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ORIGINAL

No. 31515-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,
Appellee

v.

Joseph J. Goggin,
Appellant

Appeal from the Court of Appeals Division III

MOTION FOR DISCRETIONARY REVIEW

PRV-

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I. MOVING PARTY

Mr. Joseph Goggin was convicted of Felony Driving Under the Influence on February 28, 2013. The defendant filed a timely appeal to the Court of Appeals, which upheld the conviction in an opinion issued October 28, 2014. The State motioned the court to publish the opinion on November 6, 2014. This appeal timely follows.

II. ISSUES PRESENTED

1. Whether the court committed error in allowing the admission of a mandatory blood draw taken after a search warrant where the defendant was not advised of his right to an additional blood draw?
2. Whether there was insufficient evidence as a matter of law as to the Felony DUI charge requiring dismissal of the Felony DUI charge?
3. Whether the trial court committed reversible error in admitting "certified judgments and sentences" without requiring court testimony to satisfy Article I § 22 Confrontation Clause?

III. STATEMENT OF THE CASE

Joseph Goggin was charged with felony driving under the influence on December 17, 2011. (CP 1-2). On April 26, 2012 a pretrial motion was held before the Honorable Annette Plese in Spokane County Superior Court. (VRP 4/26/12 p. 1). At the hearing the defense sought

suppression of an involuntary blood test drawn based upon a warrant. (CP 7-15) (VRP 4/26/12 p. 1-15). The defense argued that when a mandatory blood test is taken RCW 46.20.308 and 46.61.506 requires that the defendant be given notice of the right to an additional blood test. Requirement of notice of a right to an additional blood test is a statutory and due process right. (VRP 4/26/12 p. 5) (CP 7-15). The court denied the motion to suppress holding the blood draw with a warrant was not a mandatory blood test. (VRP 4/26/12 p. 18 lines 1-4, 12-18) (CP 22-24).

A jury trial was held before the Honorable Annette Plese on February 25, 2013. The trial was preceded by a 3.5 hearing. At the hearing, Officer Taj Wilkerson testified that he responded and contacted Mr. Goggin. (VRP 2/25/13 p. 40). Mr. Goggin asked if he could park his car and go home. (VRP 2/25/13 p. 42 lines 10-11). Mr. Goggin was not given *Miranda* warnings and was not free to leave. (VRP 2/25/13 p. 45-46). The officer kept Mr. Goggin's keys for his vehicle and his driver's license. (VRP 2/25/13 p. 47-48). Officer Wilkerson gave the license and keys to Trooper Marcus when he arrived. (VRP 2/25/13 p. 50-51).

Trooper Marcus asked Mr. Goggin to exit his vehicle to do field sobriety tests. (VRP 2/25/13 p. 56-57). *Miranda* warnings were only read after Mr. Goggin was handcuffed and placed in Trooper Marcus' squad car. (VRP 2/25/13 p. 59-60). Mr. Goggin did not waive his rights at that

time and no attorney was contacted. (VRP 2/25/13 p. 61). Once at the BAC room Mr. Goggin was still not allowed a phone call. (VRP 2/25/13 p. 64, see generally). After Implied Consent, Mr. Goggin refused the test but was still not allowed a phone call. (VRP 2/25/13 p. 64-66). Mr. Goggin signed a waiver when read his constitutional rights at the Public Safety Building. (VRP 2/25/13 p. 66).

Pretrial the defense objected to the state's failure to timely disclose the documents needed to prove prior convictions. (VRP 2/25/13 p. 99-106). The court orders the state provide the documents intended to prove the prior convictions to the defense. (VRP 2/25/13 p. 109). Defense counsel objects to the use of the documents that were not provided more than a week before trial. (VRP 2/25/13 p. 111-113). The defense sought a continuance to prepare for late disclosure of documents. The court denied. (VRP 2/25/13 p. 146). Prosecution responds that Kevin Creighten from Kootenai County Probation will appear to testify that he supervised Mr. Goggin while he was on probation. (VRP 2/25/13 p. 127).

Pretrial defense renewed the objection to the introduction of the blood test for failure to advise the defendant of the right to additional blood test (VRP 2/25/13 p. 129) and objects to the use of the Idaho conviction as not a comparable statute to Washington's State DUI law. (VRP 2/25/13 p. 129). Defense argues that prior offense is an element that

must be proven to the jury beyond a reasonable doubt. (VRP 2/25/13 p. 154). The state conceded that the prior offenses had to be proven by the state to the jury. (VRP 2/25/13 p. 155).

Defense argues whether an offense is comparable is a jury question. (VRP 2/25/13 p. 170-172). The trial court ruled that it is a threshold decision for the court and not the jury. (VRP 2/25/13 p. 173-174). Pretrial defense objected to the introduction of prior convictions without testimony from a person presenting the documents. (VRP 2/25/13 p. 175-177). The state conceded that since they had no fingerprints there will be testimony from officers to support the documents. (VRP 2/25/13 p. 177-178). The prosecution states there will be live testimony to verify the identity of Mr. Goggin in the Idaho case. (VRP 2/25/13 p. 177-179).

At trial, the state introduced testimony that Mr. Goggin was followed by Jason Berezay before his vehicle stopped. (VRP 2/26/13 p. 207-211). Officer Taj Wilkerson with the Liberty Lake Police Department responded and detained Mr. Goggin until Trooper Barry Marcus arrived. (VRP 2/26/13 p. 294). Officer Wilkerson said Mr. Goggin was not free to leave after he arrived. (VRP 2/26/13 p. 298).

