NO. 31890-7-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES DOUGLAS COURTER, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable John Antosz

No. 12-1-00672-8

Brief of Respondent

D. ANGUS LEE
Prosecuting Attorney

By
Joseph S. Brown
Deputy Prosecuting Attorney
WSBA # 45283

P.O. Box 37
Ephrata, Washington 98823
PH: (509) 754-2011

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B. STATEMENT OF THE CASE.

1. Procedure

On August 6th, 2013, the State charged the Defendant with hit and run with an injury[1] and driving under the influence[2] with a special allegation that the Defendant refused a blood alcohol concentration (BAC) test.[3] CP 26-27.

A trial was held on August 7, 2013. 1RP 1. A jury of the

[1] RCW 46.52.020(4)(b)
[2] RCW 46.61.502(1)

Defendant's peers convicted the Defendant on both charges and the special allegation. 3RP 219-222. The Defendant filed a timely notice of appeal on August 22nd, 2013. CP 165.

2. Facts

On December 13th, 2012, a dark, overcast evening, the Defendant was travelling south on Hansen Road in Moses Lake, WA towards the intersection of North Frontage Road and Hansen Road at an estimated speed higher than forty-five miles per hour (mph) in a thirty-five mph zone. 1RP 68-72; 2RP 30. Simultaneously, Elsa Jensen and Ellen Russell, while heading to a kennel club Christmas dinner, were stopped at a stop sign on North Frontage Road facing west. Ms. Jensen was driving, and Ms. Russell was a passenger. 2RP 53-54. Ms. Jensen pulled her vehicle into the intersection of North Frontage Road and Hansen Road. 1RP 68. The frontend of the Defendant's vehicle collided with the passenger side of Ms. Jensen's vehicle in the middle of the intersection. 1RP 72. The Defendant's vehicle traveled an estimated one hundred to five hundred feet away from the scene of the accident. 1RP 102; 2RP 28. 3RP 116.

Bob Richardson witnessed the crash. 1RP 72. At the time of the accident, Mr. Richardson was in his vehicle on the I-90 exit ramp, which

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[3] RCW 46.61.5055

runs parallel to N. Frontage Road. 1RP 73. Subsequent to the accident, Mr. Richardson went to aid Ms. Russell and Ms. Jensen, but they were already receiving assistance from Miriah Sachs. *Id.* Mr. Richardson then went to check on the status of the Defendant. 1RP 76. When Mr. Richardson approached the vehicle, the Defendant was attempting to start his vehicle. *Id.* The Defendant told Mr. Richardson that he needed to go pick up his child from practice. *Id.* Mr. Richardson told the Defendant that he could not leave. *Id.* The Defendant then exited his vehicle and began walking up the road away from the scene of the accident. *Id.* Mr. Richardson approached the Defendant and persuaded him to not leave the scene. 1RP 77. During this interaction, Mr. Richardson noticed the odor of alcohol on the Defendant. 1RP 78. Also around this time, Ms. Sachs noticed that the Defendant's voice "was very slow and slurred. 3RP 133-134.

Periodically, Mr. Richardson checked to make sure that the Defendant stayed by his vehicle. 1RP 79. At one point, he saw the Defendant throw something over a berm towards the freeway. *Id.* Law enforcement later discovered that the item thrown toward the freeway was a Budweiser eighteen pack of beer with four full beer cans in it. 1RP 105. It was estimated that the beer box was 75 feet west of the Defendant's vehicle. *Id.* The Defendant never approached Ms. Russell, Ms. Jensen, or

Ms. I Russell's vehicle to give them the required information. 1RP 79; 2RP 118.

The crash caused extensive damage to Ms. Russell's vehicle. 1RP 100. The front passenger door was severely caved in, causing the door to push into Ms. Jensen's thigh. *Id.* ; 2RP 88. Emergency responders were forced to use the "jaws of life" to extract Ms. Jensen from the vehicle. 1RP 100; 2RP 58. Ms. Jensen sustained injuries to her rotator cuff, extensive bruising along her chest and right thigh, and an aggravation of a recent knee surgery. 2RP 90-91. Ms. Russell sustained a cut on her right palm, a strained back, and a hyperextended collar bone. 2RP 57. Sgt. Jones took numerous photos of crash scene. 2RP 30.

