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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 37446-7-III

STATE OF WASHINGTON, Respondent,

v.

PAVEL KANYUSHKIN, Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Pavel Kanyushkin requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on July 20, 2021, concluding that police did not coerce his consent to seize his vehicle when he refused until they told him the other option was to seize it. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

Under *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) and *Schneckloth v. Bustamonte*, 412 U.S. 218, 233, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), consent granted only in submission to a claim of lawful authority by police is invalid. After resisting police requests for his consent to seize his truck without a warrant for over 45 minutes, Pavel Kanyushkin acquiesced when the officer told him the other option was to

seize it. Was Kanyushkin's consent coerced when it was given only after police informed him that seizure was inevitable?

IV. STATEMENT OF THE CASE

The case arose from the death of Marilyn Dhaenens while she was out for her morning walk. *Opinion*, at 1. Her husband was on the phone with her when he heard an engine rev, followed by a thump and moaning. *Id.* at 1-2. A man who was walking some distance south of the intersection that same morning heard an engine rev but did not see anything. II RP 406. After he turned away and continued walking, he heard the engine revving from behind him and was passed by a dark red truck with a table saw in the back. II RP 407. He thought the truck was driving faster than the posted 25 mph speed limit. II RP 408. The man later came to the accident scene and told police about the truck he had observed about an hour before. II RP 409-10. Police were able to obtain surveillance footage from a nearby school showing the truck. *Opinion*, at 3.

Based on this information, police began searching for similar trucks registered in the area, one of which belonged to 21-year-old Pavel Kanyushkin. *Opinion*, at 3; CP 1. After visiting Kanyushkin's home, learning he was at work, and leaving contact information, a police investigator received a call from Kanyushkin stating he was at work and had an alibi, which the investigator found unusual. *Opinion*, at 3. After obtaining Kanyushkin's location, the investigator went there to look at the truck and recognized it as the one in the surveillance video. *Opinion*, at 4. He observed what he believed to be "fresh" damage to the front end of the truck. *Id.*¹

Over approximately the next 50 minutes, the officer repeatedly requested Kanyushkin's consent to take the truck to search it and Kanyushkin repeatedly refused, saying he needed the truck for work. CP 154, 190 (time stamps noted on transcript); CP 175-76, 191. When Kanyushkin's consent was

¹ Kanyushkin explained that the truck was damaged when he bought it. *Opinion*, at 4.

not immediately forthcoming, the officer told him that he was not under arrest and was not necessarily even a suspect, CP 176-77; that the officer was there to exclude him, CP 183; that Kanyushkin should not be afraid of him, CP 184; that Kanyushkin's cooperation was an "opportunity" that could "slip past" for him, CP 193; and, finally, that his other option was to seize the vehicle, CP 194. At that point, Kanyushkin acquiesced, saying, "Sounds good." CP 194.

After seizing the truck, police searched it and obtained evidence connecting it to the scene and the accident. III RP 612, 629, 637, 640. They then interrogated Kanyushkin and Kanyushkin acknowledged he had hit something that felt like a curb or some roadkill and paused, but then drove off, not realizing that he had hit a person. III RP 540-43, 554, 679-80, 682, 713, 716, 800. He did not observe any blood on his vehicle and did not wash it before police came to his job site to inspect it. I CP 189; III RP 544, 714, 800-01. An accident reconstruction expert confirmed that the forces involved in the

impact would be minimally perceivable inside the truck, feeling like hitting a branch or a pothole. IV RP 915, 917, V RP 114-15. The expert opined that Kanyushkin may have suffered from inattention blindness as the result of being on his cell phone at the time of the collision. IV RP 929-30.

The trial court denied Kanyushkin's pretrial motion to suppress evidence resulting from the seizure, finding that Kanyushkin voluntarily consented to it, and a jury convicted him of vehicular homicide and failing to remain at the scene of a fatal accident. *Opinion*, at 11. The Court of Appeals affirmed, concluding that police did not deceive Kanyushkin nor repeatedly press the issue of searching the truck, and had probable cause to justify the threat to seize the truck. *Opinion*, at 13.

