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

STATE OF WASHINGTON, Respondent

v.

ARTHUR ALEKSEEVYCH SHCHUKIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01709-4

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly admitted Shchukin's confession at the scene of the crash because Shchukin was not in custody and, thus, the responding deputy was not required to Mirandize him prior to asking him his name.**
- II. **The trial court properly denied Shchukin's request for a *Franks* hearing because he did not carry his burden to show that the search warrant affidavit author deliberately or recklessly omitted material information about the responding deputy's observations of Shchukin from the affidavit.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Arthur Alekseevych Shchukin was charged by second amended information with Vehicular Homicide (Operating Vehicle While Under the Influence) for a car crash on or about December 17, 2016 in which he was the driver and his passenger, Alina Pozhar, died at the scene of the crash. CP 135-36. Prior to trial, Shchukin filed a motion seeking (1) to suppress the confessions he made to the responding deputy, the responding paramedic, and the investigating trooper; and (2) a *Franks* hearing. CP 34-50. The trial court, the Honorable Robert Lewis, held a hearing on the issues Shchukin raised at which the State called the three relevant witnesses. RP 19-147. At the conclusion of the hearing, the trial court

denied Shchukin's motion for suppression¹ and his request for a *Franks* hearing. RP 147-155. The associated Findings of Fact and Conclusions of Law were filed. CP 149-157.

Shchukin decided to waive his right to a jury trial and proceeded to a bench trial in front of Judge Lewis. RP 160-62; CP 129. Following the presentation of the case, the court found Shchukin guilty as charged. RP 486-490; CP 158-161. The court then sentenced Shchukin to 95 months in total confinement. RP 504-05; CP 167. Shchukin filed a timely notice of appeal. CP 179.

B. STATEMENT OF FACTS

On the morning of December 17, 2016, Arthur Shchukin met his "lover"² Alina Pozhar, who was four months pregnant, in Jantzen Beach, Oregon. RP 373, 414-15. The two spent a couple of hours just driving around before stopping at a bar where they had a few glasses of wine. RP 373. Eventually, Shchukin and Pozhar left the bar and headed to the parking lot of the Yacht Club to do "personal things." RP 374. Next, the pair drove east on Highway 14 to enjoy "being lost in the mountains." RP

¹ The trial court did suppress an incriminating statement Shchukin made to the investigating trooper, which took place in the back of the ambulance immediately after Shchukin arrived at the hospital. RP 151-52.

² No disrespect is intended. This appears to be the term Shchukin used to describe Pozhar. RP 373; *see also* CP 7 (probable cause statement); CP 68 (search warrant affidavit discussing Pozhar's relationship to Shchukin).

374. Shchukin was the driver and during this drive he consumed three glasses of wine. RP 374.

By this time it had become evening, and Shchukin was driving with Pozhar on Cabot road, a curvy, rural, two lane roadway near Camas, Washington. RP 190-91. Shchukin was driving far too fast for the conditions³ and showing off for Pozhar, when he lost control of the car entering a 20 MPH corner and slid off the roadway before slamming into some trees. RP 189-190, 207, 291-93, 296-97, 375. The passenger side of the car was the impact point for the crash and resulted in the passenger side compartment collapsing around Pozhar. RP 196, 281-83, 293, 295-96. Pozhar suffered numerous serious injuries to include a fractured jawbone, right humerus, and pelvis, a number of rib fractures, a lacerated diaphragm, intestine, uterus, and bladder, a dislocated right hand, bruised lungs, small tears in the heart, a macerated liver, bleeding around the brain, and a hinge fracture of the skull, RP 408-416. Many of these injuries “by themselves would be either immediately fatal or eventually fatal depending on the timeliness of medical intervention,” but in particular, the hinge fracture is “a devastatingly awful, immediately fatal

³ It was definitely dark at the time of the crash and snow was at least present on the shoulders of Cabot road. RP 187-88, 195, 200-01, 289-291. And while ice may have been present on different sections of the road—the air temperature was at about 32 degrees—no ice was located on the portion of roadway where Shchukin lost control of the car. RP 187-88, 198-201, 213, 217, 231, 290-91.

fracture.” RP 411, 413-15. Accordingly, Pozhar died immediately or within a few seconds of the crash. RP 419. The fetus also did not survive. RP 415.

