Supreme Court No. 101515-1
(COA No. 83628-5-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARCUS WILLIAMS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Marcus Williams asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Williams seeks review of the Court of Appeals decision dated November 7, 2022.

C. ISSUES PRESENTED FOR REVIEW

1. Due process limits the government's ability to criminalize conduct that lacks a mens rea element. A person's duty under the hit and run statute depends on the type of damage or injury that resulted from the collision. In addition, the penalty for the offense depends on the damage or injury. But as currently interpreted, the statute does not require knowledge of the result of the collision, allowing the government to convict a person of a felony based on an innocent failure to act. The Court of Appeals decision affirming Mr. Williams's conviction under the current interpretation of the statute violates due process. This is an important

constitutional question requiring this Court's determination. RAP 13.4(b).

2. The accused has a right to a trial before a fair and impartial jury, and the trial court has a duty to ensure that right is not violated. In this case, a juror repeatedly fell asleep through critical portions of trial. The Court of Appeals decision affirming Mr. Williams's conviction where the trial court refused to recess and allow the juror to rest so that he may be a fair, impartial, and competent juror violates Mr. Williams's right to a fair jury trial. This Court should grant review of this important constitutional question. RAP 13.4(b).

3. The Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution forbid the government from imposing "excessive fines." A payment is a fine if it is at least partially punitive, and it is excessive if it is grossly disproportional to the offense. The court must consider a person's ability to pay when weighing proportionality. Here, Mr. Williams cannot pay the $500 victim

penalty assessment. The Court of Appeals decision affirming this grossly disproportional penalty conflicts with binding precedent holding that this constitutional protection applies so long as the payment is at least partially punitive. Trial courts need this Court's guidance on this important constitutional issue of broad import.[1] RAP 13.4(b).

4. Mr. Williams raised several arguments in his Statement of Additional Grounds for Review. Because due process requires the State to prove every element of the crime beyond a reasonable doubt, he challenges the sufficiency of the evidence. In addition, where a juror has formed an opinion on the accused's guilt prior to trial, it violates the person's right to a fair trial. This Court should grant review of the Court of Appeals decision denying relief on these grounds. RAP 13.4(b).

[1] This issue regarding whether the victim penalty assessment is unconstitutionally excessive is currently pending in two other petitions before this Court. Petition for Review, *State v. Tatum*, No. 101247-1 (Wash. Sept. 6, 2022); Petition for Review, *State v. Ramos*, Wash. Ct. App. No. 82818-5-I, Sup. Ct. No. _____ (Wash. Dec. 1, 2022).

D. STATEMENT OF THE CASE

On a late winter afternoon, a car drove around a curve on a busy road, switched lanes to pass another car, and collided with a cyclist who was crossing the street. CP 5, 3. The car continued driving. CP 5. The cyclist died. CP 3. That evening, police found a car with a dented bumper and a cracked windshield that matched the car involved in the accident. CP 6. The car was registered to Mr. Williams. CP 6.

A few months after the accident, Detective Thomas Bacon spoke with Mr. Williams over the phone. CP 6. Mr. Williams told Detective Bacon his car was stolen several days prior to the accident and he was not involved. CP 6-7.

The State charged Mr. Williams with a hit and run resulting in death. CP 1-8. The case proceeded to trial.

1. *Juror #5 repeatedly falls asleep during the third day of trial, missing critical testimony.*

The third day of trial was dominated by Detective Bacon's testimony. That morning, he testified at length about important steps in his investigation, including his impound and

search of the car, RP 456, 465-73, and obtaining Mr. Williams's cell phone number. RP 461.

The parties and the court noticed juror #5 sleeping throughout the morning's proceedings. RP 478. When counsel brought this to the court's attention, the court decided it would have the jury take "stretch breaks every 30 minutes." RP 478. But even after the court issued stretch breaks, juror #5 continued to fall asleep. RP 496, 518.

When the trial recessed for lunch, the court spoke with juror #5. RP 516. The court told him, "we've noticed that you've had some trouble staying awake during testimony." RP 516. Juror #5 said he would feel more awake after eating, and the court dismissed him for lunch. RP 517.

Because juror #5 was unable to stay awake and there were no alternate jurors,[2] Mr. Williams asked the court to recess until the next day to allow juror #5 to get some sleep. RP

[2] The court excused two jurors on the first day of trial and there were no alternates remaining. RP 297, 299.

519. Defense counsel expressed his "very major concerns regarding Juror No. 5 in the fact that he has nodded off several times." RP 519. He noted juror #5 "fell asleep at least three times . . . . In fact at one point, he dropped his notepad." RP 518.

The State echoed defense counsel's observations that juror #5 "was dozing off and possibly sleeping in some portions of the testimony." RP 478. It stated, "it's concerning when you have a juror who you can tell is not paying attention because they're nodding off." RP 519.

The court agreed with the parties' observations, saying, "I do see [juror #5] drifting off even when he opens his eyes again." RP 518. The court said it saw juror #5 sleeping "during Detective Bacon's testimony." RP 520. It also noticed "[juror #5] drifted off within 30 seconds of the stretch, so obviously that didn't make a difference." RP 518.

After the lunch break, the court spoke with juror #5 again and asked if he felt he could stay awake and pay attention or if

they should recess for the day and let him rest. RP 524. Juror #5 told the court he could stay awake, and trial resumed. RP 524.

Detective Bacon's testimony continued that afternoon, and he testified about his phone conversation with Mr. Williams, RP 541-47, identification of the passengers in the car, RP 550, and obtaining Mr. Williams's cell tower location data, RP 529-37. Cross, redirect, and recross examination of Detective Bacon also occurred that afternoon. Other important witnesses, including fingerprint examiners, also testified that afternoon. RP 575, 588.

Juror #5 continued to struggle to stay awake during the afternoon of trial. RP 549.

2. *Mr. Williams moves to dismiss and objects to the State's proposed jury instructions because the offense requires knowledge that the collision resulted in death.*

After the State rested, Mr. Williams moved to dismiss. RP 685. He argued the crime of hit and run resulting in death requires knowledge that the collision resulted in death and, because the State presented no evidence Mr. Williams had any

knowledge that a death occurred, the State failed to prove all the elements of the offense. RP 685.

