Supreme Court No.: _____
Court of Appeals No.: 46645-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANE AHEARN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Shane Ahearn requests this Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals, Division One, in *State v. Shane Ahearn*, No. 46645-7-II, filed August 23, 2016. A copy of the opinion is attached as Appendix A. The Court of Appeals denied Mr. Ahearn's motion to reconsider on September 19, 2016. A copy of the court's order is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. An arrest made without probable cause violates the Fourth Amendment and article I, section 7. Probable cause exists only where the totality of the circumstances known to the officer at the time of the arrest would warrant a reasonably cautious person to believe an offense is being committed. Where the trooper conceded he did not have probable cause to arrest before Mr. Ahearn performed the field sobriety tests, and the evidence did not support the trial court's finding that Mr. Ahearn performed poorly on these tests, should this Court grant review in the substantial public interest? RAP 13.4(b)(4).

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State prove each element of an offense beyond a reasonable doubt. If a rational trier of fact could not

find all of the elements of the crime charged beyond a reasonable doubt the evidence is insufficient. Should this Court grant review in the substantial public interest where Mr. Ahearn was convicted of driving under the influence but the evidence did not show Mr. Ahearn had ingested alcohol or drugs or that his ability to drive was appreciably lessened by alcohol or drugs? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Shane Ahearn was driving on Route 303 early one morning when a trooper with the Washington State Patrol, Kyle Dahl, noticed Mr. Ahearn's car. 7/21/14 RP 16. According to Trooper Dahl, he observed Mr. Ahearn's vehicle weaving within its lane and then cross the white fog line twice and skip line once. 7/21/14 RP 16; Ex. 1 at 1. The second time Mr. Ahearn crossed the fog line, the trooper estimated Mr. Ahearn remained over the line for approximately one hundred yards. 7/21/14 RP 19. While the trooper was unable to recall whether there was fog on the road that night, Mr. Ahearn remembered the fog affecting his visibility. 7/21/14 RP 145, 186. There were no rumble strips to alert drivers when they strayed from the lane boundaries, and no other cars on the road. 7/21/14 RP 16, 19.

Trooper Dahl decided to stop the car based on his observations of Mr. Ahearn's driving, but was initially unable to activate his lights

because electrical cords obstructed the light switch.[1] 7/21/14 RP 19-20. Mr. Ahearn saw Trooper Dahl's vehicle gain on him quickly at a high rate of speed but, because of the fog, was unable to discern whether it was a state patrol vehicle. 7/21/14 RP 147. After he drove out of the fog, Mr. Ahearn saw it was a state trooper behind him but was unsure what he should do because the vehicle repeatedly gained on his car, as if to pass him, but then fell back again. 7/21/14 RP 150. This was distracting and made Mr. Ahearn nervous, so he decided to take the next exit and get out of the trooper's way. 7/21/14 RP 151.

As Mr. Ahearn's vehicle came to the end of the ramp at a red light, Trooper Dahl did not observe the car come to a full stop or see a turn signal activated before the car turned right. 7/21/14 RP 21; Ex. 1 at 2. At the bottom of the exit ramp, Trooper Dahl was finally able to free his light switch and activate his lights. 7/21/14 RP 20. Trooper Dahl did not observe Mr. Ahearn immediately apply his brakes in response to the lights, but Mr. Ahern soon pulled over and stopped on the right shoulder. 7/21/14 RP 22.

[1] As Trooper Dahl's vehicle got closer to Mr. Ahearn's car, the trooper also saw white light escaping from a taillight that had been broken and repaired with tape. 7/21/14 RP 17, 148. However, the trooper did not cite this as a basis for stopping Mr. Ahearn's car. 7/21/14 RP 20.

Mr. Ahearn did not expect the trooper to approach the passenger window, and initially rolled a rear window down rather than the front passenger window before finding the correct control. 7/21/14 RP 153. He provided his license, registration, and proof of insurance to the trooper without incident. 7/21/14 RP 86. Trooper Dahl noticed Mr. Ahearn sweating "quite profusely." 7/21/14 RP 24. Mr. Ahearn, who is homeless and lives in his car, had recently showered in a public facility and was wearing a thermal t-shirt designed to retain body heat. 7/21/14 RP 143-44. Trooper Dahl felt Mr. Ahearn's eyes were bloodshot and his speech rapid, but there were no odors of intoxicants in the vehicle. 7/21/14 RP 26-27.

Trooper Dahl directed Mr. Ahearn to get out of the vehicle and asked Mr. Ahearn if he would like to put on a jacket. 7/21/14 RP 28. Mr. Ahearn felt he should do what the trooper wanted, so he grabbed a sweatshirt and insulated flannel and put them on over his thermal t-shirt. 7/21/14 RP 156. Because his car was parked on a slope and he failed to step away from the open driver's side door before putting the additional layers on, the door closed on him repeatedly while he buttoned his flannel. 7/21/14 RP 156-57.

The trooper asked Mr. Ahearn if he would be willing to perform field sobriety tests. 7/21/14 RP 30. Mr. Ahearn readily agreed because he knew he was not impaired and wanted to demonstrate this to the trooper.

7/21/14 RP 157. Trooper Dahl had been employed with the Washington State Patrol for approximately three years and a commissioned trooper for approximately one and a half years. 7/21/14 RP 8. As part of his training, he spent two weeks learning about field sobriety tests and how to identify impaired drivers and completed a 16-week course focused on drug-impaired driving. 7/21/14 RP 10. During this training he was taught to identify and differentiate between types of intoxication "[a] little bit." 7/21/14 RP 11.

