NO. 45955-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH HUDSON
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Mark McCauley, Judge

BRIEF OF APPELLANT

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B. ASSIGNMENTS OF ERROR

1. The trial court violated the law of the case doctrine by admitting evidence suppressed by this Court following appeal of Hudson's first trial and conviction.

2. Based on Hudson responding "no" to a question asking if anyone was injured immediately following the accident, the state failed to prove beyond a reasonable doubt the aggravating factor for an exceptional sentence, egregious lack of remorse.

Issues Presented on Appeal

1. Did the trial court violate the law of the case doctrine by admitting evidence suppressed by this Court following appeal of Hudson's first trial and conviction?

2. Did the state fail to prove beyond a reasonable doubt the aggravating factor for an exceptional sentence, egregious lack of remorse based on Hudson responding "no" to a question asking if anyone was injured, immediately following the accident?

B. STATEMENT OF THE CASE

Hudson was charged and convicted by a jury of vehicular assault and vehicular homicide committed while intoxicated and while driving in a reckless manner and after committing the crime

exhibited an egregious lack of remorse. RP 859-863; CP 20-21, 86-91. This timely appeal follows. CP__

Close to 1:00A.M., Ken Grover heard what sounded like a car crash near his home. RP 88-89, 91. Grover called down to the road to ask if any one was hurt and heard a "no" in response. RP 89-90. Grover believed the voice sounded male, but could not identify the voice. RP 90, 105. Grover immediately got dressed and went to investigate to determine if anyone needed help. RP 90. Five minutes elapsed while he was getting dressed and looking for a flashlight and his cell phone. RP 101, 104. When Grover arrived on scene five minutes after hearing the crash, he saw a man later identified as Leon Butler, climbing out of the rear driver's side window. RP 91, 101. Grover called 911 as soon as he saw Butler getting out of the car. RP 96.

Butler was hollering frantically that two people were missing. RP 92. Butler fell to the ground and Grover heard nearby in the brush, a person gasping in the last moments of his life. RP 92-95. A woman who was lying on the ground got up and then collapsed without saying anything to Grover. RP 97.

Tommy Underwood died by the time the medics arrived, 20-

30 minutes after receiving their dispatch. RP 108. Leon Butler's testimony was introduced through a transcript from the first trial in this case. 1RP 3-19. Butler was Tommy Underwood's cousin and both were drinking at the Seagate Bar before the accident with Nancy Underwood, Leon Butler, Joe Hudson and Paula Charles, who were also drinking. RP 4. David Pickernell, Nancy Underwood's boyfriend had 6-9 beers during the evening with Tommy Underwood. RP 630-631.

Paula Charles, Hudson's girlfriend had enough to drink that she could not remember who drove the car away from the Seagate and did not remember the accident. RP 402-406. The crime lab toxicologist registered Underwood's blood alcohol level at .28. RP 558-559. Sergeant Ramirez, an officer who arrived at the crash site, determined that Leon Butler and the woman at the scene had been drinking. RP 132.

According to Nancy Underwood, at the scene, Charles told her that Hudson was the driver, but Charles told Presba that she did not remember who was driving. RP 408-409, 522-523. According to Presba, Charles told him that Hudson was the driver but Charles also would not provide a written statement to this effect and Presba

conceded that intoxication can effect perception. RP 414, 419, 428. Presba admitted that twice while under oath, Charles said that she could not remember who was driving when the accident occurred and never said under oath that Hudson was the driver. RP 427-428. Butler and Charles were taken to the hospital to be treated and for a statutory blood draw to determine their alcohol level. RP 588, 591. Both were charged with vehicular assault and vehicular homicide. RP 586.

Leon Butler's prior trial testimony indicated that he, Tommy Underwood and Paula Charles got into a car with Hudson driving after all had been drinking. RP 5. During trial, Butler placed Hudson in the driver's seat, Charles in the front passenger seat, Underwood behind the driver and himself behind the front passenger. 1RP 5. In the hospital, Butler told Mullins that Tommy Underwood was the driver, but during trial, Butler denied telling trooper Mullins that Hudson was not the driver. . RP 743-44; 1RP 19.

The state's accident reconstructionist placed Hudson in the driver's seat, Charles in the front passenger seat and Underwood and Butler in the back seat. RP 312, 315, 317, 318. The defense accident reconstructionist explained that while it was possible that this was the

seating configuration, there was insufficient evidence to render an opinion that this was accurate; and Presba's opinion was based on an incorrect mathematical formula. RP 644, 660, 687, 689, 700.

Presba testified that although he did not place any notes in his police report, Charles told Presba that she could not remember many parts of the evening involving the accident. RP 414.

a. Egregious Lack of Remorse.

