

NO. 34786-5-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

NOV 14 2014
32 yn

STATE OF WASHINGTON

Respondent,

v.

ANTHONY L. COUCH

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF GRAYS HARBOR COUNTY

Before the Honorable David E. Foscue, Judge
Before the Honorable Mark F. McCauley, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

PM 10/31/06

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A. ASSIGNMENTS OF ERROR

1. The trial court's instruction that analysis of a blood sample obtained more than two hours after the alleged incident of driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or higher, thereby denying the Appellant his state and federal constitutional right to due process of law.

2. The trial court erred in denying the Appellant's Criminal Rule 3.5 motion to suppress statements allegedly made to law enforcement on November 13, 2005.

3. The trial court erred by entering the following "Undisputed" Findings of Fact pertaining to the CrR 3.5 hearing:

III.

The defendant was read warnings regarding his constitutional rights. He stated that he understood these rights and signed a waiver form.

IV.

The defendant went on to make statements about the circumstances of the collision.

4. The trial court erred by entering the following Conclusions of Law pertaining to the CrR 3.5 hearing:

CONCLUSIONS OF LAW

Prior to the statements made by the defendant, he was advised of the warnings required by *Arizona v. Miranda*.

And, the defendant knowingly and intelligently waived his right to not speak with law enforcement.

5. The trial court erred in not taking the case from the jury for lack of sufficiency of the information.

6. The State failed to establish that the Appellant's blood test results were "valid" within the meaning of RCW 46.61.506.

7. The trial court erred in admitting the results of a blood test that did not meet the technical requirements of chapter 46.61 RCW and State toxicology requirements.

8. The evidence was insufficient to prove the Appellant was under the influence of alcohol, a necessary element of vehicular assault.

9. The cumulative error of the acts of law enforcement and errors committed by the trial court prejudiced the Appellant and materially affected the outcome at the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has the due process right to jury instructions that accurately state the law. RCW 46.41.502(1)(a) provides that the State must prove that "the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506." Did the court's issuance of

the instruction that the analysis of blood samples obtained more than two hours after the alleged incident of driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or higher require reversal of Mr. Couch's conviction for vehicular assault? Assignment of Error No. 1.

2. Did the trial court err in denying the Appellant's motion to suppress his statements where Mr. Couch was questioned at the hospital after he had sustained a head injury? Assignments of Error No. 2, 3, and 4.

3. Whether a conviction for vehicular assault pursuant to an information that fails to allege all of the elements of the offense must be reversed and dismissed? Assignment of Error No. 5.

4. The results of a blood test are admissible only where performed in compliance with the methods approved by the State toxicologist and where the State has met its burden of establishing that foundation. Where the State was unable to show that the blood sample was preserved with an enzyme poison in order to stabilize the blood alcohol concentration, as required by the Washington Administrative Code, did the trial court err in admitting evidence of the blood test? Assignments of Error No. 6 and 7.

5. To prove that Mr. Couch was guilty of vehicular assault, the State was required to prove Mr. Couch was under the influence of alcohol.

Where the blood test may have been obtained outside the two-hour time period promulgated by RCW 46.41.502(1)(a), and where the blood test failed to comply with the WAC, was the evidence sufficient to support the conviction? Assignments of Error No. 6 and 7.

6. Was the conviction based on insufficient evidence that Mr. Couch had an alcohol concentration of .08 or higher within two hours of driving? Assignment of Error No. 8.

7. If the case is retried, is the State prohibited from proceeding on the theory that Mr. Couch had an alcohol concentration of .08 or higher within two hours of driving? Assignments of Error No. 8.

8. Did the cumulative errors cumulatively deny Mr. Couch a fair trial? Assignment of Error No. 9.

C. STATEMENT OF THE CASE¹

1. Procedural history:

A jury convicted Anthony Couch of vehicular assault, as charged in an information filed by the State in Grays Harbor County Superior Court on January 3, 2006, contrary to RCW 46.61.522. CP at 1-2.

At sentencing, Judge David Foscue imposed a standard range sentence of five months. RP at 200. CP at 37-44. Timely notice of this

¹This Statement of the Case addresses the facts related to the issues presented in accord with

appeal followed. CP at 45-46.

2. Substantive facts:

a. Prior to the accident.

After working from 6:30 a.m. to 4:30 p.m. on November 12, 2005, Anthony Couch stopped off at a store and bought a six pack of beer on his way home to Brady, Washington. RP at 123. He drank two 16 ounce Busch Light beers and went to sleep by 10:30 p.m. RP at 110, 123, 141. At approximately 1:30 or 2:00 a.m., he was awakened by Shari Helberg. RP at 98, 110, 124, 125. Ms. Helberg wanted to do something, and “what I thought would be fun, is drive over to my buddy’s house, which was a couple of miles away” RP at 124. Ms. Helberg had consumed three to four beers at Mr. Couch’s house in Brady. RP at 98, 104, 110.

b. The accident.

