 209-210, 216-217.

In violation of the Court of Appeals opinion, Ramirez testified that he got a good look at Hudson when he appeared on scene and he did not look injured but he sounded intoxicated. RP 146. In violation of the Court of Appeals opinion, Presba testified that based on his review of the DNA, he could exclude Charles, Underwood and Butler as the drivers. RP 295. This testimony implies that Presba also considered Hudson's DNA which was suppressed because simply 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. RP 323.

Also in violation of the Court of Appeals opinion, Trooper Blankenship testified that he asked Hudson if he was injured to which Hudson stated that his back was sore 208-210. Blankenship testified

that Hudson was in custody but not yet under arrest when he asked Hudson about his injuries. Minutes later, Ramirez, ordered Blankenship to formally arrest Hudson. RP 214-215. After the arrest, Hudson stated again that his back was sore. RP 216-217. Hudson also said he was not in the collision and that the "female" thought that he, Hudson, was the driver. RP 220-221, 225. These statements were the evasive and inconsistent statements this Court suppressed.

Here, without authority and contrary to this Court's directive, the trial court permitted admission of evidence suppressed by this Court. The trial court's failure to adhere to this Court ruling was an error at law. *Schwab, Jr.* 163 Wn.2d 664, 762; RAP 2.5. To carry out this Court's 2012 directive in its prior opinion, the current conviction must be reversed and the matter remanded for a new trial in which the evidence suppressed by this Court remains suppressed at trial.

a. Error Not Harmless.

In Washington, evidence obtained as a result of an arrest without probable cause requires suppression of the unconstitutionally obtained evidence. *State v. Doughty*, 170 Wn.2d 57, 65, 239 P.3d 573 (2010). Admission of the illegally obtained evidence is not harmless error unless the reviewing Court is convinced beyond a

reasonable doubt that the error did not affect the verdict. *State v. Brousseau*, 172 Wn.2d 331, 363, 259 P.3d 209 (2011).

An error is only harmless beyond a reasonable doubt if the overwhelming untainted evidence necessarily leads to a finding of guilt. *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005); *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). In the unpublished opinion this Court considered the same evidence and determined that the overwhelming untainted evidence did not necessarily lead to a finding of guilt. (Unpublished opinion at page 5).

The admissible evidence the State presented in both trials to show Hudson's guilt included: (1) Butler's testimony that Hudson was the driver; (2) Butler told Mullins that Underwood was the driver; (3) Hudson's blood on the inside driver's side door, and (4) Detective Presba's accident reconstruction concluding that Hudson was the driver. . RP 427-428, 743-44; 1RP 19; Id. Hudson also could have exited the vehicle through the driver's side door without having been the driver, and Hudson presented his own accident reconstruction specialist who disagreed with Detective Presba's conclusion.

This evidence undermined the state's case and consequently, the untainted evidence that Hudson was the driver was not

overwhelming. Accordingly, the admission of evidence obtained after Hudson's arrest was not harmless beyond a reasonable doubt, which requires reversal and for a new trial. *Davis*, 154 Wn.2d 291, 305.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE AGGRAVATING FACTOR EGREGIOUS LACK OF REMORSE.

In this case there was insufficient evidence to support the aggravating factor egregious lack of remorse based on Hudson allegedly answering "no" when asked seconds after a crash if anyone was hurt.

The trial court may impose an exceptional sentence if it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Aggravating factors must be determined by a jury under the Sixth Amendment. RCW 9.94A.537; *State v. Borboa,* 157 Wn.2d 108, 118, 135 P.3d 469 (2006), *citing*, *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The reviewing Court will reverse an exceptional sentence only if (1) the record does not support the sentencing court's reasons, (2) the reasons do not justify an exceptional sentence for this offense, or

(3) the sentence was 'clearly excessive.' RCW 9.94A.585(4).

