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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 343596-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JERRY DALE HUNTOON,

Appellant.

BRIEF OF APPELLANT JERRY DALE HUNTOON

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A. ASSIGNMENTS OF ERROR

1. The superior court of Spokane County, State of Washington, erred in criminal cause no. 14-1-03131-0, on January 26, 2016, when denying, by way of oral ruling, the defendant's motion to suppress for lack of probable cause to arrest [CP 15, 16-20] which was filed by defendant, JERRY DALE HUNTOON, on October 28, 2015. [RP 54-55].

2. The superior court of Spokane County, State of Washington, also erred on March 18, 2016, in criminal cause no. 14-1-03131-0, when instructing the jury in instruction no. 6 that "[t]o return a verdict of guilty, the jury need not be unanimous as to which of [the] alternatives . . . [corresponding to RCW 46.61.502(1)(a) and (1)(b)]. . . has been proved beyond a reasonable doubt, as long as each juror finds at least on alternative . . . has been proved beyond a reasonable doubt." [RP 390-91; CP 65].

3. Finally, the superior court of Spokane County, State of Washington, erred on March 18, 2016, in criminal cause no. 14-1-03131-0, when accepting the jury verdict of guilty [CP 73] as to count I concerning the violation of RCW 46.61.502(1)(a) and (1)(b), as well as (6), and then entering its "Felony Judgment and Sentence," "Warrant of Commitment," and other related final decisions of the court, as against the defendant, JERRY DALE HUNTOON. [RP 479-83; CP 83, 84-97, 98-99, 100-01].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, contrary to the ruling of the superior court, the motion to suppress of the defendant, JERRY DALE HUNTOON, should have been granted for lack of probable cause to arrest him for driving under the influence [DUI] on September 4, 2014? [Assignments of Error nos. 1 and 3].

2. Whether, in turn, any and all evidence subsequently obtained by law enforcement should have been excluded by superior court of Spokane County, State of Washington, as the "fruit of the poisonous tree" under Wong Sun v. United States, 371 U.S. 471, 486, 91 L.E.2d 441, 83 S.Ct. 497 (1963), and its progeny, insofar as said evidence was tainted by the unlawful arrest of the defendant, JERRY DALE HUNTOON? [Assignments of Error nos. 1 and 3].

3. Whether, insofar as the forgoing evidence or observations of trooper Bart which took place before the arrest of the defendant, JERRY DALE HUNTOON, on September 4, 2014, did not rise to the level of proof required to establish beyond a reasonable doubt, the superior improperly instructed the jury in instruction no. 6 when specifying, in part, that "[t]o return a verdict of guilty, the jury need not be unanimous as to which of [the] alternatives [corresponding to RCW 46.61.502(1)(a) and (1)(b)] has been proved beyond a reasonable doubt"? [Assignments of nos. 2 and 3].

C. STATEMENT OF THE CASE

1. Factual Background. On September 4, 2014, around 1:04 a.m., Washington state trooper Jason R. Bart [badge no. 452] was on patrol going southbound on North Division Street in Spokane, Spokane County, State of Washington, near the intersection of Cleveland Avenue, when he observed a fast moving truck head northbound on Division Street. [RP 24, 247-48]. This vehicle was the only one on the roadway at the time [RP 41], and Trooper Bart was allegedly able to determine the truck was traveling 41 to 42 miles per hour [mph] in a 30 mile zone. [RP 24, 247-48]. Consequently, he turned his patrol car around and eventually caught up with the pickup truck near the intersection of Garland Avenue where he alleged clock the truck again at traveling 40 mph in a 30 mile zone. [RP 24, 248].

The truck eventually turned left onto West Lacrosse Avenue. [RP 24, 248, 275]. After Trooper Bart also turned left onto this cross street, he then activated his emergency lights; but not his siren. [RP 24, 248, 276].

During the course of Trooper Bart's observations of the truck, there was no evidence of the vehicle weaving, drifting into other lanes of traffic or any other suggestion of erratic or impaired operation of the vehicle by the driver. [RP 24, 40, 247-48, 276]. The evidence also reflects that the driver used his left hand turn signal before turning onto Lacrosse Avenue. [RP 275-76]. Trooper Bart's report does not indicate

otherwise. [Id.].