Mr. Couch and Ms. Helberg were at the friend’s house for a while and then proceeded back to Brady. On the way back Mr. Couch drove through fog, saw a deer in the road, swerved off the road and hit a culvert. RP at 99, 104, 125-26. He testified that the brakes on his car did not work at the time of the accident. RP at 137. Ms. Helberg told Grays Harbor Deputy Sheriff David Iverson that she went through the windshield and woke up on the hood

RAP 10.3(a)(4).

of the car, and then crawled back inside the car. RP at 17-18. The area near Ms. Helberg's eye was injured, as well as her chin. RP at 100. Exhibits 7 and 8. Ms. Helberg was not wearing a seatbelt at the time of the accident.² RP at 106.

Mr. Couch hit his head in the wreck and sustained a concussion. RP at 134. Later, at the hospital, he was immobilized on a backboard, was wearing a cervical collar, and had a compression bandage on his forehead obscuring most of his eye area. RP at 72.

Mr. Couch helped Ms. Helberg out of the vehicle and walked to a nearby house to get help. RP at 127-28.

Harry Covert, who lives near the scene of the accident, heard a loud noise "around three a.m. . . ." and saw that there was a car in the ditch in front of his house. RP at 2. He went outside and saw someone kneeling by the car. RP at 2. His wife called 911. RP at 2. Mr. Covert got dressed and opened the front door, and Mr. Couch was standing on the front porch, bleeding from his head. RP at 2-3. Mr. Covert did not see any indication that Mr. Couch had been drinking. RP at 3.

c. Factors in the accident.

² The incident leading to the charges occurred on what both Mr. Couch and Ms. Helberg considered their first date. RP at 97. They have remained in a boyfriend and girlfriend relationship since the accident. RP at 97, 103.

Mr. Couch told police that he swerved to avoid a deer in the road and that his brakes did not work. RP at 63, 67, 75, 77, 131, 137. Mr. Couch bought the car for \$200.00, and subsequently discovered that it had a leak in the master brake cylinder. RP at 130. He bought a large amount of brake fluid that he kept in the car and added it to the system when needed. RP at 130. He did not have the brakes fixed because it would cost approximately \$1400.00 to repair. RP at 130, 131. He checked the amount of fluid each morning before work, but he did not check the amount before driving to his friend's house with Ms. Helberg the morning of November 13. RP at 130-31. He stated once before the brakes had failed and that although the car would slow down, it would not "lock up." RP at 131. In order to stop in that situation he applied the emergency brake. RP at 131.

d. Following the accident.

Deputy Sheriff Iverson contacted Mr. Couch in the ambulance. RP at 16. He stated that he detected "a slight odor of intoxicants" on Mr. Couch's breath. RP at 16. Deputy Iverson asked him if he had had anything to drink, and he stated that it had been some time since his last drink. RP at 16. Mr. Couch stated that he did not believe that his ability to drive was affected by alcohol. RP at 129.

Mr. Couch testified that he was given intravenous morphine in the

ambulance. RP at 133. Grays Harbor Deputy Sheriff Kristi Lougheed testified, without objection, that a member of the aid crew told her that they had not given him medication. RP at 73. Deputy Lougheed stated that there was no medication given to him while she was with him in the treatment room. RP at 73.

e. **Blood draw at 5:05 a.m.**

Medical technician Beth Howe drew blood from Mr. Couch at the Grays Harbor Community Hospital on November 13 at 5:05 a.m. RP at 65, 80. Deputy Lougheed provided Ms. Howe with blood vials from a kit provided by the sheriff's office. RP at 64. She stated that the vials contained an anti-coagulant. RP at 64.

3. **Suppression hearing:**

Mr. Couch made statements to Deputy Lougheed after being taken to the hospital. The defense moved to suppress his statements pursuant to Criminal Rule 3.5. The motion was heard by Judge F. Mark McCauley on March 20, 2006.

Deputy Lougheed was dispatched to the Grays Harbor Community Hospital on November 13 to contact Mr. Couch. RP (3.20.06) at 5. At the hospital, she asked Mr. Couch what happened, and he told her that he swerved to miss a deer and that his car's brakes were not operating correctly.

