NO. 46016-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICARDO RAMIREZ DIAZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 13-1-04245-4

BRIEF OF RESPONDENT

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6. Where there was no error in the evidence admitted or defense counsel's performance, has the defendant met his burden of demonstrating cumulative error?

B. STATEMENT OF THE CASE.

1. PROCEDURE.

On November 5, 2013, Appellant Ricardo Ramirez Diaz ("defendant") was charged with felony driving under the influence and third degree malicious mischief. CP 1-2. At trial he was convicted of the driving under the influence charge. CP 64. The malicious mischief count was dismissed when the state was unable to present evidence on that charge and elected to file an Amended Information deleting that count. CP 43. 3 RP 469.

Trial commenced on Monday, February 10, 2014. 1 RP 3. The state called four deputy sheriffs, one state patrol trooper and two civilian witnesses. 2 RP 136. 3 RP 350. During the second day of testimony the trial court held a CrR 3.5 hearing immediately before the trooper's testimony. 3 RP 358. The court ruled that pre-*Miranda* statements by the defendant were not admissible but that post *Miranda* statements were admissible. 3 RP 398.

On February 13, 2014, the defendant was convicted of the felony driving under the influence charge. CP 64. The trial court held a sentencing hearing on March 14, 2014, and sentenced the defendant to 33 months in prison, the low end of the standard range. 5 RP 11. This appeal was timely filed the same day. CP 88-89.

2. FACTS.

The incidents leading to the charges in this case occurred on November 4, 2013. Just after midnight, Deputies Shane Masko and Shane Pacheos responded separately to a domestic disturbance call at a residence located at 21618 Quiet Water Loop in the Lake Tapps area. 2 RP 175. The initial report via dispatch was that the suspect, the defendant, had left the scene in a vehicle, and that the vehicle had collided with a power pole a short distance from the residence. 2 RP 176, 183, 212-214.

Deputy Pacheos made contact with the disturbance victims as they were leaving the residence. From them he learned the defendant's identity and that he had fled from the Quiet Water Loop residence. 2 RP 212. He directed the victims return to the residence to be interviewed by other officers. The disturbance investigation was completed by Deputy Masko. 2 RP 206-213. He found that property damage consisting of a vacuum cleaner having been thrown into a bathroom door had been done at the residence. 2 RP 180. He directed the other deputies to detain the defendant.

The collision scene was approximately a mile and a half from 21618 Quiet Water Loop and on the only roadway leading to the residence. 2 RP 183. 2 RP 205-06. 2 RP 186-190. The defendant was

found at the scene of the collision down a ravine by residents Gary Allen and John Fowler. 2 RP 235, 244. 2 RP 270-71. Both Mr. Allen and Mr. Fowler observed that the defendant appeared to have been the driver and was under the influence of alcohol. 2 RP 247-48. 2 RP 272-75. Once the officers arrived, they took custody of the defendant. He was initially detained based on Deputy Masko's disturbance investigation. 2 RP 184-85. The deputies testified about the defendant's physical condition, behavior and demeanor related to intoxication. 2 RP 188. During the collision investigation, a state patrol trooper was called to conduct a driving under the influence investigation. 2 RP 216-18.

The driving under the influence investigation was completed by Trooper Brett Robertson. 3 RP 359. He initially sought to obtain a breath sample via the implied consent law. 3 RP 367-68. During the implied consent procedure the defendant indicated that he wanted to talk to a lawyer. 3 RP 368-69. Trooper Robertson responded to the request by attempting to contact the defendant's lawyer and offering to contact the public defender. 3 RP 367-69, 371-72. The defendant declined the public defender and refused the breath test. 3 RP 377-78. As a result, Trooper Robertson obtained a blood search warrant. 3 RP 424. The blood test results were admitted by stipulation and showed that the defendant's blood alcohol content was .26. 3 RP 425.

