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Division III
State of Washington
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NO. 36961-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,
RESPONDENT

V.

DAVID KALANI GRAY, aka DAVID TYACK
APPELLANT

RESPONDENT'S BRIEF

APPEAL FROM THE SUPERIOR COURT OF OKANOGAN
COUNTY THE HONORABLE HENRY RAWSON
Okanogan County Case Number: 18-1-00392-24

By:

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TABLE OF CONTENTS

I. FACTS OF CASE 3
II. ARGUMENT 6
A. Mr. Gray's Constitutional Rights Were Preserved 6
B. The Evidence was Sufficient to Sustain Conviction for Driving Under the Influence 11
C. The Trial Court Did not Err at Sentencing 15
III. CONCLUSION 15

TABLE OF CASES

1. *State v. Kaufman, 10 Wash.App.2d 747, 450 P.3d 196 (2019)* 7, 8, 9
2. *State v. Baird*, 386 P.3d 239, 187 Wash.2d 210 (2016) 7, 9
3. *Birchfield v. North Dakota*, 136 S.CT. 2160, 195 L.Ed.2d 560, 84 USLW 4493 (2016)..... 7
4. *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993) 8
5. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) 8
6. *State v. Kirwin*, 165 Wash.2d 818, 203 P.3d 1044 (2009) 6, 7
7. *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) 11
8. *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995) 11
9. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992) 11
10. *In re Winship*, 397 US 358, 90 S. Ct. 1068, 25 L.Ed.2d. 368 (1970) 11
11. *State v. Hickman,* 135 Wash.2d 97, 101, 954 P.2d 900 (1988) 11
12. *State v. Calvin*, 176 Wash.App. 1, 21, 316 P.3d 496 (2013) 12

13. *State v. Coristine,* 177 Wash.2d 370,
300 P.3d 400 (2013) 12
14. *Chapman v. California*, 386 US 18,
87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 12

Washington State Statutes

1. RCW 46.20.308 4
2. RCW 9.94A.505(2)(a)(i) 4
3. RCW 9.94A.515 5
4. RCW 9.94A.506 ..... 3, 6, 7
5. RCW 9.94A.525 ..... 3, 5, 7
6. RCW 9.94A.535 ..... 3, 4, 6, 10
7. RCW 9.94A.535(2)(c) 4, 5, 6, 9
8. RCW 9.94A.537 ..... 3, 6, 7
9. RCW 9.94A.585 ..... 3, 6, 7
10. RCW 46.20.308(a)(1) 5, 7, 8, 9

I. FACTS OF CASE

After a jury trial on the merits, Mr. Gray was convicted of Felony Driving Under the Influence of Alcohol. CP 42-43, 120-121, RP 234-235. A concerned citizen, Mr. Archambault, observed Mr. Gray operating a Jeep style vehicle. RP 109, 121. Mr. Gray had passengers in his vehicle, and at one point, Mr. Archambault observed those passengers exit the vehicle, and he observed Mr. Gray continue to drive the vehicle. RP 106. The witness grew concerned because he observed Mr. Gray's vehicle swerve up onto a curb and the sidewalk hitting a guardrail, come off of the curb and then swerve over into the center of the median of the road. RP 105-106, 109, 113. Mr. Archambault also observed Mr. Gray's vehicle swerve all over the road and get close to his trailer. RP 106. Mr. Archambault observed Mr. Gray's erratic driving from Fourth Street in Okanogan to the Tire Factory, which was long enough for Mr. Archambault to believe that Mr. Gray may be driving while under the influence of alcohol. RP 105, 106. Mr. Archambault knew that Mr. Gray operated the vehicle because he observed two people get in Mr. Gray's vehicle at the Tire Factory and then he observed the same two people get out at the PUD

building in Okanogan. RP 106. Mr. Archambault observed Mr. Gray strike a retaining wall when he jumped the curb, and Mr. Archambault observed fresh damage to the front of Mr. Gray's vehicle. RP 105, 109, 113. This damage is partly how Mr. Archambault was able to describe the vehicle to the Sheriff's deputies. RP 107-109, 113. As a result, Mr. Archambault contacted the police via telephone and in person. RP 105, 106, 109. At the Beaver Trap gas station in Okanogan, Mr. Archambault located Sheriff Trooper Hawley, a trained Drug Recognition Expert. RP 112, 116.

Sheriff Hawley followed the vehicle being operated Mr. Gray. RP 122. Mr. Gray made an unusually wide turn into the gas station; and he did not park close to the gas pumps. RP 122. Also, Mr. Gray parked at the diesel only pumps, though, Mr. Gray's vehicle was fueled by gasoline only and not diesel. RP 122. Sheriff Hawley made contact with Mr. Gray after he exited the vehicle. RP 123.

