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Court of Appeals
Division III
State of Washington
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COA No. 35214-5

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

STATE OF WASHINGTON,

Respondent

v.

BRIAN CLIFFORD ALLEN

Appellant.

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

BRIEF OF RESPONDENT

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I. INTRODUCTION

A jury convicted the Defendant of Felony DUI. Prior to the Defendant's jury trial, the trial judge ordered that the trial be bifurcated, which made it so the jury would have to decide if the basic elements of DUI were met before being presented with the Defendant's predicate offense of Vehicular Assault. This bifurcated trial resulted in the jury finding the Defendant guilty of DUI during the first phase of the trial, and finding that he had committed the requisite predicate offense making the Defendant guilty of felony DUI during the second phase of the trial.

In his appeal, the Defendant argues that the Judgment and Sentence regarding his 2005 Vehicular Assault conviction was not sufficient to prove beyond a reasonable doubt that the Defendant was convicted under RCW 46.61.522(1)(b); that he drove a vehicle while under the influence of intoxicating liquor or any drug and caused substantial bodily harm to another.

It is the State's position that the Judgment and Sentence regarding the Defendant's 2005 Vehicular Assault conviction, along with the accompanying documents, provided sufficient evidence for jury to find beyond a reasonable doubt that the Defendant had been convicted of the requisite predicate conviction.

II. ASSIGNMENTS OF ERROR

Whether the Defendant's 2005 Vehicular Assault conviction could be used as a predicate offense to convict the Defendant of felony DUI in this matter.

Whether the Defendant's constitutional rights were violated when evidence pertaining to his predicate conviction was presented to prove under what prong the Defendant was convicted.

III. STATEMENT OF THE CASE

A jury trial in this matter was held on March 22, 23, and 24 of 2017. During the trial, the State sought to prove one count of Felony DUI, alleging that the Defendant drove a motor vehicle in the State of Washington and had, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or while under the influence of or affected by intoxicating liquor, and also had previously been convicted of Vehicular assault while under the influence of intoxicating liquor or any drug.

While the trial only concerned one charged crime: Felony DUI, the court granted the Defendant's motion to bifurcate the trial into two phases. During the first phase, the State was only allowed to provide evidence concerning the elements pertaining to a gross misdemeanor DUI; or in other words, the State could not present evidence concerning the

Defendant's predicate offense. If the jury found the Defendant guilty concerning the elements for a gross misdemeanor DUI, the State was allowed to proceed to phase two, where it was allowed to present evidence concerning the Defendant's predicate offense. This bifurcation came about by way of motion of the Defense for the purpose of avoiding potentially prejudicing the jury concerning the Defendant's recent criminal conduct by allowing the jury to know he had committed similar conduct in the past, resulting in injury to another.

During phase one, the jury found that the Defendant had committed the basic elements of DUI, beyond a reasonable doubt. During phase two, the State presented evidence consisting of exhibits relating to the Defendant's 2005 Vehicular Assault conviction, testimony of the investigating officer regarding the Defendant's 2005 conviction, and statements made by the Defendant confirming that his 2005 Vehicular Assault conviction was because of alcohol.

The jury ultimately found beyond a reasonable doubt that, in addition to the basic elements of DUI, the Defendant also had committed the requisite predicate offense of Vehicular assault while under the influence of intoxicating liquor or any drug.

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IV. ARGUMENT

A. Standard of Review

When reviewing whether sufficient evidence supports a criminal conviction, the reviewing court is to view the evidence in the light most favorable to the State to determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

RAP 2.5(a) bars an appellate court from reviewing claims of error that were not raised in the trial court. However, the rule does allow for an issue that was not raised at the trial level if the issue concerns a “manifest error affecting a constitutional right.” *Id.* The Defendant has requested relief under several theories, including collateral estoppel and res judicata. Such issues are a question of law which the court reviews de novo. *State v. Vasquez*, 109 Wn. App. 310, 314, 34 P.3d 1255 (Div 3, 2001), *Atlantis Cas. Ins. Co. v. Orgon Mut. Ins. Co.*, 137 Wn. App. 296, 302, 153 P.3d 211 (Div 2, 2007).

B. Felony DUI

A person is guilty of felony DUI if the person drove a motor vehicle in the State of Washington and had, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or while under the influence of or affected by intoxicating liquor, and also **had previously**

been convicted of vehicular assault while under the influence of intoxicating liquor or any drug. RCW 46.61.502(6)(b)(ii) (emphasis added).

