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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JACOB SKYLAR ALLYN LEE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Phillip K. Sorensen

No. 16-1-04674-8

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether substantial evidence shows defendant's statements were voluntary where he was coherent, gave accurate, responsive statements, and no coercive police action was used?
2. Whether this Court should affirm the community custody condition prohibiting defendant's contact with surviving family members, where it is not unconstitutionally vague or overbroad?
3. Whether this Court remand for the trial court to strike the \$200 criminal filing fee and \$100 DNA collection fee where the amendments in House Bill 1783 apply to defendant's case?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On November 28, 2016, the Pierce County Prosecuting Attorney charged Jacob Skylar Allyn Lee, hereinafter, "defendant," with one count of vehicular homicide, with the aggravated circumstance that defendant

was under community custody at the time of the commission of the crime. CP 1-2; RCW 46.61.520. The case proceeded to trial in Pierce County Superior Court before the Honorable Philip K. Sorensen on January 22, 2018. 1/22/18 RP 1.¹

On January 23, 2018, the court held a CrR 3.5 hearing to determine the admissibility of defendant's statements to Trooper Robertson at the scene of the collision. 1/23/18 RP 93-129. The issue at the hearing was whether defendant was in custody to trigger the requirement for a *Miranda*² warning. Counsel for defendant challenged the statements from the point when defendant stated he fell asleep driving, arguing,

MS. KO: Your Honor, it is the defense's position that Mr. Lee was in custody because his freedom of movement was restricted, which is the standard by which -- whether or not a reasonable person would have felt his freedom of movement would have been restrained

...

It is the defense's position that, because of his condition and because of where he was and how he was being tended to, that his freedom of movement was restrained during this period of contact between he and Trooper Robertson.

...

The question that followed thereafter, whether or not he was the driver of the Jeep and Mr. Lee's response that, yes, in fact, he was, and his further observation of Mr. Lee showing signs of intoxication, any further questioning past this point required the advisement of Miranda, as the

¹ The Verbatim Report of Proceedings in this matter are not consecutively paginated, so the State will refer to each volume by date and page number.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

questions being asked elicited -- the statements that were elicited were inculpatory in nature.

...

So, it is the defense's position that, like Ferguson³, the trooper should have mirandized earlier on rather than never advising Miranda, as he did in this particular case. So, for those reasons, we believe that -- it is our position that, after the statement wherein Mr. Jacob Lee advises the trooper that he fell asleep driving because he was working long hours, that from that point forth, the statements should be suppressed.

1/23/18 RP 123-126.

The State argued defendant was not in custody for the purposes of Miranda, explaining,

MR. JONES: Thank you, Your Honor. One of the things to keep in mind is that Mr. Lee was not being detained or restrained by Trooper Robertson. Trooper Robertson had an investigatory duty to figure out what happened in this collision. Mr. Lee was being restrained by medical personnel for his own safety and his own health and well-being. In fact, they cut Mr. -- they cut Trooper Robertson off when he stepped into the aid unit to ask some quick follow-up questions regarding what the State would say is standard, routine DUI investigation before placing a suspect under arrest, just gathering information.

The Court also needs to consider the place of the interrogation, and again, it's -- the defendant was -- basically, his life was being saved. This is not a custodial interrogation conducted by the police in the back of a patrol car or down at the precinct. And then, considering the length and the mode of the interrogation, Trooper Robertson is essentially bobbing and weaving between the medical personnel to find

³ In *State v. Ferguson*, 76 Wash. App. 560, 566, 886 P.2d 1164 (1995), the court discussed what "custody" means for the purpose of *Miranda* warnings.

out as much information as he can, making every effort not to interfere with their efforts to render aid to Mr. Lee.

So, going back to my initial argument, if being restrained to a hospital bed is not in custody for purposes of Miranda when an officer comes to ask somebody in a hospital questions, certainly this situation is likened to that, and it is much more like the Ferguson case.

1/23/18 RP 126-127.

The court found defendant was never in custody, but suppressed the statements beginning when defendant was placed in the back of the ambulance and the questioning "becomes more focused" on. "Were you drinking? Were you using drugs?" 1/23/18 RP 128. The following exchange occurred:

THE COURT: Based on my review of the briefing that's been done here and the case law, it appears to me as though Mr. Lee -- I guess, in looking at this, I don't believe Mr. Lee was in custody from beginning to end, even when he leaves in the ambulance.

However, it appears to me as though, if there is a distinction between status, once he's placed in the back -- and I guess a distinction between status and a distinction between the kind of questioning that was going on, once Mr. Lee is placed in the back of the ambulance and the questions becomes more focused on, "Were you drinking? Were you using drugs?" I guess I can see at that point where the investigation has become somewhat more focused.

So, from my standpoint, all the statements up to the time when -- up to the point in time where Mr. Lee -- prior to the point in time when Mr. Lee is asked about whether he's been drinking or using drugs, those statements are all admissible. Once he's in the ambulance and Trooper Robertson asks him, "Were you drinking? Were you using

drugs?" I am going to suppress the responses to those statements.

MR. JONES: So, just for clarification, are you finding, Your Honor, at that point that he was in custody?

THE COURT: I guess, from where I sit, no, I don't think he was in custody, but I do think that the nature of the questioning changed to directed, which may have put him in a different status than simply being in a life-saving mode, which he certainly was up to that point.

Several witnesses testified at trial including a medical examiner, forensic scientist, toxicologist, and crime scene technician. The defense called defendant's mother and step father to testify as expert witnesses in their respective capacities as a nurse and paramedic. 1/29/18 RP 150; 1/30/18 RP 512.

