

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

NO. 34332-1-II

STATE OF WASHINGTON,

Respondent,

vs.

NICHOLAS DAVID BAXLEY,

Appellant.

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CORRECTIONS
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CLALLAM COUNTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 05-1-00162-2

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

In the evening of April 15, 2005, and into the morning of April 16, 2005, the defendant was at a party at the home of Josh Hylton. RP 12/13/05, @ 59-60. The defendant was drinking and was seen having two beers. RP 12/13/05, @ 96. In the early morning hours, although no one really knows what time, the defendant left the party in his Mustang. RP 12/13/05, @ 62, 86. Three other kids went with him: Stephanie Cox, Darcy Hylton and Joshua Tupuola. RP 12/13/05, @ 62, 86. The defendant was driving, but as they left the loop-type driveway, Joshua and the defendant changed places so that Joshua was driving. RP 12/13/05, @ 63, 87. The group went to the AM / PM Mini Mart in Port Angeles. When they left the store, the defendant took his place at the wheel, Ms. Cox got in the front passenger seat, Joshua climbed into the rear passenger seat, and Darcy sat in the back seat behind the defendant. RP 12/13/05, @ 87.

The four headed out of town; approximately three miles west of Port Angeles, the car ran off the road and came to rest in a field. RP 12/13/05, @ 140.

As the defendant was getting out of the car, Timothy Bolding, who was out delivering newspapers, came across the accident. RP 12/13/05, @ 11. The defendant approached Mr. Bolding. This frightened Mr. Bolding, who left the scene and called 911. RP 12/13/05, @ 13.

As Mr. Bolding drove away, Alan Watkins and Tom Butler drove up. RP 12/13/05, @ 13, 40.

Mr. Watkins and Mr. Butler walked down to the car. RP 12/13/05, @ 26, 41. Mr. Watkins saw a female in the front passenger seat that appeared to be dead, and a male in the back passenger seat – the man appeared as though he could have been Native American. RP 12/13/05, @ 28. Mr. Watkins said that he had a memory of a woman either getting out or having just gotten out of the car, but could say for sure that he saw the woman standing near the driver's side door. RP 12/13/05, @ 27.

Mr. Butler approached the car and saw a young woman getting out of the car, and could see another woman on her back lying over the center console of the car. RP 12/13/05, @ 42.

Not aware that Mr. Bolding had gone to call 911, Mr. Butler and Mr. Watkins were worried that no emergency help had been called. They ran back to their car. They agreed that Mr. Watkins would stay at the scene and that Mr. Butler would drive to the store and call 911. RP 12/13/05, @ 43.

When Mr. Butler returned to the scene and approached the car, Mr. Watkins told Mr. Butler that he thought the woman in the front seat was deceased. RP 12/13/05, @ 45. Mr. Butler went to the car and started CPR on the woman in case she was still alive. RP 12/13/05, @ 45. As he started CPR, he noticed a young man in the back seat. He looked as though he may have been Native American. RP 12/13/05, @ 46.

Deputies Hayden and Hollis of the Clallam County Sheriff's Office arrived. It was 6:04 a.m. RP 12/13/05, @ 131. Deputy Hayden provided Mr. Butler with a CPR mask. RP 12/13/05, @ 47, 126. As Deputy Hayden attempted to help with the CPR, he was startled by "another gentleman" sitting in the back seat. RP 12/13/05, @ 127.

Deputy Hollis arrived and saw an older man in his fifties standing away from the car, and another older man in the vehicle giving CPR to a female in the front passenger seat. RP 12/13/05, @ 140-141. He also observed a younger man and woman standing outside the car, who were identified as Nicholas Baxley and Darcy Hylton. RP 12/13/05, @ 141. He spoke to Darcy, and then went back to his car to get wire cutters and had Deputy Hayden get a CPR mask. RP 12/13/05, @ 142. While Mr. Butler continued CPR, Deputies Hayden and Hollis took the defendant and Darcy Hylton, and put the defendant in the back of Deputy Hayden's car, and put Ms. Hylton in the back of Deputy Hollis' car. RP 12/13/05, @ 143. It took around five minutes from the time Deputy Hollis arrived until the defendant and Ms. Hylton were put in the back of the patrol cars. RP 12/13/05, @ 143.

