

**FILED**

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

31189-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TAYLOR MAREAN, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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BRIEF OF RESPONDENT

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I.

ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in rejecting a toxicology report (Defense Exhibit 1) showing the minor victim's blood alcohol level was 0.12, proffered to support defendant's mitigation claim that the victim was a willing participant in the illegal of events that led to her death.
2. The trial court erred as a matter of law that a passenger could not be considered statutory "willing participant" in the criminal conduct that led to her death. Based on this error, the trial court improperly rejected consideration of relevant facts set forth in Defense Exhibit 2 (sworn statement of Rosenthal) and the Statement of Probable Cause (summarizing the sworn statement of Rosenthal)<sup>1</sup>

II.

ISSUES

1. DOES THE TRIAL COURT HAVE DISCRETION TO REJECT A DEFENDANT'S ARGUMENTS?

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<sup>1</sup> The State has searched the Verbatim Report of Proceedings, twice manually and once electronically. No mention of the trial court holding that "passengers could statutorily not be considered 'willing' participants" could be found. To the extent that Assignment of Error No. 2 refers to an apparently non-existent trial court ruling, the State will not be responding.

### III.

#### STATEMENT OF THE CASE

On February 14, 2010, Deputy Damon Anderberg responded to 54<sup>th</sup> Ave. and Hatch Rd., Spokane County regarding a report of an automobile collision. CP 67. When Deputy Anderberg arrived on the scene he saw fire and EMT personnel already present. He saw a white Pontiac pushed up against a tree by a black BMW. CP 67. The deputy saw a female lying on the ground being treated by emergency personnel. CP 68. The deputy saw another female slumped over who appeared not to be breathing. This person was on the passenger side of the Pontiac. Deputy Anderberg was told by EMT personnel that the female still in the vehicle had died. CP 68. Two males kneeling over the female being treated were identified as Taylor D.W. Marean and Ryan A.Perrizo. CP 68.

Deputy Anderberg spoke to the female being treated on the ground and she identified herself as Brooke A. Reese. CP 68. She identified herself as the driver of the Pontiac. Ms. Reese advised Deputy Anderberg that deceased passenger in the Pontiac was Jacoby Bryant. CP 68. Ms. Reese told the deputy "I guess... We were racing, (southbound on Hatch) his car was fast, faster than I would have ever thought." "I tried to turn left onto 54<sup>th</sup>, but I was going too fast slid and hit the tree. The other car just hit us. I feel so stupid! I want to die!" CP 68.

Deputy Anderberg arrested Mr. Marean for vehicular homicide and transported him to Sacred Heart Medical Center for a blood draw. While at the hospital, Deputy Anderberg re-read Mr. Marean his Miranda Warnings. CP 68.

Deputy Tyler Smith responded to 54<sup>th</sup> and Hatch Road on the date and time question. CP 68. When Deputy Smith arrived at the scene he observed a white passenger vehicle with the passenger side door against a tree and a black passenger car with the front-end against the driver's side of the white passenger car. CP 68. The deputy contacted Ms. Reese at the hospital noticing the smell of intoxicating liquor on her breath as she spoke. He also noticed that her eyes were glassy and bloodshot. CP 68.

Deputy Tyler read Ms. Reese her Miranda Warnings and she indicated that she understood. CP 68. Ms. Reese started crying and told the deputy that she was responsible for her friend's death and had to live with it for the rest of her life. She also told him she had around four shots of vodka that evening. CP 69.

Dep. Jack Rosenthal investigated the incident and noted that the road had an asphalt surface and was bare/dry at the time of incident. The posted speed limit on Hatch Rd. is 30 MPH. The outside temperature was above freezing at the time of the incident. CP 69.

Dep. Rosenthal contacted Ms. Reese at the hospital and re-read her Miranda Warnings which she said she understood and she agreed to waive her rights and answer questions. CP 69.

Ms. Reese related that she and the victim, Ms. Bryant, were at a party when the defendant and Mr. Perrizo arrived around midnight. Ms. Reese stated that all of the persons at the party were drinking alcoholic beverages. CP 69. Ms. Reese admitted to consuming "...about four shots." CP 69. Ms. Reese stated that the defendant was drinking "a lot." CP 69.