The court subsequently found defendant guilty of vehicular homicide. CP 85. Defendant was sentenced to 280 months of confinement and 18 months of community custody. The court imposed crime related community custody conditions including that the defendant "(x) have no contact with surviving family members." CP 89. The court imposed the \$500 crime victim assessment fee, \$100 DNA database fee, and \$200 criminal filing fee. CP 86. Defendant timely appealed. CP 105-118.

2. FACTS

On September 10, 2016, defendant was drinking with his friend Christopher "Chris" Grice and members of Grice's family at a tavern in

Eatonville. 1/23/18 RP 54. Everyone was drinking. 1/23/18 RP 56. At some point in the night, Grice's family went home, while he and defendant returned to the tavern. *Id.* That was the last time Patricia Wrzesien hugged her son Christopher Grice. *Id.* The next time she saw her son, she was at his funeral. 1/23/18 RP 57.

In the early morning hours of September 11, 2016, Laline Riley received a phone call from her son, the defendant. 1/29/18 RP 137. He told his mother he was bleeding to death, his arm was ripped off, and he didn't know where Chris was. 1/29/18 RP 138. Meanwhile, Kraig Gillman and his wife were driving home on Mountain Highway when they saw a truck with its hazard lights flashing in the distance. 1/25/18 RP 413. As they approached, Gillman saw defendant standing on the shoulder of the road hunched over and stopped to help him. *Id.* Defendant placed another phone call to his mother and told her "I'm sorry...I'm trying to be good." 1/25/18 RP 419; 1/29/18 RP 137.

When Pierce County Sherriff's Deputy Brent Tulloch arrived on the scene, he saw defendant's truck off the roadway and defendant standing on the shoulder with eyewitness Gillman, who waved the deputy down. 1/23/18 RP 71-73. Defendant's bone was sticking out of his arm and blood was spurting out of it, indicating there was an arterial bleed.

1/23/18 RP 74. Deputy Tulloch promptly applied a tourniquet to prevent defendant from bleeding to death. 1/23/18 RP 75-76.

While he was applying the tourniquet, defendant told Deputy Tulloch he didn't know if his buddy was in the car. 1/23/18 RP 77. Tulloch had defendant lay down and asked Gillman to help stabilize defendant's head. *Id.* Again defendant told Deputy Tulloch he thought his buddy might be in the car. 1/23/18 RP 79. Defendant asked the Deputy not to let him die and thanked him for his help. *Id.* Deputy Tulloch noticed an odor of intoxicating beverage on defendant. 1/23/18 RP 80. Defendant was confused as to whether his buddy was with him or if he had already dropped him off. *Id.*

Washington State Patrol Trooper Brett Robertson arrived on the scene and was brought up to speed by Deputy Tulloch and the other emergency personnel. 1/23/18 RP 100. Trooper Robertson began to investigate the collision in order to complete the collision report required by the State when a motor vehicle collision occurs. 1/23/18 RP 113. Robertson asked defendant a few questions to determine how the collision happened, without interfering with the medics tending to defendant's injuries. *Id.*

Defendant gave his name and date of birth and told Robertson he was working long hours and fell asleep and was the driver and only

occupant of the vehicle. 1/23/18 RP 102-103. Defendant then advised Robertson that “he didn’t know if he dropped him off or not and asked us to look for, possibly, another occupant.” *Id.* Defendant gave Trooper Robertson the name Chris Harbaugh and said he thought he was coming from Eatonville Cutoff Road, where Christopher Grice lived. 1/23/18 RP 104.

As medical personnel continued to tend to defendant, now in the ambulance, Trooper Robertson contacted him and asked if he’d had anything to drink. 1/23/18 RP 105. Defendant said he had not. *Id.* Robertson asked again, and defendant told him he had a rum and coke. *Id.* Robertson asked defendant if he consumed any drugs, to which he responded no. *Id.* Trooper Robertson attempted to ask defendant to do a portable breath test, but defendant advised him he was having a hard time breathing. 1/23/18 RP 106. Robertson testified that was the end of questioning. Defendant was transported to the hospital. *Id.*

Robertson and additional troopers remained at the scene to continue investigating the collision 1/23/18 RP 131. Across the northbound side of the roadway, Trooper Paine found Christopher Grice, deceased. 1/23/18 133.

C. ARGUMENT.

1. SUBSTANTIAL EVIDENCE SHOWS DEFENDANT'S STATEMENTS WERE VOLUNTARY WHERE HE WAS COHERENT, GAVE ACCURATE RESPONSES, AND NO COERCIVE POLICE ACTION WAS USED.

“Voluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law.” *Howes v. Fields*, 565 U.S. 499, 514, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012).

The Supreme Court has held that under the Fourteenth Amendment, “[a] defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined.” *State v. Williams*, 137 Wn.2d 746, 751, 975 P.2d 963 (1999); *Jackson v. Denno*, 378 U.S. at 380, 84 S.Ct. 1774, 12 L. Ed.2d 908 (1964). CrR 3.5 provides a mechanism which allows a defendant to have the voluntariness of an incriminating statement determined in a preliminary hearing. *Williams*, 137 Wn.2d at 751.

However, most courts have held that there is no need for a separate voluntariness hearing in the case of a bench trial, reasoning that a judge is presumed to rely only upon admissible evidence in reaching a decision. *State v. S.A.W.*, 147 Wn. App. 832, 839, 197 P.3d 1190 (2008); *See, e.g., United States v. Martinez*, 555 F.2d 1269, 1272 (5th Cir.1977); *United States ex rel. Placek v. Illinois*, 546 F.2d 1298, 1306 (7th Cir.1976); *Allen v. McCotter*, 804 F.2d 1362, 1364 (5th Cir. 1986).

