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STATE OF WASHINGTON

85227-8

Supreme Court No. _____
(COA No. 63442-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS JASPER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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2010 OCT 20 PM 4:12
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STATE OF WASHINGTON

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A. IDENTITY OF PETITIONER.

Douglas Jasper, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Jasper seeks review of the Court of Appeals decision dated September 20, 2010, a copy of which is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The court inaccurately and coercively instructed the jury in response to its written questions during deliberations, without providing Jasper and his attorney the opportunity to participate in responding to questions from the deliberating jury and improperly communicated to the jury without counsel or Jasper, in violation of the Sixth and Fourteenth Amendments and Article I, section 22 of the Washington Constitution.

2. The broader scope of a defendant's right to be present at trial is presently being considered by this Court in State v. Martin, but the Court of Appeals insisted its decision in Martin is

unassailable. Should this Court grant review and decide this case in keeping with the decision to be issued in Martin¹?

D. STATEMENT OF THE CASE.

When driving home from work, Douglas Jasper unintentionally crossed the center line and hit another car going in the opposite direction. 3/11/09RP 27.² Jasper blacked out as the accident occurred and has no memory of it. Id. at 28, 33. No one alleged he used alcohol or drugs and no one claimed he was speeding.

After the accident, Jasper crawled out of a window and walked to the other car. 3/11/08RP 28. A woman standing outside the other car seemed as dazed and shaken up as Jasper was, but she did not seem otherwise injured. Id. at 29. He spoke with her and asked if she was okay. Id. at 29, 35. The woman, Jenny Li, had been the passenger in the other car and she was startled from accident and the air bags' deployment. 3/10/09RP 27. Later, she did not recall speaking to Jasper but others told her he came to the car to check on the driver. 3/10/09RP 33. The car's driver, Choon Wong, could not get out of the car because the door had pinned his

¹ State v. Martin, 1521 Wn.App. 98, 107-17, 210 P.3d 345 (2009), rev. granted, 168 Wn.2d 1006 (2010).

arm and Li did not want to hurt him by moving him, so she waited for paramedics to arrive. 3/10/09RP 29, 37-39.

The driver of a third car, William Draper, saw Jasper climb out of his car window. 3/11/09RP 7. He heard Jasper ask the driver if he was okay but did not hear him say anything else, although at this time Draper was checking his own car to be sure it was not damaged. Id. at 8-9.

After Jasper checked on the other car, he began slowly walking along the street. 3/11/09RP 30, 39, 41. A witness alerted police that he was the driver of a car in the accident. Jasper did not run or hide, but did not return to his car immediately. He explained that he was tired and confused, had trouble seeing, and was trying to clear his head. 3/11/09RP 40-41. He intended to return and believed he was circling back to the accident scene. 3/11/09RP 30. The police arrested him several blocks from the accident and Draper identified him as the driver. He fell asleep, or passed out, in the police car after he was arrested. 3/11/090RP 31. He was not taken to the hospital for examination. Id.

The State charged Jasper with one count of hit-and-run and one count of driving with a suspended license in the third degree.

² The verbatim report of proceedings (RP) will be referred to herein by the

CP 1-2. While deliberating, the jury asked several questions, including a question about whether Jasper's mental or physical condition could be considered in evaluating whether he failed to fulfill his obligations as a driver in a car accident. CP 49-52. The court responded without consulting counsel or Jasper and directed the jury to continue deliberating while refusing to provide any further instruction. Id. The jury convicted Jasper of hit and run and driving with a suspended license in the third degree. CP 53, 54.

The facts are further set forth in the Court of Appeals opinion, pages 1-2, Appellant's Opening Brief, pages 4-6, and Appellant's Reply Brief, pages 15-18. The facts as outlined in each of these pleadings is incorporated by reference herein.

E. ARGUMENT.

THE TRIAL COURT IMPROPERLY AND COERCIVELY INSTRUCTED THE DELIBERATING JURY IN VIOLATION OF JASPER'S RIGHT TO A FAIR TRIAL, HIS RIGHT TO MEANINGFUL REPRESENTATION AT ALL CRITICAL STAGES, AND HIS RIGHT TO BE PRESENT

1. A criminal defendant is entitled to be aware of and meaningfully represented at proceedings discussing the instructions for a deliberating jury. The discussion of a jury inquiry is a critical stage of a criminal proceeding at which a defendant has

date of proceedings followed by the page number.

the right to be present and receive meaningful representation.

Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45

L.Ed.2d 1 (1975); State v. Thomson, 123 Wn.2d 877, 880, 872

P.2d 1097 (1994); U.S. Const. amends. 5, 6, 14;³ Wash. Const.

Art. I, § 22;⁴ CrR 3.4 (a). A trial court commits error when it

communicates with the jury without notice to the defendant or

counsel. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466

(1983); State v. Allen, 50 Wn.2d 412, 419, 749 P.2d 702 (1988).

CrR 6.15(f)(1) provides:

After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties or their counsel. Any additional instruction upon any point of law shall be given in writing.

The Court of Appeals agreed that the court violated CrR 6.15(f)(1). Slip op. at 21 (citing State v. Langdon, 42 Wn.App. 715, 717, 713 P.2d 120 (1993)).

The record does not establish Jasper's presence. Clip op. at 21. Additionally, the trial judge used a boilerplate form that

³ The Fifth and Fourteenth Amendments protect the right to "due process of law," while the Sixth Amendment protects the right to "a speedy and public trial" with the assistance of counsel and right to confront witnesses.

⁴ "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel"

automatically includes the language that the court consulted all parties before responding to the jury's question. CP 50, 52. But that form cannot explain what happened in this particular case. The clerk's minutes detail the presence and involvement of the parties in matters conducted both on and off the record throughout the trial. CP 103-11. The minutes contain the questions asked by the jury and answers given by the court. CP 110. Yet the minutes contain no indication that the court discussed the jury's questions with counsel or Jasper. CP 110. Given the pattern and practice of the clerk's minutes in this case, it is only fair and reasonable to presume that in the few minutes that passed between when the jury sent its two notes together to the judge and the judge responded, the court did not present and discuss the matter with the attorneys and Jasper.

The attorneys did not sign the court's response, appear in court, or mention having any knowledge of the exchanges between the deliberating jury and judge. Thus, it does not appear that counsel was present or participated in crafting the court's response to the jury's question because of the very short time frame and the absence of any indication counsel was consulted in the otherwise detailed clerk's minutes.

2. The court's *ex parte* responses to the deliberating jury's questions were inadequate and coercive. The jury asked the court whether the essential elements of hit and run as set forth in the to-convict instruction are dependent upon a person's "mental, emotional, or physical condition." CP 49. The court summarily responded, "no further instructions will be given to this question," and directed the jury to "reread your instructions and **continue deliberating.**" *Id.* (emphasis added). The court delivered the same response to the jury's other question, asking the court to explain "the spirit of the law," similarly instructing the jury to "continue deliberating." CP 51-52.

