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A. ASSIGNMENTS OF ERROR

1. Mr. Dillon's Fifth and Fourteenth Amendment rights to silence and due process were violated when the court admitted at trial his statements to the police in the absence of Miranda warnings.
2. There was insufficient evidence presented to support the jury's verdict that Mr. Dillon was guilty of vehicular assault.
3. The trial court erred in failing to enter the required written findings of fact and conclusions of law following a CrR 3.5 hearing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court err and admit statements that Dillon made when Trooper Magallon made his preliminary investigation of the crash scene and had not formally placed Dillon under arrest?
2. Should the trial court have taken Dillon's case away from the jury for lack of sufficient evidence after the State proved its case beyond a reasonable doubt?
3. Did error occur when separate written findings of fact and conclusions of law were not entered following a CrR 3.5 hearing when the trial court made a clear and specific oral record of its decision that has been transcribed?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP." The Appellant's Brief shall be referred to as "AB."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Dillon's recitation of the procedural history and facts and adds the following:

Trooper Christopher Magallon¹ was dispatched to a two car head-on collision on State Route 106 near milepost 6 on April 14, 2007. RP Vol.4 55: 11-12; 56: 9; 57: 1-3, 16-17. When Trooper Magallon arrived at the crash, he observed a blue Dodge pickup "in the lane," and "on the other side of the roadway" in the "eastbound lane" a blue Ford Escape that was partially in the lane and "also partially in the ditch." RP Vol.4 57: 17-21. While Trooper Pigmon, another officer on the scene, dealt with the driver of the blue Dodge pickup truck, Trooper Magallon noticed that Dillon was "standing with his hand kind of on the top of door" of the blue Ford. RP Vol.4 57: 22-25; 58: 1. Trooper Magallon noticed that Dillon "was kind of resting himself against the open driver's side door" and was "standing outside of the vehicle." RP Vol.4 58: 1-2.

When the trooper asked Dillon whether he was "okay," because the vehicle he (Dillon) was leaning on had been damaged, Dillon said that he was, but that "he had problems...with his legs." RP Vol.4 58: 4-6. At this time, Trooper Magallon noted that Dillon had "some facial injury,"

specifically, “some blood” that was “around his mouth and beard.” RP Vol.4 58: 6-8. When the trooper asked Dillon if he was the driver, Dillon “said he was,” that he did not have a driver’s license, and “just hadn’t had one in awhile.” RP Vol.4 58: 9-13. Dillon was able to produce a valid identification card, “which identified him as Woodrow Dillon.” RP Vol.4 58: 13-15. In response to Trooper Magallon’s inquiry, Dillon confirmed that he was the sole occupant of the blue Ford. RP Vol.4 58: 16-18.

After having this dialog with Dillon, Trooper Magallon noted that he “could smell a strong odor of alcoholic intoxicant” coming from Dillon’s breath, and that Dillon’s eyes were, “red, bloodshot and watery.” RP Vol.4 58: 21-24. When Dillon spoke to the trooper, his “speech was slurred.” RP Vol.4 58: 24-25. In response to Trooper Magallon’s inquiry, Dillon estimated that he had consumed “about 7” alcoholic beverages at the “Skokomish Casino,” the last of which was about “30 minutes” before the crash. RP Vol.4 59: 23-25; 60: 3-4, 9-13.

Dillon was not free to walk away from the crash scene at this time because Troopers Magallon and Pigmon were, at this point, “investigating a collision,” and not specifically “a potential DUI.” RP Vol.4 65: 13-20. Trooper Magallon indicated that the nature of the investigation changed, however, when he re-contacted Dillon “in the ambulance.” RP Vol.4 65:

¹ By the time of the CrR 3.5 hearing Trooper Magallon had changed employers and was

21-22. The reason that Trooper Magallon asked Dillon whether he had been drinking was because he “wanted to make sure that it was prior to the collision and not following the collision.” RP Vol.4 66: 3-5.

At this time, medical aid came over to Dillon and provided him care for his injuries. RP Vol.4 60: 16-17. Trooper Magallon then met with Trooper Pigmon, who said that the other driver had “sustained serious bodily injury,” and that it appeared that the crash would be classified as a “vehicular assault case.” RP Vol.4 60: 17-22. After the medics had moved Dillon to the back of the ambulance, Trooper Magallon re-contacted him and “offered [Dillon] the opportunity to perform some voluntary standardized field sobriety tests².” RP Vol.4 61: 3-8.

