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NO. 51633-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB LEE,

Appellant.

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

The Honorable Philip K. Sorensen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting appellant's statements to police at the scene of the accident.

2. The court erred in finding as an undisputed fact that appellant was injured "as the driver" in a one vehicle collision. CP 66 (Finding of Fact 1).

3. The court erred in finding appellant asked law enforcement to look for his passenger. CP 67 (Finding of Fact 3).

4. The court erred in finding appellant drove a motor vehicle. CP 73 (Finding of Fact XIV).

5. The court erred in finding appellant mentioned a passenger to Deputy Tulloch. CP 74 (Finding of Fact XIV).

6. The court erred in finding appellant continued to tell people at the scene he was unsure where his passenger was. CP 74 (Finding of Fact XIV).

7. The court erred in finding appellant's driving proximately caused injury. CP 74, 76 (Findings of Fact XV, XVII).

8. The court erred in finding appellant was driving the motor vehicle while under the influence of intoxicating liquor or drugs. CP 77-78 (Finding of Fact XVIII).

9. The court erred in finding appellant's driving proximately caused death. CP 79 (Finding of Fact XXI).

10. The court erred in finding it was foreseeable that appellant's driving created a foreseeable risk of Mr. Grice being struck as a pedestrian. CP 80 (Finding of Fact XXII).

11. The court erred in finding appellant guilty of vehicular homicide. CP 81 (Conclusion of Law III).

12. The court erred in ordering appellant to have no contact with "surviving family members." CP 87, 89.

13. The order and condition of community custody prohibiting contact with surviving family members are unconstitutionally vague.

14. The order and condition of community custody prohibiting contact with surviving family members violate the First Amendment.

15. Under State v. Ramirez,[1] the court erred in ordering appellant to pay the criminal court filing fee of $200 and the DNA database fee of $100.

Issues Pertaining to Assignments of Error

1. Police questioned appellant immediately after his arm was nearly severed in an accident. At the time of the questioning, appellant was lying on the ground at the side of the highway in the middle of the

[1] State v. Ramirez, ___ Wn.2d, ___, 426 P.3d 714 (2018).

night, intoxicated and being treated by emergency medical personnel for his serious injuries. He was confused and likely in shock. Under article I section 9 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, were his statements involuntary and therefore inadmissible?

2. A community custody condition prohibits appellant from contacting "surviving family members." Must this condition be stricken because it is unconstitutionally vague in violation of due process and because it is not narrowly tailored to protect appellant's constitutional rights to free speech and association under the First Amendment?

3. Under the Supreme Court's recent Ramirez decision, should the $200 criminal filing fee and the $100 DNA collection fee be stricken?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Jacob Lee with one count of vehicular homicide. CP 1. The bench trial included a CrR 3.5 hearing on the admissibility of Lee's statements to police. 1RP[2] 69-129. The court admitted some of the statements, found Lee guilty, and imposed a

[2] There are nine volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Jan. 22, 23, 24, 25, 30, 31, Feb. 1, Mar. 16, 2018; 2RP – Jan. 29, 2018.

standard range sentence. 1RP 129; CP 66-68, 84, 88. Notice of appeal was timely filed. CP 105.

2. Substantive Facts

a. Lee was found staggering, confused, and bleeding profusely at the side of the road after a single car crash.

Bystanders and officers came across the scene of a one-car accident around 1:30 a.m. 1RP 96. Deputy Brent Tulloch found Lee standing in the road bleeding profusely. 1RP 73-76, 84. A Jeep was in the nearby ditch. 1RP 84. No one was in the driver's seat. 1RP 84. Lee's arm was nearly severed from his body. 1RP 73-76, 96, 98.

Before anyone else had arrived, Lee had phoned his mother to tell her he was bleeding to death. 2RP 139. She described her son as "hysterical," "incoherent," and "not making sense." 2RP 138. He told her he did not know where he was. 2RP 139.