Sheriff Hawley asked to speak with Mr. Gray and he agreed to speak with Sheriff Hawley. RP 123. Mr. Gray was observed to be disoriented and confused. RP 124. Mr. Gray had an odor of an alcoholic beverage emanating from his person. RP 124. After noting bloodshot watery eyes, Sheriff Hawley requested that Mr. Gray submit to Field Sobriety Tests; Mr. Gray agreed. RP 43, 45, 125. Sheriff

Hawley requested that Mr. Gray perform the Horizontal Gaze Nystagmus Test, the Walk and Turn Test, and the One Leg Stand test. RP 126, 129, 131. Mr. Gray failed the battery of tests. RP 126-132. All of the field sobriety tests were voluntary and Mr. Gray consented to all of the tests. RP 132. Sheriff Hawley offered Mr. Gray a voluntary Preliminary Breath Test (PBT) as well, and Mr. Gray declined. RP 132. Mr. Gray was placed under arrest for suspicion of driving under the influence of alcohol. RP 133. Search incident to arrest revealed Mr. Gray to be in possession of the keys to the vehicle that the witness and Sheriff observed Mr. Gray drive. RP 133.

At the station, Sherriff Hawley went over the entire DUI packet (9 pages) with Mr. Gray. RP 74-75, 137. Sheriff Hawley provided Mr. Gray with Miranda warning, and Mr. Gray waived Miranda and agreed to speak with the Sheriff. RP 136. Sheriff Hawley went over the implied consent warnings found in RCW 46.20.308(1)(2)(b). RP 74-75, 137, 217. Mr. Gray was offered a Draeger Breath Test and refused pursuant to his rights. RP 74-75, 137, 217. Mr. Gray stated he drank an airline bottle of alcohol in the back of Sheriff Hawley's vehicle while in route to the police station. RP 146. When asked when he began drinking, Mr. Gray also gave the answer of "19," referring to his age when he began drinking. RP 151.

At trial, Sheriff Hawley testified that he checked his vehicle prior to his shift beginning and after arresting and transporting Mr. Gray and he recovered no alcohol bottles from his back seat. RP 146. Sheriff Hawley also testified that with the bars on his windows and Mr. Gray being handcuffed, he could not have thrown the bottles out of the window. RP 146-147. In closing argument, the State properly reminded the jury that Mr. Gray refused the Draeger Breath Test. RP 212, 224, CP 101-102, CP 14-15. After trial on the merits, the jury found Mr. Gray guilty of Felony DUI. RP 234-235.

The predicate alcohol related offense to establish the felony was stipulated to by the parties. CP 99, 100, 101, 102, CP 126, RP 91, 94-96. Prior to trial, both parties discussed and submitted jury instructions regarding the elements of the offense the State need to prove beyond a reasonable doubt. CP 14-15, CP 99, CP 120-121. Furthermore, these elements were repeated in the Verdict and Special verdict forms. CP 120-121.

I. ARGUMENT

A. Mr. Gray's Constitutional Rights were Preserved

A warrantless search is presumed to violate the Fourth Amendment and Art. I sec. 7 of the Washington State Constitution. *State v. Kirwin*, 165 Wash.2d 818, 824, 203 P.3d 1044 (2009). The

State bears the burden to prove that one of the narrowly drawn exceptions to the warrant requirement validates a warrantless search. *Id.* at 824. One such exception is search incident to arrest. *Id.* at 824. The arrest must be a lawful custodial arrest to justify a warrantless search. *Id.*

A breath test is a search under the Fourth Amendment and Art. I sec. 7 of the Washington State Constitution. *State v. Baird*, 187 Wash.2d 210, 218, 386 P.3d 239 (2016). Breath tests conducted subsequent to an arrest for DUI fall under the search incident to arrest exception to the warrant requirement. *Baird* at 222 (citing *Birchfield v. North Dakota*, 136 S.CT. 2160, 2185, 195 L.Ed.2d 560, 84 USLW 4493 (2016)). A driver thus has no Constitutional right to refuse an evidentiary breath test because breath tests fall under the search incident to arrest exception to the warrant requirement. *Baird* at 222-223. If a person has no Constitutional right to refuse evidentiary breath tests, then admitting evidence of the refusal cannot violate that person's Constitutional rights. *Id.* at 223.

A breath test under former RCW 46.20.308(2) includes an evidentiary breath test, such as the Datamaster (Draeger today) breath test, but it does not include a PBT (Preliminary Breath Test), Former RCW 46.61.506 (2015). *State v. Kaufman*, 10 Wash.App.2d

747, 756, 450 P.3d 196 (2019). A PBT is voluntary and participation it does not constitute compliance with the implied consent statute (RCW 46.20.308). *Kaufman* at 756. A PBT may only be used for establishing that a person has consumed alcohol and establishing probable cause to place a person under arrest for alcohol related offenses; Former WAC 448-15-020(1). *Id.* at 756.