The court's refusal to provide the jury with pertinent instruction on the essential elements of hit and run was both incorrect and substantially prejudicial. The statute defining hit and run expressly exempts a person's criminal liability if he or she is physically incapacitated. RCW 46.52.020(4)(d). Yet the court's original instructions had not explained that by law, a driver is not required to "fulfill his obligations" following an accident if he is physically incapacitated and the supplemental instructions asking about this very circumstance did not properly direct the jury to the governing law.

Jasper testified that he was substantially incapacitated by the accident. Although there was no evidence of serious physical injury, he was not taken to the hospital for an examination. 3/11/09RP 31. He was dazed and confused. He blacked out during the accident itself and needed to walk around to clear his head. He passed out in the police car. 3/11/09RP 31. He had trouble seeing and could not concentrate. Id. at 40-41. He did not hide or run away. Thus, the jury's question was targeted at the precise circumstances of the case and whether it should consider whether Jasper was unable to comprehend the nature of the accident or potentially physiologically unable to report the necessary information to the other driver.

Rather than informing the jury that by law, it could find Jasper physically incapable of fulfilling his obligations as the driver in a car accident, and letting the jury decide if Jasper's physical distress amounted to the necessary physical incapacity, or discussing the issue with counsel and tailoring an instruction to the facts of the case, the court refused to accurately explain the law to the jury.

Jurors are free to weigh and determine facts based on their own common sense or personal beliefs. See Duncan v. Louisiana,

391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (recognizing “common-sense judgment of a jury” as inherent component of jury trial right). There is no mechanical rule the jury must apply when deciding whether a case merits a not guilty finding.

Additionally, a trial court “has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue.” United States v. Southwell, 432 F.3d 1050, 1053 (9th Cir. 2005); see also Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed.2d 350 (1946) (“When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.”).

In Southwell, the court’s original instructions were not legally inaccurate, but were unclear. When the jury asked for clarification, the court refused and told them to use the instructions they had been given. 432 F.3d at 1053. The court’s failure to clarify its instructions in response to the jury’s question was error. Id.

Here, the court not only failed to explain the law to the jury in an accurate fashion in response to its questions, but also inexplicably pressured the jury to “continue deliberations.” There was no reason for the court to order the jury to continue

deliberations, but the court twice expressed its concern that the jurors do so. While the impact of the court's coercive direction is impossible to know, courts must be cautious when directing the jury to continue deliberations, as it implies the court is dismissive of the jury's concerns or has a stake in the deliberations. The jury should deliberate without any pressure from the court. State v. Ford, 151 Wn.2d 530, 539, 213 P.3d 54 (2009); State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978); CrR 6.15(f)(2) ("After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate."). The court's instruction directed that further deliberations were required when the court had no basis to intervene in this fashion and it violated CrR 6.15 by suggesting that further deliberations were necessary.

3. The court was required to protect Jasper's right to counsel and to personally participate in the case. The record does not demonstrate the court protected or respected Jasper's right to be present and consult with counsel regarding the jury inquiry. Slip op. at 21.

A defendant need not be present during technical legal discussions or simple scheduling matters. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). But this jury inquiry was not administrative or purely legal. The jury's two questions went to the heart the defense – that Jasper did not intent to violate the law and wandered around solely due to his injury. Had Jasper been present during the discussion of how to respond to the jury's questions, he could have urged the court to let the jury take his mental or physical state into account as the law allows. Instead, the court quickly and summarily let the jury believe it could not consider the condition of the driver. The court should have included Jasper in its process of responding to the jury's two notes.

4. The trial court's failure to include Jasper in its response to the jury inquiries, and its incorrect and coercive instructions, violate the State and Federal Constitutions. When there is a violation of the right to be present, the federal constitution places "the burden . . . on the prosecution to prove that the error was harmless beyond a reasonable doubt." United States v. Marks, 530 F.3d 759, 812 (9th Cir. 2008); State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). But the Washington Constitution expressly declares a right to be

present and thus more strictly requires the State to enforce this fundamental right. State v. Ahren, 64 Wn.App. 731, 735 n.4, 826 P.2d 1086 (1992).

Article I, section 22 explicitly guarantees,

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf,[and] to meet the witnesses against him face to face [and] . . . to have a speedy public trial . .

(emphasis added). Furthermore, when the Framers drafted the state constitution it was the prevailing understanding that an accused person had a personal right to be present during discussions of jury instructions. Linbeck v. State, 1 Wash. 336, 338-39, 25 P. 452 (1890) (repeating and orally explaining jury instructions to deliberating jury with counsel but without defendant's presence is error "and we do not think this error was cured by the fact that defendant's attorney was present and made no objection."); State v. Beaudin, 76 Wash. 306, 308, 136 P. 137 (1913) (reversal where court repeated instructions to deliberating jury, because "The giving of an instruction in appellant's absence constituted prejudicial error, which was not cured" by later re-instructing the jury with defendant present, because the right to

be personally present is mandatory for all substantive trial proceedings and is strictly enforced).

The Court of Appeals refused to separately consider the differences between the state and federal constitutional rights to be present, relying on its ruling in State v. Martin, even though this Court has granted review of this very issue. Slip op. at 19 n.12 (citing State v. Martin, 151 Wn.App. 98, 107-17, 210 P.3d 345 (2009), rev. granted, 168 Wn.2d 1006 (2010)).

A Gunwall analysis further demonstrates the substantive difference in the state and federal constitutional protections, mandating stringent protection of this right in Washington.⁵

a. Textual Language and Texts of Parallel Provisions of State and Federal Constitutions (factors one and two). Because the right to appear in person is not expressly mandated in the federal constitution, while the state constitution forthrightly declares the “accused shall have the right to appear and defend in person,” the difference in textual language demonstrates the State Framers’

⁵ The six factors used in assessing the differences in state and federal constitutional protections are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

intent to provide greater protection for the right to be present at trial than the federal constitution. The framers of the Washington Constitution were certainly aware of the federal constitution, and they specifically drafted and adopted different language. State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998) (citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) and Lebbeus J. Knapp, The Origin of the Constitution of the State of Washington, 4 Wash. Hist. Q., No. 4, at 246 (1913)). In addition, Article I, section 22 lists several rights personally accorded an accused person and not included in the Sixth Amendment, such as the right to meet witnesses face to face, have a copy of the charge, testify on one's own behalf, and to appeal. Id. at 485-86.

b. State constitutional and common law (factor three). The Constitutional Convention of 1889 provides no additional evidence of the framers' intent. Rosenow, Journal of the Washington State Constitutional Convention 1889, p. 511 (1962). In particular, little is known about the history of the drafting of Article I, section 22. Foster, 135 Wn.2d at 722, 734-35; State v. Silva, 107 Wn.App. 605, 619, 27 P.3d 663 (2001). Logically, the

framers of the Washington Constitution did not intend Article I, section 22 to be interpreted identically to the federal Bill of Rights, since they used different language and the federal Bill of Rights did not then apply to the states. Utter, supra, at 496-97; Silva, 107 Wn.App. at 619 (“The decision to use other states’ constitutional language also indicates that the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution.”).