Two passing motorists had called 911. 1RP 323-24, 412-14. One of them, Kraig Gillman, got out of his car to help. 1RP 413-15. He saw Lee "hunched and staggering" on the shoulder of the highway. 1RP 412-13. Lee had by then managed to call 911, but Gillman had to speak to the dispatcher for him. 1RP 415. Gillman described Lee as confused or in shock. 1RP 418-19. Lee repeatedly asked Gillman, "Where's Chris," but when Gillman asked if there was someone with him, Lee said, "I don't know" or "No." 1RP 419.

When Deputy Tulloch arrived, he immediately applied a tourniquet because the spurting arterial blood meant Lee would likely bleed to death within minutes. 1RP 75-76. Lee told Tulloch he did not know if his buddy Chris was in the car or not. 1RP 77, 79. Tulloch noticed the odor of intoxicants and testified either intoxication or blood loss or a combination of the two could have caused Lee's confusion. 1RP 80, 90. About three hours later, at the hospital, Lee's blood alcohol level was .09 grams per 100 milliliters and tests also showed he had ingested methamphetamine. RP 338, 342; CP 39-40. Tulloch searched the immediate area of the Jeep for Lee's friend but found no one. 1RP 81-82.

Nearly an hour later, after Lee was taken to the hospital by ambulance, Trooper Brian Paine followed the Jeep's tire tracks across the highway to the shoulder on the opposite side and found the body of Lee's friend, Christopher Grice. 1RP 133, 146-47, 164, 168. The cause of death was determined to be blunt force trauma to the head. 1RP 352-53.

b. Police interrogated Lee at the scene while paramedics were treating him.

By the time Trooper Brett Robertson arrived, paramedics were already attending to Lee, who was lying on the ground. 1RP 98. Robertson began to question Lee about who he was and what had happened. 1RP 102-116. He continued questioning Lee in the ambulance until the paramedics

said they needed to leave for the hospital. 1RP 105-06. At no time did Robertson advise Lee of his constitutional rights to silence or counsel. 1RP 110-11.

The court admitted several of Lee's statements to Robertson. Robertson first asked his name and what happened. 1RP 102. Lee said he was working long hours and fell asleep. 1RP 102. Robertson then asked if he was the driver. 1RP 102. Lee said he was. 1RP 102. At Robertson's request, Lee provided his full name and date of birth. 1RP 103. Robertson then began to ask about a passenger. 1RP 103. Initially, Lee said he was the only occupant of the Jeep, but then said he did not know whether he had already dropped off his friend Chris. 1RP 103.

Once inside the ambulance, Robertson began asking whether Lee had consumed any alcohol or drugs and suggested a portable breath test. 1RP 105-06. Lee said he was having trouble breathing. RP 106. At no point did Robertson mention any of Lee's constitutional rights. 1RP 110-11. He did not mention whether Lee was under arrest. 1RP 113.

The court concluded Lee was not in custody, but nevertheless suppressed the statements made after Lee was inside the ambulance. 1RP 128-29; CP 68. But the court admitted the statements made before Lee was placed in the ambulance. 1RP 129. The court made no oral or written

findings regarding the voluntariness of any of the statements. 1RP 128-29; CP 66-68.

c. The parties presented competing theories of who was driving when the accident occurred and how Grice was killed.

Witnesses on both sides agreed the Jeep was initially travelling southbound, crossed over into the northbound lane, then onto the shoulder on the far side of the road and into a ditch adjacent to the northbound side. 1RP 256, 585-86, 651-53. There it travelled along the ditch before turning almost 90 degrees to the right to cross both lanes a second time. 1RP 586, 651-53. The Jeep stopped just off the road, on the shoulder next to the southbound side. 1RP 271, 586.

The driver's side of the Jeep had scraped along the slope of the ditch on the northbound shoulder. 1RP 252-53. The driver's side exterior mirror was broken off and the driver's side window was broken out and largely missing. 1RP 216, 278, 297-98. Grice's blood was found on the outside of the driver's side of the Jeep. 1RP 431, 474. Lee's blood[3] was found on the passenger side armrest. 1RP 440, 445-47, 474-75.