RP (3.20.06) at 6. Mr. Couch was immobilized on a backboard and was wearing a cervical collar at the time he was contacted. She stated that he spoke “very well,” but that “when he began speaking more quickly, his speech was a little slurred” and that there was “also quite a noticeable aroma of intoxicating beverages about his person.” RP (3.20.06) at 6. She then read Mr. Couch his *Miranda*³ warnings. RP (3.20.06) at 6. Mr. Couch stated that he understood his rights. RP (3.20.06) at 7. She testified that he stated that he had swerved to miss a deer, “the accident was cause by faulty brakes” and that he had had two 16 ounce beers to drink several hours ago. RP (3.20.06) at 8. She also stated that he had asked her “if he had four beers hours ago, he would be okay, wouldn’t he?” RP (3.20.05) at 10. Deputy Lougheed testified that Mr. Couch showed “definite signs of impairment” RP (3.20.06) at 9. She also stated that he seemed coherent. RP (3.20.06) at 9.

The State requested the admission of Mr. Couch’s statements to Deputy Lougheed. RP (3.20.06) at 21-22. The defense argued that the statements were not knowingly, intelligently and voluntarily made due to Mr. Couch’s head injury sustained in the crash. RP (3.20.06) at 22-23.)

The court denied the motion to suppress the statements to the deputy,

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

and found that Deputy Lougheed advised him of his rights and that he stated that he seemed to understand his rights and agreed to talk to her. The court entered what it classified “undisputed facts” and conclusions of law on March 27, 2006. Those findings and conclusions state:

UNDISPUTED FACTS

I.

On November 11, 2005, Deputy Kristi Lougheed of the Grays Harbor Sheriff’s Department made contact with Anthony Couch at the Grays Harbor Community Hospital. The defendant was being treated at the hospital for injuries caused by a vehicle collision. The defendant was, at the time, strapped to a backboard, wearing a cervical collar, and a portion of his face was covered by a large compression bandage.

II.

The defendant seemed, to the deputy, to be speaking quickly and slurring his words. Because of these observations and information provided by other officers the defendant was placed under arrest for driving under the influence.

III.

The defendant was read warnings regarding his constitutional rights. He stated that he understood these rights and signed a waiver form.

IV.

The defendant went on to make statements about the circumstances of the collision.

Based upon the foregoing findings of fact, the court enters the following:

CONCLUSIONS OF LAW

Prior to the statements made by the defendant, he was advised of the warnings required by *Arizona v. Miranda*. And, the defendant knowingly and intelligently waived his right to not speak with law enforcement.

CP at 119-124. Appendix A-1 through A-2.

Mr. Couch assigns error to the finding that he signed a waiver form and assigns error to the findings and conclusions in their entirety inasmuch as he disputes that he knowingly, intelligently, and voluntarily waived his *Miranda* rights and made statements to the deputy.

4. **Jury instructions:**

The court *sua sponte* gave the following instruction regarding the blood sample:

INSTRUCTION NO. 8.

Analysis of blood or breath samples obtained more than two hours after the alleged driving may [be] used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or higher.

CP at 28. Appendix B-1.

Defense counsel noted its objection to Proposed Instruction No. 8.

RP at 143.

5. **Verdict:**

The jury found Anthony Couch guilty of vehicular assault. CP at 31.

6. **Sentencing:**

The matter came on for sentencing on May 1, 2006. The court imposed a standard range sentence of five months. RP at 200.

D. ARGUMENT

1. **THE TRIAL COURT ERRED IN ISSUING THE INSTRUCTION THAT A BLOOD SAMPLE OBTAINED MORE THAN TWO HOURS AFTER DRIVING MAY BE USED AS EVIDENCE THAT WITHIN TWO HOURS OF DRIVING THE PERSON HAD AN ALCOHOL CONCENTRATION OF 0.08 OR HIGHER.**

The court *sua sponte* issued the following instruction:

Analysis of blood or breath samples obtained more than two hours after the alleged driving that [be] used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or higher.

Instruction No. 8. Appendix B-1.

a. **The Trial Court's Instruction Denied Mr. Couch Due Process.**

A criminal defendant has the due process right to instructions that clearly and accurately charge the jury regarding the law to be applied in a given case. U.S. Const. amends V, XIV; Const. art. I, § 3; *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975); *State v.*

Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977). Instructions that relieve the State of its burden or fail to correctly inform the jury of an essential ingredient of the crime prejudicially deny a defendant due process of law. “A legally erroneous instruction cannot be saved by the test for sufficiency.” *Id.* at 903 (citing *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

b. Mr. Couch is Entitled to Relief.

Here, Instruction 8 misstates the law by relieving the State of obligation to comply with RCW 46.41.502(1)(a). This Court should reject any effort to impart a harmless error analysis to the erroneous instruction: “Before addressing whether and instruction sufficed to allow a party to argue its theory of the case, the must first decide the instruction accurately stated the law without misleading the jury.” *LeFaber*, 128 Wn.2d 903. This Court should reverse the conviction obtained.