All of the deputy sheriffs testified about facts related to the defendant having been the driver involved in the collision. Their testimony included facts related to the defendant's injuries from the collision, his having hidden in the nearby ravine, that he was missing a shoe that was found in the driver's seat of the suspect vehicle, and that he was the registered owner of the wrecked vehicle. The fact testimony was accompanied by testimony from the primary officer who inferred that the defendant was the driver:

> Q. Based off of what you observed with regards to, I guess, the shoe, the air bag, the seat belt, what was your conclusion, based off the information that you had at that time, after taking the pictures, after seeing the whole scene with regards to the collision site of who the driver was?
>
> A. I felt it was Mr. Ricardo.
> 2 RP 340

None of the deputies testified to the jury about the content of the defendant's statements. During the CrR 3.5 hearing, the court ruled that a statement repeated by the defendant several times was admissible: "What I want to say is I fucked up." 3 RP 402. That statement, an admission of guilt, was not included in the testimony to the jury. Instead, the prosecutor and deputies limited the testimony to the jury to observations that the defendant's speech was slurred and other physical symptoms of intoxication. 2 RP 187-88.

C. ARGUMENT.

1. AN OFFICER'S TESTIMONY ABOUT APPEARANCE, BEHAVIOR AND DEMEANOR WITHOUT REFERENCE TO SILENCE IS NOT A COMMENT ON THE RIGHT TO REMAIN SILENT.

Post-arrest silence by a criminal defendant may not be used as substantive evidence of guilt. ***State v. Easter***, 130 Wn.2d 228, 236-37, 922 P.2d 1285(1996). "A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." ***State v. Lewis***, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996), citing ***Tortolito v. State***, 901 P.2d 387, 391(Wyo.1995). A mere reference to silence that is not a comment thereon is not reversible error absent a showing of prejudice. *Id.*

The standard of review for an alleged comment on an accused's silence depends on whether the alleged comment was direct or indirect. ***State v. Romero***, 113 Wn. App. 779, 790–91, 54 P.3d 1255 (2002). A direct comment - such as where an officer testified that he read the defendant ***Miranda*** rights and the defendant chose not to waive them and did not give a statement - is reviewed using a harmless error beyond a reasonable doubt standard. ***State v. Pottorff***, 138 Wn. App. 343, 346-47, 156 P.3d 955(2007) citing ***State v. Romero***, *supra* at 790. An indirect

comment - such as where an officer references a comment or action that could be inferred at an exercise of the right to remain silent - is reviewed under the lower standard of, whether a reasonable probability existed that the error affected the outcome of the trial. *Id.* at 347, citing ***State v. Romero***, 113 Wn. App. at 791-92.

In this case, there was no comment of any kind on the defendant's right to remain silent. None of the officers testified directly or indirectly that the defendant had exercised his right to remain silent due to consciousness of guilt. Nor did the prosecutor argue such an inference. The most that can be said is that while describing the defendant's appearance, behavior and demeanor, two of the officers, Masko and Pacheos, in non-responsive answers to questions about the defendant's demeanor, made a passing reference to the defendant not answering background questions:

> Q And when you came into contact with Mr. Ramirez Diaz, were you able to make any observations about the defendant?
>
> A Yes. He was very hard to speak to. I asked him for --I needed his basic information, his full name and his date of birth for my report, and he didn't want to talk to me about anything.
>
> Q Let's not get into any of Mr. Ramirez' statements. I want to ask you some background questions about the observations.
> 2 RP 187.

The prosecutor cut off the non-responsive answer from Deputy Masko. The prosecutor also immediately turned the officer's testimony back to the defendant's demeanor:

> Q When you came into contact with Mr. Ramirez Diaz, were you able to observe any signs related to driving under the influence?
>
> A His speech was slurred.
> 2 RP 188.