The truck continued to travel roughly one [1] block and then pulled over near the intersection of West Lacrosse Avenue and 4500 North Atlantic Street. [RP 24, 248]. When contacted by Trooper Bart, JERRY DALE HUNTOON immediately advised the officer that he lived at the residence situated in front of where he parked. [RP 25, 249, 277-78].

Although Trooper Bart later expressed concern over the fact Mr. HUNTOON had not “immediately” [sic] stopped his vehicle when his emergency light were activated on North Lacrosse Avenue. [RP 24]. Also, Mr. HUNTOON had not allegedly followed his instructions to stay inside his vehicle. [RP 24-25, 248, 277].

However, Mr. HUNTOON later explained that he had not seen the lights until after he had stopped in front of his home. [RP 39, 278, 374]. Also, Mr. HUNTOON stated he had neither seen the patrol vehicle nor heard the officer’s instructions to stay in his truck, until after he had already exited his vehicle. [RP 374].

In an apparent effort to defuse the situation and these concerns of the officer, Mr. HUNTOON then placed his keys on the tool box inside the bed of his truck. [RP 249, 251]. After doing so, he identified himself to the trooper. [RP 249-50].

During this process, Trooper Bart supposedly noticed that Mr. HUNTOON’s eyes seemed red and watery; his face appeared flushed. [RP

25, 38, 250]. Furthermore, he felt it was odd that Mr. HUNTOON had food in his mouth when he got out of his vehicle. [RP 250, 410].

Although trooper Bart could offer no articulable facts such as a lack of dexterity to support his suspicions of intoxication [RP 40], trooper Bart opined that Mr. HUNTOON seemed “stunted” and he had an “intoxicated appearance.” about him [RP 25, 28]. Later on, trooper Bart also noticed the “odor of intoxicants” on Mr. HUNTOON’s breath. [RP 26, 38, 250-51, 278-79]. Mr. HUNTOON was then asked whether he had had anything to drink that evening; Mr. HUNTOON responded that he had had two [2] drinks. [RP 26, 27, 250, 251, 279, 374].

In the course of these events, trooper Bart asked whether Mr. HUNTOON would agree to a field sobriety tests [FST] while informing him that these tests were not mandatory in any sense but were instead strictly “voluntary” in nature. [RP 26, 35, 279-80]. Consequently, Mr. HUNTOON declined to take them. [RP 26, 251-52, 279].

Trooper Bart acknowledged that Mr. HUNTOON was neither argumentative nor disagreeable in this regard, but simply chose not to take the FSTs offered him. [RP 27-28, 252, 375]. However, in the trooper’s view, this was a “bad sign” and demonstrated Mr. HUNTOON must have had something to hide. [RP 38, 279-82, 294].

Even though Mr. HUNTOON was already at his home for the night, and this was confirmed by the defendant’s wife, trooper Bart

concluded from the foregoing observations that Mr. HUNTOON was not safe to drive. [RP 251-53]. Because of this, Mr. HUNTOON was handcuffed and placed under arrest for allegedly driving under the influence. [RP 28, 40-41, 287-88]. This arrest occurred only a couple of minutes after Mr. HUNTOON had first been contacted by the officer and exited his truck. [RP 287-88].

It should be noted that the record reflects no evidence of Mr. HUNTOON having slurred or garbled speech. Likewise, there was no indication he was experiencing any difficulty in terms of communication, or an inability to understand or comprehend what was transpiring when being contacted by trooper Bart. Furthermore, there was no evidence suggesting he was unsteady on his feet, lacking in terms of his motor skills in terms of balance or equilibrium which might otherwise show more likely than not that he was "intoxicated" at the time of arrest. [RP 40, 284-85].

The day before on September 3, Mr. HUNTOON had been working in Moses Lake. [RP 365-66]. He was employed at the time as a field superintendent for Kenny Construction Company. [RP 365].