2. MR. COUCH’S CONFESSION WAS INVOLUNTARY AND THEREFORE SHOULD HAVE BEEN SUPPRESSED.

When Mr. Couch made his statement to the deputy, he had recently suffered a head injury in the wreck. He was immobilized on a backboard, had on a cervical collar, and a compression bandage on his head. Under these circumstances, his confession was not voluntary and should have been suppressed. U.S. Const. amends. V and XIV.

a. **Standard of Review.**

Involuntary confessions are inadmissible. All confessions are presumed involuntary. The State has a heavy burden in overcoming this presumption. *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1978); *State v. Sargent*, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

In reviewing the question of voluntariness, the appellate court must make an independent examination of the whole record. *Clewis v. Texas*, 386 U.S. 707, 708, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967); *State v. Roth*, 30 Wn. App. 740, 746, 637 P.2d 1013 (1981). A trial court's determination that a confession was voluntary will be upheld on appeal only when there is substantial evidence in the record from which the trial court could find voluntariness by a preponderance of evidence. *State v. Vannoy*, 25 Wn. App. 464, 467, 610 P.2d 380 (1980), *decision after remand on other grounds*, 27 Wn.App. 527, 618 P.2d 1340 (1980). *See, State v. Lanning*, 5 Wn. App. 426, 431, 487 P.2d 785, 792 (1971) (voluntariness a question of law); *Jurek v. Estelle*, 593 F.2d 672, 679 (5th Cir. 1979) (appellate court must carefully scrutinize circumstances surrounding confessions).

b. **Totality of Circumstances Test.**

No simple definition of "voluntariness" exists for purposes of

determining the admissibility of confessions. Voluntariness cannot be taken literally to mean a “knowing” choice. If such were the case, even confessions made under brutal treatment would be admissible as they represent a knowing choice of alternatives. Nor can voluntary be taken to incorporate a “but for” test. If such were the case virtually no confession would be voluntary, because very few people give incriminating statements in the absence of official action of some kind. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

Instead, “voluntariness” reflects an accommodation of the complex values implicated in police questioning of a suspect. The acknowledged need for police questioning as a tool of effective law enforcement is balanced with society’s deep felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair police tactics poses a real and serious threat to civilized notions of justice. *Id.*, at 206-207.

The ultimate test remains that has been the only clearly established test in Anglo-American courts for 200 years: Is the confession the product of an essentially free and unconstrained choice by its maker? If it is the confession may be used against him. If it is not, if his will have been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. *Culombe v. Connecticut*, 367 U.S.

568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1990). *See also, State v. Rupe*, 101 Wn.2d664, 679, 683 P.2d 571 (1984) (to be voluntary a confession must be the product of a rational intellect and a free will).

In determining voluntariness, “all the circumstances of the interrogation” must be evaluated. *Mincey v. Ariona*, 437 U.S. 385, 401, 98 S. Ct. 2408, 2416, 47 L. Ed. 2d 290 (1978); *State v. Rupe*, 101 Wn.2d at 679; *State v. Wolfer*, 39 Wn. App. 287, 290, 693 P.2d 154 (1984). The mere fact that *Miranda* warnings were read to the suspect does not prove that a subsequent confession was voluntary. *State v. Prater*, 77 Wn.2d 526, 463 P.2d 640 (1970). Likewise, the mere fact that a suspect signed a rights form does not prove a subsequent confession voluntary. *Miranda v. Arizona*, 384 U.S. at 492. Rather, the “totality of the circumstances” must be considered.

The totality of the circumstances test requires consideration of all pertinent factors. The common thread in every case considering the voluntariness of confessions is the goal of ensuring that the “engine of the criminal law is not be use to overreach individuals who stand helpless against it.” *Culcombe v. Connecticut*, 367 U.S. at 581. In each case, the prevailing concern is to guard against misuse of criminal investigatory power to obtain confessions from those unable to exercise their fundamental rights to silence and counsel either because of ignorance or because of other acts by state

against which effectively overbear the will to exercise those rights.

Simple recitation of *Miranda* warnings is not sufficient to guarantee a subsequent knowing and intelligent waiver of constitutional rights. Rather there must be an effective appraisal of the constitutional rights, taking into account the suspect's capacity for understanding. *Miranda v. Arizona*, 384 U.S. at 467 (accused must be adequately and effectively apprised of his rights). Courts uniformly require that the totality of the circumstances test be applied in light of the special circumstances and vulnerabilities of the particular defendant. *Vance v. Bordenkercher*, 692 F.2d 978, 982-986 (4th Cir. 1982) (Ervin, J., dissenting) (when the defendant is developmentally disabled without benefit of counsel, the police must take special precautions to ensure that any waiver is voluntary);

Applying the totality of the circumstances test, taking into account Mr. Couch's accident,⁴ his confession was not voluntary and should have been suppressed.

c. **The Error in Admitting Mr. Couch's Statements Requires Reversal of His Conviction.**