When Mr. Ahearn walked around the car toward the front of the vehicle he stumbled for a second but caught himself before falling. 7/21/14 RP 31. Trooper Dahl administered four tests: (1) the horizontal gaze nystagmus; (2) the walk-and-turn; (3) the one legged stand; and (4) the Romberg balance. Ex. 1 at 2-3. Aside from the walk-and-turn test, which was performed on too steep of a grade to provide reliable information, the results of the tests suggested Mr. Ahearn was not under the influence of alcohol. 7/21/14 RP 54, 131. A portable breathalyzer test revealed Mr. Ahearn's blood alcohol level to be 0.00. 7/21/14 RP 53.

Trooper Dahl did not believe he had probable cause to arrest Mr. Ahearn prior to performing the field sobriety tests. 7/21/14 RP 92. During the testing the trooper observed Mr. Ahearn exhibiting "body tremors" and swaying. 7/21/14 RP 47, 49. Mr. Ahern briefly counted out

loud after being told to count silently during the Romberg balance test, and counted "one, two, three" instead of "one one-thousand, two one-thousand, three one-thousand" as directed during the one legged stand. 7/21/14 RP 47, 51. During the walk-and-turn test, which was performed on a "moderate grade," rather than a level surface, Mr. Ahearn had trouble keeping his balance, raised his arms, and did not make every step touch heel to toe. 7/21/14 RP 42; Ex. 1. He also took his steps very quickly. Ex. 1 at 3.

Mr. Ahearn also continued to speak at a rapid pace, but remained cooperative and polite throughout his interaction with the trooper. 7/21/14 RP 27, 66. Based on these observations, Trooper Dahl placed Mr. Ahearn under arrest for driving under the influence. 7/21/14 RP 92.

Mr. Ahearn refused to consent to having his blood drawn, and the trooper was unable to get in contact with a deputy prosecutor in order to seek a warrant. 7/21/14 RP 59, 66. Trooper Dahl could not recall whether he offered Mr. Ahearn the opportunity to be evaluated by a drug recognition expert, who performs an examination more akin to a "mini-physical." 7/21/14 RP 91-92, 140.

After arresting Mr. Ahearn, Trooper Dahl performed a search of Mr. Ahearn's car and found two syringes in the center console, one of which was filled with a clear liquid substance that tested positive for

methamphetamine. 7/21/14 RP 64. However, because he was homeless, Mr. Ahearn was forced to carry all of his possessions in his car, not just those he was using while driving. 7/21/14 RP 16; Ex. 1 at 1.

Mr. Ahearn filed a motion to suppress arguing, in part, that the officer lacked probable cause for his arrest. CP 21. The trial court denied Mr. Ahearn's motion after an evidentiary hearing. CP 123. At a stipulated facts trial the court found Mr. Ahearn guilty of possession of methamphetamine and driving under the influence. CP 112. The court sentenced Mr. Ahearn to 16 months incarceration. CP 131; 109, 129. The Court of Appeals affirmed Mr. Ahearn's conviction. Slip Op. at 1.

D. ARGUMENT IN FAVOR OF GRANTING REVIEW

1. This Court should grant review in the substantial public interest because the trooper did not have probable cause to place Mr. Ahearn under arrest.

An arrest is a "seizure" and violates the Fourth Amendment and article I, section 7, when made without probable cause. *Staats v. Brown*, 139 Wn.2d 757, 771, 991 P.2d 615 (2000) (citing *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)); *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) ("Article I, section 7 provides greater protection of a person's right to privacy than the Fourth Amendment"). Although probable cause to arrest does not require facts that would establish guilt beyond a reasonable doubt, it requires "more

than "a bare suspicion of criminal activity.'" *State v. Gillenwater*, 96 Wn. App. 667, 670, 980 P.2d 318 (1999).

The standard is objective: probable cause to arrest exists only "where the totality of the facts and circumstances known to the officers at the time of arrest would warrant a reasonably cautious person to believe an offense is being committed." *Id.*; *see also State v. Ruem*, 179 Wn.2d 195, 202, 313 P.3d 1156 (2013) ("Probable cause requires more than suspicion or conjecture. It requires facts and circumstances that would convince a reasonably cautious person."). Such facts must be "viewed in a practical, non-technical matter." *Gillenwater*, 96 Wn. App. at 671.

Here, the trooper acknowledged he did not have probable cause to arrest Mr. Ahearn prior to performing the field sobriety tests. 7/21/14 RP 92. This only changed, he contended, after observing Mr. Ahearn complete the testing. 7/21/14 RP 92. Despite this concession, the Court of Appeals determined it did not need to address whether the trial court erroneously found that Mr. Ahearn had "performed poorly" on this testing. Slip Op. at 10.

Although the trooper testified Mr. Ahearn "performed poorly" on the walk-and-turn test, the evidence did not support this contention. 7/21/14 RP 42. In fact, the trooper failed to properly administer the walk-and-turn test, negating any ability to determine how well Mr.

Ahearn performed. 7/21/14 RP 21, 109, 131. Although the walk-and-turn test "should be conducted on a reasonably dry, hard, level, nonslippery surface," Trooper Kyle Dahl instructed Mr. Ahearn to perform the test on a moderate grade, estimated by the trooper as approximately the grade of a wheelchair ramp. Ex. 4 at 11; 7/21/14 RP 80. On a hill, and apparently walking more quickly than the average person, Mr. Ahearn had difficulty maintaining his balance at the start of the test, failed to make every step touch heel to toe, and performed the turn incorrectly. 7/21/14 RP 42; Ex. 1. However, despite the sloped surface and his rapid pace, Mr. Ahearn never stopped walking, never stepped off the imaginary line, and completed the correct number of steps. Ex. 1.