A similar non responsive exchange took place during the testimony of Deputy Pacheos:

> Q. When you arrived on site at the collision site, what did you observe?
>
> A A grey Tahoe had collided with a power pole. Mr. Ramirez was standing outside the vehicle, bloody face. Seemed a bit disoriented. Wasn't extremely cooperative with us while we asked him some questions.
>
> Q Okay. Let me stop you and ask you, you've been referring to Mr. Ramirez Diaz, and that was the person that you understood, based off of your dispatch, that was initially involved with the incident at the Quiet Water Loop address; is that correct?
> 2 RP 213,

The defendant did not object to the non-responsive testimony from the two deputies and did not ask that it be stricken. 2 RP 187, 213. This is for good reason, it was not an improper comment on the right to remain silent. This testimony is similar to the testimony in ***State v. Lewis***, *supra.*

In ***Lewis,*** a sexual assault detective testified about a telephone call with the defendant. During that phone call, the detective stated, directly, "I told him—my only other conversation was that if he was innocent he should just come in and talk to me about it." ***State v. Lewis***, 130 Wn.2d at 703. The defendant did not come in for an interview. In reviewing an alleged Fifth Amendment violation, the ***Lewis*** court held:

> The officer did not make any statement to the jury that Lewis's silence was any proof of guilt. The only thing the detective told the jury is that the defendant told him that "those women were just at my apartment and nothing happened, and they were both just cokeheads," and that "[Lewis] was trying to help them is what he said." Report of Proceedings at 163. This is consistent with Lewis's later testimony. Unlike the officer's testimony in the ***Easter*** case, which included the officer's opinion that Mr. Easter was hiding his guilt with his silence, the officer in this case made no comment on Lewis's silence. The only statement he made was that Lewis had told him he was innocent.

State v. Lewis, 130 Wn.2d at 237-38.

The testimony from deputies Masko and Pacheos did not include any statement to the jury that the defendant's silence was proof of guilt. At worst, the testimony was a reference to the officers having encountered difficulty in report writing because they were not able to get the defendant's biographical information. Biographical questions are permitted even where a defendant expressly asserts his rights. ***State v. Bradley,*** 105 Wn.2d 898, 904, 719 P.2d 546(1986)("[O]fficers can ask

such questions even after the defendant invokes his rights to remain silent and to consult an attorney.") The brief references by the officers in this case, cutoff as they were immediately by the prosecutor, are a far cry from a statement to the jury that the defendant's silence was proof of guilt. ***State v. Lewis***, 130 Wn.2d at 706-07.

There is some irony in the claim that there was an infringement of the defendant's Fifth Amendment right. The trial court held a CrR 3.5 hearing just before the testimony of the trooper who processed the defendant for driving under the influence. 3 RP 358. The court ruled that a statement from the defendant that he repeated several times was admissible: "What I want to say is I fucked up." 3 RP 402. Although that statement was ruled admissible, the prosecutor never introduced it to the jury. As a consequence, the jury did not hear that the defendant voluntarily broke his silence and admitted his culpability. Whatever may be said of the testimony of Masko and Pacheos, it would not be correct to say that the defendant actually remained silent.

Assuming for the sake of argument that the non-responsive testimony from the two deputies was in fact a comment on the right to remain silent, it could hardly be anything but harmless error. There was an abundance of evidence that the defendant was the driver and that he was heavily intoxicated. As to intoxication, the unchallenged, un-objected

to, stipulated blood test result showed that the defendant was more than three times over the legal limit. 3 RP 424. This was confirmed by observations from the officers and the neighbors who had contact with the defendant that, "he was pretty well sauced up, drunk." 2 RP 247-48, 276.

As to driving, (1) the defendant was found hiding in a ravine within 60 feet from the crashed vehicle, 2 RP 246, (2) the defendant was missing a shoe that was found on the driver's side floorboard of the vehicle, 2 RP 275, 308, (3) the vehicle was registered to the defendant and he was reported to have fled the scene of the original disturbance call in the vehicle minutes before the collision, 2 RP 213, 294, 297, 300, (4) the defendant had injuries consistent with the deployed driver's side airbag and the driver's side seatbelt, 2 RP 214-16, 225-27, 306-10, 340, and (5) no one other than the defendant was found in the vicinity of the vehicle by the neighbors who testified that they went out to the crash moments after it occurred, 2 RP 214, 238, 242-46. In light of the overwhelming evidence, no matter what standard of review is deployed, the alleged comment on silence does not warrant reversal.

