

No. 39847-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

WOODROW F. DILLON,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon

---

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE ..... 3

D. ARGUMENT ..... 5

    1.    MR. DILLON'S FIFTH AMENDMENT RIGHTS  
          WERE VIOLATED WHEN THE POLICE  
          INTERROGATED HIM PRIOR TO ADVISING  
          HIM OF HIS *MIRANDA* RIGHTS ..... 5

        a. *Miranda* warnings are required prior to custodial  
          interrogation..... 5

        b. Mr. Dillon was in custody at the time the trooper  
          asked him if he had been drinking triggering the  
          requirement for *Miranda* warnings. .... 7

        c. The court erred in failing to enter written findings of  
          fact and conclusions of law as required by CrR 3.5. 11

    2.    THE STATE FAILED TO PROVE THAT MR.  
          DILLON WAS GUILTY OF VEHICULAR  
          ASSAULT ..... 14

        a. The State bears the burden of proving each of the  
          essential elements of the charged offense beyond a  
          reasonable doubt. .... 14

        b. The State failed to prove Mr. Dillon drove with a  
          blood alcohol level of 0.08% *within two hours of*  
          *driving*. .... 15

        c. The remedy for failing to prove all of the elements  
          beyond a reasonable doubt is reversal with  
          instructions to dismiss..... 17

E. CONCLUSION..... 18

## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V .....	1, 5
U.S. Const. amend. XIV .....	1, 2, 5, 14

### FEDERAL CASES

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) .....	14
<i>Berkemer v. McCarty</i> , 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) .....	6, 7, 10
<i>Burks v. United States</i> , 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) .....	18
<i>California v. Beheler</i> , 463 U.S. 1121, 103 S.Ct. 3517, 3520, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) .....	6
<i>Chavez v. Martinez</i> , 538 U.S. 760, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003) .....	11
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	14
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) .....	14
<i>Malloy v. Hogan</i> , 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) .....	5
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966) .....	5
<i>United States v. Patane</i> , 542 U.S. 630, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004) .....	5, 11

WASHINGTON CASES

*City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 44, 93 P.3d 141  
(2004) ..... 15

*State v. Broadaway*, 133 Wn.2d 118, 942 P.2d 363 (1997) ..... 6

*State v. Brown*, 145 Wn.App. 62, 184 P.3d 1284 (2008)..... 15

*State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996) ..... 18

*State v. D.R.*, 84 Wn.App. 832, 930 P.2d 350 (1997)..... 6

*State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980) ..... 12

*State v. Ferguson*, 76 Wn.App. 560, 886 P.2d 1164 (1995)..... 8, 9

*State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) ..... 14

*State v. Harris*, 106 Wn.2d 784, 725 P.2d 975 (1986)..... 6

*State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998)..... 12, 13

*State v. Krall*, 125 Wn.2d 146, 881 P.2d 1040 (1994) ..... 12

*State v. Moore*, 161 Wn.2d 880, 169 P.3d 469 (2007) ..... 8

*State v. Post*, 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599  
(1992) ..... 5

*State v. Potter*, 156 Wn.2d 835, 132 P.3d 1089 (2006)..... 8

*State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992) ..... 14

*State v. Walton*, 67 Wn.App 127, 834 P.2d 624 (1992)..... 10

STATUTES

RCW 46.61.502..... 15

RCW 46.61.522..... 15

RULES

CrR 3.5.....passim

CrR 6.1..... 12

## A. ASSIGNMENTS OF ERROR

1. Mr. Dillon's Fifth and Fourteenth Amendment rights to silence and due process were violated when the court admitted at trial his statements to the police in the absence of *Miranda* warnings.

2. There was insufficient evidence presented to support the jury's verdict that Mr. Dillon was guilty of vehicular assault.

3. The trial court erred in failing to enter the required written findings of fact and conclusions of law following a CrR 3.5 hearing.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Fifth and Fourteenth Amendments to the United States Constitution forbid admission of defendant's statement which resulted from custodial interrogation absent evidence the defendant was provided with *Miranda*<sup>1</sup> warnings. A person is in custody for the purposes of *Miranda* where a reasonable person in the defendant's position would have believed he was in custody to the degree associated with formal arrest. When the trooper initially contacted Mr. Dillon, Mr. Dillon was not free to leave. Further, on this initial contact, the trooper observed that Mr. Dillon exhibited signs of being under the influence of alcohol. The trooper's

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966).

suspicious were confirmed by Mr. Dillon's answers to the trooper's incriminating questions which came before *Miranda* warnings were given. Must these unwarned statements which were the product of custodial interrogation be suppressed under *Miranda*?