c. Preexisting state law. Preexisting law mandated a defendant’s presence as a necessary requirement before commencing trial. An 1854 territorial law provided, “No person prosecuted for an offense punishable by death or by confinement or in the county jail, shall be tried unless personally present during the trial.” Laws 1854, p. 412, § 109. Another territorial law provided, “On the trial of any indictment the party shall have the right . . . to meet witnesses produced against him face to face.” Laws 1854, p. 371, § 2. These preexisting laws demonstrate a desire at the time of the framing of the constitution to expressly protect a defendant’s personal right to be present throughout all material aspects of the trial upon its commencement, and these laws were strictly enforced. The court in Beaudin cited this law in

reversing a conviction where the court answered a jury by re-instructing the deliberating jury without the defendant's presence. 76 Wash. at 308; see also Linbeck, 1 Wash. at 339 (repeating instructions to jury without defendant's presence not cured by counsel's presence); State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914) (state constitution guarantees accused person "right to be present at every stage of the trial when his substantial rights may be affected"). In Shutzler, the court emphasized that any violation of the right to be present cannot be tolerated, because "[t]he wrong lies in the act itself, in the violation of the constitutional and statutory right of the accused to be present and defend in person and by counsel." 82 Wash. at 367-68.

d. Differences in structure between state and federal constitutional provisions. The United States Constitution is a grant of limited power to the federal government, whereas the Washington constitution imposes limitations on the otherwise plenary power of the state. Foster, 135 Wn.2d at 458-59; Gunwall, 106 Wn.2d at 61. This factor supports an independent analysis of the right to presence, just as it does the right to self-representation and the right to face to face confrontation. Foster, 135 Wn.2d at 458-59; Silva, 107 Wn.App. at 619. Because Article I, section 22

expressly grants the right to appear and defend in person, and the federal constitution does not, the state constitution embodies an intent to mandate such presence during any substantive legal proceedings unless expressly waived.

e. Matters of particular state or local concern. The regulation of criminal trials in Washington is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62. This includes the protection provided to criminal defendants by the confrontation clause, and similarly, throughout proceedings that may affect the substantial rights of the accused. Foster, 135 Wn.2d at 494; Shutzler, 82 Wash. at 367. Jury instruction is plainly a matter of particular local concern as it is predicated on the jury understanding state law in a state court prosecution. See State v. Lanciloti, 165 Wn.2d 661, 666-67, 201 P.3d 323 (2009) (discussing constitutional requirement that juries shall be drawn from county where offense occurred).

f. The greater protection afforded by the Washington Constitution means courts may not deny a defendant the opportunity to participate in a substantive stage of proceedings without an express waiver. As articulated in Shutzler, a violation of

the right to be present is “conclusively presumed to be prejudicial.”
82 Wash. at 367. It is a right that cannot be waived without being
afforded the opportunity to do so. Duckett, 144 Wn.App. at 806-07.

Since it is the right of the accused to be present at every stage of the trial when his substantial rights may be affected, it is no answer to say that in the particular proceeding nothing was done which might not lawfully have been done had he been personally present. The excuse, if good for the particular proceeding, would be good for the entire proceedings; the result being a trial and conviction without his presence at all. The wrong lies in the act itself, in the violation of the constitutional and statutory right of the accused to be present and defend in person and by counsel.

Shutzler, 82 Wash. at 367-68; see also Beaudin, 76 Wash. at 308;
Linbeck, 1 Wash. at 339.

In State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006), the Supreme Court ruled that even if the federal constitutional right to a public trial may be reviewed for the harmlessness of the closure, the Washington constitution’s explicit protection of the public trial right precludes any de minimus analysis. A similar approach should apply to the violation of Jasper’s right to be present during a material portion of the trial, because the Washington Constitution expressly guarantees the right to be present at trial. His right to be present at trial is not

meaningful unless he may participate in the process of properly explaining to the jury the type of evidence they may consider or the specific application of the law to the facts of the case. The error is structural, as dictated by the mandatory language of the state constitution, and is presumed prejudicial just as it is when the court violates the right to a public trial. See State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009) (in Washington, “[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.”).

Even under a constitutional harmless error test, the prosecution cannot prove this error harmless. During this material stage in the trial, the court summarily rejected the jury’s request for an explanation of whether the driver’s failure to remain at the scene of an accident can be excused by virtue of mental or physical handicaps. The law provides that physical incapacitation is an excuse but the court never explained this legal principle to the jury. Jasper’s defense was that he was suffering the mental, physical, and physiological effects of the accident and was simply trying to clear his head from the shock, not leaving the scene of an accident.

The court’s failure to accurately instruct the jury, and its method of doing so without counsel or Jasper’s involvement and

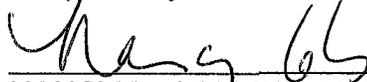
participation as well as by coercively intervening in deliberations and directing the jury to continue deliberations, undermined Jasper's right to appear in person, participate in the trial, and receive a fair trial by jury, contrary to Article I, sections 21 and 22, as well as the Sixth and Fourteenth Amendments. This Court should accept review to address a commonly occurring issue involving the scope of the fundamental constitutional right to be present and represented by counsel at all stages of the trial, including when the jury asks substantive questions of the trial judge while deliberating.

F. CONCLUSION.

Based on the foregoing, Petitioner Douglas Jasper respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 20th day of October 2010.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 63442-9-1
v.)	
)	
DOUGLAS SCOTT JASPER,)	PUBLISHED OPINION
)	
Appellant.)	FILED: September 20, 2010
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Dwyer, C.J. — The confrontation clause of the Sixth Amendment prohibits the admission of an affidavit containing testimonial statements absent an opportunity for the defendant to cross-examine the witness. An affidavit attesting that the affiant performed a diligent search of records and that the records revealed that the defendant's license to drive was suspended or revoked on a particular day contains testimonial assertions. Thus, such an affidavit is inadmissible where the defendant is not provided an opportunity to cross-examine the witness. An affidavit containing such statements was admitted into evidence in the trial of Douglas Jasper. Accordingly, we reverse Jasper's conviction for driving while license suspended or revoked in the third degree.

Also at issue is whether the trial court erred by responding to jury

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inquiries without notifying the attorneys or Jasper. Pursuant to CrR 6.15, the trial court is obligated to notify the parties about a jury inquiry and allow the parties to suggest an appropriate response. However, contrary to Jasper's contention, the trial court's failure to notify the parties in this instance did not violate Jasper's constitutional right to be present during trial proceedings because the jury's inquiries involved only legal, rather than factual, matters. The trial court's error was solely in not following the dictates of the court rule. This error, however, was harmless. Thus, we affirm Jasper's conviction for felony hit-and-run driving.

I

On February 14, 2008, Jasper's vehicle crossed the centerline of a roadway and collided with a car travelling in the opposite direction. After Jasper's vehicle came to a stop against an embankment, he exited his vehicle, checked on the occupants of the other car, and then began walking away from the scene of the collision. The driver of the other vehicle was pinned inside the car and was subsequently treated for a broken arm. Jasper was arrested a few blocks from the scene of the collision.

Jasper was charged with felony hit-and-run, a violation of RCW 46.52.020, and with driving while license suspended or revoked in the third degree, a violation of RCW 46.20.342(1)(c).