A car travelling in the opposite direction came upon the scene of Shchukin’s crash. RP 314-15, 332-33. The women in that car first heard a car horn blaring and then noticed a damaged vehicle with flashers on as they drove closer to the sound. RP 314-17, 319, 324-25, 333. The women stopped their car, got out, and approached Shchukin’s crashed vehicle. RP 317, 333. Shchukin was hysterical, crying, and begged them to “save her.” RP 318, 321, 329, 333-35. One of the women ran to call 911 while the other stayed closer to the scene and noticed that Pozhar was obviously deceased. RP 318-321, 334-35.

Clark County Sheriff’s Deputy Seth Brannan arrived at the scene of the crash at about 8:30 PM and noted that some medical and fire personnel were already on scene. RP 300-02. Dep. Brannan parked his vehicle, approached the scene on foot, and walked up to check the “black vehicle up against a tree.” RP 303. Dep. Brannan walked directly past Shchukin on his way to the crashed vehicle and, after observing the deceased Pozhar in the front passenger side, he returned to speak with the “very distraught, very upset” Shchukin. RP 304-05, 308, 310.

Shchukin identified himself, advised Dep. Brannan that he was the driver of the vehicle, and told Dep. Brannan that he was showing off for Pozhar, went too fast into the corner, and that he had killed her. RP 305-06. In fact, Shchukin asked to be taken to jail. RP 310. While Shchukin was speaking, Dep. Brannan smelled the “odor of alcohol” on Shchukin’s breath. RP 306-07. Shchukin also acknowledged that he and Pozhar had been drinking wine as they drove around. RP 309. Dep. Brannan spent a very short amount of time with Shchukin before Shchukin was attended to by medical personnel. RP 307-09.

Firefighter paramedic Joshua Proctor attended to a very agitated and emotional Shchukin along with another paramedic who Proctor was “overseeing.” RP 228, 232-34. At first, Shchukin denied medical attention and repeatedly told the paramedics “I killed her, I killed the woman I love” and requested that they “just take [him] to jail.” RP 236-38, 243. Shchukin also told paramedics what led to the crash, explaining that he was showing off for his girlfriend, he was going too fast, they had consumed some wine, he lost control of the vehicle, and that he had killed her. RP 243.

Eventually, however, the paramedics were able to get Shchukin seated at which point they assessed him and suspected his right collarbone was broken. RP 239-240. Next, they gave Shchukin the drug Versed in

order to calm him down as he remained agitated and emotional. RP 240-41. En route to the hospital the paramedics also administered Fentanyl for pain. RP 241.

Clark County Sheriff's Office Detective Ryan Preston arrived at the hospital just before Shchukin. RP 360, 365. After Shchukin's arrival, Det. Preston briefly contacted him in the back of the ambulance at which point he noticed that Shchukin's eyes were bloodshot and watery. RP 366-68, 381. Shchukin was then taken away to receive medical care. RP 369-371. After some time had passed, Det. Preston went to Shchukin's hospital room where he *Mirandized* and interviewed him about what led to the crash and observed that Shchukin's eyes remained bloodshot and watery. RP 371-72.

Shchukin relayed the day's events to Det. Preston, to include meeting with Pozhar, drinking wine with her at the bar, and sharing a bottle of wine with her during the evening drive that culminated with him crashing the car that he was driving. RP 373-75. Shchukin admitted that his actions led to the collision and explained to Det. Preston that as he drove into the relevant corner of Cabot road that he had failed to negotiate it, applied the brakes hard, and lost control of the vehicle at which point it slid off the roadway. RP 374-75.