Trooper Barry Marcus of Washington State Patrol (WSP) testified that he arrested Mr. Goggin on December 17, 2011. (VRP 2/27/13 p. 315). He conducted field sobriety tests with Mr. Goggin. (VRP 2/27/13 p. 342-

344). Then the court admitted evidence that Mr. Goggin refused the breath test. (VRP 2/27/13 p. 356-357). At trial, the state sought to admit a blood test drawn after a search warrant was obtained. (VRP 2/27/13 p. 365). The defense objected to the introduction of the blood test based upon the earlier argued motion. (See VRP 4/26/12) (VRP 2/27/2013 p. 365) (CP 7-15). The Trooper testified the time from driving to blood draw was about three hours. (VRP 2/27/13 p. 374). The Trooper testified that the implied consent warnings for blood were not read in this case. (VRP 2/27/13 p. 398-399).

The defense objected to the introduction of the blood test results. (VRP 2/27/13 p. 444-445; 450) (VRP 4/26/12 p.5) (CP 7-15). Over defense objection, the state introduces the reading of .32 with testimony that it is more than four times the .08 legal limit. The defense objected to this as a violation because of the lack of presumptive limit allegation in this case. (VRP 2/27/13 p. 452 lines 15-25).

Outside of the presence of the jury, the parties argued regarding the state exhibits offered to prove prior convictions. Exhibit 5 (P 5) was a certified judgment and sentence from Kootenai County Idaho. The defense argues that a witness is required to verify and connect the document to Mr. Goggin. (VRP 2/28/13 p. 502). The state had previously conceded that they must prove the defendant is connected with the document. (VRP

2/25/13 p. 177-179; 155-157). Defense objected to the admission of the documents P5-P11 as violating *Crawford v. Washington* and the right of confrontation. (VRP 2/28/13 p. 508, 512). The state responds that it is their burden to prove the prior convictions and the identity of the person convicted. (VRP 2/28/13 p. 513). The state acknowledges that if they cannot prove these two elements there will be a "motion at the half or at the end of the States' case to deal with that." (VRP 2/28/13 p. 513 lines 18-24).

The Court at hearing outside of the presence of the jury found that *Crawford* does not apply and RCW 5.44.010 addresses certified court records. (VRP 2/28/13 p. 519-520). The booking photos do not fall under that exception and the state must lay a foundation. Even if the booking photos are public records they require a person to identify them. (VRP 2/28/13 p. 520-521). The court advises the prosecution "That would not be, but the other ones will be admissible. You will need to do it in front of the jury noting your objections."

The jury returns to the courtroom and the state calls Taj Wilkerson. The state introduces a copy of Mr. Goggin's identification card seized on December 17, 2011. (VRP 2/28/13 p. 529). Court admitted P14. (P 14). Officer Clinton Gibson was called and he testified he arrested Mr. Goggin on March 13, 2003 for driving under the influence. (VRP 2/28/13 p. 533-

535). The court admitted a photo of Mr. Goggin from March 14, 2003 as P6. (P6) (VRP 2/28/13 p. 535). The government called Deputy Chad Ruff who testified he arrested Mr. Goggin on January 19, 2004 and admitted booking photo of Mr. Goggin. (P 8) (VRP 2/28/13 p. 536-538). Ray Bourgeois was called and he testified that he assisted in the arrest of Joseph Goggin in July of 2006 and he identifies (P 10) as a photo of Joseph Goggin. (VRP 2/28/13 p. 544-546). The state then rested its case. (VRP 2/28/13 p. 546 line 24).

The defense moves the court, outside of the presence of the jury, for dismissal because the state provided no evidence of the Idaho allegation of the DUI. (VRP 2/28/13 p. 548). The defense argued even if there was a certified document there would be insufficient evidence as a matter of law. (VRP 2/28/13 p. 548-549). The state has not proven the felony and they are left with the misdemeanor charge. (VRP 2/28/13 p. 549). The defense pointed out that there was no identification of Mr. Goggin as the person arrested in Idaho. (VRP 2/28/13 p. 549).

The state concedes that they failed to admit the judgment and sentences before the jury. (VRP 2/28/13 p. 549). The defense argues that the judgment and sentences were never offered or admitted before the jury. (VRP 2/28/13 p. 550-551). The court at this point must consider based upon the evidence admitted to the jury and must find insufficient

evidence as a matter of law. (VRP 2/28/13 p. 551-553). Yet, the court then rules that it is admitting those documents when the jury comes back. (VRP 2/28/13 p. 553). The court then rules there is sufficient evidence and that at this time is admitting the judgment and sentence. (VRP 2/28/13 p. 554 lines 5-11). Court then denies the motion to dismiss the felony DUI. (VRP 2/28/13 p. 554-555).

The jury then re-enters the courtroom. (VRP 2/28/13 p. 558). The state moves to re-open "for the purpose of indicating exhibits that were admitted outside the presence of the jury." (VRP 2/28/13 p. 558 lines 16-20). The court then granted leave to re-open. (VRP 2/28/13 p. 558). The state moves to admit P5 (P 5), P7 (P 7), P9 (P 9), and P11 (P 11). (VRP 2/28/13 p. 559). The defense objects citing the argument made previously. The court notes the objection and admits (VRP 2/28/13 p. 599) P5 (P 5), P7 (P 7), P9 (P 9), and P11 (P 11). (VRP 2/28/13 p. 559). The defense then rested without presenting a case. (VRP 2/28/13 p. 559 line 23). The defense renews the motion to dismiss based upon insufficiency of the evidence. The court then denies the defense motion to dismiss. (VRP 2/28/13 p. 561-562).

IV. GROUNDS FOR RELIEF

Mr. Goggin is entitled to review under RAP 13.4 (b)(1,3,4). First, the ruling of the Court of Appeals is in direct conflict with the Supreme

Court's decision in *Turpin, Morales,* and *Bartels,* requiring defendants be notified of their right to additional testing. RAP 13.4 (b)(1). Second, there is a significant question of law under Article 1 § 22 of the Washington State Constitution because Mr. Goggin was unable to confront a witness against him, face to face. RAP 13.4 (b)(3). Third, allowing insufficient evidence to be used to increase a defendant's penalties is a matter of public interest. RAP 13.4 (b)(4).

