

TREAT AS RES. BRIEF

NO. 34670-2-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
Respondent,

vs.

DUSTIN R. SNODGRASS  
Appellant.

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STATE'S MOTION ON THE MERITS

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III. For the purposes of this Motion the State will adopt the Appellant's Statement of the Case to provide a factual basis for the Court. Additionally, incorporated by reference, the designated Clerks Papers and Recording of Proceedings previously transmitted by the trial court may be referenced.

IV. This Motion to Affirm on the Merits is appropriate based on the record here since the issues presented for review by this Court in the above-captioned action are clearly controlled by settled law, are factual in nature and supported by the evidence, or are matters lying within the sound discretion of the trial court and need not be disturbed.

A. The Trial Court exercised tenable, sound discretion, supported by evidence in the record that Snodgrass's statements were freely and

voluntarily made in light of Miranda Warnings.

"We hold that the rule to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record. State v. Broadway, 133 Wn. 2d 118, 131 (1997).

"The Court has held that under the Fourteenth Amendment, '[a] defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined.'" State v. Williams, 137 Wn. 2d 746, 751 (1999) (internal cites removed). "The rule, as a whole, is still intended to ward against the admission of *involuntary, incriminating* statements. Even under a former version of CrR 3.5, where a *confession* was admitted into evidence without the required pretrial hearing, we held that remand for such a hearing was unnecessary where there was no question of the

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confession's voluntariness." Williams, 137 Wn. 2d at 152. "To assess voluntariness, 'the inquiry is whether, under the totality of the circumstances, the confession was coerced.'; see State v. Rupe, 101 Wn.2d 664, 678 (1984) (totality of circumstances test of voluntariness; circumstances include the condition of the defendant, the defendant's mental abilities, and the conduct of the police)." Broadaway, 133 Wn. 2d at 132. "A waiver of Miranda rights need not be explicit but may be inferred from particular facts and circumstances. A waiver may be found when defendant freely and selectively responds to police questioning after initially asserting Miranda rights. . . . Once a defendant asserts his right to remain silent, this must be scrupulously honored, and all interrogation must cease." State v. Coles, 28 Wn. App. 563, 567 (1981).

First of all the defendant in this case did

not oppose the admission of his statements made to Skamania County Sheriff Det. Scheyer. [RP 16]. So under Williams, 137 Wn.2d at 152, *supra*, it is unclear whether or not the court had to rule on the admissibility of otherwise uncontested statements.

During the 3.5 hearing the court listened solely to the testimony of Det. Scheyer and the defendant did not rebut Det. Scheyer's testimony. The court found that prior to Det. Scheyer conducting the custodial interview that she read the defendant Miranda Warnings from a Sheriff's Department card, that the defendant understood the warnings, and that his answers to her questions were knowingly and voluntarily made.

[RP 17].

These facts are verities on appeal and these facts are sufficient to support the conclusion of law that the statements made to

Det. Scheyer by the defendant would be admissible at trial barring any evidentiary issues. [RP 17].

A review of the entire trial record supports the trial court's 3.5 decision. The 3.5 rule is intended to "ward against the admission of *involuntary, incriminating* statements." Williams, 137 Wn.2d at 152. Yet the record clearly reflects that the bulk of the statements made by Snodgrass were self-serving or non-incriminatory. The defendant got to tell his version of the accident by laying blame on a dark truck. He attested to his sobriety prior to the accident. He stated that he was driving the speed limit. He attributed the methamphetamine in his possession to his sister's boyfriend who was also in the car at the time of the accident. The only truly incriminating statements were those made to Det. Scheyer admitting to possessing a baggy of

methamphetamine. It should be noted that the defendant was not charged with VUCSA-Possession of Methamphetamine so the incriminating value of this lone statement is very minor.