Mr. Williams pointed to discrepancies between the definition and to-convict jury instructions. RP 688. The definition instruction stated: "A person commits the crime of hit and run where he or she is the driver of a vehicle and is *knowingly involved in an accident resulting in the death of any person* and fails to carry out his or her obligation to fulfill all following duties . . . . " CP 67 (emphasis added); RP 688-89. He argued the plain language of the definition "indicates that the person has to know that a death resulted." RP 689. However, the to-convict instruction did not include knowledge of death as an element.[3] CP 68-69; RP 689.

[3] As initially given, the to-convict instruction, in relevant part, read as follows:

"To convict the defendant of the crime of hit and run, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about February 26, 2019, the defendant was the driver of a vehicle;

The court concluded the word "knowingly" in the definition instruction only applies to the collision and not to the resulting death and denied Mr. Williams's motion. RP 690. It held knowledge of the resulting harm is not an essential element of the crime, stating, "you're involved in something that the result constitutes a crime, but you don't necessarily have to know that it results in a crime." RP 690.

3. During deliberation, the jury asks multiple questions about a person's duty under the crime of hit and run.

During deliberation, the jury submitted three inquiries to the court about the definition and to-convict instructions. CP 72, 74, 76.

The jury's first question was about differences between the definition and the to-convict instructions about a person's duty: "On point #9 (to-convict instruction) element 4c it states

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(2) That the defendant's vehicle was involved in an accident resulting in the death of any person;
(3) That the defendant knew that he had been involved in an accident
(4) That the defendant failed to satisfy his obligation to fulfill all of the following duties . . . . "

the driver must give info 'to person struck or injured.' Point #8 (definition instruction) clarifies 'or any person attending.' Which do we follow?"[4] CP 76; RP 733. The court agreed the instructions were incorrect and confusing because they required the person to provide information to the person who was hit—in this case, a deceased person. RP 736. Over Mr. Williams's objection, the court provided a supplemental instruction and told the jury to add language to person's duties in the to-convict instruction: "On instruction #9, insert the following after 'any person struck or injured' in (4)(c) – 'or the driver or any occupant of, or any person attending, any vehicle collided with.' " CP 77; RP 735, 737-38.

[4] The relevant portions of the driver's duty in the jury instructions as initially given read as follows:

Definition (#8): give his information "to any person struck or injured or the driver or any occupant of, or any person attending, any vehicle collided with." RP 67.

To-convict (#9): give his information "to any person struck or injured." RP 68.

The jury's next question was about a person's duty under the hit and run statute: "If return to the scene would be futile because the person struck could not receive information and was already receiving assistance is there still a legal duty to return to the scene according to the law." CP 74. The court responded: "Please refer to your jury instructions." CP 75.[5]

The jury found Mr. Williams guilty. CP 78. At sentencing, the court ordered Mr. Williams to pay a $500 victim penalty assessment. RP 759; CP 265.

E. ARGUMENT

1. The Court of Appeals decision that the crime of hit and run does not require knowledge of the resultant harm violates due process.

Due process requires the State to prove "beyond a reasonable doubt . . . every fact necessary to constitute the

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[5] The jury's third inquiry and the court's response were:

Jury Inquiry: "Is a bicycle legally considered a 'vehicle.' " CP 72.

Court's Response: "The court will be giving no further instructions on this issue." CP 73.

crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. This is a bedrock principle of criminal procedure and "provides concrete substance for the presumption of innocence." *Winship*, 397 U.S. at 363.

"[W]rongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed 288 (1952). A crime requires the State to prove "a culpable mental state regarding 'each of the statutory elements.'" *Rehaif v. United States*, ___ U.S. ___, 139 S. Ct. 2191, 2195, 204 L. Ed. 2d 594 (2019). The constitution prohibits criminalizing "passive conduct . . . that is unaccompanied by intent, knowledge, or mens rea." *State v. Blake*, 197 Wn.2d 170, 179-80, 481 P.3d 521 (2021).

The crime of hit and run criminalizes a failure to act, which is passive conduct. The statute imposes upon a person an affirmative duty, and the specific requirements of that duty depend on the damage or injury caused by the accident. In

addition, the severity of the crime and the punishment for failing to fulfill the specific requirements of that duty are also based on the result of the car accident.

For example, if a driver collides with an unattended vehicle or other property, the driver can satisfy their duty by leaving a note with their name and address. RCW 46.52.010. If a driver collides with an occupied vehicle, the driver must move their car to a safe location and provide their name and information. RCW 46.52.020(2)(a), (3). If the collision causes injury or death, the driver must immediately stop, provide their name and information, and render assistance. RCW 46.52.020(1), (3). If nobody is able to receive information, the driver must report the accident to the police and provide their information. RCW 46.52.020(7).

"One must be aware of facts giving rise to the duty in order to trigger the obligation to perform it." *State v. Miller*, 308 N.W.2d 4, 6 (Iowa 1981). The specific actions required by the hit and run statute depend on the result of the accident.

Therefore, knowledge of damage, injury, or death is a necessary element of the crime of hit and run.[6] *State v. Mancuso*, 652 So.2d 370, 372 (Fla. 1995).

Similar to the duty required, the classification of the crime and the severity of the penalty also depend on the result of the accident. If the collision only results in property damage and the driver fails to satisfy their duty, they may be guilty of a misdemeanor. RCW 46.52.010(3). If it results in property damage and another person is present but not injured, it is a gross misdemeanor. RCW 46.52.020(5).

If the collision results in injury, the offense is a class C felony. RCW 46.52.020(4)(b). If death, it is a class B felony, which is punishable by a $20,000 fine and up to 10 years in prison. RCW 46.52.020(4)(a); RCW 9A.20.021(1)(b). The

[6] Most jurisdictions require knowledge of the resulting damage or injury as an essential element of the crime of hit and run. Marjorie A. Caner, Annotation, *Necessity and Sufficiency of Showing, in Criminal Prosecution under "Hit-And-Run" Statute, Accused's Knowledge of Accident, Injury, or Damage*, 26 A.L.R. 5th 1, §§ 3[b], 4[b] (2021).

increase in punishment, despite the same conduct, must be accompanied by a higher degree of culpability. *See State v. Porras*, 610 P.2d 1051, 1054 (Ariz. 1980) (higher penalties for hit and run based on result of collision require knowledge of the injury).