V. ARGUMENT

Issue 1: The court committed reversible error in allowing admission of a mandatory blood draw taken after a search warrant where the defendant was not advised of his right to an additional blood draw.

The Revised Code of Washington at 46.61.506 (6) states: "The person tested may have a physician, or qualified person of his or her own choosing, administer one or more tests in addition to any test administered by law enforcement officer." The implied consent statute at RCW 46.20.308 (2) states: "The officer shall inform the person of his or her right . . . to have additional test administered by any qualified person of his choosing as provided in RCW 46.61.506."

The Washington State Supreme Court ruled in *State v. Turpin*, 94 Wn.2d 820, 826-827, 620 P.2d 990 (1980) that the failure to inform a vehicular homicide defendant of her right to an additional test required suppression of the states' blood test. Also the failure to advise the

defendant of the right to additional test denied Ms. Turpin the opportunity to garner potentially exculpatory evidence in her case. *Id.* at 826. In making its ruling the court held the blood test was inadmissible because the "state cannot be allowed to use evidence which the defendant is unable to rebut because she was not advised of her right to independent testing." *Id.* at 826.

In another case addressing the right to additional blood testing the Washington Supreme Court held that RCW 46.61.506 (5) provides a right to an additional blood test. *State v. Bartels*, 112 Wn.2d 882, 886, 774 P.2d 1183 (1989). The court ruled the statute "permits a driver to obtain evidence with which to impeach the results of the state-administered test.

Stannard, 109 Wash.2d 29, 35, 742 P.2d 1244 (1987). The court noted further, "The statutory requirement demonstrates an important protection of the subject's right to fundamental fairness which is built into our implied consent procedure." citing *State v. Canaday*, 90 Wash.2d 808, 817, 585 P.2d 1185 (1978).

Most recently, in *State v. Morales*, 173 Wn.2d 560, 568-569, 269 P.3d 263 (2012), the court ruled that "before administering a mandatory blood alcohol test of a person suspected of vehicular assault, the arresting officer must advise the suspect of his right to have additional test

administered by any qualified person of the arrestee's choosing." The court ruled the defendant has an opportunity to gather potentially exculpatory evidence, regardless of the fact that there is no right to refuse a mandatory blood test. *Id* at 569 citing *State v. Turpin*, 94 Wash.2d 820, 826, 620 P.2d 990 (1980).

It is significant that the court noted the importance of the right to independent blood samples to address transiency of intoxication. *Morales* at 575. Secondly, "That he may have his own tests made if he fears the accuracy or fairness of the test given by law enforcement officers." *Morales* at 576 citing *State v. Richardson*, 81 Wash.2d 111, 116, 499 P.2d 1264 (1972); *State v. Carranza*, 24 Wash.App. 311, 318, 600 P.2d 701 (1979). Thirdly, the court "observed that in a DUI case the right to independent testing "is in keeping with a defendant's constitutional due process right to gather evidence in his own defense." *Morales* at 576 citing *State v. McNichols*, 128 Wash.2d 242, 250-51, 906 P.2d 329 (1995).

The court should suppress the blood test because the defendant was denied his right to obtain an additional blood test. *Turpin*, 94 Wn.2d at 822. As in *Turpin,* the defendant was told he had no choice but to take the blood test but was not advised of a right to an additional test. The failure of the police to advise him of his right to an additional test prevented the accused from obtaining evidence to use in his defense. *Turpin*, 94 Wn.2d

at 822. Trooper Barry Marcus failed to advise Mr. Goggin of his right to additional blood test after obtaining the warrant and marked off the warnings for blood (CP14-15) (CP 22-24) (VRP 2/27/13 p. 398-399) which mandates suppression of the blood test. *State v. Morales*, 173 Wn.2d 560, 568-569, 269 P.3d 263 (2012).

The Court of Appeals found the case at hand factually different from *Turpin* because Mr. Goggin was notified by implied consent warnings for a breath test that he had a right to an additional test. *State v. Goggin,* No. 3515-1-III, (Wash. III Oct. 28, 2014). However, his blood was ultimately taken subject to a search warrant. *State v. Goggin,* No. 3515-1-III, (Wash. III Oct. 28, 2014). However, as in *Turpin,* Mr. Goggin was not notified he had the right to an additional blood test after the mandatory blood draw; which is ultimately what was used to convict him. Moreover, allowing police officers to evade the implied consent warnings with a search warrant is contrary to the legislative intent of ensuring that defendants are able to gather potentially exculpatory evidence for their own case. The defense seeks suppression of the blood test and a new trial on the misdemeanor charge.

Issue 2: There was insufficient evidence as a matter of law as to a felony DUI requiring dismissal of the felony charge.

There was insufficient evidence in this case to establish that the defendant had four or more prior offenses within the last ten years. (VRP 2/28/13 p. 595). The defense at trial moved for dismissal of the felony DUI charge after the state rested. (VRP 2/28/13 p. 548-549). The defense argued that the state's failure to introduce the prior convictions resulted in insufficient evidence for the felony DUI. (VRP 2/28/13 p. 549 lines 1-10). Additionally, there was no identification of Mr. Goggin as the person arrested in the Idaho case. (VRP 2/28/13 p. 549). The defense sought dismissal of the felony DUI charge. The defense pointed out that the prior felony judgment and sentences were not offered or admitted before the jury. (VRP 2/28/13 p. 550-552). The state conceded that they failed to admit the judgment and sentences before the jury. (VRP 2/28/13 p. 550-551).

