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INTRODUCTION

It is undisputed that Sprint employee John Burnston hit and ran, leaving a lifeless black mare lying in the middle of the road. Nanette Aurdal collided with the dead horse, suffering severe injuries. Instruction 18 correctly informed the jury of Washington's hit-and-run statute.

Sprint does not ask this Court to interpret Washington's hit-and-run statute. It asks this Court to review the appellate court's holdings on harmless error and preservation.

Sprint's harmless-error argument is at odds with substantial evidence before the jury. The jury heard testimony about a state-law mandate requiring Burnston to stop, about specific details of the hit-and-run statute, about Sprint policy requiring Burnston to stop, and about Burnston's extreme negligence. Instruction 18 said nothing the jury had not already heard.

Sprint's preservation argument misses the point. Sprint's only objection to Instruction 18 was that the hit-and-run statute does not apply to accidents with animals. The appellate court's preservation holding pertains only to Sprint's new argument that the hit-and-run statute is not intended to prevent future accidents.

This Court should deny review.

STATEMENT OF THE CASE

John Burnston hit Phillip Huntington's horse while driving a Sprint utility truck southbound on Center Road in Chimacum. RP 1093-95. Although Sprint's truck was equipped with flares, a strobe light and reflective safety cones, Burnston did not stop, but fled the scene. RP 1096, 1100. More than 15 minutes passed before Burnston returned to the scene, by which time, Nanette Aurdal had hit the horse, totalling her vehicle and suffering serious injuries. RP 173-74, 176-78, 182-83, 185-86, 197-98, 202-03, 566, 593-94, 607, 609, 957.

The Aurdals sued the Huntingfords, Sprint, and Burnston for negligence. CP 1-6. The trial court instructed the jury that a driver involved in a collision damaging property must immediately stop and remain at the scene:

A statute provides that:

The driver of any vehicle involved in an accident resulting in damage to other property shall immediately stop such vehicle at the scene of such accident or as close thereto as possible and shall forthwith return to, and in any event shall remain at, the scene of such accident; every such stop shall be made without obstructing traffic more than is necessary.

CP 142 (Instruction 18); RP 1288. Sprint agrees that "general negligence principles" and its own safety policies require drivers

involved in an accident to stop. RP 34-35, 42, 1232; Ex 26. Sprint's only objection at trial, and the only one discussed in its Petition for Review, is that former RCW 46.52.020, upon which Instruction 18 is based, did not "apply to an accident with an animal." RP 1231-32, 1267; Pet. 5.

As discussed below, Sprint raised different objections for the first time on appeal, including that the former statute imposed no duty to stop and stay to prevent further accidents. Unpub. Op. at 5; *supra*, argument § B. While the appellate court remarked that Sprint made this new argument "persuasively," the court did not consider it, correctly holding that Sprint "fail[ed] to preserve the issue for appeal." *Id.* Sprint's Petition nonetheless assumes that Instruction 18 was "legally incorrect," and asks this Court to review the appellate court's holding on preservation and its holding that the assumed instructional error was harmless. Pet. at 1-2.

ARGUMENT

- A. There is no conflict with cases holding that erroneous jury instructions are presumptively prejudicial – the appellate court correctly cited and followed the very case-law upon which Sprint asserts a conflict.**

Since Sprint agrees that "general negligence principles" require drivers involved in a collision to stop, its objection to

Instruction 18 must be its reference to "a statute" requiring drivers to stop. RP 1232. But the instruction is consistent with considerable testimony, admitted at trial without objection, about a statutory "mandate" to stop. That testimony, along with other evidence of Burnston's negligence, renders any instructional error harmless.

"Even when an instruction given is . . . erroneous," reversal is required only when the error is prejudicial; *i.e.*, "presumably affects the outcome of the trial." Unpub. Op. at 6; ***Herring v. Dep't of Soc. & Health Servs.***, 81 Wn. App. 1, 23, 914 P.2d 67 (1996). If the appellate court determines that an instruction is erroneous, then it "presume[s] prejudice subject to comprehensive record review." Unpub. Op. at 6 (citing ***Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160***, 151 Wn.2d 203, 212, 87 P.3d 757 (2004)).

In ***Blaney***, for example, the trial court instructed the jury to calculate Blaney's future wage loss "from today until the time Ms. Blaney may reasonably be expected to retire." 151 Wn.2d at 210. This Court held that the instruction was erroneous, where it denied the jury the discretion to determine how long Blaney would be employed. *Id.* But this Court held that giving the instruction was

harmless, where Blaney presented evidence that she would work until retirement, and her employer only speculated that she could be terminated prior to retirement. *Id.* at 211-12. Any error here is similarly harmless, where there was ample evidence that Burnston had a statutory (and common-law) duty to stop.

