No. 31623-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAMES DOUGLAS COURTER,

Appellant

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

The Honorable John Antosz

APPELLANT'S BRIEF

HAILEY L. LANDRUS, Of Counsel
KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorneys for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE..2

E. ARGUMENT..8

1. The trial court erroneously admitted unnecessarily cumulative and prejudicial photographic evidence of the traffic collision…….8

2. The State failed to prove each element of the crime of DUI where there is insufficient evidence that Mr. Courter was under the influence of intoxicating liquor or affected by intoxicating liquor at the time of driving…………………………………………..11

3. The State failed to produce sufficient evidence of Hit and Run – Injury where the evidence shows Mr. Courter stopped and remained at the scene and provided required information……..16

4. The trial court erred by failing to give the jury an instruction limiting the purpose of the refusal evidence……………………18

5. Trial counsel rendered ineffective assistance of counsel by failing to request an instruction limiting the purpose of the refusal evidence…………………………………………………20

6. The prosecutor committed misconduct during closing argument by arguing that Mr. Courter's refusal was evidence that he was guilty of DUI…………………………………………………..22

F. CONCLUSION……………………………………………………24

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

Donaldson v. Donaldson, 38 Wn.2d 748, 231 P.2d 607 (1951)…………13

Fannin v. Roe, 62 Wn.2d 239, 382 P.2d 264 (1963)……………………11

State v. Crenshaw, 98 Wn.2d 789, 659 P.2d 488 (1983)……………….8, 9

State v. Donckers, 200 Wn. 45, 93 P.2d 355 (1939)……………….…….12

State v. Hurd, 5 Wn.2d 308, 105 P.2d 59 (1940)……………………...12

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009)……………………20

State v. Long, 113 Wn.2d 266, 778 P.2d 1027 (1989)……………….15, 19

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997),
cert. denied, 523 U.S. 1008 (1998)……………………………………20

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)…………………20

State v. Uglem, 68 Wn.2d 428, 413 P.2d 643 (1966)……………………13

Washington Courts of Appeal Cases

State v. Aaron, 57 Wn. App. 277, 787 P.2d 949 (1990)…………………19

State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010)………………..23

State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001)……………...19

State v. Grier, 168 Wn. App. 635, 278 P.3d 225 (2012)………………...22

State v. Hughes, 118 Wn. App. 713, 77 P.3d 681 (2003)……………22, 23

State v. Hutton, 7 Wn. App. 726, 502 P.2d 1037 (1972)………………...11

State v. Komoto, 40 Wn. App. 200, 697 P.2d 1025 (1985)………………17

State v. Perebeynos, 121 Wn. App. 189, 87 P.3d 1216 (2004)……....11, 17

State v. Powell, 150 Wn. App. 139, 206 P.3d 703 (2009)……………….22

State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985)…………………8

State v. Silva, 106 Wn. App. 586, 24 P.3d 477,
review denied, 145 Wn.2d 1012 (2001)………………………......17, 18

State v. Stein, 140 Wn. App. 43, 165 P.3d 16, 30 (2007)………………..20

State v. Whitaker, 133 Wn. App. 199, 135 P.3d 923 (2006)……………8, 9

State v. Wilhelm, 78 Wn. App. 188, 896 P.2d 105 (1995)……………….12

State Statutes and Court Rules

ER 105 ……………………………………………………………18, 19

RCW 46.52.020…………………………………………………………15

RCW 46.61.502(c)………………………………………………………16

RCW 46.61.517…………………………………………………………12

Outside or Federal Authorities

Brawley v. Esterly, 267 S.W.2d 655 (Mo. 1954)………………………...11

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984)…………………………………………………...20

A. SUMMARY OF ARGUMENT

James Courter appeals his convictions for Hit and Run – Injury and DUI – BAC Refusal, arguing that neither conviction is supported by substantial evidence. Mr. Courter also contends that the trial court erroneously admitted cumulative and prejudicial photographic evidence. He further argues that, because the trial court admitted his BAC refusal for the limited purpose of proving refusal, the court erred by failing to give the jury a limiting instruction, defense counsel rendered ineffective assistance by failing to request or propose a limiting instruction, and the prosecutor committed misconduct by encouraging the jury to consider the evidence as proof of guilt.