At trial, a police officer testified that, at the time of Jasper's arrest, Jasper

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admitted that his license was suspended. The State offered as an exhibit an affidavit from a legal custodian of driving records and two Department of Licensing (DOL) records. The two records indicate that DOL mailed Jasper two notices stating that his license would be suspended if he did not appropriately respond to citations (1) for driving without liability insurance and (2) for a registration violation. The affidavit states: "After a diligent search, our official record indicates that the status on February 14, 2005, was: . . . Suspended in the third degree."¹ Jasper objected to the admission of the affidavit on

¹ The affidavit states:

The information in this report pertains to the driving record of:

Lic. #: []	Birthdate: November 11, 1960	
Name: Jasper, Douglas Scott	Eyes: BLU	Sex: M
10724 SUMMIT LK RD NW	Hgt: 5 ft 11 in	Wgt: 175 lbs
OLYMPIA WA 98502	License Issued: September 15, 2005	License Expires: November 11, 2009

After a diligent search, our official record indicates that the status on February 14, 2005, was:

Personal Driver License Status:

- Suspended in the third degree

Commercial Driver License Status:

The following also applied:

PDL Attachments:

- Notice of Suspension June 28, 2007

CDL Attachments:

Having been appointed by the Director of the Department of Licensing as legal custodian of driving records of the State of Washington I certify under penalty of perjury that such records are official, and are maintained within the Department of Licensing.

/s

confrontation clause grounds. The trial court admitted all of the documents.

Jasper testified. He explained that he had hit his head in the collision and, as a result, he was dazed and confused. He testified that he knew his license was suspended on the day of the collision.

During its deliberations, the jury submitted two inquiries to the trial court. The first requested clarification of one of the jury instructions; specifically, the jury inquired whether a person's obligation to fulfill certain duties after being involved in a motor vehicle collision was "dependent on [the individual's] mental, emotional, or physical condition." The second inquiry requested a definition of the "spirit of the law," a phrase which had been used numerous times by defense counsel in closing argument. Without notifying the prosecutor or Jasper's counsel of the jury's questions and without the prosecutor, Jasper, or his counsel being present, the trial court promptly responded identically to both of the jury's questions in writing: "Please re-read your instructions and continue deliberating. No further instructions will be given to this question."

The jury subsequently convicted Jasper as charged. Jasper appeals.

II

Jasper first contends that the admission of the affidavit of the DOL record custodian violated his Sixth Amendment right to confrontation. We agree.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against

him.” U.S. Const. amend. VI. “[T]he ‘principal evil’ at which the clause was directed was the civil-law system’s use of ex parte examinations and ex parte affidavits as substitutes for live witnesses in criminal cases.” State v. Luj, 153 Wn. App. 304, 314, 221 P.3d 948 (2009) (citing Crawford v. Washington, 541 U.S. 36, 50, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)), review granted, 168 Wn.2d 1018, 228 P.3d 17 (2010). Such a practice denies the defendant a chance to test accusers’ assertions “in the crucible of cross-examination.” Crawford, 541 U.S. at 61.

Not every out-of-court statement used at trial implicates the core concerns of the confrontation clause. Rather, the scope of the clause is limited to “witnesses’ against the accused—in other words, those who ‘bear testimony.’ ‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” Crawford, 541 U.S. at 51 (quoting 2 N. Webster, *An American Dictionary of the English language* (1828)). Thus, the confrontation clause gives defendants the right to confront those who make testimonial statements against them.² Crawford, 541 U.S. at 53–54.

The Court declined to offer a comprehensive explanation of what makes a statement “testimonial,” but it listed three possible formulations for the “core class” of testimonial statements covered by the confrontation clause:

[1] *ex parte* in-court testimony or its functional equivalent—that is,

² A limitation on the right to confrontation that existed at common law—inapplicable here—applies when a witness is unavailable and the accused had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 53-54. The confrontation clause “also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” Crawford, 541 U.S. at 60 n.9.

material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51–52 (internal quotation marks and citations omitted).

Last year, in Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the United States Supreme Court further honed the analysis of evidence’s testimonial character. The defendant therein was charged with distributing and trafficking in cocaine. Melendez-Diaz, 129 S. Ct. at 2530. The trial court admitted into evidence three “certificates of analysis,” sworn to by laboratory analysts before a notary public, which stated that the seized bags were “examined with the following results: The substance was found to contain: Cocaine.” Melendez-Diaz, 129 S. Ct. at 2531.

A five-member majority held, in a “rather straightforward application of [the] holding in Crawford,” that the certificates were inadmissible. Melendez-Diaz, 129 S. Ct. at 2533. The Court determined that the certificates were “quite plainly affidavits: ‘declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths.’” Melendez-Diaz, 129 S. Ct. at 2532 (quoting Black’s Law Dictionary 62 (8th ed. 2004)). The affidavits constituted testimonial statements because they were “functionally identical to

live, in-court testimony, doing 'precisely what a witness does on direct examination.'" Melendez-Diaz, 129 S. Ct. at 2532 (quoting Davis v. Washington, 547 U.S. 813, 830, 126 S. Ct. 2266, 165 L. Ed. 2d. 224 (2006)). Moreover, the statements were "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.'" Melendez-Diaz, 129 S. Ct. at 2532 (quoting Crawford, 541 U.S. at 52). Consequently, the analysts were 'witnesses' for Sixth Amendment purposes, and "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to 'be confronted with' the analysts at trial." Melendez-Diaz, 129 S. Ct. at 2532 (quoting Crawford, 541 U.S. at 54). The Court concluded, "[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against [the defendant] was error." Melendez-Diaz, 129 S. Ct. at 2542.

In so holding, the Court rejected a claim that the analysts' affidavits were "akin to the types of official and business records admissible at common law." Melendez-Diaz, 129 S. Ct. at 2533–40.³ This was not so, the Court explained, because the class of official and business records admissible at common

³ The Melendez-Diaz majority also rejected several other arguments. First, it rejected the suggestion that laboratory analysts are not subject to the confrontation requirement because they are not "accusatory" or "conventional" witnesses. 129 S. Ct. at 2533-35. Second, it rejected the argument that forensic analysts should not have to testify live because their testimony would be the result of "neutral, scientific testing" that is not "prone to distortion or manipulation," and, thus, confrontation would be unlikely to affect their testimony. 129 S. Ct. at 2536. Third, it rejected the suggestion that the confrontation clause was satisfied because the defendant could have subpoenaed the analysts to testify at trial. 129 S. Ct. at 2540.

law—and, thus, admissible without violating the confrontation clause—bore the hallmark of “having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial.” Melendez-Diaz, 129 S. Ct. at 2539–40. Thus, “[a] clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record.” Melendez-Diaz, 129 S. Ct. at 2539. Conversely, what a clerk could not do, without an opportunity for confrontation by the defendant, was “what the analysts did here: *create* a record for the sole purpose of providing evidence against a defendant.” Melendez-Diaz, 129 S. Ct. at 2539. In that regard,

[f]ar more probative here are those cases in which the prosecution sought to [introduce] into evidence a clerk’s certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. Like the testimony of the analysts in this case, the clerk’s statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched. Although the clerk’s certificate would qualify as an official record under respondent’s definition—it was prepared by a public officer in the regular course of his official duties—and although the clerk was certainly not a “conventional witness” under the dissent’s approach, the clerk was nonetheless subject to confrontation.