**V. ARGUMENT WHY REVIEW SHOULD BE
ACCEPTED**

Police tactics have long been recognized to implicate significant constitutional protections, including the Fifth

Amendment privilege against self-incrimination and the Fourth and Fourteenth Amendment's protections against unreasonable searches and seizures. *See Miranda v. Arizona*, 384 U.S. 436, 442-43, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (*quoting Brown v. Walker*, 161 U.S. 591, 596-67, 16 S. Ct. 644, 40 L. Ed. 819 (1896)) (acknowledging the privilege against self-incrimination arose historically as a denunciation of "inquisitorial and manifestly unjust methods" of interrogation); *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-25, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (observing that the Due Process Clause's voluntariness requirement balances the need for effective law enforcement with "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness."). Because the tactics used to obtain possession of Mr. Kanyushkin's vehicle implicate the voluntariness of his consent, the case presents a significant question of constitutional law and warrants review under RAP 13.4(b)(3). Further, because the Court of Appeals' ruling conflicts with

State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003) and *State v. Werth*, 18 Wn. App. 530, 534, 571 P.2d 941 (1977), *review denied*, 90 Wn.2d 1010 (1978), review should be granted under RAP 13.4(b)(1) and (b)(2).

Consent is not voluntary unless it is obtained without either explicit or implicit compulsion, resulting from a person's own "free and unconstrained choice." *Werth*, 18 Wn. App. at 534. Nor is consent inferred from mere acquiescence in police conduct. *See State v. Schultz*, 170 Wn.2d 746, 757, 248 P.3d 484 (2011) (individuals do not waive their constitutional rights "just because they are too afraid or too dumbfounded by the brazenness of the action to speak up."). Instead, consent is determined from the totality of the circumstances. *O'Neill*, 148 Wn.2d at 588 (citing *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999)). It is not a multifactor analysis but considers the circumstances as a whole. *See id.* at 589.

In the present case, the police seized Mr. Kanyushkin's truck without first obtaining a warrant, obligating the State to establish an exception for the seizure. "Even where probable cause to search exists, a warrant must be obtained unless excused under one of a narrow set of exceptions to the warrant requirement." *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). Because the State relies upon Mr. Kanyushin's consent to the search, that consent must be free from compulsion and must constitute more than mere acquiescence to police authority. *See Werth*, 18 Wn. App. at 534 (circumstances where defendant would have perceived that police would search her home with or without her consent were coercive); *O'Neill*, 148 Wn.2d at 589 ("[T]he only reason for the representations that he could and would simply arrest O'Neill and search incident to arrest if he did not obtain consent was to obtain that consent."). Because a claim of authority to search amounts to informing the defendant that he has no right to resist the search, the coerciveness of the threat – even if

colorably lawful – precludes consent. *Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968).

Here, after Kanyushkin repeatedly refused to allow police to seize the truck, the officer told him it would be seized otherwise. I CP 194 (“[M]y other option is – is to seize the vehicle.”). He then offered Kanyushkin a ride home, whereupon Kanyushkin acquiesced, saying, “Sounds good.” I CP 194. Under these circumstances, police cannot rely upon Mr. Kanyushkin’s consent to seize the truck because he consented only after it was made clear that he had no real option to refuse.²

² Furthermore, at the time of the seizure police had only a suspicion about the red truck’s involvement in the accident because it had been seen speeding in the area around the time of the accident. See II RP 405-06, 408. They did not observe any blood or any efforts by Mr. Kanyushkin to clean the vehicle, and Mr. Kanyushkin responded to their inquiry the same night. See II RP 475, IV RP 773; CP 189. However, the officer thought it was strange that Kanyushkin volunteered that he had an alibi when he called and saw damage on the truck that he believed was fresh. Opinion, at 3-4. These subjective evaluations do not rise to the level of probable cause that police would have been required to show to seize Mr. Kanyushkin’s truck, as they threatened.

As in *O'Neill*, Mr. Kanyushkin's consent was given "only in submission to a claim of lawful authority." 148 Wn.2d at 589 (quoting *Schneckloth*, 412 U.S. at 233). If police believed they could lawfully seize his truck on probable cause, they would not have needed Mr. Kanyushkin's consent; thus, the only reason to tell him they had that option was to get him to acquiesce in the taking by concluding the seizure and search was inevitable. *See id.* at 589-90.