Although it is the State's burden to prove voluntariness, it need only do so by a preponderance of the evidence. *State v. Braun*, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). A confession is coerced, i.e., not voluntary, if based on the totality of the circumstances the defendant's will was overborne. *State v. Burkins*, 94 Wn. App. 677, 694, 973 P.2d 15 (1999); *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). Factors a court may consider include the defendant's physical condition, age, experience, mental abilities, and the conduct of the police. *State v. Cushing*, 68 Wn. App. 388, 392, 842 P.2d 1035 (1993); *State v. Rupe*, 101 Wn.2d at 679, 683 P.2d 571 (1984); *State v. Forrester*, 21 Wn. App. 855, 863, 587 P.2d 179 (1978).

When the record has substantial evidence from which a trial court could find that a defendant's confession was voluntary, such a determination will not be disturbed on appeal. *State v. Ng*, 110 Wn.2d 32,

37, 750 P.2d 632 (1988). The trial court's conclusion as to the admissibility of the accused's statements will not be set aside on appeal if there is substantial evidence supporting the voluntariness of the defendant's statement. *State v. Gardner*, 28 Wn. App. 721, 723–24, 626 P.2d 56 (1981); *State v. McDonald*, 89 Wn.2d 256, 264, 571 P.2d 930 (1977).

- a. Defendant's will was not overborne by intoxication or injury where he was coherent, gave accurate responses, and no coercive police action was used.

It is well-settled that intoxication alone does not necessarily render a defendant's custodial statements involuntary. *State v. Alferez*, 37 Wn. App. 508, 510, 681 P.2d 859 (1984); *State v. Turner*, 31 Wn. App. 843, 846, 644 P.2d 1224 (1982). However, it may be a factor in deciding whether the defendant understood his rights and made a conscious decision to forego them. *Gardner*, 28 Wn. App. at 723–24; *State v. Cuzzetto*, 76 Wn.2d 378, 457 P.2d 204 (1969). A defendant does not make involuntary statements because of intoxication unless the intoxication rises to the level of mania where the defendant could not comprehend what he was saying and doing. *Cuzzetto*, 76 Wn.2d at 386-87.

Similarly, a defendant in a debilitated state following serious injury can make voluntary statements, so long as his statements were the product of free and rational choice. *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S.

Ct. 2408, 2418, 57 L. Ed. 2d 290 (1978). A defendant is not in custody where his freedom of movement is restricted as a result of medical care rather than police action. *State v. Butler*, 165 Wn. App. 820, 828, 269 P.3d 315 (2012), (citing, *State v. Kelter*, 71 Wn.2d 52, 54, 426 P.2d 500 (1967)).

A trial court determines whether a statement is voluntary by inquiring whether, under the totality of the circumstances, the statement was coerced. *Broadaway*, 133 Wn.2d at 132. Coercive police activity is a necessary predicate to the finding that a confession is not voluntary. *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008); *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

Here, although defendant was injured and intoxicated, his weakened state did not rise to the level of incoherence that would render his confession involuntary. Trooper Robertson testified that defendant was coherent. 1/23/18 RP 99. Defendant gave accurate responses as to his name, birthdate, Grice's first name, and where Grice lived. 1/23/18 RP 103. Defendant was able to stand and walk to the shoulder of the road to catch the attention of passersby. 1/25/18 RP 413.

Additionally, defendant was coherent enough to use his cell phone to call his mother on his own before witnesses arrived to help. 1/26/18 RP 136-139. When he spoke to his mother on the phone a second time,

defendant apologized, saying “I’m trying to be good,” which suggests he was coherent enough to contemporaneously comprehend the consequences of his actions that night. 1/25/18 RP 419. Defendant was not so intoxicated or debilitated that he could not understand what he was saying and doing. His will was not overborne by his weakened condition, so his statements were voluntary.

Defendant gave inconsistent statements about what happened before the collision, initially claiming he worked long hours and fell asleep. 1/23/18 RP 102. However, that inconsistency makes sense, because defendant knew he was driving intoxicated, so he was likely lying initially to avoid the repercussions of his actions. Defendant was also seemingly confused as to whether his friend had been with him or not, but that was reasonable considering the fact that defendant, the eyewitnesses, and emergency personnel were at the post-collision scene, and no one had found Christopher Grice at that point. *Id.* at 103, 168. Defendant’s inconsistencies do not show he was incapable of making a voluntary statement considering the circumstances.

Defendant’s statements about whether he had dropped Grice off, although exhibiting confusion, also suggest he was coherent enough to remember why they were in the car and where they were going. 1/23/18 RP 80. Defendant was more than likely correct that he was dropping Grice

off, because it was the end of the night, they were very close to Grice's house when the collision happened, and it was defendant's car they were riding in. *Id.* at 61, 64. Although defendant was somewhat confused, the content of his statements does not show he was so incoherent that he could not understand what he was saying and doing or exercise his will.

Furthermore, defendant's statements were not the product of coercion. Trooper Robertson testified that defendant was coherent. 1/23/18 RP 99. Defendant was able to answer Robertson's questions while medics treated him, and he provided several accurate details including his name, birth date, Grice's first name, and where Grice lived. 1/23/18 RP 103. Defendant was not so debilitated that Robertson should have known defendant could not make voluntary statements.

