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Division III
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NO. 35214-5

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN CLIFFORD ALLEN,

Appellant.

Appeal from Whitman County Superior Court
Honorable Gary Libey
No. 16-1-00109-7

BRIEF OF APPELLANT

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I. INTRODUCTION

Defendant appeals his conviction of felony DUI, arguing it was improper to raise it from a gross misdemeanor. A DUI is raised to a felony if a defendant has a prior Vehicular Assault conviction but *only* if the offense was specifically committed while under the influence of alcohol. Defendant's 2005 judgment and sentence for vehicular assault only found defendant was guilty of vehicular assault generally, and did not specify the alcohol prong. The State improperly submitted evidence outside the 2005 judgment and sentence to prove that the 2005 vehicular assault was allegedly committed while under the influence of alcohol, including holding a "resurrected" 3.5 hearing to admit Defendant's 2005 statement that "I'm drunk." The State further admitted the old charging Information, Statement of Defendant on Plea of Guilty, and had the original officer appear and read his more than decade-old report. Not surprisingly, the officer had no memory of Defendant. All of this "evidence" violated multiple principles of double jeopardy, *res judicata*, collateral estoppel, the confrontation clause, the rule of lenity, judicial economy, common sense principles of witness reliability, and public policy. The judgment and sentence, the *ultimate and only* finding from the previous court, did not specify the alcohol prong, and it was improper and unlawful to admit decade-old extrinsic evidence to the contrary.

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II. ASSIGNMENTS OF ERROR

The trial court erred when it permitted evidence outside the predicate Judgment and Sentence to be presented to the jury to prove a predicate offense.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether a Judgment and Sentence that convicts a defendant of Vehicular Assault generally can be used twelve years later to provide a predicate offense of Vehicular Assault-DUI specifically.

Whether a defendant's constitutional rights are violated when a prior vehicular assault case is re-opened and re-litigated to support subsequent factual findings about the presence or absence of alcohol.

IV. STATEMENT OF CASE

Defendant was found guilty of felony DUI on April 7, 2017, in Whitman County. Defendant was arrested after approaching his parked truck at a bar in Pullman. CP 193-201. The crime of DUI is normally a gross misdemeanor, except (among other possibilities) when a defendant has previously been convicted of "Vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b)." RCW 46.61.502(6)(b)(ii). The crime of Vehicular Assault may be established by three possible basis, only one of which involves the necessary predicate of alcohol: (a) driving in a reckless manner and causes substantial bodily harm, *or* (b) **while under the influence of alcohol**, *or* (c) with disregard for the safety of others and causes substantial bodily harm. RCW

46.61.522(1). Subsection (c) is a Serious Level III crime, while (a) and (b) are more serious at Level IV. RCW 9.94A.515.

Here, Defendant had a Vehicular Assault conviction from 2005 from Spokane County, and the court and jury here concluded that it had been committed “while under the influence of alcohol,” thus raising his present DUI conviction to a felony. However, defense counsel correctly noted throughout the case that the Judgment and Sentence from 2005 was ambiguous as to which alternative of Vehicular Assault Defendant was found guilty of. The Judgment and Sentence merely stated Defendant was guilty of “VEHICULAR ASSAULT RCW 46.61.522(1) [...] as charged in the Information.” CP 206. Neither of the three subsections were *ever* specified *anywhere*. The referenced Information vaguely charged Defendant with a sweeping “catch-all” charge that, without using statutory language, charged Defendant with what appeared to be all three alternatives including under the influence of alcohol “and any drug:”

the defendant [...] operated a motor vehicle while under the influence of or affected by intoxicating liquor and any drug, and in a reckless manner, and with disregard for the safety of others, did cause substantial bodily harm to [...]. 2004 Information.

The defense noted this deficiency throughout the proceedings, both in a motion to dismiss on November 4, 2017, (VRP 4-15) and at the final day of trial. It was correctly noted that the Information was not dispositive due to its vagueness and especially due to the fact that Defendant was never alleged to be under the influence of “any drug.” CP 101-119. Also, it was noted and affirmed by the Court that Defendant was not ultimately

convicted of the subsection (c) prong (“disregard for the safety of others”) because the final sentence imposed implied the crime was a Seriousness Level IV, which could only be either the alcohol (b) *or* recklessness (a) prongs:

THE COURT: I agree, very clearly here, a review of the judgment and sentence in and of itself does not answer the question. When you take the judgment and sentence, look at the standard range that was set forth for the offense, it does eliminate the DSO [disregard for safety of others] prong, but it could still be the reckless prong or the DUI prong.