A second set of tire tracks was found in the northbound, oncoming lane. 1RP 202. The tracks intersected the path of the Jeep where it crossed

[3] The forensic scientist testified that the odds of the DNA profiles in question matching a randomly selected unrelated individual were one in 160 quadrillion and one in 110 quintillion, respectively. 1RP 475.

both lanes before coming to a stop. 1RP 202. The location of these intersecting tire marks was consistent with Grice being struck as a pedestrian in the northbound lane. 1RP 202, 628. The defense accident reconstruction expert testified this was the most likely scenario. 1RP 627.

Lee's mother and stepfather, an emergency room registered nurse and a critical care paramedic, respectively, testified Grice's injuries were inconsistent with being dragged out the driver's side window of the car onto the ground and were more consistent with being struck as a pedestrian by another car. 1RP 530-31, 533-34, 544; 2RP 150-52.

The State developed several theories. At first, the second set of tire tracks caused detectives to also wonder whether Grice had, in fact, been walking on the road when a passing car struck him. 1RP 202. Next, they theorized Grice must have hit his head on the utility pole. 1RP 288-89; 2RP 48-51. Then it became clear the Jeep had not come close enough to the pole for that to be possible. 2RP 62-63. The third theory was that Grice must have been thrown from the passenger seat through the driver's side window and ejected when the Jeep lurched downward and to the left when it travelled into and along the ditch. 1RP 292-93.

After the bench trial, the court found both sides' accident reconstruction witnesses were credible. CP 72-73. The court found Lee was the driver based on 1) the blood trail from where Lee was standing on the

side of the road to the driver's side of the Jeep, 2) Lee's mention to Tulloch, Robertson, and fire department personnel of a passenger, 3) Lee's statements to Robertson that he was the driver, that he had fallen asleep, and that he was unsure if he had already dropped off his passenger. CP 73-74. The court also found Lee's driving proximately caused the injuries that led to Grice's death. CP 74-79. The court found there was "no compelling evidence" Grice was hit by a different car. CP 79. Additionally, the court found that, even if a second car had struck Grice, Lee's driving was the proximate cause of Grice's injuries because the accident created a foreseeable risk that a surviving person would wander onto the road and be struck by a passing car. CP 80.

C. ARGUMENT

1. LEE'S STATEMENTS TO TROOPER ROBERTSON WERE INVOLUNTARY AND THEREFORE INADMISSIBLE.

The court erred in admitting Lee's statements to Trooper Robertson because his severe injuries and intoxication rendered his statements involuntary. His conviction must be reversed because the involuntary statements were used to convict him, in violation of his constitutional rights.

The Fifth Amendment to the United States Constitution provides that no "person shall be compelled in any criminal case to be a witness against himself." The Washington Constitution, article 1, section 9, likewise

provides, "no person shall be compelled in any criminal case to give evidence against himself."[4] The Fourteenth Amendment to the United States Constitution provides that States may not "deprive any persons of life, liberty, or property, without due process of law[.]"

These constitutional provisions prohibit the use of involuntary statements at trial. Oregon v. Elstad, 470 U.S. 298, 306-07, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985) (Fifth Amendment prohibits the State's use of compelled testimony); Payne v. Arkansas, 356 U.S. 560, 561, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958) ("use in a state criminal trial of a defendant's confession obtained by coercion – whether physical or mental – is forbidden by the Fourteenth Amendment."). "[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law." Mincey v. Arizona, 437 U.S. 385, 398, 98 S. Ct. 2408, 2416, 57 L. Ed. 2d 290 (1978).

Before a defendant's statement may be admitted at a criminal trial, the State bears the burden of establishing, by a preponderance of the evidence, that the statement was voluntarily made. Lego v. Twomey, 404 U.S. 477, 487-89, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972). CrR 3.5 requires written findings of fact and conclusions of law after a hearing on the

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[4] The protections of article 1, § 9 are co-extensive with Fifth Amendment protections. State v. Earls, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). Thus, this brief focuses on the federal provision.

voluntariness of the statement. Findings of fact are reversed on appeal when not supported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, reasonable person that the asserted fact is true. State v. P.E.T., 185 Wn. App. 891, 901, 344 P.3d 689 (2015) (citing State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)).