2. The Fourteenth Amendment Due Process Clause requires the State to prove every essential element of the charged offense beyond a reasonable doubt. As charged here, the State was required to prove that Mr. Dillon had a blood alcohol level of at least .08 within two hours of driving. The evidence here failed to prove that the blood sample was taken from Mr. Dillon within two hours of his driving, thus failing to prove he had a blood alcohol level of at least .08 within two hours of driving. Is Mr. Dillon entitled to reversal of his conviction with instructions to dismiss?

3. CrR 3.5 requires the court to enter written findings of fact and conclusions of law following a hearing regarding the admissibility of the defendant's statements. Here, the court held the required hearing but has never entered the necessary written findings and conclusions. Must this Court remand the matter for entry of the required CrR 3.5 written findings and conclusions?

### C. STATEMENT OF THE CASE

On April 13, 2007, at approximately 9 p.m., Washington State Trooper Christopher Magallon was dispatched to a report of a motor vehicle collision on Highway 106 at milepost 6 in Mason County. RP 307-08, 311. On arriving, the trooper saw a Dodge pick-up truck facing westbound in the westbound lanes and a Ford Focus in the eastbound lane, halfway in a ditch and halfway in the lane. RP 308. The trooper contacted Mr. Dillon, who was standing beside the Ford next to the open driver's door. RP 309. Mr. Dillon had some blood around his mouth and on his beard. *Id.*

In response to the trooper's questions, Mr. Dillon acknowledged he was the driver of the Ford, and he admitted he did not have a driver's license but produced an identification card for the trooper. RP 309-10. Asked about what had happened, Mr. Dillon indicated he came around the corner and hit the pick-up. *Id.* The trooper noted during his initial encounter with Mr. Dillon that Mr. Dillon's eyes were bloodshot and watery, he had a strong odor of alcohol on his breath, and his speech was slow and slurred. RP 310. The trooper asked Mr. Dillon if he had been drinking, and Mr. Dillon admitted he had approximately 30 minutes before the accident. RP 310-11.

The trooper determined that the driver of the pick-up had significant injuries, so the trooper decided to arrest Mr. Dillon for vehicular assault. RP 312. The trooper formally arrested Mr. Dillon in the rear of an ambulance where he was being treated for his injuries. RP 312-13. Mr. Dillon was then advised of his rights under *Miranda* at that time. RP 313.

Mr. Dillon was taken to Mason General Hospital for treatment where blood samples were taken. RP 315. The samples were logged into the Washington State Patrol evidence system at 2:10 a.m., but the phlebotomist who took the samples could not remember when the samples were taken from Mr. Dillon or anything else about the blood draw. RP 217. A subsequent test of Mr. Dillon's blood by the Washington State Patrol crime laboratory revealed a blood alcohol level of .19. RP 359.

Mr. Dillon was subsequently charged with vehicular assault. CP 61. Following a jury trial, Mr. Dillon was convicted as charged. CP 32.

D. ARGUMENT

1. MR. DILLON'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE POLICE INTERROGATED HIM PRIOR TO ADVISING HIM OF HIS *MIRANDA* RIGHTS

a. *Miranda* warnings are required prior to custodial interrogation. Under the Fifth Amendment of the United States Constitution, an individual has the right to be free from compelled self-incrimination while in police custody. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In *Malloy v. Hogan*, the United States Supreme Court held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States. 378 U.S. 1, 6-11, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

Where there has been a failure to give *Miranda* warnings, the State violates a defendant's constitutional rights if it seeks to introduce unwarned statements at trial. *United States v. Patane*, 542 U.S. 630, 641, 124 S.Ct. 2620, 159 L.Ed.2d 667 (2004). *Miranda* warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent. *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992).

Under *Berkemer v. McCarty*, *Miranda* safeguards apply “as soon as a suspect's freedom of action is curtailed to a ‘degree associated with formal arrest.’ ” 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983). A person is in custody only after a formal arrest or if freedom of action or movement is curtailed to a degree associated with formal arrest. *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). In determining whether an individual was in custody, the review is an objective one; i.e., whether a reasonable person in the individual's position would believe he was in police custody to a degree associated with formal arrest. *Berkemer*, 468 U.S. at 440; *State v. D.R.*, 84 Wn.App. 832, 836, 930 P.2d 350 (1997).