Det. Preston, in between the time of his initial contact with Shchukin and the hospital room interview, applied for a search warrant for Shchukin's blood. RP 371, 378-79. Shchukin's blood tested positive for ethanol at 0.10 grams per 100 milliliters and for THC at 1.5 nanograms per milliliter. RP 430, 433-36, 452-53, 460-62. Retrograde extrapolation of the blood alcohol concentration (BAC) was also performed with an estimation that a person whose BAC was 0.10 after three hours of driving would have had a BAC between 0.11 and 0.12 within two hours of driving. RP 456-57.

Further investigation of the crashed car and the crash scene followed. Inside the car, the police found a broken bottle of Chardonnay wine. RP 211-12, 255, 285-86. An inspection of the car and the scene led to the determination that the crash was not the result of a mechanical failure or ice on the road. RP 266-280, 289-292. Instead, the police accident reconstructionist opined that Shchukin was driving too fast as he entered the corner and lost control of the car, which then slid sideways off the road and impacted the tree. RP 291-93, 297-98.

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ARGUMENT

I. The trial court properly admitted Shchukin’s confession at the scene of the crash because Shchukin was not in custody and, thus, the responding deputy was not required to Mirandize him prior to asking him his name.

“*Miranda* warnings were developed to protect a defendant’s constitutional right not to make incriminating confessions or admissions to police while in the coercive environment of police custody.” *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004) (citation omitted). But the *Miranda* decision was “not intended to hamper the traditional function of police in investigating crime” to include “[g]eneral on-the-scene questioning as to facts surrounding a crime.” *Miranda v. Arizona*, 384 U.S. 436, 477, 86 S.Ct. 1602 (1966). Accordingly, a suspect must only be read his *Miranda* warnings when he or she is subjected to custodial interrogation. *Id.* The failure to do so in such a situation renders a suspect’s statements inadmissible. *State v. Sargent*, 111 Wn.2d 641, 657-58, 762 P.2d 1127 (1988).

CrR 3.5 governs the admissibility of a suspect’s statements vis-à-vis *Miranda*. CrR 3.5(a); *State v. Piatnitsky*, 170 Wn.App. 195, 221, 282 P.3d 1184 (2012); *State v. Chambers*, 197 Wn.App. 96, 128-131, 387 P.3d 1108 (2016). Appellate courts review a trial court’s findings of fact following a CrR 3.5 hearing for substantial evidence and the trial court’s

conclusions of law de novo. *Chambers*, 197 Wn.App. at 131 (citations omitted). “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *Piatnitsky*, 170 Wn.App. at 221 (internal quotation omitted). On the other hand, unchallenged findings of fact are verities on appeal. *Id.* Merely assigning error to a finding of fact, however, is insufficient to constitute a “challenge;” a party must also support the assignment of error with argument or citation to authority or the “challenged” findings of fact are considered verities. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Sabahi*, 5 Wn.App. 2d 1039, 2018 WL 5013886 (2018).⁴

a. Custody

“‘Custody’ for the purposes of *Miranda* is narrowly circumscribed and requires formal arrest or restraint on freedom of movement to a degree associated with formal arrest.” *State v. Ferguson*, 76 Wn.App. 560, 566, 886 P.2d 1164 (1995). The inquiry into whether a suspect was in custody is an objective one looking at what a reasonable person would believe under the totality of the relevant circumstances. *Id.*; *State v. Rosas-Miranda*, 176 Wn.App. 773, 779, 309 P.3d 728 (2013). The key “issue is

⁴ This Court’s opinion in *Sabahi* is unpublished. Pursuant to GR 14.1, the opinion “may be accorded such persuasive value as the court deems appropriate.”

not whether a reasonable person would believe he or she was not free to leave, but rather “[w]hether such a person would believe he was in police custody of the degree associated with formal arrest.” *Ferguson*, 76 Wn.App. at 566. (alteration in original) (quoting 1 W. LaFave & J. Israel, *Criminal Procedure* § 6.6, at 105 (Supp.1991)).

