

FILED

JUN 01 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

No. 289273

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

JAMES A. MOORE,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE BLAINE G. GIBSON, JUDGE

---

BRIEF OF RESPONDENT

---

JAMES P. HAGARTY  
Prosecuting Attorney

Kevin G. Eilmes  
Deputy Prosecuting Attorney  
WSBA #18364  
Attorney for Respondent  
211, Courthouse  
Yakima, WA 98901  
(509) 574-1200

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence supported both the “reckless manner” and “under the influence” alternative means of committing vehicular assault?
2. Whether the trial court erred in ordering restitution?

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Sufficient evidence supported both alternative means of committing the offense.
2. The court did not abuse its discretion in ordering restitution for “easily ascertainable” damages based upon sufficient evidence.

## II. STATEMENT OF THE CASE

The Respondent is satisfied with Moore’s Statement of Facts, and adopts it. RAP 10.3(b)

## III. ARGUMENT.

- 1. There was sufficient evidence to support the conviction for vehicular assault under both alternative means.**

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to

find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Grover, 55 Wn. App. 923, 930, 780 P.2d 901 (1989), *review denied*, 114 Wn.2d 1008, 790 P.2d 167 (1990). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

It is true that the right to a unanimous verdict is derived from the constitutional right to a trial by jury, and accordingly, may be raised for

the first time on appeal. State v. Gooden, 51 Wn. App. 615, 617, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988).

When a single offense may be committed in more than one way, a jury must unanimously agree on guilt, but not the means by which the crime was committed so long as there is sufficient evidence to support each alternative means. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994), *cited in* State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995).

Mr. Moore challenges the sufficiency of the evidence supporting the “reckless manner” alternative with which he was charged under the vehicular assault statute, RCW 46.61.522. In fact, there was sufficient evidence presented at trial to support both alternative means.

The facts of this case are quite similar to those in Hursh. There, the defendant was charged with the alternative means of recklessness and intoxication under the vehicular assault statute, and he contended on appeal that there was not sufficient evidence to show that he acted recklessly. Hursh, 77 Wn. App. at 248.<sup>1</sup>

The Court of Appeals held:

The uncontroverted evidence here shows Hursh admitted to drinking six to eight beers before getting into his car. He

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<sup>1</sup> Applying the since-abrogated standard of willful and wanton disregard for the safety of others to vehicular assault. State v. Roggenkamp, 153 Wn.2d 614, 630, 106 P.3d 196 (2005).

was dozing on and off just before the accident. His car drifted off the roadway, struck a guardrail before coming back across the roadway and colliding with a “jersey barrier”. These actions constituted willful or wanton disregard for the safety of persons or property. There was substantial evidence supporting both alternative means.

Id., at 248-49.

Here, Mr. Moore related to the deputies that he and his girlfriend had been drinking at the Sports Center. They left, and had then gotten into an argument while driving. He accelerated, or “smashed the gas” before losing control of his vehicle. **(1-4-10 RP 307-08; 12-30-09 RP 95-96)** Moore testified at trial that while he couldn’t remember the actual collision, he did allow that given the damage to the house which resulted, he was likely going “pretty fast”. **(1-4-10 RP 340)** His BAC readings were .097 and .099. **(12-30-09 RP 189)**

The evidence was sufficient to support the alternative of driving in reckless manner, in that Mr. Moore operated a motor vehicle in a rash or heedless manner, indifferent to the consequences. Just as in Hursh, Moore admitted to consuming alcohol before getting behind the wheel of his car. Rather than dozing, Moore was upset and arguing. Those facts, when combined with smashing the accelerator, constitute ample evidence supporting both alternative means. A rational trier of fact could find

Moore guilty beyond a reasonable doubt under either one. Ortega-Martinez, 124 Wn.2d at 708.

**2. The court did not err in ordering the restitution.**

Mr. Moore also assigns error to the court's order that he pay restitution in the amount of \$10,396.70, of which \$1,000 would be paid to the homeowners to reimburse them for their deductible, and the balance to their insurer.

The court must order restitution whenever an offender is convicted of an offense which results in injury to any person or damage to property. RCW 9.94A.753(5). Restitution shall be based upon "easily ascertainable" damages. RCW 9.94A.753(3). Damages which are easily ascertainable are tangible damages supported by sufficient evidence. State v. Tobin, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), *affirmed*, 161 Wn.2d 517, 166 P.3d 1167 (2007). A trial court's determination of restitution is reviewed for abuse of discretion. State v. Israel, 113 Wn. App. 243, 249, 54 P.3d 1218 (2002).

More than just an estimate, the trial court here was provided a very specific figure of \$57, 396.70, which was the amount the homeowner's insurer paid on the claim to repair the house. Further, that insurer in turn obtained a settlement of \$48,000 on its subrogation claim against Mr.

Moore's insurer. The amount of damages left owing was well-documented, and it is apparent that while Mr. Moore and his counsel did not agree to the restitution amount, the court was evidently satisfied that the State's burden had been met. (2-12-10 RP 77-78) In any event, the damages were tangible, supported by sufficient evidence, and the court did not abuse its discretion.

#### IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction, as well as the order for restitution.

Respectfully submitted this 31st day of May, 2011.

  
Kevin G. Eilmes, WSBA No. 18364  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,	)	NO. 289273
	)	
Respondent,	)	SWORN STATEMENT OF SERVICE
	)	BY MAIL
vs.	)	
	)	
JAMES A MOORE,	)	
	)	
Appellant.	)	

I, Elaine Chartrand, state that I am and was at the time of the service of the Brief Of Respondent, herein referred to, a citizen of the United States, residing at Yakima, Yakima County, Washington; that I am over the age of twenty-one years and am not a party to the within entitled action.

That on the 31st day of May, 2011, I served upon Julia A. Dooris, Gemberling & Dooris, P O Box 9166, Spokane, WA 9929, Attorney for Appellant, and James A. Moore, 261-A Dottie Drive, Selah, WA 98942, the appellant herein, a copy of the aforementioned instrument, by putting the same, enclosed in sealed envelopes, postage paid, into the post office.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

  
Elaine Chartrand  
May 31, 2011  
at Yakima, WA