The court reviews de novo the ultimate issue of voluntariness, which is a legal question. Arizona v. Fulminante, 499 U.S. 279, 287, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991); State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). "[A]ny doubt as to whether the confession was voluntary must be determined in favor of the accused." Bram v. United States, 168 U.S. 532, 565, 18 S. Ct. 183, 42 L.Ed. 568 (1897); see also Fulminante, 499 U.S. at 287 (describing question as "a close one" but reversing).

a. To be voluntary, a statement must be the result of a rational choice.

"To be voluntary, a confession must be the product of a rational intellect and a free will." State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571 (1984) (citing Mincey, 437 U.S. at 398). A confession is not voluntary unless it is "the product of an essentially free and unconstrained choice by its maker." Schneckloth v. Bustamonte, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602,

81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961)). The test for voluntariness is whether an individual's "will was overborne in such a way as to render his confession the product of coercion." Fulminante, 499 U.S. at 288. The voluntariness determination "'reflects deep, even if inarticulate, feelings of our society'" about the acceptability of imposing certain interrogation methods on a particular person. United States v. Preston, 751 F.3d 1008, 1020 (9th Cir. 2014) (quoting Haley v. Ohio, 332 U.S. 596, 603, 68 S. Ct. 302, 92 L. Ed. 224 (1948) (Frankfurter, J., concurring)).

In deciding whether a statement was voluntary, courts examine the totality of circumstances. Schneckloth, 412 U.S. at 226; Broadaway, 133 Wn.2d at 132. A statement may be involuntary under the Fifth Amendment regardless of custody status. See Johnson v. New Jersey, 384 U.S. 719, 730, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966) (claim of coercion available to those not falling under Miranda protections); United States v. Walton, 10 F.3d 1024, 1028 (1993) (distinguishing claims); United States v. Conley, 859 F. Supp. 830, 835 (W.D.Pa. 1994) (same); see also Fulminante, 499 U.S. at 282-83 (defendant not in custody on charge to which coerced statement pertained). "Coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." Fulminante, 499 U.S. at 288 (quoting Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960)).

The defendant's physical condition at the time is part of the voluntariness inquiry. Rupe, 101 Wn.2d at 679 (citing Mincey, 437 U.S. at 398). Additionally, "A statement may not be admitted if because of mental illness, drugs, or intoxication, the statement was not the product of a rational intellect and a free will." United States v. Kelley, 953 F.2d 562, 565 (9th Cir. 1992).

b. Lee's statements were not the product of rational intellect or free will because he was severely injured and intoxicated.

Trooper Robertson interrogated Lee on the side of the road after Lee's arm had been nearly severed from his body in a car accident. 1RP 96, 102. Lee's severely weakened physical state, combined with his intoxication and police interrogation rendered his statements involuntary.

His physical state was akin to the defendant in Mincey, where the court declared, "It is hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will.'" 437 U.S. at 398. Mincey had been "seriously wounded just a few hours earlier." Id. Although he had received some treatment, he was in intensive care and complained of unbearable pain in his leg. Id. The court further noted he was "evidently confused and unable to think clearly." Id. Finally, the court noted Mincey was lying on his back in a hospital bed, "encumbered by tubes, needles, and breathing apparatus" such that he was "at the complete mercy" of the

detective, "unable to escape or resist the thrust of [the detective's] interrogation." Id. at 399.

Lee was similarly physically incapacitated and at the mercy of the detective. At the time of his statements to police, Lee had been severely injured in a devastating car accident only minutes earlier. 1RP 146-47. When the first officer arrived, he was bleeding so severely that a tourniquet was applied to save his life. 1RP 75-76. A bone was sticking out of his arm. 1RP 416. His mother described him in the phone call as hysterical and incoherent. 2RP 138. Deputy Tulloch said he was exhibiting confusion. 1RP 80. Robertson claimed he was coherent, but then recounted inconsistent and apparently confused statements about whether his friend was with him. 1RP 99, 103. The motorist who stopped to aid him described him as confused or in shock. 1RP 418-19.