Due process requires the State to prove knowledge of the resulting harm as a necessary element of the offense. But the Court of Appeals stated that it was bound by this Court's holding in *State v. Vela*, 100 Wn.2d 636, 673 P.2d 185 (1983). *State v. Williams*, No. 83638-5-I, slip op. at 8-9 (Wash. Ct. App. Nov. 7, 2022).

The text of the hit and run statute does not contain a mens rea element. RCW 46.52.020. But in *State v. Martin*, this Court implied knowledge. 73 Wn.2d 616, 625, 440 P.2d 429 (1968). This Court held the person must at least have knowledge of the collision and that "knowledge of the damage or injury is generally a prerequisite to a conviction for the violation." *Id.* at 624-25 (citations omitted).

But then in *Vela*, this Court stepped back from its reasoning in *Martin* and held the crime of hit and run does not require the State to prove the person knew the damage or injury caused by a collision. *Vela*, 100 Wn.2d at 640.

The Court of Appeals stated, "*Vela* binds this court." *Williams*, No. 83628-5-I, slip op. at 9. But *Vela* was decided based on statutory construction; it did not involve a due process argument. In addition, *Vela* was decided nearly four decades ago, and recent decisions by this Court and the United States Supreme Court requiring a mens rea element for certain crimes to preclude criminalizing innocent conduct renders *Vela*'s construction of the statute unconstitutional.

Also, when *Vela* was decided, a hit and run resulting in injury or death were both a class C felony. *See* former RCW 46.52.020(2), Laws of 1980, ch. 97, § 1. The legislature has since increased the offense resulting in death to a class B felony. Laws of 2000, ch. 66, § 1. The severity of this penalty requires an equally guilty mind.

The Court of Appeals also failed to meaningfully consider binding precedent. In *Rehaif*, the United States Supreme Court held the prosecution must prove a culpable mental state for each element of an offense. 139 S. Ct. at 2193. The offense in *Rehaif* was unlawful possession of a firearm, and the elements at issue were: (1) possession of a gun, and (2) the person's status as a noncitizen. *Id.* at 2195-96. The Supreme Court held knowledge must apply to both elements, otherwise it would punish innocent conduct because possessing a gun alone may be entirely innocent. *Id.* at 2195, 2197. Because the person's status as a noncitizen was the crucial element that made possession a crime, if the person does not know their status at the time they had the gun, they do not have a guilty mind. *Id.* at 2198.

Similarly, knowledge of being in a car accident alone is innocent conduct. What makes hit and run a crime is where the person knows the damage, injury, or death resulting from the collision and chooses to abdicate their duty and flee the scene.

Knowledge of the harm is what separates wrongful from innocent conduct. *See Rehaif*, 139 S. Ct. at 2197.

This Court's decision in *Blake* also binds the Court of Appeals. In *Blake*, this Court overturned longstanding jurisprudence and held the drug possession statute violates due process because it criminalized passive conduct. 197 Wn.2d at 195. This Court held due process requires that the harsh consequences of a felony require an equally guilty mental state. *Id*. at 183.

In addition, the Court of Appeals sua sponte held it was bound by *Vela* because the legislature has not amended the statute to add a knowledge element. *Williams*, No. 83628-5-I, slip op. at 11-12. But the State did not advance this argument, nor did the parties brief the issue. *See Stanley v. Illinois*, 405 U.S. 645, 659-61, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (Burger, C.J., dissenting) (criticizing the majority for raising an issue sua sponte without briefing and argument from the parties). In addition, the legislature's apparent acquiescence

does not render a statute constitutional. *See Blake*, 197 Wn.2d at 191-92 (declaring the drug possession statute unconstitutional in light of binding precedent and the legislature's acquiescence).

As currently interpreted under *Vela*, the hit and run statute criminalizes a failure to act without requiring knowledge of the circumstances that give rise to the particular duty to act. This criminalizes passive conduct. In addition, a person faces serious consequences despite an innocent mental state. This is true even if the driver was ready and willing to meet any of the duties required under the statute but failed to do so simply because they did not know. This violates due process.

A person cannot choose to do the right thing if they do not know the circumstances that give rise to that duty. A culpable mental state "'separate[s] those who understand the wrongful nature of their act from those who do not.'" *Rehaif*, 139 S. Ct. at 2196 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.3, 115 S. Ct. 464, 130 L. Ed. 2d 372

(1994)). In order to comport with due process, the implied knowledge element in the hit and run statute must apply to both the fact of the collision and the resulting damage, injury, or death. This Court should grant review and overturn *Vela*'s unconstitutional interpretation of the hit and run statute. RAP 13.4(b).

2. The Court of Appeals decision that Mr. Williams was not prejudiced by a sleeping juror violates his rights to a trial by a fair and competent jury.

All persons accused of a crime have the right to a trial before a fair and impartial jury. U.S. Const. amend. VI; Const. art. I, §§ 21, 22. At the bare minimum, to be fair and impartial, the jury must be awake. *State v. Hughes*, 106 Wn.2d 176, 204, 721 P.2d 902 (1986).

The trial court has an affirmative duty to ensure a person's rights to a fair trial. RCW 2.36.110 (the court has a duty to excuse an unfit juror); CrR 6.5 (the court must discharge and replace a juror who is "unable to perform [their] duties"). Among the mechanisms available to the court to

protect the defendant's rights, it can also issue a recess or continue the case. *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974). The court errs when its denial of a motion for a recess prejudices the defendant. *Id.*

Here, the record was clear that juror #5 was sleeping throughout the third day of trial. Even after the court issued stretch breaks, talked to juror #5 multiple times, and declined Mr. Williams's request for a recess, juror #5's eyes continued to "flitter[]" during afternoon testimony. RP 549. Defense counsel said it looked like juror #5 was still sleeping through the afternoon of trial. RP 549.