Relevant factors used to determine whether a person was in custody include “the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.” *Howes v. Fields*, 565 U.S. 499, 509, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012) (citations omitted). Factors that are irrelevant include “whether the officer’s unstated plan was to take [the suspect] into custody or that [the suspect] was the focus of the police investigation [, or] . . . whether the police had probable cause to arrest [the suspect] (before or during the interview).” *State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004).

Generally, an officer who arrives “at the scene of an accident” may, without rendering a person in custody:

ask [the] person apparently involved in the accident a moderate number of questions to determine whether he should be issued a traffic citation, whether there is probable cause to arrest him, or whether he should be free to leave after the necessary documentation has been exchanged.

Ferguson, 76 Wn.App. at 568 (quoting in *Cordoba v. Hanrahan*, 910 F.2d 691, 694 (10th Cir. 1990); *City of College Place v. Staudenmaier*, 110 Wn.App. 841, 849-850, 43 P.3d 43 (2002)). This general conclusion follows straightforwardly from the well-established *Terry* jurisprudence, which allows the police to detain a person “in order to investigate the circumstances that provoke suspicion” and to—without providing *Miranda* warnings—ask the person questions that may confirm “the officer’s suspicions.” *Berkemer v. McCarty*, 468 U.S. 420, 439-440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *Heinemann v. Whitman Cy.*, 105 Wn.2d 796, 808-09, 718 P.2d 789 (1986) (holding that the request for the performance of field sobriety tests from a suspect following a traffic stop does not amount to custody requiring *Miranda* warnings). Notably, the “seriousness of the potential traffic charge does not alter the analysis” so the fact that “a driver who is involved in a fatality road accident is likely to be detained longer than a driver who is pulled over for committing a relatively minor traffic infraction” is not problematic. *Ferguson*, 76 Wn.App. at 567.

Ferguson is instructive. 76 Wn.App. 560. There the defendant drove into an intersection and crashed into the passenger side of another

car that was also passing through the intersection. *Id.* at 562. An occupant of that other car died at the scene of the crash and another was seriously injured. *Id.* While a nurse was rendering assistance to those individuals, a police officer, Garnett, arrived and contacted the defendant who “was out of his car, seated on a grassy knoll at the . . . corner of the intersection.” *Id.* at 563.

Officer Garnett asked the defendant:

if he had been driving the Volkswagen. Ferguson answered yes. Garnett asked for Ferguson’s driver’s license. Ferguson responded that it was in his vehicle. From Ferguson’s facial expression and general demeanor, Garnett believed Ferguson to have been drinking. He asked Ferguson if this was so. Ferguson stated that he had been drinking. Garnett asked how much. Ferguson admitted to two mixed drinks. Garnett then assisted with traffic control, but kept an eye on Ferguson, as a bystander had said Ferguson had been trying to leave the area.

Id. Furthermore, shortly thereafter, a trooper arrived at the scene, spoke with Garnett, and then approached the defendant and asked if he had been drinking. *Id.* The defendant admitted to having had “a couple of drinks.” *Id.*

On appeal, the defendant argued that “that the trial court erred in determining that he was not ‘in custody’ for purposes of *Miranda* when Officer Garnett and [the] [t]rooper . . . questioned him about his drinking as he sat on the grassy knoll at the scene of the accident.” *Id.* at 565-66.

Ferguson rejected the defendant's argument, holding that neither the fact that the defendant was not free to leave the scene "nor the fact that this was a fatality accident, standing alone or taken together, changed *Ferguson's* temporary detention from a *Terry* stop to a custodial arrest for purposes of *Miranda*." *Id.* at 568. *Ferguson* further noted that questioning of the defendant was (1) done in "full view" of witnesses; and (2) "brief and non-deceptive" as he was asked "straightforwardly whether he had been drinking" and driving one of the vehicles. *Id.* at 568, 568 n. 12.