B. ASSIGNMENTS OF ERROR

1. The trial court erroneously admitted unnecessarily cumulative and prejudicial photographic evidence of the traffic collision. (Exhibits 3 through 10)

2. The State failed to prove each element of the crime of DUI – BAC Refusal.

3. The State failed to prove each element of the crime of Hit and Run.

4. The trial court erred by failing to instruct the jury on the limited purpose of the refusal evidence.

5. Defense counsel provided ineffective assistance by failing to request or propose a limiting instruction regarding the refusal evidence.

6. The prosecutor committed misconduct during closing argument by arguing that Mr. Courter's refusal to submit to a blood test was evidence that he was guilty of DUI.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erroneously admitted unnecessarily cumulative and prejudicial photographic evidence of the traffic collision? (Exhibits 3 through 10)

2. Whether the State produced sufficient evidence that Mr. Courter was under the influence of intoxicating liquor or affected by intoxicating liquor at the time of driving his motor vehicle?

3. Whether the State produced sufficient evidence that Mr. Courter failed to stop and remain at the scene of the collision and provide required information?

4. Whether the trial court should have issued a limiting instruction on the BAC refusal evidence when it state, *sua sponte*, that it would?

5. Whether defense counsel provided ineffective assistance of counsel by failing to request or propose a limiting instruction?

6. Whether the prosecutor committed misconduct during closing argument by arguing that Mr. Courter's BAC test refusal was evidence that he was guilty of DUI.

D. STATEMENT OF THE CASE

On a dark, rainy evening on December 12, 2013, James Courter got home from work at 5:45 p.m., began drinking a beer, and was about to relax in his hot tub when his son called, asking for a ride. 3RP 143. Without finishing the beer, Mr. Courter got in his Jeep Grand Cherokee and drove southbound on Hansen Road in Moses Lake, Washington.[1] 1RP

[1] Trial occurred August 7-9, 2013. 1RP refers to proceedings on August 7th. 2RP refers to proceedings on August 8th. 3RP refers to proceedings on August 9th.

69; 2RP 30; 3RP 143. Around 6:00 p.m., he rounded a bend and, two seconds later, collided with a Toyota Corolla that was crossing a poorly-lit intersection on Hansen Road after having stopped at a stop sign. 1RP 68, 72, 85; 2RP 26, 56, 84, 87; 3RP 125, 144. Neither driver saw the other vehicle before the collision. 2RP 56, 59; 3RP 144.

Mr. Courter stopped his Jeep approximately 100 feet from the scene of the accident. 1RP 74, 77; 2RP 28. He got out and walked away from his vehicle twice, once to throw something over the shoulder of the road toward the highway. 1RP 77-79. Both times he returned to his vehicle. 1RP 77-79.

The collision caused extensive damage to both vehicles. 1RP 92, 94; 2RP 28, 32-42, 108; Exhibits 3-10. Mr. Courter's Jeep had sustained front end damage and was missing its front bumper. 1RP 94. The Jeep's airbag had also deployed. 3RP 147. The other driver's Toyota sustained a large amount of body damage to the front passenger side, and the interior was a mess of broken parts and a deployed airbag. 1RP 92.

The collision also injured all three individuals involved. Mr. Courter injured his neck; mentally, he was "in and out." 3RP 146. The Toyota's driver suffered back strain, a hyper-extended collar bone, and a cut to the palm of her right hand. 2RP 57. The Toyota's passenger injured her thigh, knee, chest, and rotator cuff. 2RP 89-90.

Sergeant Brian Jones photographed the drivers' vehicles. 2RP 28, 35. He also photographed a box of beer and four unopened beer cans inside the box, which he found on the side of the road behind a bush near Mr. Courter's Jeep. 1RP 104-05; 2RP 42-43. The box of beer belonged to Mr. Courter and had been left over from a fishing trip a few weeks earlier. 3RP 148.