"The flexibility which makes consent searches favored among law enforcement officials also creates a strong potential for abuse." Kaplan, David S. and Dixon, Lisa, *Coerced Waiver and Coerced Consent*, 74 Den. U. L. Rev. 941, 948 (1997). Here, obtaining Mr. Kanyushkin's "consent" permitted police to pursue their hunches in investigating Mrs. Dhaenens' death, rather than demonstrating probable cause to a neutral magistrate. *See id.* Indeed, if police believed that the information in their possession rose to the level of probable cause, they had no reason to convince Mr. Kanyushkin to agree

and should have simply seized it after he refused consent. *See State v. Houser*, 95 Wn.2d 143, 149, 922 P.2d 1218 (1980) (a warrant is not required when police have probable cause to believe a vehicle is stolen or was used in the commission of a felony).

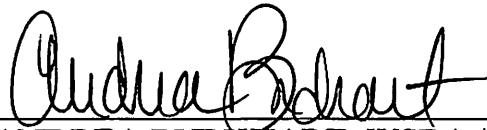
Because the circumstances present in this case clearly demonstrate that Mr. Kanyushkin only consented to the seizure of the truck after police communicated that he had no real alternative, *O'Neill* controls and should have invalidated the seizure because acquiescence to authority is not voluntary consent. Because of the significant constitutional questions concerning the validity of consent and the conflict between the Court of Appeals' ruling and *O'Neill* and *Werth*, review is appropriate and should be granted under RAP 13.4(b)(1), (2), and (3).

VI. CONCLUSION

For the foregoing reasons, Mr. Kanyushkin respectfully requests that the petition for review be granted and that this Court enter a ruling that the State failed to establish an exception to the warrant requirement to seize Mr. Kanyushkin's truck.

RESPECTFULLY SUBMITTED this 19 day of August, 2021.

TWO ARROWS, PLLC



ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE


I, the Undersigned, hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing it in the U.S. Mail, first-class postage pre-paid, addressed as follows:

Pavel Kanyushkin, DOC #422325
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals' electronic filing portal as follows:

Larry Steinmetz
Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

Signed this 19 day of August, 2021 in Kennewick,
Washington.


Andrea Burkhart

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

STATE OF WASHINGTON,)	No. 37446-7-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
PAVEL KANYUSHKIN,)	
)	
Appellant.)	

PENNELL, C.J. — Pavel Kanyushkin appeals his convictions for vehicular homicide and failure to remain at the scene of a fatal accident. We affirm.

FACTS

On October 18, 2018, Marilyn Dhaenens was struck and killed by a vehicle while walking at the easternmost of two intersections between Country Vista Drive and Mission Avenue in Liberty Lake, Washington. Ms. Dhaenens had left home for her usual morning walk around 8:00 a.m. and was talking to her husband, Scott Dhaenens, over her cell

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phone at the time she was struck. During their conversation, Mr. Dhaenens heard an engine rev and his wife say, “Oh my God.” 2 Report of Proceedings (RP) (Jan. 15, 2020) at 391. Then he heard a thump, moaning, and the sound of a vehicle’s exhaust trail off. Mr. Dhaenens kept trying to talk to his wife but all he could hear in response was mumbling. Mr. Dhaenens hung up and tried calling again but received a busy signal. He then immediately left home to look for his wife on the route he knew she normally took.

At around 8:15 a.m., an individual traveling in the area discovered Ms. Dhaenens lying in the middle of the southbound lane of Country Vista Drive, about 50 feet south of its intersection with Mission Avenue. The individual called 911. First responders, law enforcement and Mr. Dhaenens arrived at the scene shortly thereafter. Ms. Dhaenens was taken by ambulance to Sacred Heart Medical Center. She later died from her injuries.

The driver of the vehicle who hit Ms. Dhaenens did not remain at the scene and no one witnessed the incident. Law enforcement located two plastic clips a few feet north of where Ms. Dhaenens was found in the road. There were no braking or scuff marks on the road. However, given the location of Ms. Dhaenens, law enforcement believed the vehicle that struck her was traveling southbound on Country Vista Drive.

While there were no direct witnesses, a man who had been walking along Country Vista Drive further south of where Ms. Dhaenens was struck reported seeing a dark red

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pickup truck with a table saw in its bed not long after the hit-and-run. The truck was revving its engine and appeared to be speeding. Surveillance footage from a nearby school revealed a red truck had traveled through the area. At least part of the truck's body was lifted and there were items in the truck's bed. Its exhaust was near the right rear tire, and a unique sticker appeared on the back window. Analysis of the surveillance footage indicated the truck was speeding.