This case cannot be meaningfully distinguished from *Ferguson*. Here, just as in *Ferguson*, Dep. Brannan arrived at the scene of the crash, became aware of a fatality, and walked up to and contacted the defendant (Shchukin) who was positioned on the ground near where the crash occurred. RP 32-34; CP 151 (Finding of Fact No. 6). Dep. Brannan then simply asked a distraught Shchukin for his name at which point Shchukin identified himself and made the incriminating statements about being the driver, drinking wine while driving, driving too fast, showing off, and repeatedly and spontaneously remarking "I killed her." RP 34-36, 57, 59, 64-65⁵, 68-69; CP 151 (Finding of Fact No. 7). Thus, Dep. Brannan's

⁵ Dep. Brannan clarified in response to the trial court's questions that he only asked Shchukin for his name and that he did not ask Shchukin specific questions about the incident. *See also* CP 151 (Finding of Fact No. 7). He also could not recall asking Shchukin any additional, general questions, though admitted it was possible that he did. RP 65, 68-69.

question(s), like those by the police in *Ferguson*, were straightforward, not deceptive, and in view of witnesses.

Moreover, neither prior to, nor during that one to three minute contact, did Dep. Brannan physically detain or restrain Shchukin or tell Shchukin he was under arrest. RP 36-40; CP 151 (Finding of Fact No. 8). Consequently, *Ferguson*, and the above-cited case law, compels the conclusion that the trial court correctly determined that “Deputy Brannan’s contact with the Defendant at the scene of the crash is consistent with being a *Terry* investigatory stop” and that Shchukin was not in custody at the time he made the relevant statements to Dep. Brannan. CP 156 (Conclusion of Law No. 4). Accordingly, “*Miranda* warnings were not required” before asking Shchukin his name. CP 156 (Conclusion of Law No. 4).

Shchukin argues that “[u]nder these circumstances, a reasonable person would not feel free to leave.” Brief of Appellant at 12-13. And while that may be true, that argument misses the point since the question is “whether such a person would believe he was in police custody of *the degree associated with formal arrest.*” *Ferguson*, 76 Wn.App. at 566 (emphasis added) (internal quotation omitted). A reasonable person would not believe he was “in police custody of the degree associated with formal arrest” at the time Dep. Brannan approached Shchukin and asked for his

name; and all of the relevant factors, *supra*, for determining “custody” support this conclusion, such as the fact that (1) the duration of any questioning⁶ was short; (2) the location of the questioning was out in public and in front of witnesses; (3) Shchukin was not physically restrained; and (4) he was released to the firefighter paramedics for medical treatment at the conclusion of the contact with Dep. Brannan. *Howes*, 565 U.S. at 509; *Berkemer*, 468 U.S. at 439-440; *Heritage*, 152 Wn.2d at 218-19. As a result, Shchukin’s argument fails and his statements to Dep. Brannan—made spontaneously and while he was not in custody—were properly admitted into evidence.⁷

b. Harmless Error

An error in admitting a defendant’s confession in violation of *Miranda* can be considered harmless “if the untainted evidence is so overwhelming that it necessarily leads to the same outcome.” *State v. Mayer*, 184 Wn.2d 548, 566, 362 P.3d 745 (2015) (citing *In re Cross*, 180

⁶ The State maintains Dep. Brannan did not actually engage in questioning of Shchukin, i.e., he did not ask him multiple, specific questions about the incident. Instead, aside from identifying himself in response to Dep. Brannan’s identification question, Shchukin’s incriminating statements were spontaneous. RP 64-65; CP 151 (Finding of Fact No. 7), 156 (Conclusion of Law No. 4).

⁷ Notably, despite being mentioned in his argument heading, Shchukin does not directly challenge the admission of Shchukin’s incriminating statements to the firefighter paramedics. Br. of App. at 10-15. And to the extent that such a claim can be found in the relevant pages it lacks the argument and citation to authority required by the rules. RAP 10.3(a)(6)

Wn.2d 664, 688, 327 P.3d 660 (2014). Here, any error in admitting Shchukin's statements is harmless because the untainted evidence of his guilt is overwhelming. The untainted evidence that would remain include: the fact that (1) Shchukin was the driver of the vehicle that crashed; (2) Shchukin had the odor of intoxicants on his breath and bloodshot and watery eyes; (3) a smashed wine bottle was found in the vehicle; (4) the crash reconstruction pointed to poor driving as the cause of the crash rather than a mechanical failure or ice on the roadway; (5) Shchukin's blood alcohol concentration was at 0.10 when tested and was between 0.11 and 0.12 within two hours after he stopped driving; and (6) Shchukin made numerous and similar inculpatory statements regarding driving too fast, drinking wine, and killing Pozhar to the firefighter paramedics and Det. Preston. CP 158-160.⁸ Thus, any error was harmless.

