

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

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STATE OF WASHINGTON,

Respondent,

v.

PHILMER JOHNNY,

Appellant.

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

The Honorable Robert R. Lewis

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BRIEF OF APPELLANT

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## A. SUMMARY OF ARGUMENT

Philmer Johnny and Richard and Savannah Mobley were involved in a motor vehicle collision. Mr. Johnny drove a short distance away and got out of his van. The Mobleys followed Mr. Johnny but refused to stop and exchange information. Mr. Johnny was charged with felony hit and run as well as driving under the influence of alcohol. At trial, Mr. Johnny proposed a jury instruction which would have told the jury his duty to stop and exchange information may be excused, which mirrored his defense at trial. However, the trial court refused to give the requested instruction. The failure to give the proposed instruction violated Mr. Johnny's constitutionally protected right to present a defense and requires reversal of his conviction.

## B. ASSIGNMENT OF ERROR

Mr. Johnny's right to due process was violated when the trial court refused to instruct the jury using Defendant's Proposed Instruction 3, which stated:

The duty to supply information to the other party in an accident may be excused if the other party leaves the scene of the accident.

### C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The trial court is required to give a requested jury instruction where the instruction is a correct statement of the law and reflects the party's theory of the case. The failure to give a defense jury instruction which tracks the defense theory of the case deprives the defendant of the right to present a defense. Mr. Johnny requested a jury instruction indicating that a duty to stop and exchange information following an automobile collision maybe excused if the other party leaves the scene of the collision. The instruction was a correct statement of the law and tracked his theory of the defense. Is Mr. Johnny entitled to reversal of his conviction for hit and run and remand for a new trial for the denial of his right to present a defense?

### D. STATEMENT OF THE CASE

It was around 2:30 a.m. on July 27, 2014, when the vehicles of Savannah and Richard Mobley and Philmer Johnny collided at a traffic light in Vancouver. 6/20/2016RP 103-05. There was damage to both vehicles. 6/20/2016RP 105. The vehicles sat for about 10 seconds when Mr. Johnny began to drive away. *Id.* The Mobley's contacted 911 and followed Mr. Johnny. 6/20/2016RP 105-06. A short distance away, Mr.

Johnny stopped and was standing outside his minivan apparently looking at the damage. 6/20/2016RP 106.

As the Mobley's pulled their car up to Mr. Johnny's minivan, Mr. Johnny approached. 6/20/2016RP 107, 120. Mr. Mobley stated Mr. Johnny "did not look happy." 6/20/2016RP 120. The Mobleys did not make contact with Mr. Johnny and he drove away. 6/20/2016RP 106.

Mr. Johnny was later involved in another collision where his minivan struck a tree and in which he suffered injuries. 6/20/2016RP 131-32. Mr. Johnny was transported to the hospital where the police obtained a blood sample from him pursuant to a search warrant. 6/20/2016RP 142-43.

Mr. Johnny was subsequently charged with felony hit and run and driving while under the influence under the affected by alternative means. CP 8; 6/20/2016RP 94. At trial, Mr. Johnny sought the trial court to instruct the jury using Defendant's Proposed Instruction 3. CP 17. (A copy of Defendant's Proposed Instruction 3 is attached in the Appendix). The court refused to give the proposed instruction. 6/21/2016RP 212. Mr. Johnny excepted to the court's refusal. 6/21/2016RP 213. Mr. Johnny was subsequently convicted as charged. CP 37-38; 6/21/2016RP 253.

## E. ARGUMENT

### 1. **The trial court impermissibly infringed Mr. Johnny's right to present a defense when it refused to give his requested jury instruction.**

- a. *A defendant is entitled to have the jury instructed on his theory of the case.*

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"). Similarly, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

A defendant has the right to have the jury accurately instructed. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Thus, as part of the constitutionally protected right to present a defense, the defendant is entitled to instructions embodying his theory of the case if the evidence supports that theory. *State v. Benn*, 120

Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993).

“Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case.”

*State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). When considering whether a proposed jury instruction is supported by sufficient evidence, the trial court must take the evidence and all reasonable inferences in the light most favorable to the requesting party. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Further, due process requires that jury instructions allow the parties to argue all theories of their respective cases supported by sufficient evidence, fully instruct the jury on the defense theory, inform the jury of the applicable law, and give the jury discretion to decide questions of fact. *State v. Allen*, 161 Wn.App. 727, 734, 255 P.3d 784 (2011), *aff'd*, 176 Wn.2d 611 (2013). A criminal defendant has a right to have the jury instructed on a defense that is supported by substantial evidence. *State v. Walters*, 162 Wn.App. 74, 82, 255 P.3d 835 (2011). Thus, the court must give jury instructions that accurately state the law, that permit the defendant to argue his theory of the case, and that the

evidence supports. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

This Court reviews a trial court's refusal to give a requested jury instruction *de novo* where the refusal is based on a ruling of law. *State v. White*, 137 Wn.App. 227, 230, 152 P.3d 364 (2007), *citing State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Where the court's refusal to give a requested instruction was based on factual reasons, it is reviewed for an abuse of discretion. *White*, 137 Wn.App. at 230, *citing Walker*, 136 Wn.2d at 771-72. A proposed instruction is appropriate if it properly states the law, is not misleading, and allows a party to argue a theory of the case that is supported by the evidence. *Redmond*, 150 Wn.2d at 493.