Officers soon began searching for similar trucks registered to individuals living in the area. Pavel Kanyushkin's truck was on this list. Officer Mark Holthaus and Sergeant Jeff Jones of the Liberty Lake Police Department went to Mr. Kanyushkin's home, which is located several blocks from the scene of the accident, around 4:30 p.m. that same day. Mr. Kanyushkin's mother told the officers her son had left for work in his truck earlier that day and had not yet returned home. Sergeant Jones left his business card with Mr. Kanyushkin's mother and asked for Mr. Kanyushkin to contact him.

At 5:32 p.m., Mr. Kanyushkin called Sergeant Jones. Mr. Kanyushkin immediately stated he had an alibi: he was at a job site in Airway Heights at 8:00 a.m., thirty minutes away from Liberty Lake. Sergeant Jones believed this to be unusual. In his 16 years as a police officer, no suspect had ever begun a conversation with him by stating an alibi.

Sergeant Jones asked if he could look at Mr. Kanyushkin's truck and talk in person.

Mr. Kanyushkin agreed and provided his job site location near downtown Spokane.

When Sergeant Jones arrived at the job site less than an hour later, he immediately recognized Mr. Kanyushkin's truck as the vehicle depicted in the surveillance footage.

Like the truck in the footage, the front bumper of Mr. Kanyushkin's truck was bent, there was a sag, the muffler was the same, tools were in the truck's bed, and the truck was lifted. Sergeant Jones also observed damage on the front end of the vehicle. Between the truck's midline of the hood to the driver's side headlights, there were dents and cracks.

Sergeant Jones believed the damage to be fresh because the cracks were white, and the chrome covering was wrinkled.

Sergeant Jones told Mr. Kanyushkin he was "going to take a look at [his] . . . truck real quick." Clerk's Papers (CP) at 156.¹ In response, Mr. Kanyushkin told Sergeant Jones the front-end damage was on the truck when he bought it. Sergeant Jones told Mr. Kanyushkin he had surveillance footage of a vehicle and the two continued to converse:

[MR. KANYUSHKIN]: Just for your information. I don't—the reason I agreed to this is 'cause I mean *I coulda been, like, . . . "Hey you can't just check out my car without a warrant"* but I figure I have nothin' [to] hide

¹ Sergeant Jones's interactions with Mr. Kanyushkin were captured on the officer's body camera.

[SERGEANT JONES]: If you didn't do anything right?
[MR. KANYUSHKIN]: Well yeah, oh, I didn't do anything so I have
nothin' to hide and I feel bad for whoever did
this
[SERGEANT JONES]: Okay well if you don't mind me, I'm just gonna
look around. Um, if you got stuff to do with
your boss. I'm not gonna go in the vehicle at all.
[MR. KANYUSHKIN]: Okay.
[SERGEANT JONES]: I'm ju—I'm just gonna look around. So if I
have any questions, I'll . . . holler at you all
right.
[MR. KANYUSHKIN]: All right.

Id. at 250 (emphasis added).

Mr. Kanyushkin stated the first job site he stopped at that morning was at Mackenzie Beach Lane in Liberty Lake. When his boss called at 8:03 a.m., he was already there picking up tools. Mr. Kanyushkin told Sergeant Jones he did not drive through the intersection where Marilyn Dhaenens was hit, even though it was near the beginning of the quickest route from his home to the job site. He also stated he did not drive by the school that had provided the surveillance footage.

Sergeant Jones explained he was not accusing Mr. Kanyushkin of being involved in the hit-and-run, but a similar looking truck was seen in the area around the time of the accident. Then, Sergeant Jones asked Mr. Kanyushkin if he could take the truck back to the station to look at it further. Mr. Kanyushkin did not directly answer. He stated he needed the vehicle to get to work and did not have another. Sergeant Jones asked to take

some pictures for his report, and said he hoped Mr. Kanyushkin was not involved in the collision.² Sergeant Jones stated “You know? Um, you know, right now, we’re just having a conversation. You know? You’re not in handcuffs, you’re not under arrest for anything, okay?” *Id.* at 176. Mr. Kanyushkin responded, “Yeah.” *Id.* Sergeant Jones noted he just wanted to exclude Mr. Kanyushkin as a suspect in the investigation.