2. TESTIMONY ABOUT FACTS AND INFERENCES CONCERNING THE DEFENDANT'S DRIVING WAS NOT IMPROPER LAY OPINION, NOR WAS THE ISSUE PRESERVED IN THE ABSENCE ANY OBJECTION MADE TO SUCH TESTIMONY

The trial court's ruling on the admissibility of opinion evidence is reviewed for abuse of discretion. ***State v. Blake***, 172 Wn. App. 515, 523, 298 P.3d 769, *review denied* 177 Wn.2d 1010, 302 P.3d 180 (2012). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." ***State v. Quaale***, ___Wn.2d ___, ___P.3d___(December 18, 2014) (at Slip Opinion, p. 2) citing ***State v. Demery***, 144 Wn.2d 753, 758, 30 P.3d 1278(2001).

It is axiomatic that "no witness may 'testify to his opinion as to the guilt of a defendant whether by direct statement or inference.'" ***City of Seattle v. Heatley***, 70 Wn. App. 573, 577, 854 P.2d 658 (1993), citing ***State v Black***, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Evidence that is not "a direct comment on the defendant's guilt" does not contravene this principle. ***City of Seattle v. Heatley***, 70 Wn. App. at 578. Where opinion or inference testimony is not a direct comment on the defendant's guilt, it is admissible where "the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear

understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge. . . ." ER 701. ***State v. Madison***, 53 Wn. App. 754, 760-62, 770 P.2d 662(1989).

Inferences based on facts satisfy all of the requirements of ER 701. The officers' inferences were based on their "perception", that is what they saw, heard and did during the investigation. Their inferences were helpful to "the determination of a fact in issue", that is whether or not the defendant was the driver. ER 701. None of the testimony was scientific. The officers' observations are those that most drivers would be acquainted with as a result of daily use of an automobile equipped with safety equipment.

Officer Mahlum summed up the inference testimony succinctly on redirect after the defense attorney had explored the issue on cross:

> Q. Based off of what you observed with regards to, I guess, the shoe, the air bag, the seat belt, what was your conclusion, based off the information that you had at that time, after taking the pictures, after seeing the whole scene with regards to the collision site of who the driver was?
>
> A. I felt it was Mr. Ricardo.
> 2 RP 340.

The inference testimony in this case is not like impermissible inference testimony concerning a defendant's state of mind. ***State v. Farr-Lenzini***, 93 Wn. App. 453. 970 P.2d 313(1999). In ***Farr-Lenzini***, a state trooper testified about his impressions of the defendant's intent during an eluding incident. The court observed that the officer was not qualified to testify as to a driver's state of mind. "Consequently, we find there was an insufficient foundation to qualify the trooper as an expert for purposes of expressing an opinion as to Farr–Lenzini's state of mind." ***State v. Farr-Lenzini***, 93 Wn. App. at 461.

In this case, the officers were not asked to speculate as to the defendant's state of mind. They described what they observed concerning the driver of the wrecked vehicle. They did not see the accident, but they saw the aftermath. This did not constitute impermissible state of mind testimony.

The officers' testimony in this case is similar to inference testimony about intoxication. Such testimony is admissible as a lay opinion. ***City of Seattle v. Heatley***, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). In ***Heatley,*** the court stated that "It has long been the rule in Washington that a lay witness may express an opinion on the degree of intoxication of another person where the witness has had an opportunity to observe the affected person." ***City of Seattle v. Heatley***, 70 Wn. App. at

580. The officer in ***Heatley*** directly opined that the defendant "was intoxicated and impaired to the extent that he could not drive safely. . . ." *Id.* at 580.

The defendant argues that an order *in limine* was violated when the prosecutor introduced inferences that the defendant was the driver. 1 RP 21. The order actually concerned the terms that the witnesses were to use in referencing the defendant during their testimony. The prosecutor agreed to instruct his witnesses to refer to the defendant as "the defendant" or as "Mr. Ramirez Diaz". At the same time he explicitly indicated that the witnesses would testify as to the facts. 1RP 21. The trial court agreed that the prosecutor's proposal was appropriate and the testimony, none of which was objected to, was introduced consistent with the ruling.