A special verdict finding the existence of an aggravating circumstance is reviewed under the sufficiency of the evidence standard. *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144 (2011); *State v. Stubbs,* 170 Wn.2d 143 117, 123, 240 P.3d 143 (2010). Under this standard, the reviewing Court reviews 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. *Chanthabouly*, 164 Wn. App. 104, 142-43; *citing*, *State v. Yates,* 161 Wn.2d 714, 752, 168 P.3d 359 (2007); RCW 9.94A.537(3).

b. Egregious Lack of Remorse

RCW 9.94A.535(3)(q) is the controlling statute required to find Hudson "demonstrated or displayed an egregious lack of remorse." RCW 9.94A.535(3)(q). Hudson argues that the evidence failed to demonstrate that his actions rose to the legally required level of egregiousness. In *State v. Ross,* 71 Wn.App. 556, 563–64, 861 P.2d 473 (1993), the court found the State supported the egregious lack of remorse factor by showing that Mr. Ross continued to blame the justice system for his crimes and that his statement that he was sorry

was not credible. *Ross,* 71 Wn.App. at 563–64. "Whether a sufficient quantity or quality of remorse is present in any case depends on the facts." *Ross,* 71 Wn.App. at 563.

In *State v. Erickson,* 108 Wn.App. 732, 739–40, 33 P.3d 85 (2001), the Court upheld the defendant's lack of remorse where he bragged and laughed about the murder, thought the killing was funny, joked about being on television for the murder, and told police he felt no remorse. *Erickson,* 108 Wn.App. at 739-40.

In *State v. Wood,* 57 Wn.App. 792, 795, 790 P.2d 220 (1990), the Court upheld the egregious conduct when a woman joked with her husband's killer about sounds her husband made after the killer shot him and went to meet a boyfriend's family 10 days after her husband's death. *Wood,* 57 Wn.App. at 795.

In *State v. Zigan* 166 Wn.App. 597, 270 P.3d 625, *review denied* 174 Wn.2d 1014, 281 P.3d 688 (2012), the state proved the aggravating factor of egregious lack of remorse beyond a reasonable doubt following conviction for vehicular homicide where the defendant's vehicle struck the victim, who was riding a motorcycle with her husband, and killed her instantly. Moments after victim's wife died, the defendant, while laughing and smiling, asked the victim's

husband if he was "ready to bleed?" *Zigan* 166 Wn.App. at 603.

Here, seconds after a crash when Hudson was likely disoriented and highly intoxicated, he allegedly answered "no" to the question asking if anyone was hurt. Hudson returned to the scene later but denied involvement. Notwithstanding the fact that Hudson may have said Hudson said "no", this does not compare to the sadistic conduct in *Erickson*, *Ross, Wood* or *Zigan.*

In these cases the defendants were overtly cruel and took pleasure in their crimes and in inflicting more suffering. Hudson did not brag, joke or make fun of anyone, and he did not blame the criminal justice system. Rather, Hudson left the scene, likely disoriented, intoxicated and afraid, and perhaps said "no" in this state of mind. This poor judgment does not demonstrate beyond a reasonable doubt, an egregious lack of remorse. RP 226-228.

b. Remand for Reversal of Exceptional Sentence.

When an exceptional sentence "is based upon reasons insufficient to justify an exceptional sentence ... the matter must be remanded for resentencing within the standard range." *State v. Ferguson,* 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). However, if the trial court expresses its intent to give the same exceptional sentence

of any single valid aggravating factor, then remand is unnecessary. *State v. Jackson,* 150 Wn2d 251, 276, 76 P.3d 217 (2003).

Here the trial court based its exceptional sentence on the single aggravating fact egregious lack of remorse, for which there is insufficient evidence, therefore remand is necessary to vacate the exceptional sentence. RP 465. *Jackson,* 150 Wn2d at 276; *State v. Halgren*, 137 Wn.2d 340, 347, 971 P.2d 512 (1999) (*quoting*, *State v. Barnes*, 117 Wn.2d 701, 711-12, 818 P.2d 1088 (1991).

D. CONCLUSION

Hudson respectfully requests this Court reverse his conviction and remand for a new trial and enter a finding that the state did not prove the aggravating fact egregious lack of remorse. If this Court does not remand for a new trial, Hudson requests this Court vacate his exceptional sentence.

DATED this 12th day of December 2014.

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor Gerald Fuller Gfuller@co.grays-harbor.wa.us and JWalker@co.grays-harbor.wa.us, and Joseph Hudson DOC# 341716 8 Coyote Ridge Corrections Center Post Office Box 769 Connell, WA 99326-0769, a true copy of the document to which this certificate is affixed, On December 12, 2014. Service was made to the prosecutor electronically and via U.S. Postal to Hudson.

Lise Ellner

Signature

APPENDIX "C"

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
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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

---

[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

APPENDIX "D"

AFFIDAVIT

I, Joseph Dean Hudson, declare under penalty of perjury that the following statements within this affidavit are true and correct to the best of my knowledge and has been executed on this 10th day of September, 2015, at Coyote Ridge Corrections Center, 1301 North Ephrata Avenue, P.O. Box 769, Connell, WA 99326 in the County of Franklin, Washington.