See VRP 13.

This trial was bifurcated – first for a verdict as to the present charge of DUI, and second, to determine whether Defendant’s 2005 conviction involved alcohol. The jury concluded that Defendant committed DUI on March 23, 2017 (VRP 438), and the following day concluded that his 2005 conviction involved alcohol (VRP 560).

Over defense counsel’s myriad and timely objections, this second day of trial involved the admission of multiple documents more than a decade old as well as a bizarre, resurrected “3.5 hearing” from the closed 2005 case for purposes of admitting the Defendant’s old statement that “I’m drunk” into evidence. The officer that responded to the 2005 incident physically appeared and stated he had no memory at all of defendant (VRP 473). Despite having no memory, he was allowed to read from his report to the court and the jury, which stated that he could smell the “odor of intoxicants” on defendant at the time. VRP 496. On cross-examination, the officer’s lack of memory was clear:

Q. Okay. Okay. With respect to the contact with Mr. Allen then, so you don't have an independent recollection of him making those statements to you, correct?

A. Correct.

Q. Do you have an independent recollection of you reading him the Miranda warnings?

A. I don't.

A finding that Miranda warnings had been properly read was made and Defendant's statement was admitted by the court at the conclusion of the "3.5 hearing" (VRP 486). The officer read from his report a second time to the jury afterwards (VRP 496) and the "I'm drunk" statement was submitted to the jury. The 2005 Statement of Defendant on Plea of Guilty and the original charging Information were also submitted into evidence without authentication, despite a Confrontation Clause objection. VRP 508.

The jury concluded that the 2005 conviction was for Vehicular Assault-DUI. VRP 560.

Defendant appeals his conviction and assigns error to all jury instructions related to his prior vehicular assault charge.

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V. ARGUMENT

A. LAW

1. Standard of Review

a) *Review of Constitutional Issues*

Generally, an appellate court will not address a new issue on appeal unless the defendant can demonstrate that it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333; 899 P.2d 1251 (1995) . Under RAP 2.5(a)(3), a defendant must show how an alleged constitutional error actually affected his rights at trial. *See McFarland*, at 334. It is this showing of actual prejudice that makes the error “manifest.” *McFarland*, at 333 (citing *State v. Scott*, 110 Wn.2d 682, 688; 757 P.2d 492 (1988)). A “manifest” error is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” *State v. Lynn*, 67 Wn.App. 339, 345; 835 P.2d 251 (1992).

One such error is a challenge to the admission of out-of-court testimony under the confrontation clause, which is reviewed de novo. The State has the burden to establish a witness’s statements were nontestimonial. Whether collateral estoppel applies to bar re-litigation of an issue is also reviewed de novo. *State v. Vasquez*, 109 Wn.App. 310, 314; 34 P.3d 1255 (2001), *aff’d*, 148 Wn.2d 303; 59 P.3d 648 (2002); *State v. Bryant*, 100 Wn.App. 232, 236–37, 237 n. 9; 996 P.2d 646 (2000), *rev’d on other grounds*, 146 Wn.2d 90, 42 P.3d 1278 (2002);

b) *Substantial Evidence*

“Generally, [factual] findings are viewed as verities, provided there is **substantial evidence** to support the findings.” *State v. Halstien*, 122 Wash.2d 109, 128; 857 P.2d 270 (1993). **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. *Halstien*, at 129.” *State v. Hill*, 123 Wn.2d 641, 644; 870 P.2d 313 (1994).

2. Statute

RCW 46.61.502 “Driving Under the Influence” states (in relevant part) when a DUI is raised from a gross misdemeanor to a felony (emphasis added):

(6) It is a class B felony punishable under chapter 9.94A RCW [...] if

(b) The person has ever previously been convicted of:

[...]

(ii) Vehicular assault while under the influence of intoxicating liquor or any drug, **RCW 46.61.522(1)(b)**;

It is noteworthy that the statute explicitly states, in bold text above, “RCW 46.61.522(1)(b),” clearly establishing not merely that ‘alcohol was involved’, but that the person must have been convicted *specifically of* “RCW 46.61.522(1)(b).” If the subsection had stopped at “...or any drug” then it might argued that the door is open to re-litigate the presence of alcohol in predicate offenses, but it did not.

The bases for vehicular assault are contained in RCW 46.61.522:

Vehicular assault—Penalty.

