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No. 33335-0-II

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

BY Cmm

**STATE OF WASHINGTON,**  
Respondent,

v.

**STEPHEN TUCKER,**  
Appellant.

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

THE HONORABLE DAVID E. FOSCUE

BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTERSTATEMENT OF FACTS**

### **Procedural history**

The defendant was charged by Information with two counts of Vehicular Homicide, RCW 46.61.502, in connection with the death of Michelle A. Burton and her daughter, Megan R. Ottson Burton. The matter was tried to a jury. During deliberations, the jurors informed the judge that they had a question about the definition of the word “appreciable” in Instruction 6, the definition of “under the influence”. (Supplemental Record). The trial court, over the objection of defense counsel, gave the jury an additional instruction which provided the a dictionary definition of “appreciable” as “capable of being noticed, estimated, or measured; noticeable”. (Supplemental Record). The defendant was convicted of both counts.

### **Factual background**

On August 6, 2003, Michelle Burton and her family were traveling southbound on Highway 101 towards Humptulips. (RP 9). Burton, her husband and her daughter were on vacation. They were looking for a campsite further south. (RP 9). Ms. Burton was driving. The defendant was driving northbound.

As both cars approached a gentle right hand curve in the road, the defendant's vehicle crossed over into Ms. Burton's lane of travel. (RP 44).

The left front tire of the defendant's vehicle struck the Burton's vehicle. (RP 195). The impact caused both vehicles to rotate counterclockwise. (RP 42). This section of Highway 101 is a two lane highway. (RP 26). The road is relatively straight. There were no other vehicles on the road at the time. The weather was clear and dry. (RP 9).

Michelle Burton suffered a skull fracture. (RP 153-54). Megan suffered severe craniocerebral trauma as a result of blunt impact to her head. (RP 158). Both Ms. Burton and her daughter died as result of injuries received in the collision.

Troopers arrived on scene and contacted the defendant, who was still seated in his vehicle. (RP 32). During this contact, Trooper Carson noted that there were dozens of prescription drug bottles in a backpack on the front passenger seat of the defendant's car. (RP 33). The defendant's car was partially blocking the roadway. (RP 74). It was impounded and taken into evidence. The various medications were taken out of the car and placed into evidence. (RP 35).

The defendant was transported to Grays Harbor Community Hospital. While at the hospital, Trooper McMullen, a Drug Recognition Expert, contacted the defendant. (RP 110-11). Trooper Carson had told Trooper McMullen that the defendant had various prescription bottles in his car at the

time of the collision and that the defendant admitted that his actions had caused the collision. (RP 110-1).

Based upon the information relayed to him, Trooper McMullen asked the defendant if he had taken any medication that day. (RP 121-22). The defendant replied that he takes large amounts of medications, otherwise he “can’t make it through the day”. (RP 121). The defendant then admitted that he had taken medications earlier in the day, including an anti-depressant, tramadol, and a muscle relaxant, carisaprodol as “that is the only way that I can function”. (RP 120-21).

Trooper McMullen noticed that the defendant’s pupils were dilated. (RP 116). Trooper McMullen also knew that the defendant had been given morphine at the hospital. (RP 112). Because of the presence of morphine, Trooper McMullen expected that the defendant’s pupils would be constricted based upon his training and experience as a Drug Recognition Expert. (RP 116-120). This confirmed for Trooper McMullen that the defendant had taken other medication. Trooper McMullen, based on his training and experience, believed that the defendant was under the influence of medications other than morphine. (RP 117).

The defendant was then arrested for Vehicular Homicide and a blood draw was taken. (RP 121). An analysis of the blood showed the presence of tramadol (a narcotic analgesic), amitriptyline (an anti-depressant), sertraline

(an anti-depressant), quetiapine (an anti-convulsant and anti-psychotic), meprobamate (a muscle relaxant), and THC (marijuana) in the defendant's system at the time of the collision. (RP 221-230). All of these drugs effect the central nervous system, and at least three of the drugs carry warnings that indicate that a person should not operate heavy machinery when taking these drugs. (RP 221-235).

At trial, the prosecutor utilized a PowerPoint presentation during closing argument. (Supplemental Record). The first slide of the presentation included the in-life photo of the victims which had already been admitted into evidence during the trial. (RP 307-8; Supplemental Record). Defense counsel objected to the use of the photo. The court overruled the objection.

*Id.*

## ARGUMENT

### **1. Probable cause to arrest the Defendant existed based on the cumulative knowledge of the troopers, the circumstances of the collision, and the evidence collected at the scene. (Response to Assignment of Error III)**

“Probable cause to arrest exists when the totality of the facts and circumstances known to the officers at the time of the arrest would warrant a reasonably cautious person to believe an offense is being committed”.