Mr. Ahearn performed well on the remaining two tests. While performing the one-leg stand, the trooper observed "there was a little sway" to Mr. Ahearn, which he described as "almost like a pendulum, just kind of in a circle." 7/21/14 RP 48. The trooper testified Mr. Ahearn also counted "one, two, three" instead of "one one-thousand, two one-thousand, three one-thousand" as directed. 7/21/14 RP 47. However, Mr. Ahearn otherwise completed the test as instructed. During the 30-second test, he did not use his arms for balance, hop, or

put his foot down. Ex. 1. Two or more "clues" on this test indicate impairment. Ex. 4 at VIII-13. The trooper observed only one clue. Ex. 1 (Sobriety Tests).

Finally, during the Romberg balance test, Mr. Ahearn closed his eyes and tilted his head back as instructed. 7/21/14 RP 50. He initially counted out loud but immediately stopped upon being given a reminder. 7/21/14 RP 51. Trooper Dahl testified Mr. Ahearn exhibited "body tremors" during this test, which he described as a "severe shiver." 7/21/14 RP 92. Despite noting Mr. Ahearn was sweating "profusely" in the car, and that it was a cool night in February, the trooper stated he did not believe the cold air on Mr. Ahearn was causing him to shiver, but did acknowledge "the cold could very well have contributed" to it. 7/21/14 RP 92. However, Mr. Ahearn had no difficulty estimating when a 30-second period had passed within the acceptable range, indicating that even if his speech and pace appeared faster than average, his brain had an accurate sense of the passage of time. 7/21/14 RP 51, 131.

Throughout this testing, and his interactions with Trooper Dahl, Mr. Ahearn remained cooperative and polite. 7/21/14 RP 66. Because the trooper testified he would not have had probable cause to arrest Mr.

Ahearn prior to the field sobriety tests, this Court should accept review, reverse, and suppress all evidence obtained subsequent to Mr. Ahearn's arrest. RAP 13.4(b)(4).

2. Review should be granted in the substantial interest because there was insufficient evidence for any rational trier of fact to find the elements of driving under the influence beyond a reasonable doubt.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). When the sufficiency of the evidence is challenged, the Court must determine whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the element beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

In order to convict Mr. Ahearn of driving under the influence the State was required to prove beyond a reasonable doubt that he

actually ingested alcohol or a drug. RCW 46.61.502. The State did not meet this burden. The trooper noted Mr. Ahearn was sweating in the car and began to have "body tremors," or shiver, upon exposure to the cool night air. Ex. 1 at 1. His eyes appeared bloodshot and watery and the trooper believed his speech and pace during the walk-and-turn test was faster than normal. Ex. 1 at 1-3.

However, there was no odor of an intoxicant emanating from the vehicle or Mr. Ahearn's person, and his performance on the field sobriety tests and portable breathalyzer test demonstrated he was not under the influence of alcohol. Ex. 1 at 2-3. Although the trooper suspected Mr. Ahearn was under the influence of a drug, he did not confirm his suspicions though a blood test or examination by a drug recognition expert. Ex. 1 at 3.

While the trooper later found a syringe with methamphetamine and an empty syringe in the center console, there was no evidence Mr. Ahearn had recently injected himself with methamphetamine. Ex. 1 at 3. Because Mr. Ahearn is homeless, the empty syringe in the car did not suggest recent use or use while driving, but simply that it was one of the possessions he carried in his car the way others store items in their homes. Ex. 1 at 2. In contrast, Mr. Ahearn's polite and

cooperative demeanor throughout his interactions with the trooper suggested he was not under the influence of a mind-altering substance. Ex. 1 (DUI Interview).

In addition, the State needed to prove not only that Mr. Ahearn had consumed alcohol or a drug, but that this substance lessened his ability to drive by an appreciable degree. *State v. Hansen*, 15 Wn. App. 95, 97, 546 P.2d 1242 (1976). The Court of Appeals has found the State failed to meet this burden with far more evidence than what the State presented in Mr. Ahearn's case. In *Gillenwater*, both the car and the defendant exuded a strong odor of alcohol and the trooper observed a cooler full of beer behind the driver's seat and three empty beer cans on the floorboard. 96 Wn. App. at 669. On these facts alone, this Court found the State did not prove the defendant had consumed enough alcohol to affect his driving. *Id.* at 669 n.1, 671 (finding that this evidence was insufficient for a conviction, but noting that the additional evidence at trial showed the defendant was incoherent, still smelled strongly of alcohol an hour after his arrest, and a blood draw revealed a blood alcohol level of 0.18). Here, there was far less evidence suggesting both that Mr. Ahearn had ingested a mind-altering substance and that he had consumed enough of it to affect his driving.

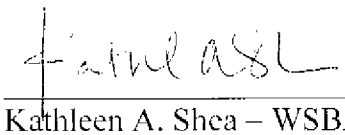
While law enforcement did not observe the defendant in *Gillenwater* driving before his car was struck by another vehicle, the observations made by Trooper Dahl did not show Mr. Ahearn was impaired. Brief lane incursions do not violate the law. *State v. Jones*, 186 Wn. App. 786, 791, 347 P.3d 483 (2015); *State v. Prado*, 145 Wn. App. 646, 649, 186 P.3d 1186 (2008). Turning right at a red light without signaling or coming to a complete stop, while traffic violations, do not suggest the driver is impaired when done on empty roads at approximately 3:00 a.m. Ex. 1 at 1-2. Thus, based on the stipulated facts presented to the trial court, the State failed to prove beyond a reasonable doubt that Mr. Ahearn committed the offense of driving under the influence, and this Court should accept review. RAP 13.4(b).

E. CONCLUSION

This Court should grant review of the Court of Appeals opinion affirming Mr. Ahearn's convictions for driving under the influence and possession of methamphetamine.

