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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY *[Signature]*
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COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

NO. 349*40-0-II

STATE OF WASHINGTON

Respondent.

vs.

William Barge

Appellant.

Lewis County Superior Court Cause No. 05-1-00859-2
Honorable Judge Nelson E. Hunt

STATE'S RESPONSE BRIEF

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pm 12-15-06

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I. STATEMENT OF THE CASE

Appellant's version of the facts is adequate for purposes of this appeal.

II. ARGUMENT

A. AILURE TO HOLD A 3.5 HEARING IN THIS BENCH TRIAL IS NOT FATAL TO THIS CASE BECAUSE THE STATEMENTS WERE VOLUNTARY AND THERE IS SUFFICIENT EVIDENCE INDEPENDENT OF THE DEFENDANT'S STATEMENTS TO SUPPORT THE HIT AND RUN CONVICTION.

Appellant claims that the trial court erred when it failed to hold a separate 3.5 hearing on the admissibility of the Defendant's statements to police. The State disagrees, because this was a bench trial and there was no objection as to the voluntariness of the defendant's statements, and because even without the defendant's statements there is sufficient evidence to support the conviction for hit and run.

Failure to hold a 3.5 hearing to determine if a defendant's statement sought to be introduced into evidence was freely given will not render the statement inadmissible where the record shows no issue concerning the statement's voluntariness. State v. Kidd, 36 Wn.App. 503, 674 P.3d 674(1983); State v. Bebb, 44 Wn.App. 803, 723 P.2d 512 (1986), aff'd, 108 Wn.2d 515, 740 P.2d 829 (1987); State v. Negrete, 72 Wn.App. 62, 863 P.2d 137 (1993) rev.

denied 123 Wn.2d 1030, 877 P.2d 695 (1984) (focus of a 3.5 hearing is on the voluntariness of the statements, not on its contents or the culpability of the accused). Failure to hold a 3.5 hearing is subject to a harmless error analysis. State v. Williams, 34 Wn.App. 662, 673-674, 663 P.2d 1368 (1983) rev'd on other grounds, 102 Wn.2d 733, 689 P.2d 1065 (1984).

Furthermore, "[i]n bench proceedings, because a trial judge is presumed to know the rules of evidence and to be capable of disregarding inadmissible evidence, we encourage the liberal admission of evidence." State v. Chavez, ___ Wn.App. ___, 142 P.3d 1110, 1116 (2006), citing State v. Bell, 59 Wn.2d 338, 365, 368 P.2d 177 (1962); see also State v. Melton, 63 Wn.App. 63, 68, 817 P.2d 413 (1991); Harris v. Rivera, 454 U.S. 339, 346, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981) ("[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.") And, "[w]here a case is heard by a judge without a jury, a new trial should not be granted for error in the admission of evidence, if there remains substantial admissible evidence to support the findings." Id. citing State v. Ryan, 48 Wn.2d 304, 308, 293 P.3d 399 (1956)(other citations omitted); State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002) ("appellate

court will not reverse a judgment in a non-jury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment") (emphasis added).

In the present case, the following exchange occurred on the record at the bench trial regarding statements made by the

Defendant:

PROSECUTOR: Did you advise the defendant of his Miranda warnings?

TROOPER: I did. I had made a decision to --

DEFENSE ATTY: I'm gonna object. I don't know why counsel wants to ask about statements. It's my understanding he invoked his rights. Why are we pursuing this line of questioning?

PROSECUTOR: The defendant did made statements to the trooper.

THE COURT: You mean there's a dispute as to whether statements were actually made? Is that what I'm hearing? Well, let's continue the--I'll allow you to continue on with the questions.

* * *

PROSECUTOR: After you read the defendant his Miranda warnings, did he *agree to speak to you?* [emphasis added]

TROOPER: *Yes, he did.* [emphasis added]

PROSECUTOR: What statements did he give you?

TROOPER: Well, we were actually waiting at the jail for a DRE, a Drug Recognition Expert, to respond, and I asked him he would like to talk to me about the collision, which *he said he would*. I asked him if he could tell me what happened, and he stated that he was attempting to lose the cop and that he was traveling west on Harrison--I believe he stated in the right lane--when he decided to turn the car around, and he said that when he pulled up the emergency brake the car spun around but it stopped instead of doing a full spin as he intended, and he said he looked up to his left and saw the patrol car coming and it swerved and hit him in the driver's door.

PROSECUTOR: Did he say anything else about after they struck?

TROOPER: Yes, he did. He said that he continued and went through the parking lot of the Pizza Hut, not knowing that it wasn't a thoroughfare.

PROSECUTOR: Okay. And did he say why he stopped?

TROOPER: He didn't have anywhere to go.

PROSECUTOR: But he --

TROOPER: I believe his exact words were there is a lake.

2 RP 69, 70 (emphasis added).

This was the only discussion by defense counsel in this case regarding the subject of the defendant's statements. There was no further objection by the defendant as to the failure to hold a hearing regarding these statements and, most importantly, there was no claim by the defendant that these statements were not "voluntary."