Mr. HUNTOON left work that day to return to his residence in Spokane around 4:00 p.m. and arrived home approximately an hour and a half later. [RP 366, 368].

Around 10:00 p.m. that evening, he met a friend, Derek, at the

Happy Times Tavern on North Division Street and had a couple of vodka sevens which were normal sized drinks. [RP 368, 371]. Later on, around 11:30 p.m. or shortly thereafter, Mr. HUNTOON agreed to drive the friend home who was in no shape himself to drive. [RP 371, 373]. However, before doing so, they stopped at a fast-food restaurant, Jack-in-the-Box, and ordered "take out" including French fries. [RP 371, 373-74]. He then drove Derek to his home located at 2527 North Atlantic Street, which is situated down the Division street hill from Mr. HUNTOON's residence also on 4500 block of North Atlantic. [RP 371].

It was late, and after taking the his friend home, Mr. HUNTOON then immediately headed home so as to get some sleep before returning to work in Moses Lake the next morning. [RP 371]. While enroute, he then began finishing his French fries. [RP 374].

As described above, his encounter with trooper then ensued a short time later after he existed his truck in front of his residence. After being placed under arrest, and being transported to the Spokane City/County jail facility, Mr. HUNTOON was given a breathalyzer test. [RP 263-73, 320-22, 330, 332, 360-62]. The results of said tests showed a reading of 0.08 or higher. [RP 322].

2. Procedural History. On September 8, 2014, the defendant, JERRY DALE HUNTOON, was charged by information with Count I: felony driving while under the influence in violation of RCW

46.61.502(1)(a) and (b), (6)(a) and having previously incurred four or more prior offenses within ten years as defined in RCW 46.61.5055(13), Count II: first degree driving while license suspended or revoked in violation of RCW 46.20.342(1)(A) and Count III: violation of ignition interlock requirement in violation of RCW 46.20.740(G). [CP 1-2].

Subsequently, on May 14, 2015, the information was amended by the plaintiff, STATE OF WASHINGTON, with respect to Count I wherein the prosecution alleged that Mr. HUNTOON “had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person’s breath or blood and/or while under the influence of or affected by intoxicating liquor or any drug; and further, the defendant previously incurred four or more prior offenses within ten years as defined in RCW 46.61.5055(14).” [CP 11-12]. Said amendment information mirrored the alternative language set forth in RCW 46.61.502(1)(a) and (b).

Later on, at the end of trial on January 29, 2016, these alternative means and methods of committing the offense of driving under the influence were contained in jury instruction no. 6. That instruction stated in part that “[t]o find a verdict of guilty, the jury need not be unanimous as to which of alternatives [as reflected in RCW 46.61.502(1)(a) and (b)] has been proved beyond a reasonable doubt. [RP 390-91; CP 64].

Prior to trial, on October 28, 2015, the defendant, Mr. HUNTOON,

filed a motion to suppress any and all evidence obtained by law enforcement following his arrest for driving under the influence [DUI] on September 4, 2014, insofar as there was no probable cause to support the same as required under Article I, section 7, of the Washington State Constitution. [CP 15, 26-20]. The STATE opposed the motion. [CP 21-30].

Immediately prior to trial, the matter was heard by the superior court on January 26, 2016. [RP 14-53]. The court ruled that there was, under the totality of the circumstances, probable cause to arrest Mr. HUNTOON based upon the defendant's speed and other factors. [RP 54].

Thereafter, Mr. HUNTOON pled guilty to counts II and III of the amended information and said pleas were accepted by the superior court following his colloquy with the court. [RP 58-70]. The case then proceeded to trial before a jury beginning the next day, January 27, through 28, 2016. At the close of evidence and argument, the jury was given the court's "jury instructions" including no. 6 which set forth the alternative elements to conviction under RCW 46.61.502(1)(a) and (b). [RP 390-91; CP 65]. This same instruction also stated that "the jury need not be unanimous as to which of [these] alternative[s] . . . has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative . . . has been proved beyond a reasonable doubt." [RP 390-91; CP 65].

Following its deliberation, the jury entered a verdict of “guilty of crime of driving while under the influence as charged.” [RP 427-29; CP 73]. The jury was then dismissed, and trial concluded. [RP 429].