State v. Gillenwater, 96 Wn.App. 667, 670, 980 P.2d 318 (1999), rev. den., 140 Wn.2d 1004 (2000). Probable cause to arrest in no way requires facts that would establish guilt beyond a reasonable doubt. *Id.*

The cumulative knowledge of all officers acting as a unit may be considered in determining whether there was probable cause to arrest a suspect under the “fellow officer rule”. Torrey v. City of Tukwila, 76 Wn.App. 32, 39, 882 P.2d 799 (1994); State v. Maesse, 29 Wn.App. 642, 647, 629 P.2d 1349 (1981). “In circumstances where police officers are acting together as a unit, cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect.” Maesse, supra, 29 Wn.App. 642 at 647.

Here, Trooper Carson told Trooper McMullen that the defendant admitted that he was the causing driver of a collision which resulted in two deaths. Trooper Carson found numerous prescription bottles on the passenger seat of the defendant’s car. Trooper McMullen later confirmed with the defendant that he was the driver of his car and that he had taken medications earlier in the day. Trooper McMullen then corroborated the defendant’s statements by his observations. The defendant’s eyes were dilated, when they should have been constricted based on the morphine the defendant had been given at the hospital.

In addition, this collision occurred on a relatively straight stretch of road on a clear dry day. Trooper Carson noted that the defendant crossed the centerline and collided into an oncoming vehicle. The trooper could properly infer from this evidence that a reasonably prudent driver would not cross the centerline under such circumstances. Considering all of this evidence, there was ample evidence to support the court's determination that there was probable cause to believe that the defendant committed the crime of Vehicular Homicide. This assignment of error must be denied.

**2. Any rational trier of fact could have found the Defendant guilty beyond a reasonable doubt, viewing the evidence in a light most favorable to the State. (Response to Assignment of Error I).**

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). During such a review, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Partin, 88 Wn.2d 899, 906-7, 5567 P.2d 1136 (1977).

Any rational trier of fact would find the defendant guilty beyond a reasonable doubt, viewing the evidence in a light most favorable to the State, based on the facts set out in the previous section on probable cause taken

together with the testimony of Melissa Pemberton. Ms. Pemberton testified that the defendant had tramadol (a narcotic analgesic), amitriptyline (an anti-depressant), sertraline (an anti-depressant), quetiapine (an anti-convulsant and anti-psychotic), meprobamate (a muscle relaxant), and THC (marijuana), in his system at the time of the collision. (RP 221-230). She further testified that all of these drugs affect the central nervous system, and at least three of the drugs carry warnings that indicate that a person should not operate heavy machinery when taking these drugs. Taken together, sufficient evidence exists to support the defendant's conviction. The court commissioner agreed. (Ruling Affirming Judgment and Sentence, p. 12-13). This assignment of error must be denied.

**3. The State's experts were properly allowed to testify because they both qualified as experts, their opinions were based on scientific theory, and their testimony was helpful to the trier of fact. (Response to Assignment of Error II).**

This court must review the admission of expert testimony under the abuse of discretion standard. Kirk v. Washington State University, 109 Wn.2d 448, 459, 746 P.2d 285 (1987). A trial court may admit expert opinion testimony when it finds that such testimony will help the jury determine a fact at issue or otherwise understand the evidence at trial. ER 702. Before such evidence can be admitted, "the expert must qualify as an expert, the expert's opinion must be based on a theory generally accepted in

the relevant scientific community, and the testimony must be relevant to the trier of fact.” State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

**a. Melissa Pemberton, a state toxicologist, was properly allowed to testify as an expert witness on the effects of marijuana and other pharmaceuticals on the body.**

Ms. Pemberton is a forensic toxicologist for the State of Washington. She has testified countless time throughout the state as an expert witness. In her testimony she outline her credentials, her degree in microbiology, and her training and experience in forensic toxicology. Ms. Pemberton based her opinion concerning the drugs in the defendant’s system at the time of the crash on her training and literature in the field. As such, the trial court properly allowed in her testimony as an expert witness in the field of toxicology. The court commissioner agreed. (Ruling affirming Judgment and Sentence, p. 14-15).

**b. The trial court properly admitted the testimony of Trooper McMullin as a Drug Recognition Expert.**

A Drug Recognition Expert may express an opinion that a suspect’s physical attributes are or are not consistent with the physical signs associated with certain categories of drugs. State v. Baity, 140 Wn.2d 1, 17-18, 991 P.2d 1151 (2000). Trooper McMullen is a certified Drug Recognition Expert. He expressed an opinion that was within his area of expertise.