Similarly, the statements defendant challenges were not the product of interrogation. When Trooper Robertson arrived on the scene, he had an obligation to compose an accident collision traffic report, which includes investigating why the collision happened. 1/23/18 RP 112-113. Robertson testified that was the reason he was asking defendant questions at that point. 1/23/18 RP 113. The trial court found the questions became "more focused" when Robertson asked, "were you drinking?" and suppressed the statements from that point on. 1/23/18 RP 129. However, up until that point, the questions were not interrogative in nature and were

asked under the Robertson's authority and obligation to investigate the collision. 1/23/18 RP 112-113.

Moreover, when defendant resisted questioning and expressed a difficulty to breathe, Trooper Robertson ceased questioning and allowed medics to continue tending to defendant. 1/23/18 RP 106. Robertson used no coercive tactics in questioning defendant, nor did he take advantage of defendant's intoxicated and injured state. Accordingly, defendant's will was not overborne by coercion.

In *Gladden v. Unsworth*, the defendant's intoxication was so great that it created "a potential for invasion of constitutional rights" in regard to his confession and remanded for a determination of voluntariness.

He staggered around the cabin and was unable to stand up alone. He smelled strongly of alcohol, the pupils of his eyes were dilated, and he was "jabbering," "babbling," and "raving." His speech was heavily slurred.

396 F.2d 373, 379 (9th Cir. 1968). Here, the facts are less compelling. Defendant was able to stand, use his phone, and made coherent statements. 1/23/18 RP 103; 1/26/18 RP 413; 1/29/18 RP 136. His statements were poles apart from the slurred babbling the defendant in *Gladden* exhibited. Here, defendant made multiple responsive, accurate statements. 1/23/18 RP 103. Defendant was not so intoxicated or debilitated that his will was overborne.

Defendant also cites *Mincey v. Arizona* to support his argument that defendant's debilitated state following the collision rendered his statements involuntary. 437 U.S. 385 at 401. *Mincey* was interrogated in an intensive care unit, seriously wounded, weakened by pain and shock, and with tubes in his mouth so that he could not talk and had to write his answers on a piece of paper. *Id.* at 398. His statements were incoherent, consisting of sentences that made no sense.⁴ *Id.* at 399.

Mincey clearly expressed his wish to end questioning without his lawyer present several times, yet the officer persisted with questions. *Id.* at 399-401. Mincey explicitly stated that he was confused and unable to think clearly. *Id.* at 401. The court found that in his debilitated state, his will to resist the officer's persistent questioning was overborne and reversed his conviction. *Id.* at 401-402.

However, the facts of this case are distinguishable from *Mincey*. Here, defendant was seriously injured when Trooper Robertson questioned him. 1/23/18 RP 73. However, when Robertson was questioning defendant, his purpose was completing a collision report, which is a report

⁴ For example, two of the answers written by Mincey were: "Do you me Did he give me some money (no)" and "Everybody know Every body." And Mincey apparently believed he was being questioned by several different policemen, not Hust alone; although it was Hust who told Mincey he had killed a policeman, later in the interrogation Mincey indicated he thought it was someone else. *Mincey v. Arizona*, 437 U.S. 385, 410, 98 S. Ct. 2408, 2422, 57 L. Ed. 2d 290 (1978)

required by the state following motor vehicle collisions. *Id.* at 113. Defendant readily answered Robertson's questions, contrary to the repeated requests to end questioning in *Mincey*. *See*, 437 U.S. at 399-400. When defendant said he was having a hard time breathing, Robertson ended questioning and left the ambulance, so the medical personnel could continue tending to defendant. 1/23/18 RP 106.

Additionally, defendant's statements to Trooper Robertson were far from the incoherent responses in *Mincey*. Here, although defendant gave the wrong last name for his passenger, Grice, nonetheless defendant was accurate as to his friend's first name and the fact that Grice lived on the corner of Eatonville Cutoff Road. 1/23/18 RP 115. Forgetting a friend's last name is a minor mistake that could reasonably occur absent intoxication or injury.

Although defendant expressed confusion as to whether he had already dropped Grice off at home, defendant remembered that he was on the way to do so. 1/23/18 RP 61, 111. The content of his responses suggest he was sufficiently coherent to make accurate, responsive statements. The totality of the circumstances does not suggest defendant's will was overcome by his intoxication, injury, or coercion.

Accordingly, the trial court properly admitted defendant's statements to Trooper Robertson.

- b. Reversal is unwarranted where substantial evidence supports a finding of voluntariness.

The purpose of a CrR 3.5 hearing is to protect constitutional rights by assuring a defendant of his right to have the voluntariness of the statement or confession determined prior to trial, and to allow the court to rule on its admissibility. *State v. Tim S.*, 41 Wn. App. 60, 63, 701 P.2d 1120 (1985); *State v. Fanger*, 34 Wn. App. 635, 636–37, 663 P.2d 120 (1983). A trial court's determination that a confession was voluntary is binding on appeal when there is substantial evidence from which the trial court could find voluntariness by a preponderance of the evidence. *State v. Vannoy*, 25 Wn. App. 464, 467, 610 P.2d 380 (1980).