After medical personnel arrived and removed Stephanie Cox, the decedent, from the car, Jason Tupuola was able to get out of the car. RP 12/13/05, @ 146.

Deputy Ellefson of the Clallam County Sheriff's Office arrived at the scene at approximately 6:30 a.m. RP 12/14/05, @ 15. After completing some initial work, he spoke to the defendant in the back of the patrol car. RP 12/14/05, @ 25. He examined the car. One of his

observations was that it was very muddy around the car, but there was no mud on the floor mats of the car. RP 12/14/05, @ 28. This indicated to him that no one had gotten out of the car and then back in. RP 12/14/05, @ 29.

The defendant was taken to Olympic Medical Center, where his blood was drawn. RP 12/13/05, @ 148. The blood was tested and was shown to have a blood/alcohol concentration of .14 grams per 100 milliliters. RP 12/13/05, @ 149.

De. Selove testified that Stephanie Cox died as the result of the motor vehicle collision. RP 12/13/05, @ 105. Ms. Hylton experienced seven fractured ribs and a collapsed lung. RP 12/13/05, @ 79. Jason Tupuola had three fractured ribs and a compressed disc in his back. RP 12/13/05, @ 91.

After the trial, the defense made a motion for a new trial based upon a declaration of Darcy Hylton, wherein she stated that her testimony at trial had been incorrect, and that she now remembered that it was Jason Tupuola who had been driving. The motion for a new trial was denied. That decision was appealed. Ultimately, the direct appeal and appeal on the motion for a new trial were consolidated.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. The Defendant's Convictions For Vehicular Homicide And Vehicular Assault Were Not Based On Insufficient Evidence.

Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements beyond a reasonable doubt. A reviewing court draws all reasonable inferences in favor of the State. *State v. G.S.*, 104 Wn.App. 643, 17 P.3d 1221 (2001).

The defendant argues that because there was no evidence that the defendant's blood sample was taken within two hours of his driving, that there was insufficient evidence to sustain the vehicular homicide and vehicular assault convictions. This is incorrect.

As set forth in the "to convict" instruction, the State was required to prove that the defendant was operating a motor vehicle while under the influence of intoxicating liquor. See Instruction #12. "While under the influence" was defined as, "a person drives while under the influence of intoxicating liquor when he drives a motor vehicle while under the influence of or affected by intoxicating liquor, or while he has sufficient alcohol in his body to have an alcohol concentration of .08 or higher within two hours of driving." (emphasis added). See Instruction #9.

Here, there is evidence of both. Not only was the blood alcohol test showing a concentration of .14 per 100 milliliters, almost twice the legal limit, there was plenty of other evidence proving the defendant to be under the influence. During cross-examination, Josh Hylton testified that before the defendant and his friends left the party, another friend, Levi Barclay, had offered to drive because everyone in the car had been drinking. RP 12/13/05, @ 71. He also testified that he saw the defendant drink "a couple of beers." RP 12/3/05, @ 73. Deputy Hayden

testified that when he spoke to the defendant at the scene, that there was a strong odor of intoxicants coming from his breath. RP 12/13/05, @ 129.

Deputy Hollis also spoke with the defendant, and noticed a “strong smell of alcohol.” RP 12/13/05, @ 147.

With regard to the blood/alcohol concentration sample, even if it had been taken more than two hours after the collision, it is still evidence of the defendant’s intoxication. As set forth in RCW 46.61.502(4), “Analysis of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more, in violation...”.

The defendant now argues that when he stipulated to the blood sample’s admissibility, he was not stipulating that it was valid. If that was the thought by the defense, why wasn’t this issue raised when the test results were admitted at the trial. The defendant can’t agree to admit evidence, not reserve any issues surrounding the evidence, and then on appeal claim that he was only agreeing that it was admissible but not valid. The defendant cannot simply raise this issue for the first time on appeal. Unless the alleged claim is a manifest error affecting a constitutional right, the appellate courts will not consider issues raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Here, the defendant makes no such claim.

