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NO. 51211-4-II

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

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STATE OF WASHINGTON

Respondent,

vs.

CHARLES C. HARTZELL, IV,

Appellant.

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**BRIEF OF RESPONDENT**

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BRIEF OF RESPONDENT

*State of Washington v. Charles C. Hartzell, IV*, No. 51211-4-II

**I. COUNTERSTATEMENT OF THE ISSUES**

- A. Whether the Trial Court properly denied Defendant's CrR 3.6 Suppression Motion where the Inventory Search conducted pursuant to a lawful vehicle impound lead to the discovery of nearly two ounces of heroin and methamphetamine?**
- B. Whether the Trial Court properly denied Defendant's Motion for Mistrial where the Prosecutor did not engage in misconduct?**

**II. STATEMENT OF THE CASE**

**A. PROCEDURAL HISTORY**

On February 16, 2017, by Amended Information the State charged Defendant with: Count I - Attempting to Elude a Pursuing Police Vehicle, Count II - Hit and Run Property Damage, Count III - Driving While License Suspended or Revoked in the Third Degree, Count IV - Possession with Intent to Manufacture or Deliver a Controlled Substance – Heroin, Count V - Possession with Intent to Manufacture or Deliver a Controlled Substance – Methamphetamine, and Count VI – VIII - Unlawful Possession of Payment Instruments (separate and distinct victims). CP 14, pp. 3 – 6.

On July 6, 2017, the Trial Court conducted a CrR 3.6 hearing and denied Defendant's motion to suppress evidence of the controlled substances found in the car driven by Defendant. CP 130, pp. 264 – 271.

On July 21, 2017, a jury found Defendant guilty on the above counts except that the Driving While Suspended Charge, and two counts of Unlawful Possession of Payment Instruments were dismissed. CP 100, p. 236.

Defendant received a standard range sentence of 120 months on Count IV based on a theoretical offender score of 16, capped at nine (with other lesser sentences on the other counts ordered to run concurrently). *Id.* at pp. 238 – 240.

This appeal followed.

#### **B. FACTS**

The facts of this case are largely undisputed. In essence, Jefferson County Sheriff's Deputy Brian Anderson was on routine patrol on the evening of February 6, 2017. RP 215. He was in uniform and in a marked patrol car when he saw Defendant at a gas station around 10:00 p.m. RP 215 – 217. Deputy Anderson recalled Defendant had a DOC warrant for his arrest which he re-confirmed. RP 218.

Defendant got in his car and left the gas station. RP 219. Deputy Anderson pulled in behind Defendant and stopped him. *Id.* He contacted Defendant and told him he had a warrant for his arrest. *Id.* Defendant then hit the gas and took off. 220.

Deputy Anderson estimated Defendant's speed at over 100 mph in 25 m.p.h. and/or 40 m.p.h. zones. RP 224. Defendant went through a

four way stop near a QFC at 80 to 85 m.p.h. RP 225. Defendant lost control of his vehicle on a corner near a laundromat and slammed into a tree. RP 226. Deputy Anderson saw Defendant get out of the passenger side of his car and take off running towards a business park. *Id.*

Deputies later found Defendant nearby after searching for him for about one and a half hours. RP 228 – 229. Defendant complained of injuries and was taken to a nearby hospital. RP 229 – 230. Ultimately he was released to the jail. *Id.*

While this was going on, deputies were working to get the car off the root wad of a tree it had ended up on (the tree had to be cut down first) as the tow company would not take the car before it was in a more towable position. RP 238 – 241. There were also concerns about power lines and the potential damage to an adjacent home associated with the tree. RP 240. Once on the ground deputies commenced an inventory search to protect the Sheriff's Office and the tow company from any theft claims associated with items in the car. RP 242.

During the search deputies found a black backpack on the front passenger floorboard. RP 244. The backpack was unzipped. RP 245. Deputies then saw suspected methamphetamine in the black backpack and terminated their inventory search immediately. RP 246 – 248.

The car had evidence tape placed on it then it was then towed to a locked and secured area at the Sheriff's Office. RP 248. Deputy

Anderson applied for a search warrant and later searched the car with Deputy Avery the following night. RP 249 – 250.

Prior to searching the vehicle pursuant to search warrant, Deputy Anderson photographed the vehicle and made sure all the evidence tape was intact. RP 252 – 254.

During the course of the search, Deputy Anderson “re-discovered” the backpack and two baggies of suspected methamphetamine. RP 254. In addition to two bags of suspected methamphetamine, and a bag of suspected heroin, Deputy Anderson also found four checkbooks, three phones, a bill of sale and a picture of Defendant with a female. RP 255 – 262

The suspected methamphetamine was methamphetamine, a little over 43 grams. RP 394 – 399, 409. The suspected heroin was heroin, a little over 12 grams. *Id.*

### III. ARGUMENT

**A. The Trial Court properly denied Defendant’s CrR 3.6 Suppression Motion where the Inventory Search conducted pursuant to a lawful vehicle impound lead to the discovery of nearly two ounces of heroin and methamphetamine.**

Defendant appeals the Trial Court’s denial of his motion to suppress evidence found in plain view: 1) following an inventory search of a vehicle he used in a high speed pursuit, 2) where property damaged occurred, and 3) where he fled the scene.