Washington State Trooper Phil Jesse arrived shortly after the collision. 2RP 107. He found Mr. Courter walking around his Jeep. 2RP 108. Mr. Courter said he had been driving down Hansen Road and a car pulled out in front of him. 2RP 111. The trooper observed the odor of intoxicants coming from Mr. Courter and initiated a DUI investigation. 2RP 112-13, 141. He tried administering the horizontal gaze nystagmus (HGN) test. 2RP 142-43. Mr. Courter kept moving his head, so the trooper could not complete the test. 2RP 144-45. Trooper Jesse attempted no further field sobriety tests because he handcuffed Mr. Courter for ignoring commands to stop putting his hands in his pockets to search for chap stick. 2RP 145. The trooper then arrested Mr. Courter for driving under the influence of alcohol and transported him to the hospital. 2RP 147, 149-50. On the way, Mr. Courter said he drank a couple of beers earlier that day. 2RP 150.

At the hospital, the trooper read Mr. Courter implied consent warnings. 2RP 153. According to the trooper, Mr. Courter said he understood the warnings but refused to submit to a blood test. 2RP 156. He told the trooper he drank a couple of beers a little after 2 p.m. 2RP 157, 159. Trooper Jesse believed Mr. Courter "was under the influence of alcohol." 2RP at 161. According to the trooper, "[w]ithout determining all of the factors and not knowing what his blood alcohol level is, he probably should not have been driving...," based on the collision, the odor of intoxicants, and his demeanor. 2RP at 161.

Mr. Courter knew he had been in a car accident but never approached the Toyota and did not remember anyone involved in the collision or the investigation afterward. 3RP 149, 154. He recalled only bits and pieces of conversations he had. 3RP 149. He did not recall signing any papers, receiving implied consent warnings, or the trooper asking him for a blood sample. 3RP 151-52.

The State charged Mr. Courter with hit and run with an injury and with driving under the influence with a DUI-BAC refusal enhancement. CP 26-27.

At trial, the court admitted twelve photographs of the collision scene over defense counsel's objection. 2RP 11, 18-21, 32, 36. Exhibit 3 was a photograph of the position of the Toyota Corolla after the collision.

2RP 15. Exhibit 4 was a photograph of the Toyota from another angle, showing medics attending to the occupants. 2RP 15, 36. Exhibit 5 depicted the damage to the front passenger side of the Toyota and the deployed airbag. 2RP 15, 37. Exhibit 6 was a close-up of the photograph in Exhibit 5. 2RP 16, 39. Exhibit 7 showed that the Toyota's passenger door had been removed. 2RP 16, 39. Exhibit 8 depicted the interior front compartment of the Toyota. 2RP 17, 40.

Exhibit 9 showed the Jeep Cherokee and the damage to it in the foreground and other vehicles in the background. 2RP 41. Exhibit 10 showed the Jeep Cherokee's extensive damage and its location compared to the white fog line. 2RP 17, 41.

Exhibit 11 was a photograph of an open case of beer off in the distance. 2RP 17, 42. Exhibit 12 was a close-up of the box of beer behind a bush. 2RP 17, 43. Exhibit 13 was a photograph of the inside of the box. 2RP 17, 43. Exhibit 14 depicted the contents of the box – four unopened cans of beer. 2 RP 17, 44.

Defense counsel argued that all of the photographs should have been excluded as cumulative and overly prejudicial, except for two photographs of the Toyota, one photograph of the Jeep, one of the beer box, and one of the beer cans. 2RP 19. The court decided the photographs were not cumulative, the number of photographs offered was

typical, the State claimed reasons for each individual photograph, and each photograph had the distinct and strong possibility of being helpful to the jury on different elements at issue. 2RP 20-21.