Melendez-Diaz, 129 S. Ct. at 2539.

The State notes that, after the Crawford decision was announced, the Washington Supreme Court considered whether the Sixth Amendment was implicated by the admission of affidavits certifying the status of a defendant’s driver’s license. State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007); State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007). The court held that “the

[United States Supreme] Court's express recognition that business records are not 'testimonial' provides a basis for concluding that public records, as well as certifications of the absence thereof, are also not testimonial evidence."

Kirkpatrick, 160 Wn.2d at 876. Thus, the court held that neither a certification by the DOL that the defendant did not have a driver's license on a particular date, Kirkpatrick, 160 Wn.2d at 887, nor a certification by the DOL that the defendant's driver's license was suspended on a particular day, Kronich, 160 Wn.2d at 904, was testimonial.⁴

These Washington Supreme Court decisions, however, predate the United States Supreme Court's decision in Melendez-Diaz. "When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings." State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008). Therefore, the intervening United States Supreme Court decision supersedes the Washington Supreme Court's decisions on this Sixth Amendment question.

Here, two agency records (copies of letters sent to Jasper by the DOL) were admitted into evidence, each revealing that the DOL intended to suspend Jasper's license if he did not respond to two earlier citations issued to him. These two records were admissible public records; Jasper is not contending otherwise. See, e.g., United States v. Orozco-Acosta, 607 F.3d 1156, 1163-64,

⁴ In so holding, our Supreme Court relied, in part, on a Ninth Circuit case that has been overruled as a result of Melendez-Diaz. See United States v. Orozco-Acosta, 607 F.3d 1156, 1161 n.3 (9th Cir. 2010).

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(9th Cir. 2010) (warrants of removal); United States v. Huete-Sandoval, 681 F.Supp.2d 136, 139-40 (D. Puerto Rico 2010) (border crossing records from the ATS Database); Commonwealth v. Weeks, 77 Mass. App. Ct. 1, 927 N.E.2d 1023 (2010) (court docket sheets); Commonwealth v. Martinez-Guzman, 76 Mass. App. Ct. 167, 920 N.E.2d 322, 325 n.3 (records from registrar of motor vehicles detailing defendant's driving history), review denied, 456 Mass. 1104, 925 N.E.2d 547 (2010); Commonwealth v. McMullin, 76 Mass. App. Ct. 904, 904-05, 923 N.E.2d 1062 (2010) (court records and driving records); Fowler v. State, 929 N.E.2d 875, 880 (Ind. App. 2010) (booking information printout).

Jasper contends, however, that the admission of the affidavit of the record custodian itself violated his right to confrontation because the affidavit is testimonial. The affidavit is not merely a certification that the agency records attached to the affidavit were true and correct copies of records possessed by the DOL. Without question, such a statement would be of the type approved by Melendez-Diaz. 129 S. Ct. at 2539; see, e.g., United States v. Mallory, ___ F.Supp.2d ___, 2010 WL 1286038, *3 (E.D.Va. 2010) (“[T]he FedEx custodian’s certification in this case does not comment on the content or meaning of the record. . . . [and] does not attempt to describe or decipher the content of the business record” but merely certified that the attached documents were true copies of records kept in the regular course of business).

Instead, the affidavit herein contains ex parte statements made for the

purpose of establishing the fact that Jasper was driving with a suspended license on the day of the collision. The affidavit first asserts that the affiant performed a diligent search, implying that the person searching the records knew what records to search for, knew how to find them in the database, and conducted the search correctly. The affidavit next states that Jasper's license was suspended on a particular day. This statement explains what the results of the records search revealed and what the witness concluded from the records searched. These statements are testimonial because they constitute factual assertions, intended to prove an element of a crime charged. They are not mere statements of the authenticity of the attached records themselves. The affidavit also contains an indirect assertion regarding the non-existence of a record, impliedly asserting that no agency records exist indicating either that Jasper avoided suspension of his license by properly attending to the prior citations referenced in the two letters or that his license was ever reinstated following such a suspension. A statement asserting that a particular record does not exist, when offered to establish that fact, is testimonial.⁵

⁵ See, e.g., United States v. Martinez-Rios, 595 F.3d 581, 586 (5th Cir. 2010) (finding admission of certificate of nonexistence of record, which indicated defendant had not received consent to re-enter the United States, violated the Sixth Amendment); Orozco-Acosta, 607 F.3d at 1161 n.3 (accepting the government's concession that defendant's Sixth Amendment right to confrontation was violated by the admission of a certificate of the non-existence of a record, certifying that "after a diligent search . . . no record was found to exist indicating that [the defendant] obtained consent . . . for re-admission in the United States"); United States v. Norwood, 603 F.3d 1063, 1067 (9th Cir. 2010) (accepting the government's concession that an affidavit prepared by an employee certifying that "a diligent search of the department's files failed to disclose any record of wages reported for [the defendant] from January 1, 2004 through March 31, 2007," violated the defendant's right to confrontation); Tabaka v. District of Columbia, 976 A.2d 173, 175-76 (D.C. 2009) (holding that the challenged "certificate of no-record" by a DMV official was testimonial); Washington v. State, 18 So.3d 1221, 1224 (Fla. App. 4 Dist. 2009)

In addition, unlike the DOL records attached to the affidavit, the affidavit itself did not exist within DOL's records independently of Jasper's prosecution. It is not a public record kept in the ordinary course of the administration of the DOL's affairs. Rather, the affidavit was plainly created in order to provide evidence against him for purposes of prosecuting him—a circumstance that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. See Crawford, 541 U.S. at 51-52 (categorizing such statements as testimonial). Indeed, the affidavit declares that Jasper's driving status was "Suspended in the third degree," a statement not contained in either of the two agency records attached to the affidavit and submitted therewith.

For all of the above-described reasons, the affidavit is testimonial and implicates Jasper's Sixth Amendment right to confront witnesses against him.⁶

(holding that certificate of non-licensure, attesting that a search of the state's licensing division records revealed that no one bearing the defendant's name held a license to engage in contracting, was admitted in violation of the defendant's Sixth Amendment rights).

⁶ Our decision today that the affidavit herein contains testimonial statements is reinforced by the decisions of the courts of several other jurisdictions, which almost uniformly hold that affidavits from a variety of sources that are attesting to the meaning or content of particular records or certifying that no record exists are testimonial based on the reasoning of Melendez-Diaz. See, e.g., Martinez-Rios, 595 F.3d at 586; Orozco-Acosta, 607 F.3d at 1161 n.3; State v. Alvarez-Amador, 235 Or. App. 402, 405, 410-11, 232 P.3d 989 (2010) (holding that the defendant's Sixth Amendment right to confrontation was violated by the admission of an affidavit by an employee of the Social Security Administration attesting that two Social Security numbers "do not belong to [defendant]. These two numbers have been assigned by the Commissioner of the Social Security Administration to two other individuals whom [sic] both are now deceased"); Tabaka, 976 A.2d at 175-76; Washington, 18 So.3d at 1224 (admission of certificate of non-licensure violated the defendant's Sixth Amendment rights because "[s]uch certificate is accusatory, was introduced to establish an element of the crime, was prepared at the request of law enforcement as part of its investigation in this case, and is evaluative in the sense that it represents not simply the production of an existing record, but an assertion regarding the results of an individual's search of a database or databases").