The erroneous admission of the Appellant's confession in this case

⁴ Mr. Couch also testified at trial that he was given morphine intravenously following the accident. RP at 133. Mr. Couch did not testify at the suppression hearing and this testimony was not considered by the court. Deputy Loughheed testified to the contrary, stating that she

was not harmless beyond a reasonable doubt. The erroneous admission of Appellant's confession cannot be harmless. *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988). In *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 1263, 113 L. Ed. 2d 302 (1991), the Supreme Court held that admission of an involuntary confession is subject to "harmless error" analysis. In *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986), the Washington Supreme Court adopted the "overwhelming untainted evidence" standard in harmless error analysis. In order to determine whether the admission of Mr. Couch's statement in the instant case constituted harmless error, this Court must look only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilt.

3. **A CONVICTION FOR VEHICULAR ASSAULT PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE ELEMENTS OF THE OFFENSE MUST BE REVERSED AND DISMISSED.**

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C Torcia, WHARTON ON CRIMINAL PROCEDURE § 238, p. 69 (13 3d. 1990). In

learned from the aid staff that he was not given medication following the crash. ...

Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charge in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. I, § 22 (amend. 10); CrR 2.1(b); *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information “will be more liberally construed in favor of validity....” *Kjorsvik*, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

- (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, “state the acts

constituting the offense in ordinary and concise language....” *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question “is whether the words would reasonably appraise an accused of the elements of the crime charged.” *Kjorsvik*, 117 Wn.2d 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

RCW 46.61.522 provides that a person is guilty of vehicular assault if he or she operates or drives any vehicle:

- (a) In a reckless manner and causes substantial bodily harm to another; or
- (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or
- (c) With disregard for the safety of others and causes substantial bodily harm to another.

To constitute vehicular assault, there must be a causal connection between the injury to a person and the criminal conduct of the defendant so that the act done was a cause of the resulting substantial bodily harm. *See State v. Neher*, 112 Wn.2d 347, 352, 771 P.2d 330 (1989).

Mr. Couch was charged in the information as follows:

That the said defendant, Anthony L. Couch, in Grays Harbor County, Washington, on or about November 13, 2005, did operate or drive a vehicle (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or (b) while under the influence of/or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of/or affected by intoxicating liquor and any drug, and did cause substantial bodily harm to another, *to wit*: Shari K. Helberg.

CP at 1. Appendix C-1.

This information is upside down because it does not allege the causal connection between the alleged criminal conduct on the part of Mr. Couch and the injury to another person, as set forth in RCW 46.61.522. (“In a reckless manner **and** causes substantial bodily harm to another;” RCW 46.61.522(1)(a) (emphasis added); “While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, **and** causes substantial bodily harm to another;” RCW 46.61.522(1)(b) (emphasis added); “With disregard for the safety of others **and** causes substantial bodily harm to another” RCW 46.61.522(1)(c) (emphasis added). The language in the charging document does not reflect the conduct-and-caused-substantial-bodily-harm structure of the verbiage of RCW 46.61.522. Instead, the information alleges only that Mr. Couch operated or drive a vehicle in the proscribed prohibited manner, not that he drove in the prohibited manner and thereby caused the bodily injury.

The information is therefore defective, and the conviction obtained on the charge of vehicular assault must be reversed and the charge dismissed. *State v. Kitchen*, 61 Wn. App. 911, 812 P.2d 888 (1991). Mr. Couch need not show prejudice, since *Kjorsvik* calls for a review of prejudice only if the “liberal interpretation” upholds the validity of the information. See *Kjorsvik*, 117 Wn.2d at 105-06.

4. **MR. COUCH’S VEHICULAR ASSAULT
CONVICTION WAS BASED ON
INSUFFICIENT EVIDENCE.**

In a criminal prosecution, due process requires the state to prove every element of the charged crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496 at 502, 120 P.3d 559 (2005), citing *State v. Teal*, 152 Wn.2d 333, 96 P.3d 974 (2004) and *In re Winship*, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Because this is a constitutional requirement, a challenge to the sufficiency of the evidence may be raised for the first time on appeal. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements beyond a reasonable doubt. A reviewing court draws all reasonable inferences in favor of the state. *State v. G.S.*, 104 Wn. App. 643 at 651, 17 P.3d 1221 (2001). If a reviewing court finds insufficient evidence to prove an

element of a crime, reversal is required; retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy.

Smith, supra, at 504-505.

a. **There was no evidence that Mr. Couch's blood sample was obtained within two hours of the accident.**

Vehicular assault requires proof that the defendant operated a motor vehicle “[w]hile under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.501...” One means of proving intoxication involves showing that “the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person’s breath or blood made under RCW 46.61.506.” RCW 46.41.502(1)(a).