The Trial Court entered findings of fact and conclusions of law. Supp. CP Doc. No. 130 (eight pages). The findings of fact are unchallenged. *Appellant's Brief*. Unchallenged findings of fact are verities on appeal. *State v. Froehlich*, 197 Wn. App. 831, 837, 391 P.3d 559 (2017).

Exceptions to the warrant requirement for a search exist. One of those is for a “noninvestagatory, good faith inventory search of an impounded vehicle. *Id.* The inventory search is lawful only if the vehicle was lawfully impounded. *Id.* The impoundment of a car is lawful if it is 1) evidence of a crime, 2) pursuant to a community caretaking function, or if 3) the driver committed a traffic offense where the legislature expressly authorized impoundment. *Id.* at 838.

In the instant case there are two different factors that justify the impoundment of the vehicle driven by Defendant. First, there is ample evidence Defendant attempted to elude a pursuing police vehicle, a felony and a violation of RCW 46.61.024<sup>1</sup>. Second, RCW 46.55.113 expressly authorizes impoundment of a vehicle when a driver is arrested for a

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<sup>1</sup> RCW 46.61.024 provides in pertinent part:

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

violation of RCW 46.20.342. Driving While License Suspended/Revoked is a violation of RCW 46.20.342 and was one of the reasons Defendant was arrested. Additionally, RCW 46.55.113 authorizes a police officer to take custody of a vehicle “at his or her discretion, and provide for its prompt removal to a place of safety” when a police officer finds an unattended vehicle at the scene of an accident or the driver of a vehicle is arrested and taken into custody by a police officer. Distinguishable from our case law, RCW 46.55.113 places no requirement on a police officer to consider alternatives to impoundment.

While *Froehlich* does state that officers are to consider alternatives to impoundment, it did not address RCW 46.55.113, which the State asserts is controlling authority on the topic of impoundment based on a violation of RCW 46.20.342, where a vehicle is unattended at the scene of an accident, or where the driver was arrested and taken into custody – all of which apply to this case.

*Froehlich* is also distinguishable from the case at bar. In *Froehlich*, the Defendant was in an automobile accident and the vehicle was impounded under a community caretaking function. *Froehlich* at 834 - 838. Only later were drugs discovered in the car *Id.* at 836. Here the car was impounded pursuant to a felony arrest involving the vehicle, because there was an accident where the driver/defendant fled the scene, because the driver/defendant was driving while license suspended/revoked, and

because the driver/defendant was arrested following a harrowing high-speed pursuit where the car ended up in a tree near power lines and in danger of further damaging someone's property.

Finally, *Froehlich* does not require officers to divorce themselves from all reason. The trial court found as a matter of common sense that impoundment was necessary and sums up the circumstances in its findings of fact:

17. During that time Deputy Peterson began making arrangements to impound and tow the car which could not be driven and also could not be allowed to remain on private property on top of a downed tree.

18. In order to arrange to remove the car from the scene Deputy Peterson had to deal with two issues before the car could be removed: the downed tree and the compromised power line. The tree had to be cut down because of its precarious position and because of the power line and proximity to the house.

19. This was all happening after midnight, in the early morning hours.

20. It took Deputy Peterson about 1 to 2 hours to get the tree contractor to cut the tree, the power company to come out and to call for a tow truck driver, who would not remove the car until the tree was down.

21. The tree was cut down and the car moved back off of the root wad so that it was no longer in a precarious position.

25. The context of the inventory search is that there has been a high speed chase and a high speed collision with a tree in someone's yard next to their house. The defendant fled initially at the first traffic stop then fled the vehicle after a high-impact crash. It takes an hour to catch the defendant then additional time to take him to the hospital and back the Sheriff's office and jail. After all of that that the deputies had to deal with the car.

28. They wanted to get the car towed and the search done because at that point in time they had already been dealing with the situation for a matter of several hours.

Because officers properly conducted, or at least began, an inventory search, they were in a location lawfully where they saw in plain view, suspected controlled substances. The Plain View doctrine does, therefore apply as reflected in the Trial Court's conclusions of law, and consistent with *State v. O'Neill*, 148 Wn.2d 564, 583, P.3d 489 (2003), and *State v. Gibson*, 152 Wn. App. 945, 219 P.3d 964 (2009).

**B. The Trial Court properly denied Defendant's Motion for Mistrial where the Prosecutor did not engage in misconduct.**

**1. No Prosecutorial Misconduct.**

A Defendant who claims prosecutorial misconduct bears the burden of demonstrating the conduct was improper and it prejudiced the defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), review denied, 100 Wn.2d 1008 (1983). See also, *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747, (1994) The central question is whether there was a substantial likelihood the alleged misconduct affected the jury's verdict and deprived the defendant of a fair trial. *Id.*

In *State v. Warren*, 165 Wn. 2d 17, 26, 195 P.3d 940 (2008), the Court determined once again, that "to prevail on a claim of prosecutorial

misconduct, a defendant must show first the prosecutor's comments were improper and second that the comments were prejudicial." The Court also determined that such an error could be cured. *Id.* at 28.