In contrast to these decisions, however, is the Maine Supreme Court's opinion in State v. Murphy, 991 A.2d 35, 2010 ME 28 (Me. 2010), wherein the court held that an affidavit from the

The State's arguments to the contrary are unavailing. The Sixth Amendment's prohibition on the admission of testimonial statements in the absence of an opportunity for confrontation is not limited to those statements that "creat[e] new evidence" or that "contain opinions of the exercise of judgment." Respt's Br. at 21. Nor does the Supreme Court's decision in Melendez-Diaz purport to limit its application to affidavits "attesting to facts that occurred wholly after the crime"; the State's argument suggesting as much, Respt's Br. at 17, is incorrect. Additionally, the availability to Jasper of the agency records themselves does not eliminate the confrontation clause violation presented by the admission of the affidavit.

The State also incorrectly asserts that the affidavit herein is merely authenticating DOL records, as approved of in Melendez-Diaz, contending that the "terse summary of the relevant body of records" does not prevent the affidavit from being admissible. But the affiant's "summary"—that Jasper's

secretary of state was not testimonial. See also State v. Gilman, 993 A.2d 14, 24, 2010 ME 35, (2010) (following Murphy). The affidavit attested that Murphy's "license or right to operate" was suspended, Murphy had been sent notice of suspension, and Murphy's "right to operate was under suspension" on a particular date "because the statutory conditions for restoration had not been satisfied." The Maine court held that the right to confrontation was not implicated because (1) any comment in Melendez-Diaz regarding clerks' certificates of public records was dicta, (2) the affidavit reported neutral information, (3) such certificates are routinely prepared for non-prosecutorial purposes, and (4) cross-examination would have little utility. Murphy, 991 A.2d at 36 n.2, 42-45. To support its holding that the Secretary of State's certificate contained non-testimonial statements, the Maine court also relied on its belief that the state and federal courts "have not completely discarded reliability as a factor when determining whether public records, such as those admitted in this case, are testimonial. . . . A reliability-based approach to public records is harmonious with both the purpose of the Confrontation Clause right and the modern realities associated with proving the content of routinely maintained motor vehicle records." Murphy, 991 A.2d at 43-44. However, the United States Supreme Court has explicitly rejected such a reliability-based approach: "[r]eliability is an amorphous, if not entirely subjective, concept" and, thus, "the only indicium of reliability sufficiently to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford, 541 U.S. at 63, 69.

license was suspended in the third degree—is precisely the type of statement that implicates the confrontation right. The brevity of the statement is irrelevant to determining whether it is testimonial.

In addition, the majority in Melendez-Diaz expressly rejected the assertion that such affidavits fit within the historical exception for business records and, accordingly, do not implicate the confrontation clause. To the contrary, the Court noted that the business records exception does not include documents kept in the regular course of business when “the regularly conducted business activity is the production of evidence for use at trial.” Melendez-Diaz, 129 S. Ct. at 2538. Contrary to the State’s contention, documents that are “calculated for use essentially in the court, not in the business”—such as the affidavit herein from the DOL custodian of records—do not fit within the historical business records exception. Melendez-Diaz, 129 S. Ct. at 2538 (quoting Palmer v. Hoffman, 318 U.S. 109, 114, 63 S. Ct. 477, 87 L. Ed. 645 (1943)).

The State also contends that cross-examination would be an empty formalism. The facts of this case highlight the danger of adopting such a cavalier view of the utility of confrontation; United State Supreme Court precedent precludes the adoption of such a view. As the Court stated:

“To be sure, the [Sixth Amendment]’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.

This is not what the Sixth Amendment prescribes.”

Melendez-Diaz, 129 S. Ct. at 2536 (quoting Crawford, 541 U.S. at 61-62).

Significantly, the facts herein are especially adverse to the State’s contention that cross-examination would be pointless: the date identified in the record custodian’s affidavit, on which Jasper’s license to drive was asserted to have been “Suspended in the third degree,” is three years earlier than the date on which the State alleged that Jasper was driving with a suspended license. Even the dullest of defense attorneys might have come up with a question or two to ask a live witness in such a situation.

As in Melendez-Diaz, “[t]he Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against [Jasper] was error.” 129 S. Ct. at 2542.

III

Nevertheless, the error in admitting the affidavit does not automatically warrant reversal of Jasper’s conviction. Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error analysis. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d. 705 (1967). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. State v. Stephens, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980). However, a constitutional error may be “so unimportant and insignificant” in the setting of a particular case that the error is

harmless beyond a reasonable doubt. State v. Wells, 72 Wn.2d 492, 500, 433 P.2d 869 (1967) (emphasis omitted) (quoting Chapman, 386 U.S. at 21–22). “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.” State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Where the untainted evidence alone is so overwhelming that it necessarily leads to a finding of the defendant’s guilt, the error is harmless. Guloy, 104 Wn.2d at 426. A conviction should be reversed “where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.” Guloy, 104 Wn.2d at 426.

Here, the error in admitting the affidavit was not harmless: there is a reasonable probability that the jury found it necessary to consider the assertions in the affidavit in order to find Jasper guilty of driving while license suspended or revoked in the third degree.

To convict Jasper of driving while license suspended or revoked in the third degree, the State needed to prove that Jasper was driving in Washington, that his license was suspended at the time that he was driving, and that his license was suspended *because* he had failed to “furnish proof of financial responsibility for the future” or he had “failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic

infraction or citation.” RCW 46.20.342(1)(c).

Jasper testified that he believed that his license was suspended on the day of the collision, but he did not explain why his license had been suspended. A police officer also testified that, after he was arrested, Jasper stated that his license was suspended. But again, Jasper did not state the reason that his license was suspended. The two DOL records of letters sent to Jasper indicating that Jasper’s license was going to be suspended in June 2007—about seven months before the collision—explain that Jasper’s license would potentially be suspended because he had, as of the date of the letters, failed to “respond, appear, pay, or comply with the terms of” citations for driving without liability insurance and for driving without current licensing tabs.

However, this evidence alone is not sufficient to satisfy all of the elements of driving with a license suspended *in the third degree*.⁷ Without the affidavit,

⁷ The to-convict instruction provided in this case stated:

To convict the defendant of driving while license suspended or revoked in the third degree, as charged in Count II, each of the following three elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 14, 2008, the defendant drove a motor vehicle;

(2) That at the time of driving an order was in effect that suspended or revoked the defendant’s driver’s license or driving privileges because

(a) the defendant failed to furnish proof of financial responsibility for the future as provided by RCW chapter 46.29;

or

(b) the defendant failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or failed to comply with the terms of a notice of traffic infraction or citation, as provided in RCW 46.20.289;

and

(3) That the driving occurred in the State of Washington.