Whether the interrogation was custodial and thus required *Miranda* warnings is reviewed by this Court *de novo*. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

b. Mr. Dillon was in custody at the time the trooper asked him if he had been drinking triggering the requirement for *Miranda* warnings. Here, upon arrival at the scene of the collision and prior to any questioning, the trooper observed Mr. Dillon leaning against his car, his eyes were bloodshot and watery, his speech slurred, and his breath had a strong odor of alcohol. RP 58.<sup>2</sup> The trooper also observed Mr. Dillon's car to be on the wrong side of the roadway and the two vehicles had evidence of a head-on collision. RP 57. The trooper testified that at this point, Mr. Dillon was not free to leave. Besides questioning Mr. Dillon, the trooper did not obtain any additional evidence of what had occurred prior to placing Mr. Dillon under arrest in the rear of the ambulance. RP 61-63.

Under the facts from this record, a reasonable person would have believed he was under arrest at the time the trooper first started his questioning. *Berkemer*, 468 U.S. at 440. Despite the trooper's protestations to the contrary, given the evidence the trooper observed in his initial contact with Mr. Dillon, the trooper certainly intended to arrest Mr. Dillon for vehicular assault. The

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<sup>2</sup> The facts as stated here are cited from the testimony of Trooper Magallon at the CrR 3.5 hearing.

trooper had all of the probable cause he needed for an arrest at this first contact. The fact the trooper did not formally arrest Mr. Dillon until Mr. Dillon was in the rear of the ambulance is of no moment. Everything the trooper needed, he had without having to question Mr. Dillon<sup>3</sup>

The facts here distinguish Mr. Dillon's case from this Court's oft-cited decision in *State v. Ferguson*, 76 Wn.App. 560, 886 P.2d 1164 (1995). In *Ferguson*, an off-duty police officer came upon an automobile collision. Two victims were inside the two vehicles while a third person was seated on a grassy area near the intersection where the accident occurred. One of the victims later died. Under questioning, Mr. Ferguson admitted being the driver of one of the cars, admitted having been drinking and admitted he had two mixed drinks. Mr. Ferguson was transported to the hospital for treatment for the injuries he suffered. A blood sample was taken from Mr. Ferguson, which indicated he had a blood alcohol level of 0.19. He was subsequently charged with vehicular homicide.

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<sup>3</sup> A person is guilty of vehicular assault if, while driving a vehicle under the influence of drugs or alcohol, he or she causes substantial bodily harm to another person. RCW 46.61.522(1)(b).

"Probable cause [to arrest] exists when the arresting officer has 'knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed' at the time of the arrest." *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) (alteration in original), quoting *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

Mr. Ferguson sought suppression of his pre-*Miranda* admissions regarding his drinking because the officers failed to give him the *Miranda* warnings. The trial court denied the motion, finding that Mr. Ferguson was not in custody when the officers questioned him, thus *Miranda* warnings were not required. This Court affirmed, agreeing Mr. Ferguson was not in custody. *Id.* at 586.

Given the scene that the officers came upon, it was unclear to the officers whether Mr. Ferguson was involved in the accident and unclear to them how the accident occurred. Under that scenario it was entirely appropriate for the officers to question Mr. Ferguson to ascertain what had occurred and whether Mr. Ferguson had anything to do with it. In contrast, here it was clear from the trooper's initial observations of the accident scene and Mr. Dillon's condition as the trooper described it, that Mr. Dillon was under the influence of alcohol and was the driver of the car which was on the wrong-side of the road, more than enough for the trooper to conclude Mr. Dillon was involved in the accident and was likely under the influence of alcohol, more than enough to constitute probable cause to arrest Mr. Dillon for vehicular assault.

Further, the trooper testified, and the court found, that when the trooper arrived on the scene and observed Mr. Dillon, Mr. Dillon was not free to leave. RP 66. But, Mr. Dillon was not merely detained for further investigation, he was in custody at the time the trooper questioned him. As a result, the trooper was required to give Mr. Dillon the *Miranda* warnings prior to questioning him at the scene of the accident.