When reviewing a challenge to the sufficiency of the evidence, the appellate court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed. 560 (1979). The purpose of this standard of review is to ensure that the trial court fact finder "rationally applied" the constitutional standard required by the due process clause of the Fourteenth Amendment, which

allows conviction of a criminal offense only upon proof beyond a reasonable doubt. *Jackson*, 443 U.S. at 317-318, 99 S. Ct. 2781; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed. 368 (1970). In other words, the *Jackson* standard is designed to ensure that the defendant's due rocess right in trial court was properly observed.

At issue here is whether the state proved that the defendant was convicted of four prior qualifying offenses. The state failed to prove any of the prior offenses when it rested before introducing any of the judgment and sentences into evidence. (VRP 2/28/13 p. 548-549; see also VRP generally). The defense moved for dismissal arguing that the state's failure to introduce the prior convictions resulted in insufficient evidence for the felony DUI. (VRP 2/28/13 p. 547-549). The defense argued even if the prior judgment and sentences were admitted, the evidence is insufficient because there was no identification of Mr. Goggin in the Idaho case. (VRP 2/28/13 p. 549). The court then allowed the state to reopen, over defense objection, and introduce the judgment and sentences after the state rested. (VRP 2/28/13 p. 558-559).

There was insufficient evidence to prove the four prior DUI convictions required by RCW 46.61.506 because the government failed to introduce any of the four prior judgment and sentences before resting its case in chief. (VRP 2/28/13 p. 546-549). The defense argued that there

had been no identification of Mr. Goggin as the person arrested in Idaho. "There's just a total insufficient evidence on the Idaho DUI certainly as to the evidence admitted to this court." (VRP 2/28/13 p. 549) (VRP 2/28/13 p. 560-561).

The state must prove the identity of the person arrested in the prior cases was indeed the person charged before this court. *State v. Hill*, 83 Wash.2d 558, 560, 520 P.2d 618 (1974); See also *United States v. Jackson*, 368 F.3d 59, 63-64, (2nd Cir. 2004); *United States v. Allen*, 383 F.3d 644, 649 (7th Cir. 2004) . "To sustain this burden when criminal liability depends on the accused's being the person to whom a document pertains . . . the State must do more than authenticate and admit the document; it also must show beyond a reasonable doubt 'that the person named therein is the same person on trial.' Because in many instances men bear identical names, the State cannot do this by showing 'identity of names alone.' Rather, it must show, by evidence independent of the record, that the person named therein is the defendant in the present action." *State v. Huber*, 119 P.3d 388, 390, 119, 129 Wn.App. 499 502 (2005).

The court in *Huber* made suggestions of how the state can meet the burden of demonstrating that the person is the person identified by documents including "otherwise – admissible booking photographs, citing

State v. Murdock, 91 Wash.2d 336, 338-340, 588 P.2d 1143 (1979); *State v. Johnson*, 33 Wash.App. 534, 538, 656 P.2d 1099 (1982); booking fingerprints citing *State v. Murdock*, 91 Wash.2d 336, 340, 288 P.2d 1143 (1979); *State v. Johnson*, 33 Wash.App. 534, 538, 656 P.2d 1099 (1982); eyewitness identification or distinctive personal information. *State v. Huber*, 129 Wash.App. 499, 503, 119 P.3d 388, 390 (2005).

The court in *State v. Huber*, 129 Wash.App. 499, 503, 504, 119 P.3d 388, 391 (Div. 2 2005) held that merely producing documents "but no evidence to show 'that the person named therein is the same person on trial' . . . concluding that the evidence is insufficient to support a finding that the person on trial is the person named in the state's exhibits, we reverse and remand with directions to dismiss the bail jumping charge with prejudice."

The same occurred in the Goggin case. The state only admitted the judgment and sentence from Idaho, after resting in its case-in-chief, without any further evidence to demonstrate the identity of the individual arrested in Idaho. The Court of Appeals contends that the Judgment and Sentence that was admitted after the prosecution had rested, along with Mr. Goggin's ID cards were sufficient to support the conviction of felony DUI. *State v. Goggin,* No. 3515-1-III, (Wash. III Oct. 28, 2014). Yet, the Judgment and Sentence were admitted after the prosecution rested and the

trial court allowed the prosecution to reopen its case in chief to present them and the ID cards were not enough to positively identify Mr. Goggin. Without more, the case must be dismissed for insufficient evidence as to the felony DUI charge.

Issue 3: The trial court committed reversible error in admitting "certified judgment and sentences" without requiring court testimony to satisfy Article I § 22 Confrontation Clause.

Pretrial, the defense objected to the introduction of the prior convictions without testimony from a person presenting the documents. (VRP 2/25/13 p. 175-177). The prosecution states there will be live testimony to verify the identity of Mr. Goggin in the Idaho case, however that never happened (VRP 2/25/13 p. 177-179). The defense argued that the failure to bring a person to prove the defendant is the person connected to the document violated his right of confrontation. (VRP 2/28/13 p. 513). The court held that RCW 5.44.010 addressed certified documents requiring no person to identify the court documents. (VRP 2/28/13 p. 519-520). The state acknowledges that they must prove the identity of the person arrested (VRP 2/28/13 p. 559) and the defense renewed the objections but the court admitted the documents. (VRP 2/28/13 p. 599).

In determining the meaning of a state constitutional provision, the "'focus is on whether the unique characteristics of the state constitutional provision and its prior interpretations actually compel a particular

result.'" *State v. Chenoweth,* 160 Wash.2d 454, 463, 158 P.3d 595 (2007) (quoting *City of Seattle v. McCready,* 123 Wash.2d 260, 267, 868 P.2d 134 (1994)). Moreover, we examine the Constitutional text, the historical treatment of the interest at stake as disclosed by relevant case law and statutes, and the current implications of recognizing or not recognizing an interest. *Id.* at 463, 158 P.3d 595.