Ed Wells, Aurdal's accident reconstruction expert, testified that "state law mandates" that Burnston stop after he hit Huntingford's horse:

Q. . . I believe you testified that Mr. Burnston should have stopped once he hit the horse?

A. I'm certain I said that.

Q. Okay. And why should he have stopped?

A. Well, for one thing, state law mandates it, and, second, he should have stopped to protect the scene and keep others from potential harm.

RP 220-21. Nothing contradicted Wells' testimony about a "state law mandat[e]." *Id.*

On cross-examination, Wells agreed with counsel's statement that "the law . . . says to stop as soon as practicable." RP 236. Counsel even inquired about the specific wording of "the law" requiring drivers to stop. *Id.* This exchange is plainly about former RCW 46.52.020's mandate that a driver involved in an accident must "immediately stop":

Q. You talked about a duty to stop under the law. That's not an absolute duty in terms of where to stop or how quickly to stop or where to park?

A. Well, the law is not specific about the details that you have described. It's only specific that you are to stop, identify yourself, render aid, etc.

Q. Yeah. And in fact, it says to stop as soon as practicable, doesn't it? Words to that effect?

A. I believe that's the wording.

Id. Again, nothing contradicted this testimony that "the law" imposed a "duty to stop" and identify, render aid, etc. *Id.*

Instruction 18 is consistent with, even repetitive of, this testimony. The jury heard that "state law mandates" that Burnston "stop[] once he hit the horse." RP 220-21. The jury heard that "the law" imposed "a duty to stop," and to identify oneself and render aid. RP 236. There was no harm in repeating that "[a] statute provides that: The driver of any vehicle involved in an accident" must stop and remain at the scene. CP 142.

More testimony of Burnston's negligence underscores that no harm occurred. Wells testified "the first thing to be done would be to stop as safely and quickly as possible, as near to the incident as [Burnston] could have gotten stopped." RP 239. He explained that it made no difference whether Burnston initially stopped, but left determining that he could not safely back up. RP 221.

In addition to testimony regarding the "state law mandate[]," the jury heard that Sprint drivers may not "hit-and-run." RP 43. The "IN CASE OF ACCIDENT" card in Burnston's Sprint vehicle required him to "[s]top at once," and to "[t]ake steps to prevent further accidents," such as setting out "warning devices" located in the Sprint vehicle. RP 42, 108; Ex 26. Daniel O'Connel, who trained Burnston in Sprint's safety procedures, testified that Burnston failed to follow company guidelines. RP 34-35, 42-43, 45.

The jury also heard that Burnston falsified his accident report, stating that Aurdal hit the horse while Burnston was "stopped, putting out flares." RP 45. Burnston admitted that he did not stop. RP 1096. Aurdal repeatedly characterized these false statements as "a lie" and as "far from the truth," without objection. RP 43-45.

Thus, the jury not only heard that Burnston had a statutory duty to stop, but also heard significant other evidence of Burnston's negligence and lack of credibility. The appellate court correctly held that any instructional error was harmless. Unpub. Op. at 5-7.

There is no conflict with this Court's decisions holding that the appellate courts must presume that an erroneous jury instruction is prejudicial. Pet. at 8-9 (citing *Blaney*, 151 Wn.2d at

211; *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311-12, 898 P.2d 284 (1995); *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 584 (1977). Sprint argues that the appellate court failed to presume prejudice, as required by *Wanrow*, *Mackay* and *Blaney*, *supra*. Pet. 9. But the appellate court plainly and correctly acknowledged that “[w]hen considering an erroneous jury instruction, we presume prejudice subject to a comprehensive record review.” Unpub. Op. at 6 (citing *Blaney*, 151 Wn.2d at 212). Assuming *arguendo* that the instruction was erroneous, the court did exactly what *Blaney* demands, engaging in a “comprehensive record review,” which revealed that Instruction 18 was not prejudicial. Unpub. Op at 5-7.

In any event, giving Instruction 18 was not only harmless, but it was proper, where former RCW 46.52.020 plainly applied. Former RCW 46.52.020 first and foremost requires a driver involved in an accident damaging “other property” to immediately stop and remain at the accident scene. The Huntingfords’ horse was “other property,” and Sprint has never claimed otherwise. *Sohol v. Clark*, 78 Wn.2d 813, 820, 479 P.2d 925 (1971) (a horse is personal property); *Wall-A-Hee v. N. Pac. Ry. Co.*, 180 Wash. 656, 41 P.2d 786 (1935) (same). Since Burnston plainly was

“involved in an accident resulting only in . . . damage to other property,” he had to “immediately stop . . . and . . . remain at, the scene of such accident.” Former RCW 46.52.020(2). Thus, the former statute plainly applied.