If you find from the evidence that elements (1) and (3), and any of the alternative elements (2)(a) or (2)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count II. To return a verdict of guilty, the jury need not be unanimous as to which of

there is no evidence that, on February 14, 2008, Jasper's driving privileges were suspended *because of* some reason that satisfies the elements of driving while license suspended or revoked in the third degree. Jasper's own testimony and his statements to the police officer do not indicate the reason for his suspended license. Neither do the admissible driving records indicate that Jasper's license was actually suspended for the reasons stated or that his license remained suspended for those same reasons on February 14, 2008. That the defendant admitted to having a suspended license does not provide evidence regarding why his or her license was suspended or whether the defendant was eligible to reinstate the license, elements that alter the degree of crime charged.⁸ In the absence of the statements in the affidavit, the remaining untainted evidence does not resolve beyond a reasonable doubt whether Jasper's license was ever actually suspended as threatened in the admissible driving records and whether it remained suspended for those same reasons on February 14, 2008.

alternatives (2)(a), or (2)(b) 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.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty as to Count II.

See also 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 93.07, at 319-20 (3d ed. 2008).

⁸ The varying degrees of driving while license suspended or revoked are not lesser-included offenses of the greater degrees of the crime. Rather, they are inferior degree crimes. A person does not commit the lower degree crime when he or she commits the higher degree crime. See RCW 46.20.342. An offense is only a lesser-included offense where the elements of the lesser offense are included wholly within the greater offense, such that it is impossible to commit the greater without having committed the lesser. Unlike a lesser-included offense, an inferior degree offense may have an element that is not an element of the greater offense. State v. Peterson, 133 Wn.2d 885, 889-92, 948 P.2d 381 (1997).

Therefore, the error in admitting the evidence was not harmless.⁹ Guloy, 104 Wn.2d at 426. Accordingly, Jasper's conviction for driving while license suspended must be reversed.¹⁰

IV

Jasper next contends that the trial court, by responding in writing to the jury's questions in his absence, violated both his constitutional right to be present during trial proceedings and CrR 6.15(f)(1). We disagree that Jasper's constitutional rights were violated, but we agree that the trial court's actions were inconsistent with the dictates of CrR 6.15.¹¹

Pursuant to the confrontation clause of the Sixth Amendment, the due process clause of the Fourteenth Amendment, and article I, section 22 of the Washington Constitution, a criminal defendant has the right to be present during all critical stages of a criminal proceeding.¹² State v. Pruitt, 145 Wn. App. 784,

⁹ Jasper additionally contends that the error in admitting the affidavit also affects his conviction for felony hit-and-run because the prosecutor used the affidavit to argue that Jasper was generally irresponsible and avoided facing the consequences of his actions. However, Jasper mischaracterizes the prosecutor's closing argument. The error in admitting the affidavit did not taint Jasper's conviction for felony hit-and-run.

¹⁰ Because this confrontation clause issue is dispositive with respect to Jasper's conviction for driving while license suspended or revoked, we need not reach Jasper's additional contention that the DOL affidavit constitutes an impermissible opinion on an ultimate issue. See State v. Thiefault, 160 Wn.2d 409, 414 n.1, 158 P.3d 580 (2007).

¹¹ We review de novo an alleged error in a trial court's response to a jury inquiry. State v. Becklin, 163 Wn.2d 519, 525, 182 P.3d 944 (2008) (citing State v. Hachenev, 160 Wn.2d 503, 512, 158 P.3d 1152 (2007)).

¹² Jasper contends that his right to be present at different stages of the proceedings is broader under article I, section 22 of the Washington Constitution than under the Sixth Amendment of the federal constitution because the state constitution expressly protects a criminal defendant's "right to appear and defend in person, or by counsel." Const. art. I, § 22. However, this argument is unpersuasive. We recently conducted a Gunwall analysis (State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)) of an argument similar to the one advanced by Jasper. See State v. Martin, 151 Wn. App. 98, 107-17, 210 P.3d 345 (2009), review granted, 168 Wn.2d 1006, 226 P.3d 781 (2010). We held that the state constitution does not protect a criminal defendant's right to be present during trial more broadly or more stringently than does

798, 187 P.3d 326 (2008). A critical stage is one where the defendant's presence has a reasonably substantial relationship to the fullness of his or her opportunity to defend against the charge. In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). Generally, in-chambers conferences between the court and counsel on legal matters are not critical stages except when the issues raised involve disputed facts. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (citing United States v. Williams, 455 F.2d 361 (9th Cir. 1972); People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992)).

Here, the issue raised by the jury's first inquiry involved a question of law regarding a driver's obligation to fulfill his or her duties pursuant to the statute. The issue raised by the jury's second inquiry involved a question of law regarding a definition for the "spirit of the law." No factual issue is raised by either of these questions. Because the jury's questions did not raise any issues involving disputed facts, the court's consideration of and response to the jury's inquiries did not constitute a critical stage of the proceedings. Therefore, Jasper's presence when the trial court resolved the jury's inquiries was not constitutionally required.¹³

the United States Constitution. "That the state constitution expressly guarantees that which the Sixth Amendment impliedly protects has no effect on the content of the rights protected under the parallel constitutional provisions." Martin, 151 Wn. App. at 110. Thus, our analysis of the defendant's right to be present is the same for both the Sixth Amendment and article I, section 22.

¹³ Jasper affirmatively contends that both he and counsel were absent during the trial

However, Jasper correctly contends that the trial court violated CrR 6.15(f)(1) in responding to the jury's inquires. Criminal Rule 6.15 expressly requires that all parties be notified of any jury question posed to the trial court during deliberation and be afforded an opportunity to comment upon an appropriate response:

The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. . . . Any additional instruction upon any point of law shall be given in writing.

CrR 6.15(f)(1). "Any communication between the court and the jury in the absence of the defendant [or defense counsel] is error." State v. Langdon, 42 Wn. App. 715, 717, 713 P.2d 120 (1986).

Here, the trial court did not notify the parties of the contents of the jury's questions or provide the parties with an opportunity to comment upon an appropriate response, contrary to the requirements of CrR 6.15(f)(1). In this regard, the trial court erred.

Nevertheless, when such an error occurs, the defendant must raise the possibility that the communication between the judge and the jury was prejudicial

court's resolution of the jury's questions, and the State agrees that the only indication that defense counsel was consulted is the trial court's standard, pre-printed response form, which states: "**COURT'S RESPONSE:** (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD)." Therefore, we assume that Jasper was not present for purposes of this analysis.

and the State may demonstrate that the error was harmless. State v. Bourgeois, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). Generally, where the trial court's response to a jury inquiry is "negative in nature and conveys no affirmative information," no prejudice results and the error is harmless. State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980); accord State v. Safford, 24 Wn. App. 783, 794, 604 P.2d 980 (1979). In State v. Johnson, 56 Wn.2d 700, 355 P.2d 13 (1960), our Supreme Court held that a trial court's written response to a jury inquiry without informing counsel was improper, but the error was not prejudicial because the trial court "communicated no information to the jury that was in any manner harmful to the [defendant]." 56 Wn.2d at 709.

Here, the jury inquired whether "a person's 'obligation to fulfill all of the following duties' [is] dependent on their mental, emotional, or physical condition?"¹⁴ The trial court responded: "Please re-read your instructions and continue deliberating. No further instructions will be given to this question." Jasper argues that he was prejudiced by the trial court's failure to inform the parties of the jury inquiry because, had he been given the opportunity to participate in forming a response, he would have requested that the trial court instruct the jury about an available statutory defense relieving a driver of the obligation to fulfill the statutory duties following a collision.