Trooper Jesse of the Washington State Patrol conducted the DUI investigation. 2RP 113. Initially, Trooper Jesse asked the Defendant to provide his license, insurance, and registration. *Id.* The Defendant passed over the registration at least two times. *Id.* Trooper Jesse had to point out to the Defendant the document that he needed. *Id.* In his interaction with the Defendant, Trooper Jesse noticed that the Defendant had a strong odor of intoxicants on him. *Id.* At this time, the Defendant denied consuming any alcohol. *Id.*

Trooper Jesse attempted to conduct the standardized field sobriety tests (SFSTs). 2RP 144. In the horizontal gaze nystagmus (HGN) test, the

first of the three SFSTs, the subject is instructed to not move his or her head during the test. *Id.* Despite these instructions, the Defendant was not able to perform the test without moving his head. *Id.* Trooper Jesse was not able to conduct the other SFSTs because the Defendant continually put his hands in his pockets despite commands to the contrary, causing an officer safety concern. 2RP 145. Trooper Jesse secured the hands of the Defendant, and, with the aid of Sgt. Brian Jones, the Defendant was put into handcuffs. 2RP 146. During this confrontation, the Defendant was slurring his words slightly. 2RP 148. No other SFSTs were conducted, and the Defendant was placed under arrest for DUI. 2RP 149.

Trooper Jesse then attempted to take the Defendant to the Moses Lake Police Department for BAC testing, but the Defendant complained of neck pain. 2RP 149-150. Trooper Jesse then decided to take the Defendant to Samaritan Hospital to determine if the Defendant had any injuries. 2RP 150. On the way to the hospital, the Defendant now admitted to having "a couple of beers." *Id.*

At the hospital, the Defendant was read his implied consent warnings for blood, and he refused to submit to a blood BAC test. 2RP 151-156. In a later DUI interview, the Defendant admitted again to drinking "a couple of beers." 2RP 159. Trooper Jesse testified that, in his opinion, the Defendant was intoxicated, and that he was not safe to be

driving. 2RP 161.

At trial, the Defendant claimed that just prior to leaving his home, he opened his beer but did not finish it. 3RP 143. The Defendant testified that prior to the crash he did not hit the brakes. 3RP 144. Lastly, the Defendant testified that he never went over to Ms. Russell's vehicle and that he was physically able to do so. 3RP 154; 3RP 156.

At trial, the State introduced eleven photographs, which were labeled by the court as Plaintiff's Exhibits 3 through 14. 1RP 14-17. Exhibit 3 shows the position of the Corolla following the collision. 1RP 15. Exhibit 4 shows the position of the Corolla from an angle differing from that in Exhibit 3 and emergency responders tending to the occupants. *Id.* Exhibit 5 shows the position of the vehicle, the side damage to the Corolla, and the deployment of the side curtain airbag. *Id.* Exhibit 6 shows the intrusion into the vehicle below the A-pillar. *Id.* Exhibit 7 shows the vehicle after the passenger door had been removed. 1RP 16. Exhibit 8 shows the interior of the Corolla, the cabin intrusion, and the damage to the dashboard and interior of the vehicle. 1RP 17. Exhibit 9 shows the Defendant's vehicle, the damage to it, and its position relative to the stop sign behind it. *Id.* Exhibit 11 shows the beer box in the distance and its spatial relationship to the other items in the photo. *Id.* Exhibit 12 shows the beer box hidden behind the bush. *Id.* Exhibit shows

the cans of beer that were still in the box. *Id.* Exhibit 14 shows the quantity beers were inside the box. *Id.*

Defense counsel argued that Plaintiff's exhibits 3 through 14 should have been omitted as cumulative and overly prejudicial, except for two photographs of the Toyota, one photograph of the Jeep, one of the beer box, and one of the beer cans. 2RP 19.

The court held that the photographs were not cumulative, stating that the prosecutor had articulated reasons for each photo and that each "has the distinct and strong possibility of being helpful to the jury." 2 RP 20.

Defense counsel also moved to exclude any evidence of the Defendant's refusal to a blood alcohol test. The trial court initially ruled that the refusal evidence could be used to prove the refusal special allegation but reserved on the issue of whether or not the refusal could be used as evidence of guilt. 1RP 28. After further research, however, the court ruled that the refusal could be used as evidence of guilt. 2RP 101.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT HELD THAT THE PHOTOS WERE MORE PROBATIVE THAN PREJUDICIAL AND NOT NEEDLESSLY CUMULATIVE.

The Defendant argues that the trial court erred when it allowed the

admission of Plaintiff's exhibits 3 through 14 because the exhibits were both cumulative and overly prejudicial. This contention is incorrect.