Voluntariness was evident in the context of the 3.5 hearing's testimony. The defendant was interviewed by Det. Scheyer in the interview room at the jail over one month after the accident had occurred so he had had plenty of time to reflect on the matter. The defendant willingly recalled his version of the accident and yet was cognizant of his right to remain silent and terminate the interview. There is little doubt that the defendant was read his Miranda Warnings and knowingly asserted his right to remain silent when he found it conducive. The waiver of Miranda rights can certainly be inferred by review of the interview and need not be explicit. Coles, 28 Wn.App. at 567. When the defendant stopped the interview

Det. Scheyer "scrupulously honored," Id., his right to remain silent.

Even at trial the defendant did not take issue with Det. Scheyer's testimony regarding his interview statements but for the discussion about methamphetamine. "Snodgrass stated that Det. Scheyer's testimony concerning their interview had been correct about the accident details but that he had not discussed the 'stuff' that was found in his shoe." [RP 297]

In conclusion, the court properly found that the statements made to Det. Scheyer were knowingly and voluntarily made. There was no question of voluntariness here, the defendant's statements were largely self-serving, and he controlled the extent of questioning by terminating the interview. Any error is harmless.

B. Trooper Wells did not impermissibly comment on Snodgrass's right to remain silent by asking routine questions and relating physical observations of defendant which defendant was free to rebut when he later testified.

(The error was not a manifest error affecting a constitutional right and is not ripe for review, per RAP 2.5(a). However, the State will address this issue given the overriding claim of ineffective assistance of counsel.)

The defendant's reliance on State v. Easter, 130 Wn. 2d 228 (1996) is misplaced. Easter, 130 Wn.2d at 243, qualifies the opinion of the court by stating "[n]othing in our conclusion, however, prevents the State from introducing pre-arrest evidence of a non-testimonial nature about the accused, such as physical evidence, demeanor, conduct, or the like. Our opinion does not address the right of the State under state and federal due process

principles to impeach the accused's testimony where the accused testifies and puts his [] credibility before the trier of fact." The companion case to Easter, State v. Lewis, 130 Wn. 2d 700 (1996) is more on point here. Lewis, 130 Wn.2d at 706 holds that "merely mentioning a suspect's pre-arrest silence, although not advisable, generally does not violated due process." In Lewis, unlike in Easter, the officer did not render an opinion that linked the defendant's silence with guilt. In Lewis, the defendant took the stand, while in Easter the defendant chose not to testify. Most importantly, in Lewis, the testimony and discussion about the defendant's refusal to answer questions was brief while "[i]n Easter the police officer offered his opinion to the jury that Mr. Easter was hiding his guilt when he told the jury that Mr. Easter was a 'smart drunk.' The State then emphasized Mr. Easter's

pre-arrest silence many times during closing argument." Lewis, 130 Wn. 2d at 705.

Here the testimony of Trooper Wells is not impermissibly 'commenting' on the defendant's right to remain silent. ("Comment" means that the State uses the accused's silence to suggest to the jury that the refusal to talk is an admission of guilt., Id., at 707). Wells was merely asking routine vehicular-accident questions, the defendant was not under arrest, the victim had not yet died, no drugs had yet been found. Wells's testimony highlighted the atypical demeanor of the defendant at the hospital rather than what the defendant did or did not say. Wells testified that the defendant appeared lethargic and tired, that the defendant looked away, and his demeanor was evasive. [RP 116] This is not a 'comment' on the defendant's right to remain silent, these observations are not offered as substantive

evidence of guilt. Easter, 130 Wn. 2d at 243.

Unlike in Easter, but similar to Lewis, the defendant here took the stand and said that he had been cooperative and explained his demeanor that morning.

Finally, here the State did not make any impermissible 'comment' that linked the defendant's silence to his guilt, unlike in Easter where the 'smart drunk' opinion of the officer became the central theme in the State's closing. Here there was no explicit mention of Wells's testimony at all in closing.

Any error is harmless given the fact that Wells's testimony was consistent the testimony provided by the citizen responder, Rodney McCafferty [RP 19], the Sheriff Deputy at the scene, Dep. Helton [RP 50], the EMS crew [RP 73] and the nurses at the hospital [RP 162]- to wit, the defendant was atypically uncooperative throughout the entire process and his demeanor

and appearance indicated that he may have been affected by drugs.