Evidentiary objections not made in the trial court are not preserved for appeal. ***State v. Perez–Cervantes***, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000), ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Here, the defendant did not object to the inference testimony and in fact pursued the same lines of questioning himself on cross. Were this Court to have a concern about adherence to the order *in limine* or to the propriety of the inference testimony, any such error was not preserved.

In this case, the officers were properly permitted to infer that the defendant had driven. They testified both about their observations and the

inferences that they drew from those observations. For the most part they testified without objection. The inferences were well within the range of permissible lay opinion or inference.

3. THE DEFENSE ATTORNEY WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO TESTIMONY ABOUT THE DISTURBANCE CALL WHERE THE OFFICERS WERE FIRST DISPATCHED TO THAT CALL AND THE DEFENDANT UTILIZED THE TESTIMONY IN HIS CLOSING ARGUMENT.

To prevail on an ineffective assistance claim, a defendant must show both deficient performance and resulting prejudice. ***State v. Carson***, 179 Wn. App. 961, 975, 320 P.3d 185(2014), citing ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). The standard of review is *de novo*, "beginning with a strong presumption that trial counsel's performance was adequate and reasonable and giving exceptional deference when evaluating counsel's strategic decisions." ***State v. Carson***, *supra* at 975-76, citing ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and ***State v. Grier***, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

In this case the defendant cannot show deficient performance. Under the *res gestae* or so-called "same transaction" exception to ER 404(b), such evidence is "admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to

the charged crime." ***State v. Lillard,*** 122 Wn. App. 422, 431-32, 93 P.3d 969(2004), citing ***State v. Tharp***, 27 Wn. App. 198, 205, 616 P.2d 693(1980).

There was a brief reference to the original disturbance call in this case. The officers had been dispatched to 21618 Quiet Water Loop in the Lake Tapps area. 2 RP 175. They had contact with the reporting party, Brandon Eyle. 2 RP 196. No testimony was introduced about the specific allegations from the disturbance other than (1) there had been property damage when a vacuum was thrown through a door, 2 RP 180, (2) a short time later there was a collision nearby 21618 Quiet Water Loop involving the defendant, 2 RP 183, and (3) that the defendant was detained at the scene of the collision, 2 RP 184-85. Facts such as these are part of what happened close in time and place to the crime. They are circumstantial evidence that the defendant was the driver of a vehicle that fled from the scene of the disturbance. Regardless of whether a separate property damage offense was committed, such testimony was material and relevant to the driving under the influence charge. To the extent that such testimony can be characterized as ER 404(b) misconduct evidence, it was properly admitted as same transaction or proof of *res gestae*. ***State v. Lillard***, *supra*, ***State v. Tharp***, *supra.*

The defendant's trial attorney can hardly be faulted for not objecting to admissible evidence. He used the evidence to his advantage in closing:

> Mr. Macejunas talked about a motive. He had a motive to get out of there because something was going on at that Quiet Water Loop address. That's interesting. What facts did we hear about what was going on there? We didn't hear any facts. So, yeah, it's possible there was a motive to get out of there. It's also possible there wasn't because we haven't been given any evidence as to what was going on at that address. That's not part of this case. We haven't heard any testimony with respect to that. 3 RP 493.

Under *de novo* review, with deference to the strategic decision making of the defense attorney, his performance was more than adequate and reasonable. ***State v. Carson***, 179 Wn. App.961, 975, 320 P.3d 185(2014). The defense attorney had not objected to the "same transaction" evidence, consistent with his trial strategy. He turned the scarcity of the evidence of what happened during the disturbance to his advantage. Such strategic thinking should not be viewed as deficient performance; it is praiseworthy defense strategy in light of the overwhelming evidence of intoxicated driving.

4. THE TRIAL COURT DID NOT ERR BY ADMITTING EVIDENCE OF THE DEFENDANT'S REFUSAL TO TAKE A BREATH ALCOHOL TEST AFTER HAVING BEEN ADVISED OF HIS IMPLIED CONSENT WARNINGS AND AFTER NUMEROUS ATTEMPTS WERE MADE TO CONTACT A LAWYER.