Id. State v. Kidd, 36 Wn.App. 503, 674 P.3d 674 (1983) (failure to hold 3.5 hearing does not render statements inadmissible where the record shows no issue concerning the statements' voluntariness). Because the record in this case shows that there was no issue as to the voluntariness of the defendant's statements, it was not error to consider them.

However, even if this Court finds that the statements were not admissible, the conviction for hit and run should be upheld because there was sufficient other competent evidence submitted by the State to support the hit and run conviction without the defendant's statements.

Three law enforcement officers testified at trial as to the facts supporting the hit and run charge. The following testimony by these officers is relevant to this hit and run charge:

OFFICER CARROLL: When [the defendant] came back, he went into this turn lane for people going in the opposite direction again around the cement jersey or cement --I can't think of what they're called . . . And then at this point in time the vehicle made a really hard turn to the left and stopped right there, and then Trooper Lowrey's patrol car hit the defendant's vehicle here. Both vehicles were at a stop, and then all of a sudden the vehicle left again, went to the Pizza Hut parking lot, went around the building, went up over the cement curbing here. . . .There's no way around. . . . The vehicle was half over the barrier and going towards the downhill side of the lake.

2 RP 13, 14.

OFFICER REICHERT: I was --the distance was probably three, three and a half blocks. I saw the headlights swerving then the car go sideways in the road, the cars slow or come to a stop in the roadway, then they took off again.

* * *

PROSECUTOR: And did you eventually come upon the vehicles?

OFFICER REICHERT: Yes.

PROSECUTOR: And where were they located at that point?

OFFICER REICHERT: In the Pizza Hut parking lot . . .It appeared that the vehicle [the defendant's] attempted to drive around the building and then was stopped by brush as there's no driveway that goes around that particular restaurant.

2 RP 28, 29.

OFFICER LOWREY: [S]uddenly the car [defendant's] jerked, real suddenly, back to the left like a fast motion. I was directly behind the vehicle from the time it exited all the way here, and when it made its sudden U-turn here I hit it broadside.

PROSECUTOR: Did you have any opportunity where you could have avoided the suspect vehicle?

OFFICER LOWREY: At that point, no. I mean, he cut to the right and immediately jerked it to the left. . . . But no, there was no way.

PROSECUTOR: [S]o both vehicles came to a complete stop for - -

OFFICER LOWREY: So much so that I even advised radio that we were involved in a traffic collision and will be stopped at I think 700-block or 800-block of Harrison Avenue.

PROSECUTOR: And did the pursuit actually stop there?

OFFICER LOWREY: No, it did not.

PROSECUTOR: What happened next?

OFFICER LOWREY: The defendant hit the gas, pulled back like he was heading. . . . Heading back in toward town. . . and then it suddenly cut into the parking lot of Pizza Hut. . . .It cut back in, went right here and then went back behind. There's a little bit of a driveway area, maybe that much back behind where it looks like it goes around behind Pizza Hut. He went right back there and stopped right at the edge or on the corner there and I pinned him in so it wouldn't go any farther, couldn't reverse out.

PROSECUTOR: Now was he slowly moving into the - -

OFFICER LOWREY: Oh, no no. It was an active pursuit again * * * [lights and sirens were still going on, everything. At the time there was nobody on the road except other patrol cars. He could have stopped right there in the middle of the road without any problems * * * he could have stopped there safely at that time of the morning with no traffic. . . he could have pulled to the curb or any of the parking spots here or whatever but instead [he] went all the way back behind Pizza Hut.

PROSECUTOR: And at an accelerated speed?

OFFICER LOWREY: Yes, yes.

2 RP 39-41. Officer Lowrey also identified the defendant William Barge as the suspect involved in this accident on the date in

question. 2 RP 41. Additionally, Officer Lowrey testified that he [Lowrey] had been injured in the collision. 2 RP 42.

This testimony by the officers is sufficient in itself to support the charge of hit and run without considering the defendant's statements. These three officers testified that the defendant William Barge's vehicle was involved in a collision with Officer Lowrey's patrol car and that the defendant failed to stop after this collision and that the defendant in fact immediately continued fleeing from the scene of the accident before he abruptly was forced stop because there was nowhere else he could go. 2 RP 13.14,28,29, 39-41. Thus, the State did not even need the Defendant's statements to prove its case with regard to this crime. Because the evidence was sufficient to prove the hit and run charge even without the Defendant's statements, this Court should hold that failure to hold a 3.5 hearing, if error, was harmless error and the Appellant's conviction for hit and run should be affirmed.

B. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE DEFENDANT'S CONVICTION OF FELONY HIT AND RUN.

Appellant also makes a sufficiency of the evidence claim as to the hit and run conviction. This argument is also without merit.