Even though Grover could not identify the male voice he heard say "no" when he called out asking if anyone was hurt, Grover testified that when he later met Butler, he was certain the voice was not Butler's. RP 90, 96, 105. Based on this information, the state alleged and the jury considered the voice to be Hudson's and imposed an exceptional sentence based on egregious lack of remorse for Hudson allegedly not informing Grover that there were injured people at the crash site. RP 90, 96. Grover testified that he did not delay based on the response to his question, and could not have arrived at the crash site sooner. RP 90, 96. There was police testimony that Hudson may have been disoriented. RP 227-228

The jury found Hudson guilty as charged of vehicular assault and vehicular homicide committed while intoxicated and while driving

in a reckless manner and after committing the crime exhibited an egregious lack of remorse. RP 859-863. The sole evidence in support of egregious lack of remorse was limited to Grover testifying that immediately after the accident, he heard an unidentified man respond "no" when asked if anyone was hurt. RP 82, 84. The court entered findings and conclusions that simply stated the jury answered yes to the special verdict regarding the aggravating factor, but no facts were noted in the findings and conclusions to support the jury's verdict. CP 27-29.

b. Court of Appeals Unpublished Opinion Suppressing Evidence.

On May 30, 2012, the Court of Appeals reversed Hudson's conviction because the police arrested Hudson without probable cause and illegally obtained evidence therefrom. CP 16-18; Exhibit A-1; RP 73, 199-200. (*State v. Hudson,* 168 Wn.App *Unpublished Opinion*. 1023). This Court suppressed the following evidence obtained from the "fruit of Hudson's" illegal arrest:

> (1) Hudson's evasive and inconsistent statements to Trooper Blankenship, (2) his blood-alcohol level, (3) his admission of guilt and statement that his stomach hurt to Detective Presba, (4) photographs of and testimony about Hudson's injuries, and (5) a recording of Hudson's phone call from the jail.

Unpublished Opinion at page 4-5. The trial court ruled that all evidence suppressed by the Court of Appeals May 2012 decision was to be suppressed in the present case. RP 73, 199-200.

Mullins and Ramirez were present along with trooper Blankenship when Hudson arrived on scene. RP 207. In violation of this Court's order on remand, the trial court admitted the following suppressed evidence. Blankenship asked Hudson to identify himself, which he did. RP 207-208. Blankenship described Hudson as being highly intoxicated. RP 208. First, Blankenship testified that Hudson had brush in his hair but did not appear to be injured. RP 208. Second. as Blankenship was escorting Hudson to the back of the patrol car he asked Hudson if he was injured, to which Hudson responded "no". RP 209-210, 216. Third, after Blankenship placed Hudson in the back of his patrol car, Hudson said that his back hurt. RP 209-210, 217. Fourth, the prosecutor also asked Blankenship if Hudson had any visible injuries or bleeding, which drew objections that were sustained as violating the motions in limine. RP 208-209.

When given the opportunity, the defense moved for a mistrial based on the officer's references to Hudson's equivocation and

injuries which were the suppressed by this Court in Court of Appeals Unpublished Opinion in *State v. Hudson*, issued May 30, 2012). RP 73; 209-211; Exhibit A-1.

The defense argued the law of the case and argued that Hudson was in custody when placed in the patrol car and the state argued he was not in custody until informed he was under arrest a few minutes later. RP 211-218. The trial court denied the motion for a mistrial, and permitted Hudson's comments and the police testimony regarding Hudson's injuries and equivocation. RP 217-218.

C. ARGUMENTS

1. THE TRIAL COURT VIOLATED THE LAW OF THE CASE DOCTRINE BY ADMITTING EVIDENCE SUPPRESSED BY THE COURT OF APPEALS.

The trial court ordered in limine that all evidence previously suppressed by this court was to be suppressed during trial. RP 73, 199-200. (May 30, 2012 *State v. Hudson*, 40915-3-II Unpublished Opinion). Exhibit A-1. Later during trial, the trial court permitted the suppressed statements ruling that the Court of Appeals did not mean to suppress the statements made by Hudson regarding his equivocation or injuries or any statements made prior to formal arrest. RP 211-212, 216-218.

The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation. *State v. Schwab, Jr.* 163 Wn.2d 664, 762, 185 P.3d 1151 (2007); *Roberson v. Perez*, 156 Wn.2d 33, 41 P.3d 844 (2007); *Cook v. Brateng*, 180 Wn.App. 368, 373, 321 P.3d 1255 (2014). The purpose of the doctrine "seeks to promote finality and efficiency in the judicial process," *Schwab*, 163 Wn.2d at 672,(*quoting*, *Roberson*, 156 Wn.2d at 41.

For purposes of the law of the case doctrine both of Hudson's trials were the same litigation because: (1) the charges were the same; (2) the state presented the same evidence in both trials; and (3) Hudson's second trial commenced following this Court's order on remand.