If the State had been aware that the “two hour” period was going to be an issue, the State could have easily provided the appropriate

testimony at trial. As it is, the testimony at trial indicates that the blood sample was taken within two hours of the collision. According to Mr. Bolding, he came across the accident around 4:00 a.m., but wasn't really sure of the time. RP 12/13/05, @ 11. He watched as the driver got out of the car and came over to Bolding's car. RP 12/13/05, @ 12. Mr. Bolding told him not to get close to his car, and drove away and called 911. RP 12/13/05 @ 13. Another car pulled in behind Mr. Bolding as he was leaving, which turned out to be Alan Watkins and Tom Butler. RP 12/13/05, @ 13, 40. Mr. Butler thought that the time was about 5:30 or 6:00 a.m. Law enforcement (Deputy Hayden and Deputy Hollis) arrived at 6:04 a.m. RP 12/13/05, @ 131. Deputy Ellefson arrived a short time later at 6:30 a.m. RP 12/13/05, @ 15. Deputy Ellefson, inter alia, spoke to the defendant and "requested that Mr. Baxley be taken to the hospital for the mandatory blood draw, making sure that the deputy was aware of the legal issues that needed to be addressed at the hospital." RP 12/14/05, @ 29. Deputy Hollis stated that he left the scene and went to Olympic Medical Center for a blood draw. RP 12/13/05, @ 148. Based upon all of the testimony, it would appear that the collision occurred around "5:45-ish", and the defendant was taken to the hospital around 6:40-ish.

If the defendant really believed there was an issue with regard to the "two-hour" period, he should have raised it during the trial. He can't simply stipulate to the admissibility of the blood sample and then on appeal claim that he was only stipulating to its admissibility, not that it was valid.

There was plenty of evidence produced by the State at trial to prove that the defendant was both driving a motor vehicle while under the influence of or while affected by intoxicating liquor, and driving while he had an alcohol concentration of .08 or higher within two hours of driving.

The defendant further argues that there was insufficient evidence to convict the defendant because no evidence was presented that the blood sample was taken in compliance with methods approved by the State toxicologist (as required under RCW 46.61.506). For this argument, the defendant relies upon *State v. Basio*.¹ In *Basio*, the defendant's convictions were reversed. The State had failed to make a prima facie showing that the blood sample had been properly preserved. That case is distinguishable from the instant case, in that presumably in Mr. Basio's case, the defendant didn't stipulate to the admissibility of the blood test and didn't raise the issue for the first time on appeal.

The defendant also argues that compliance with RCW 46.61.506 is a substantive requirement that must be proved to the jury beyond a reasonable doubt.

Contrary to the defendant's assertion, compliance with RCW 46.61.506 is not a substantive requirement that must be proved to the jury beyond a reasonable doubt. The fact that the law imposes certain requirements before a piece of evidence can be admitted does not mean

¹ 107 Wn.App. 462, 27 P.3d 636 (2001).

that the compliance with those requirements rises to the level of something that must be proven to the jury beyond a reasonable doubt.

For example, in order to be admissible, any piece of evidence sought to be admitted must be relevant. ER 402. Under the defendant's theory, before any piece of evidence could be admitted, the State would have to prove beyond a reasonable doubt that the evidence met the requirements of ER 402 before the evidence could be introduced.

But more importantly, again, here the defendant stipulated to the admissibility of the blood sample. Whether or not the stipulation addressed every possible issue is irrelevant. If the defendant thought that compliance with RCW 46.61.506 was an issue, he should have raised it with the trial court in order that the State could have produced the required evidence, and the parties could have argued the issue.

There was more than sufficient evidence to convict the defendant of both driving under the influence of or affected by intoxicating liquor, and as having a blood/alcohol concentration of more than .08 within two hours of driving.

B. The Court's Instructions To The Jury Were Not Constitutionally Deficient.

The defendant argues that because the instructions did not include language that set forth that the State had to prove beyond a reasonable doubt that the blood sample was obtained and stored in compliance with RCW 46.61.506, that they were defective. This is incorrect.