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⁸ All of this evidence would have still been available to the State had the trial court suppressed Shchukin's statements to Dep. Brannan. To the extent that any information would have been excised from the search warrant affidavit for blood, the State still could have properly admitted the BAC evidence under the independent source doctrine since probable cause still existed. *See infra* Arg. II. And because shortly after Det. Preston authored the search warrant affidavit Shchukin made more detailed incriminating statements to him, if necessary, a new, valid warrant could have been issued. *See State v. Betancourth*, 190 Wn.2d 357, 413 P.3d 566 (2018). Nonetheless, the evidence was overwhelming even absent the BAC evidence.

II. The trial court properly denied Shchukin’s request for a *Franks* hearing because he did not carry his burden to show that the search warrant affidavit author deliberately or recklessly omitted material information about the responding deputy’s observations of Shchukin from the affidavit.

A search warrant “may be invalidated if . . . there were deliberate or reckless omissions of material information from the warrant.” *State v. Ollivier*, 178 Wn.2d 813, 847, 312 P.3d 1 (2013) (citing *State v. Chenoweth*, 160 Wn.2d 454, 478-79, 158 P.3d 595 (2007)). But that is the ending point. First, a defendant must make a “substantial preliminary showing of such a material . . . omission” in order to be “entitled to a *Franks* evidentiary hearing.” *Id.* (citation omitted). Provided a defendant makes this showing he or she will then have the opportunity to “establish the allegations,” and, if successful, the “omitted material must be included and the sufficiency of the affidavit then assessed as so modified.” *Id.* (citation omitted). Only if this modified affidavit “fails to support a finding of probable cause” will the original search warrant be invalidated and the evidence obtained suppressed. *Id.*

A trial court’s denial of a *Franks* hearing is reviewed for an abuse of discretion. *State v. Wolken*, 103 Wn.2d 823, 829-830, 700 P.2d 319 (1985). Moreover, appellate review begins “with the presumption that the affidavit supporting a search warrant is valid.” *State v. Atchley*, 142

Wn.App. 147, 157, 173 P.3d 323 (2007) (citing *Franks v. Delaware*, 483 U.S. 154, 171, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)).

a. Omission of Material Information

To establish that a defendant is entitled to a *Franks* hearing on the basis of the omission of information from a search warrant affidavit, the defendant must make a substantial showing that omission was the result of the *affiant's* (1) “intentional misconduct” or a “reckless disregard for the truth”; *and* that (2) the omission was of material information. *Chenoweth*, 160 Wn.2d at 469-472, 478-79, 481; *State v. Garrison*, 188 Wn.2d 870, 873, 827 P.2d 1388 (1992); *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001). Accordingly, a *Franks* hearing is not warranted if the omission is “based solely on negligent or inadvertent mistake.” *Chenoweth*, 160 Wn.2d at 471; *Clark*, 143 Wn.2d at 751.

An intentional omission that amounts to misconduct is self-explanatory. An omission by a reckless disregard for the truth, on the other hand, can be established where the *affiant* “in fact entertained serious doubts as to the truth of facts or statements in the affidavit” and “[s]uch ‘serious doubts’ [can be] shown by (1) actual deliberation on the part of the affiant, or (2) the existence of obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” *Clark*, 143 Wn.2d at 751 (internal quotations omitted) (citations omitted); *Chenoweth*, 160 Wn.2d at

479 (citations omitted).