Here, in relevant part, the law of the case doctrine prevented the trial court from reconsidering this Court's May 30, 2012 opinion directing suppression of the following evidence on remand: (1) Hudson's evasive and inconsistent statements to Trooper Blankenship, (2) his statement that his stomach hurt to Detective Presba, and (3) photographs of and testimony about Hudson's injuries. Unpublished Opinion at page 5.

The trial court disregarded the law of the case and instead permitted the state to introduce evidence that: (1) Hudson's evasive statements to Trooper Blankenship about being injured; (2) Blankenship's observations of Hudson's injuries and appearance; and (3) Hudson's statements about injuries made to Blankenship after he was placed in the patrol car, but before he was formally arrested. RP 209-210, 216-217.

In violation of the Court of Appeals opinion, Ramirez testified that he got a good look at Hudson when he appeared on scene and he did not look injured but he sounded intoxicated. RP 146. In violation of the Court of Appeals opinion, Presba testified that based on his review of the DNA, he could exclude Charles, Underwood and Butler as the drivers. RP 295. This testimony implies that Presba also considered Hudson's DNA which was suppressed because simply eliminating the others' DNA would not lead to the conclusion that Hudson was the driver unless there was some DNA placing Hudson in the driver's seat. RP 323.

Also in violation of the Court of Appeals opinion, Trooper Blankenship testified that he asked Hudson if he was injured to which Hudson stated that his back was sore 208-210. Blankenship testified

that Hudson was in custody but not yet under arrest when he asked Hudson about his injuries. Minutes later, Ramirez, ordered Blankenship to formally arrest Hudson. RP 214-215. After the arrest, Hudson stated again that his back was sore. RP 216-217. Hudson also said he was not in the collision and that the "female" thought that he, Hudson, was the driver. RP 220-221, 225. These statements were the evasive and inconsistent statements this Court suppressed.

Here, without authority and contrary to this Court's directive, the trial court permitted admission of evidence suppressed by this Court. The trial court's failure to adhere to this Court ruling was an error at law. *Schwab, Jr.* 163 Wn.2d 664, 762; RAP 2.5. To carry out this Court's 2012 directive in its prior opinion, the current conviction must be reversed and the matter remanded for a new trial in which the evidence suppressed by this Court remains suppressed at trial.

a. Error Not Harmless.

In Washington, evidence obtained as a result of an arrest without probable cause requires suppression of the unconstitutionally obtained evidence. *State v. Doughty*, 170 Wn.2d 57, 65, 239 P.3d 573 (2010). Admission of the illegally obtained evidence is not harmless error unless the reviewing Court is convinced beyond a

reasonable doubt that the error did not affect the verdict. *State v. Brousseau*, 172 Wn.2d 331, 363, 259 P.3d 209 (2011).

An error is only harmless beyond a reasonable doubt if the overwhelming untainted evidence necessarily leads to a finding of guilt. *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005); *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). In the unpublished opinion this Court considered the same evidence and determined that the overwhelming untainted evidence did not necessarily lead to a finding of guilt. (Unpublished opinion at page 5).

The admissible evidence the State presented in both trials to show Hudson's guilt included: (1) Butler's testimony that Hudson was the driver; (2) Butler told Mullins that Underwood was the driver; (3) Hudson's blood on the inside driver's side door, and (4) Detective Presba's accident reconstruction concluding that Hudson was the driver. . RP 427-428, 743-44; 1RP 19; Id. Hudson also could have exited the vehicle through the driver's side door without having been the driver, and Hudson presented his own accident reconstruction specialist who disagreed with Detective Presba's conclusion.

This evidence undermined the state's case and consequently, the untainted evidence that Hudson was the driver was not

overwhelming. Accordingly, the admission of evidence obtained after Hudson's arrest was not harmless beyond a reasonable doubt, which requires reversal and for a new trial. *Davis*, 154 Wn.2d 291, 305.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE AGGRAVATING FACTOR EGREGIOUS LACK OF REMORSE.

In this case there was insufficient evidence to support the aggravating factor egregious lack of remorse based on Hudson allegedly answering "no" when asked seconds after a crash if anyone was hurt.

The trial court may impose an exceptional sentence if it finds that there are substantial and compelling reasons justifying an exceptional sentence. RCW 9.94A.535. Aggravating factors must be determined by a jury under the Sixth Amendment. RCW 9.94A.537; *State v. Borboa,* 157 Wn.2d 108, 118, 135 P.3d 469 (2006), *citing*, *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

The reviewing Court will reverse an exceptional sentence only if (1) the record does not support the sentencing court's reasons, (2) the reasons do not justify an exceptional sentence for this offense, or

(3) the sentence was 'clearly excessive.' RCW 9.94A.585(4).