Compliance with RCW 46.61.506 is not an essential element of the crime. It is a statute that outlines what procedures must be followed in order to admit the piece of evidence, which in turn proves the essential element of the crime. Under the defendant's theory, for every piece of evidence that the State seeks to admit, the State must also prove to the jury beyond a reasonable doubt that it can be admitted.

C. The Statute Criminalizing Vehicular Homicide Does Not Violate The Separation Of Powers Doctrine.

The defendant argues that because the Legislature has not defined the phrases "proximate result" and "proximately caused", that the judiciary has improperly encroached on a legislative function. This is not correct.

"It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed, but not specifically defined. *State v. David*, 134 Wn.App. 470, ___ P.3d ___ (2006). On the contrary, if the judiciary did not meet the Legislature's expectations of filling in legislative blanks in statutory crimes, the judiciary would be failing to fulfill its judicial duties. *David*, @ 481.

Since the Legislature omitted a statutory definition of "proximate result" and "proximately caused" when it promulgated the vehicular homicide statute, the Legislature implied that the judiciary should

continue to define these two phrases according to common law principles. *David*, @ 481-482.

Moreover, this is not an improper delegation of power. The Legislature has historically left to the judiciary the task of defining some criminal elements. RCW 46.61.520, the vehicular homicide statute, is not an unconstitutional violation of the separation of powers doctrine. *David*, @ 483.

D. The Prosecution Did Not Engage In Vindictive Prosecution.

The prosecutor did not engage in vindictive prosecution when she added an additional count of vehicular assault to the Information. The defendant was charged with one count of vehicular homicide and one count of vehicular assault (as well as the gross misdemeanor charge of driving while license suspended in the second degree). During the plea negotiations, according to the court record, he was told that he could plead as charged, or the State would add an additional count of vehicular assault. RP 08/12/06, @ 2.

Contrary to the defendant's position, the addition of the additional count of vehicular assault is not vindictive prosecution. To support his position, the defendant relies on *State v. Korum*,² a Division II case; however, that case was overruled by the Supreme Court: *State v. Korum*, 157 Wn.2d 614, ___ P.3d ___ (2006).

² 120 Wn.App. 686, 86 P.3d 166 (2004).

The Washington Supreme Court addressed prosecutorial vindictiveness, saying that there were two kinds, actual vindictiveness and a presumption of vindictiveness. The filing of additional charges falls within the category of presumptive vindictiveness. *Korum*, @ 627.

To establish “a presumption of vindictiveness”, the defendant must prove that all of the circumstances taken together, supports a realistic likelihood of vindictiveness. The prosecution may then rebut the presumption by presenting objective evidence, justifying the prosecutorial action. *Korum*, @ 627-628.

As pointed out by the *Korum* court, the federal circuit courts have not conclusively decided whether a presumption of vindictiveness can even occur in a pre-trial setting, and that Washington case law suggests that actual vindictiveness is required to invalidate the prosecutor’s adversarial decisions made prior to trial. *Korum*, @ 628.

Although the *Korum* court did not specifically rule on whether a presumption of vindictiveness may arise pre-trial, it did analyze two federal cases wherein the courts ruled, “the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging document are unjustified.” *Korum*, @ 630, citing *United States v. Goodwin*, 457 U.S. 368, 372-85, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). In *Bordenkircher v. Hayes*, 434 U.S. 357, 363-364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), the Supreme Court held that there is no violation of due process if the accused is free to accept or reject the

prosecution's offer, and the prosecutor had probable cause to believe that the accused committed the offense. *Korum*, @ 629.

“By tolerating and encouraging the negotiation of pleas, this court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right not to plead guilty.” *Bordenkircher*, @ 629.

In *Korum*, the defendant had pled guilty with a ten year recommendation, but then withdrew his plea, and following a subsequent conviction by a jury to an amended Information, faced a 100 year sentencing recommendation by the State. The Court of Appeals³ had held that such an increase suggested prosecutorial vindictiveness. The Washington Supreme Court held that the mere filing of additional charges and the consequent increase in sentence, regardless of the magnitude, cannot support a presumption of vindictiveness. *Korum*, @ 634.