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(a) In a reckless manner and causes substantial bodily harm to another; or

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or

(c) With disregard for the safety of others and causes substantial bodily harm to another.

Subsections (a) and (b) above are Seriousness Level IV offenses, while subsection (c) is Seriousness Level III. RCW 9.94A.515.

3. Caselaw – Felony DUI

No Washington case appears to have this case’s factual pattern—where a predicate Judgment and Sentence references the vehicular assault statute generally without specification to one of the three subsections. The closest case appears to be *State v Bird*, 187 Wn.App. 942; 352 P.3d 215 (2015). In that case, the Court of Appeals, Division I found that sufficient evidence supported a finding that the predicate vehicular assault was committed under the influence of alcohol because the judgment and sentence explicitly stated so: “Vehicular Assault—All Alternatives” and the notation “(DUI)” was handwritten over “All Alternatives.” *Id.* at 946. Furthermore, Bird explicitly stated in his plea that he “...did drive a motor vehicle while under the influence of alcohol and did cause substantial bodily harm to another person...” *Id.*

In *Bird*, the Court of Appeals, Division I stated that it disagreed with Division II regarding whether the question before the court was one of law or fact:

Whether a prior conviction qualifies as a predicate offense is a threshold question of law for the court, and not an essential element of the crime of felony DUI. *State v. Chambers*, 157 Wash.App. 465, 479, 237 P.3d 352 (2010), review denied, 170 Wash.2d 1031, 249 P.3d 623 (2011); *State v. Cochrane*, 160 Wash.App. 18, 20, 253 P.3d 95 (2011). We disagree with Division Two's recent opinion, *State v. Mullen*, 186 Wash.App. 321, 345 P.3d 26 (2015), holding otherwise.

In *Mullen*, a divided Division II held that it was a question of fact for the jury, that must be proved beyond a reasonable doubt, while the dissent in *Mullen*, like *Bird*, maintained it was a question of law for the judge.

For the reasons set forth *infra*, this Court should hold that the issue is a question of fact; but regardless of whether it is a question for the judge or jury, any evidence beyond the final judgment and sentence should still be excluded from consideration. “[...]the guidelines as to what is a question of fact or law are not precise.” *Hartley v. State*, 103 Wn.2d 768; 698 P.2d 77.

A felony Judgment and Sentence contains Findings. See pattern form, 2005. Those Findings reference that Defendant was found guilty in their Statement of Defendant on Plea of Guilty. *Id.* A felony Judgment and Sentence also contains a Judgment, which reiterates that finding of guilt, and then a final Sentence imposed on the defendant. *Id.*

Washington’s civil procedure statutes (RCW 4.56.010) define a judgment as “the final determination of the rights of the parties in the action.” In *State v. Siglea*, the Washington Supreme Court adopted the same definition for criminal cases, with one cogent addition—finality is achieved

through actual imposition of sentence following an adjudication of guilty.
State v. Siglea, 196 Wn. 283; 82 P.2d 583 (1938).

4. Caselaw- Constitutional Issues

Permitting courts or juries to investigate beyond a final judgment and sentence to determine if a predicate act was committed under the influence raises several constitutional concerns. First, re-opening what could hypothetically be decades-old cases to hold (as here) 3.5 hearings or to conduct factual disputes violates res judicata and collateral estoppel, both of which were well-summarized by the Washington Supreme Court in *State v. Dupard*:

Collateral estoppel, perhaps more descriptively denoted as issue preclusion, and res judicata are doctrines having a common goal of judicial finality. The principles underlying both doctrines are to prevent relitigation of already determined causes, curtail multiplicity of actions, prevent harassment in the courts, inconvenience to the litigants, and judicial economy. *Bordeaux v. Ingersoll Rand Co.*, 71 Wash.2d 392, 429 P.2d 207 (1967); see generally 1B J. Moore, Federal Practice s 0.405 (1972).

Of the two doctrines, res judicata is the more comprehensive because it relates to a prior judgment arising out of the same cause of action between the parties. Collateral estoppel is less encompassing, barring relitigation of a particular issue or determinate fact. Both doctrines require a large measure of identity as to parties.

In 1970, the United States Supreme Court accorded collateral estoppel constitutional dimension by incorporating it into the Fifth Amendment protection against double jeopardy. There, the court speaking of collateral estoppel noted:

It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct.

1189, 1194, 25 L.Ed.2d 469 (1970).

State v. Dupard, 93 Wn.2d 268, 273; 609 P.2d 961 (1980).