Courts review a trial court's decision after a CrR 3.5 hearing by determining whether substantial evidence supports the trial court's findings of fact, and whether those findings support the conclusions of law. *Broadaway*, 133 Wn.2d at 130–31. “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Further, “the court must determine de novo whether the trial court ‘derived proper conclusions of law’ from its findings of fact.” *Id.*

Where a trial court fails to comply with the CrR 3.5(c) requirement of written findings supporting the ruling on suppression, and the oral

ruling is inadequate to allow appellate review, the lack of written findings is not grounds for reversal absent demonstrable prejudice. *State v. Thompson*, 73 Wn. App. 122, 129, 867 P.2d 691 (1994). Reversal is not required where the record adequately supports the court's ruling. *Id.*

Where the insufficiency of the findings can be cured without the introduction of any new evidence, remand to permit entry of further findings if appropriate. *State v. Souza*, 60 Wn. App. 534, 541, 805 P.2d 237 (1991), (citing *State v. Greco*, 57 Wn. App. 196, 205, 787 P.2d 940, review denied, 114 Wn.2d 1027, 793 P.2d 974 (1990)). The real question before us is whether a defendant's substantive constitutional right was violated, not whether the exact procedural niceties directed under CrR 3.5(b) have been followed. *Williams*, 137 Wn.2d at 754.

Most courts have held that there is no need for a separate voluntariness hearing in the case of a bench trial, reasoning that a judge is presumed to rely only upon admissible evidence in reaching a decision. *S.A.W.*, 147 Wn. App. at 839; See, e.g., *Martinez*, 555 F.2d at 1272; *Illinois*, 546 F.2d at 1306; *Allen*, 804 F.2d at 1364. Moreover, Washington courts presume that evidence is considered by a trial judge only for its proper purpose. *State v. Bell*, 59 Wn.2d 338, 360, 368 P.2d 177, cert. denied, 371 U.S. 818, 83 S.Ct. 34 (1962); *State v. Maesse*, 29 Wn. App. 642, 649, 629 P.2d 1349 (1981).

Here, reversal is not warranted. The findings and conclusions following the CrR 3.5 hearing on defendant's statements to Trooper Robertson lack an explicit finding of voluntariness. CP 66-68. However, substantial evidence supports a finding of voluntariness. Furthermore, the error is not of constitutional magnitude. Remand to supplement the written findings is appropriate, and reversal is not warranted.

As explained above, the record does not show that defendant's will was overborne by his intoxication, injuries, or police coercion. Although injury and intoxication contributed to defendant's weakened state, those things do not necessarily render his statements involuntary. *Alferez*, 37 Wn. App. at 510; *Turner*, 31 Wn. App. at 846. Substantial evidence shows despite defendant's weakened state, he was coherent enough to make voluntary statements.

Trooper Robertson testified defendant was coherent. 1/23/18 RP 99. Much of defendant's responses to his questions were accurate, including his name, birth date, Grice's first name, and where Grice lived. 1/23/18 RP 103. Defendant was able to stand, walk, and use his cell phone to call his mother before anyone arrived at the scene. 1/26/18 RP 413; 1/29/18 RP 136. When he spoke to his mother a second time, he was conscious enough to appreciate the wrongfulness of his actions, apologizing for not being "good." 1/25/18 RP 419. Much of his

inconsistency can be attributed to wanting to hide his intoxicated driving and being confused because no one had found Christopher Grice yet.

Similarly, the record does not show the use of coercion. Trooper Robertson testified defendant was coherent and answered several questions, so nothing suggests Robertson thought defendant's state rendered him unable to make voluntary statements. 1/23/18 RP 103. Robertson's purpose in questioning defendant was to complete his investigatory duty to fill out the accident collision report required by the State. 1/23/18 RP 113. When defendant resisted questioning, Trooper Robertson stopped. *Id.* at 106. The record does not show Robertson took advantage of defendant's weakened condition. Accordingly, substantial evidence in the record supports a finding of voluntariness.

Furthermore, defendant has not shown prejudice resulting from the failure of the trial court to enter a finding on voluntariness. A lack of written findings is not grounds for reversal absent demonstrable prejudice. *Thompson*, 73 Wn. App. at 129. First of all, defendant never raised voluntariness as an issue in his CrR 3.5 motion to suppress or at the CrR 3.5 hearing during trial. CP 5-11, 1/23/18 RP 123-127. Defendant merely made an argument as to his custodial status for the purpose of *Miranda* requirements. 1/23/18 RP 123-127; *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The court considered whether the statement was made while defendant was in custody and if it was the result of interrogation. 1/23/18 RP 128-130; CP 66-68. Those were the appropriate inquiries. *State v. Walker*, No. 20286-1-II, 2002 WL 1839263, at *2 (Wash. Ct. App. August 13, 2002) (unpublished).⁵ Accordingly, when ruling on admissibility, the trial court likely omitted an explicit finding on voluntariness because it was never explicitly disputed. The court nonetheless held the required 3.5 hearing, which has the specific purpose of providing a uniform procedure for the admission of voluntary confessions. *Williams*, 137 Wn.2d at 750.

However, courts have held that a hearing for voluntariness is not required in a bench trial. *S.A.W.*, 147 Wn. App. at 839; *See, e.g., Martinez*, 555 F.2d at 1272; *Illinois*, 546 F.2d at 1306; *Allen*, 804 F.2d at 1364. A trial judge is presumed not to consider inadmissible evidence in rendering the verdict. *State v. Read*, 147 Wn.2d 238, 244, 53 P.3d 26, (2002).

Accordingly, the lack of a written finding of voluntariness is not of constitutional magnitude because the court adequately protected defendant's rights by holding the hearing, thereby allowing defendant to

⁵ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

specifically challenge voluntariness at that time. The court presumably found the statements voluntary because it admitted them, and voluntariness is the key determination made at a CrR 3.5 hearing. CP 66-68; *Williams*, 137 Wn.2d at 751.

Defendant cites, *State v. Webb*, 147 Wn. App. 264, 271, 195 P.3d 550 (2008), to support the proposition that omitted findings following a CrR 3.5 hearing are held against the state and require reversal. Brief of Appellant 18-19. However, the court in *Webb* said,

there are situations where evidence in the record may support remand from an appeals court to allow the trial court to make omitted factual findings. But in such cases, evidence to support the omitted findings must already be in the record. This is not such a case. Reversal is required.