In order for the State to obtain a conviction for felony DUI in this matter, it must prove the existence of the Defendant's prior offense, vehicular assault while under the influence of liquor or any drug, beyond a reasonable doubt. *State v. Chambers*, 157 Wn. App. 465, 481, 237 P.3d 352 (Div 1 2010). However, "whether a prior offense... qualifies as a predicate offense, is a threshold determination to be decided by the trial court." *Id.* Further, in *Chambers*, the defendant challenged the trial court's use of a preponderance standard in deciding whether the predicate offense qualified, and the Court of Appeals ultimately disagreed with the Defendant and found the threshold used by the trial court to be appropriate. *Id.* at 480-81.

The appellate court has analyzed the same issue present in this matter. *State v. Bird*, 187 Wn. App. 942, 352 P.3d 215 (Div 1, 2015). In *Bird*, the defendant was facing a DUI that was elevated to the felony level based on a prior conviction for vehicular assault. *Id.* at 944. The defendant argued that because the record was unclear as to which alternative under the vehicular assault statute he was convicted of, his current felony DUI should be dismissed. *Id.* at 945. The court ultimately decided that the

evidence before them was “more than sufficient to establish that Bird was under the influence in his conviction for vehicular assault.” *Id.* The evidence to support the court’s finding is as follows: 1) at the time of arrest for his current conviction, the defendant told the officers about his vehicular assault conviction and that he was aware that his current charge would be a felony. *Id.* at 944. 2) The defendant entered a plea of guilty to *all* alternatives and the judgment and sentence that was entered included the DUI prong. *Id.* at 946. 3) The statement of defendant on plea of guilty stated that he drove a motor vehicle while under the influence and did cause substantial bodily harm to another. *Id.* 4) In the statement of defendant on plea of guilty, the defendant agreed that the court could review the police reports and/or a statement of probable cause to establish a factual basis for the plea. *Id.* The reports indicated that the defendant had the odor of alcohol on him, the defendant exhibited signs of being intoxicated, and witnesses had seen him consume alcohol that evening. *Id.* 946-47. The court concluded that “there is sufficient information upon which a trial court could determine that the guilty plea referred to the DUI prong and, therefore, relevant and admissible at the trial.” *Id.* at 947.

In the case at hand, the Judgment and Sentence at issue indicates that the Defendant pled guilty and was convicted of one count of Vehicular Assault on January 24, 2005. (Trial Exhibit 13). The Defendant

argues that this is the sole document to be considered, and that it is not specific enough to support the predicate offense. The State disagrees.

The Judgment and Sentence reads as follows:

The defendant was found guilty on 1-24-05

by plea

Count : I **VEHICULAR ASSAULT**
 RCW 46.61.522(1)-F (#05013)
 Date of Crime **September 24, 2004**
 Incident No. **002-04-0325473**

as charged in the information[.]

While the Judgment and Sentence only references 46.61.522(1), it does state that the Defendant was found guilty “by plea.” Because the Judgment and Sentence made reference to the Defendant’s “plea” of guilty, it is the State’s position, and the trial court agreed, that the Statement of Defendant on Plea of Guilty was relevant and admissible. (Trial Exhibit 15). It is important to note that the Defendant made no objection at trial to the admission of this exhibit. (CP 521). This exhibit contained information establishing that the Defendant was convicted under the DUI prong. (Trial Exhibit 15). First, on page 1, the Defendant acknowledged that he has been charged with vehicular assault with the understanding that the elements are “Operating a motor vehicle while under the influence of or affected by intoxicating liquor and/or any drug,

and in a reckless manner, *and* with disregard for the safety of others, did cause substantial bodily harm to another.” *Id.* (emphasis added). It is important to note that unlike the statute that uses the disjunctive “or” to separate the alternatives, the plea of guilty at issue used the conjunctive “and” indicating *all* of the elements. Further, unlike the statute, the elements laid out in the Defendant’s plea lists the DUI prong before any of the other prongs. *Id.* Second, on page 3, the document indicates that the prosecuting attorney will make specific recommendations, including an “Alcohol Evaluation with Recommended Treatment[.]” *Id.* Third, on page 5, the Defendant stated that if the judge finds that a chemical dependency contributed to the offense, the judge may order rehabilitation or to perform affirmative conduct “*related to the circumstances of the crime* for which I am pleading guilty.” *Id.* (emphasis added).