The admissibility of photographs is generally within the sound discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Hoffman*, 116 Wn.2d 51, 88, 804 P.2d 577, 596-597 (1991). Accurate photographs are admissible if their probative value outweighs their prejudicial effect. *Hoffman*, 116 Wn.2d at 88; ER 403.

Plaintiff's exhibits 3 through 14 were neither cumulative nor overly prejudicial. In order for a jury to convict a defendant, it must find beyond a reasonable doubt that there was an accident that resulted in an injury. RCW 46.52.020(1). Each of the photos was highly probative of this element of the hit and run injury charge.

It is true, as the Defendant argues, that there was no real issue as to whether or not there was an accident or whether the victims sustained injuries; however, the State bears the burden, putting every element into issue. The State is entitled to show the jury evidence that makes the existence of the accident more likely, and that is what it did by showing the photos of the accident. Further, because the existence of an injury is also an essential element of the felonious hit and run count, the State was also entitled to show the photos to demonstrate the severity of the accident. As the severity of the accident rises, so does the likelihood of injuries to the victims. Exhibits 3 through 14 allowed the jury to gauge

the acuteness of the accident, making it highly probative and helpful for the jury.

The Defendant also argues that the photos were designed to inflame the jury's passions; however, the photos were not gruesome in any way. They simply depicted what happened to the vehicles involved in the accident. They do not have the content that could inflame the jury's passions.

Lastly, the Defendant argues that the photos were needlessly cumulative and warrant a new trial. In contrast, the Prosecutor explained to the court how each exhibit was uniquely probative by highlighting that each photo had a different perspective or showed additional spatial relationships between objects of interest. 2RP 14-18. There was a sum total of eleven photos entered into evidence, and counsel for the Defendant stated that it was appropriate to enter four of the photos into evidence, making a difference of only seven photos in a three day felony trial. From this, the Defendant asks for a reversal and a new trial. Even if the photos were cumulative, which the State contends is not the case, they would not carry the unfairness necessary for a new trial.

Further, as noted above, the decision to include or omit photos is left within the discretion of the trial court and is only disturbed if an abuse of discretion is shown. *Hoffman*, 116 Wn.2d at 88. The trial court carefully analyzed each of the photos and held that "the prosecutor has articulated reasons for each individual photo. Some of them have

different viewpoints and perspectives. And I think each of these has the distinct and strong possibility of being helpful to the jury on [the] different elements that it had to decide on." 2RP 20. Thus, the State asks the Court to hold that the trial court did not abuse its discretion by finding that the additional seven photos were more probative than prejudicial and not needlessly cumulative.

2. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S CONVICTION OF THE DEFENDANT FOR DRIVING WHILE UNDER THE INFLUENCE.

The Defendant argues that that there was not sufficient evidence to support the jury's conviction of the Defendant for driving under the influence. As the trial record demonstrates, this argument has no merit.

When reviewing for sufficiency of the evidence, the court must view the evidence in the light most favorable to the State to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004); *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981); *see also State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (holding that all reasonable inferences

from the evidence must be interpreted in favor of the State and interpreted most strongly against the defendant).

Circumstantial and direct evidence are considered equally reliable on review. *Thomas*, 150 Wn.2d at 874. Determinations regarding conflicting evidence or credibility are up to the trier of fact and not subject to review. *Id.* Specifically regarding credibility determinations, the Washington State Supreme Court has held that "great deference" must be given to the trier of fact's determinations because "[i]t, alone, has had the opportunity to view the witness' demeanor and to judge his veracity." *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

In this case, to convict the defendant of driving under the influence, each of the following three elements of the crime must be proved beyond a reasonable doubt: [4]

> (1) That on or about December 13, 2012, the defendant drove a motor vehicle;
> (2) That the defendant at the time of driving a motor vehicle was under the influence of or affected by intoxicating liquor; and,
> (3) That this act occurred in the State of Washington.

CP 156 (Instruction No. 10).[5]

There was sufficient evidence that the Defendant was under the influence submitted to the jury. First, with regards to the Defendant's driving, Mr. Richardson testified that the Defendant was traveling well

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[4] The Defendant does not argue that elements (1) and (3) and the special allegation were not met. The elements were met at trial, however. 1RP 68-72; 2RP 30; 2RP 151-156.

above the speed limit. Second, the Defendant crashed into the victim's car. Third, the Defendant testified that he never hit his breaks. All three of these facts are evidence of intoxication.