In *Warren* the Deputy Prosecutor made a serious error in closing argument in that it "undermined the presumption of innocence. *Id.* at 26. The error was repeated three times. *Id.* at 24. In addressing the issue the Court stated:

Had the trial judge not intervened to give an appropriate and effective curative instruction, we would not hesitate to conclude that such a remarkable misstatement of the law by a prosecutor constitutes reversible error. However, reviewing the argument in context, because Judge Hayden interrupted the prosecutor's argument to give a correct and thorough curative instruction, we find that any error was cured. We presume the jury was able to follow the court's instruction. (some improper prosecutorial remarks may touch upon constitutional rights but are still curable by a proper instruction).

*Id.* at 28 [internal citations omitted].

Here, the questions related to Defendant's prior history and whether he genuinely had a substance abuse issue. This was important because Defendant's theory of the case was that he had a significant drug problem and that the nearly two ounces of heroin and methamphetamine he possessed was for personal usage.

The prosecutor asked Defendant's expert witness if she saw whether Defendant had any arrests for drug dealing or drug usage. This question if it had been permitted to be answered would have helped to

demonstrate the thoroughness, or lack thereof, of the evaluation. This Office for example, frequently looks to a defendant's criminal history, particularly as it relates to substance abuse, to determine whether a person should be admitted to Drug Court. Nonetheless, the question was objected to and the Trial Court sustained the objection. RP 767.

Two questions later the prosecutor asked Defendant's expert witness if Defendant told her he had arrests or something about drug use in his history. RP 767. Once again this is relevant to the issue of whether Defendant has a substance abuse issue, for example, a long string of controlled substance convictions would support the conclusion Defendant had a substance abuse problem. Furthermore, Defendant opened the door to this line of inquiry when Defendant's expert stated on direct exam by Defendant's counsel: "part of the evaluation is also reading police reports *and criminal history.*" RP 743. Nonetheless, this question was also objected to and the Trial Court sustained the objection. RP 767.

Finally, the State asked: "[a]nd he told you something about that happened in 2014? ... And he indicated to you that something happened to him that was dramatic? ... And what was that? ...And where was that" RP 776.

Defense counsel did not object to these questions until they had been answered. RP 777. The Court overruled the objection but shut the

State down when it tried to delve further into Defendant’s criminal history.  
RP 776 – 782.

As in all cases, the jury received WPIC 1.01 which states in part:  
“One of my duties has been to rule on the admissibility of evidence.” The  
instruction continues: “Do not speculate whether the evidence would have  
favored one party or the other.”

To the extent the State’s questions may have been improper, they  
were minor in comparison to the overall quantity of evidence (taking up a  
half dozen questions – several of which were successfully objected to -  
out of hundreds upon hundreds of pages of testimony). Furthermore,  
WPIC 1.01 would have cured any defects absent any evidence to the  
contrary. As such, any potential prejudice to Defendant’s rights to a fair  
trial were mitigated.

## **2. Motion for Mistrial denied.**

A trial court’s decision to deny a motion for mistrial is reviewed  
for an abuse of discretion. *State v. Garcia*, 177 Wn. App. 769, 776, 313  
P.3d 422 (2013). “[A]buse of discretion will be found for a denial of a  
mistrial only when ‘no reasonable judge would have reached the same  
conclusion.’” *Id.* There must be a substantial likelihood the error affected  
the jury’s verdict. *Id.* Stated another way, “[a] mistrial should be ordered  
“ ‘only when the defendant has been so prejudiced that nothing short of a

new trial can insure that the defendant will be tried fairly. *Id.*

Whether a mistrial was warranted is determined by analyzing the *Hopson* Factors<sup>2</sup> which include: 1) the seriousness of the irregularity, 2) whether it involved cumulative evidence, and 3) whether the trial court properly instructed the jury to disregard the irregularity or error. *Id.*

The State contends there was no irregularity and even if there was, WPIC 1.01 cured any potential defect by telling the jury to not speculate on how an evidentiary ruling may have affected one of the parties.

Based on the information available to it, the Trial Court properly declined the defense invitation for a mistrial. Defendant fails to show the Trial Court abused its discretion by denying the motion for mistrial.

#### IV. CONCLUSION

For the foregoing reasons, Defendant's conviction and sentence should be affirmed.

Respectfully submitted this 21<sup>st</sup> day of December, 2018.



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<sup>2</sup> *State v. Hopson*, 113 Wn.2d 273, 778 P.2d 1014 (1989).

**PROOF OF SERVICE**

I, Laura Mikelson, declare that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system. I delivered an electronic version of the brief, using the Court's filing portal, to:

Catherine Glinski, WSBA #20260  
glkinskilaw@wavecable.com

I declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct. Dated this 21<sup>st</sup> day of December, 2018, and signed at Port Townsend, Washington.



Laura Mikelson  
Legal Assistant

**JEFFERSON COUNTY PROSECUTING ATTORNEY'S OFFICE**

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