Mr. Kanyushkin expressed some unease. Since the police had video and pictures of a truck in the area appearing to be his, Mr. Kanyushkin wondered if it made him a suspect and if he would be blamed for Ms. Dhaenens’s death. Sergeant Jones stated “No, not necessarily. . . . [W]e’ve been going and looking for a lot—lots of Dodge trucks. In town. Not just yours. . . . But we also have to rule out vehicles, too. And if we can rule out your vehicle . . . then . . . that only helps you, correct?” *Id.* at 177-78. Mr. Kanyushkin agreed. Sergeant Jones again stated he was not there to accuse but to help Mr. Kanyushkin, and his cooperation would go a long way. Then, Sergeant Jones again asked to take pictures of the front of the truck and Mr. Kanyushkin agreed.

Around this time, Alex Zhelez, Mr. Kanyushkin’s boss, interrupted to clarify that morning’s timeline. Mr. Zhelez said he spoke to Mr. Kanyushkin at 8:03 a.m.

² Mr. Kanyushkin stated, “No,” but it isn’t clear whether he is saying no to the photos or being involved in the accident. *Id.* at 176.

Mr. Kanyushkin told Mr. Zhelez he just picked up tools at the Mackenzie Beach Lane job site. Mr. Kanyushkin arrived at work in Airway Heights about an hour later.

Sergeant Jones reiterated his obligation to investigate Mr. Kanyushkin based on the similarities between his truck and the one seen in the area. He stated he was not trying to give Mr. Kanyushkin “a hard time,” but wanted to exclude him so he could find the person responsible. *Id.* at 183-84. Sergeant Jones and Mr. Kanyushkin then discussed the similarities and differences between his truck and the truck in the photo.

Sergeant Jones asked again whether he could: “take [Mr. Kanyushkin’s] truck. And process it. Just to rule you out.” *Id.* at 191. Mr. Kanyushkin stated “As much as I’d like that, I have no (INDISTINCT) of getting to work.” *Id.* Mr. Kanyushkin did not understand why Sergeant Jones needed to take the truck. Sergeant Jones explained the police needed to do their “due diligence.” *Id.* at 192. He also noted the police needed to exclude him as a suspect due to “[t]he severity of what’s going on.” *Id.* Sergeant Jones again suggested Mr. Kanyushkin’s cooperation would look good for him. Then, Mr. Zhelez stated “Dude, if you didn’t do it, let ‘em have the truck.” *Id.* Mr. Kanyushkin again expressed concern about getting to work, asking “Is there any other way? Without me having to drop my truck off? So that I can still have it to drive to work?” *Id.* at 193. Sergeant Jones said there was not. Sergeant Jones further noted “with the severity of what

I'm looking at? I need to rule you out. And so, my other option is . . . to seize the vehicle." *Id.* at 194. Mr. Zhelez said "Just let 'em have the truck . . . survive without it." *Id.* Mr. Kanyushkin agreed to let Sergeant Jones take the truck.

While waiting for a tow truck, Sergeant Jones and Mr. Kanyushkin continued to converse. Sergeant Jones told Mr. Kanyushkin why he was looking further at his truck:

[SERGEANT JONES]: Um, there's some stuff on the front that I wanna look at closer and I'm totally bein' honest with you. . . . And I want somebody that knows a whole lot more than me . . . uh, to look at that. . . . So they look at it. They process it. . . . If they say, ay, nothin' . . . we can rule this vehicle out. . . . We're good, you get your truck back and I can move on to, you know, lookin' for who I really need to look for.

[MR. KANYUSHKIN]: Yeah.

[SERGEANT JONES]: And plus your cooperation, you know, with us looks, you know, really good.

Id. at 289. Mr. Kanyushkin's parents arrived to pick him up. They asked, "Do you have a warrant from the court to take the vehicle?" *Id.* at 291. Officer Jones stated the vehicle was being voluntarily provided. Sergeant Jones and Mr. Kanyushkin's parents further talked about Mr. Kanyushkin's previous concerns about getting to work. Mr. Kanyushkin stated to his parents, "You're making it worse." *Id.* at 293. Mr. Kanyushkin left with his parents. His truck was then towed to the Liberty Lake Police Department.

A warrant for Mr. Kanyushkin's truck was issued the next day. Officers discovered Mr. Kanyushkin's truck had similar features and damage as the truck depicted on the surveillance footage. The grill also appeared to be missing clips matching those recovered at the scene. A forensic scientist later determined the plastic tabs recovered had been part of the truck's grill. Plastic material on the hood of the truck matched earbuds Ms. Dhaenens was wearing at the time she was struck.