The trial court also admitted Mr. Courter's refusal to submit to the BAC test for the express purpose of proving the refusal enhancement, but not for evidence of guilt. 1RP 23-32. It indicated that it would give the jury a limiting instruction if it decided to admit the refusal as proof of guilt. 1RP 32. No instruction was ever given, and defense counsel did not request or propose one. CP 144-60. The State, nevertheless, relied on Mr. Courter's refusal of the BAC test as proof that he was guilty of DUI:

> So number one, that the Defendant drove a motor vehicle. Two, that the Defendant at the time of the driving a motor vehicle was under the influence of or affected by intoxicating liquor. Now, how do we know that?
> . . .
> Look at the Defendant's actions. . .
>
> [W]hen Trooper Jesse took the Defendant to the hospital, went through, read him his rights, that would have been -- that would have been a good time if somebody hadn't been drinking or maybe just had a few sips to go ahead and take that test. The Trooper says … if you refuse to take this test, you're going to lose your license for a year. And the fact that you refused, it is going to be used against you in court later on. And right there with the chance to put up or shut up, the Defendant said "No, I don't want to take that test."
>
> And that's -- that's something you can consider. Why didn't the Defendant want to take that test? Well, he knew how much he had to drink that day.

3RP 198-200.

The jury found Mr. Courter guilty of Hit and Run and DUI, and it returned a special verdict, finding that Mr. Courter refused the BAC test. CP 161-63.

Mr. Courter appeals. CP 165.

E. ARGUMENT

1. The trial court erroneously admitted unnecessarily cumulative and prejudicial photographic evidence of the traffic collision.

The trial court erred by admitting Exhibits 3 and 5 through 10, photographs of the traffic collision, as cumulative proof that Mr. Courter was involved in an accident. The admission of photographs is reviewed for abuse of discretion. *State v. Sargent*, 40 Wn. App. 340, 347, 698 P.2d 598 (1985).

Under ER 403, otherwise relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The State does not have "'carte blanche to introduce every piece of admissible evidence' when the cumulative effect of that evidence is inflammatory and unnecessary." *State v. Whitaker*, 133 Wn. App. 199, 227, 135 P.3d 923 (2006) (quoting *State v. Crenshaw*, 98 Wn.2d 789, 807,

659 P.2d 488 (1983)). Appellate courts will reverse the trial court's decision to admit photographs if "it is clear from the record that the primary reason to admit gruesome photographs is to inflame the jury's passion." *Whitaker*, 133 Wn. App. at 227.

Here, the Court admitted State's Exhibits 3-10, which the State allegedly used to prove that "the defendant's vehicle was involved in an accident." CP at 100; 3RP 189. Exhibits 3 through 8 showed damage to the Toyota, medics attending to the Toyota's occupants, and what the car looked like after the Jaws of Life were used to extract the passenger. Exhibits 9 and 10 showed damage to the front end of Mr. Courter's Jeep. The prosecutor published these exhibits to the jury during the State's case in chief and closing argument by projecting the photographs onto the wall. 2RP 32, 36; 3RP 189. In closing, the prosecutor projected Exhibit 7 (a photograph of the Toyota) to remind jurors that "the door had been removed by using the Jaws of Life. The fire department had to free Ms. Jensen from the vehicle." 3RP 189. He then projected Exhibit 8, "showing the extensive damage to the interior [of the Toyota]." 3RP 189. He argued that Exhibit 8 "tells us two things. One, this vehicle was involved in a crash, and, two, it was – this was a pretty significant crash." 3RP 189. The prosecutor then assured the jurors that the photographs would be available during deliberations. 3RP 189.

Hit and run requires the State to prove that *the defendant* was involved in an accident. CP 154 (Instruction 8). But Mr. Courter was not driving the Toyota. He was driving the Jeep. Six photographs of the Toyota showed the Toyota, not Mr. Courter, was in an accident. Based on the facts of the case and the prosecutor's closing argument, it is clear that the State's primary purpose for submitting the photographs of the Toyota at trial and in closing was to inflame the jury's passions by showing photographs of the other driver's vehicle, which had been torn apart by the Jaws of Life, and medics attending to occupants of the other vehicle.

All eight of the State's witnesses and Mr. Courter testified that he was involved in a car accident – the same information gleaned from these photographs in a non-prejudicial manner. The photographs of the Toyota were merely cumulative evidence of the undisputed testimony and only served to inflame the passions of the jury and encourage sympathy for the occupants of the other vehicle. The trial court erred by failing to exclude the photographs under ER 403. Mr. Courter's convictions should be reversed and the case remanded for a new trial.