In addition to the Statement of Defendant on Plea of Guilty, the Judgment and Sentence stated that the Defendant was found guilty of “Count No: I... as charged in the information[.]” (Trial Exhibit 13). Because of this, it is the State’s position, and the trial court agreed, that the Information that was filed in the same cause number was also relevant and admissible. (Trial Exhibit 16). Similar to the Statement of Defendant on Plea of Guilty, this exhibit indicted that crime the Defendant was

convicted of was Vehicular Assault under *all* prongs, listing the DUI prong first. *Id.*

Further, it is important to note that there are portions of the Judgment and Sentence that indicate that the Defendant was DUI at the time of the assault. (Trial Exhibit 13). First, on page 2 of the document, the court found that “the offender has a **chemical dependency** that has contributed to the offense(s).” *Id.* Further, on page 8, the court ordered an “Evaluation and treatment at the direction of his CCO.” *Id.*

In addition to these physical exhibits, the court also admitted the Defendant’s statements regarding his vehicular Assault conviction. just like in *Bird*, while the officer was investigating the Defendant’s most current DUI, the Defendant made statements regarding his criminal history, telling the officer that his Vehicular Assault conviction was because of alcohol. (CP 503).

Just as in *Bird*, the Judgment and Sentence in this matter does not designate a single specific prong under which the Defendant was convicted. However, the Statement of Defendant on Plea of Guilty indicates that the Defendant was convicted under *all* prongs. The Defendant never objected to the admissibility of this exhibit at trial and therefore is barred from asking the court to review its admissibility now. *See* RAP 2.5(a).

Also, the Information that the Defendant to which plead guilty indicates that the Defendant was charged under *all* prongs of the Vehicular Assault statute. And finally, just like in *Bird*, the Defendant made statements to the investigating officer that the vehicular assault was alcohol related.

The exhibits and testimony concerning the Defendant's prior conviction for Vehicular Assault are more than sufficient, such that a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.

C. Res Judicata and Collateral Estoppel

ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Further, ER 402 goes onto state that "[a]ll relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

In the case at hand, the State had the burden to prove that the Defendant had previously been convicted of Vehicular Assault while under the influence of intoxicating liquor or any drug. Throughout the proceedings leading up to the trial, the Defendant made it clear that his

position was that the Judgment and Sentence for his Vehicular Assault was insufficient, or ambiguous enough, to prove beyond a reasonable doubt that his Vehicular Assault was while under the influence.

The State would like to point out that there is no indication that the Defendant entered an “*in re Barr*” plea to Vehicular Assault. In the case of *in re Barr*, the State Supreme Court upheld a guilty plea in which the defendant benefitted from the plea based on a plea bargain even though there was not a factual basis to support the crime to which the defendant actually plead to. *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984). This case has been used to support a “compromise” plea so long as there are sufficient facts to support the original charge. *See e.g. State v. Zhao*, 157 Wn.2d 188, 193, 137 P.3d 835 (2006).

The Defendant argues that the *sole* document that should have been considered at trial to prove the Defendant’s predicate offense was the Judgment and Sentence. (Trial Exhibit 13). Because there was no indication of an “*in re Barr*” plea, nor is there any mention of in the Judgment and Sentence of an *amended* Information, it is the State’s position that the filings referenced in the Judgment and Sentence are relevant because they show what specific crime with which the Defendant was charged and to which he plead guilty.

In his appeal, the Defendant argues that any evidence beyond the Judgment and Sentence violated the principals of res judicata and collateral estoppel. The State has no contention with the Defendant's analysis of these doctrines as outlined in the applicable case law. However, the State does dispute that the admission of the evidence at issue violated these principles.

Hypothetically, if the Defendant's Judgment and Sentence made it clear that the Vehicular Assault conviction was under a specific prong other than the DUI prong, and the State was now trying to convince a jury that the Defendant *should have been* convicted under the DUI prong based on the facts, then yes, these two doctrines would preclude the State from presenting such evidence. However, that is not the case here. The circumstances in the case at hand are that the Judgment and Sentence and the Statement of Defendant of Plea of Guilty (which was never objected to) show that the Defendant was convicted under *all* the prongs. The additional evidence that was admitted, the Information (that was objected to) as well as the officer's testimony, only reiterated what was in front of the jury. These items did not contradict the Judgment and Sentence; they just affirmed what was already there. The admission of these items did not equal re-litigation of a decided matter.

