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RESPONDENT'S COUNTERSTATEMENT OF CASE

On January 3, 2006, an Information was filed in Grays Harbor County Superior Court charging the defendant with Vehicular Assault. Prior to trial, a CrR 3.5 hearing was conducted, at which statements of the defendant were ruled admissible at trial. (RP 03/20/06 at 4 through 24). On April 19, 2006, the defendant was brought to trial and convicted as charged. Later, he was sentenced to five months in the county jail.

At the CrR 3.5 hearing, Deputy Kristi Lougheed testified as to contact she had with the defendant during her investigation of the charged crime. She testified that she had been working as a Sheriff's deputy for approximately 12 years and that she was working on November 13, 2005. (RP 03/20/06 at 5). On that night, she was instructed to proceed to the Grays Harbor Community Hospital to contact the defendant. Her intent was to contact him and determine whether there was probable cause to place him under arrest. At the hospital, she was briefed by fellow deputies as to the collision that caused the defendant's injuries. She was informed that the defendant was the driver of the vehicle and that a passenger had been injured. On the scene of the collision, deputies could smell an odor of alcohol coming from the defendant. *Id.*

Deputy Lougheed made some initial questions before *Mirandizing* the defendant. (RP at 6). She asked him simply what had occurred and the defendant stated that he swerved to miss a deer and that the vehicle's brakes were not operating correctly. After this brief conversation, Deputy

Lougheed placed the defendant under arrest for Vehicular Assault. She explained that this was based upon her observations as to slurring in the defendant's speech and a noticeable aroma of intoxicating beverage on his person. *Id.*

Deputy Lougheed read the defendant the information provided on the Washington State Patrol DUI packet which includes *Miranda* warnings. After the defendant was advised of his rights, he stated that he understood them and that he agreed to speak with the officer. (RP 7).

The defendant then explained that the collision was caused by faulty brakes and a deer in the road. (RP 8). He also explained that he had consumed two beers several hours prior to the collision.

The deputy testified that she had read through the questionnaire on the Washington State Patrol DUI packet. When asked if there was anything about the defendant's demeanor which would lead the deputy to believe that the defendant would not understand her, the deputy responded no. She explained that he answered her questions appropriately, but noted a definite sign of impairment. In making its ruling, the court stated that the only testimony that it had to base his decision on was that of Deputy Lougheed. (RP 23). The court stated that the testimony was that "despite the fact that [the defendant] was injured, he understood her questions and responded appropriately. The court stated that it had no testimony to contradict this, specifically stating that there was no testimony denying that he understood the questions. Finding that the defendant was advised

of his rights; that he understood his rights and that he was willing to talk to the officer, the court concluded that the defendant freely and voluntarily waived his rights to remain silent.

Written findings have been entered and were accurately quoted by the defendant.

At trial, the State called Harry Covert, who testified regarding a collision that he witnessed in front of his home at 388 Camp Creek Road in Grays Harbor County, Washington. He stated that at approximately 3:00 a.m., he heard a loud bang and the house shook. (RP 04/19/06 at 2). Mr. Covert went to the window and saw a car in the ditch. He got dressed and went outside. He saw somebody kneeling down near the vehicle and asked his wife to call 911 dispatch. The driver contacted him, and asked him to use the phone. Mr. Covert was able to identify the defendant as the person with which he made contact. (RP 4).

The State's next witness was Deputy David Iverson on the Grays Harbor County Sheriff's Department. (RP12). He testified that he responded to a collision on November 13, 2005, at approximately 3:30 a.m. When he arrived, both passengers of the vehicle were in the aid car. When he contacted the driver, he could smell a slight odor of intoxicants on his breath. (RP 16). The defendant admitted to the deputy that he had drank previously. The deputy observed a long brownish hair imbedded in the passenger side windshield. (RP 17).

Next to testify was Lieutenant Matt Stowers of the Grays Harbor County Sheriff's Department. He explained that he had worked for the Sheriff's Department for over 20 years. At the time of the trial, he was the supervisor of a traffic unit and had undergone an advanced collision investigation course. (RP 24).

The Lieutenant had been called to the collision on Camp Creek Road, and conducted an accident investigation. (RP 26). After observing the length of the remaining tire tracks behind the vehicle in the ditch, the Lieutenant came to the conclusion that the driver did not brake prior to the collision. This conclusion was based on the fact that there was no furrowing of the tire tracks. The Lieutenant went on to explain that there was no indication that the driver made any effort to swerve back onto the roadway. (RP 32). The longer of the two tracks was 91 feet long.