2. The State failed to prove each element of the crime of DUI where there is insufficient evidence that Mr. Courter was under the influence of intoxicating liquor or affected by intoxicating liquor at the time of driving.

Mr. Courter's DUI conviction must be reversed because it is not supported by sufficient evidence that he was under the influence of or affected by intoxicating liquor at the time of the collision.

This Court reviews a challenge to the sufficiency of the evidence by analyzing whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the State and after drawing all reasonable inferences therefrom. *State v. Perebeynos*, 121 Wn. App. 189, 192-93, 87 P.3d 1216 (2004).

An inference is "a logical deduction or conclusion from an established fact." *Fannin v. Roe*, 62 Wn.2d 239, 242, 382 P.2d 264 (1963). But "[w]hen the inference of a[n] [essential] fact . . . has no evidentiary basis, . . . a jury, may not *speculate* as to the existence of the essential fact—the word 'speculate' being here used in the sense of reaching a conclusion by theorizing upon assumed factual premises outside of and beyond the scope of the evidence." *Brawley v. Esterly*, 267 S.W.2d 655, 659 (Mo. 1954); *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

A person is guilty of driving while under the influence of intoxicating liquor if he drives a vehicle while "under the influence of or affected by intoxicating liquor." RCW 46.61.502(c). A driver is affected by intoxication if his "ability to handle an automobile was lessened in an appreciable degree by the consumption of intoxicants." *State v. Wilhelm*, 78 Wn. App. 188, 193, 896 P.2d 105 (1995). The issue is not whether Mr. Courter drank alcohol. The issue is whether, at the time of the accident, Mr. Courter was under the influence of the amount of alcohol that he had consumed. *State v. Hurd*, 5 Wn.2d 308, 316, 105 P.2d 59 (1940). Circumstances must be proved and not assumed to establish this element. *State v. Donckers*, 200 Wn. 45, 93 P.2d 355 (1939).

The evidence does not support a finding that Mr. Courter was under the influence of alcohol at the time of the accident. The record shows Mr. Courter either (1) drank less than one beer right before driving, or (2) drank two beers between 2:00 p.m. and 6:00 p.m. At best, the record supports a finding that Mr. Courter drank a total of two beers before the collision. The drinking occurred over four hours (between 2:00 p.m. and 6:00 p.m.) It is not logical to conclude that Mr. Courter was under the influence of alcohol after consuming two beers in a four-hour period.

The fact that Mr. Courter had four unopened cans of beer in available to him out of an 18-pack in his Jeep does not support an inference that he consumed any particular quantity of alcohol on the night of the collision. It neither supports an inference that he consumed more than acknowledged by witnesses nor an inference that he was under the influence of the quantity consumed. *See Donaldson v. Donaldson*, 38 Wn.2d 748, 754, 231 P.2d 607 (1951).

The most that the presence of the box of beer established was the mere opportunity to drink to excess. "Opportunity alone does not rise to the dignity of proof that a defendant actually committed the act. The opportunity to commit a crime is not a substitute for proof of the commission of a crime." *State v. Uglem*, 68 Wn.2d 428, 438, 413 P.2d 643 (1966) (Rosellini, C.J. dissenting).

The odor of intoxicants on Mr. Courter's breath is insufficient evidence that Mr. Courter was driving under the influence, even when considering the evidence is a light most favorable to the State. The evidence showed Mr. Courter drank, at most, two beers before driving. It is not logical to infer from the presence of the odor of intoxicants Mr. Courter's breath that he drank more than two beers. The odor the officer detected could be present after consuming two beers. Thus, the combination of two beers consumed, the collision, and the odor of

intoxicants does not rise to the level of substantial evidence of driving under the influence of alcohol.

Mr. Courter's speech, language, and inability to follow directions after the collision are not substantial evidence that he was affected by alcohol at the time of the collision either. Mr. Courter received a head injury during the accident. That injury more reasonably explains his speech, language, and inability to follow directions than does his consumption of two beers.

The fact that Mr. Courter hid unopened beer cans is also insufficient evidence that he had been driving under the influence of alcohol. The jury could not have reached the conclusion that Mr. Courter was driving under the influence from this evidence without speculating that Mr. Courter drank more than two beers – a fact that was outside the scope of the evidence.