In its oral ruling, the trial court ruled that Mr. Dillon was not free to leave once the trooper arrived on the scene. RP 80. But, despite the trooper's observations of Mr. Dillon when the trooper first contacted him, the trial court found *Miranda* warnings were not required until Mr. Dillon was placed under arrest in the ambulance *after* the trooper's obvious interrogation because the trooper was merely investigating the traffic collision. RP 80-81.

The court's conclusion ignored the fact that the officer's belief or intent regarding whether the person is under arrest is irrelevant. *Berkemer*, 468 U.S. at 442. The only question is whether a reasonable person in the suspect's position would believe he is under arrest. *State v. Walton*, 67 Wn.App 127, 130, 834 P.2d 624 (1992). Thus, the issue is not whether *the trooper* believed Mr. Dillon was in custody but whether a reasonable person

in Mr. Dillon's position would believe he was in custody. Given the fact he was not free to leave, he was interrogated by a police officer regarding his actions during and preceding the traffic collision including questions requiring an incriminating response, it seems clear a reasonable person in Mr. Dillon's position would believe he was in custody.

The remedy for failure to give *Miranda* warnings is the "exclusion of unwarned statements." *Patane*, 542 U.S. at 641-42, citing *Chavez v. Martinez*, 538 U.S. 760, 790, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003). The failure of the trooper to render *Miranda* warnings to Mr. Dillon prior to questioning him requires this Court to excluded his resulting statements.

c. The court erred in failing to enter written findings of fact and conclusions of law as required by CrR 3.5. The trial court held the evidentiary hearing on the admissibility of Mr. Riley's statements on June 30, 2009. At the conclusion, the court found Mr. Dillon's statements voluntary and admissible. RP 80-81. To date written findings of fact and conclusions of law as required by CrR 3.5 have not been entered by the trial court.

CrR 3.5(c) requires:

After the hearing, the court *shall set forth in writing*:  
(1) the undisputed facts; (2) the disputed facts; (3)  
conclusions as to the disputed facts; and (4)  
conclusion as to whether the statement is admissible  
and the reasons therefor[e].

(Emphasis added.) The term “shall” indicates a *mandatory* duty on  
the trial court. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040  
(1994).

The importance of written findings and conclusions has been  
reinforced by the Washington Supreme Court:

A trial court's oral opinion and memorandum opinion are no  
more than oral expressions of the court's informal opinion at  
the time rendered. [citations omitted.] An oral opinion “has  
no final or binding effect unless formally incorporated into the  
findings, conclusions and judgment.”

*State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998), *quoting*  
*State v. Dailey*, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980).

*Head* determined that in adult bench trials where written  
findings and conclusions are not filed, remand for entry of findings  
is the appropriate remedy. *Head*, 136 Wn.2d at 622. But, at the  
hearing on remand, no additional evidence may be taken as the  
findings and conclusions are based solely on the evidence already  
taken. *Head*, 136 Wn.2d at 625.

We hold that the failure to enter written findings of fact  
and conclusions of law as required by CrR 6.1(d)  
requires remand for entry of written findings and

conclusions. An appellate court should not have to comb an oral ruling to determine whether appropriate “findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

*Head*, 136 Wn.2d at 624.

Although *Head* involved failure to enter written findings and conclusions on the issue of the defendant’s guilt, following a bench trial, its rationale is equally applicable here where the court has failed to file written findings following a hearing pursuant to CrR 3.5. Written findings and conclusions facilitate appellate review and enable the appellant to focus on the material issues. *Id.* at 622-23.

Here findings have never been filed. The importance of the lack of findings cannot be understated since the court’s ruling has been challenged and this Court is left with merely an oral record from which to review the trial court’s ruling, which as *Head* noted is not the final order of the court. This Court must remand Mr. Dillon’s matter for the entry of the CrR 3.5 findings, or alternatively, reverse and dismiss Mr. Dillon’s conviction if such findings are not entered.