At around 2:00 a.m., the two girls decided to leave. CP 69. Ms. Reese said that she and Ms. Bryant left in her Pontiac and headed south on Grand Blvd. Ms. Reese told the deputy that her intention was to take Ms. Bryant home. According to Ms. Reese, the defendant and his passenger, Mr. Perizzo, followed them in the defendant's BMW. CP 69. Ms. Reese described how the defendant would pass her at a high rate of speed and then slow down so that Ms. Reese could pass. CP 69. This occurred more than once.

At the intersection of 43<sup>rd</sup> and Scott, the defendant stopped in the roadway and rolled down his window. CP 70. The defendant challenged Ms. Reese to race. CP 70.

Ms. Reese tried to slow down for a left turn but lost control and slid through the intersection into a tree and then the defendant ran into Ms. Reese's car. CP 70.

Ms. Asa Louis is employed by the Washington State Patrol Crime Laboratory as a blood analyst. She determined that the defendant's blood ethanol

level had been 0.13 g/100mL and also contained 11.6 mg/mL of carboxy-THC (marijuana metabolite).

Det. David Thornburg determined that the defendant's car was travelling at a minimum of 51 MPH when he struck the Pontiac. CP 71.

The defendant elected to plead guilty to vehicular homicide and was sentenced. CP 13-23. The defendant then filed this appeal. CP 24-36.

#### IV.

#### ARGUMENT

##### A. THE TRIAL COURT HAS THE DISCRETION AS TO WHICH EVIDENCE TO ADMIT AND WHICH ARGUMENTS TO ACCEPT/REJECT.

The defendant asserts that the lower court should have accepted his arguments labeling the deceased passenger a "willing participant" and therefore allowing the defendant to argue for an exceptional downward departure sentence. The State has no problem with the idea that the statutes allow for an exceptional downward should the other party be named a "willing participant." However, the State rejects the defendant's wanton fabrication of "facts" and his attempt to seek a designation of "willing participant" as applied to the deceased female passenger.

It is plain from his briefing that the defendant relies a great deal on what he terms a "fair inference." Actually, some of the defendant's "fair inferences" are anything but. For example, the defendant describes how the defendant

stopped his car in the roadway and rolled down his window to speak to the occupants of the other car. Brief of App. 19. The unclarified assertion here is that both girls in the victim's car heard an invitation to race and both agreed to become participants in such a race. The fact that a race challenge was issued to the girls' car is in no way a "fair inference" that the challenge was heard, understood, and agreed to by everyone in the female's car. Absent trial testimony, there is no way for the defendant to know whether or not the passenger was screaming: Stop! Or attempting to exit the car. Did the victim become a "willing participant" because she could not jump out of a moving vehicle? The defendant cites no authority for his repeated "inferences."

The defendant thinks it is a "fair inference" that everybody was drinking at a party and so the victim was aware that both drivers had alcohol. There is an interesting twist to the logic of this "inference" in that if one assumes that the victim was aware of the consumption of alcohol, she also became a "willing participant" because she got into a car driven by a female partygoer. Several things must be assumed in order for this claim to have any validity whatsoever. It is unknown what understanding of consumption of alcohol was known by the victim. The victim would have to know how much alcohol was consumed by the defendant and the alcohol's effect upon the defendant. These sorts of claims, are not "fair inferences."

The defendant argues the victim was not held against her will and did not protest Ms. Reese's decision to race. Brf. of App. 20. There was no trial, defendant plead guilty, and the court imposed a standard range sentence. "A sentence within the standard range...for an offense ***shall not be appealed.***" RCW 9.94A.585(1) (emphasis added). The record does not support the defendant's characterization of the victim as a "willing participant."

The SRA provides for an exceptional sentence below the standard range only when such is justified by *substantial and compelling reasons.* RCW 9.94A.535 (emphasis added).

(1) Mitigating Circumstances...

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only...

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

RCW 9.94A.535(1)(a) (emphasis added).

Here, defendant faults the court for not exercising its discretion in its consideration of all the "relevant" evidence in his motion for an exceptional sentence.

"The admission of relevant evidence is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of that discretion." *State v. Mak*, 105 Wn.2d 692, 702, 718 P.2d 407 (1986). "...[T]he trial court may

exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Such determinations are left to the sound discretion of the trial court.” *Id.* at 703. “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959)). However, nothing in the record supports this position. The record reflects that the court simply imposed a standard range sentence.

V.

#### CONCLUSION

For the reasons stated, the sentence of the defendant should be affirmed.

Dated this 11<sup>th</sup> day of September, 2013.

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