The provision in our state constitution reads, in pertinent part, that an accused appear and defend in person . . . to meet witnesses against [and] to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend VI, on the other hand, merely provides that an accused has the right "to a speedy and public trial . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." It is readily observable that our state's confrontation clause provides several rights that are not specifically set forth in the Sixth Amendment, namely: the right to appear and defend in person, the right to have a copy of the charge, the right to testify in one's own behalf, to meet witnesses against him face to face, and right to appeal in all cases.

When looking into constitutional history and common law history, it appears that little is known about what the drafters of Article I § 22 intended in 1889. It is known that shortly after statehood, the State

Supreme Court acknowledged that Article I § 22 provided defendants the right to meet the witnesses against them face to face and to cross-examine those witnesses in open court. *State v. Martin*, 171 Wn.2d 521, 531, 252 P.3d 872 (2011) citing *State v. Stentz*, 30 Wash. 134, 142, 70 P. 241 (1902). It was found significant that the federal constitution did not provide such broad protection to defendants at the time Washington became a state. *Martin*, supra.

Next, the preexisting state law in this area supports a broader interpretation of the State Constitution. Again, the Supreme Court in *State v. Martin*, 171 Wn.2d 521, 533, 252 P.3d 872 (2011) found that the state law "may be responsive to concerns of citizens long before they are addressed by analogous constitutional claims." Citing *Gunwall*, 106 Wash.2d at 62, 720 P.2d 808. Noting that federal law under the Sixth Amendment did not afford a defendant the right to testify until 1961. Citing *Ferguson v. Georgia*, 365 U.S. 570, 596, 81 S. Ct. 756, 596, 81 S. Ct. 756, 5 L.Ed.2d 783 (1961). Ultimately, the Supreme Court found this to weigh in favor of an independent analysis of Article I § 22. *State v. Martin*, 171 Wn.2d 521, 533, 252 P.3d 872 (2011).

Lastly, the structural difference between the two Constitutional provisions weighs clearly toward an independent analysis. The language of Article I § 22 requires a "face to face" meeting of witnesses in a

criminal prosecution. By including the verbiage face to face it is implied that more protection is afforded. There is nothing requiring such specific rights in the Sixth Amendment. The structure of the language of Article I § 22 weighs in favor of independent analysis here, as in *State v. Martin*, 171 Wn.2d 521, 533, 252 P.3d 872 (2011). The court should grant independent review. The defense maintains that the right of confrontation under Article I § 22 clearly mandates that there must be more than documentary evidence to support the conviction. Article I §22 mandates and requires a face to face meeting to support the identification of the defendant in a criminal prosecution.

V. CONCLUSION

There was insufficient evidence on the question of the prior convictions and this mandates dismissal of the felony DUI. The introduction of the blood test where the defendant was not advised of his right to an additional test requires a new trial on the misdemeanor charge. This court should remand for a new trial on the misdemeanor charge alone.

Respectfully submitted this 2 day of December, 2014

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APPENDIX

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JOSEPH JAMES GOGGIN, Appellant.	)	No. 31515-1-III UNPUBLISHED OPINION

BROWN, J. – Joseph Goggin appeals his felony driving under the influence (DUI) jury conviction. In addition to his evidence insufficiency challenge, Mr. Goggin contends the trial court erred in (1) admitting blood alcohol test results without an additional independent-testing advisement, and (2) admitting an Idaho DUI judgment and sentence in violation of his state confrontation rights. We affirm.

FACTS

On December 17, 2011, Spokane police officer Barry Marcus responded to a call about a person, later identified as Mr. Goggin, possibly driving under the influence of an intoxicant. Upon contact with Mr. Goggin, Officer Marcus noticed the odor of intoxicants on Mr. Goggin's breath and observed he was stumbling and had slurred speech. Mr. Goggin failed field sobriety tests. Officer Marcus then arrested Mr. Goggin for DUI. After taking Mr. Goggin in for a blood alcohol concentration (BAC) test, Officer Marcus

read him the implied consent warnings, including the right to have additional tests performed by a person of his own choosing. Mr. Goggin indicated he understood his rights and signed the implied consent form. When Mr. Goggin refused the breath test, Officer Marcus obtained a search warrant to draw a sample of Mr. Goggin's blood that was taken about three hours after his arrest without any further independent-testing advisement.

Alleging Mr. Goggin had four prior DUI convictions, the State partly charged him with felony driving under the influence of an intoxicating liquor. He moved to suppress the results of the blood test based on the officer's failure to advise him of his right to an additional test after obtaining the warrant. The trial court concluded, "[t]his was a blood draw authorized by a search warrant. The trooper did not have to advise the defendant of the right to additional tests." Clerk's Papers (CP) at 23. The court explained:

> The trooper was not mandated by the statute to get a search warrant. It was a decision, a discretion [sic] decision on his part to basically seek out further evidence by a neutral and detached magistrate.
>
> In no way did the Court see that as mandatory, and the trooper could have at that time got an implied consent warning, taken a refusal and gone with it.

Report of Proceedings (RP) (April 26, 2012) at 17.

At trial, brothers Jared and Jordan Berezay testified that on December 17, 2011, around 5:00 p.m., they were driving when they were abruptly cut off by a man later identified as Mr. Goggin. They saw Mr. Goggin swerving left and right and crossing the center line into oncoming traffic, causing other cars to swerve out of the way. The

brothers called 911 and followed Mr. Goggin until he parked. According to Jared Berezay, when Mr. Goggin exited his car he was staggering and smelled of alcohol. Jordan Berezay noticed Mr. Goggin "had a hard time keeping his balance" and was "stumbling" toward Jared. RP at 265.