The court's denial of a recess prejudiced Mr. Williams. Juror #5 was unable to perform his duties to be a fair and impartial juror because he continually fell asleep during Detective Bacon's testimony—the State's key witness and lead investigator. In fact, the record demonstrates he missed the most critical portion of trial: juror #5 was unable to stay awake during Detective Bacon's testimony about how Mr. Williams

told him his car was stolen and he was not involved in the accident. RP 542-48, 549. During this portion of his testimony where juror #5 appeared to be sleeping again, the State played the recorded telephone conversation where Mr. Williams argued his innocence. RP 542-48, 549.

Despite defense counsel's observations that juror #5's eyes were "flittering" and he appeared to be sleeping, the Court of Appeals concluded the record did not demonstrate prejudice. RP 549; *Williams*, No. 83628-5-I, slip op. 13. The Court of Appeals's conclusion is contrary to the record.

The trial court failed its duty under the constitution, statute, and court rule to ensure Mr. Williams's rights to a fair trial by jury. The Court of Appeals decision concluding Mr. Williams was not prejudiced is an important constitutional issue of broad import, and this Court should grant review. RAP 13.4(b).

3. The Court of Appeals decision refusing to apply the Excessive Fines Clause to the victim penalty assessment violates the constitutional prohibition against disproportional punishment.

The Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution forbid the government from imposing "excessive fines." U.S. Const. amend. VIII; Const. art. I, § 14. The purpose of the Excessive Fines Clause is to limit the government's ability to require payments "as *punishment* for some offense." *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (emphasis in original, citations omitted).

The analysis under the Excessive Fines Clause is a two-part inquiry. First, the court must determine whether the payment is punishment. *United States v. Bajakajian*, 524 U.S. 321, 328-29, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). The Excessive Fines Clause so long as the payment is "at least partially punitive." *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019); *City of Seattle v. Long*, 198 Wn.2d 136, 163, 493 P.3d 94 (2021).

Second, the court must determine whether the fine is grossly disproportional to the offense. *Id*. at 334; *Long*, 198 Wn.2d at 163. When weighing proportionality, the court must consider five factors: "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, [] (4) the extent of the harm caused," and (5) the person's ability to pay. *Long*, 198 Wn.2d at 167 (citations omitted), 171.

First, the plain language of the victim penalty assessment statute makes clear it is punishment. *See Long*, 198 Wn.2d at 148 (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). When a person is found guilty of a crime, RCW 7.68.035(1)(a) directs that "there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law."

This Court examined the exact same language in *Long* to conclude the financial obligation in that case was punishment.

In *Long*, a person challenged the costs associated with the city's impoundment of his truck. 198 Wn.2d at 163. This Court examined the plain language of the municipal code, which stated: "Vehicles in violation of this section are subject to impound . . . in addition to *any other penalty* provided for by law." *Id.* (emphasis in original, quoting SMC 11.72.440(E)). This Court held the plain language indicated the impoundment costs were partially punitive and, therefore, subject to the Excessive Fines Clause. *Id.*

The plain language of the victim penalty assessment statute mirrors the municipal code in *Long* and demonstrates it is partially punitive. The victim penalty assessment is imposed "in addition to *any other penalty or fine* imposed by law." RCW 7.68.035(1)(a) (emphasis added). Like the municipal code in *Long*, the statute plainly characterizes the victim *penalty* assessment as a *penalty*. It serves in part to punish, and it is subject to the Excessive Fines Clause.

Here, the Court of Appeals did not examine the plain language of the statute and avoided the issue of whether the victim penalty assessment is subject to the Excessive Fines Clause. *Williams*, No. 83628-5-I, slip op. at 14. In reaching its decision, it relied on *State v. Curry*, 118 Wn.2d 911, 814 P.2d 16 (1992), which held the statute to be constitutional without further elaboration. *Id.* (citing *State v. Tatum*, 23 Wn. App. 2d 123, 130, 514 P.3d 763 (2022) (also relying on *Curry*)).

But *Curry* did not involve an excessive fines claim. Indeed, "Curry's reasoning is vague; it does not state precisely what constitutional arguments it took into account." *Tatum*, 23 Wn. App. 2d at 130; *see Williams*, No. 83628-5-I, slip op. at 14 ("Williams correctly observes, as we did in *Tatum*, . . . that *Curry*'s reasoning was vague."). In addition, *Curry* was decided before the United States and this Court held the Excessive Fines Clause applies to any payment that is "at least partially punitive." *Timbs*, 139 S. Ct. at 659; *Long*, 198 Wn.2d at 163.

The plain language makes clear the victim penalty assessment is partially punitive. The Court of Appeals failed to follow binding precedent. Under both *Timbs* and *Long*, the financial penalty is subject to the constraints of the Excessive Fines Clause.

In addition, the Court of Appeals did not weigh the five factors to determine proportionality. "'The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality.'" *Long*, 198 Wn.2d at 166 (quoting *Bajakajian*, 524 U.S. at 334). But the victim penalty assessment is not proportioned to any offense: it is a mandatory fine imposed on all criminal defendants, regardless of the offense committed or the extent of the harm caused. In addition, Mr. Williams cannot pay. *See Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d, 709, 723, 497 P.3d 871 (2021), *review denied* 199 Wn.2d 1003 (2022) ("[A]n individual's ability to pay can outweigh all other factors.").

The victim penalty assessment is grossly disproportional punishment. This Court should grant review in order to address the unconstitutional nature of this mandatory penalty. RAP 13.4(b)

4. Mr. Williams asks this Court to grant review of the arguments in his Statement of Additional Grounds for Review.

Mr. Williams advanced several additional arguments. Statement of Additional Grounds for Review, *State v. Williams*, No. 83628-5-I (Wash. Ct. App. Sept. 6, 2022.) Mr. Williams also requests this Court to grant review of those issues.

Mr. Williams argues two witnesses lied and their testimony cannot support the verdict. He also argued Detective Bacon's testimony was insufficient to support the conviction. In addition, he pointed out one of the potential jurors read about another case involving Mr. Williams in the news and concluded Mr. Williams was guilty. Even though that juror was excused for cause, Mr. Williams argued other jurors could have conversed with that potential juror or looked up the news

articles, thereby violating his right to a fair trial. This Court should accept review of these important issues affecting Mr. Williams's constitutional rights. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, Mr. Williams respectfully requests this Court to grant review pursuant to RAP 13.4(b).