Mr. Johnny's right to present a defense was infringed when the trial court refused to give the requested instruction.

b. *The requested instruction was a correct statement of the law and tracked Mr. Johnny's theory of defense.*

Mr. Johnny's theory of defense was that his duty to give information to the Mobleys was excused when they drove away without stopping to interact with him. The requested instruction tracked that defense. Further, Defendant's Instruction 3 was a correct statement of the law. The instruction was taken from the decision in *State v.*

*Teuber*, 19 Wn.App. 651, 577 P.2d 147, *review denied*, 91 Wn.2d 1006 (1978). Thus the Court was required to instruct the jury using Mr. Johnny's requested instruction.

Under the hit and run statute, a driver involved in an injury collision is required to, among other things, "immediately stop at the scene of such accident or as close thereto as possible" and "give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license" to the other party in the collision. RCW 46.52.020(1), (3).

In *Teuber*, Mr. Teuber backed into his neighbor's parked car, which at the time was occupied. The occupants of the damaged car left the scene immediately after the collision. As a result, Mr. Teuber did not provide the information required by the statute. *Teuber*, 19 Wn.App. at 657. The appellate court reversed Mr. Teuber's conviction for hit and run, concluding that the duty to leave information was excused when the other party left the scene of the collision. *Id.*

Similarly, here, the testimony of both Mr. and Ms. Mobley indicated that Mr. Johnny had stopped and had gotten out of his van and was approaching them. 6/20/2016RP 106, 119-20. The Mobleys made a decision not to stop or get out of their car. *Id.* When Mr. Johnny

got out of the van and approached them, the Mobleys agreed that they did not intend to try and exchange information with Mr. Johnny. *Id.* The decision in *Tueber* is clear that if the other party leaves the scene then the duty to supply information may be excused. 19 Wn.App. at 657-58.

As explained in *Teuber*, Mr. Johnny's proffered instruction was a correct statement of the law. Whether or not the duty to provide information "may be" excused under the statute is a factual question for the jury to decide. In addition, whether his duty to provide information to the Mobleys remained, in light of their flight from the scene was central to his defense.

The trial court refused to give the proposed instruction on the basis that the *Teuber* decision was a sufficiency of the evidence case, and the instruction was not a correct statement of the law in light of the fact Mr. Johnny initially drove from the scene. 6/11/2016RP 210-12.

The trial court was incorrect for two reasons. First, the question was not whether the jury could find Mr. Johnny was guilty, but whether, taking the evidence in the light most favorable to Mr. Johnny, the court should have instructed the jury using Defendant's Proposed Instruction 3. Second, *Teuber* is a correct statement of the law even

assuming Mr. Johnny initially drove away. This fact is relevant for the jury in deciding whether Mr. Johnny's duty *may have been* excused under the circumstances, which the proposed instruction detailed. Thus, the proposed instruction was a correct statement of the law.

The failure of the trial court to instruct the jury using Defendants Proposed Instruction 3 denied Mr. Johnny his constitutionally protected right to present a defense.

**2. The Court should exercise its discretion and deny any request for costs on appeal.**

Should this Court reject Mr. Johnny's arguments on appeal, he asks this Court to rule that no costs on appeal be ordered due to his continued indigency. *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016).

The superior court entered an order of indigency at sentencing, authorizing Mr. Gray to pursue the appeal of his convictions. CP 106. Under the recently amended RAP 14.2, even where the State may substantially prevail, appellate costs are not proper where the individual was indigent at trial and remains indigent on appeal:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's

financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2. Because of his current and presumed continuing indigency, Mr. Johnny asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, 192 Wn.App. at 393.

F. CONCLUSION

For the reasons stated, Mr. Johnny asks this Court to reverse his convictions and remand for a new trial.

DATED this 27th day of January 2017.

Respectfully submitted,

*s/Thomas M. Kummerow*

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## APPENDIX

Instruction No. \_\_\_\_\_

The duty to supply information to the other party in an accident may be excused if the other party leaves the scene of the accident.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 49212-1-II
v.	)	
	)	
PHILMER JOHNNY,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

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SIGNED IN SEATTLE, WASHINGTON THIS 27<sup>TH</sup> DAY OF JANUARY, 2017.

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# WASHINGTON APPELLATE PROJECT

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