Sprint’s only argument at trial and before this Court is that the former statute did not apply to accidents with an animal because former RCW 46.52.020(3) requires a “driver of any vehicle involved in an accident resulting in . . . damage to other property [t]o give his or her name, address, insurance company . . . and vehicle license number,” etc. Pet. 4-5, 7; RP 1231-32, 1267. As Sprint puts it, “[t]here was no person at the scene of Burnston’s accident to whom Burnston could have provided the information . . . required by [former] RCW 46.52.020(3).” Pet. 6.

Burnston breached his duty to stop and remain at the scene, so his subsequent duties are irrelevant. But in any event, Sprint’s argument that the hit-and-run statute does not apply when there is “no person at the scene of [the] accident” would plainly and impermissibly permit a whole host of hit and runs. If Sprint is right, then any driver who hits a parked car, a house, or even a propane tank, could leave the scene, taking no responsibility for the property

damage, if there was “no person at the scene” to witness his wrongdoing. *Id.* That is not and cannot be the law.

B. There is no conflict – the appellate court correctly held that Sprint failed to preserve an objection to Instruction 18 that it neglected to even mention in the trial court.

At trial, Sprint’s only objection to Instruction 18 was that RCW 46.52.020 does not “apply to an accident with an animal.” Pet. 7; Unpub. Op at 4. Sprint’s Petition raises only this objection to Instruction 18, summarily stating that no more is required under CR 51(f). Pet. 7-8. Sprint misses the point – the appellate court correctly held that Sprint failed to preserve a completely different basis for the objection to Instruction 18, which Sprint nowhere mentions here. This Court should deny review.

Civil Rule 51(f), which provides the framework for taking exceptions to jury instructions, requires the “objector [to] state distinctly the matter to which he objects and the grounds of his objection” “A party who fails to apprise the trial court of the specific points of law or the claimed defect in the instruction fails to preserve the issue for appeal.” Unpub. Op. at 5 (citing **Stewart v. State**, 92 Wn.2d 285, 298, 597 P.2d 101 (1979)).

For the first time on appeal, Sprint argued that Instruction 18 was improper because former RCW 46.52.020 “impose[d] no duty

to stop and stay to *prevent further accidents.*" Compare BA 10 with RP 1231, 1232 and 1267; Unpub. Op at 5 (emphasis in Unpub. Op).¹ The appellate court correctly held that Sprint failed to raise this argument in the trial court. Unpub. Op. at 5. Thus, the appellate court refused to reach the question, holding that Sprint "failed to preserve the issue for appeal." *Id.* (citing RAP 2.5(a)). Sprint does not address this holding. Pet. 7-8.

Sprint argues only that it objected to instruction 18 on the ground that former RCW 46.52.020 does not apply to collisions with animals. Pet. 7. The unpublished opinion does not address that argument. Unpub. Op. at 3-5. This Court should not review a "holding" that the appellate court never made.

Sprint again imagines a conflict where none exists. Pet. 7-8 (citing ***Crossen v. Skagit County***, 100 Wn.2d 355, 669 P.2d 1245 (1983)). There, counsel took exception to the trial court's refusal to give several instructions based on the Manual on Uniform Traffic Control Devices, citing the statutes upon which the proposed instructions were based. ***Crossen***, 100 Wn.2d at 357-58.

¹ Sprint also argued on appeal that Instruction 18 erroneously omitted parts of the statute. BA 12-13. But here too, Sprint failed to object on that ground before the trial court or to propose an instruction including the other parts of the statute. BR 23. The appellate court did not address this unpreserved argument. Unpub. Op. at 3-5.

The appellate court held that the objection was not preserved, where counsel “merely” cited the statute, without explaining why the instructions were necessary. 100 Wn.2d at 357, 359. This Court reversed, holding that “the failure to give a rationale [does not] necessarily preclude[] appellate review, [where] it was apparent . . . that the trial judge understood the basis of counsel’s objection.” *Id.* at 359 (emphasis in original).

Crossen is plainly inapposite. This is not a matter of whether the trial judge “understood” Sprint’s objection, or whether Sprint simply failed to provide a “rationale” for its objection. 100 Wn.2d at 359. Sprint did not object to Instruction 18 on the sole ground the appellate court found persuasive. Unpub. Op. at 5. Sprint does not claim otherwise, or even address this point.

In short, Sprint’s preservation argument entirely misses the mark, attacking a phantom holding the appellate court never made. This Court should deny review.

CONCLUSION

The appellate court’s correct decisions on preservation and harmless error are not in conflict with existing precedent and do not raise issues of substantial public interest. This Court should deny review.

RESPECTFULLY SUBMITTED this 4th day of October,
2012.

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A handwritten signature in black ink, appearing to read 'Kenneth W. Masters', written over a horizontal line.

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