I, Joseph Dean Hudson, hereby declare, that my Appellate Attorney, Lise Ellner, WSB # 20955, P.O. Box 2711, Vashon, WA 98070, did not file a "Reply Brief" in my defense, case no. 45955-8-II, nor did said counsel notify me as to why.

Joseph Dean Hudson
(Print Name)

Affidavit pursuant to 28 U.S.C. 1746, **Dickerson v Wainwright**, 626 F.2d 1184; affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.

APPENDIX "E"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSEPH DEAN HUDSON, Appellant.	No. 45955-8-II UNPUBLISHED OPINION

JOHANSON, C.J. — Joseph Dean Hudson appeals his convictions and sentence for vehicular homicide and vehicular assault after a retrial. He argues that (1) the trial court erred by admitting evidence that we suppressed after Hudson's first appeal and (2) there was insufficient evidence to support the jury's finding that he acted with an egregious lack of remorse. We hold that (1) the trial court admitted no suppressed evidence and (2) sufficient evidence exists to support the jury's finding that Hudson acted with an egregious lack of remorse. Accordingly, we affirm Hudson's convictions and sentence.

FACTS

I. BACKGROUND FACTS

In April 2009, Hudson and his then-girlfriend, Paula Charles, met two friends—Tommy Underwood and Leon Butler—at a bar to have a few drinks. They left the bar in Charles's vehicle.

At about 1:00 AM, the car went off the road, down a seven-foot embankment, rolled twice, and stopped about 100 feet from Kenneth Grover's home. Grover heard the crash from his bedroom and "hollered" out the window, asking if anybody was hurt. 1 Report of Proceedings (RP) at 89. He heard a calm, male voice answer, "[N]o." 1 RP at 90. Grover got dressed, went out to investigate, and discovered Butler climbing out of the rear driver's side window. Butler was frantic and limping when he emerged from the vehicle. Grover and Butler found an unresponsive Charles. Grover then discovered Underwood, who died within minutes of the accident.

Butler and Grover could not locate Hudson. Hudson returned to the accident scene about two hours later. In order to separate Hudson from several of Underwood's family members who had assembled, Trooper Ben Blankenship took Hudson to his patrol car. Several minutes later, Sergeant Sam Ramirez ordered his troopers to arrest everyone who he thought had been in the vehicle, including Charles, Butler, and Hudson. They complied. Later that night Charles told Detective Dan Presba that when the group left the bar, she was in the front passenger seat and Hudson was driving.

II. FIRST TRIAL AND APPEAL

In January 2010, the State charged Hudson with vehicular homicide and vehicular assault and added an aggravating factor alleging that Hudson displayed an egregious lack of remorse. At the first trial, the jury convicted Hudson on both charges and found an egregious lack of remorse for both charges.

Hudson appealed his convictions and we held that Hudson's arrest was invalid and suppressed any "evidence obtained as a result of his arrest." *State v. Hudson*, noted at 168 Wn. App. 1023, slip op. at 7 (2012). In the prior decision, we enumerated the specific pieces of evidence that should have been suppressed because they were the fruits of Hudson's illegal arrest:

> (1) Hudson's evasive and inconsistent statements to Trooper Blankenship, (2) his blood-alcohol level, (3) his admission of guilt and statement that his stomach hurt to Detective Presba, (4) photographs of and testimony about Hudson's injuries, and (5) a recording of Hudson's phone call from the jail.

Hudson, slip op. at 8. We reversed Hudson's convictions and remanded for a new trial. *Hudson*, slip op. at 9.

III. RETRIAL

In November 2013, prior to Hudson's second trial, the trial court granted the State's motion to compel Hudson to provide a deoxyribonucleic acid (DNA) sample, based in part on Butler's sworn statement that Hudson had been driving. A forensic DNA scientist with the Washington State Patrol Crime Lab tested Hudson's new DNA sample and matched it to blood found on the inside of the driver's door of the vehicle.

At trial, the witnesses testified consistent with the above background facts. Sergeant Ramirez also testified that he did not remember whether Hudson appeared injured but that he could smell the odor of intoxicants on Hudson and noticed that Hudson was speaking as if he were intoxicated and was "swaying" from side to side. 1 RP at 148. Hudson did not object to this testimony.