Sentencing of Mr. HUNTOON took place on March 18, 2016. [RP 440, et seq.]. At that time, the prosecution sought to have certain out-of-state offenses included in the defendant’s offender score so as to reach a score of 9 plus. [RP 440-45; CP 74-79]. Mr. HUNTOON opposed the inclusion of the same in his offender score. [RP 446-47, 463; CP 80-82]. Ultimately, the superior court accepted the prosecution’s documentation and proof identifying certain additional offenses which had previously occurred in the State of Michigan. [RP 455, 466; CP 86-87]. Consequently, the defendant received an offender score of ten [10] resulting in the superior court imposing a sentence of sixty [60] months imprisonment for his conviction by the jury’s verdict of guilty entered on count I. [CP 4-97].

This appeal follows. [CP 104; spindle]. Additional facts and circumstances are set forth below as they relate to an issue or argument.

D. STANDARD OF REVIEW

The existence of probable cause to arrest is reviewed as a mixed question of law and fact. City of College Place v. Staudenmaier, 110 Wn.App. 841, 846, 43 P.3d 43 (2002). Under the basic inquiry, the issue

becomes whether the totality of facts and circumstances, within the officer's knowledge at the time of the arrest, was sufficient to convince a person of reasonable caution to believe that a crime has been committed. State v. Rogers, 70 Wn.App. 626, 631, 855 P.2d 294 (1993). However, in a DUI arrest, the question is whether the investigating officer had knowledge and facts sufficient to establish that the defendant had driven a motor vehicle, while under the influence, to a degree that rendered such driving appreciably impaired. O'Neill v. Department of Licensing, 62 Wn.App. 112, 116, 813 P.2d 166 (1991). Thus, there must be more than the simply odor of alcohol and driving a motor vehicle in order for the officer to have probable cause to arrest. See, 32 L. Callahan, "Washington DUI Practice Manual," Wash.Prac., §32.7 at 839 (West 2011); see also, City of Seattle v. Pearson, 192 Wn.App. 802, 810, 369 P.3d 194 (2016); State v. Gillenwater, 96 Wn.App. 667, 671, 980 P.2d 318 (1999); WPIC 92.10.

In a criminal case, an error of constitutional magnitude, including that of an unlawful arrest, is presumed prejudicial and requires reversal unless the prosecution establishes, by way of the remaining competent evidence in the case, that such error was harmless beyond a reasonable doubt. State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). In this context, a

challenge to the sufficiency of the evidence at trial implicates constitutional due process requirements and may be raised for the first time on appeal. In re Winship, 397 U.S. 358, 361, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); State v. Bland, 71 Wn.App. 345, 359, 860 P.2d 1046 (1993); State v. Martin, 69 Wn.App. 686, 688-89, 849 P.2d 1289 (1993). On review, the critical question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); see also, Green, at 221-22; Bland, at 359.

E. ARGUMENT

1. Contrary to the erroneous ruling of the superior court, the motion of the defendant, JERRY DALE HUNTOON, for suppression of any and all evidence illegally seized and obtained by police on September 4, 2014 and constituting the "fruit of the poisonous tree" in terms of the defendant's unlawful arrest, said motion and relief request therein should have been granted in light of the absence of probable cause to support said arrest of the defendant for the alleged felony crime of driving under the influence [DUI] on September 4, 2014. [Issues nos. 1 and 2].

It is axiomatic to a proper review of this case that the mere evidence of consumption of alcohol does not in itself establish probable cause to arrest a suspect for the alleged crime of driving under the influence in violation of RCW 46.61.502(1)(a) and (1)(b). See generally,

City of Seattle v. Pearson, 192 Wn.App. 802, 810, 369 P.3d 194 (2016);
State v. Gillenwater, 96 Wn.App. 667, 671, 980 P.2d 318 (1999); WPIC
92.10. Something more is required to warrant a lawful arrest and violation
of one's privacy interests under both federal and state law. Id.