After a jury determines an issue by its verdict, the State cannot “constitutionally hale [a defendant] before a new jury to litigate that issue again.” *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970).

Furthermore, relitigating predicate offenses for DUI raises many Confrontation Clause concerns. While it is true that the State in the case at bar managed to summon the original responding officer from 2005 to trial, the Defendant was deprived of the ability to confront the victim, other witnesses, other officers, or the author of the charging Information that was presented to the jury as “evidence” of DUI.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses against them. Statements of an absent witness may not be admitted if the statement is of a testimonial nature, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination.

See State v. Mares, 160 Wn.App. 558, 562; 248 P.3d 140 (2011):

5. Witness Reliability and Rule of Lenity

Post-conviction litigation of the facts in a predicate offense also raises concerns about the reliability, relevancy, and competency of any witnesses that may appear. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. ER 602. Here, the officer stated he had

no memory of Defendant, forcing the defense to defend itself against effectively “dead” evidence with no live testimony.

If the felony-enhancement statute for DUIs is ambiguous because it is not clear whether a defendant must have (1) merely committed the prior under the influence or (2) explicitly committed it under the statutory DUI subsection, then the rule of lenity requires the latter interpretation. If after applying rules of statutory construction an appellate court conclude that a statute is ambiguous, “the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.” *State v. Jacobs*, 154 Wn.2d 596, 601; 115 P.3d 281 (2005) (citing *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249; 955 P.2d 798 (1998)).

6. Bifurcation and a New Jury

A prospective juror must be excused for either actual or implied bias. RCW 4.44.170; *Carle v. McChord Credit Union*, 65 Wn.App. 93, 108; 827 P.2d 1070 (1992). Actual bias requires “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” *Kuhn v. Schnall*, 155 Wn.App. 560, 574; 228 P.3d 828 (2010). Implied bias requires “the existence of the facts [that] in judgment of law disqualifies the juror.” *Id.* One way in which a prospective juror can be impliedly biased is if he or she has “an interest ... in the event of the action, or the principal question involved therein.” *Id.* Because a great variety of fact patterns can arise, a trial court must have a measure of discretion in determining what

constitutes an “interest.” *Id.* A trial court has broad discretion to control the order and manner of trial proceedings. ER 611; *State v. Johnson*, 77 Wn.2d 423, 426; 462 P.2d 933 (1969).

Although bifurcated trials “are not favored,” they may sometimes be necessary. *State v. Kelley*, 64 Wn.App. 755, 762; 828 P.2d 1106 (1992). For example, bifurcation is appropriate where the defendant argues insanity and a second inconsistent defense. See *State v. Jeppesen*, 55 Wn.App. 231, 236–38; 776 P.2d 1372 (1989), review denied, 113 Wn.2d 1024, 782 P.2d 1070. Bifurcation is inappropriate if a unitary trial would not significantly prejudice the defendant or if there is a substantial overlap between evidence relevant to the proposed separate proceedings. *Jeppesen*, at 237, *State v. Jones*, 32 Wn.App. 359, 369; 647 P.2d 1039 (1982), rev'd on other grounds, 99 Wn.2d 735, 664 P.2d 1216 (1983).

An appellate court reviews a bifurcation decision for abuse of discretion. *Jeppesen*, at 236. A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701; 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

B. ANALYSIS

Here, the court violated Defendant’s constitutional protections by permitting re-litigation of his closed 2005 case. The evidence before the jury was insufficient to support a finding that Defendant committed Vehicular Assault under the influence where the judgment and sentence did not explicitly state as such.

First, the final Judgment and Sentence from 2005 is the *only* evidence the jury or judge was permitted to consider when determining the predicate offense. As stated in *Siglea*, this document is the “the final determination,” and contains the ultimate findings and *only* judgment of the court.

Paragraph 3.1 of the Judgment and Sentence states “The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1”. CP 207. The referenced Paragraph 2.1 states: “There being no reason why judgment should not be pronounced, the Court FINDS: [...] The defendant was found guilty on 1-24-05 [...] Count No.: I VEHICULAR ASSAULT RCW 46.61.522(1) [...] as charged in the Information.” The inquiry must stop here. “RCW 46.61.522(1)” is the only crime defendant is explicitly found guilty of in this document, *not* “RCW 46.61.522(1)(b)” [DUI] as *explicitly required* by the felony-enhancement statute (RCW 46.61.502(6)(b)(iii)). There is simply no finding that the Defendant was guilty of Vehicular Assault- DUI.