DATED this 19th day of October, 2016.

Respectfully submitted,



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APPENDIX A

COURT OF APPEALS, DIVISION II OPINION

August 23, 2016

Filed
Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHANE NMI AHEARN, Appellant.	No. 46645-7-II UNPUBLISHED OPINION

SUTTON, J. – Shane Nmi Ahearn appeals his bench trial convictions for unlawful possession of a controlled substance and driving under the influence (DUI). He challenges various findings of fact and conclusions of law from both the suppression hearing and the bench trial, and argues that (1) the trial court erred when it denied his motion to suppress because the trooper lacked probable cause, and (2) the evidence does not support his DUI conviction. We affirm.

FACTS

I. BACKGROUND[1]

On February 2, 2014, at about 3:15 AM, Washington State Patrol Trooper Kyle Dahl observed the vehicle Ahearn was driving swerving within its lane of travel, crossing the fog line, and then swerving into the adjacent lane. At one point, the vehicle crossed over the fog line and

[1] These facts are drawn from the trial court's findings of fact and conclusions of law related to the CrR 3.6 suppression motion and the trial court's CrR 6.1(d) findings of fact and conclusions of law related to the bench trial. To the extent Ahearn does not challenge these findings, they are verities on appeal. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). We address Ahearn's specific challenges to the findings below.

continued to drive for about 100 yards before returning to its lane. When the vehicle eventually exited the highway, it did not stop at the stop sign at the end of the exit ramp and then it turned left without signaling.

Trooper Dahl activated his emergency lights to pull Ahearn over. Ahearn continued to drive for about a quarter of a mile, passing several safe places to stop, before pulling over.

When Trooper Dahl told Ahearn to roll down his window, Ahearn "struggle[d] excessively with the window switches." Clerk's Papers (CP) at 124. Ahearn was "sweating profusely, to the extent [the trooper] was concerned for [Ahearn's] health and asked if [Ahearn] was alright." CP at 124. Ahearn told Trooper Dahl that he had just showered, but he did not say that was the reason he was sweaty.[2] Trooper Dahl did not notice anything external, such as it being hot inside the vehicle, which could have explained Ahearn's profuse sweating.

Once out of the vehicle, Ahearn "struggled to keep the driver's door from closing on him while trying to put his jacket on, and he struggled with the buttons on the jacket." CP at 125. Ahearn also stumbled, "on nothing apparent," as he walked toward the front of his vehicle. CP at 125, 162. Throughout their contact, Trooper Dahl noticed that Ahearn's speech "was fast and broken" and that "his eyes were watery and bloodshot." CP at 125, 162.

Ahearn consented to take field sobriety tests. Trooper Dahl administered a portable breath test, the horizontal gaze nystagmus (HGN) test, the walk and turn test, the one-leg stand test, and

[2] The trial court found these facts—that Ahearn told Trooper Dahl he had showered but did not say the shower was why he was sweating—when addressing the suppression motion; the trial court did not include these facts in its findings of fact related to the bench trial. Accordingly, we do not consider these facts in our sufficiency of the evidence analysis.

the Romberg balance test.[3] Ahearn's HGN test provided "zero clues," and a portable breath test sample he provided registered .000. CP at 125, 163.

The results of the walk and turn test were "questionable," but the test was administered on a grade, which did not comply with test standards. CP at 125, 163. Ahearn also performed poorly on the one-leg stand test and the Romberg balance test.[4] Throughout the tests, Ahearn exhibited "violent body tremors," he "swayed in a circular motion when standing still," and he "continued to sweat despite the cold." CP at 126, 162. He also "walked very fast during the [w]alk and [t]urn test." CP at 126, 162.

Trooper Dahl concluded that Ahearn's physical movements, tremors, swaying, rapid speech and walking, and profuse sweating suggested he was affected by a stimulant.[5] Trooper Dahl arrested Ahearn for suspicion of DUI.

After his arrest, Ahearn consented to a search of his vehicle. During the search, Trooper Dahl found a syringe containing a clear liquid, later identified as methamphetamine.

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[3] We describe these tests in more detail below.

[4] Ahearn challenges the trial court's findings with regard to these tests; we discuss these findings in more detail below.

[5] Trooper Dahl testified to this at the suppression hearing, but he did not include this statement in his incident report, which was submitted as evidence at the bench trial. Accordingly, we consider this fact when evaluating the denial of the suppression motion, but not when evaluating the bench trial conviction.

II. PROCEDURE

A. SUPPRESSION MOTION

The State charged Ahearn with unlawful possession of a controlled substance (methamphetamine), and DUI. Ahearn moved to suppress all of the evidence obtained after the stop. He primarily argued that Trooper Dahl lacked probable cause to arrest him for the DUI. Trooper Dahl; Ahearn; and Thomas Missel, Ahearn's expert on DUI investigations, testified at the suppression hearing.

In addition to testifying about the facts above, Trooper Dahl testified that he administered the walk and turn test, the one-leg stand test, and the Romberg balance test. Trooper Dahl testified that the walk and turn test requires the subject to walk a straight line by placing one foot in front of the other heel-to-toe for nine steps, to turn around by keeping their front foot on an imaginary line and taking a series of small steps around the front foot with their back foot, and to return using the heel-to-toe method. Ahearn struggled to keep his balance when listening to the instructions, turned the wrong way at the turn, and failed to take heel-to-toe steps several times.