RCW 46.52.020 provides that a driver involved in a collision will not be

¹⁴ Jasper assigns error to the trial court's response to the jury's second question but does not discuss this issue independently from the issues raised by the other inquiry and response. Accordingly, we do not separately address this assignment.

criminally liable for failing to fulfill the driver's statutory obligations—including providing insurance information and assisting those who were injured in the collision—if that driver is “injured or incapacitated by such accident to the extent of being physically incapable of complying with this section.” RCW 46.52.020(4)(d). Jasper contends that this statutory defense was available to him because there was testimony suggesting that Jasper hit his head during the collision and was confused and disoriented as a result.

“[A]dditional instructions on the law *can* be given during deliberation.” State v. Becklin, 163 Wn.2d 519, 529–30, 182 P.3d 944 (2008). Whether to give further instructions to the jury after deliberations have begun is within the discretion of the trial court. State v. Ng, 110 Wn.2d 32, 42–43, 750 P.2d 632 (1988); see CrR 6.15(f)(1). However, “such supplemental instructions should not go beyond matters that either had been, or could have been, argued to the jury.” State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990). In Ransom, the appellate court held that the trial court erred in giving an additional instruction regarding accomplice liability after deliberations had begun because “[t]he effect was to add a theory that the State had not elected and that defense counsel had no chance to argue.” 56 Wn. App. at 714.

Here, neither party presented argument on the theory that Jasper was physically incapable of fulfilling his statutory obligations. This is unsurprising given that Jasper did not propose an instruction setting forth this statutory

defense. Thus, even had the trial court properly informed the parties of the jury inquiry and even had Jasper proposed an additional instruction regarding the statutory defense, the trial court could not have properly given such an instruction. Ransom, 56 Wn. App. at 714; cf. Becklin, 163 Wn.2d at 530 (holding that trial court acted within its discretion when it gave the jury further instruction on the law because both parties had presented arguments on the theory).

The trial court erred by not informing the parties of the jury's inquiry and by not providing Jasper's counsel with an opportunity to participate in developing an appropriate response. But this error was harmless. The trial court's reply was not erroneous. The trial court's response was neutral, did not convey any affirmative information, and did not communicate to the jury any information that was harmful to Jasper. Moreover, the trial court could not have further instructed the jury on a new defense theory because the parties had not had an opportunity to address that theory in closing arguments. Therefore, Jasper was in no way prejudiced by the trial court's error. The State has satisfied its burden of proving that the trial court's error was harmless.¹⁵

¹⁵ Jasper also contends that the trial court's response to the jury inquiry coerced a verdict because it stated that the jury should "continue deliberating." For this contention, he relies on State v. Boogaard, 90 Wn.2d 733, 585 P.2d 789 (1978). This argument fails.

CrR 6.15(f)(2) states: "After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." In Boogaard, the trial judge, after inquiring about the history of the vote, asked the foreman and each juror whether a verdict could be reached in a half hour. 90 Wn.2d at 735.

In this case, by contrast, the trial court did not question any juror about the nature of the vote or deliberations, there was no indication that the jury was deadlocked, and the trial court did not suggest that deliberations should continue for any particular period of time or should result in any particular verdict. The trial court's response in this regard was merely to state that the jury would not be getting any further instructions regarding their inquiry. This response was not

IV

Jasper's conviction for driving while license suspended or revoked in the third degree is reversed and the cause remanded for further proceedings consistent with this opinion. Jasper's conviction for felony hit-and-run is affirmed.

Dupe, C. S.

We concur:

Leach, A. C. J.

Grosse, J.

coercive.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 63442-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent James Whisman, Jennifer Atchison
King County Prosecuting Attorney-Appellate Unit
- appellant
- Travis Stearns, Suzanne Elliott
Attorneys for Amicus Curiae (WADA and WACDL)


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 20, 2010

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 63442-9-1
v.)	
)	ORDER DENYING MOTION FOR
DOUGLAS SCOTT JASPER,)	RECONSIDERATION AND
)	CHANGING OPINION
Appellant.)	

The panel having determined that the respondent's motion for reconsideration should be denied and that opinion should be changed, it is hereby

ORDERED that respondent's motion for reconsideration is denied and the opinion of this court in the above-entitled case filed September 20, 2010 be changed as follows:

Footnote 13 (page 20) and all accompanying text shall be deleted.

The following footnote 13 and accompanying text shall be inserted in its place:

¹³Jasper affirmatively contends that both he and counsel were absent during the trial court's resolution of the jury's questions. "The jury gave both questions to the court at 1:42 p.m., and the court returned both answers to the jury at 1:50 p.m. The clerk's minutes otherwise detail the presence and involvement of the parties in matters conducted both on and off the record and yet the minutes contain no indication that the court discussed the jury's questions with counsel or Jasper." Br. of Appellant at 20-21.

The State agrees that the only indication that Jasper or his counsel were consulted is the trial court's standard preprinted response form, which states: "**COURT'S RESPONSE:** (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD)." The State concedes that, "[t]he record is silent as to whether Jasper and/or his counsel were informed of the jury inquiry, except for the notation on the preprinted form, which stated that all parties had been afforded the opportunity to be heard." Br. of Resp't at 27.

In the event that contact with counsel was made by the trial court, the record is silent as to Jasper's counsel's suggested response, if any, to the jury inquiries. Similarly absent is any indication as to Jasper's counsel's response, if any, to the trial court's suggested answers to the jury's inquiries.

Faced with this record, the State does not urge affirmance based on compliance with the court rule. Rather, the State contends that, "[a]ssuming, *arguendo*, that the trial court's failure to consult Jasper or his counsel before answering the jury's question was error, the error is harmless." Br. of Resp't at 32.

Accordingly, we assume the facts as urged by Jasper in resolving this issue.

Following the initial filing of this opinion, the State filed a pleading that we categorized as a motion for reconsideration. Appended to the pleading was a copy of a letter from the trial court to counsel. The gist of the letter is the trial judge's assertion that telephone contact with trial counsel was made upon receipt of the jury's inquiry. Jasper filed a response to the motion, correctly citing to applicable rules which preclude supplementation of the appellate record in this fashion.

To the extent that the State's purpose was to afford readers of this opinion with the trial court's recollection of circumstances, this mention should accomplish that purpose. Jasper is correct, however, in noting that our rules preclude any grant of relief to the State as a result of the motion or its attachment.

This all points to a greater issue. We are sympathetic to trial judges who receive a copy of the appellate opinion in a matter over which they presided and who believe that the factual recitation therein is incomplete. In this regard, however, we are subservient to the trial court. Only those matters about which the trial court allows or causes a record to be made are available for us to review. As has often been observed, for purposes of appellate review, there is virtually no difference between a trial event that did not take place and a trial event that took place but about which no record was made.

The remainder of the opinion shall remain the same.

Dated this 1st day of DECEMBER, 2010.

We concur:

Leach, J.

Dwyer, C.J.

Glose, J.

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