In addition to suffering severe blood loss and likely shock, Lee was also intoxicated. 1RP 73-76, 80, 90, 418-19. Intoxication is also capable of rendering a statement involuntary. For example, in Gladden v. Unsworth, 396 F.2d. 373, 379, 380 (9th Cir. 1968), an intoxicated defendant was unable to stand alone and was "jabbering," "babbling," and "raving." The Ninth Circuit held the error in admitting his confession "was so gross and so prejudicial as to amount to denial of due process." Id. at 380.

Even more similar to this case is Vandegriff v. State, 219 Tenn. 302, 306, 409 S.W.2d 370 (1966), where the appellant was interrogated in the emergency room of a hospital almost immediately after he arrived there. He was in a dazed condition with a skull fracture, nose and facial fractures, and a concussion, and may have been under the influence of alcohol. Id. at 306-07. The Tennessee Supreme Court held, "It cannot be doubted, on this record, that at the time of these inculpatory statements, the defendant had, in substantial part at least, been shorn of his volition. His statement could not have been 'the product of a free intellect.'" Id. at 309.

Like Vandegriff, Lee was both severely injured and intoxicated. 1RP 96, 102, 342. Like Vandegriff, he was interrogated shortly after the accident while he was still receiving immediate medical attention. 1RP 107-08. Like Vandegriff's, Lee's statements to police were not the product of rational intellect or free will. They were the product of a confused, intoxicated, and severely injured person who was suffering from shock and blood loss.

c. Lee's debilitated state left him unable to make a rational decision in the face of police interrogation.

Lee's extremely debilitated state, both mentally and physically, rendered him unable to exercise his rational intellect or free will in the face of police questioning. The due process voluntariness test examines the circumstances surrounding the giving of a confession including the

questioning by officers. Dickerson v. United States, 530 U.S. 428, 434, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). A spontaneous statement , that is not the produce of police questioning, is likely to always be voluntary. State v. Ortiz, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985). But a due process violation occurs when "'governing self-direction is lost *and compulsion, of whatever nature or however infused*, propels or helps to propel the confession.'" Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir.1991) (en banc) (quoting Culombe, 367 U.S. at 602).

"[W]hen the interrogating officers reasonably should have known that a suspect is under the influence of drugs or alcohol, a lesser quantum of coercion may be sufficient to call into question the voluntariness of the confession." United States v. LeShore, 543 F.3d 935, 940-41 (7th Cir. 2008). Even police interrogation that would normally be viewed as non-coercive can result in an involuntary confession when the person is in a weakened physical state. Rupe, 101 Wn.2d at 679.[5] Lee's statements were not spontaneous. Although he was not in custody, his statements were solicited and propelled by police interrogation. In light of his severe injuries and

[5] See also Preston, 751 F.3d at 1019-20 ("to the extent that Derrick held that the issue of police coercion during interrogations must be evaluated without regard to the individual circumstances of the suspect, it cannot be reconciled with prior opinions of this Court or with binding Supreme Court precedent.") (overruling Derrick v. Peterson, 924 F.2d 813 (9th Cir.1991)).

likely intoxication, of which Robertson was aware, that interrogation made his statements involuntary.

Robertson's interrogation is state action that distinguishes this case from Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). In Connelly, the defendant walked up to an off-duty police officer and confessed to murder without any eliciting conduct whatsoever by the officer. Id. at 160. The court held that coercive police conduct was a prerequisite for excluding the statement as involuntary. Id. at 167. The Connelly holding rests on the lack of any state action that prompted the confession. Id. at 165.