In the event that this court does find that the evidence that was admitted in addition to the Judgment and Sentence and the Statement of Defendant of Plea of Guilty violated either res judicata or collateral estoppel, the Court should still affirm the Defendant's conviction because these two exhibits alone provided sufficient evidence for a rational fact finder to find beyond a reasonable doubt that the Defendant had been convicted of the requisite predicate offense. The court should find that, if the admission of the additional evidence was done it error, it was harmless error.

While the doctrines of res judicata and collateral estoppel concern a person's constitutional rights, they are not outside of harmless error analysis. In the context of this case, the evidence at issue would fall within a class of "trial error" as opposed to a "structural defect" such as right to a jury trial, right to counsel, etc. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140,148-9, 126 S.Ct. 2557 (2006). The Court should find that "a constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." However, a constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is unattributable to the error." *State v. Dupard*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Applying the harmless error analysis to the case at hand, the court should find beyond a reasonable doubt that a jury would have reached the same verdict absent the evidence at issue. As stated above, the Judgment and Sentence and the Statement of Defendant of Plea of Guilty regarding the Defendant's prior Vehicular Assault conviction made it clear that the Defendant was convicted under *all* prongs of the Vehicular Assault statute. Without any additional evidence the jury still would have convicted the Defendant of felony DUI.

D. Bifurcation/New Jury

As addressed above, the trial court in this matter bifurcated the trial severing the evidence regarding the Defendant's predicate offense from the evidence regarding his current DUI. The bifurcation was based on a motion brought by the Defendant. The trial court granted the motion so the jury would not be prejudiced by evidence that the Defendant had committed the same actions in the past, resulting in serious bodily harm to another, when deciding if he had committed the crime of DUI from his recent actions. In his motion, the Defendant never requested that the court impanel a new jury to hear the second phase of the trial. In short, the court granted exactly what was asked for in the Defendant's motion to bifurcate.

RAP 2.5(a) addresses what types of claims that can be reviewed which were not raised in the trial court. These claims include: "(1) lack of

trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.”

The Supreme Court has made it clear that “[c]ourts should strive to afford defendant’s the fairest trial possible.” *State v. Roswell*, 165 Wn.2d 186, 197, 196 P.3d 705 (2008). However, while bifurcation for the purpose of limiting possible prejudice because of prior convictions is constitutionally permissible, the State Supreme Court has specifically held that bifurcation is not required. *Id.* The court made it clear that “trial courts may exercise their sound discretion to reduce unnecessary prejudice where practical.” *Id.* at 198.

Again, in this case, the bifurcation that took place was exactly what was asked for in the Defendant’s motion. There was no objection to the same jury hearing phase two of the trial, and in his motion, the Defendant suggested that the *same* jury hear phase two. It is the State’s position that, because there was no objection at the time of trial, and because this issue does not fall within one of the three enumerated exceptions stated in RAP 2.5(a), this court cannot review this claim of error.

In the event that this court does consider this issue, it should find that the court did not abuse its discretion by not empanelling a new jury for phase two of the trial.

V. CONCLUSION

The court should affirm the Defendant's conviction because there was more than sufficient evidence to support the verdict rendered by the jury. The court should find that the admission of evidence beyond the Judgment and Sentence and the Statement of Defendant of Plea of Guilty did not violate the doctrines of res judicata or collateral estoppel because it was not presented for the purpose of the jury finding the Defendant guilty of something other than the crime of which he was previously convicted. Although the evidence was rightfully admitted, if this court were to find otherwise, the conviction should still be affirmed because the Judgment and Sentence and the Statement of Defendant of Plea of Guilty alone was enough to convince a jury beyond a reasonable doubt that the Defendant had been convicted of the predicate offense.

The State requests that the court affirm the Defendant's conviction.



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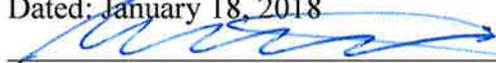
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Dated: January 18, 2018


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WHITMAN COUNTY PROSECUTOR'S OFFICE

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