While it may be seen as a worthy cause of law enforcement to
prevent those who are intoxicated from driving while under the influence,
such goal in itself may not be used to bootstrap, justify or overcome an
illegal seizure or arrest of a person without probable cause in the first
instance. See, State v. Jackson, 102 Wn.2d 432, 445, 688 P.2d 1272
(1984) (quoting State v. Sieler, 95 Wn.2d 43, 48-49, 621 P.2d 1272
(1980)). In other words, ignoble ends never justify the means by which
such are obtained especially when constitutional protections are at stake as
in this case. Id.

For example, an initially legitimate traffic stop cannot be
transformed into a pretextual fishing expedition for some other underlying
purpose or justification. See, State v. Ladson, 138 Wn.2d 343, 352, 979
P.2d 833 (1999); State v. Michaels, 60 Wn.2d 638, 639-40, 374 P.2d 989
(1962); State v. Hoang, 101 Wn.App. 732, 6 P.3d 602 (2000); see also, 32
L. Callahan, "Washington DUI Practice Manual," Wash.Prac., §20:9 at
436-38 (West 2011). By the same measure, it is a longstanding rule of

constitutional law that innocuous or equivocal facts or observations by police are insufficient in themselves to establish probable cause to arrest. State v. Young, 123 Wn.2d 173, 196, 867 P.2d 593 (1994); State v. Huft, 106 Wn.2d 206, 210-11, 720 P.2d 838 (1986); Jackson, at 438; State v. Rakosky, 79 Wn.App. 229, 238-39, 901 P.3d 364 (1995); State v. White, 44 Wn.App. 215, 217, 720 P.2d 873 (1986), review denied, 107 Wn.2d 1020(1987); State v. McPherson, 40 Wn.App. 298, 300-01, 698 P.2d 563 (1985). In this regard, probable cause to arrest exists only when sufficient facts are present to lead a reasonable person to conclude that there is a probability, amounting to more likely than not, that the suspect at hand is involved in criminal activity. State v. Gentry, 125 Wn.2d 570, 607, 888 P.2d 1105 (1995).

Here, at the time JERRY DALE HUNTOON was handcuffed, taking into custody and placed under arrest by Washington state trooper Jason R. Bart [badge no. 452], the alleged facts upon which trooper Bart relied were (a) the suspect, Mr. HUNTOON, was allegedly speeding in a 30 miles per hour [MPH] zone around 1:00 a.m., (b) the suspect's alleged failure thereafter to immediately pull over when the trooper's emergency lights were activated and by continuing to drive approximately one [1] block further so as to park in front of his residence, (c) the suspect's

alleged failure to follow the trooper's directions to remain in his vehicle even though he was in front of his house, (d) the suspect eating the remainder of his french fries which he had purchased at a fast food store while on the trip home, (e) the suspect having voluntarily placed his car key out of his possession on the top of the tool chest located in the bed of his truck, (f) from the officer's headlight the suspect's eyes seemed watery and bloodshot, and the suspect's face appeared flushed, (g) there was an odor of alcohol coming from the suspect's breath, (h) the suspect's acknowledgement that he had had two [2] drinks earlier that evening and, finally and perhaps most dispositive the trooper's view point and decision to place Mr. HUNTOON under arrest, (i) the suspect's choice to decline the officer's request to perform field sobriety tests [FST] even though he was specifically told that the FSTs were entirely "voluntary" in nature. [RP 20-28, 38-41].

In light of these equivocal circumstances, Mr. HUNTOON submits on appeal that immediately upon trooper Bart having contacted him the investigation became nothing short of "pretextual" in nature. Clearly, such investigation violated the constitutional tenets of State v. Ladson, supra. Driving 40 miles per hour, at 1:00 in the morning with no other traffic on the roadway, in a 30 mph zone, was never the real focus during

trooper Bart's investigation and contact with the defendant. See, 32 L. Callahan, at §20:9 at 436-38.

In any event, it is clear the vast majority of the factors, identified above, were either purely innocuous or had no bearing whatsoever as to any valid determination that the defendant was "intoxicated." Stated differently, probable cause to arrest did not exist insofar as those facts posed by trooper Bart were not necessarily indicative of any criminal activity in terms of evidence of being under the influence as claimed by trooper Bart. See, Young, at 196.