Here, the defendant hasn't even attempted to show how under all the circumstances taken together that there is a realistic likelihood of vindictiveness. All that happened here is that the prosecutor was going to allow the defendant to plead to one count of vehicular homicide and one count of vehicular assault, thus eliminating one of the charges for which there was probable cause. The defendant was free to accept or reject the offer.

³ *State v. Korum*, 120 Wn.App. 686, 86 P.3d 166 (2004).

There was no prosecutorial vindictiveness.

E. The Trial Court Did Not Abuse Its Discretion When It Did Not Allow Cross-Examination Of Deputy Hayden On The Reason For His Termination From The Sheriff's Department.

A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court – 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. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

Prior to the trial, Deputy Hayden was terminated from the Clallam County Sheriff's Office for having an affair on county time, and using a county cell phone for personal use. RP 12/13/05, @ 115. The defense sought to impeach Deputy Hayden with this information. The court denied the request, saying that there didn't seem to be an issue of credibility; that all the deputy would be testifying to is what he saw when he reached the collision scene – that the only statement by the defendant made to the deputy was that the defendant didn't think that he was hurt. RP 12/13/05, @ 119-122.

The defense lawyer then said he really wasn't too concerned about not being allowed to cross the deputy on this issue, so long as the deputy "sticks to what he said in the reports." RP 12/13/05, @ 121. "So in other words, if he stays to his report, I can see only marginal relevance to any dishonesty issue." RP 12/13/05, @ 122. It would appear that the defense was not objecting to the court's ruling; given that there was no

objection, this issue cannot now be raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

Even if the matter was properly preserved for appeal, this is not a situation wherein no reasonable person would adopt the view taken by the trial court.

Deputy Hayden testified that he came upon the scene at approximately 6:00 a.m., saw some skid marks, observed three people outside of the car, and provided a CPR mask to Mr. Butler who was performing CPR on Ms. Cox. RP 12/13/05, @ 123-125.

He also stated that when he attempted to help Mr. Butler perform CPR, he was startled by “another gentleman in the back seat.” RP 12/13/05, @ 127. He also testified that he asked the defendant who was driving, to which the defendant did not respond; he also asked the defendant if he was injured, to which the defendant responded, “no.” RP 12/13/05, @ 128.

With the exception of his interaction with the defendant, everything that Deputy Hayden told the jury was also told to the jury by other witnesses. Any issue of credibility was minimal. There was no probative value in allowing cross-examination on Deputy Hayden’s employment issues. ER 608. In deciding admissibility issues, other factors the trial judge must address include avoiding needless consumption of time and protecting witnesses from harassment or undue embarrassment. ER 611(a). Here, balancing all the issues involved, the trial court did not abuse its discretion when it did not allow cross-examination on Deputy Hayden’s employment problems.

Even if the court did abuse its discretion, the error was harmless. The jury would have reached the same verdict even if the error had not occurred. *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985).

F. The Trial Court Did Not Violate The Defendant's Constitutional Right To A Jury When It Imposed A Sentence Which Included Two Enhancements For The Defendant's Two Prior Driving Under The Influence Convictions.

As indicated by the defendant, he is raising this issue only for the purposes of preservation of error. Under the circumstances, the State will not respond, other than to say that pursuant to *Blakely v. Washington*,⁴ the trial court did not unconstitutionally use the defendant's two prior driving under the influence convictions to enhance his sentence.

G. The Trial Court Did Not Abuse Its Discretion When It Denied The Defendant's Motion For A New Trial.

The trial court did not abuse its discretion when it denied the defendant's motion for a new trial, based upon one of the witnesses having changed her story about who was driving the car at the time of the collision.

A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court – where reasonable persons could take differing views regarding the propriety of the trial

⁴ 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)

court's actions, the trial court has not abused its discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

To obtain a new trial based on newly discovered evidence, a defendant must show that the new evidence is material, and that it could not have been discovered with reasonable diligence and produced at trial. Here, the newly discovered evidence was available during the trial. Defense counsel alluded to this evidence prior to resting. RP 12/19/05, @ 2-3.

Additionally, it may not be “merely cumulative or impeaching,” and a new trial will not be granted if the evidence “will not change the trial result.” *State v. Binh Thach*, 126 Wn.App. 297 at 318, 106 P.3d 782 (2005). A new trial may be denied if any one of these factors are absent. *State v. Macon*, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996).