Detective Presba, a collision reconstruction expert, opined that Charles, Underwood, and Butler had not been driving. Detective Presba concluded that, in his opinion, Hudson was the driver. Hudson did not object to this testimony.

Trooper Blankenship also testified that when he first approached Hudson, he noticed the odor of intoxicants, that Hudson's speech patterns were off, and that Hudson had brush and other debris in his hair. As Trooper Blankenship walked Hudson to his patrol car in order to separate Hudson from Underwood's family members, Hudson told Trooper Blankenship that "his back was sore." 2 RP at 210.

Hudson objected to Trooper Blankenship's testimony and moved for a mistrial, arguing that Trooper Blankenship had referred to suppressed evidence "twice." 2 RP at 210. The trial court stated that it wanted to clarify the moment of Hudson's arrest because evidence obtained after his arrest should be suppressed. Outside the jury's presence, both Hudson and the State questioned Trooper Blankenship, who stated that he did not arrest Hudson until he had been secured in the back of the patrol car for at least five minutes. Hudson stated he was "satisfied" that Trooper Blankenship's testimony had been proper, and the trial court then denied his motion for a mistrial. 2 RP at 217.

After the second trial, the jury convicted Hudson on both charges and also found that he acted with an egregious lack of remorse as to both charges. Hudson appeals his convictions and sentence.

ANALYSIS

I. LAW OF THE CASE AND SUPPRESSED EVIDENCE

First, Hudson argues that the trial court violated the law of the case doctrine when it admitted evidence that we suppressed in Hudson's first appeal. We hold that the trial court did not violate the law of the case doctrine because it admitted no evidence in the retrial that was suppressed in the first appeal.

Under the law of the case doctrine, an appellate court's holding must be followed "in all of the subsequent stages of the same litigation." *State v. Schwab*, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008). We previously held that the police did not have probable cause to arrest Hudson and suppressed "the evidence obtained as a result of his arrest." *Hudson*, slip op. at 7. We review a trial court's conclusions of law regarding whether evidence should be suppressed de novo. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

Hudson argues that Sergeant Ramirez, Detective Presba, and Trooper Blankenship testified to facts that should have been suppressed under our prior decision. We disagree.

Hudson's argument here is an attempt to expand the specific list of suppressed evidence that we enumerated in our prior decision into broad categories of types of information that must be suppressed regardless of whether they were actually "obtained as a result of his [unlawful] arrest." *Hudson*, slip op. at 7. But this argument is misplaced. In our prior decision, we did not suppress *all* evidence of Hudson's injuries or *all* evidence of evasive and inconsistent statements. *Hudson*, slip op. at 8. We suppressed evidence of injuries or evasive and inconsistent statements—as well as any other evidence—that were the "*fruits of his arrest*." *Hudson*, slip op. at 8 (emphasis added).

First, at the retrial, Sergeant Ramirez testified that (1) he could not "recall if [Hudson] had any injuries" but could smell an odor of intoxicants when he approached him, and (2) Hudson exhibited several other signs of intoxication. 1 RP at 146. The other signs of intoxication included affected speech patterns and "swaying." 1 RP at 148. However, Sergeant Ramirez made each of these observations before he told Trooper Blankenship to secure Hudson in his patrol car and before Hudson was arrested. Therefore, Sergeant Ramirez's testimony and observations were not "evidence obtained as a result of [Hudson's] arrest" and were not suppressed in Hudson's first appeal. *Hudson*, slip op. at 7.

Second, Detective Presba opined that, based on the December 2013 DNA report, Charles, Underwood, and Butler were not driving the vehicle when it crashed. Hudson claims that this evidence was improper because it "implies that Presba also considered Hudson's DNA," which should have been suppressed. Br. of Appellant at 10. But Detective Presba lawfully obtained a DNA sample from Hudson pursuant to the trial court's November 2013 order—which Hudson does not challenge. Hudson's DNA sample was not "evidence obtained as a result of his arrest" and, therefore, not suppressed in Hudson's first appeal. *Hudson*, slip op. at 7.

Third, as Trooper Blankenship walked Hudson to his patrol car, he asked Hudson if he was injured and Hudson responded that "his back was sore." 2 RP at 210. Trooper Blankenship also inquired about whether Hudson was involved in the accident and Hudson said, "[N]o." 2 RP at 225. However, Blankenship took Hudson to his patrol car to separate him from Underwood's family members who were gathering and causing a commotion and not because Hudson was under arrest at that time. Because Hudson was not under arrest or in custody, the statements he made to

Trooper Blankenship were, again, not "evidence obtained as a result of his arrest" and were not suppressed by our prior decision in this case.[1] *Hudson*, slip op. at 7.