Trooper McMullen's testimony confirms the defendant's admissions that he had taken medications earlier in the day. The defendant admitted that he had taken tramadol and carisaprodol. This was later confirmed by a blood draw. Trooper McMullen's observations simply confirmed this information that the jury received. This was not a case where the only proof of being affected by drugs or alcohol was the testimony of a Drug Recognition Expert. McMullen's testimony was properly admitted.

**4. The Defendant's bag of prescription medications was properly seized. (Response to Assignment of Error IV).**

One of the recognized exceptions to the requirement of a warrant is the inventory search. State v. Simpson, 95 Wn.2d 170, 662 P.2d 1199 (1980). Under this exception, a law enforcement officer may conduct a "good faith inventory search [of a vehicle] following the lawful impoundment". Evidence obtained during such a search is admissible. State v. Bales, 15 Wn. App. 834, 835, 552 P.2d 688 (1976). Law enforcement may also impound a vehicle as evidence of a crime, part of the police community care-taking functions, or part of the police function of enforcing traffic regulations. State v. Simpson, *supra*, at 170, 189)

**Inventory search**

"Whenever a driver is arrested for a [driving under the influence-related offenses] the vehicle is subject to impoundment." RCW 46.55.113(1)

(2006). A vehicle is also subject to impoundment when it “...constitutes and obstruction to safety of jeopardizes public safety”, RCW 46.55.113(2)(b) (2006) or when the driver of a vehicle in involved in an accident is physically or mentally incapable of deciding what steps to take to protect his or her property”. RCW 46.55.113(2)(c) (2006).

Even if a car has not yet been impounded, but will be, evidence found in such a search is admissible if the State can prove that the police did not act unreasonably or attempt to accelerate discovery, and that the evidence would have been inevitably discovered through proper and predictable investigatory procedures. State v. Richman, 85 Wn.App. 568, 572, 933 P.2d 1088 (1997). Such is the situation in the present case.

Even if the defendant’s car was not technically impounded at the scene of the collision, the vehicle would have eventually been impounded. The defendant’s car was blocking part of a lane of traffic and was damaged to the extent that it could not be driven off the road. (RP 74). There was no other choice but to tow the defendant’s vehicle, and therefore, to impound and inventory it. Trooper Carson did nothing to accelerate the search. He simply looked inside an open bag on the passenger side of the defendant’s car and saw prescription bottles that he would have eventually seen. (RP 33, RP 03/11/05, 14-15). As such, Trooper Carson did not act unreasonably. The

bag of prescriptions sought to be suppressed would have been inevitably discovered within the next hour when the defendant's car was hauled away.

### **Evidence of a crime exception**

Another exception to the warrant rule is the "evidence of a crime" exception. See State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980). Under the "evidence of a crime" exception, law enforcement can impound a vehicle if they have "probable cause to believe that the vehicle was stolen or that it was used in the commission of a felony." State v. Houser, supra, at 143, 149.

Here, the defendant's car was impounded because troopers believed that he had committed the crime of vehicular homicide, and thus, had used his car as an implement of that crime. Just as a knife could be seized in a stabbing, or a gun in a shooting, so to may a car in a vehicular assault or homicide. As such, the defendant's car was appropriately seized as evidence of a crime.

This assignment of error must be denied.

### **5. The supplemental instruction, which provided the dictionary definition of "appreciable", was proper. (Response to Assignment of Error V).**

The trial court has the discretion to give further jury instructions to the jury after deliberations have begun, as long as the supplemental instruction does not suggest the need for agreement, the consequences of no agreement,

or the length of time that the jury must deliberate. CrR 6.15(f) (2006); State v. Ng, 110 Wn.2d 32, 42, 750 P.2d 632 (1988); State v. Ransom, 56 Wn.App. 712, 714, 785 P.2d 469 (1990). This even includes giving an explanatory instruction where the meaning of an original instruction is unclear or potentially misleading. State v. Young, 48 Wn.App. 406, 415, 739 P.2d 1170 (1987).

Jurors in this case sent back a note which asked for the definition of “appreciable”. (Supplemental Record). As used in Instruction 6: “Any person is ‘under the influence of’ or ‘affected by the use of’ drugs if the person’s ability to drive is affected in any appreciable degree”. WPIC 92.10. The trial court sent back a supplemental instruction, based upon a dictionary definition, which set out the following: “The dictionary definition of appreciable is ‘capable of being noticed, estimated, or measured; noticeable’”. (Supplemental Record). No one is asserting that this was an incorrect statement of the law.