I certify this brief contains 4,924 words and complies with RAP 18.17.

Respectfully submitted this 2nd day of December 2022.

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APPENDIX

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Court of Appeals
Division I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. MARCUS BRADLEY WILLIAMS, Appellant.	No. 83628-5-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — Marcus Williams appeals his conviction for felony hit and run, arguing that the to-convict instruction omitted an essential element of the crime. He also argues that the trial court erred by (1) denying his request to recess so that a juror who had been observed sleeping could rest and (2) ordering him to pay the mandatory victim penalty assessment. We hold that the jury was properly instructed and discern no error in the trial court's declining to recess or imposing the victim penalty assessment. We also hold that none of the issues that Williams raises in his statement of additional grounds for review (SAGR) warrants reversal. Therefore, we affirm.

FACTS

In August 2019, the State charged Williams by information with felony hit and run following a February 2019 collision that resulted in a bicyclist's death. Williams pleaded not guilty, and the charge was tried to a jury over five days in late August and early September 2021.

At trial, witness Tyrel Charles testified that he, Kenoshay Rouse, Kayla Martinka, and an infant, were in Williams's white Chevrolet four-door on February 25, 2019, when they were involved in a collision. Charles testified that he, Martinka, and the infant, were in the back seat, Rouse was in the front passenger seat, and Williams was driving. Charles recalled that the group was traveling on Rainier Avenue South when "the car in front of us all of a sudden slammed on their brakes, so [Williams] moved over and then by the time we got side by side . . . that's when the dude on the bike came out." Charles testified that there was "a loud bang" and the windshield broke. Charles could not remember the cross street, but recalled "it was by the Safeway."

Charles testified that after hitting the bicyclist, Williams "continued driving straight and . . . came to a stop around the corner," and after "a brief like two minutes," began driving again. He testified that Williams stopped at multiple friends' houses "trying to find somewhere to leave the car." Charles recalled that "someone [Williams] knew" picked up Charles, Rouse, Martinka, and the infant, and took them home, but he could not remember if Williams "stayed or if he left." He also recalled that Williams left his car in "a field."

Martinka, who also testified, recalled that on February 25, 2019, the group was in a white car, with Williams driving, when they were involved in a collision. When asked "how the car accident happened, involving the bicyclist," Martinka responded, "We were driving in the left lane and the car immediately in front of us came to a complete stop and to avoid an accident, [Williams] merged to the right. And as soon as he merged to the right, it was right there." When asked whether there was any damage to the car, Martinka responded that "[t]here was some glass." She testified that after the accident,

Williams "stop[ped] some ways right up above" but did not get out of the car and eventually kept going. Martinka testified that Williams left the car "somewhere outside" and then went with the group to Martinka's house, where he stayed for "a couple of days."

A paramedic who responded to the collision testified that the bicyclist was pronounced dead at the scene. And, a medical examiner testified that the collision caused the bicyclist's death.

Multiple law enforcement officers who responded to or investigated the collision also testified at Williams's trial. Officer Quinton Cooper testified that although he initially went to the scene, he left because he "received . . . additional information from . . . Renton PD that they had located a possible suspect vehicle." Officer Mitchell Schaefer similarly testified that "[d]ispatch . . . advised that someone had called in and explained they found a vehicle" matching the description of the car involved in the collision. Schaefer, who then went to the vehicle's location, testified that it was "up a long residential street in Renton, kind of tucked away on a little green space" and that it "had a lot of extensive front end damage and some blood over the front end of the vehicle and the glass." The citizen who reported the car to law enforcement later described it as a Chevrolet sedan.

The jury also heard testimony from Detective Thomas Bacon. Bacon's testimony began on the second day of trial. That day, Bacon authenticated two 911 calls from the underlying incident, and they were played for the jury. In one call, the caller stated, "I just witnessed a person on a bike—he just got hit by the car and the car is fleeing." The caller indicated that the car "was a white car . . . like an old like Chevrolet type of

four-door." When asked about the location, the caller responded, "It's . . . across the street from Rainier Beach Safeway."

After the 911 calls were played, Bacon described the scene of the collision, including by describing several photographs he took at the scene and discussing his initial impressions. Bacon also described reviewing photographs of the Chevrolet that was found in Renton. He testified that "the big thing that really caught [his] attention" was that "it looks just like the damage you'd expect to see in a vehicle that impacts a pedestrian or a bicyclist." He also testified, "You know, people drive around with damaged windshields all the time; people rarely ever drive around with a vehicle that badly damaged. It appeared to me that . . . more than likely, it had just happened." Bacon testified that after viewing a video of the collision that he had obtained from a nearby business, he "felt overwhelmingly . . . it was the same car." The video was then admitted into evidence and played for the jury. The video shows a white sedan striking a bicyclist and continuing away from the scene. After the video concluded, the case adjourned for the day.

Bacon testified again the next day, which was a Thursday and the third day of trial. During his morning testimony, Bacon described the location where the white Chevrolet was recovered. He then testified that the vehicle was impounded, and that he used the vehicle's license plate number and vehicle identification number to run a records check with the Department of Licensing. Bacon testified that the records check revealed that the vehicle had been sold in December 2018 to Williams, and during Bacon's testimony, the trial court admitted a document identifying Williams as the owner of the vehicle. Bacon then testified about his unsuccessful efforts to obtain additional

video footage, his visit to the location where the Chevrolet was abandoned to take additional photographs, and his search of the Chevrolet for additional evidence, including fingerprints. After the court admitted some photographs of the Chevrolet and some diagrams that Bacon created of the damage to the bicycle, the court took a morning recess. At that point, the prosecutor indicated that "Juror 5" "was dozing off and possibly sleeping in some portions of the testimony," and the court stated that it would "start taking stretch breaks every 30 minutes" and "keep an eye on him."

When the court reconvened, Bacon described several photographs showing the damage to the Chevrolet, then described the damage to the victim's bicycle. He described his reconstruction of the collision, including how he reached an estimate "that the vehicle was traveling somewhere between 34 and 37 mph at the time of impact." He testified that he "never found any information or any indication that anybody ever contacted us about this collision, as far as being responsible or being the owner of that vehicle." Bacon then began describing how to interpret certain cell phone records, which the State offered for admission. Defense counsel objected and indicated that "this might be a good time to recess." The trial court then announced a lunch break but asked Juror 5 to stay behind.