This case is more akin to State v. Sondergaard, where the court held, "[T]he very act of interrogating . . . one known to be under a substantial mental disability supplies the requisite coercion." State v. Sondergaard, 86 Wn. App. 656, 663, 938 P.2d 351 (1997) (quoting 3 W. LaFave, Search and Seizure § 8.2(e), at 671–72 (3d ed. 1996)). In Sondergaard, the court held that consent to a search may be involuntary despite a lack of overtly coercive police conduct. 86 Wn. App. at 662. The court reasoned that the police adopting a non-threatening manner does not necessarily mean consent is voluntary when the person has an obvious mental disability or incapacity. Id. The court distinguished Connelly on the grounds that "Any mental

impairment experienced by the defendant in Connelly was not obvious at the time." 86 Wn. App. at 662.

Like Sondergaard, this case is distinguishable from Connelly because Lee's statements were elicited by state action and Lee's physical and mental impairment was obvious. Trooper Robertson knew Lee was severely injured and suffering from massive blood loss. 1RP 96, 98. He also suspected Lee was either extremely fatigued or intoxicated. 1RP 102-04. Nevertheless, Robertson intentionally questioned Lee with the goal of eliciting incriminating information. 1RP 103-05. Robertson's knowing conduct and Lee's weakened and inebriated state rendered Lee unable to give a voluntary statement.

d. The State did not meet its burden to prove the statements were voluntary.

On these facts, the State did not meet its burden to prove Lee's statements were voluntary. This is also evidenced by the fact that the trial court did not find the statements were voluntary. CP 66-68;1RP 128-29.

In the context of a suppression motion, the absence of an affirmative finding is held against the State, State v. Webb, 147 Wn. App. 264, 270, 274, 195 P.3d 550 (2008), which is consistent with the requirement that the State must show an exception to the warrant requirement by clear and convincing evidence. "When the State successfully resists a motion to suppress, it is

obligated to procure findings of fact and conclusions of law that, standing on their own, will withstand appellate scrutiny." State v. Watson, 56 Wn. App. 665, 666, 784 P.2d 1294 (1990). The requirement should apply equally in the Fifth Amendment and due process context, where the State bears the burden to prove the voluntariness of a defendant's statement before it may be admitted. Lego v, 404 U.S. at 487-89. Because the court did not enter a written finding that the statements were voluntary, and the record shows they were not, this Court should reverse Lee's conviction.

e. This constitutional error requires reversal of Lee's conviction.

Lee's conviction must be reversed because the State cannot prove beyond a reasonable doubt that the admission of his statements did not contribute to the verdict. Constitutional errors are presumed prejudicial. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (citing Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). As discussed above, the admission of an involuntary statement violates the Fifth and Fourteenth Amendments and Article I, section 9 of the Washington Constitution; it is, therefore, constitutional error that is presumed prejudicial. Fulminante, 499 U.S. at 295-96. Under the "overwhelming untainted evidence" test, courts look to the untainted evidence to determine whether it

is so overwhelming that it "necessarily leads to a finding of guilt." State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985).

The error requires reversal unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. State v. Berube, 150 Wn.2d 498, 505, 79 P.3d 1144 (2003). The State must disprove the idea that the erroneously admitted evidence amounted to "the 'slight impetus' that affected the verdict." Coristine, 177 Wn.2d at 383 (quoting Glasser v. United States, 315 U.S. 60, 67, 62 S. Ct. 457, 86 L. Ed. 680 (1942)). The State cannot do so here.

Whether Lee was the driver is an essential element of the offense of vehicular homicide. RCW 46.61.520. Moreover, that element was substantially disputed at trial. 1RP 702 (Defense closing argument). Lee's own statements on this question were a significant part of the State's case against him. 1RP 661 (State's closing argument). And the court specifically relied on those statements in finding the essential element that Lee was the driver of the Jeep. CP 73-74; 1RP 732. Without these statements, the State cannot show the court would have found Lee was the driver beyond a reasonable doubt.

A confession is perhaps the most damning evidence imaginable. "Admission of a confession 'will seldom be harmless.'" United States v. Barnes, 713 F.3d 1200, 1207 (9th Cir. 2013) (quoting United States v.