Id. The court in *Webb* clearly stated that remand to cure omitted findings is appropriate where the record supports them. Where a defendant has not established actual prejudice resulting from the absence of findings and conclusions, remand for entry of written findings of fact and conclusions of law is the proper course. *State v. Head*, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998).

Reversal is not required because the record adequately supports a finding of voluntariness. The record shows defendant's will was not overcome by his intoxication, injuries, or coercion. Defendant has not shown actual prejudice resulting from the insufficient written findings, so

this Court should remand for the trial court to enter a finding of voluntariness.

- c. Even if admission of defendant's statements was error, the error was harmless because the overwhelming untainted evidence supports a finding of guilt.

It is well-established that constitutional errors may constitute harmless error. *Harrington v. California*, 395 U.S. 250, 251-251, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969). To find an error affecting a constitutional right harmless, the reviewing court must find it harmless beyond a reasonable doubt. *Id.*, (citing *Arizona v. Fulminante*, 111 S.Ct. at 1257; *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). Admission of an involuntary confession is subject to treatment as harmless error. *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991).

The Washington Supreme Court has adopted the “overwhelming untainted evidence” standard in harmless error analysis, looking only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty. *Guloy*, 104 Wn.2d at 426. Inadmissible evidence is harmless if it is of minor significance compared to the overwhelming evidence taken as a whole. *State v. Bourgeois*, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997). In determining whether an error by the trial court was harmless an appellate court must measure the admissible evidence of the defendant's guilt against the prejudice, if any, caused by

the inadmissible evidence. *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015).

Even if admission of defendant's statements to Trooper Robertson was error, it was harmless, because substantial evidence supports a finding of guilt, even without defendant's statements to Trooper Robertson. Deputy Tulloch testified that defendant "didn't really know if his buddy was with him or if *he had already dropped him off*. He didn't know which direction *he was driving*." 1/23/18 RP 80 (*emphasis added*).

Tulloch did not testify that defendant specifically referred to Christopher Grice as his "passenger," but the fact that Grice was the passenger was reasonably inferred from defendant's statements that he was dropping Grice off, which suggests defendant was the one who was driving. It would be unreasonable to conclude Christopher Grice was the driver on the way to drop himself off in defendant's vehicle. Both defendant and Grice were drinking earlier in the night, so there is no reason to believe Grice was better suited to drive. 1/23/18 RP 56.

WSP Trooper Paine, investigating the collision, followed the vehicle's tire marks and found Christopher Grice's deceased body of the side of the roadway. 1/23/18 RP 147, 194. The WSP investigation determined the vehicle crossed the roadway and went down the ditch, causing everything within it to shift rapidly toward the driver's side.

1/24/18 228, 297. The vehicle eventually turned right and crossed over the roadway to come to rest on the shoulder. *Id.* at 320. Additionally, a trail of blood was observed from where defendant was standing to the driver's side door of the vehicle. CP 73; 1/23/18 RP 92. This evidence supports the State's theory that Grice was ejected from the driver's side window and defendant, who injured his arm, was the driver.

Craig Luker, an accident reconstructionist and defense expert witness, testified that the State's theory that defendant was in the driver's seat when Christopher Grice was ejected past him through the driver's side window, resulting in the injury to defendant's arm, was possible. 1/30/18 RP 645. Both WSP investigators and Luker testified that if the defense theory that Christopher Grice was hit by a car had occurred, they would typically expect to see a debris field near the point of impact, which they did not. 1/24/18 RP 226; 1/30/18 RP 630.

Dr. Matthew Lacy, the medical examiner, testified that Grice's injuries were consistent with an ejection from a vehicle and inconsistent with a strike by a vehicle to a pedestrian. 1/25/18 RP 396, 399, 401. Grice's injuries were also consistent with contact with the glass from the vehicle's windows. 1/25/18 RP 402-403. Craig Luker agreed that scrapes on Grice's shoulders were consistent with him going out the driver's side window. 1/30/18 RP 621. Grice's blood was found on the exterior of the

driver's side window. 1/25/18 RP 441, 474. This evidence further supports the State's theory and rejects the defense theory of a vehicle-pedestrian collision.

Defendant argues that without his statements to Trooper Robertson, the court could not have found that he was the driver. Br. of App. 20. However, the court specifically noted that it found that element "based on the testimony of the first responders, the State Patrol investigation, the testimony of Mr. Luker, and the admissions of Mr. Lee." 2/1/18 RP 735. The court relied on substantial evidence other than defendant's statements to Trooper Robertson to find defendant was the driver.

There is overwhelming evidence of defendant's guilt aside from his statements. The admission of defendant's statements to Trooper Robertson had no effect on the evidence deduced from the testimony of the numerous other witnesses. Defendant's statements may have contributed to the determination of his guilt. However, the overwhelming other evidence supports a finding of guilt. Accordingly, any error in admitting defendant's statements to Trooper Robertson was harmless beyond reasonable doubt. This Court should affirm the ruling of the trial court.

2. THIS COURT SHOULD AFFIRM THE COMMUNITY CUSTODY CONDITION PROHIBITING DEFENDANT'S CONTACT WITH SURVIVING FAMILY MEMBERS, WHERE IT IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD.