After the rest of the jury exited, the trial court explained to Juror 5, "The reason I held you back was because we've noticed that you've had some trouble staying awake during testimony." The court asked Juror 5, "[W]ould it be helpful to you to have the afternoon to take a nap? Or is there something that we could do to make it easier for you to be able to stay awake during the testimony?" Juror 5 responded that he had been up until 1:00 a.m. but that he did not need a nap and, "Once I have some food in

me, I'll be fine." After Juror 5 left the courtroom, defense counsel stated for the record, "Juror No. 5, I noticed he was falling asleep. He fell asleep at least three times while I observed it." The trial court indicated that it did "see him drifting off" and asked "for everyone to keep an eye on it and keep me updated if they see something that I don't."

When court reconvened after the lunch recess, defense counsel stated, "Your Honor, in discussing this matter with my Client, we have some very, very major concerns regarding Juror No. 5 in the fact that he has nodded off several times this morning." He observed that there were no alternate jurors remaining and asked the trial court to recess until Monday. The court declined to do so but brought Juror 5 in before the remaining jurors, and asked, "Hi. Wondering how you're feeling at this point?" Juror 5 responded that he had had some coffee, and when asked whether the court should recess to allow him "to take a break and get some sleep," Juror 5 responded, "No, no. . . . it's just not necessary."

Bacon then resumed testifying. During Bacon's afternoon testimony, the trial court admitted a recording of Bacon's interview with Williams, which was played for the jury. During the interview, Williams denied being involved in a collision on February 25, 2019, and told Bacon that his car had been stolen two or three days earlier. After the interview was played, the trial court excused the jury for an afternoon break, and the following colloquy took place:

> THE COURT: Anything we need to discuss before breaking?
> [PROSECUTOR]: Not from the State.
> [DEFENSE COUNSEL]: I'm still watching Juror No. 5, Your Honor.
> THE COURT: I've been watching Juror No. 5. I haven't seen him sleeping, have you?
> [DEFENSE COUNSEL]: I saw his eyes flittering.
> THE COURT: Okay (laughs).
> [DEFENSE COUNSEL]: It's kind of difficult because he'll look

> down and it looks like he's—
> THE COURT: Yes.
> [DEFENSE COUNSEL]: You know, from my position—that's why I haven't emailed you.
> THE COURT: Yes, okay. I'm keeping an eye on him. All right. Thank you.

The foregoing colloquy is the final reference in the record to Juror 5's inattentiveness.

After the State rested its case, Williams brought a motion to dismiss, arguing that one of the elements of felony hit and run is the driver's knowledge not only of a collision, but also that the collision resulted in death. Williams asserted that dismissal was required because "the State has failed to prove that Mr. Williams was aware that a death occurred in the accident." The trial court denied Williams's motion, reasoning, "The charge is while driving a motor vehicle, [Williams] was knowingly involved in an accident resulting in the death of another person," and "the [']knowingly involved in[']] is the modifier for an accident, not the death." Consistent with this ruling, the trial court's to-convict instruction read, in relevant part:

> To convict the defendant of the crime of hit and run, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about February 25, 2019, the defendant was the driver of a vehicle;
> (2) That the defendant's vehicle was involved in an accident resulting in the death of any person;
> (3) That the defendant knew that he had been involved in an accident
> (4) That the defendant failed to satisfy his obligation to fulfill all of the following duties:
> (a) Immediately stop the vehicle at the scene of the accident or as close thereto as possible;
> (b) Immediately return to and remain at the scene of the accident until all duties are fulfilled;
> (c) Give his name, address, insurance company, insurance policy number, and a vehicle license number, and exhibit his driver's license, to any person struck or injured; and
> (d) Render to any person injured in the accident reasonable assistance, including carrying or making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that

> such treatment is necessary or such carrying is requested by the injured person or on his behalf; and
> (5) That any of these acts occurred in the State of Washington.

The jury found Williams guilty as charged. At sentencing, the trial court waived all discretionary legal financial obligations and imposed only the mandatory, $500.00 victim penalty assessment.

Williams appeals.

ANALYSIS

A. To-Convict Instruction

Williams contends that reversal is required because the to-convict instruction omitted an essential element of the charged crime. Specifically, he renews his argument that the hit and run statute, RCW 46.52.020, requires the State to prove that the defendant had knowledge not only of the collision but also of the resultant injury or death. The State counters that Williams's argument is foreclosed by State v. Vela, 100 Wn.2d 636, 673 P.2d 185 (1983). We agree with the State.

"Because it 'serves as a yardstick by which the jury measures the evidence to determine guilt or innocence,' a to-convict instruction must contain all essential elements of the charged crime." State v. Gonzalez, 2 Wn. App. 2d 96, 105, 408 P.3d 743 (2018) (internal quotation marks omitted) (quoting State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)). We review the adequacy of a to-convict instruction de novo. Gonzalez, 2 Wn. App. 2d at 105.

The hit and run statute imposes upon "[a] driver of any vehicle involved in an accident resulting in the injury to or death of any person" a duty to "immediately stop such vehicle at the scene of such accident or as close thereto as possible" and to

"forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of [RCW 46.52.020(3)]." RCW 46.52.020(1). Those requirements include "render[ing] to any person injured in such accident reasonable assistance." RCW 46.52.020(3). In Vela, our Supreme Court held, unequivocally, that the hit and run statute "cannot be construed to require knowledge of injuries," and "[k]nowledge of the accident is all the knowledge that the law requires." 100 Wn.2d at 641 (emphasis added). "If a motorist knows he has been involved in an accident and fails to stop, he is guilty of violating RCW 46.52.020." Vela, 100 Wn.2d at 641.

Vela binds this court. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (Supreme Court's decision on issue of state law binds all lower courts until that court reconsiders). Thus, Williams's contention that knowledge of injury or death is an essential element of felony hit and run fails. And so, too, does Williams's assertion that the to-convict instruction erroneously omitted this element.

Williams disagrees and argues, relying chiefly on State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021), that Vela's interpretation of the hit and run statute does not comport with due process.