A special verdict finding the existence of an aggravating circumstance is reviewed under the sufficiency of the evidence standard. *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144 (2011); *State v. Stubbs,* 170 Wn.2d 143 117, 123, 240 P.3d 143 (2010). Under this standard, the reviewing Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *Chanthabouly*, 164 Wn. App. 104, 142-43; *citing*, *State v. Yates,* 161 Wn.2d 714, 752, 168 P.3d 359 (2007); RCW 9.94A.537(3).

b. Egregious Lack of Remorse

RCW 9.94A.535(3)(q) is the controlling statute required to find Hudson "demonstrated or displayed an egregious lack of remorse." RCW 9.94A.535(3)(q). Hudson argues that the evidence failed to demonstrate that his actions rose to the legally required level of egregiousness. In *State v. Ross,* 71 Wn.App. 556, 563–64, 861 P.2d 473 (1993), the court found the State supported the egregious lack of remorse factor by showing that Mr. Ross continued to blame the justice system for his crimes and that his statement that he was sorry

was not credible. *Ross,* 71 Wn.App. at 563–64. "Whether a sufficient quantity or quality of remorse is present in any case depends on the facts." *Ross,* 71 Wn.App. at 563.

In *State v. Erickson,* 108 Wn.App. 732, 739–40, 33 P.3d 85 (2001), the Court upheld the defendant's lack of remorse where he bragged and laughed about the murder, thought the killing was funny, joked about being on television for the murder, and told police he felt no remorse. *Erickson,* 108 Wn.App. at 739-40.

In *State v. Wood,* 57 Wn.App. 792, 795, 790 P.2d 220 (1990), the Court upheld the egregious conduct when a woman joked with her husband's killer about sounds her husband made after the killer shot him and went to meet a boyfriend's family 10 days after her husband's death. *Wood,* 57 Wn.App. at 795.

In *State v. Zigan* 166 Wn.App. 597, 270 P.3d 625, *review denied* 174 Wn.2d 1014, 281 P.3d 688 (2012), the state proved the aggravating factor of egregious lack of remorse beyond a reasonable doubt following conviction for vehicular homicide where the defendant's vehicle struck the victim, who was riding a motorcycle with her husband, and killed her instantly. Moments after victim's wife died, the defendant, while laughing and smiling, asked the victim's

husband if he was "ready to bleed?" *Zigan* 166 Wn.App. at 603.

Here, seconds after a crash when Hudson was likely disoriented and highly intoxicated, he allegedly answered "no" to the question asking if anyone was hurt. Hudson returned to the scene later but denied involvement. Notwithstanding the fact that Hudson may have said Hudson said "no", this does not compare to the sadistic conduct in *Erickson*, *Ross, Wood* or *Zigan*.

In these cases the defendants were overtly cruel and took pleasure in their crimes and in inflicting more suffering. Hudson did not brag, joke or make fun of anyone, and he did not blame the criminal justice system. Rather, Hudson left the scene, likely disoriented, intoxicated and afraid, and perhaps said "no" in this state of mind. This poor judgment does not demonstrate beyond a reasonable doubt, an egregious lack of remorse. RP 226-228.

b. Remand for Reversal of Exceptional Sentence.

When an exceptional sentence "is based upon reasons insufficient to justify an exceptional sentence ... the matter must be remanded for resentencing within the standard range." *State v. Ferguson,* 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). However, if the trial court expresses its intent to give the same exceptional sentence

of any single valid aggravating factor, then remand is unnecessary. *State v. Jackson,* 150 Wn2d 251, 276, 76 P.3d 217 (2003).

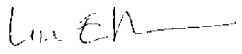
Here the trial court based its exceptional sentence on the single aggravating fact egregious lack of remorse, for which there is insufficient evidence, therefore remand is necessary to vacate the exceptional sentence. RP 465. *Jackson,* 150 Wn2d at 276; *State v. Halgren*, 137 Wn.2d 340, 347, 971 P.2d 512 (1999) (*quoting*, *State v. Barnes*, 117 Wn.2d 701, 711-12, 818 P.2d 1088 (1991).

D. CONCLUSION

Hudson respectfully requests this Court reverse his conviction and remand for a new trial and enter a finding that the state did not prove the aggravating fact egregious lack of remorse. If this Court does not remand for a new trial, Hudson requests this Court vacate his exceptional sentence.

DATED this 12th day of December 2014.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor Gerald Fuller Gfuller@co.grays-harbor.wa.us and JWalker@co.grays-harbor.wa.us, and Joseph Hudson DOC# 341716 8 Coyote Ridge Corrections Center Post Office Box 769 Connell, WA 99326-0769, a true copy of the document to which this certificate is affixed, On December 12, 2014. Service was made to the prosecutor electronically and via U.S. Postal to Hudson.

Lise Ellner

Signature

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