After examining the truck, law enforcement called Mr. Kanyushkin to pick up his vehicle. When Mr. Kanyushkin arrived, Sergeant Jones asked if he could answer additional questions. Mr. Kanyushkin was escorted to an interview room where three officers were present. Sergeant Jones provided Mr. Kanyushkin a *Miranda*³ warning. Mr. Kanyushkin subsequently admitted that on the morning of the accident he drove through the intersection where Ms. Dhaenens was hit and continued down Country Vista Drive. Mr. Kanyushkin stated he stopped at the intersection and did not see any vehicles or people. While driving through the intersection, it felt like he hit a curb or something, but he was unsure. Mr. Kanyushkin said he paused for a moment and then drove off.

When Mr. Kanyushkin arrived at the first job site, he examined the truck's front to see if there was damage or blood. He did not think he hit a person. When Mr. Kanyushkin

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

heard Ms. Dhaenens had died, he did not come forward because he was “too afraid of the consequences.” CP at 63. Prior to taking Mr. Kanyushkin into custody, Mr. Kanyushkin told his family members, “I did it,”⁴ and to go home. *Id.* at 324.

Officer Austin Brantingham transported Mr. Kanyushkin to the Spokane County Jail. During transport, Mr. Kanyushkin stated that when he left home on the morning of the accident his windows were frosted over, and he was looking through a gap on the lower part of the windshield. Since Mr. Kanyushkin’s truck was big and loud, he hoped people would get out of his way. Mr. Kanyushkin reiterated he thought he hit a log or roadkill. Since he did not see blood on the truck and was not going very fast, he did not think he hit a person. Mr. Kanyushkin also stated he did not stop to see whether he hit anything because he was late for work.

The police seized Mr. Kanyushkin’s cell phone during the custodial interview and later obtained a warrant. A search of the phone showed Mr. Kanyushkin called Mr. Zhelez at 8:11 a.m. on October 18, 2018. The call lasted three minutes and three seconds. Internet searches retrieved from the cell phone showed Mr. Kanyushkin conducted searches the day after the collision for “Liberty Lake crash,” “woman dies

⁴ Mr. Kanyushkin did not specify what he did but Officer Holthaus and Officer Michael Bogenreif testified they believed Mr. Kanyushkin was referring to the hit-and-run when he made this statement.

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in hit and run,” “Marilyn Dhaenens,” “how long does it take to get a search warrant,” and “how fast do you need to be driving to kill an adult pedestrian.” 4 RP (Jan. 17, 2020) at 808-09.

The State charged Mr. Kanyushkin with vehicular homicide and failure to remain at the scene of a fatal accident. Prior to the start of trial, Mr. Kanyushkin unsuccessfully moved to suppress evidence seized from his truck and cell phone. In denying the motion to suppress, the trial court found that, prior to his arrest, all interactions between Mr. Kanyushkin and the police were completely voluntary.

A jury convicted Mr. Kanyushkin as charged. He was sentenced to 48 months in prison followed by 18 months of community custody. Mr. Kanyushkin has filed a timely appeal, challenging the trial court’s suppression decisions.

ANALYSIS

Consent to seizure of the truck

Mr. Kanyushkin argues the trial court should have granted his motion to suppress because he did not voluntarily agree to the seizure of his truck. Because he asserts the initial seizure was invalid, Mr. Kanyushkin claims all subsequently obtained evidence should have been suppressed from the State’s case in chief at trial.

Law enforcement generally must obtain a warrant prior to seizing property. *See* U.S. CONST. amend. IV; WASH. CONST. art. I, § 7. But consent is an exception to the warrant requirement. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004). The State has the burden of proving valid consent. This includes showing consent was voluntarily given, free from coercion or duress. *State v. O'Neill*, 148 Wn.2d 564, 588-90, 62 P.3d 489 (2003). We look to the totality of the circumstances in assessing whether the State has proven voluntary consent. *Id.* at 588.

Mr. Kanyushkin argues his consent was invalid for six reasons: (1) he was not provided *Miranda* warnings, (2) he was not informed he could refuse to consent, (3) he is the 21-year-old son of immigrants, (4) Sergeant Jones misrepresented the purpose of his investigation, (5) Sergeant Jones repeatedly asked for Mr. Kanyushkin's consent, and (6) Sergeant Jones threatened to seize the truck.

The first four contentions are readily resolved against Mr. Kanyushkin. Because he was not in custody, *Miranda* warnings were not required. *See O'Neill*, 148 Wn.2d at 589. Although Mr. Kanyushkin is young and was not advised of the right not to consent, he appeared cognizant of his rights and on his own brought up subjects such as an alibi and the necessity of a warrant. While Sergeant Jones did not share with Mr. Kanyushkin that he was a primary suspect, he was never dishonest. Sergeant Jones advised Mr.