In Blake, our Supreme Court held that Washington's felony drug possession statute was unconstitutional "because it criminalize[d] wholly innocent and passive nonconduct on a strict liability basis" "with no mens rea or guilty mind" and, thus, was not a valid exercise of the legislature's police power. 197 Wn.2d at 182-83, 193. By contrast, the hit and run statute as interpreted in Vela includes a mens rea element—knowledge—and criminalizes a person's leaving the scene of a known accident without stopping to investigate or render assistance—conduct that is neither passive, wholly

innocent,[1] nor beyond the reach of the legislature's broad police power. Cf. State v. City of Seattle, 94 Wn.2d 162, 165, 615 P.2d 461 (1980) ("The scope of police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people."); Vela, 100 Wn.2d at 641 (observing that the hit and run statute "requires the motorist to stop and investigate" and that the "public interest . . . is served by requiring persons involved in vehicle collisions to stop and provide identification and other personal information and to be available to render assistance if required"). Williams's reliance on Blake is misplaced. Cf. State v. Moreno, 198 Wn.2d 737, 743, 499 P.3d 198 (2021) (observing that the court's primary concern is "adding mens rea elements to strict liability criminal statutes that otherwise would have no mental state" (emphasis added)).

Williams also cites Rehaif v. United States, ___ U.S. ___, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019), for the proposition that "[a] crime requires proof of a culpable mental state regarding each of the statutory elements." (Internal quotation marks omitted.) Williams mischaracterizes Rehaif.

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[1] In support of his assertion that the hit and run statute punishes innocent conduct, Williams points out that another statute, RCW 46.52.010, sets forth a more limited set of duties for a motorist who collides with an unattended vehicle. He then speculates that a hypothetical motorist who "backs into a car and, believing it to be unoccupied, leaves a note with their name and address" and, thus, "think[s] they have satisfied their duty under RCW 46.52.010(1)," could later be convicted of a felony if, "unbeknownst to them someone was sleeping in the car" and was injured. Williams argues, citing Blake, that "[t]his violates due process." But there is a difference between a statute (like the one at issue in Blake) that is wholly invalid because the legislature enacted it to criminalize innocent nonconduct, and a statute that violates due process as applied to a particular set of facts. Nothing in Blake suggests that a statute is invalid just because it may be unconstitutional as applied to a particular defendant. Cf. Didlake v. Washington State, 186 Wn. App. 417, 423, 345 P.3d 43 (2015) (distinguishing facial challenges from as-applied challenges to the constitutionality of a statute). Furthermore, the facts of Williams's hypothetical are not before this court. For the foregoing reasons, we need not and do not consider Williams's hypothetical. Cf. State v. McCarter, 91 Wn.2d 249, 253, 588 P.2d 745 (1978) ("One cannot urge the invalidity of a statute unless harmed by the particular feature which is challenged."), overruled on other grounds by In re Det. of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984); Flory v. Dep't of Motor Vehicles, 84 Wn.2d 568, 572, 527 P.2d 1318 (1974) ("The judicial function . . . does not generally encompass rendering advisory opinions nor speculate upon how some other controversy would be resolved.").

In Rehaif, the Court, in construing a federal criminal statute, applied "a . . . presumption . . . that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" 139 S. Ct. at 2195 (emphasis added) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)). The Court did so after "find[ing] no convincing reason to depart from the ordinary presumption" and observing that, without an additional scienter element, the statute at issue would criminalize the "entirely innocent" conduct of possessing a gun. Rehaif, 139 S. Ct. at 2195, 2197. Here, as discussed, the hit and run statute as interpreted in Vela does not criminalize entirely innocent conduct. And while the State does not point it out, there is a convincing reason not to apply the presumption described in Rehaif in determining our state legislature's intent with regard to the hit and run statute: Vela held, unequivocally, that the hit and run statute "cannot be construed to require knowledge of injuries." Vela, 100 Wn.2d at 641. Yet the legislature has not added such a knowledge requirement to the statute despite having amended it four times since Vela was decided in 1983. See LAWS OF 1990, ch. 210, § 2; LAWS OF 2000, ch. 66, § 1; LAWS OF 2001, ch. 145, § 1; LAWS OF 2022, ch. 194, § 1.[2] Under these circumstances, there exists a competing, arguably stronger, presumption that the legislature has acquiesced to Vela's interpretation of the statute. See Blake, 197 Wn.2d

[2] Williams observes that in one of these amendments, the legislature increased a hit and run resulting in death from a class C felony to a class B felony. See LAWS OF 2000, ch. 66, § 1. He asserts that "[t]he increase in punishment must be accompanied by a higher degree of culpability." But he cites no authority to support this assertion, so we reject it. Cf. Vela, 100 Wn.2d at 640 (rejecting argument that "[a] more serious penalty should be imposed only if the defendant's mental state makes her more culpable"); State v. Brown, 140 Wn.2d 456, 466, 998 P.2d 321 (2000) (rejecting argument that, to prove third degree assault under statute elevating assault from fourth to third degree if victim is a law enforcement officer, the State must prove that defendant knew the victim was a law enforcement officer).

at 191 (the legislature acquiesced to judicial interpretation of the simple possession statute as lacking any mens rea element where it subsequently amended it multiple times without adding one).

In short, Rehaif does not, as Williams claims, support the proposition that a crime requires proof of a culpable mental state regarding each statutory element. Instead, the Rehaif court merely applied an interpretive presumption under circumstances that are readily distinguishable from the circumstances here. Rehaif does not control.

B. Juror 5

Williams next contends that the trial court erred in declining to recess for the weekend to allow Juror 5 to sleep. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a fair trial by an impartial jury. State v. Gaines, 194 Wn. App. 892, 896, 380 P.3d 540 (2016). "A sleeping juror may prejudice the defendant's due process rights and right to an impartial jury." In re Pers. Restraint of Caldellis, 187 Wn.2d 127, 146, 385 P.3d 135 (2016).

However, a defendant seeking reversal based on a sleeping juror must establish prejudice. See State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986) (dismissing claim about drowsy jurors because "[n]othing suggest[ed] that the jury drowsiness problem was such as to prejudice the defendant"). The defendant must generally show "how long the jurors slept or what specific testimony they missed by sleeping." Caldellis, 187 Wn.2d at 146.