Trooper Dahl admitted that this test was designed to be conducted on level ground and that there was a noticeable grade where this test occurred. But he did not think the grade was sufficient to affect this test, and he commented that the grade had nothing to do with Ahearn's executing the turn incorrectly. Because this test was validated on level ground, however, Trooper Dahl took the grade into consideration when evaluating Ahearn's performance. He also stated that in his training he learned that he could still "consider" the test even if it was performed on a grade, but it would not be "weighted as heavily as if it was done on level ground." 1 Report of Proceeding (RP) (July

21, 2014) at 46. Trooper Dahl specifically testified that Ahearn "performed poorly" on this test. 1 RP (July 21, 2014) at 42.

Trooper Dahl next testified that the one-leg stand test requires the subject to stand on one-leg, to raise the other foot about six inches off of the ground, and to "count by one thousands until" the officer tells them to stop. 1 RP (July 21, 2014) at 46. Trooper Dahl testified that during this test, Ahearn swayed and he counted "one, two, three," rather than "one one-thousand, two one-thousand, three one-thousand," as he had been instructed to do. 1 RP (July 21, 2014) at 47. While the way the subject counts is not a "standardized clue" for this test, Trooper Dahl considered Ahearn's failure to count as instructed because it related to his ability to follow instructions. 1 RP (July 21, 2014) at 47-48.

Trooper Dahl testified that during the Romberg balance test, the subject is instructed to close his eyes and tilt his head back; to estimate thirty seconds "in [his] mind;" and to tilt his head forward, open his eyes, and say stop after 30 seconds. 1 RP (July 21, 2014) at 50-51. Trooper Dahl also stated that Ahearn's time estimation was "pretty close," at 34 seconds. 1 RP (July 21, 2014) at 51. But Trooper Dahl once again observed that Ahearn had trouble following the instructions because he started counting out loud and had to be reminded to count to himself.

Missel testified about the validity of the field sobriety tests for detecting alcohol use. He testified that to determine whether a subject has a blood alcohol level of over .08, there are a minimum number of clues for each test that the examiner must observe for each test: four out of six clues for the HGN test, two or more clues for the walk and turn test, and two or more clues for the one-leg-stand test. And he testified that validation of these tests by the National Highway

Traffic Safety Administration (NHTSA) would give users the "percentage of accuracy rate" of probability that a subject was impaired. 1 RP (July 21, 2014) at 120.

Throughout this testimony, Missel emphasized that the validation studies related to these tests were only accurate for tests performed following the NHTSA protocols. He also testified that a trooper would have the opportunity to make a lot of observations outside of the testing that might suggest impairment, even though those observations would not be supported by validation studies. In addition, he testified that there had never been any validation studies on whether the field sobriety tests Trooper Dahl administered were effective in detecting drug use.

As to the particular tests here, Missel testified that he was concerned that the walk and turn test had been administered on a slope of about 10 percent grade. He opined that the slope made the test results "invalid." 1 RP (July 21, 2014) at 112. But he also noted that, while the observations made during the test would lack the certainty of a properly performed test, the trooper could "still [make] observations." 1 RP (July 21, 2014) at 108, 120, 131.

Missel also testified that the Romberg balance test was used in the drug recognition program. The subject's time accuracy was one factor, but the tester would also watch for "body sway," tremors, and other factors. 1 RP (July 21, 2014) at 123. He testified that even an unvalidated test, such as the Romberg balance test, could provide additional "observations" that would be helpful. 1 RP (July 21, 2014) at 125.

Missel then testified that the slope would not affect the one-leg stand. He testified that Trooper Dahl did not, however, observe enough clues on the one-leg stand to show impairment because Ahearn's internal clock estimate "fell within the acceptable range of 25 to 35 seconds." 1 RP (July 21, 2014) at 131. He stated that for the officer to be able to say with 65 percent accuracy

that a subject was impaired, the subject would need to show two clues. Missel admitted that the trooper could consider the one observed clue in conjunction with other observations when determining if the subject was impaired.

Based on this testimony and the facts above, the trial court found that Trooper Dahl had probable cause to arrest Ahearn for DUI. The trial court denied the motion to suppress.

B. BENCH TRIAL ON STIPULATED FACTS

Following the suppression hearing, Ahearn waived his right to a jury trial and agreed to a bench trial based on the law enforcement reports and stipulated facts. Specifically, he stipulated that the crime lab had tested the contents of the syringe found in his vehicle and had determined that the syringe contained methamphetamine, and he "adopt[ed] the testimony of his expert witness, Thomas Missel, who testified in the CrR 3.6 hearing that standardized field sobriety tests are a valuable tool in drug related DUI investigations and provide observational information for law enforcement."[6] CP at 110.

In addition to the facts set out above, Trooper Dahl stated in his report that when he first contacted Ahearn, Ahearn stated that he had not been drinking alcohol and that he had not "taken any medication or any drug[s]." CP at 115. Trooper Dahl also wrote that when he administered the field sobriety tests he observed that (1) Ahearn's eyes were blood shot and watery, (2) Ahearn was having violent body tremors, (3) Ahearn was swaying in a circular motion, and (4) Ahearn continued to sweat even though it was colder outside of his car.

[6] For purposes of our analysis, we will presume that this allowed the trial court to consider Missel's testimony in its entirety.