As a general rule, Courts will not consider issues raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). However, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right, RAP 2.5(a)(3). *McFarland* at 333. RAP 2.5(a)(3) is not intended to afford criminal defendants means to obtaining new trials when they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be manifest – i.e., it must be constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error manifest, allowing appellate review. *Id.* at 333. Although RAP 2.5(a) permits a party to raise for the first time on appeal a "manifest error affecting a constitutional right," RAP 2.5(a) does not mandate appellate review of newly raised argument where facts necessary for its adjudication

are not in the record and therefore where the error is not "manifest." *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Mr. Gray's constitutional rights were not violated or implicated in the trial on the merits. On the contrary, Mr. Gray's statutory rights under the implied consent statute pursuant to RCW 46.20.308(2). Mr. Gray was initially investigated for DUI. Mr. Gray agreed to speak with police and provided Sheriff Hawley with enough reasonable suspicion that he requested that he submit to standardized Field Sobriety Tests, which he failed. Mr. Gray was then arrested for suspicion of DUI. Therefore, the search incident to arrest exception applies to Mr. Gray's case, and when warned and notified of his right to refuse the evidentiary breath test; he refused. This case is entirely distinguishable from *Kaufman* as it is factually similar to the facts in *Baird* for several reasons.

First, unlike the Defendant in *Kaufman*, Mr. Gray was specifically arrested for suspicion of Driving under the Influence of Alcohol. Prior to being arrested, Sheriff Hawley received a call for possible DUI (RP 37), he spoke to a civilian witness that identify Mr. Gray as driving a silver colored vehicle with front end damage, he observed the same vehicle, followed it for a block or two, observed the vehicle make an unusually wide turn, park next to the diesel gas

pumps when the Sheriff observed the vehicle had a gasoline combustible engine and not a diesel engine.

Sheriff Hawley made contact with Mr. Gray, observed he was disoriented, he had bloodshot watery eyes, and the obvious odor of an alcoholic beverage emanating from his person. Mr. Gray agreed to submit to Field Sobriety Tests, which he failed. At trial, Sheriff Hawley was thoroughly questioned regarding the tests, and Sheriff Hawley submitted that Mr. Gray failed them. RP 91-97. Once arrested, Mr. Gray was provided with Miranda warnings and the Implied Consent Warnings found in the DUI packet. At trial, Sheriff Hawley was asked if he went over every question and procedure in the DUI packet; Sheriff Hawley answered in the affirmative.

Second, Mr. Gray's refusal to the breath test was post Miranda and post implied consent warnings. The State had the right to use the evidence of Mr. Gray's refusal against him as it is a statutory right and not constitutional. Therefore, Mr. Gray's constitutional rights were not violated.

Third, Mr. Gray's counsel presumes that the prosecutor in closing referred to the PBT when the deputy reminds the jury in closing argument that Mr. Gray refused the test. RP 132. The State submits that the deputy prosecutor referred only to the Draeger

breath test being refused, which is why the deputy prosecutor states "refused the test" and not "refused the preliminary breath test." The prosecutor never really inquired about any PBTs in direct examination of Hawley. The jury instructions and verdict forms refer to the evidentiary breath test and the defense accepted them. The State submits that Mr. Gray's assumption that the deputy prosecutor was not referring to the breath test in closing but the preliminary breath test is a leap that is not supported by the record. Mr. Gray did not object or raise these issues at trial. Had the objection been made timely, a record would have been made establishing clearly that the prosecutor referred to Mr. Gray's refusal in context to the evidentiary breath test and not the PBT. But, no objection was made and the trial court now cannot cure or clarify the record. In this case, the only statement is "he refused the test," which was in response to Mr. Gray's argument in closing that the State did not provide scientific evidence of Mr. Gray's guilt, and such evidence would have been definitive.

B. The Evidence was Sufficient to Sustain Conviction

When reviewing a challenge to the sufficiency of the evidence, courts must determine "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, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal prosecution, the State must prove each element of the charged crime beyond a reasonable doubt. *In re Winship*, 397 US 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d. 368 (1970).

The law of the case doctrine is an established doctrine with roots reaching back to the earliest days of statehood. *State v. Hickman,* 135 Wash.2d 97, 101, 954 P.2d 900 (1988). Under the doctrine jury instructions not objected to become the law of the case. Id. at 102. When the State adds an unnecessary element to a to-convict instruction, and the jury convicts the defendant, the unnecessary element must be supported by sufficient evidence. *State v. Calvin*, 176 Wash.App. 1, 21, 316 P.3d 496 (2013). Finally, if a trial error is of Constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt.