A number of photos were admitted that depicted the accident scene. Among them, was a photo of the defendant's vehicle and its position in the ditch along the side of the road.

Also admitted, were light-colored brown or blonde hairs removed from the passenger side windshield. (RP 39).

Next, Deputy Kristi Lougheed of the Grays Harbor County Sheriff's Department testified. She testified substantially the same as she did at the CrR 3.5 hearing.

Deputy Lougheed went on to explain the procedure of the defendant's blood draw. She stated that at 5:05 a.m., the sample was

taken. Beth Howe performed the draw with vials that were given to her by Deputy Lougheed. (RP 65). Deputy Lougheed took the vials and submitted them to evidence. (RP 66).

Deputy Lougheed also explained in detail the defendant's responses to the DUI questionnaire. The defendant admitted to drinking prior to driving. The deputy also noted that the defendant seemed to be going through mood swings. At the end of the questionnaire, the deputy made a notation that her observation as to the defendant's intoxication was "obvious." (RP 69).

After this, Beth Howe testified. She explained that she was a medical technologist and that on November 13, 2005, she performed a blood draw on the defendant. (RP 80). She used iodine to prepare the injection site, and used vials given to her by the deputy. Ms. Howe labeled them and dated them with the patient's name and her initials. (RP 81). She inspected the vials before she performed this procedure and found that they were in proper conditioned. She commented that they had anti-coagulant in them. (RP 81).

A State toxicologist, Kari Gruendell, testified as to forensics analysis of the defendant's blood sample. She gave a detailed explanation of her training and experience and the methods by which she tests blood samples.

She performed the tests in the State Toxicology case numbered 058434. (RP 88). This was a test on the defendant's blood using a head

space gas chromatograph. Two tests were performed and the results were .095 grams per 100 milliliters of blood and 0.102 grams per 100 milliliters of blood. The results of this toxicology test were entered into evidence and were admitted without objection. (RP 93).

The toxicologists also produced a photocopy of the blood vials that she had obtained in the case. This was marked as Exhibit 19. (See attachment A). On the label of the vials one can clearly see the defendant's name and the date of the blood draw. Also, clearly indicated are the words "potassium oxalate" and "sodium fluoride". Exhibit 19 was admitted without objection.

The victim in this case also testified. One of her injuries resulted in a scar above her eye, which she showed to the jury. Later, photos of her injuries were admitted into evidence. (RP 114). After this, the State rested. The defendant was ultimately convicted.

ARGUMENT

1. The jury instruction as to evidence of blood alcohol concentration was proper.

The appellant first claims that Jury Instruction No. 8 misstates the law. This is incorrect, because Jury Instruction No. 8 is the exact statement of RCW 46.61.502(4). A statute must be read to give meaning to all of its subsections. The appellant argues that this subsection is in conflict with RCW 46.61.502(1), but does not articulate the conflict. Reading both subsection of the statute together, it is clear it is the State's

burden to prove that the appellant had a blood alcohol concentration of 0.08 or higher within two hours after driving, but evidence obtained after that period is still admissible to establish this element.

Clearly, this is not a misstatement of the law.

2. The trial court had substantial evidence to base its ruling admitting the appellant's statements.

The appellant argues that his statements should not have been admissible because they were involuntary, due to injury he was suffering at the time that they were made. Whether or not injury may have influenced his ability to give a statement is a finding of fact.

Findings of Fact entered following CrR 3.5 hearing are verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). A contested finding of fact made as a result of a suppression hearing will not be disturbed if the finding is based on substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58 (2002). The party challenging the finding bears the burden of proving that the court did not rely on such evidence. *Id.* Substantial evidence is “evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” *Id.* Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court must defer to the trier of fact on issues of

conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

The court specifically ruled on this matter and stated that the defendant's condition did not impair his ability to voluntarily waive his rights. The court explained that his ruling was based upon the uncontested testimony of Deputy Kristi Lougheed. The court specifically addressed the defendant's physical condition and found that he answered questions and responded appropriately. The court ultimately concluded that the defendant freely and voluntarily waived his right to remain silent.

This is substantial evidence by which the court could make its ruling.

3. The charging document in this case alleged all the elements of the crime of Vehicular Assault.

The appellant argues that the charging language did not allege all elements of the crime of Vehicular Assault. The appellant's statement of the law and statement of the charging language is accurate. The charging language in this case mirrors RCW 46.61.522. Appellant argues that it in fact alleviates the State's burden to prove a causal connection between the defendant's driving and the injury caused to the victim of this case.