Here, Williams asserts he was prejudiced because Juror 5 "continued to fall asleep in the afternoon" on the third day of trial and, thus, "slept during critical testimony

by Detective Bacon." Williams avers, specifically, that "Juror # 5 missed critical evidence that supported Mr. Williams's innocence"—namely, the telephone interview during which Williams denied being involved in an accident and told Bacon that his car had been stolen.

Williams mischaracterizes the record. During the colloquy that occurred after the interview was played, the trial court indicated that it had been watching Juror 5 and "ha[d]n't seen him sleeping." While defense counsel noted that he saw Juror 5's "eyes flittering," defense counsel did not disagree with the trial court's assessment. To the contrary, and despite the trial court's earlier direction that the parties "keep [it] updated" if they saw something the trial court did not, defense counsel indicated that he had decided against e-mailing the trial court for reasons that are not apparent from the record. The record does not support Williams's assertion that Juror 5 "continued to fall asleep in the afternoon" and "missed" the telephone interview that was played during Bacon's afternoon testimony.

Furthermore, to the extent Juror 5 was asleep during Bacon's testimony from the morning of the third day of trial, that testimony focused largely on the recovery and impound of the suspect vehicle, Bacon's learning that the vehicle had been sold to Williams in December 2018, and Bacon's search of the vehicle for additional evidence. Williams does not specify what part of this testimony Juror 5 missed, much less establish resulting prejudice.

Williams fails to show that the trial court abused its discretion in declining to recess. See Hughes, 106 Wn.2d at 204 ("The determination as to whether the jury was so inattentive that the defendant was prejudiced is [a] matter addressed to the trial

court's discretion, and is reviewable only for abuse."). Moreover, there is overwhelming evidence in the record that Williams was driving during the collision, that the damage to his vehicle was significant such that Williams would have known that a collision had occurred, and that he did not return to or remain at the scene. Reversal is not required.

C. Victim Penalty Assessment

Williams contends that because he is indigent, the trial court violated the constitutional prohibition on excessive fines when it ordered him to pay the mandatory, $500.00 victim penalty assessment (VPA). See RCW 7.68.035(1)(a) (requiring imposition of the VPA on "any person . . . found guilty in any superior court of having committed a crime" subject to exceptions not applicable here). But as we explained in State v. Tatum, 23 Wn. App. 2d 123, 130, 514 P.3d 763 (2022), we are bound by State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), in which our Supreme Court held that the VPA is constitutional as applied to indigent defendants. See Curry, 118 Wn.2d at 918 ("[W]e hold that the [VPA] is neither unconstitutional on its face nor as applied to indigent defendants."). Williams correctly observes, as we did in Tatum, 23 Wn. App. 2 at 130, that Curry's reasoning was vague. But we adhere to Tatum and hold that Curry nonetheless forecloses Williams's constitutional challenge to the VPA.

D. Statement of Additional Grounds for Review

Williams raises a number of additional issues in a SAGR, but none requires reversal.

First, Williams asks, "Why is it ok for [Charles] to commit perjury and rec[ei]ve no criminal charges?" Similarly, Williams asks with regard to Martinka, "Any form of perjury is perjury, why would it be ok for [Martinka] to commit perjury on the stand [and] the

[S]tate be ok with it[?]" In other words, Williams asserts that Charles and Martinka lied on the stand, and he points to evidence that he claims undermined their testimony. But it is the function and province of the jury, not this court, to weigh the evidence, determine the credibility of the witnesses, and to decide disputed questions of fact. Hughes, 106 Wn.2d at 203-04. Williams's assertion invites this court to reweigh the evidence and, thus, is without merit. See State v. Bunch, 2 Wn. App. 189, 467 P.2d 212 (1970) ("As an appellate court, . . . we cannot weigh the evidence or re-evaluate the credibility of witnesses.").

Second, Williams contends that "Juror # 24 tainted the jury pool by mentioning he heard about me in the news and what he has read in the newspaper." To this end, the record reflects that during voir dire, Juror 24 stated, "I probably have more prejudice against the Defendant than not because I remember reading about—not so much the hit and run, but . . . what this gentleman was accused of doing later in a road rage incident. And I don't know whether I can get past that." Juror 24 was then excused for cause after confirming that he had already reached an opinion in the case and would not be able to set it aside. Williams asserts that reversal is required because the other jurors in the same pool as Juror 24 "could have formed a negative opinion about [Williams] and refrained from telling the court about any potential prejudice they may have formed." Williams also asks, "Of the Jury that was selected to sit and hear the trial, did they listen to the court [and] not research my case, or look me up, or even converse with someone about me that could have potentially did so[?]"

But "[w]e presume that juries follow the instructions and consider only evidence that is properly before them." State v. Perez-Valdez, 172 Wn.2d 808, 818-19, 265 P.3d

853 (2011). Here, the trial court instructed the venire not to discuss the case with anyone or "do any research online or elsewhere about any aspect of it." The jury was also instructed of its "duty to decide the facts in this case based upon the evidence presented to you during this trial" and that it "must reach [its] decision based on the facts proved to [it] and on the law given to [it], not on sympathy, prejudice, or personal preference." Williams's speculations that other potential jurors "could have formed a negative opinion" or researched Williams's case are insufficient to overcome the presumption that the jury did as instructed.

Finally, Williams asserts that Detective Bacon was biased because "he solely based his investigation on [Williams and] no one else" and "[w]ith all the information he rec[ei]ved [throughout] this investigation in his mind [Williams] was the only one charged." But Williams does not specify what "information" Bacon received that should have prompted him to focus his investigation elsewhere, and "the appellate court is not obligated to search the record in support of claims made in a [SAGR]." RAP 10.10(c). In any case, regardless of the thoroughness of Bacon's investigation, Williams does not argue—much less establish—that the investigation failed to produce sufficient evidence to sustain the jury's verdict. Cf. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) ("The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.").

Affirmed.

Mann, J.

WE CONCUR:

Díaz, J.

Chung, J.

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** under **Case No. 83628-5-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:

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Washington Appellate Project

Date: December 2, 2022

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