State v. Coristine, 177 Wash.2d 370, 380-381, 300 P.3d 400 (2013) (citing, *Chapman v. California*, 386 US 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

In this case, Mr. Gray was observed to be weaving and swerving while following close enough to lay witness Mr. Archambault's vehicle that he thought his vehicle would be rear ended, which caused him to observe Mr. Gray's driving further. Mr. Archambault observed Mr. Gray drive over a curb and strike a guardrail causing damage to the front end of his vehicle. Sheriff Hawley observed more erratic driving by Mr. Gray when he made an unusually wide turn into the Chevron gas station. Furthermore, Sheriff Hawley observed that Mr. Gray's vehicle was a gasoline engine, but he parked at the diesel pumps. Upon initial contact with Mr. Gray, Sheriff Hawley observed an "obvious" odor of an alcoholic beverage emanating from Mr. Gray's person.

Sheriff Hawley requested that Mr. Gray submit to Field Sobriety Tests. Mr. Gray consented. Mr. Gray submitted to the HGN, Walk and Turn, and One Leg Stand Test, and failed. Based upon this totality of circumstances, Mr. Gray was arrested for suspicion of DUI. At the station, Mr. Gray was provided the DUI packet post Miranda warnings. He refused to submit to the Draeger breath test, and was warned that

a refusal could be used against him in trial. In addition, Mr. Gray lied to Sheriff Hawley stating that he drank an airplane size bottle of vodka in Sheriff Hawley's vehicle on the way to the station. Mr. Gray admitted to consuming an alcoholic beverage earlier in the day. At trial, Mr. Gray stipulated to his prior conviction for vehicular assault, the predicate offense making the DUI a felony in this case. Furthermore, any errors were harmless as Mr. Gray was arrested based upon probable cause for suspicion of DUI, search incident to arrest law enforcement explained his choices to refuse a breath test with driving privilege ramifications or take the test, and Mr. Gray chose to refuse. This evidence was admissible against Mr. Gray at trial and never implicated his Constitutional rights. Even if the Court excluded reference to the refusal of either the PBT or the Draeger breath test, the jury was provided more than enough evidence in addition to the refusal to correctly conclude beyond a reasonable doubt that Mr. Gray was guilty of DUI felony offense. Therefore, even if somehow this case was not distinguishable from *Kaufman*, and the Court ruled that Mr. Gray's Constitutional rights were implicated in this matter, there was ample evidence in addition to that evidence making any such error harmless as Mr. Gray drove on a curb, struck a guardrail, was disoriented, smelled like alcohol, and failed the field sobriety tests.

C. The Defendant's Scoring was Proper

Mr. Gray's offender score was correctly scored. Mr. Gray has criminal convictions between January 19, 1999 and October 5, 2005. Specifically, Mr. Gray was convicted in M00050881 of Theft. He was also convicted of Assault in the Fourth Degree-domestic violence on or about April 7, 2005. These were misdemeanor convictions. The Wash out provisions only apply if there are convictions that wash after a certain period of time totally crime free. RCW 9.94A.525(1)(c). Mr. Gray has never gone five consecutive years without a criminal conviction. Therefore, in this case, Mr. Gray has no history that wash out, and his offender score was properly calculated.

II. CONCLUSION

Mr. Gray's conviction and sentence should be affirmed and upheld. Mr. Gray's appeal should be denied because his Constitutional Rights were not violated.

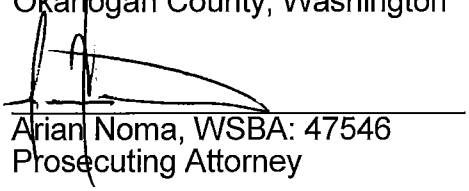
WHEREFORE, the State prays that this Honorable Court shall:

1. Deny Mr. Gray's appeal;
2. Affirm Mr. Gray's conviction and uphold his sentence;
3. Deny Mr. Gray's request for remand and retrial;
4. Mr. Gray should bear appellate costs if appropriate; and
5. Grant any other relief that this Honorable Court deems just and

appropriate.

DATED this 21st day of February, 2020.

ARIAN NOMA
Prosecuting Attorney
Okanogan County, Washington



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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. DAVID KALANI GRAY, AKA DAVID KALANI TYACKE, Appellant.	COA No. 369617 CERTIFICATE OF SERVICE

I, Christa L Levine, do hereby certify under penalty of perjury that on the 21st day of February, 2020, I caused the original RESPONDENTS OKANOGAN COUNTY BRIEF to be filed in the Court of Appeals Division III and a true copy of the same to be served on the following in the manner indicated below:

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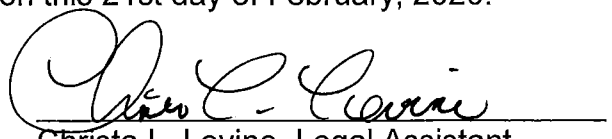
Signed in Okanogan, Washington this 21st day of February, 2020.



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