Here, we have a witness, Darcy Hylton, who testified at the trial that the last thing she remembers was being at the party standing up on one of the benches, and then the next thing she remembers was waking up in the hospital. RP 12/13/05, @ 79. Shortly after the trial, Ms. Hylton executed a declaration saying that her testimony had not been entirely correct, and that she was sure that Jason Tupuola was driving at the time of the accident, not the defendant. She went on to say that “I did, in fact, tell several people prior to the trial that Jason Tupuola was driving, not Nick Baxley.” Supp. CP

In another declaration, Davanna Galyean stated that Darcy Hylton sat next to her during Jason Tupuola's testimony, and that Darcy whispered to her that Jason was driving at the time of the accident.

Contrary to the defense's argument, these statements by Ms. Hylton do not meet the test for newly discovered evidence: It is clear that this evidence was evidence that could have been produced at trial. Ms. Galyean was aware of this evidence and could have easily provided it to the defense. It is interesting that Ms. Galyean did not feel the statements of Ms. Hylton were important until after the verdict.

But more importantly, defense counsel was aware of Ms. Hylton's statement. Just before he rested, the lawyer said that Darcy had told another client of his that the defendant hadn't been driving, but that for tactical reasons (apparently worried about Ms. Hylton's reliability) he had decided not to call Ms. Hylton or his other client. RP 12/19/05, @ 203.

Clearly, this is evidence that could have been presented at the trial.

Additionally, this evidence is not new evidence, but is simply impeachment evidence and would not change the result of the trial. Here, should a new trial be granted, Ms. Hylton would either testify consistent with her original trial testimony or would testify consistent with her declaration. Either way, her testimony at the new trial would be impeached with one of her prior statements. As impeachment evidence, her declaration does not qualify as newly discovered evidence, and as impeachment evidence, the evidence would not change the result of the trial. It is highly unlikely that a jury would believe her new testimony and arrive at a different result, given that with two different versions, she would not be a very credible witness. Most likely, her testimony would

simply be discounted and the new jury would rely on the same evidence that the first jury relied upon to convict the defendant. This is particularly true because the person Ms. Hylton says was driving was stuck in the back seat and could not have gotten out until Ms. Cox (the decedent) was removed by the emergency personnel. RP 12/13/05, @ 18, 42, 46-47, 145-146.

Even as “non-recantation” evidence as the defendant believes the statement should be characterized, Ms. Hylton’s post-conviction declaration fails to meet the test for newly discovered evidence.

Contrary to the defendant’s assertion, Ms. Hylton’s declaration is recantation evidence. She testified and later changed that testimony – as stated by Ms. Hylton in her declaration, her testimony at trial “was not entirely correct.” According to the Oxford American Dictionary (1980 Edition), “recant” means to withdraw one’s former statement or belief, etc., formally rejecting it as wrong or heretical. It is a very tortured argument to claim that because her previous testimony was that she had no recollection of the incident, that now saying that she knew who was driving, is not a recantation, but simply evidence that stands alone as fresh, recently discovered evidence.

Ms. Hylton has changed her story, and as a result her declaration is inherently questionable. “Recantation by an important witness of [that witness’] testimony at the trial does not necessarily, or as a matter of law, entitle the defendant to a new trial.” *Macon*, @ 801.

When a defendant makes a motion for a new trial based upon recantation evidence, the trial court must first determine whether the

recantation is reliable. Recantations are inherently suspect and “[w]hen the trial court, after careful consideration, has rejected such testimony, or has determined that it is of doubtful or insignificant value, its action will not lightly be set aside by an appellate court.” *Macon*, @ 804, citing *State v. Wynn*, 178 Wash. 287, 34 P.2d 900 (1934).

