

No. 44512-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

STEVEN K. SMITH, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 12-1-00281-9

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The circumstantial and direct evidence received by the jury at trial was sufficient to sustain the jury's verdict of guilty.
2. The trial court did not err by ordering Smith to submit to a chemical dependency evaluation and to complete recommended follow-up treatment.
3. The trial court erred by imposing a combined total term of community custody and incarceration that is disallowed by RCW 9.94A.701(9).

B. FACTS AND STATEMENT OF THE CASE

The State accepts Smith's summary of facts but also identifies the following additional facts from the record:

When he was contacted by Officer Hinton at the scene of the accident, Smith's eyes were bloodshot and watery. RP 71, 89. Officer Hinton considered the totality of his observations and based upon his training and experience opined that Smith was under the influence. RP 71, 79-80.

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C. ARGUMENT

1. The circumstantial and direct evidence received by the jury at trial was sufficient to sustain the jury's verdict of guilty.

On appeal, Smith argues that there was insufficient evidence for the jury to have found that he was under the influence while driving his vehicle. Brief of Appellant at p. 1, 4. In his assignments of error, Smith asserts that the trial court erred by not taking the charge of felony driving under the influence from the jury for insufficiency of the evidence (Brief of Appellant at p. 1, Assignment of Error No. 1), but Smith provides no citation to the record where he asserts that he made a motion to the trial court on this basis. Instead, in the argument section of his brief Smith argues only that there was insufficient evidence that his ability to drive was lessened to any appreciable degree and that, therefore, the evidence was insufficient to sustain the jury's finding that he was under the influence of alcohol. *Id.* at 4-6.

Smith argues that “[t]here was no evidence that [he] was driving erratically or speeding immediately prior to the accident.” Brief of Appellant at p. 5. But, proof of the crime of driving under the influence does not require proof of bad driving; instead, the driving element is proved if the driver's *ability* to drive is lessened to any appreciable degree

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by the use of alcohol or a drug. RCW 46.61.502; *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). When reviewing a challenge to the sufficiency of the evidence, the reviewing court views the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Drum*, 168 Wn.2d 23, 34–35, 225 P.3d 237 (2010). An appellant challenging the sufficiency of evidence necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Drum*, 168 Wn.2d at 35.

Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). The reviewing court need not be convinced of the

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defendant's guilt beyond a reasonable doubt but need only find that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

In the instant case, the jury received evidence which showed that Smith was the causing driver of a head-on collision and that, when officers arrived to investigate the collision, Smith had an open can of beer which he was drinking at the time of the collision, that he had a flushed face, bloodshot, water eyes, and delayed responses and actions, and that he emanated a medium odor of alcohol as he spoke to the investigating officer. RP 51-52, 63, 66, 68, 71-72, 80, 89, 124-25, 135, 164-65, 167-69. Smith refused field sobriety tests and refused to submit to a breath test after he was arrested for driving under the influence. RP 77, 129-30, 174.

Smith's refusal to take the field sobriety tests is evidence of his consciousness of guilt. *City of Seattle v. Stalsbrotten*, 138 Wn.2d 227, 233-34, 978 P.2d 1059 (1999). Refusal of the breath test, also, is evidence of consciousness of guilt. *State v. Zwicker*, 105 Wn.2d 228, 713 P.2d 1101 (1986).

Neither speeding nor erratic driving are elements of the offense of driving under the influence. RCW 46.61.502. Neither does proof of the

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offense require proof of bad driving. *Id.*; *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995). Instead, the required proof is proof that the defendant's *ability* to drive was lessened to an appreciable degree because of impairment by drugs or alcohol. *Id.* In the instant case, the fact that Smith drove straight into an intersection and collided head-on with a car that was sitting still at a traffic light is strong circumstantial evidence that his ability to drive was impaired. Smith's bad driving, together with the other signs and symptoms exhibited by Smith, such as the odor of alcohol and his bloodshot, watery eyes, and the fact that he refused the field tests and breath test, amount to ample, abundant evidence from which the jury could find, and did find, that Smith was driving under the influence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995).

2. The trial court did not err by ordering Smith to submit to a chemical dependency evaluation and to complete recommended follow-up treatment.

At sentencing, the trial court did not make a specific finding that Smith suffered from a chemical dependency; the checkbox related to the boilerplate finding on the form-order judgment and sentence was

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unchecked. CP 4. However, the jury convicted Smith of the felony offense of driving under the influence. CP 3, 22.

Driving under the influence is a drug-related traffic offense. RCW 9.94A.703(4)(b)(ii). Thus, irrespective of whether the court found that Smith suffered from a chemical dependency, because Smith was convicted of an alcohol-related traffic offense, the court was required to order a chemical dependency evaluation and recommended follow-up treatment as a part of the judgment and sentence. RCW 9.94A.703(4)(b)(i).

3. The trial court erred by imposing a combined total term of community custody and incarceration that is disallowed by RCW 9.94A.701(9).

Felony driving under the influence is a "crime against persons" as defined by RCW 9.94A.411(2)(a). Therefore, under RCW 9.94A.701(3) the court in the instant case was required to sentence Jacob to one year of community custody upon his conviction of felony driving under the influence. RCW 9.94A.701(9), however, requires that when the combined total of incarceration and community custody exceed the statutory maximum for the crime of conviction, the court must shorten or eliminate the term of community custody so that the combined total does not exceed the statutory maximum.

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The statutory maximum sentence for felony driving under the influence is five years. RCW 9A.20.021(1)(c). The trial court in the instant case sentenced Smith to 55.5 months incarceration with the greater of twelve months or the period of any earned early release to be served on community custody. CP 7-8. Notwithstanding the court's notation that the combined total of community custody and incarceration shall not exceed sixty months, this sentence is not in compliance with RCW 9.94A.701(9). *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012).

D. CONCLUSION

There is ample, abundant direct and circumstantial evidence in the record to sustain the jury's finding that Smith drove under the influence of alcohol as charged in this case.

Because the jury convicted Smith of driving under the influence, which is an alcohol or drug-related traffic offense, the trial court is required by statute to order as term of community custody that Smith submit to chemical dependency evaluation and that he complete any treatment recommended following the evaluation.

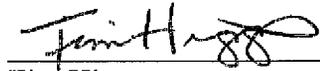
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But, the sentencing court erred by ordering a combined total of community custody and incarceration that is disallowed under RCW 9.94A.701(9), as recently held by *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012). This case should be returned to the trial court to reduce the term of community custody so that the combined total of incarceration and community custody do not exceed the maximum of 60 months.

DATED: August 26, 2013.

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