The only other evidence of Mr. Courter's ability to handle his automobile is the brief moment between coming around a bend and colliding with the Toyota that was crossing a poorly lit intersection at night. Mr. Courter had the right-of-way, and neither driver saw the other vehicle until impact because it was dark, there was a curve just before the intersection, and the intersection was poorly lit. None of this evidence suggests Mr. Courter's consumption of alcohol lessened his ability to

drive. It suggests the lighting, the nature of the road, and weather conditions affected his ability to drive.

Mr. Courter's refusal to submit to a BAC test was not evidence that could be relied on in this trial to establish that the defendant was under the influence of or affected by intoxicating liquor. It is generally true that a person's refusal to submit to a test of the alcohol concentration in the person's blood under RCW 46.20.308 "is admissible into evidence at a subsequent criminal trial…" to infer guilt or innocence of DUI. RCW 46.61.517; *State v. Long*, 113 Wn.2d 266, 272, 778 P.2d 1027 (1989). Here, however, the trial court specifically stated that is was only admitting Mr. Courter's refusal for the sole purpose of proving the State's special allegation. This evidence was not admitted to prove Mr. Courter's guilt of the underlying DUI charge.

Because Mr. Courter's refusal was not admitted as proof that he was under the influence of alcohol, and because the other evidence does not support a finding that Mr. Courter's driving was affected by intoxicating liquor, the State failed to produce sufficient evidence that Mr. Courter was guilty of DUI. His DUI conviction and the special verdict finding must be dismissed.

3. The State failed to produce sufficient evidence of Hit and Run – Injury– where the evidence shows Mr. Courter stopped and remained at the scene and provided required information.

The State also failed to produce sufficient evidence of the essential elements of Hit and Run - Injury. There was not sufficient evidence that Mr. Courter failed to immediately return to and remain at the scene where he gave the statutorily required information.

To convict Mr. Courter of Hit and Run - Injury, the State had to prove Mr. Courter failed to fulfill all of the following duties: (1) immediately stop his vehicle at or close to the scene of the accident, (2) immediately return to and remain at the scene, (3) give statutorily required information to the other driver, other passenger, or any person attending any vehicle, and (4) render reasonable assistance to anyone injured. CP 154; *compare* RCW 46.52.020. The evidence does not show Mr. Courter failed to fulfill all of these duties.

Mr. Courter immediately stopped his vehicle at the scene of the accident and gave the statutorily required information to an officer there. Considering Mr. Courter's own head injuries, and the fact that a nurse was on scene with paramedics soon thereafter to aid the other injured persons, Mr. Courter was not derelict in any duties to render reasonable assistance to those injured. And, while Mr. Courter wandered briefly on foot to the side of the road near some bushes and even down the road some paces, he

immediately returned to his vehicle where he remained until law enforcement approached him, took his information, and later arrested him.

This case is significantly distinguishable from those cases where our Courts of Appeal have found sufficient evidence to affirm Hit and Run convictions for drivers who actually left the scene of the accident. For example, a driver who knew he was involved in an accident with an officer and then drove away from the scene was guilty of Hit and Run. *State v. Silva*, 106 Wn. App. 586, 592-93, 24 P.3d 477, *review denied*, 145 Wn.2d 1012 (2001). Similarly, there was sufficient evidence to affirm a Hit and Run conviction where a driver struck a pedestrian, failed to stop his vehicle and drove away from the scene. *State v. Komoto*, 40 Wn. App. 200, 697 P.2d 1025 (1985).

Mr. Courter did not leave the accident scene in his brief walk on the roadway or to the nearby bushes. He apparently went a few feet from his car and relocated a box of beer, and he initially started to move as if he would be leaving the scene when he walked on the road. But, with urging from a witness to the accident, Mr. Courter did remain at the accident scene, talked to his son on the phone to reassure him that he was alright, and answered the officer's questions. These actions are not those of a fleeing driver who failed to "immediately return to and remain" at the scene of an accident. *C.f., Perebeynos*, 121 Wn. App. 189 (sufficient

evidence of Hit and Run where driver who was involved in an accident initially drove to work and then returned to the accident scene a couple hours later).