In this case, there was no conclusive proof that the blood sample was taken within two hours of the accident. Mr. Convert testified that he heard a loud bang outside his house at “around three a.m.” RP at 2. Deputy Iverson was called to the scene of the accident at approximately 3:30 a.m. RP at 12. Aid personnel were already at the scene when deputy Iverson arrived. RP at 14. The blood draw occurred at 5:05 a.m. RP at 65.

Taking this evidence in a light most favorable to the prosecution, this testimony establishes a potential window of time greater than two hours during which the blood sample could have been taken; hence, the state did

not prove beyond a reasonable doubt that Mr. Couch's alcohol concentration was greater than .08 within two hours after driving. In other words, if the accident occurred at 3:00 a.m., the sample was taken five minutes outside the permissible window of time. If, on the other hand, it occurred at 3:05 a.m. or later, the State complied with the statute. On the other hand, if it occurred prior to 3:05 a.m., the State did not meet the required time frame. The precise time of the accident is not contained in the record.

Because of this, the evidence was insufficient to sustain Mr. Couch's conviction. It is impossible to determine whether the jury's general verdicts were based on a determination that Mr. Couch was "affected by" alcohol, or on a belief that his blood alcohol was greater than .08 within two hours of driving. Because of this, the conviction must be reversed. Furthermore, since the evidence was insufficient to establish that Mr. Couch had an alcohol concentration of .08 or higher within two hours of driving, he may not be retried on that theory. *See, e.g., State v. Fernandez*, 89 Wn. App. 292 at 300, 948 P.2d 872 (1997); *State v. Stephenson*, 89 Wn. App. 217 at 226, 948 P.2d 1321 (1997).

5. **THE TRIAL COURT ERRED IN ADMITTING RESULTS OF THE BLOOD TEST, ABSENT EVIDENCE THAT THE TEST CONFORMED WITH THE CONTROLLING REGULATIONS.**

a. **The State was required to prove the blood analysis complied with methods approved by the State toxicologist.**

In order to prove Mr. Couch committed vehicular assault, the State was required to prove he was under the influence of intoxicating liquor. RCW 46.61.522(1)(b). The State can meet such a burden of proof with evidence that a person's blood alcohol level was at least 0.08 within two hours after the incident or by other evidence tending to show the person was under the influence of alcohol. RCW 46.61.502; *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 93 P.3d 141 (2004).

Blood tests are admissible as evidence of intoxication only if they meet the requirements of chapter 46.61 RCW. RCW 46.61.1506(3); *Clark-Munoz*, 152 Wn.2d at 48-49 (holding blood and breath evidence inadmissible where State fails to prove strict compliance with administrative code). "Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 *shall have been performed according to methods approved by the state toxicologist.*" RCW 46.61.503(3) (emphasis added); *see also Clark-Munoz*, 152 Wn.2d at 48-50.

The state toxicologist promulgated WAC 448-14 et seq. to implement the dictates of RCW 46.61.506(3) with regard to blood tests. *State v. Schulze*, 116 Wn.2d 154, 167, 804 P.2d 566 (1991).

The regulations approve the tests only if they meet strict standards for precision, accuracy, and specificity. WAC 448-14-010. The regulations also specify the general manner in which tests must be conducted. WAC 448-14-010. WAC 448-14-020 sets forth analytical and reporting procedures for blood tests, and standards for sample containers and preservation. WAC 448-14-030 sets forth qualifications for blood analysis.

Schulze, 116 Wn.2d at 167.

Compliance with the provisions of WAC 448-14 *et seq* is mandatory, and the State must demonstrate compliance before any evidence of blood tests can be admitted. *State v. Garrett*, 80 Wn. App. 651, 654, 910 P.2d 552 (1996); *State v. Bosio*, 107 Wn. App. 462, 467, 27 P.3d 636 (2001).

b. The State failed to prove the blood sample was preserved with an enzyme poison sufficient in amount to stabilize the alcohol concentration.

WAC 448-14-020(3) governs the sample container and preservatives used for testing blood samples for alcohol. Subsection (b) provides in relevant part,

Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration.

WAC 448-14-020(3)(b).

In *State v. Bosio*, Division Three of this Court considered the appeal of a woman convicted of vehicular assault. 107 Wn. App. 462, 463 (2001).

Following an automobile accident, Ms. Bosio submitted to a blood test, and the results showed she had a blood alcohol level of .23. *Id.* at 464. On appeal, Ms. Bosio contended the trial court should not have admitted the results of her blood test because there was no evidence establishing, *inter alia*, the use of an enzyme poison or an anticoagulant. *Id.* at 466.