The term “appreciable” is an uncommon term. It is similar to “appreciate”, and is potentially misleading. “Appreciable” is a term not often used in daily speech. It is reserved more often to the speech of lawyers and financiers. One does not often remark to a friend that their weight has fluctuated by an “appreciable degree”, or that the weather was “appreciably” warmer than the day before. Even more problematic is that the term

appreciable might be assumed by many to be akin to appreciate, that is, to be grateful for or to fully understand. This is obviously not the meaning of “appreciable”. Indeed, under this understanding, a juror could understand Instruction 6 to be asking whether the defendant had knowledge that he was affected by drugs. This may have led jurors to examine the evidence under an incorrect standard of law.

By providing jurors with a dictionary definition of “appreciable”, the trial court kept jurors from making an assumption about the definition of a word. This was a matter of judgment for the trial court. State v. Young, 48 Wn.App. 406, 415 (1987). The court put no undue emphasis on the instruction. It was the jury that asked for a definition. It was a correct statement of the law. As such, the clarifying instruction was necessary and appropriate.

**6. The prosecutor’s use of a previously admitted in-life photo of the victims for less than a minute was not prejudicial. (Response to Assignment of Error VI).**

A trial court’s decision to admit an in-life photograph is reviewed under an abuse of discretion standard. State v. Rice, 110 Wn.2d 577, 599-600, 757 P.2d 889 (1988), cert. den., 491 U.S. 910 (1989); State v. Stackhouse, 90 Wn.App. 344, 957 P.2d 218 (1998); State v. Furman, 122 Wn.2d 440, 452, 858 P.2d 1092 (1993). In-life photographs are not

inherently prejudicial, especially when the jury also hears testimony about or sees “after death pictures of the victim’s body”. Furman, 122 Wn.2d at 452.

Here, the jury heard testimony from Dr. Selove, the forensic pathologist, who performed the autopsy on the two victims. (RP 152-160). Dr. Selove testified about the injuries that the victims’ received: Michelle Burton’s skull had been crushed in, and her femur fractured. (RP 153-154). Megan Burton had a severely fractured jaw, and brain trauma. (RP 157-158). Although there were no death photos of the victims admitted, the jury still heard the testimony of Dr. Selove and the photos of the mangled cars admitted as evidence. As such, trial court did not abuse its discretion when it admitted the in-life photo of the victims.

**7. The prosecutor’s argument that the defendant “stole the lives of” the victims in a Vehicular Homicide case was not improper. (Response to Assignment of Error VII).**

Counsel is given reasonable “latitude to argue the facts in evidence” in closing argument and to “make reasonable inferences” from those facts. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). A prosecutor’s statements in closing argument are reviewed in the context of the total argument, the issues in the case, and the evidence addressed in the argument. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); State v. Thach, Wn.App. 297, 316, 106 P.3d 782 (2005). It is the defendant who bears the burden to show that a prosecutor’s statement was both improper and had a

prejudicial effect. *Id.*; State v. Roberts, 142, 142 Wn.2d 471, 533, 15 P.3d 713 (2000). Prejudicial effect requires a finding that there was a substantial likelihood that the statement affected the jury's verdict. Roberts, 142 Wn.2d at 533, 14 p.3d 713 (quoting State v. Prile, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). As such, this court must consider the seriousness of the irregularity, whether the statement at issue was cumulative evidence, and whether the prejudice was so egregious that nothing short of a mistrial could cure the error. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986) (citing State v. Weber, 99 Wn.2d 158, 165-66, 656 P.2d 1102 (1983)).

Here, the prosecutor made the statement that the defendant “stole the lives” of the victims in this case, that he took the lives of two individuals when he crossed the centerline under the influence and committed the crime of Vehicular Homicide. (RP 307, 308). Using the word “stole” would be no different from using the word “took”. There was nothing inflammatory or prejudicial about the use of this one word considering the nature of this offense. This assignment of error must be denied.

**Defendant's statement of additional grounds for relief**

The defendant has not raised any grounds not adequately briefed by the parties to date. The State has no further response to issues raised by the defendant.

**CONCLUSION**

The conviction must be affirmed.

Dated this 27 day of November, 2006

Respectfully Submitted,

  
\_\_\_\_\_  
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143

GRF/jfa

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DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN M. TUCKER,

Appellant.

No.: 33335-0-II

**DECLARATION OF MAILING**

**DECLARATION**

I, Molly McBain hereby declare as follows:

On the 28th day of November, 2006, I mailed a copy of the Brief of

Respondent to John L. Farra; Attorney at Law; P.O. Box 817; Ocean Shores, WA 98569 and to  
Stephen M. Tucker; #881359; Stafford Creek Corrections Center; 191 Constantine Way;  
Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the  
foregoing is true and correct to the best of my knowledge and belief.

Molly McBain