The Legislature designed the Hit and Run statute to punish *fleeing* drivers involved in accidents that result in either property damage or injury to some person. *Silva*, 106 Wn. App. 586. Mr. Courter was not a fleeing driver. A driver who stops and remains at or near the scene of an accident, like Mr. Courter, is not the type of driver the State intended to punish under the Hit and Run statute. Mr. Courter's Hit and Run conviction should be reversed because substantial evidence does not support it.

4. The trial court erred by failing to give the jury an instruction limiting the purpose of the refusal evidence.

The trial court failed to instruct the jury to consider the BAC refusal evidence for the limited purpose of proving the special refusal allegation.

"When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105. "[I]t is of vital importance that counsel have the benefit of the instruction to stress to the jury that the testimony was admitted only for a limited purpose and may

not be considered as evidence of the defendant's guilt." *State v. Freeburg*, 105 Wn. App. 492, 502 n.22, 20 P.3d 984 (2001) (quoting *State v. Aaron,* 57 Wn. App. 277, 281, 787 P.2d 949 (1990)).

Defense counsel moved to exclude the BAC refusal evidence in its entirety. The court denied defense counsel's motion, admitted the evidence for the limited purpose of proving the special refusal allegation (but not guilt), and, *sua sponte*, said it would issue a limiting instruction. But it never issued the limiting instruction. Without the limiting instruction, the jury was free to consider the evidence as proof of Mr. Courter's guilt.

Ordinarily, juries can infer guilt of DUI from refusal of a blood test. *Long*, 113 Wn.2d at 272. But, given the court's evidentiary ruling here, the law of the case must provide otherwise. ER 105. The court's failure to instruct the jury consistent with its own evidentiary ruling prejudiced Mr. Courter because, aside from the circumstantial BAC refusal, there was insufficient evidence to establish that he was under the influence of alcohol at the time of the accident. Mr. Courter's conviction should be reversed.

5. Trial counsel rendered ineffective assistance of counsel by failing to request an instruction limiting the purpose of the refusal evidence.

Alternatively, defense counsel rendered ineffective assistance by failing to request and propose a limiting instruction on the BAC refusal evidence. "A party who fails to ask for a limiting instruction waives any argument on appeal that the trial court should have given the instruction." *State v. Stein*, 140 Wn. App. 43, 70, 165 P.3d 16, 30 (2007).

To prevail on a claim of ineffective assistance of counsel, Mr. Courter must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient performance is performance that falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). Counsel's conduct is not deficient if it "can be characterized as legitimate trial strategy or tactics." *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Here, trial counsel did not request or propose a limiting instruction on the BAC refusal but instead moved to exclude the evidence in its entirety. The court denied defense counsel's motion and admitted the evidence of refusal only as proof of the refusal enhancement and not as proof of Mr. Courter's guilt or innocence of DUI. Although the court said, *sua sponte*, it would issue a limiting instruction, it did not issue such an instruction and trial counsel did not remind the court to issue the instruction. Under these circumstances, defense counsel's failure to request or propose the limiting instruction was deficient.

Whether or not Mr. Courter was under the influence of alcohol at the time of the collision was the crucial issue on the DUI charge. The fact that BAC refusals ordinarily can be used to infer guilt of DUI demonstrates how important such a limiting instruction would have been. There was no legitimate tactical reason for trial counsel's failure to seek a limiting instruction when the court had already agreed to give it.

Trial counsel was clearly deficient in this instance because under ER 105, Mr. Courter was entitled to such a limiting instruction. Mr. Courter was prejudiced by this deficient performance because, had counsel requested the instruction, he would have received it. And the jury would have been clearly instructed on how to use the BAC refusal evidence, very possibly finding Mr. Courter not guilty of DUI. This is particularly the

case because the jury was required to find beyond a reasonable doubt that Mr. Courter was under the influence of alcohol at the time of the collision. The only significant evidence as to this element comes from evidence that Mr. Courter drank up to two beers over a four hour period preceding the collision. Without the limiting instruction, the jury was allowed to use the BAC refusal evidence to bolster the drinking evidence. This is more than enough prejudice to undermine confidence in the jury's verdict. *State v. Powell*, 150 Wn. App. 139, 153, 206 P.3d 703 (2009).