In this regard, there was no indication that Mr. HUNTOON was driving erratically or going at a slow speed. Instead, it could be reasonably assumed that he was driving over the limit since as traffic was non-existent as trooper Bart acknowledged, and Mr. HUNTOON was eager to get home and rest before the next workday.

Also, Mr. HUNTOON testified he did not see the trooper's emergency lights until the time he pulled over. Trooper Bart acknowledged that he did not activate the lights until having turned left onto Lacrosse Avenue. [RP 372]. By the same token, Mr. HUNTOON stated that he had not stayed inside his truck because he had not heard the officer's command until after he had exited his truck. [RP 372]. Then, for

safety reasons, trooper Bart had Mr. HUNTOON remain outside his vehicle during the remainder of his investigation.

Similarly, the fact Mr. HUNTOON declined the so-called “voluntary” FSTs is not indicative any reasonable inference of criminal conduct, nor does it constitute any arguable proof of Mr. HUNTOON being under the influence and in violation of RCW 46.61.502(1).

This in itself should be considered a violation of due process on the part of law enforcement. Contrary to trooper Bart reliance upon Mr. HUNTOON having declined the FSTs, those test are supposedly voluntary in nature and Mr. HUNTOON was so advised.

Even when coupled with the alleged observation that Mr. HUNTOON’s eyes appeared watery and bloodshot, and his face flushed, the fact he declined the FSTs does not rise to the probable cause. Young, at 196. There are other plausible explanations for these conditions including, the suspect suffering from allergies, a cold or the flu, or simply being tired from a long day and the lack of sleep. See, Huft, at 211. Suffice it to say, Trooper Bart made no inquiries in this regard. In the end, he simply reached the end he wanted in the first place and placed Mr. HUNTOON under arrest without probable cause.

Mr. HUNTOON showed no signs of any lack of coordination or

dexterity [RP 4o], nor did he demonstrated any slurred, garbled or incoherent speech, which are possible indicators of intoxication or being under the influence. See generally, State v. Avery, 103 Wn.App. 527, 541, 13 P.3d 226 (2000).

Once again, probable cause to arrest exists only when there are sufficient facts present to lead a reasonable person to conclude that there is a probability that criminal activity is afoot. Gentry, at 607. Here, there was no such requisite showing based upon the innocuous circumstances described by trooper Bart. Accordingly, Mr. HUNTOON's arrest and seizure for DUI on September 4, 2014 was unlawful. All resulting evidence was therefore subject to exclusion as the "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 486, 91 L.E.2d 441, 83 S.Ct. 497 (1963); see also, State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); State v. O'Bremski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967); State v. Birdsong, 66 Wn.App. 534, 540, 832 P.2d 533 (1992). Given the lack of any remaining, admissible evidence in this case Mr. HUNTOON's conviction, judgment and sentence for a violation of RCW 46.61.502(1) should now be reversed and the case dismissed with prejudice. RAP 12.2.

2. Insofar as the forgoing evidence or alleged observations of trooper Bart before the arrest of the defendant, JERRY DALE HUNTOON, on September 4, 2014, failed to reach required level of proof beyond a reasonable doubt, the superior court improperly instructed the jury in instruction no. 6. [Issue nos. 3].

Even if it could be arguably said that the foregoing pre-incarceration evidence, and alleged observation of trooper Jason R. Bart, established probable cause to arrest the defendant, JERRY DALE HUNTOON, for driving under the influence, the issue remains whether those same facts and observation rose to the level of proof beyond a reasonable doubt of the crime contemplated under RCW 46.61.502(1)(b). Accord, State v. Gillenwater, 96 Wn.App. 667, 671, 980 P.2d 318 (1999). Simply put, they do not.