Liberty Lake Police Officer Taj Wilkerson responded first. He testified Mr. Goggin's speech was "thick tongued and slurred." RP at 291. Mr. Goggin told Officer Wilkerson he had had a "few beers" at a bar. RP at 292. Officer Wilkerson observed Mr. Goggin was "very slow to respond to my questioning." RP at 293.

Trooper Barry Marcus testified when he contacted Mr. Goggin, he noticed Mr. Goggin struggled to get out of his car, could not maintain his balance, and had "a strong odor of intoxicants on his breath." RP at 326. He related Mr. Goggin had difficulty focusing and his eyes were watery and bloodshot. Trooper Marcus then administered the three standard field sobriety tests. According to the Trooper, Mr. Goggin's ability to perform the tests was "impaired pretty well by alcohol." RP at 342. He staggered, could not maintain his balance or put one foot in front of the other, could not stand on one leg, perform the eye tracking test, or recite his ABCs.

During cross-examination, defense counsel asked Trooper Marcus whether he re-read the implied consent warnings to Mr. Goggin after obtaining the search warrant:

> [Defense counsel]: Did you at any time advise him as part of any warnings related to the blood test that he could get an additional blood test?

> [Trooper Marcus]: That was in part of the implied consent warnings for breath. It states in there that you have the right to additional tests administered by a qualified person of your own choosing.
> [Defense counsel]: You have separate warnings for blood; do you not?
> [Trooper Marcus]: We do, but implied consent warnings for blood weren't read in this case.

RP (Feb. 27, 2013) at 399.

Dr. Naziha Nuwayhid, PhD, a forensic toxicologist, testified Mr. Goggin's blood sample tested 0.32 gram per 100 milliliters and related a person's ability to drive is impaired at 0.08 gram per milliliter. She estimated Mr. Goggin had the equivalent of 16 standard drinks in his system at the time of his arrest.

The State moved to admit certified copies of four prior DUI judgment and sentences bearing Mr. Goggin's name. Defense counsel objected to their admission, arguing the State was required to bring in a witness to verify the documents. He argued the admission of the documents without a witness to verify them violated his confrontation rights under *Crawford*.[1] The court rejected Mr. Goggin's argument, reasoning certified court records are admissible under RCW 5.44.010 and are not testimonial evidence, rendering *Crawford* inapplicable. Even so, to identify Mr. Goggin as the person in the Washington State DUI judgment and sentences, the State produced related booking photographs and called the police officers who had arrested Mr. Goggin on the 2003, 2004, and 2006 DUI cases.

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[1] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

After the State initially rested, the trial court allowed the State to reopen to inform the jury it had admitted exhibits 5, 7, 9, and 11. Mr. Goggin unsuccessfully argued even if the judgment and sentence had been admitted "there's not been any testimony about how the arrest occurred if, indeed, it did occur in the state of Idaho." RP at 549. Mr. Goggin renewed his motion to dismiss based on the State's failure to produce a witness from Idaho who could provide evidence that he had been arrested in Idaho. The court denied the motion, finding sufficient circumstantial evidence to go to the jury.

The jury found Mr. Goggin guilty of felony DUI. He appealed.

ANALYSIS

A. Admissibility of Blood Test Results

The issue is whether the court erred in admitting Mr. Goggin's blood alcohol test results. He contends the test should not have been admitted because the State failed to re-advise him of his right to additional testing after it administered a blood draw pursuant to a search warrant. The State responds it was not statutorily mandated to read the implied consent warnings for a blood alcohol test because the arresting officer was not investigating a crime that statutorily mandated a blood draw under RCW 46.20.308(3).

When reviewing a suppression motion, we determine if substantial evidence supports the findings of fact and if the findings support the conclusions of law. *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997). We review solely those findings

of fact to which error has been assigned; we treat unchallenged findings as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). We review conclusions of law de novo. *State v. Eisfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008).

Mr. Goggin does not challenge the court's findings of fact. Thus, our review is confined to the trial court's conclusion that the arresting officer was not required to advise Mr. Goggin of the right to additional tests because the blood draw was authorized by a search warrant, not the implied consent statute.

RCW 46.20.308(1) partly states:

> Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration, . . . in his or her breath if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. *Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.*

(Emphasis added.) RCW 46.20.308(2) partly states "[t]he officer shall inform the person of his or her right to refuse the breath test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506." RCW 46.20.308(3) allows either breath or blood testing under circumstances generally concerning unconsciousness or arrest for certain crimes not

applicable here. Mr. Goggin was arrested for DUI. Thus, he was not subject to the mandatory test provision of RCW 46.20.308(3) for felony DUI.

Relying primarily on *State v. Turpin*, 94 Wn.2d 820, 620 P.2d 990 (1980), Mr. Goggin argues because he was subject to a mandatory blood draw, the officer should have advised him of his right to an additional blood test. He reasons the officer's failure to advise him of his right to an additional test mandates suppression of the blood test and a new trial. But *Turpin* is factually distinguishable.

Ms. Turpin was arrested for negligent homicide, a crime subject to the mandatory test provisions of RCW 46.20.308(3). *Turpin*, 94 Wn.2d at 822. After arrest and a blood draw to determine the blood alcohol content in her blood, police did not advise Ms. Turpin of her right under the implied consent statute to have an independent blood test performed. The *Turpin* court held the State has a statutory duty to notify a person accused of vehicular homicide that he or she has a right to an independent blood test and suppressed the blood test results because Ms. Turpin had not been able to gather potentially exculpatory evidence.

In contrast to *Turpin*, the arresting trooper advised Mr. Goggin of his right to additional tests, and Mr. Goggin acknowledged he understood this right. Thus, unlike the defendant in *Turpin*, Mr. Goggin was aware of the right to seek alternative testing and gather potentially favorable evidence in his defense. Significantly, the blood test

was taken pursuant to a search warrant supported by probable cause, not under the mandatory blood or breath test provision of RCW 46.20.308(3).