C. The defense counsel here acted as a reasonably competent attorney and his conduct did not cause prejudice.

In all fairness, defense counsel can only work with what they have and here the evidence overwhelmingly led to finding of guilt.

Under Strickland v. Washington, Snodgrass must show that (1) his counsel's performance was deficient, and (2) the deficient performance resulted in prejudice. 466 U.S. 668, 687 (1984). Snodgrass must overcome a strong presumption that his counsel's representation was adequate and effective. State v. McFarland, 127 Wn.2d 322, 335 (1995) To show prejudice, Snodgrass must be able to establish that "there is a reasonable probability that, except for counsel's unprofessional error's, the result of

the proceeding would have been different." Id.

In this case, the defendant cannot overcome the strong presumption that the defense counsel's representation was adequate and effective. Ostensibly, the defendant here can not show that any prejudice can be attributed to his counsel's errors or that the probable result of the trial would have been acquittal. The physical evidence, alone, including the vehicle wreckage, observations of defendant at the scene, the methamphetamine in the defendant's blood, the passenger's injuries and death, all point to conviction. The jury was not going to be dissuaded by technical rebuffs and sophistic jousting.

D. It is within the sound discretion of the trial court to rule on objections and here the defendant was not forced to comment on the credibility of the witnesses.

"A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so 'flagrant and ill intentioned' that it causes enduring and resulting prejudice that a curative instruction could not have remedied. In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect." State v. Boehning, 127 Wn. App. 511, 518 (2005) "In evaluating whether the prosecutor's comments were prejudicial, we look to the entire trial." Id. "Prejudice is established where there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Dhaliwal, 150 Wn.2d 559, 578 (2003).

"Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."

State ex rel Carroll v. Junker, 79 Wn.2d 12, 26  
(1971).

Here the trial court sustained two objections by the defendant. We need not consider those statements.

A review of testimony shows that the defendant testified that he had taken methamphetamine roughly 3-4 days prior to the accident [RP 298]. This was inconsistent with a lab report that indicated the presence of metamphetamine and Soma in his blood shortly after the accident. The defendant advanced his own opinion about how meprobamate (Soma) had gotten into his blood when he testified that "I believe [meprobamate] was part of the shot with the anesthesia that I got before the stitches." [RP 299] The State then appropriately asked, "Your testimony is that despite them finding methamphetamine in your blood, you had not done it for three days prior to this accident. Is

that what you are asking this jury to believe?"

[RP 299]

This issue is not ripe for appeal since any objection was waived by the defendant at trial. There is nothing "'flagrant and ill intentioned' that it causes enduring and resulting prejudice" inherent in this question to get it reviewed by this court now (e.g. RAP 2.5(a) (3)). There is not a substantial likelihood that the instances of misconduct affected the jury's verdict; there was no prejudice.

The State later tries to examine the defendant's claim that a second vehicle caused the accident. The Defendant stated that he did not actually see the vehicle hit him. The State established that the defendant had a rear view mirror, that he had a passenger side mirror, that he had a driver's side rear view mirror, and that the defendant had told Det. Scheyer that he had never seen headlights before the

accident.

So, the State asked the obvious question that goes straight to the issue of credibility, "You're asking the jury to believe that with three rear-facing mirrors, you saw no headlights approaching you from behind?" [RP 304] The court overruled the defense objection. And the defendant answered, "I'm asking the jury to believe what they would like to believe. I am not asking the jury to believe anything other than what they would like to believe." [RP 304]

While this potential error was preserved for appeal by timely objection there is no prejudice to the defendant shown by its content. The series of questions properly addressed the credibility of the witness.

Ultimately the defendant can not show any substantial prejudicial effect by the court to allow these questions in light of the very strong physical evidence, the eyewitness

testimony placing the defendant in the driver's seat, and the testimony of medical personnel and law enforcement.