2. THE STATE FAILED TO PROVE THAT MR. DILLON WAS GUILTY OF VEHICULAR ASSAULT

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In order to obtain a conviction for vehicular assault as charged here, the State was required to prove that Mr. Dillon drove

a vehicle while under the influence of intoxicating liquor as set forth in RCW 46.61.502 and caused substantial bodily harm to Mr. Brown, the driver of the pick-up. RCW 46.61.522(1)(b). To prove driving while under the influence of intoxicating liquor under RCW 46.61.502 as charged here, the State was required to prove Mr. Dillon's blood alcohol level was at least 0.08 *within two hours after driving*. RCW 46.61.502(1)(a); *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 44, 93 P.3d 141 (2004); *State v. Brown*, 145 Wn.App. 62, 68-69, 184 P.3d 1284 (2008).

b. The State failed to prove Mr. Dillon drove with a blood alcohol level of 0.08% *within two hours of driving*. The court instructed the jury that to convict Mr. Dillon of vehicular assault, the State was required to prove beyond a reasonable doubt, among other things, that Mr. Dillon “was under the influence of intoxicating liquor or drugs. . .”

To convict the defendant of the crime of vehicular assault, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about the 13<sup>th</sup> of April 2007, the defendant drove a vehicle;
- (2) That the defendant’s driving proximately caused substantial bodily harm to another person;
- (3) That at the time the defendant *was under the influence of intoxicating liquor or drugs*; and
- (4) That this act occurred in the State of Washington.

CP 47 (Court's Instruction No. 12) (emphasis added). The court further defined "under the influence" as:

A person is under the influence or affected by the use of intoxicating liquor or any drug when he or she has sufficient alcohol in his or her body to have an alcohol concentration of 0.08 or higher *within two hours after driving* as shown by an accurate and reliable analysis of the person's blood, or the person's ability to drive a motor vehicle is lessened in any appreciable degree as a result of intoxicating liquor or any drug.

CP 43 (Court's Instruction No. 8) (emphasis added).

Based upon the court's instructions, the State was required to prove Mr. Dillon had a blood alcohol level of greater than 0.08% within two hours of driving, which could only be proven by a blood draw that occurred within two hours of Mr. Dillon's driving. Here, the State failed to prove the blood draw was taken within two hours of driving, thus failing to prove Mr. Dillon had a blood alcohol level of at least 0.08% within two hours of driving. Alan Bonilla, the phlebotomist who took Mr. Dillon's blood worked from 4 p.m. to 12:30 a.m. on the night of April 13, 2007, but couldn't recall anything about the draw including what time he did it. RP 217. Since there was no evidence presented the blood draw occurred within two hours of Mr. Dillon driving, there simply was no evidence

Mr. Dillon had a blood alcohol level 0.08 or greater within two hours of the collision.

Further, the State did not proceed, nor did the court instruct on, the alternative means of driving while under the influence: the State only proceeded under the *per se* over 0.08% prong. Thus, the State was *required* to prove Mr. Dillon had a blood alcohol level of over 0.08% within two hours of driving.

To compound matters, the jury sent out a note which inquired about this absence of proof:

Does the blood have to be drawn within 2 hrs. [sic] of accident [sic].

CP 33. The court merely referred the jury back to the instructions, which did nothing to answer the jury's question and only compounded the problem. As a consequence, the court's answer seemingly allowed the jury to convict Mr. Dillon on less evidence than necessary to prove beyond a reasonable doubt Mr. Dillon had a blood alcohol level greater than 0.08% within two hours of driving.

c. The remedy for failing to prove all of the elements beyond a reasonable doubt is reversal with instructions to dismiss.

Since there was insufficient evidence to support Mr. Dillon's conviction for vehicular assault, this Court must reverse the

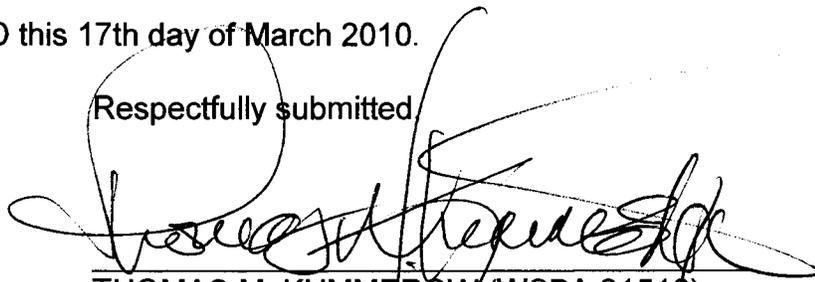
conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated, Woodrow Dillon submits this Court must reverse his conviction for vehicular assault with instructions to dismiss.

DATED this 17th day of March 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends upwards into the 'Respectfully submitted' line.

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