Trooper Dahl's report also described Ahearn's performance on three field sobriety tests:

> **Walk and Turn Test:**
> While giving Ahearn the instructions[,] Ahearn started the test early twice. Ahearn also lost his balance and had to step offline to his right to catch his balance. Once Ahearn began the test[,] Ahearn missed heel to toe on steps five[,] six[,] and seven on his first nine steps. Ahearn the[n] made a quick turn in one motion to his right. On Ahearn's second nine steps[,] Ahearn missed heel to [t]oe on steps five, six, seven, eight, and nine. Ahearn also used his arms for balance during the test. Ahearn also took his steps at a faster than normal pace.
>
> **One Leg Stand:**
> For this test[,] Ahearn stood on his right leg and raised his left foot. During the test Ahearn swayed and had body tremors. Ahearn also did not count as he was instructed. Ahearn counted one, two three etc. instead of one-thousand and one, one-thousand and two etc.
>
> **Romberg Balance:**
> For the test Ahearn estimated 30 seconds in 34 actual seconds. Ahearn began counting out loud by thousands until I reminded him to count in his head. After Ahearn finished the test, I asked Ahearn how long he thought that was, Ahearn stated he thought it was about 30 seconds. I asked Ahearn how he counted, Ahearn stated he just counted and that he imagined a stopwatch in his head. I observed Ahearn to have violent body tremors, and sway in a circular motion.

CP at 116.

Trooper Dahl further stated that Ahearn continued to sweat while being transported. Ahearn refused to consent to a blood draw and none was taken.

The trial court filed written findings of fact and conclusions of law under CrR 6.1(d). These findings are consistent with the facts above.[7] Based on these facts, the trial court concluded that Ahearn was guilty of DUI because he operated a motor vehicle "while his ability to drive was impaired by a drug." CP at 163. The trial court also found Ahearn guilty of unlawful possession of a controlled substance.

[7] We address the specific CrR 6.1(d) findings that Ahearn challenges in more detail below.

Ahearn appeals the denial of his suppression motion and his bench trial conviction for DUI.

ANALYSIS

I. SUPPRESSION MOTION

Ahearn first argues that the trial court erred when it denied his suppression motion. He contends that Trooper Dahl lacked probable cause to arrest him.[8] We disagree.

A. LEGAL STANDARDS

"We review a trial court's denial of a CrR 3.6 suppression motion to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." *State v. Cole*, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). "We review conclusions of law, including mischaracterized 'findings,' de novo." *Cole*, 122 Wn. App. at 323.

B. CHALLENGES TO FINDINGS

1. CrR 3.6 Finding of Fact No. XVII

Ahearn assigns error to CrR 3.6 finding of fact no. XVII, which states:

> That Trooper Dahl testified the Defendant performed poorly on the three physical dexterity and divided attention tests. He testified that throughout the contact and during the [field sobriety tests] the Defendant had violent body tremors. He swayed in a circular motion when standing still. He walked very fast during the Walk and Turn test. He continued to sweat despite the cold and to speak in a fast, broken manner.

[8] Ahearn also argues that the syringe evidence should have been suppressed because it was fruit of the poisonous tree following the unlawful arrest. Because we hold that the arrest was based on probable cause, this argument fails.

CP at 125-26. Ahearn's arguments address only the first two sentences of this finding, accordingly, we address only those portions of this finding. RAP 10.3(a)(6); *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004).

Ahearn first challenges the portion of CrR 3.6 finding no. XVII stating, "Trooper Dahl testified the Defendant performed poorly on the three physical dexterity and divided attention tests." CP at 125-126. Regardless of whether the trial court's finding that Ahearn "performed poorly" on the tests was supported by the record, it is ultimately irrelevant because, as discussed below, the trial court's conclusion that the State established probable cause is supported by other findings. Thus, we do not address this issue further.

Ahearn also argues that the trial court should not have considered Ahearn's "body tremors" as evidence of impairment because these "severe shiver[s]" could be contributed to the fact Ahearn had been sweating and was outside in the cold. Br. of Appellant at 15-16. To the extent this argument relates to CrR 3.6 finding of fact no. XVII, the trial court found that Trooper Dahl *testified* at the suppression motion hearing that throughout the contact and during the testing Ahearn had violent body tremors. This finding is amply supported by Trooper Dahl's testimony.

2. CrR 3.6 Finding of Fact No. IXX

Ahearn next assigns error to CrR 3.6 finding of fact no. IXX, which states:

> That Defendant's physical movements, violent body tremors, swaying, rapid speech and walking, profuse sweating, and other indicators did suggest the Defendant was affected by a stimulant.

CP at 126.

As noted above, Ahearn argues that the trial court should not have considered Ahearn's "body tremors" as evidence of impairment because these "severe shiver[s]" could be contributed

to the fact Ahearn had been sweating and was outside in the cold. Br. of Appellant at 15-16. Ahearn is correct that his sweating and the cold temperature could have contributed to his shivers or tremors. But Trooper Dahl testified that while the cold may have contributed to Ahearn's shivering, based on his training and experience, he did not believe the cold caused the shivers because of "the severity of them." 1 RP (July 21, 2014) at 92. This testimony supports the trial court's consideration of this factor as suggestive of Ahearn being affected by a stimulant. Additionally, even if the cold had contributed to Ahearn's shivers or tremors, the trial court considered several additional factors, such as Ahearn's balance problems, profuse sweating, fast speech, and attention issues, that suggested Ahearn was affected by a stimulant and the absence of this single factor would not affect this finding.[9]

C. CHALLENGES TO CRR 3.6 CONCLUSIONS OF LAW

Ahearn next challenges the trial court's CrR 3.6 legal conclusion that the State established probable cause.[10] Again, we disagree.

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[9] Ahearn also appears to argue that Trooper Dahl did not contradict Ahearn's testimony that visibility was poor because of foggy conditions, suggesting that the trial court should have made a finding on this issue. Because Ahearn does not assign error to finding of fact no. IV from the suppression hearing findings, which describes Ahearn's driving, we do not address this assertion. Furthermore, to the extent Ahearn is attempting to argue that his erratic driving was not enough to establish probable cause to suspect he was driving while impaired, it is still a factor we may consider when examining the totality of the circumstances.