6. The prosecutor committed misconduct during closing argument by arguing that Mr. Courter's refusal was evidence that he was guilty of DUI.

The prosecutor's comment that Mr. Courter's refusal was proof that he was guilty of DUI is prejudicial error.

To establish prosecutorial misconduct during closing argument, a defendant must prove challenged comments are both improper and prejudicial. *State v. Hughes*, 118 Wn. App. 713, 722, 77 P.3d 681 (2003). A comment is prejudicial where there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Grier*, 168 Wn. App. 635, 652, 278 P.3d 225 (2012). Where no objection is made to the remarks, the reviewability of the alleged prosecutorial misconduct depends on whether the prosecutor's conduct was so flagrant and ill-intentioned as to create prejudice that could not be negated by a curative instruction. *Id*. "The

prosecutor's comments are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given." *State v. Corbett*, 158 Wn. App. 576, 594-95, 242 P.3d 52 (2010).

The only contested fact on the DUI charge was whether Mr. Courter was under the influence of or affected by intoxicating liquor at the time he was driving his motor vehicle. The prosecutor argued in closing that the State proved Mr. Courter was under the influence of or affected by intoxicating liquor because of (1) Mr. Courter's inconsistent stories, (2) witness observations of Mr. Courter's speech, language, and inability to follow directions, (3) the fact Mr. Courter hid unopened beer cans, and (4) Mr. Courter's refusal to take a blood test. 3RP 198-200.

Ordinarily, a prosecutor has wide latitude to draw and express reasonable inferences from the evidence. *Hughes*, 118 Wn. App. 727. Here, however, the trial court specifically limited the evidence of Mr. Courter's refusal for the narrow purpose of proving the refusal enhancement. The court did not admit the refusal as proof of Mr. Courter's consciousness of his guilt of DUI. The court unequivocally stated that it would give the jury a limiting instruction if it decided to admit the refusal as proof of guilt, but it failed to issue a limiting instruction. The prosecutor flagrantly disregarded the court's evidentiary

ruling and argued in closing that Mr. Courter refused to take the blood test because he knew he had been driving under the influence of alcohol.

Under the totality of the circumstances, the prosecutor's argument was so flagrant and ill-intentioned that a curative instruction could not have negated the prejudice it created. Without the refusal argument, it is likely that the jury would not have found Mr. Courter guilty of DUI. There is a substantial likelihood that the jury would have found Mr. Courter's injuries from the collision explained his inconsistent stories, his speech and language, his inability to follow directions, and his odd behavior in hiding unopened beer cans. Mr. Courter's BAC refusal, however, could not be negated by his injuries. The jury would conclude that Mr. Courter either guiltily refused the BAC test or innocently complied. Because the jury found Mr. Courter refused the BAC test, the prosecutor's argument that the refusal proved Mr. Courter's consciousness of guilt of DUI very likely affected the jury's verdict on the DUI charge. Mr. Courter's DUI conviction and enhancement should be reversed.

F. CONCLUSION

Based on the arguments set forth above, Mr. Courter's convictions should be reversed.

Respectfully submitted this 13th day of March, 2014.

/s/______________________________
Hailey L. Landrus, WSBA #39432
Attorney for Appellant

/s/______________________________
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

Nichols Law Firm, PLLC
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 31890-7-III
vs.	)	No. 12-1-00672-8
	)	
JAMES COURTER	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
______________________________	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 13, 2014, I mailed a true and correct copy of the Appellant's opening brief to:

James Douglas Courter
6743 Eagle Drive NE
Moses Lake, WA 98837-9158

Having obtained prior permission from Grant County Prosecutor's Office, I also served a true and correct copy of the same on D Angus Lee by email at kburns@co.grant.wa.us by e-mail.

Dated this 13th day of March, 2014.

/s/ Kristina M. Nichols___________
Kristina M. Nichols, WSBA #35918
Nichols Law Firm PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com