On three separate occasions, the Defendant stated that he had consumed three different amounts of alcohol. Initially, he stated he had not been drinking at all. Later, he told Trooper Jesse that he had had a couple of beers. At trial, the Defendant testified that he had only opened a beer but had not had a chance to finish it. These inconsistent positions would cause a trier of fact to not believe the Defendant's testimony.

Several of the trial witnesses testified that the Defendant displayed indicators of intoxication. Trooper Jesse testified that he smelled the odor of intoxicants on the Defendant and that he was slurring his speech slightly. Mr. Richardson also noticed the odor of intoxicants on the Defendant, and Ms. Sachs testified that the Defendant's speech was slow and slurred. Trooper Jesse also testified that the Defendant was not able to follow the instructions for the HGN test and continually puts his hands in his pockets despite commands to the contrary. Lastly, Trooper Jesse testified that in his opinion the Defendant was not safe to drive.

The Defendant also displayed a consciousness of guilt. He attempted to evade suspicion by hiding the beer box. Further, when

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[5] See RCW 46.61.502.

confronted with an opportunity to exculpate himself, he refused to submit to a blood alcohol test.[6] Both of these items are powerful evidence of guilt.

The Defendant, in his brief, attempts to isolate all of the above pieces of evidence and argue that each piece alone is insufficient for a finding of guilt; however, a jury does not consider each piece of evidence in isolation. The jury looks at the entire body of evidence and makes a decision upon the whole.

The standard or review mandates that the Court view the evidence in the light most favorable to the State, and under this standard, there was ample evidence for a rational jury to convict the Defendant. Thus, the State requests this Court to deny the Defendant's second argument.

3. THERE WAS SUFFICENT EVIDENCE TO SUPPORT THE JURY'S CONVICTION OF THE DEFENDANT FOR HIT AND RUN – INJURY.

The Defendant also argues that the State did not produce sufficient evidence for the jury to find the Defendant guilty of hit and run with an injury. This also is incorrect.[7]

To convict Mr. Courter of Hit and Run - Injury, the State had to

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[6] The Defendant argues that this evidence should have been addressed with a limiting instruction. That issue is fully addressed in Argument 4. Briefly, the State argues that no such instruction was necessary because the law clearly allows refusal evidence to infer guilt and because the court denied the Defendant's motion for the limiting instruction.

[7] Please see the opening discussion of Argument 2 for the applicable sufficiency standard.

prove that Mr. Courter failed to fulfill *any*[8] of the following duties:[9]

1. Immediately stop his vehicle at or close to the scene of the accident,
2. Immediately return to and remain at the scene
3. Give statutorily required information to the other driver, other passenger, or any person attending any vehicle, and
4. Render reasonable assistance to anyone injured. [10]

CP 154; RCW 46.52.020(3).

The State shouldered its burden here as well. RCW 46.52.020(1) states as follows:

> (1) A driver of any vehicle involved in an accident resulting in the injury to or death of any person or involving striking the body of a deceased person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section. . . .

RCW 46.52.020(1).

This Statute requires an individual who has been involved in an accident to immediately stop his or vehicle at the scene of the accident; however, if

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[8] The Defendant misstates the State's burden in his brief. The Defendant argues that the State has to show that he failed to do *all* of the required duties listed in RCW 46.52.020 (3). The State only has to show that he failed to do one of the four alternatives. CP 154.
[9] The State also has to prove that the Defendant was in an accident, that he knew he was in an accident, and that there was an injury. The Defendant does not argue that the State did not meet these elements. As a consequence, these elements are not addressed fully; however, the record makes it clear that the Defendant was in an accident, that he knew he was in an accident, and that Ms. Jensen and Ms. Russell sustained injuries. 3RP 154; 2RP 59; 2RP 88. Thus, he was required to fulfill the duties laid out in RCW 46.52.020(3)
[10] The record makes clear that Ms. Jensen and Ms. Russell received reasonable assistance by emergency responders. Thus, the State does not argue that the Defendant failed to fulfill duty four.

a person cannot immediately stop at the scene of the accident, they must (1) stop "as close therto as possible," (2)"forthwith" return to the scene of the accident, and (3) remain until the requirements of RCW 46.52.020(3) have been met.