In this issue, the jury was instructed, in paragraph 2 of instruction no. 6 that, that in order “[t]o convict the defendant of the crime of felony driving while under the influence” the jury was required to find “[t]hat the defendant at the time of driving a motor vehicle (a) was under the influence of or affected by intoxicating liquor or (b) had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable test of the defendant’s breath.” [CP 65]. Jury instruction no. 6 then went on to state that “[t]o return a verdict of guilty, the jury need not be unanimous as to

which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds at least one alternative in paragraph (2) have been proved beyond a reasonable doubt.” [Emphasis added]. [Id.].

A similar situation involving alternative means of committing the crime of driving under the influence arose in State v. Martin, 69 Wn.App. 686, 688-69 & n.1, 849 P.2d 1289 (1993). There, the Division III of the court of appeals held that “[i]f the jury is not required to be unanimous as to the means of the crime’s commission, the evidence in support of each alternative means must be such that a rationale trier of fact could have found each means of committing the crime was proved beyond a reasonable doubt. [Emphasis added]. See also, State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982); State v. Bland, 71 Wn.App. 345, 358, 860 P.2d 1046 (1993).

This requirement of sufficiency of the evidence showing guilt beyond a reasonable doubt embodies constitutional considerations of due process. Id.; see also, Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). In turn, the giving of this erroneous, alternative instruction was deemed by the Martin court as not “trivial” in nature. Martin, at 689; see

also, State v. Maupin, 63 Wn.App. 887, 822 P.2d 355, review denied, 119 Wn.2d 1003 (1992). Consequently, a challenge to the sufficiency of the evidence implicates constitutional due process requirements and may be raised for the first time on appeal. In re Winship, 397 U.S. 358, 361, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); Bland, at 359; Martin, at 689; see also, RAP 2.5(a)(3).

The dispositive issue then becomes whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime, alternatively posed under RCW 46.61.502(1)(b), beyond a reasonable doubt. Jackson, 443 U.S. at 319; Green, at 221-22; Bland, at 359. The answer is unequivocally ‘no.’

In retrospect, and even if the evidence and observations made by trooper Jason R. Bart could be said to have risen to the level of probable cause, those same facts did not satisfy the heightened burden of proof showing guilt beyond a reasonable doubt as to the alternative means posed by the prosecution in paragraph (2)(a) of jury instruction no. 6. [CP 65]. Jackson, 443 U.S. at 319; Green, at 221-22; Martin, at 688-89.

Consequently, that instruction constituted error analogous to that

which occurred in Martin. Also, as was the situation in that case, the jury instructions given herein [CP 57-72], and the verdict form wherein the jury found Mr. HUNTOON guilty of count I [CP 73], “do not plainly show that the jury was in fact unanimous as to the alternative means supported by sufficient evidence.” Id.

As a result, it can only be concluded that the erroneous nature of instruction no. 6 affected the outcome of this case and such error was not harmless. Id.; see also, State v. Bonds, 98 Wn.2d 1, 18, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831, 78 L.Ed.2d 112, 104 S.Ct. 111 (1983). The prosecution cannot prove otherwise. See, State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994).

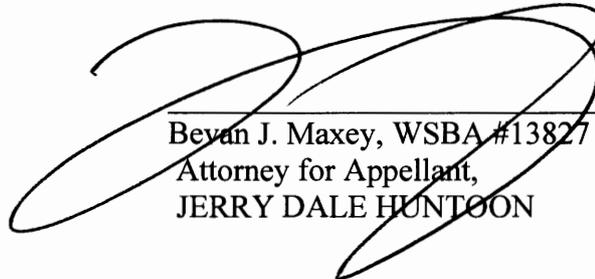
In sum, the verdict of guilty entered on January 29, 2016 [CP 73] along with the conviction, felony judgment and sentence, and warrant of commitment, entered on March 18, 2016 [CP 84-87], should once again be reversed and ordered dismissed with prejudice. RAP 12.2.

F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, JERRY DALE HUNTOON, respectfully requests that the judgment and sentence, and warrant for commitment, for driving while under the influence [RCW 46.61.502(1)(a), (1)(b) and (6)], which were erroneously entered against him by the superior court of Spokane County, State of Washington, on March 18, 2016, be reversed and such charge ordered dismissed with prejudice by this court. RAP 12.2.

DATED this 18th day of October, 2016.

Respectfully submitted:



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