The evidence that Hudson argues should have been suppressed in this case was not the fruit of Hudson's unlawful arrest. Accordingly, we hold that the trial court did not violate the law of the case doctrine because it did not admit evidence that was suppressed in Hudson's first appeal.

II. EGREGIOUS LACK OF REMORSE SPECIAL VERDICT

Hudson next argues that there is insufficient evidence to support the jury's special verdict finding that he acted with an egregious lack of remorse. Specifically, Hudson claims that the facts here are distinguishable from other cases where an egregious lack of remorse special verdict was deemed appropriate. We hold that there is sufficient evidence to support the jury's special verdicts finding an egregious lack of remorse.

Whether the defendant demonstrated an egregious lack of remorse depends on the specific facts of each case. *State v. Ross*, 71 Wn. App. 556, 563, 861 P.2d 473, 883 P.2d 329 (1993). We review a jury's special verdict finding of an egregious lack of remorse under a sufficiency of the evidence standard. *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010) ("A jury's finding by special interrogatory is reviewed under the sufficiency of the evidence standard."). Therefore,

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[1] Hudson also argues that Trooper Blankenship made two other statements that should have been suppressed. Specifically, the fact that (1) once he was in the car, Hudson again told Trooper Blankenship that his back was sore, and (2) Hudson pointed to Charles and told Trooper Blankenship that she was yelling at him because she thought that Hudson was the driver. However, Trooper Blankenship testified to these facts during an offer of proof when the jury was not present and in an effort to investigate Hudson's specific objection. The trial court excluded the statement about Charles yelling, and the jury only heard Trooper Blankenship testify that Hudson said his back was sore *prior to* his arrest. Moreover, Hudson stated that he was "satisfied" that Trooper Blankenship's proposed testimony was consistent with our prior decision. 2 RP at 217. Therefore, Hudson's argument about these statements is baseless.

we must determine whether, when reviewing the evidence in a light most favorable to the State, any rational jury could have found the existence of an egregious lack of remorse beyond a reasonable doubt. *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007). We consider circumstantial and direct evidence equally reliable. *Yates*, 161 Wn.2d at 752. A "mundane lack of remorse found in run-of-the-mill criminals" is not sufficient. *State v. Garibay*, 67 Wn. App. 773, 781, 841 P.2d 49 (1992), *abrogated on other grounds by State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996).

Here, the jury was instructed that

> [a]n egregious lack of remorse means that the defendant's words or conduct demonstrated extreme indifference to harm resulting from the crime. In determining whether the defendant displayed an egregious lack of remorse, you may consider whether the defendant's words or conduct:
>
> (a) increased the suffering of others beyond that caused by the crime itself;
>
> (b) were of a belittling nature with respect to the harm suffered by the victim or others; or
>
> (c) reflected an ongoing indifference to such harm.
>
> A defendant does not demonstrate an egregious lack of remorse by denying guilt, remaining silent, asserting a defense to the charged crime or failing to accept responsibility for the crime.

Clerk's Papers (CP) at 83-84; *see also* 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 300.26, at 736 (3d ed. 2008).

Grover testified that when he arrived, Butler was hobbling and eventually fell to the ground as Grover looked for the vehicle's other occupants. When Grover discovered Charles, she was not moving, did not appear to be conscious, and was covered in so much blood that he could not see her face. Underwood was gasping as he died in a tree over 30 feet away after being thrown from the car during the accident. However, Grover heard a calm, male voice say that nobody was hurt

and Hudson walked away after the accident without calling for help and did not return for about two hours.

Based on the injuries that Grover observed and Hudson's conduct, a rational jury could have found that Hudson was the calm, male voice who told Grover that nobody was hurt because Underwood was badly injured and not in a condition to speak, and Butler was "frantic" and "hollering." 1 RP at 92. A rational jury could also have determined that Hudson displayed an "ongoing indifference" to the harm that he caused because by leaving the accident scene for over two hours when his friends needed medical assistance and by telling Grover that nobody was hurt, he prevented them from getting medical assistance as soon as possible. CP at 84. Therefore, we hold that sufficient evidence supports the jury's special verdict finding that Hudson demonstrated an egregious lack of remorse.