[10] Ahearn assigns error to portions of findings of fact no. IXX and no. XXIV that relate to the trial court's probable cause finding. Because the probable cause findings are in fact legal conclusions, we treat them as such on appeal. *State v. Chamberlin*, 161 Wn.2d 30, 40-41, 162 P.2d 389 (2007); *Cole*, 122 Wn. App. at 323. Ahearn also assigns error to conclusion of law no. III, which is the trial court's conclusion that Trooper Dahl had probable cause to arrest Ahearn for DUI.

Whether probable cause exists is a legal question we review de novo. *State v. Grande*, 164 Wn.2d 135, 140, 187 P.3d 248 (2008). "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Probable cause requires more than "a bare suspicion of criminal activity." *Terrovona*, 105 Wn.2d at 643. But it does not require facts that would establish guilt beyond a reasonable doubt. *State v. Conner*, 58 Wn. App. 90, 98, 791 P.2d 261 (1990). The probable cause determination "rest[s] on the totality of facts and circumstances within the officer's knowledge at the time of the arrest." *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

The facts show that before Trooper Dahl arrested Ahearn, Ahearn (1) was weaving in and out of his lane while driving, (2) failed to stop at a stop sign, (3) turned without signaling, (4) failed to pull over immediately when Trooper Dahl put on this emergency lights despite passing several areas where he could have safely stopped, (5) struggled "excessively" with the window controls when asked to roll down the vehicle's window,[11] (6) was sweating profusely for no apparent external reason, (7) struggled to keep the driver's side door from closing on him while attempting to put on a jacket, (8) struggled to button his jacket, (9) stumbled, apparently on nothing, when walking to the front of his car, (10) "exhibited "violent body tremors," "swayed in a circular motion

[11] CP at 124 (3.6 FF IX).

when standing still," and "walked very fast during the [w]alk and [t]urn test,"[12, 13] and (11) continued to sweat despite being outside in the cold. In addition, Ahearn's "speech throughout the contact was fast and broken and . . . his eyes were watery and bloodshot," and Trooper Dahl concluded that Ahearn's physical movements and behavior suggested he was affected by a stimulant. CP at 125.

While any one of these facts may not have given rise to probable cause, the totality of these circumstances demonstrated that Ahearn was having physical symptoms, such as balance problems, profuse sweating, tremors, and fast speech, as well as attention issues. These factors demonstrate that probable cause existed to believe Ahearn was driving under the influence.

Ahearn also asserts that many of the facts Trooper Dahl relied on could have been explained by it being 3:00 AM, Ahearn having been awake all night and not being appropriately dressed for the weather, and Ahearn being uncomfortable in the trooper's presence. While there could be alternative explanations for Ahearn's condition and reactions, the State was not required to prove beyond a reasonable doubt that Ahearn was impaired or that impairment was the only possible explanation in order to establish probable cause. *See Conner*, 58 Wn. App. at 98. And given the numerous factors described above that suggested some level of impairment, the trial court did not err when it concluded that the trooper had probable cause.

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[12] CP at 126.

[13] While this test was not administered properly, Missel testified that Trooper Dahl could still make "observations" that would be relevant to whether Ahearn was driving under the influence. 1 RP (July 21, 2014) at 108, 120, 125, 131, 134-36.

Ahearn also argues that the State did not show that Trooper Dahl offered him the opportunity to undergo an evaluation by a drug recognition expert and that the State's failure to do this "must be construed in Mr. Ahearn's favor." Br. of Appellant at 17. In support of this argument, Ahearn cites *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997), which states only that if the trial court does not make a finding on a factual issue, we presume that the party with the burden of proof failed to sustain their burden on this issue. *Armenta* does not address whether Trooper Dahl was required to offer Ahearn the opportunity to seek an evaluation by a drug recognition expert before determining probable cause. Because Ahearn cites no authority supporting his argument, we do not consider it further. RAP 10.3(a)(6).

Because the factors described above demonstrate that probable cause existed to believe Ahearn was driving under the influence, we hold that the trial court did not err when it denied Ahearn's suppression motion.

II. SUFFICIENCY

Ahearn next argues that the evidence is insufficient to support his DUI conviction.[14] Specifically, he argues that portions of the trial court's CrR 6.1(d) findings of fact no. VIII and no. IX are not supported by substantial evidence and that the trial court erred in concluding that the State had proved he had been driving under the influence of drugs. We disagree.

[14] We note that while some of the analysis in this section appears repetitive, we cannot just rely on the CrR 3.6 analysis because the trooper's testimony in the CrR 3.6 hearing was not stipulated to for the bench trial. Thus, the facts in this later section rely only on the trooper's written statements, which were not as in depth as the CrR 3.6 hearing testimony, and there are some subtle differences.

A. LEGAL STANDARDS

When challenging the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all inferences that may reasonably be drawn from them. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005). When a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Following a bench trial, we review a trial court's decision to determine whether substantial evidence supports any challenged findings and whether the findings in turn support the conclusions of law. *Stevenson*, 128 Wn. App. at 193. "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." *Stevenson*, 128 Wn. App. at 193. Unchallenged findings of fact are verities on appeal, and we do not review the fact finder's credibility determinations. *Stevenson*, 128 Wn. App. at 192 n.11, 193. "Circumstantial evidence provides as reliable a basis for findings as direct evidence." *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). And we review conclusions of law de novo. *Stevenson*, 128 Wn. App. at 193.