An appellate court reviews a challenge to the sufficiency of the evidence by determining whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Perebeynos, 121 Wn.App. 189, 192-194, 87 P.3d 1216 (2004), citing State v. Green, 94 Wn.2d 216, 222, 616 P.2d 628 (1980). After a bench trial, the reviewing court determines "whether substantial evidence supports the trial court's findings of fact and . . . whether the findings support the conclusions of law." State v. Stevenson, 128 Wn.App. 179, 193, 114 P.3d 699 (2005) (other citations omitted).

Appellant argues that the hit and run statute does not apply to a person who is hit by a pursuing police officer. This is not correct, and Appellant cites no relevant authority for this argument. Fault is not relevant to the crime of hit and run: "hit-and-run driving is leaving the scene of an accident and is totally independent of any fault in causing the accident." State v. Lutman, 26 Wn.App. 766, 768, 614 P.2d 224 (1980)(emphasis added); State v. Bourne 90 Wash.App. 963, 973, 954 P.2d 366 (1998) (hit and run does not require that the defendant cause the injury); State v. Perebeynos, 121 Wn.App. 189, 192-194, 87 P.3d 1216 (2004) ("causation is not

an element of felony hit and run"). Accordingly, this portion of Appellant's argument is without merit.

Appellant also argues that he was "incapacitated" by the accident and thus could not comply with the hit and run statute. This claim is not supported by the record. At the time the defendant in this case committed the core elements of this crime-- the "hit and run" elements (when his car was involved in the accident with the patrol car [hit] and when he immediately fled away from the accident ["run"])--the defendant's actions obviously show that he was not "physically incapacitated" at the time the accident occurred. See State v. Komoto, 40 Wn.App. 200, 697 P.2d 10925, rev. den. cert. den. 106 S.Ct. 572, 474 U.S. 1021, 88 L.Ed.2d 556 (1985) (one of the essential elements of hit and run is that the "driver of the vehicle did not stop immediately and remain at the scene of the accident") (emphasis added). If the defendant in the present case had been truly "incapacitated" at the time of the accident, he would not have been able to leave the scene of the accident (and we wouldn't be here). But that is not what happened. The collision between Officer Lowrey's and the defendant's vehicle occurred but then, rather than remaining at the scene after this collision, the defendant sped away. 2 RP 13,14, 28, 39,40. Thus,

Appellant's argument that he was so "incapacitated" that he could not comply with the hit and run statute simply flies in the face of the evidence presented. Accordingly, this argument should be disregarded.

Appellant further argues that without his statements to the police there was insufficient evidence, and that because Officer Lowrey, "within seconds of the collision, pulled Barge from his car and placed him under arrest," Barge did not have to return to the scene and offer paperwork and medical assistance. Brief of Appellant at 14. This second argument is misleading and is simply not what happened here. In fact, Officer Lowrey did not pull the defendant out of his vehicle until after the defendant had already fled away from the scene of the accident without stopping to give information or render aid. 2 RP 13,14, 28, 39,40. 41.

As to the issue of sufficiency of the evidence without the defendant's statements, the State previously addressed this but again the State believes the record shows more than enough remaining evidence to prove the hit and run charge-- independent of the defendant's statements. To reiterate, the State presented testimony by three police officers who witnessed the fact of the collision and who saw the defendant flee the scene of that accident

without stopping to give information or render aid as required by the hit and run statute. Id. , RCW 46.52.020. Officer Lowrey also testified that he was injured in the accident. 2RP 42. There was sufficient evidence independent of the defendant's statements to uphold the hit and run conviction.

Furthermore, Appellant's argument that Officer Lowrey's actions "obviated" the need for the defendant to comply with the hit and run statute is contrary to the evidence presented. Accordingly, these arguments are without merit and the conviction should be affirmed.

III. CONCLUSION

Even if this Court decides it was error to admit the defendant's statements without holding a 3.5 hearing in this bench trial, the State presented more than sufficient evidence independent of those statements to support the elements of the crime of hit and run, and the conviction should be upheld. All other arguments made by the Appellant are without merit, and his convictions should be affirmed.

RESPECTFULLY SUBMITTED this 15 day of December, 2006.

JEREMY RANDOLPH
Lewis County Prosecutor

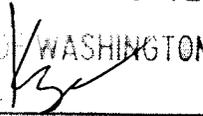
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BY 
DEPUTY

STATE OF WASHINGTON,) NO. 34940-O-II
Respondent,)
vs.)
WILLIAM BARGE,)
Appellant.) DECLARATION OF
MAILING

I, LORI SMITH, Deputy Prosecutor for Lewis County,
Washington, declare under penalty of perjury of the laws of the
State of Washington that the following is true and correct: On this
15th day of December, 2006, I mailed a copy of the State's
Response Brief by depositing same in the United States Mail,
postage pre-paid, to attorney for Appellant at the name and
address indicated below:

Jodi Backlund, Attorney at Law
Backlund & Mistry
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DATED this 15 day of December, 2006, at Chehalis,
Washington.


Lori Smith, Deputy Prosecutor

Declaration of
Mailing