The criminal rules provide that when arrested, a defendant has the right to an attorney "[a]t the earliest opportunity." CrR 3.1(c)(2). In the context of a driving under the influence crime, the rule ensures that the defendant is aware of the right to counsel before providing incriminating evidence, and to ensure that they know of the right to counsel in time to decide whether to obtain an independent blood test or disinterested witnesses to observe their condition. ***State v. Trevino***, 127 Wn.2d 735, 745-46, 903 P.2d 447 (1995), and ***State v. Templeton***, 148 Wn.2d 193, 212, 59 P.3d 632 (2002).

When a defendant requests an attorney the officer must attempt to contact an attorney but need not discontinue the investigation. ***City of Bellevue v. Ohlson***, 60 Wn. App. 485, 803 P.2d 1346(1991). In ***Ohlson***, as in this case, the officer did what he could to put the defendant in contact with an attorney. The ***Ohlson*** court pointed out that "[the defendant's attorney] and three public defenders were called, but Ohlson was unable to contact an attorney to advise him." *Id.* at 491. Because the officer made

"every reasonable effort to provide access to counsel, the rule is satisfied even though actual contact is not effected." *Id.*

In this case, Trooper Robertson carried out his duty much as the officer in ***Ohlson*** carried out his. Trooper Robertson "asked [the defendant] for his lawyer's name numerous times. Finally, he told me his lawyer was Ian Perrigan . . . " 3 RP 368. After unsuccessfully researching Perrigan's contact number, the trooper then offered to contact the public defender. 3 RP 368-69. The evidence thus shows that the trooper first pressed the defendant for the name of his attorney and sought to make actual contact with the attorney. 3 RP 368-69. Then the trooper tried to connect the defendant with the public defender. This was unsuccessful because the defendant was "unwilling" to contact the public defender. 3 RP 369. The trooper was "asking him if he had another attorney he wanted to talk to, then I pointed to the implied consent form there." 3 RP 371. The defendant refused the breath test after having been given the opportunity to talk to a lawyer and after declining to do so.

Throughout the defendant's contact with Trooper Robertson, the defendant was disruptive and belligerent. 3 RP 377. He "interrupted me throughout, but I still continued to read it verbatim. Stood up, would sit back down. Started spitting on the floor. So I read him all that. Then he made those statements." 3 RP 377. The trooper's response to this

defendant's request for a lawyer and attempt to disrupt the investigation is comparable to the officer's attempt in ***Ohlson*** to contact the defendant's attorney and three public defenders. Trooper Robertson did what he could before offering and having the defendant refuse the breath test. Under these circumstances no violation of the criminal rule occurred.

5. THE DEFENDANT HAS NOT MET HIS BURDEN OF PROOF TO DEMONSTRATE CUMULATIVE ERROR WHERE THERE WAS NO ERROR IN THE ADMISSION OF EVIDENCE OR DEFENSE COUNSEL'S PERFORMANCE

Under the cumulative error doctrine, a defendant may be entitled to relief if a trial court were to commit multiple, separate harmless errors. ***State v. Venegas,*** 155 Wn. App. 507, 520, 228 P.3d 813(2010). In such cases, each individual error might be deemed harmless, whereas the combined effect could be said to infringe the right to a fair trial. *Id.* citing ***State v. Weber***, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), and ***State v. Hodges***, 118 Wn. App. 668, 673–74, 77 P.3d 375 (2003). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." *Id.*

The first requirement for cumulative error is multiple, separate errors. The defense cannot make such a showing in this case. The only assignment of error in this case that can arguably be viewed as error was the reference to the defendant's lack of cooperation by two deputies.

Those references, when properly viewed through the lens of ***Lewis***, *supra*, should not be considered error. But even so if they were, the overwhelming evidence of intoxication and driving more than overcomes any concern about the outcome of the trial.

All other claims of error, as was more fully argued above, were not in fact error. For this reason they cannot support the cumulative error claim. This Court should deny the claim of cumulative error as lacking support.

D. CONCLUSION.

For the foregoing reasons, the Court should affirm the defendant's conviction.

DATED: Friday, December 26, 2014.

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-26-14 Therese Kay
Date Signature

PIERCE COUNTY PROSECUTOR

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