The court found there was sufficient evidence establishing the presence of the anticoagulant. Both the nurse who conducted the blood draw and the trooper who observed the draw testified about powder in the vials, and the blood was not coagulated. *Id.* at 467-68. But the court agreed with Ms. Bosio with regard to the enzyme poison, finding no evidence that the enzyme poison was added to the blood sample. *Id.* at 468. Accordingly, the court reversed the conviction and remanded the case for a new trial. *Id.*

In the case at hand, Beth Howe, a medical technologist employed at Grays Harbor Community Hospital, testified that she drew blood from Mr. Couch the morning of November 13, and put the blood into vials she obtained from Deputy Lougheed. RP at 79-82. She testified that the vials “were in proper condition[,]” that they had anticoagulant in them, and “the seals had not been broken.” RP at 81. Deputy Lougheed testified that she noticed “a small amount of anti-coagulant power” in the vials. RP at 64.

The State offered no proof of compliance with the regulations or even

a proclamation of compliance from the manufacturer. Moreover, the State offered no testimony regarding the presence of enzyme poison.

In the absence of such evidence demonstrating compliance with the enzyme poison requirement, the State failed to make prima facie case that Mr. Couch's blood sample was properly preserved. *Bosio*, 107 Wn. App. at 467; *see also* ER 901 (addressing foundation requirements of evidence). As in *Bosio*, the fact that a vial had an anticoagulant does not establish that it also had a sufficient amount of enzyme poison. 107 Wn. App. 468.

c. **The blood test results should have been excluded.**

Where the State fails to show compliance with the regulations, the evidence of the blood test must be excluded. *See Garrett*, 80 Wn. App. at 653; *Bosio*, 107 Wn. App. at 468; *cf. Clark-Munoz*, 152 Wnn.2d at 48-50. Because the State could not show the blood test complied with the regulations promulgated by the State toxicologist, the blood test evidence should have been suppressed.

6. **THE EVIDENCE WAS INSUFFICIENT TO PROVE, BEYOND A REASONABLE DOUBT, MR. COUCH COMMITTED VEHICULAR ASSAULT.**

a. **The State must prove each element of each crime charged.**

Due process requires the State to prove every element of its case beyond a reasonable doubt.⁵ *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983) (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Generally, a claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). A challenge to the sufficiency of the evidence requires the reviewing court to consider the evidence in the light most favorable to the State and to deny the claim of a rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson*, 443 U.S. at 319).

b. **No rational trier of fact could have found Mr. Couch was under the influence of alcohol.**

To convict Mr. Couch of vehicular assault, the State was required to

⁵ The Fourteenth Amendment to the United States Constitution and Article I, § 3 of the Washington Constitution both guarantee due process of law. The Fourteenth Amendment provides, in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." Similarly, Article 1, § 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

prove Mr. Couch was under the influence of alcohol. RCW 46.61.522(1)(b).

Here, there was simply no admissible evidence suggesting Mr. Couch was under the influence of alcohol. The blood test failed to comply with the regulations and the results of the test should have been suppressed, as argued *supra*. Mr. Couch told Deputy Lougheed that he had “a couple” 16 ounces Busch Light beers after he got off work, and that he went to sleep by 10:00 or 10:30 p.m. RP at 68, 123. He told the officer that he was not affected by alcohol. Deputy Lougheed testified that at the hospital, his speech was “very good.” RP at 69. She noticed “a little slurring of his speech” when he spoke more quickly. RP at 69. She stated that her opinion that his level of impairment was “obvious.” RP at 69. Mr. Covert testified that Mr. Couch did not appear intoxicated. RP at 3.

Without any admissible evidence showing Mr. Couch was intoxicated, the evidence was insufficient to prove Mr. Couch was under the influence of intoxicating liquor.

c. Reversal of the conviction is required.

In the absence of sufficient evidence of each of the elements of the crime charged, a guilty verdict cannot stand and the charges against the defendant must be dismissed. *State v. Hickman*, 135 Wn.2d 97, 103, 954

P.2d 900 (1998). Because there was insufficient admissible evidence that Mr. Couch was under the influence of alcohol, an element necessary to prove vehicular assault as charged, this Court must dismiss the charges.

7. **CUMULATIVE ERROR DENIED MR. COUCH
A FAIR TRIAL.**

The combined effects of error may require a new trial, even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the Appellant a fair trial. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *United States v. Pearson*, 746 F.2d 789, 796 (11th Cir. 1984). In this case, the cumulative effect of the trial court's errors and errors of law enforcement cited *supra* produced an unmistakable series of errors that prejudiced the Appellant and materially affected the outcome of the trial.

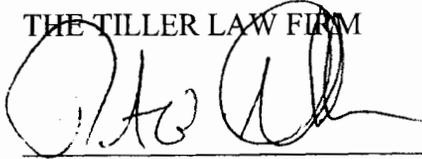
E. CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse his conviction.