B. CRR 6.1(d) FINDING OF FACT NO. VIII

Finding of fact no. VIII states:

> That the Defendant performed Field Sobriety Tests (FSTs); the Gaze Nystagmus test, the Walk and Turn test, the One Leg Stand test, and the Romberg Balance [t]est. *That the defendant performed poorly on all three physical dexterity and divided attention tests.* That the Defendant had violent body tremors throughout the contact and during the FSTs. He swayed in a circular motion when standing still. He walked very fast during the Walk and Turn test. He continued to sweat despite the cold and to speak in a fast, broken manner. That the results of the

> Walk and Turn are questionable, as there was as slope to the ground, approximated at a 10% grade, which does not comport with the NHTSA standards. That the Defendant showed zero clues on the HGN test and provided a portable breath test sample of .000.

CP at 162-63. Ahearn argues that the evidence does not support the portion of this finding stating that he "'performed poorly' on the field sobriety tests." Suppl. Br. of Appellant at 2. Even presuming that the trial court's conclusion that Ahearn "performed poorly" on the field sobriety tests was incorrect, this error would be harmless because, as discussed below, the remaining findings support the trial court's conclusions of law.

C. CrR 6.1(d) Finding of Fact No. IX

Finding of fact no. IX states:

> That the Defendant's physical movements, observed while he was performing field sobriety tests, included violent body tremors, swaying, rapid speech and walking, profuse sweating, and other indicators that *suggest the Defendant was affected by a stimulant.*

CP at 163. Ahearn argues that the evidence does not support the trial court's conclusion that Ahearn's physical movements and other indicators "suggest[ed]" that he was affected by a "stimulant." Suppl. Br. of Appellant at 3.

Ahearn is correct that Trooper Dahl's report did not state that these factors suggested Ahearn was affected by a stimulant. Trooper Dahl stated only that these factors, plus his other observations during the stop, led him to believe that Ahearn was unsafe to drive. Thus, Ahearn is correct that this finding is not supported by the record. But this error is harmless because the remaining findings support the trial court's conclusions of law.

D. CrR 6.1(d) Conclusion of Law No. II

Conclusion of law no. II provides:

> That the Defendant is guilty of [DUI] because he operated a motor vehicle on public roadways in Kitsap County, Washington on February 2, 2014 *while his ability to drive was impaired by a drug.*

CP at 163 (emphasis added). Ahearn argues that this conclusion of law is actually a finding of fact and that it is not supported by the stipulated evidence.

We disagree with Ahearn's assertion that this is a finding of fact. Conclusion of law no. II is, instead, the trial court's conclusion that the State has proved the elements of the DUI. Thus, we address this as the trial court labeled it, as a conclusion of law.

Ahearn argues that the evidence was not sufficient to support the verdict because it did not establish that he was under the influence of drugs or that he was impaired. We disagree with Ahearn's argument and hold that the trial court's bench trial findings support this conclusion of law.

As to Ahearn's impairment, the unchallenged findings of fact established that he (1) was unable to maintain his lane of travel while on the highway, (2) ran a stop sign when he exited the highway, (3) failed to signal when he turned, (4) struggled with simple tasks such as unrolling his window and putting on his jacket, and (5) exhibited physical symptoms including excessive

sweating, body tremors, and lack of attention during the field sobriety tests. These facts support the conclusion that he was impaired.[15]

As to the cause of this impairment, the trial court's unchallenged bench trial findings mention no evidence suggesting that Ahearn was impaired by alcohol. But the unchallenged findings also show that the trooper found drugs in Ahearn's vehicle. Ahearn's obvious impairment coupled with the presence of drugs in the car provide sufficient circumstantial evidence that the impairment was caused by drug use.[16] Thus, the trial court's findings of fact support its conclusion that that the State had proved the DUI charge.

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[15] Ahearn argues that his inability to maintain his lane of travel, his failure to stop, and his failure to signal were not enough to establish his driving was impaired because he was driving on empty roads at 3:00 AM. But these facts are not the only facts suggesting impairment.

[16] Ahearn argues that the evidence is insufficient because the trooper did not confirm the drug use with a blood test or examination by a drug recognition expert. But such direct evidence is not required. *See State v. Woolbright*, 57 Wn. App. 697, 701, 789 P.2d 815 (1990) ("[C]hemical tests are neither necessary nor required to prove intoxication.").

Ahearn also argues that the mere presence of a syringe containing methamphetamine and an empty syringe in the center console was not sufficient to establish that Ahearn used the drugs because he was homeless and could have just been storing the syringes in the car. This argument goes beyond the trial court's findings of fact, so we do not consider it further.

Ahearn also cites *State v. Gillenwater*, 96 Wn. App. 667, 980 P.2d 318 (1999), but this case is inapplicable here. At best, *Gillenwater* suggests that to establish guilt of DUI beyond a reasonable doubt, the State must present more than just evidence that the defendant had been drinking. *See* 96 Wn. App. at 671. But the *Gillenwater* court was dealing with a probable cause issue that involved the fact that no one had observed any erratic driving by the defendant, it was not addressing whether the presence of alcohol in the vehicle could establish a DUI without any direct evidence that the defendant had ingested it.

CONCLUSION

Ahearn fails to show that the trial court erred in denying his motion to suppress or that his bench trial conviction for DUI was improper. Accordingly, we affirm his convictions.

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.

SUTTON, J.

We concur:

MAXA, A.C.J.

MELNICK, J.

APPENDIX B

ORDER DENYING MOTION FOR RECONSIDERATION

September 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SHANE AHEARN,

Appellant.

No. 46645-7-II

ORDER DENYING MOTION FOR RECONSIDERATION

Appellant moves for reconsideration of the court's August 23, 2016 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Sutton, Melnick

DATED this 19th day of September, 2016.

FOR THE COURT:

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DIVISION II
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STATE OF WASHINGTON
BY _____
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Maxa, A.C.J.
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☐ Attorney for other party

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Washington Appellate Project

Date: October 19, 2016

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