Assuming without conceding the jury could even consider the original Information referenced in Paragraph 2.1, one finds that the Information is just as broad as the Judgment and Sentence:

the defendant [...] operated a motor vehicle while under the influence of or affected by intoxicating liquor and any drug, and in a reckless manner, and with disregard for the safety of others, did cause substantial bodily harm to [...]. 2004 Information.

This broadest-possible “catch-all” summary confirms that Defendant was found guilty of the vehicular assault statute generally, and

not one subsection specifically. For example, Defendant was never accused of being under the influence of “any drug” in 2004, and just as it would be preposterous for a court more than a decade later to say this Information proves he has, say, a history of methamphetamine use, it is just as preposterous to claim this Information proves he was DUI-alcohol.

Considering the rule of lenity, one must read RCW 46.61.502(6)(b)(iii) to *only* permit enhancements to a felony when defendants are explicitly and specifically previously convicted of the DUI subsection. To interpret the statute as a green light to broadly consider whether “alcohol was involved” violates the rule of lenity.

The trial court here erred when it permitted the investigation to proceed beyond the 2005 final Judgment and Sentence, sailing into uncharted waters rife with constitutional violations. It began with the State’s “3.5 hearing” resurrected from the closed, 12 year old case, seeking to admit Defendant’s statements in 2004 that “I’m drunk.” Not only did this clearly violate res judicata and principles of collateral estoppel, but it thrust an evidentiary nightmare onto the jury. The only live witness present, the responding officer, had no memory whatsoever of Defendant. How then he could reliably testify that he read *Miranda* to the Defendant more than a decade ago is confounding. As far as the record reflects, defense counsel does not appear to have been given any opportunity to summon or call other witnesses to the 2004 accident to testify to the contrary.

After prevailing, the State then proceeded to have the officer read off his old report to the jury, which stated that he could smell the odor of

intoxicants on the Defendant. First, this police report was not a finding of fact in the Judgment and Sentence, and was thus not proper evidence before the jury. Even though the defendant in his Statement on Plea of Guilty may have stated the presiding judge could review the police reports for the *sole listed purpose* to “form a factual basis for the plea”, that did not somehow transmute it into a carte-blanche waiver to have the police reports used for any purpose whatsoever in any court proceeding into the future.

The State may argue that the Court of Appeals in *Bird* addressed the police reports in their analysis, which stated Mr. Bird was drunk. However, the few sentences devoted to the police reports in *Bird* were mere dicta; cumulative proof that the Judgment and Sentence, which explicitly stated “DUI” and is thus completely distinguishable, was true.

How this Defendant could properly confront charging documents and an officer that did not even remember him is also concerning. The Defendant was unable to confront the victim, other witnesses, other officers, or the author of the charging Information that was presented to the jury as “evidence” of DUI.

The trial court further abused its discretion when it bifurcated the trial without impaneling a new jury, substantially prejudicing the Defendant. No juror on the last day of trial was an objective trier of fact, since they all had knowledge of Defendant’s current conviction which they themselves had just rendered. It is hard to imagine how a trier of fact that had just found DUI would *not* find that Defendant had committed the same in the past. If the issue of whether Defendant had been DUI a decade earlier

really was a question of fact requiring re-litigation, as the State would purport, then it is even more important that Defendant be entitled to a new, unbiased jury that did not have personal knowledge of him.

The public policy and judicial economy concerns quickly become apparent in an analysis of this case. The State and defense counsel could easily have ended up in a situation where they were essentially re-trying the entire 2004 incident. One could also easily see the time span between crimes being even greater than the one at bar – are Washington courts to hold 3.5 hearings forty years after the fact, against sixty-year-old DUI defendants who committed priors when they were twenty? Are elderly witnesses to appear in courtrooms and testify if they smelled alcohol on an individual thirty years in the past?

The 2005 Judgment and Sentence is all that was properly before the jury or the court. It was and is the final finding of the prior court, nothing more and nothing less. If it did not explicitly specify the DUI prong of Vehicular Assault, then it is not the State's prerogative to prove ex post facto that it 'meant' to. The felony-enhancement statute explicitly states "RCW 46.61.522(1)(b)," clearly establishing not merely that "alcohol was involved", but that the person must have been convicted *specifically of* "RCW 46.61.522(1)(b)."

VI. CONCLUSION

This matter should be remanded for re-sentencing as a gross misdemeanor.

Respectfully submitted this 20th day of November, 2017.

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