Accordingly, the trial court correctly reasoned Mr. Goggin was no longer subject to the requirements of the statute. It follows that once the officer obtained a search warrant for a blood alcohol test independent of RCW 46.20.308(3), he was not required to re-advise Mr. Goggin of his right to additional tests.

Our conclusion is supported by *City of Seattle v. Robert St. John*, 166 Wn.2d 941, 946, 215 P.3d 194 (2009), in which the Washington Supreme Court held that the plain language of RCW 46.20.308(1) allows officers to "*obtain a search warrant for blood alcohol tests regardless of the implied consent statute.*" *St. John*, 166 Wn.2d at 946 (emphasis added). In *St. John*, the motorcyclist refused to take the voluntary test; but, the evidence that the motorcyclist was driving under the influence constituted sufficient probable cause to justify a warrant. *Id.* at 948. Similarly here, the search warrant and subsequent blood alcohol test were the result of evidence showing Mr. Goggin was driving under the influence. Thus, the State was not required to re-advise Mr. Goggin of his right to additional tests after issuance of the search warrant.

Even if the blood test results were admitted in error, any error was harmless. We review potentially erroneous rulings of admissibility under the nonconstitutional harmless error standard. *State v. Morales*, 173 Wn.2d 560, 582, 269 P.3d 263 (2012). An erroneous ruling of admissibility will not amount to reversible error unless the court

determines that "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *State v. Calegar*, 133 Wn.2d 718, 727, 947 P.2d 235 (1997) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). The outcome of a trial is materially affected if the jury would have reached a different verdict had the error not occurred. *State v. Hardy*, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997).

Given our facts, it is unlikely the jury would have reached a different verdict had the trial court excluded the evidence of Mr. Goggin's blood alcohol test. Mr. Goggin was seen swerving into oncoming traffic, his breath smelled of alcohol, his eyes were bloodshot and watery, he could not maintain his balance, his speech was slurred, he was slow to answer questions, and he failed all of the field sobriety tests. From this evidence, a jury could reasonably conclude that Mr. Goggin was under the influence of or affected by intoxicating liquor. RCW 46.61.502(1)(b). Any evidentiary error was harmless.

In sum, we conclude the trial court did not err in admitting the blood alcohol test.

B. Evidence Sufficiency

The issue before us is whether sufficient evidence supports Mr. Goggin's felony DUI conviction. Mr. Goggin contends the certified copy of an Idaho judgment and sentence for DUI that bears his name is insufficient proof of a prior conviction because the State failed to prove he was the person arrested in Idaho.

Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

To convict Mr. Goggin of felony DUI, the State had to prove that on December 17, 2011, Mr. Goggin drove a vehicle under the influence of or affected by intoxicating liquor, he had four or more prior DUI convictions within 10 years and the driving occurred in the State of Washington. RCW 46.61.502(1)(c), (6)(a). That the defendant has four or more prior offenses is an essential element of felony DUI. *State v. Santos*, 163 Wn. App. 780, 783, 260 P.3d 982 (2011). The best evidence of a prior conviction is a certified copy of a judgment and sentence. *Santos*, 163 Wn. App. at 784.

In criminal trials, the State has the burden of establishing, beyond a reasonable doubt, the identity of the accused as the person who committed the offense. *State v. Huber*, 129 Wn. App. 499, 501, 119 P.3d 388 (2005). When, as here, a previous conviction is an underlying element of the current charged offense, "[t]he State must do more than authenticate and admit the document; it must also show beyond a

reasonable doubt 'that the person named therein is the same person on trial.'" *Huber*, 129 Wn. App. at 502 (quoting *State v. Kelly*, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)). "Identity of names alone" is insufficient to establish that the person named in the document is the same person on trial. *Huber*, 129 Wn. App. at 502 (quoting *United States v. Jackson*, 368 F.3d 59, 63-64 (2d Cir. 2004). Because many people share identical names, the State must show by independent evidence that the person named in the document is the defendant in the present action. *Id.* This burden can be met by presenting booking photographs, booking fingerprints, eyewitness identifications, a certified copy of a driver's license, or other distinctive personal information. *Id.* at 503; *State v. Chandler*, 158 Wn. App. 1, 7, 240 P.3d 159 (2010).

Here, the State met its burden of proving Mr. Goggin was the same Joseph Goggin convicted of the 2009 DUI in Idaho by submitting Mr. Goggin's 2007 to 2011 Washington State Identification card. This photographic identification card included Mr. Goggin's height and weight, hair and eye color, and his address. This information matched the identifying information in the 2009 Idaho judgment and sentence. The identification card was issued in 2007 and was valid until 2011; thus, it corresponded with the date of the Idaho conviction. Accordingly, the State provided sufficient evidence of this fourth DUI to support the conviction for felony DUI.

C. Confrontation Rights

The issue is whether Mr. Goggin's confrontation rights under the Washington Constitution were violated when the trial court admitted Exhibit 5, the Idaho judgment and sentence. Mr. Goggin contends his right to confront the witnesses against him was violated by the absence of any testimony that he was the person named in Exhibit 5. He argues the right of confrontation under article I, section 22 of the Washington Constitution requires more than documentary evidence to support the conviction, arguing, "Article I, section 22 mandates and requires a face to face meeting to support the identification of the defendant in a criminal prosecution." Br. of Appellant at 20. Mr. Goggin asks us to conduct a *Gunwall*[2] analysis and hold that Washington's confrontation clause requires the State to "bring a person to admit the judgment and sentences." Br. of Appellant at 17.