Williams, 435 F.3d 1148, 1162 (9th Cir. 2006)). Nevertheless, Lee's statements might be viewed as less harmful if other similar statements were properly admitted. They were not.

Lee's statements to Robertson were the only statements admitting that he was the driver of the Jeep. The court entered findings of fact suggesting Lee made other statements to Deputy Tulloch referring to a "passenger," which could be seen as indicating he was the driver. CP 67 (Finding of Fact 3); CP 74 (Finding of Fact XIV). But these findings are not supported by substantial evidence in the record and must be reversed and disregarded for purposes of the harmless error analysis.

Findings of fact are reversible on appeal when they are unsupported by substantial evidence in the record. P.E.T., 185 Wn. App. at 901 (citing Broadaway, 133 Wn.2d at 130). Substantial evidence is evidence that would persuade a fair-minded, rational person of the truth of the assertion. Id. (citing Hill, 123 Wn.2d at 644).

Nowhere in Deputy Tulloch's testimony did he say that Lee referred to his passenger. The term he used in reference to Lee's statements was "Buddy." 1RP 77, 79. Only when Tulloch was talking about his own investigations did he begin to refer to Grice as the passenger. 1RP 81-82. Tulloch's testimony is not substantial evidence that Lee referred to Grice as his passenger, and the findings to that effect must be reversed. The only

statements by Lee that could be taken as an admission of guilt were those that should have been suppressed, as discussed above. Because it is far from clear that they did not contribute to the verdict, Lee's conviction must be reversed.

2. THE CONDITION OF SENTENCE REQUIRING LEE TO HAVE NO CONTACT WITH "SURVIVING FAMILY MEMBERS" IS UNCONSTITUTIONALLY VAGUE AND UNNECESSARILY INFRINGES LEE'S FIRST AMENDMENT RIGHTS.

As a condition of community custody, and as a no-contact condition of his sentence, the court ordered Lee to have no contact with "surviving family members" for the rest of his life. CP 87, 89. The condition does not inform Lee of whose family. It does not specify the degree of relatedness. Nor does it require that Lee have any knowledge that the person is a surviving family member. Even assuming the condition refers to Grice's family, Lee could be sanctioned for speaking to someone he had know way of knowing was a distant relative. Without specifying which family is involved, an unscrupulous corrections officer could sanction Lee for speaking to virtually anyone. The condition is unconstitutionally vague because it fails to clearly inform him of what conduct is prohibited and permits arbitrary enforcement by the Department of Corrections. It also unnecessarily chills his First Amendment freedom of speech and association.

The due process vagueness doctrine requires the State to provide citizens fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). It also protects against arbitrary, ad hoc, or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

There is no presumption in favor of the constitutionality of a community custody condition. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Community custody conditions are subject to reversal when they are manifestly unreasonable. Id. at 791-92. The imposition of an unconstitutionally vague condition is manifestly unreasonable. Id. at 792.

The no-contact order and condition of community custody in this case violate the due process vagueness doctrine. The orders fail to define with any degree of specificity which persons Lee must not contact. This fails to provide him fair warning and exposes him to arbitrary enforcement action by the State. The order and condition should be stricken because they violate due process.

Additionally, "[W]hen a statute or other legal standard, such as a condition of community placement, concerns material protected under the First Amendment, a vague standard can cause a chilling effect on the exercise of sensitive First Amendment freedoms." Bahl, 164 Wn.2d at 753. For this reason, a heightened level of clarity is demanded. Id. Careful review of sentencing conditions—even more so than in the typical case—is required where those conditions interfere with the fundamental constitutional right of an accused. State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998). Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the State and public order. Id. Such conditions must also be sensitively imposed. Bahl, 164 Wn.2d at 757; State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

The condition prohibiting Lee's contact with surviving family members violates the First Amendment because it is unconstitutionally overbroad. By failing to limit the degree of familial association or even define which family the person belongs to, this condition has a severely chilling effect on Lee's ability to speak to anyone at all for fear of accidentally violating the prohibition on contact.