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Kanyushkin he was investigating the hit-and-run accident that had killed Ms. Dhaenens. He also told Mr. Kanyushkin his truck was similar the one observed on video surveillance. It was technically accurate for Sergeant Jones to advise Mr. Kanyushkin a search of his vehicle could be exculpatory. Sergeant Jones may have emphasized facts favorable to Mr. Kanyushkin while asking for consent, but there was no actual deception.

Mr. Kanyushkin's consent was not undermined by repeated requests. Unlike *O'Neill*, Mr. Kanyushkin never expressly denied Sergeant Jones's request for consent. *Id.* at 573, 591. Instead, he merely voiced hesitation based on his need for transportation to and from work. Furthermore, Sergeant Jones did not "repeatedly press[] the issue." *See id.* at 589. Instead, Sergeant Jones asked for consent only at two points during the course of a lengthy conversation.

Finally, Mr. Kanyushkin's consent was not made in response to a claim of lawful authority. Officers do not undermine consent merely by accurately explaining their ability to obtain a warrant. *State v. Cherry*, 191 Wn. App. 456, 472, 362 P.3d 313 (2015) (citing *State v. Smith*, 115 Wn.2d 775, 790, 801 P.2d 975 (1990)). That is all that happened here. At the time Sergeant Jones asked for consent, he already had probable cause to seize Mr. Kanyushkin's truck. The truck closely resembled the vehicle associated with the hit-and-run. Sergeant Jones noticed fresh damage to the truck, consistent with a

recent impact. Mr. Kanyushkin also lived near the incident site and made suspicious comments, such as volunteering to have an alibi. Although this combination of circumstances may have not been enough to justify a jury verdict, it was sufficient to permit issuance of a warrant. Sergeant Jones did not undermine the validity of Mr. Kanyushkin's consent by accurately explaining his ability to obtain a warrant for purposes of seizing the truck.

Additional factors support the trial court's finding of voluntariness. Prior to consenting to the seizure of his truck, Mr. Kanyushkin voluntarily cooperated with Sergeant Jones. He talked to Sergeant Jones about his whereabouts that morning and allowed Sergeant Jones to look over and take pictures of his truck. The totality of the circumstances shows Mr. Kanyushkin validly consented to the seizure of his truck.

Cell phone warrant

Mr. Kanyushkin argues the search of his cell phone was invalid because it was not supported by probable cause. The State does not defend the validity of the warrant. Instead, the State claims the fruits of the warrant were harmless. According to the State, the information obtained from the cell phone warrant was not relevant to any of the contested elements of proof at trial.

When evidence obtained in violation of a defendant's constitutional rights is introduced at trial we apply a constitutional error analysis to assess whether the evidence was harmless. *State v. Scherf*, 192 Wn.2d 350, 370, 429 P.3d 776 (2018). Under the constitutional harmless error standard, the State must prove improperly admitted evidence was harmless beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). This can be established by showing "untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Id.* at 636.

The State introduced only two aspects of the cell phone information: (1) Mr. Kanyushkin's phone made an outbound call at the approximate time of the hit-and-run and (2) Mr. Kanyushkin engaged in internet searches about the collision. Both categories of evidence helped Mr. Kanyushkin's case, instead of harming it. Mr. Kanyushkin's expert relied on the outbound call information to opine as to why Mr. Kanyushkin was not negligent. In addition, the internet searches did not take place until after Mr. Kanyushkin interacted with Sergeant Jones on October 18. The searches were therefore consistent with the behavior of an innocent person. Had Mr. Kanyushkin been aware of hitting someone at the time of the collision, one would expect he would engage in internet searches shortly thereafter. Instead, Mr. Kanyushkin did not begin searching on his phone until after the initial contact with police. Mr. Kanyushkin's search activity was consistent


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with the behavior of an innocent person who became worried about his circumstances only after talking to the police. We agree with the State that introduction of the cell phone evidence at trial was harmless beyond a reasonable doubt.

CONCLUSION


The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

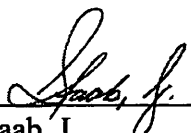


Pennell, C.J.

WE CONCUR:



Siddoway, J.



Staab, J.

BURKHART & BURKHART, PLLC

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