Evidence rulings are reviewed for an abuse of discretion. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 691, 101 P.3d 1 (2004). A trial court abuses discretion when its "'decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons.'" *Id.* (quoting *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). In considering whether the confrontation clause was violated, our review is de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

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[2] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Initially, we must decide whether to analyze Mr. Goggin's argument under the Sixth Amendment to the United States Constitution or under article I, section 22 of the Washington Constitution. Mr. Goggin raises the *Gunwall* argument for the first time on appeal. Under RAP 2.5(a)(3), we are not required to consider the argument because he has failed to assert a manifest constitutional error exception. *State v. Bertrand*, 165 Wn. App. 393, 400, 267 P.3d 511 (2011).

The Washington Supreme Court has concluded article I, section 22 of our State's constitution is subject to an independent analysis from the Sixth Amendment for the confrontation clause and, therefore, a *Gunwall* analysis is no longer necessary. *State v. Pugh*, 167 Wn.2d 825, 839, 225 P.3d 892 (2009). Instead, we analyze whether the unique characteristics of the state provision and its prior interpretations compel a particular result. *Pugh*, 167 Wn.2d at 835. This entails "an examination of the constitutional text, the historical treatment of the interest at stake as reflected in relevant case law and statutes, and the current implications of recognizing or not recognizing an interest." *State v. Chenoweth*, 160 Wn.2d 454, 463, 158 P.3d 595 (2007).

Article I, section 22 of the Washington Constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face." 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. Quoting *State v. Foster*, 135 Wn.2d 441, 462-63, 957 P.2d 712

(1998), our Supreme Court recently noted that although article I, section 22 is unique in using the language "face to face" "'the meaning of the words used in the parallel clauses is substantially the same.'" *State v. Lui*, 179 Wn.2d 457, 468, 315 P.3d 493, *cert. denied*, 134 S. Ct. 2842 (2014). Following this precedent, we conclude the text of the Washington Constitution does not compel a result different from that under the Sixth Amendment.

In *Lui*, the court noted it had "consistently rejected arguments that the state confrontation clause provides greater protections than the federal confrontation clause." *Lui*, 179 Wn.2d at 469. The court then cited numerous cases in support of this conclusion, including *Pugh*, which held that the excited utterance hearsay exception does not violate state confrontation rights. *Id.* at 469. Mr. Goggin does not point to any treatment of the Washington provision that is more protective of the right to confrontation than the federal standard.

Next, Mr. Goggin urges us to hold article 1, section 22 requires the State to bring a person to court to authenticate the judgment in order to have a "face to face" meeting with adverse witness. But he fails to explain why a broader reading of the Washington confrontation clause is necessary. The constitutional interest at issue here is adequately addressed by the Sixth Amendment analysis.

The Sixth Amendment confrontation clause "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541

U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (citation omitted). Thus, in a criminal trial, the State cannot introduce a testimonial statement from a nontestifying witness unless the witness is unavailable and the defendant has a cross-examination opportunity. *Crawford*, 541 U.S. at 68. A statement is testimonial when its primary purpose is to establish facts relevant to a criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). *Crawford* allows non-testimonial statements. *State v. Benefiel*, 131 Wn. App. 651, 653-54, 128 P.3d 1251 (2006).

In *Benefiel*, this court held a defendant's judgment and sentence is not testimonial because "[i]t is not a statement for the purpose of establishing some fact and it does not constitute a statement the declarant would reasonably believe would be used by the prosecutor in a later trial." *Benefiel*, 131 Wn. App. 656. In *Benefiel*, one of the issues before this court was whether admission of the defendant's judgment and sentence violated the confrontation clause of the Sixth Amendment. *Id.* at 655. Mr. Benefiel argued, as does Mr. Goggin, that the admission of a judgment and sentence violates the confrontation clause because he was not allowed to cross-examine the clerk who attested to the document. *Id.* The *Benefiel* court rejected his argument,

noting that under RCW 5.44.010[3] and ER 902(d), certified court records are self-authenticating and admissible and that court records are not testimonial. *Id.* at 655-56.

Considering *Benefiel*, the trial court did not err in admitting Mr. Goggin's judgment and sentence as a nontestimonial, self-authenticating public record under RCW 5.44.010. Our conclusion is in accord with the purpose of article I, section 22, which is to prevent the admission of unconfronted statements "[w]here cross examination would serve to expose untrustworthiness or inaccuracy." *State v. Ryan*, 103 Wn.2d 165, 175, 691 P.2d 197 (1984). Regarding confrontation clause protections, we evaluate whether admission of the hearsay statement constitutes a "'material departure from the reason underlying the constitutional mandate guaranteeing to the accused the right to confront the witnesses against him.'" *Pugh*, 167 Wn.2d at 837 (quoting *State v. Ortego*, 22 Wn.2d 552, 563, 157 P.2d 320 (1945)).

Mr. Goggin's Idaho judgment and sentence was inherently trustworthy. It was not created in anticipation of litigation or to prove a fact at trial; therefore, it was not necessary to cross-examine the clerk who certified the document. A certified record not prepared for use in a criminal proceeding but created for the administration of an entity's affairs is not testimonial. *State v. Jasper*, 174 Wn.2d 96, 112, 271 P.3d 876 (2012).

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[3] RCW 5.44.010 provides: "The records and proceedings of any court of the United States, . . . shall be admissible in evidence in all cases in this state when duly certified by the attestation of the clerk, . . . or other officer having charge of the records of such court, with the seal of such court annexed."

Trustworthiness of public records exists because of the declarant's official duty and high probability that he or she has performed his public duty to make an accurate record. *State v. James*, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). Accordingly, the admission of the Idaho judgment and sentence did not violate Mr. Goggin's confrontation rights.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, C.J.

Korsmo, J.

Certificate of Service

I, Ron Burns, hereby certify that on December 2nd, 2014, I caused a true and correct copy of the foregoing Defendant's Reply Brief & Motion for Discretionary Review to be forwarded with all of the required charges prepaid by the method indicated below.

Ron Burns

Ron Burns
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