The Court of Appeals has held that the only causal connection the State must prove to support a charge of Vehicular Homicide is that connection between the act of driving and the accident. Causation

between intoxication and death is not an element of Vehicular Homicide. *State v. Morgan*, 123 Wn.App. 810, 99 P.3d 411 (2004).

The appellant seems to argue that the information should have more language than the statute. RCW 46.61.502(1) states that: “a person is guilty of vehicular assault if he operates or drives any vehicle: (b) well under the influence of intoxicating liquor or any drug, as defined by a RCW 46.61.502, and causes substantial bodily harm to another. The information in this case states:

That the said defendant, Anthony L. Couch, in Grays Harbor County, Washington, on or about November 13, 2005, did operate or drive a vehicle (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or (b) while under the influence of/or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of/or affected by intoxicating liquor and any drug, and did cause substantial bodily harm to another, *to wit*: Shari K. Helberg;

There is no functional difference between this language and that cited from the statute.

The appellant does not argue that the statute is vague, only that the information does not contain verbiage that is in the statute. The appellant seems to imply some significance to the conjunction “and” by putting it in bold type. The only inference that can be made from this is that appellant believe that the “**and** causes substantial bodily harm to another” is a required element. Which it is. But, the information states: “**and** causes substantial bodily.” The grammatical relationship between this clause and

the “operate or drive a vehicle” clause is identical to the statute. If the statute is sufficient then the information is.

4. The State presented ample evidence to convict the defendant of the crime of Vehicular Assault.

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. McCollum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State’s evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn.App. 478, 484, 761 P.2d 632 (1987) *rev. den.*, 11 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted more strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In considering this evidence, “credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The appellant argues that the respondent failed to conclusively prove that the blood sample was taken within two hours after the defendant’s driving. This is not a requirement of Washington State law. RCW 46.61.502(4) specifically states that the State can use evidence obtained outside this period to prove the defendant’s blood alcohol

concentration within two hours after driving. The defendant's blood sample was taken either within the two hour period or minutes after its expiration. A reasonable jury could conclude based on their common experience that the defendant's alcohol concentration within the time period had not change substantially. This is substantial evidence to support a jury finding of a blood alcohol concentration of .08 or higher within two hours of driving.

5. The defendant failed to object to the admission of the blood analysis at trial. Therefore, he has waived any objection on appeal.

It is clear that the failure to object to the admission of evidence at trial constitutes a waiver of objection and bars its assertion on appeal. *State v. Hartness*, 147 Wn.3d 15, 2, 65 P. 742 (1928). This is true even if the evidence was obtained by an illegal search and seizure. *State v. Silvers*, 70 Wn.2d 430, 423 P.2d 539 (1967). Constitutional issues may be raised for the first time on appeal. RAP 2.5. The issue at hand is the foundation for scientific evidence. This is not a constitutional issue. In the absence of a constitutional issue, the appellant is precluded from raise a issue for first time on appeal. *State v. Rienks*, 46 Wn.App. 537, 731 P.2d 1116 (1987).

Moreover, a photocopy of the vials was admitted into evidence. This photocopy clearly indicates that the vials had the proper chemicals in them. At the time that Exhibit #19 was admitted the state toxicologist was still on the witness stand. If the State was put to task on this point required

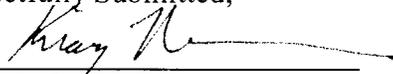
foundation could have been made. Any objection on the part of defense counsel would have been futile.

CONCLUSION

For these reason the state asks this Court to deny the appellant's claimed errors.

DATED this 2 day of ^{Feb.} ~~January~~, 2007.

Respectfully Submitted,

By: 
KRAIG C. NEWMAN
Deputy Prosecuting Attorney
WSBA #33270

KCN/jfa

A



Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. The above is a true and correct copy of the original instrument which is on file or of record in this court.

Done this JAN 26 2007 day of
 Cheryl Brown, Clerk By [Signature]
 Deputy Clerk

Grays Harbor County	
Case No.	05-1-771-3
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Deponent's Name	
Petitioner's Name	
Respondent's Name	
EXHIBIT NO.	19
ADMITTED	4-19-06
Offered & Refused	

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STATE OF WASHINGTON
BY an
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 34786-5-II

v.

DECLARATION OF MAILING

ANTHONY L. COUCH,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 2nd day of February, 2007, I mailed a copy of the Brief of Respondent to Peter B. Tiller; Attorney at Law; P.O. Box 58; Centralia, WA 98531 and to Anthony L. Couch; 315 East Broadway, Apartment C-2; Montesano, WA 98563, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman

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