DATED: October 31, 2006.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. Tiller', written over a horizontal line.

PETER B. TILLER-WSBA 20835
Of Attorneys for Anthony Couch

A

'06 MAR 27 P1:13

CHERYL BROWN
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 v.)
)
 ANTHONY L. COUCH,)
)
 Defendant.)

NO. 05-1-771-3

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: CrR 3.5 HEARING**

THIS MATTER having come on before the undersigned judge of the above-entitled court on March 27, 2006, the State appearing through Kraig Newman, Grays Harbor County Deputy Prosecuting Attorney, the defendant appearing in person and with his attorney, David Hatch, and the Court having considered the evidence presented, enters the following.

UNDISPUTED FACTS

I.

On November 11, 2005, Deputy Kristi Loughed of the Grays Harbor Sheriff's Department made contact with Anthony Couch at the Grays Harbor Community Hospital. The defendant was being treated at the hospital for injuries caused by a vehicle collision. The defendant was, at the time, strapped to a backboard, wearing a cervical collar, and a portion of his face was covered by a large compression bandage.

II.

The defendant seemed, to the deputy, to be speaking quickly and slurring his words. Because of these observation and information provided by other officers the defendant was

20

1
2
3 placed under arrest for driving under the influence.

4 III.

5 The defendant was read warnings regarding his constitutional rights. He stated that he
6 understood these rights and signed a waiver form.

7 IV.

8 The defendant went on to make statements about the circumstances of the collision.

9
10
11 Based upon the foregoing findings of fact, the court enters the following:

12
13 **CONCLUSIONS OF LAW**

14 Prior to the statements made by the defendant, he was advised of the warnings required
15 by *Arizona v. Miranda*. And, the defendant knowingly and intelligently waived his right to not
16 speak with law enforcement.

17
18
19 DATED: 3/27/09

J. Mark McCauley
JUDGE, Department No. I

20
21 Presented by:

Kraig Newman
Kraig Newman
Deputy Prosecuting Attorney
WSBA# 33270

David Hatch
David Hatch
Attorney for the defendant
WSBA# 21310

B

INSTRUCTION 8.

Analysis of blood or breath samples obtained more than two hours after the alleged driving may used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or higher.

C

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06 JAN -3 P12:35

CHERYL BROWN
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

ANTHONY L. COUCH,
DOB: 01/30/82

Defendant.

No.: 05-1-771-3

INFORMATION

P.A. No.: CR 05-0734

P.R. No.: GHSO 05-11538

I, H. Steward Menefee, Prosecuting Attorney for Grays Harbor County, in the name and by the authority of the State of Washington, by this Information do accuse the defendant(s) of the crime(s) of VEHICULAR ASSAULT, committed as follows:

That the said defendant, Anthony L. Couch, in Grays Harbor County, Washington, on or about November 13, 2005, did operate or drive a vehicle (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or (b) while under the influence of/or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of/or affected by intoxicating liquor and any drug, and did cause substantial bodily harm to another, *to wit*: Shari K. Helberg;

CONTRARY TO RCW 46.61.522(1)(b) and against the peace and dignity of the State of Washington.

DATED this 30 day of December, 2005.

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County

BY: 
KRAIG C. NEWMAN
Deputy Prosecuting Attorney
WSBA #33270

KCN/cat

INFORMATION -1-

H. STEWARD MENEFEE
PROSECUTING ATTORNEY
GRAYS HARBOR COUNTY COURTHOUSE
102 WEST BROADWAY, ROOM 102
MONTESANO, WASHINGTON 98563
(360) 249-3951 FAX 249-6064

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY L. COUCH,

Appellant.

COURT OF APPEALS NO.
34786-5-II

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that the original and one copy of Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies of were mailed to Anthony L. Couch, Appellant, and Kraig C. Newman, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on October 31, 2006, at the Centralia, Washington post office addressed as follows:

Mr. Kraig C. Newman
Deputy Prosecuting Attorney
102 W. Broadway Ave., Room 102
Montesano, WA 98563-3621

Mr. David Ponzoha
Clerk of the Court
WA State Court of Appeals
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

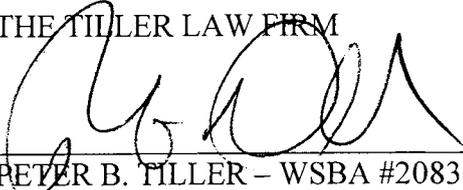
CERTIFICATE OF
MAILING

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE - P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828

Mr. Anthony L. Couch
c/o Grays Harbor County Jail
P.O. Box 630
Montesano, WA 98563

DATED: October 31, 2006.

THE TILLER LAW FIRM



PETER B. TILLER - WSBA #20835
Attorney for Appellant

CERTIFICATE OF
MAILING

2

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE - P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828