A criminal defendant's constitutional rights while under community custody are subject to the infringements authorized by the Sentencing Reform Act (RCW 9.94A). *State v. Llamas-Villa*, 67 Wn. App. 448, 455, 836 P.2d 239 (1992). A one-year community custody sentence is generally required when an offender is convicted of a felony offense under chapter 69.50 RCW and sentenced to the custody of the department. RCW 9.94A.701(3)(c).

When a court sentences an offender to a term of community custody, the court must sentence that offender to the community custody conditions listed in RCW 9.94A.703(1). Pursuant to RCW 9.94A.703(3), a court may elect to impose as part of community custody discretionary conditions including that the defendant, “(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals” and “(f) Comply with any crime-related prohibitions.”

Illegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (citing *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)). The abuse of discretion standard applies whether this court is reviewing a

community custody condition for unconstitutional vagueness or overbreadth. *State v. Magana*, 197 Wn. App. 189, 200, 389 P.3d 654 (2016).

- a. The condition is not unconstitutionally vague where it gives adequate warning of the prohibited conduct and is not subject to arbitrary enforcement.

A community custody condition is not unconstitutionally vague so long as it (1) provides ordinary people with fair warning of the proscribed conduct, and (2) has standards that are definite enough to “protect against arbitrary enforcement.” *Magana*, 197 Wn. App. at 200-01. In deciding whether a term is unconstitutionally vague, the term is not considered in a “vacuum,” rather, it is considered in the context in which it is used. *Bahl*, 164 Wn.2d at 754, (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)).

The reviewing court must read the language in context and give it a “sensible, meaningful, and practical interpretation.” *City of Spokane*, 115 Wn.2d at 180. “Impossible standards of specificity are not required since language always involves some degree of vagueness.” *Bahl*, 164 Wn.2d at 759.

The condition which orders defendant to “have no contact with surviving family members” is not unconstitutionally vague. CP 87. Giving the condition a sensible, meaningful, practical interpretation, it is clear that

the condition prohibits contact with the victim's family members. *See, City of Spokane*, 115 Wn.2d at 180. In the context of this case, it would be unsensible to interpret the condition to apply to any family other than the victim's. This case involves one defendant and one victim. The victim's family members were drinking with the defendant and victim right before the crime occurred, and the victim died as a result of defendant's crime, so understandably the victim's family was affected by it.

While the defendant's family was also likely affected emotionally by the case, it would be unsensible for the condition to apply to defendant's own family members considering circumstances, which involve no conflict between defendant and his own family. The only practical interpretation of the condition is to apply it to the victim's family members.

Additionally, at sentencing, the State recommended unambiguously that defendant "be ordered as a condition of community custody to have no contact with *the victim's family*." RP 736. Defendant's argument that it is unclear who this condition applies to fails, because he was put on notice that the condition applies to the victim's family

members when the State recommended the condition at sentencing. Accordingly, the condition is not unconstitutionally vague because it does not identify whose family it refers to.

Defendant also argues the condition is vague because it “fails to define with any degree of specificity which persons Lee must contact,” so, “Lee could be sanctioned for speaking to someone he had no way of knowing was a distant relative.” Br. of App. 22-23. The condition that defendant have no contact with the victim’s family members is adequately definite because the protected class here with an interest in avoiding defendant’s contact could reasonably include even a distant relative.

A higher degree of specificity would be unreasonable in this case considering the traumatic nature of the victim’s death as a result of defendant’s crime, which understandably likely had profound effects on members of the victim’s family. It would be difficult to define a point at which Christopher Grice’s family members are no longer sufficiently related to him to protect from defendant’s contact.

A condition need not provide “complete certainty as to the exact point at which [the convicted person’s] actions would be classified as prohibited conduct. *Matter of Brettell*, No. 76384-9-I, 2018 WL 6042816,

at *2 (Wash. Ct. App. November 19, 2018).⁶ Defendant and the victim, Christopher Grice, were friends, and they socialized together with members of Grice's family. 1/23/18 RP 55-56, *See*, 89 (Defendant referred to Grice as a friend). It is therefore reasonable to assume defendant has substantial knowledge of who the condition prohibits contact with because he is familiar with Grice's family.

Furthermore, the risk of arbitrary enforcement of the condition is marginal. Defendant's conduct is sensitively limited by prohibiting contact with members of a single family, who have a compelling interest in avoiding contact with defendant. Additionally, defendant will be incarcerated for a total of 280 months, and during that time, the chance that he accidentally contacts a member of the victim's family will be close to none, because potential contact will be limited to other inmates and intentional contact with persons outside of prison.

Nonetheless, if defendant is sanctioned for accidentally coming into contact with a member of the victim's family in the future, he can assert at a review hearing that he lacked knowledge as a defense. *See*,

⁶ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

RCW 9.94A.737(6)(c) (An offender has the right to a hearing before the imposition of sanctions for community custody violations).⁷

The condition that defendant “have no contact with surviving family members” is not unconstitutionally vague because the condition gives adequate warning of the prohibited conduct and is not subject to arbitrary enforcement. If need be, the condition could be clarified on the judgment and sentence by adding the word “victim’s” before “surviving family members,” however, such clarification is unnecessary when the condition is considered in the context of this case. Accordingly, this Court should affirm the condition.

- b. The condition is not overbroad where it does not unreasonably infringe defendant’s first amendment rights to speak and associate.

An offender's usual constitutional rights during community placement are subject to SRA-authorized infringements. *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006). Freedom of association may be restricted if imposed sensitively and if the restriction is reasonably necessary to accomplish the essential needs of the state and public order. *Id.*, (citing *State v. Riley*, 121 Wn.2d 22, 37–38, 846 P.2d 1365 (1993)).