Omitted information is not material just because it “tends to negate probable cause.” *Garrison*, 188 Wn.2d at 874. Rather the “challenged information must be *necessary* to the finding of probable cause.” *Id.* (emphasis in original) (citation omitted). In other words, ““omitted information that is potentially relevant but not dispositive is not enough to warrant a *Franks* hearing.”” *Id.* at 875 (quoting *U.S. v. Colkley*, 899 F.2d 297, 301 (4th Cir.1990)).

Here, Shchukin argues that Det. Preston omitted from his search warrant affidavit the fact that Dep. Brannan did not observe Shchukin to be “slurring his words” or unsteady on his feet. Br. of App. at 16-17; RP 58-59. Shchukin then argues that these omissions were material, but fails to make any argument to support the notion that the omissions were the result of Det. Preston’s (the affiant) “intentional misconduct” or because of his “reckless disregard for the truth.” Br. of App. at 15-20. In fact, Shchukin does not even put forward any evidence that Det. Preston had knowledge of Dep. Brannan’s observations regarding Shchukin’s ability to speak without slurring or stand steadily. *See* RP 124-26. These failures are dispositive because Shchukin falls far short of a “substantial preliminary showing” that he must make in order to be entitled to a *Franks* hearing, let

alone to show that the trial court abused its discretion in denying him one. *Ollivier*, 178 Wn.2d at 847.

Regardless, however, of the resolution of Shchukin's argument on the first prong of the *Franks* test, his claim also fails because the alleged omissions were not material. First, in this case, the absence of observations of slurred speech and unsteadiness from the affidavit would plainly suggest to the magistrate that the suspect was not slurring his speech or unsteady on his feet—those observations would have been in the affidavit if observed. RP 58-59. Just the same, the magistrate could assume that a whole host of other facts that would be inculpatory if they existed, e.g., a wine spill on clothing or a receipt for the purchase of wine, did not exist by virtue of the fact that they were not contained in the affidavit, but that does not transform their absence into *omissions* let alone material, exculpatory omissions.

Moreover, probable cause existed even if these “omissions” were included in the search warrant affidavit. The affidavit still contained evidence that (1) Shchukin was involved in a single vehicle car crash in which his passenger died; (2) Shchukin admitted to driving and while driving speeding, showing off, losing control, crashing the car, and killing Pozhar; (3) Shchukin admitted to drinking 3 glasses of wine while driving the car; (4) Dep. Brannan could “smell the odor of alcohol emanating from

[Shchukin's] breath" as he spoke; and (5) Det. Preston observed that Shchukin's eyes were bloodshot and watery. CP 107-113, 154 (Finding of Fact No. 19). The above evidence supports a finding of probable cause even when considered with that fact that Dep. Brannan did not observe Shchukin to be slurring his words or unsteady on his feet. *State v. Inman*, 2 Wn.App.2d 281, 285, 289-290, 409 P.3d 1138 (2018) (finding probable cause of driving under the influence existed where the suspect "smelled of alcohol . . . admitted he had been driving the motorcycle" involved in the crash, "and that he had been drinking before driving"); *see State v. Steinbrunn*, 54, Wn.App. 506, 508, 511, 774 P.2d 55 (1989) (holding probable cause for vehicular homicide existed following a crash when the trooper "smelled the odor of intoxicants on [the suspect's] person"); *see also State v. Nichols*, 4 Wn.App.2d 1076, 2018 WL 3844364 (2018) (finding probable cause of vehicular homicide).⁹ Consequently, any omission of Dep. Brannan's observations was not material and the trial court did not abuse its discretion when it denied Shchukin's request for a *Franks* hearing. CP 157 (Conclusion of Law No. 9).

⁹ The opinion in *Nichols* is unpublished. Pursuant to GR 14.1, the opinion "may be accorded such persuasive value as the court deems appropriate."

CONCLUSION

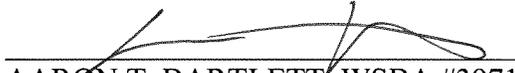
For the reasons argued above, this Court should affirm Shchukin's conviction for vehicular homicide.

DATED this 26 day of July, 2019.

Respectfully submitted:

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