Hudson points to three cases where an egregious lack of remorse was found and argues that the facts here demonstrate that his conduct—saying, "No," to Grover when he asked if anybody was hurt—was not nearly so severe.[2] We disagree with Hudson because (1) he improperly limits the evidence that he acted with an egregious lack of remorse to his one-word response to Grover and (2) these cases are not analogous.

In *Ross*, we held that the defendant's refusal to take responsibility for his actions and the fact that he continued to "blame the justice system for his crimes" showed an egregious lack of remorse. 71 Wn. App. at 563-64.

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[2] Hudson also points to Division Three of this court's opinion in *State v. Erickson*, 108 Wn. App. 732, 33 P.3d 85 (2001), for additional support. However, the defendant in *Erickson* did not challenge the trial court's determination that he had acted with a "lack of remorse" and Division Three did not review whether the evidence in that case was sufficient to support the special verdict. 108 Wn. App. at 740-42.

In *State v. Wood*, 57 Wn. App. 792, 798, 790 P.2d 220 (1990), we upheld an egregious lack of remorse aggravator applied to a defendant who helped plan her husband's murder. Wood traveled with another man just over one week after the murder and established a residence with a third man just three weeks after the murder. *Wood*, 57 Wn. App at 795. Wood joked about her husband's death and teased the man who pulled the trigger of the gun that killed her husband about his sensitivity to the sound her husband made as he died. *Wood*, 57 Wn. App. at 795.

In *State v. Zigan*, 166 Wn. App. 597, 603, 270 P.3d 625, *review denied*, 174 Wn.2d 1014 (2012), Division Three affirmed the trial court's finding that Zigan displayed an egregious lack of remorse. There, immediately following a fatal accident, Zigan asked the victim's husband if he was "'ready to bleed.'" *Zigan*, 166 Wn. App. at 602. Zigan smiled and laughed while talking with police officers at the scene and joked later with one of the officers that the officer should not ride a motorcycle because "he might get killed by [Zigan] too." *Zigan*, 166 Wn. App. at 603. Zigan also joked with his fellow inmates about the accident. *Zigan*, 166 Wn. App. at 603.

Although the conduct in each of these cases was severe, these cases do not dictate the result here because whether sufficient evidence supports an egregious lack of remorse special verdict is a fact-specific inquiry, *Ross*, 71 Wn. App. at 563, and the facts in this case demonstrate that Hudson displayed an extreme and ongoing indifference to the injuries he caused to his friends. From the facts in this case, a reasonable jury could conclude that Hudson (1) was the driver of the vehicle, (2) calmly told Grover that nobody was hurt immediately after the accident, and (3) walked away from the accident for over two hours without getting help for his friends. When Hudson left the scene, one of his friends was dying after being ejected from the car into a tree and Charles, his

girlfriend at the time, had blood all over her face. A reasonable jury could find that his continued indifference to their injuries was extreme and ongoing.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Worswick J
WORSWICK, J.

Melnick J.
MELNICK, J.

APPENDIX "F"

AFFIDAVIT

I, Joseph Dean Hudson, declare under penalty of perjury that the following statements within this affidavit are true and correct to the best of my knowledge and has been executed on this 10th day of September, 2015, at Coyote Ridge Corrections Center, 1301 North Ephrata Avenue, P.O. Box 769, Connell, WA 99326. in the County of Franklin, Washington:

I, Joseph Dean Hudson, hereby declare, that my Appellate Attorney, Lise Ellner, WSB # 20955, P.O. Box 2711, Vashon, WA 98070, did not file a Motion for Discretionary Review in my defense, case no: 45955-8-II, nor did said counsel notify me as to why.

Joseph Hudson

Joseph Dean Hudson
(Print Name)

Affidavit pursuant to 28 U.S.C. 1746, **Dickerson v Wainwright**, 626 F.2d 1184; affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury and the Laws of the State of Washington, that on this day, he did deliver in the internal mail system for the U.S. Postal Service at Coyote Ridge Corrections Center, postage pre-paid, one true & correct copy of Appellant's "Motion for Discretionary Review" of Brief of Appellant Case No: 45955-8-II; Gray's Harbor Superior Court No: 09-1-172-6, addressed to:

ATTN: Clerk, Washington State Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

ATTN: Clerk, Court of Appeals, Division II
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Respectfully submitted this 20th day of October 2015

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