In the instant case, the trial judge reviewed Ms. Hylton’s declaration after she failed to appear at the hearing (although she had appeared at a previously scheduled hearing; however, on that day, she appeared at 9:00 a.m. and was directed to return at 3:00 p.m. which she failed to do). RP 08/10/06, @ 2-3, 03/03/06, @ 203. As indicated by the trial judge, Ms. Hylton’s trial testimony provided nothing to the jury “with regard to the circumstances surrounding the accident, and where Mr. Baxley may have been or wasn’t.” RP 08/10/06, @ 5. The trial judge went on to say, “So this is not a case where we have the sole eye witness or the sole complaining party recanting their testimony, as might be the case in a domestic violence assault or some sort at the home. The jury considered other evidence, and based their verdict upon the other evidence, not Ms. Hylton.” RP 08/10/06, @ 5.

What the court is saying, is that it is hard to believe that this newly discovered evidence would have changed the outcome of the verdict – which is one of the requirements in order for the court to grant the defendant a new trial.

After analyzing whether the verdict would have been different due to the newly discovered evidence, the trial court then addressed the reliability of Ms. Hylton’s declaration (which is the order of analysis that

the defendant argues must occur). In that regard, the trial court found that when Ms. Hylton testified, there was nothing that would have alerted the court that she was being untruthful. RP 08/10/06, @ 6. Additionally, the court indicated that with regard to the reliability of the declaration, that it was concerned given that she had failed to appear several times when she was to provide live testimony (it was also noted that she had appeared on two occasions, however). RP 08/10/06, @ 7.

The defendant argues that Ms. Hylton's declaration is reliable because it is inconsistent with the defendant's testimony – the fact that the declaration supports the defendant does not make it reliable, but more importantly, as far as this writer can tell, the defendant (other than statements made to law enforcement) never testified. RP 12/19/05, @ 2-3.

In denying the motion for a new trial, the court did not abuse its discretion. Clearly, this is not a situation where no reasonable person would adopt the view espoused by the trial court. In fact, the only reasonable position to take, would be to deny the motion for a new trial. As stated in the court in *Macon*, when a trial court has rejected recantation testimony, "its action will not lightly be set aside by an appellate court. *Macon*, @ 804.

H. The Defendant Was Not Denied Effective Assistance Of Counsel When He Did Not Request A Material Witness Warrant For Ms. Hylton.

To establish ineffective assistance of counsel, a defendant must demonstrate that the lawyer's performance fell below an objective standard of reasonableness, and that but for the lawyer's error, the result of the proceeding would have been different. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Although counsel's performance is presumed to be adequate, the presumption is overcome if no legitimate tactic explains counsel's conduct. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, it is very clear why the defense lawyer did not ask for a material witness warrant. First of all, as he indicated to the court the first time she failed to appear, for strategic reasons he didn't want to be the one who requested a warrant. RP 03/03/06, @ 7. Like any good trial lawyer with a difficult witness who has important testimony for one's case, he didn't want to make Ms. Hylton angry by getting her arrested – if arrested at the request of the defense, she may have appeared in court and not testified consistent with the declaration, but may have reverted back to her original story.

Furthermore, if defense counsel could have gotten the court to decide the issue on the declaration, he would not have needed to worry about cross-examination of Ms. Hylton by the State. Nor would he have had to worry about Ms. Hylton appearing in court and disavowing her declaration. And even more importantly, here the State had asked for the motion to be stricken because of the lack of live testimony – had the

court agreed, the defendant would have been out of luck. Plus, had the court delayed the hearing due to the warrant, it would have been unpredictable as to when the matter would ultimately have been heard.

Clearly, defense counsel's performance was based upon legitimate tactics and did not fall below an objective standard of reasonableness. Additionally, the fact that the recanting witness had to have been arrested in order to get her to testify would not have added to a finding of reliability, and therefore, clearly the outcome of the proceeding would not have been different.

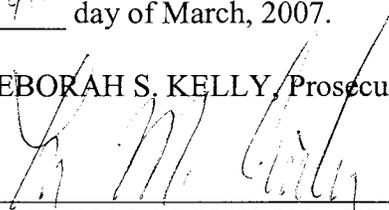
III. CONCLUSION

The defendant has raised no issues of merit and his conviction should be affirmed.

The motion for a new trial was properly denied.

DATED this 9th day of March, 2007.

DEBORAH S. KELLY, Prosecuting Attorney



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