With regards to the first duty, the Defendant did not immediately stop his vehicle at or as close as possible to the scene of the accident. Multiple witnesses estimated the distance between the scene of the accident and the Defendant's vehicle between 100 and 500 feet. Mr. Richardson testified that when he approached the Defendant in his vehicle, the Defendant was attempting to start his vehicle, stating that he had to go pick up his child. Fortunately, the Defendant's vehicle would not start. When viewing the evidence in a light most favorable to the state, a rational juror could have found that 100 to 500 feet was not "as close thereto as possible," especially when it appeared that he preferred to continue driving away from the scene. RCW 46.52.020(1).

With regards to the second duty, Mr. Richardson also testified that the Defendant started walking away from his vehicle in the exact opposite direction of the accident. Further, the Defendant, in an attempt to evade suspicion, traveled 75 feet west into the bushes to hide his box of beer. Once an individual is at the scene, he or she may not leave until fulfilling the duties of RCW 46.52.020(3). RCW 46.52.020(1). These facts could

lead a rational trier of fact to believe beyond a reasonable doubt that the Defendant failed to remain at the scene during one of his expeditions.

The Defendant also failed to fulfill the third duty. RCW 46.52.020(3) states that a person involved in an accident "shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided." There was no evidence presented at trial that the Defendant gave the information required by RCW 46.52.020(3) to Ms. Russell or Ms. Jensen. In fact, the Defendant admitted that he never did so and that he was physically able to do so.

Thus, the State asks the Court to find that a rational juror could have found that the Defendant did not fulfill three of his obligations beyond a reasonable doubt.

4. THE TRIAL COURT DID NOT ERR BY FAILING TO GIVE THE JURY A LIMITING INSTRUCTION ON THE USE OF THE REFUSAL EVIDENCE.

The Defendant next argues that the trial court erred by not giving the jury an instruction to not use the refusal as evidence of guilt. The Defendant, in his brief, states that the trial court ruled that there would be a limiting instruction to limit the use of the refusal evidence. In actuality, the trial court initially reserved on the issue, but the trial court later ruled

that the refusal evidence could be used as evidence of guilt. 2RP 101. And, the Defendant agrees that refusal evidence can be used to infer guilt. Appellant's Brief Pg. 19; *State v. Long*, 113 Wn.2d 266, 272, 778 P.2d 1027 (1989). Thus, the State requests that the Court disregard this argument.

5. COUNSEL FOR DEFENDANT DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST AN INSTRUCTION LIMITING THE PURPOSE OF THE REFUSAL EVIDENCE.

The Defendant argues that his counsel was ineffective because he did not request a limiting instruction on the use of refusal evidence. This argument is incorrect.

Ineffective assistance of counsel claims are governed by the analytical framework established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The convicted defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." Id. at 687-88.

As shown in Argument 4, the trial court correctly ruled that the refusal evidence could be used as evidence of guilt. Failing to object to a correct ruling is not evidence that the Defendant's representation fell below an objective standard of reasonableness. Therefore, the

Defendant's fourth argument is meritless.

6. THE PROSECUTOR DID NOT COMMIT PROSECUTORIAL MISCONDUCT BY ARGUING THAT REFUSAL EVIDENCE CAN BE USED TO INFER GUILT BECAUSE THE TRIAL COURT CORRECTLY RULED THAT IT CAN BE USED FOR SUCH PURPOSES.

In his final argument, the Defendant asserts that the prosecutor committed prosecutorial misconduct because he told the jurors that they should infer guilt from the Defendant's refusal to have his BAC tested. This position is erroneous.

In order to triumph on a claim of prosecutorial misconduct, a defendant is obliged to show that in the context of the record and all of the conditions of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438,442, 248 P.3d 43(2011). To show prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *Id.; State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Again, the Defendant incorrectly states that the trial court ruled that refusal evidence could not be used to infer guilt. Because this is not the case, the prosecutor's comments were neither improper nor prejudicial.

D. CONCLUSION.

Based upon the above, the State requests this Court to deny each of the Defendants arguments.

DATED: May 12th, 2014

D. ANGUS LEE
Grant County
Prosecuting Attorney

Joseph S. Brown
Deputy Prosecuting Attorney
WSBA # 45283

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, vs. JAMES DOUGLAS COURTER, Appellant.	)	No. 31890-7-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Hailey L. Landrus
Kristina M. Nichols
Wa.Appeals@gmail.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

James Douglas Courter
6743 Eagle Drive NE
Moses Lake WA 98837

Dated: May 12, 2014.

Kaye Burns