When the questions are reviewed in context it is clear that they were proper cross examination and did not cause the defendant to comment on another witnesses credibility.

E. There is overwhelming evidence in the record that necessarily leads to a finding of guilt; any errors are harmless.

"The cumulative effect of trial court errors may deprive the defendant of a fair trial and thus warrant reversal, even if each of the errors, considered alone, could be considered harmless." State v. Coe, 101 Wn.2d 772, 789 (1984). "A cumulative error analysis depends on the nature of the error. Constitutional error requires reversal unless we are convinced beyond a reasonable doubt that any reasonable jury

would have reached the same result in the absence of the error." State v. Welch, 115 Wn.2d 708, 728 (1990). Constitutional error is harmless when overwhelming evidence supports the conviction. Id. "Nonconstitutional error requires reversal only if it is reasonably probable that the error materially affected the trial's outcome." State v. Halstein, 122 Wn.2d 109, 127 (1993).

Assuming *arguendo* that (1) the errors argued by the defendant are appealable and not barred by RAP 2.5, and (2) that the errors actually rose to the level of manifest error affecting a constitutional right, a panel of his peers would still have found Snodgrass guilty. The untainted evidence in this case overwhelmingly supports the jury's finding of guilt and any reasonable jury would have reached the same decision absent the error. State v. Aumick, 126 Wn.2d 422, 430 (1995); see also

Whelchel, 115 Wn.2d at 728.

Here the record is replete with physical evidence, with testimony from disinterested parties, testimony from a passenger in the vehicle at the time of the accident, and testimony from the investigating officers. The wrecked car, the blood test with methamphetamine and Soma, and the lack of any evidence to suggest a different cause of the accident are all examples of the direct evidence put to the jury. The testimony of the concerned citizen, the EMS crew, and the hospital staff was put to the jury. The testimony of the victim's boyfriend, who was a passenger in the vehicle at the time of the crash, provided damning evidence that the defendant had been using methamphetamine the night before the accident. The officers's testimony about the defendant's odd demeanor, his impairment, and of accident reconstruction offered strong evidence of guilt.

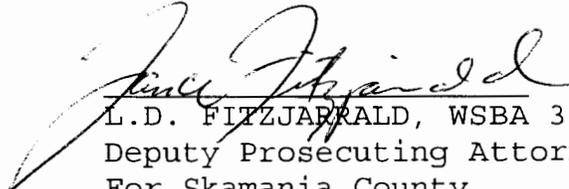
Irrespective of any of the defendant's claims of error or ineffective assistance of counsel what really stands out is that the "cumulative effect" of all of the State's evidence vitiates any claims of reversible error.

CONCLUSION

The trial court's discretion and the fact-finding province of the jury need not be disturbed given the overwhelming evidence supporting a finding of guilt in this case. This Motion to Affirm on the Merits should be granted.

DATED May 4, 2007

Respectfully submitted,



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07 MAY 2007  
BY \_\_\_\_\_

COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

State of Washington	)	
Respondent,	)	No. 34670-2-II
	)	
v.	)	
	)	Declaration of Service:
DUSTIN R. SNODGRASS,	)	
Appellant,	)	

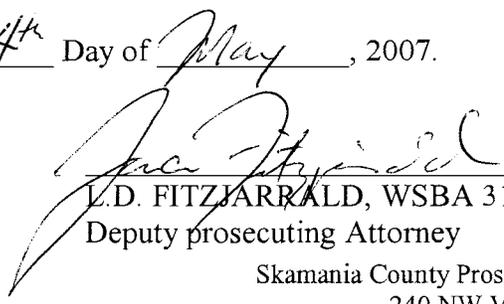
The undersigned on oath states that on the date below I duly mailed true and correct copies of the following documents by placing them in the US Mail postage prepaid to the interested parties at the addresses listed.

**STATE'S MOTION TO AFFIRM ON THE MERITS**

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SIGNED IN Stevenson, WA on the 4<sup>th</sup> Day of May, 2007.

  
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