⁷ The offender shall have the right to: (i) Be present at the hearing; (ii) have the assistance of a person qualified to assist the offender in the hearing, appointed by the hearing officer if the offender has a language or communications barrier; (iii) testify or remain silent; (iv) call witnesses and present documentary evidence; (v) question witnesses who appear and testify; and (vi) receive a written summary of the reasons for the hearing officer's decision. RCW 9.94A.737(6)(c), Community Custody Violations.

The trial court has discretion to order an offender to refrain from “direct or indirect contact with the victim of the crime or a specified class of individuals” and “comply with any crime related prohibitions.” RCW 9.94A.703(3)(b),(f).

When considering whether a community custody condition is unconstitutionally overbroad, courts focus on whether the condition is crime-related. *State v. McKee*, 141 Wn. App. 22, 37, 167 P.3d 575 (2007)). A “crime-related prohibition” is an “order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). “‘Directly related’ includes conditions that are ‘reasonably related’ to the crime.” *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

The assignment of crime-related prohibitions has traditionally been left to the discretion of the sentencing judge. *Riley*, 121 Wn.2d at 37. A crime-related prohibition will be reversed only if it is manifestly unreasonable. *Riley*, 121 Wn.2d at 37 (quoting *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

Defendant argues the condition is overbroad because it restricts his First Amendment rights to speak and associate.

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.

Br. of App. 23-24.

Defendant's argument fails because the condition is crime-related. No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *Llamas-Villa*, 67 Wn. App. at 456. The victim's family is directly related to the circumstances of the crime in this case. Immediately preceding the collision that ended the victim, Christopher Grice's, life, he and defendant were socializing with members of Grice's family. 1/28/18 RP 54. Shortly thereafter, defendant killed Grice in a drunk driving collision. 1/23/18 RP 57, 133. It is therefore reasonable to assume that members of Grice's family were deeply traumatized by defendant's crime.

Grice's mother testified against the defendant at trial. 1/23/18 RP 52-64. Various members of Grice's family wrote letters to the court expressing their deep grief caused by defendant's crime and recommending a harsh sentence for defendant. CP 121-126. Accordingly, prohibiting contact with members of the victim's family in this case is reasonably related to the crime.

As explained above, the scope of the condition is reasonably necessary. Considering the traumatic nature of the victim's death in this case, it would be reasonable to protect even distant relatives of the victim,

who understandably have been affected emotionally by defendant's crime, from contact with defendant. It would be difficult to define a point at which family members are no longer sufficiently related to the victim to protect from defendant's contact. The condition sensitively limits defendant's contact with members of a single family, and therefore does not unreasonably infringe his freedom of speech or association.

Accordingly, a condition prohibiting defendant's conduct with the victim's family is not unconstitutionally overbroad. This Court should affirm the condition.

3. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE CRIMINAL FILING FEE AND DNA COLLECTION FEE PURSUANT TO THE AMENDMENTS IN HOUSE BILL 1783.

When a person is convicted in superior court, the court may order the payment of LFOs as part of the sentence. *State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (citing RCW 9.94A.760(1)). Courts review a sentencing court's decision on whether to impose LFOs for abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). A court abuses its discretion when it imposes an LFO based on untenable grounds or for untenable reasons. *Id.*

The legislature recently enacted Engrossed Second Substitute House Bill 1783 (House Bill 1783), which amended the LFO statutory

scheme. *See*, Laws of 2018, ch. 269, §§17, 18. Effective June 7, 2018, courts may no longer impose the \$200 filing fee on defendants who are indigent at the time of sentencing. RCW 36.18.020(2)(h). Additionally, the DNA collection fee statute was amended to state:

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*).

In *Ramirez*, the Supreme Court held that the recent LFO statutory amendments in House Bill 1783 apply to cases that were pending on appeal when the amendments went into effect. *State v. Ramirez*, 192 Wn.2d 732, 747, 426 P.3d 714 (2018). When a controlling law is amended while a case is pending on review, “it would be anomalous for an appellate court to apply an obsolete law where no vested right or contrary legislative intent is disturbed by applying a more current law.” *Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 621, 694 P.2d 697 (1985).

Defendant argues the court should strike the \$200 criminal filing fee and \$100 DNA collection fee. Br. of App. 25. Defendant was sentenced on March 16, 2018. CP 82-94. Defendant filed this appeal March 22, 2018. CP 105-118. Defendant’s case was pending on appeal when the above amendments went into effect on June 7, 2018. *Id.*

Accordingly, the State concedes that he is entitled to the benefit of the amendments in House Bill 1783.

The amended legislation prohibits imposition of the \$200 criminal filing fee on defendants who are indigent at the time of sentencing. RCW 36.18.020(2)(h). The court found defendant indigent at sentencing, so this court should remand for the trial court to strike the \$200 criminal filing fee. CP 102-104; RP 753. Furthermore, the State's records show that defendant's DNA was previously collected and is on file with the Washington State Patrol Crime Lab. Accordingly, defendant is exempt from the \$100 DNA fee under RCW 43.43.7541.

This Court should remand for the trial court to strike the \$200 criminal filing fee and \$100 DNA collection fee.

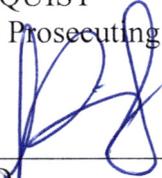
D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this Court affirm defendant's conviction and the community custody

condition and remand for the trial court to enter a finding of voluntariness and strike the \$200 criminal filing fee and \$100 DNA collection fee.

DATED: January 29, 2019.

MARK LINDQUIST
Pierce County Prosecuting Attorney



ROBIN SANDY
Deputy Prosecuting Attorney
WSB # 47838

Brenna Quinlan
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-30-19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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