The trial court's order prohibiting Lee from contacting surviving family members does not promote public safety or order and it was not

sensitively imposed. It must be stricken because it needlessly infringes on Lee's freedom to speak and associate.

3. THE $200 CRIMINAL FILING FEE AND THE $100 DNA COLLECTION FEE SHOULD BE STRICKEN UNDER *STATE V. RAMIREZ.*

The discretionary legal financial obligations must be stricken because Lee is indigent. In State v. Ramirez, an appellant challenged discretionary legal financial obligations (LFOs) on the grounds that the trial court had not engaged in an appropriate inquiry regarding his ability to pay under State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714, 717 (2018). The Supreme Court agreed, setting forth detailed instructions regarding the appropriate inquiry. Id. at 719-721. But, based on watershed statutory amendments that took effect while Ramirez's appeal was pending, the Supreme Court ultimately granted relief on statutory grounds.

The Court explained that Laws of 2018, ch. 269, § 6 (3) ("House Bill 1783") made substantial modifications to several facets of Washington's LFO system. In doing so, the legislature "address[ed] some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction." Ramirez, 426 P.3d at 721.

For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, establishes that the DNA database fee is

no longer mandatory if the offender's DNA has been collected because of a prior conviction, and provides that a court may not sanction an offender for failure to pay LFOs *unless* the failure to pay is willful. Id. (citing Laws of 2018, ch. 269, §§ 1, 18, 7.)

It amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. Id. It also prohibits imposing the $200 filing fee on indigent defendants. Id. at 721-22.

As Ramirez further noted, a trial court "'shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).'" Id. at 721 (quoting Laws of 2018, ch. 269, § 6 (3)). Thus, indigency may established by three objective criteria. "Under RCW 10.101.010(3)(a) through (c), a person is 'indigent' if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level." Ramirez, ___ Wn.2d at ___, 426 P.3d at 722.[6]

Crucially to this case, the Court also held that the House Bill 1783 amendments applied prospectively to cases not yet final on appeal.

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[6] If none of these criteria apply, only then must the trial court engage in an individualized inquiry into current and future ability to pay. Ramirez, ___ Wn.2d at ___, 426 P.3d at 722.

Ramirez, ___ Wn.2d at ___, 426 P.3d at 722-23 (citing State v. Blank, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997)). The Supreme Court concluded that the trial court impermissibly imposed discretionary LFOs, as well as the $200 criminal filing fee, on Ramirez. The Court remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. Ramirez, ___ Wn.2d at ___, 426 P.3d at 723.

Here, the record indicates Lee is indigent under RCW 10.101.010 (3). CP 102-04. And House Bill 1783 applies prospectively to his case. This Court should remand to strike the $200 filing fee.

This Court should also strike the DNA fee under House Bill 1783 and Ramirez. RCW 43.43.7541, the statute controlling the imposition of a DNA fee, was amended under House Bill 1783. The statute now provides that

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*

RCW 43.43.7541 (emphasis added.); Laws of 2018, ch. 269, § 18.

Lee's criminal history includes several prior felonies. CP 85. Clearly, the State has previously collected his DNA. Because Lee's case is not yet final, the new statute applies. Ramirez, ___ Wn.2d at ___, 426 P.3d at 722-23. As a result, the DNA fee must be considered a discretionary LFO, which

may not be imposed on an indigent defendant. Thus, the DNA fee should be stricken.

D. CONCLUSION

Because his conviction was obtained by using an involuntary confession, Lee's conviction must be reversed. At a minimum, the vague and overbroad no contact condition of his sentence as well as the discretionary legal financial obligations must be stricken.

DATED this 31st day of October, 2018.

Respectfully submitted,

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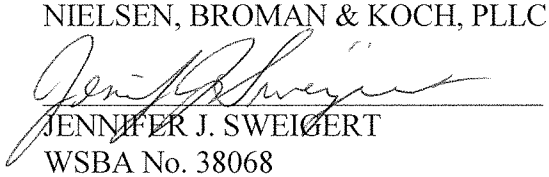

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