Specifically, the trooper told Dillon that the FSTs were “completely voluntary,” and Dillon said that he would “rather not” perform them. RP Vol.4 61: 11-17.

The trooper then advised Dillon of his constitutional rights, including waiver, and Dillon stated that “he understood.” RP Vol.4 61: 20-21. The rights that Trooper Magallon read Dillon were “verbatim from the DUI arrest report.” RP Vol.4 62: 4-5. Dillon was unable to sign the constitutional rights form, because he on a gurney in the back of an ambulance at that time. RP Vol.4 62: 6-8. Once Trooper Magallon had

working as an officer for the U.S. Forest Service.

read Dillon his rights and ensured that he understood them, the trooper did not obtain any other statements, aside from the waiver, from him. RP Vol.4 62: 17-21. The trooper noted that he formally arrested Dillon when Dillon was in the back of the ambulance. RP Vol.4 63: 5-6.

3. Summary of Argument

The trial court did not err by admitting Dillon's statements when Trooper Magallon performed his preliminary investigation of the crash scene because Dillon had not been formally arrested. Once Dillon told the trooper that he had consumed "about 7" alcoholic beverages at the "Skokomish Casino," the last of which was about "30 minutes" before the crash, a reasonable person in Dillon's place would not have felt free to leave the scene. RP Vol.4 59: 23-25; 60: 3-4, 9-13. Because Dillon made his statements prior to and not after he was formally arrested, triggering Miranda³ warnings, the trial court was correct to admit them.

The trial court also did not err by not taking Dillon's case away from the jury for lack of sufficient evidence, because the testimony and evidence demonstrate that the blood draw occurred within 2 hours after Dillon's driving. Trooper Magallon testified that he was dispatched to investigate the crash "out on Highway 106" at a "[l]ittle after 9:00 PM" on April 13, 2007, and Exhibit 55, which was admitted into evidence, shows

² Abbreviated to "FSTs."

that the Trooper obtained the blood draw at Mason General Hospital on “04/13/07” at “2258” hours, or 10:58 PM. RP Vol.6 307: 12-24; CP 48.4 (List of Exhibits), 55 (WSP Property/Evidence Report). Dillon’s argument that the State also had to prove the timing of the blood draw in relation to Dillon’s driving is misplaced, because neither RCW 46.61.522 nor the jury instructions in Dillon’s case specifically required this.

Lastly, because the trial court made a clear and specific record of its findings of fact and conclusions of law from the CrR 3.5 hearing which were transcribed and placed on pages 77-81 in Volume 4 of the Official Report of Proceedings, error did not occur because separate written findings were not entered. At most, the fact that separate findings and conclusions were not entered constitutes harmless error. Should the Court disagree with the State’s analysis on this particular issue, the State asks the Court to remand so that separate, written findings and conclusions can be entered. The State respectfully requests the Court to find the judgment and sentence of the Court to be complete and correct, and to affirm.

³ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY ADMITTING DILLON'S STATEMENT WHEN TROOPER MAGALLON PERFORMED HIS PRELIMINARY INVESTIGATION OF THE CRASH SCENE BECAUSE DILLON HAD NOT BEEN FORMALLY ARRESTED.

Under Berkemer,⁴ Miranda safeguards apply as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest. State v. Short, 113 Wash.2d 35, 40, 775 P.2d 458 (1989). Berkemer rejected the existence of probable cause as a factor in the determination of custody and in so doing it reaffirmed that its focus was on the possibility of coercion alone. Short, 113 Wash.2d at 40-41.

The sole inquiry has become whether the suspect reasonably supposed his freedom of action was curtailed. Short, 113 Wash.2d at 41. The only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. In State v. Harris, the Court found that a Miranda warning is not required when the questioning is part of a routine, general investigation in which the defendant voluntarily cooperated but is not yet charged. State v. Harris, 106 Wash.2d 784, 789, 725 P.2d 172 (1986).

The facts of Berkemer are comparable to Dillon's case, because they show that while police may question an individual and even ask

him/her to perform sobriety tests, formal arrest triggering Miranda warnings may not come until later in the encounter.

In Berkemer, Trooper Williams of the Ohio State Patrol observed a motorist weaving in and out of a lane on a state highway. Berkemer, 468 U.S. at 423. After following this car for two miles, Trooper Williams made a traffic stop and asked the motorist to exit his vehicle. After the motorist complied, the trooper noticed that he was having difficulty standing. At that point, Trooper Williams concluded that the motorist would be charged with a traffic offense and that his freedom to leave the scene was terminated. The motorist was not, however, actually told that he would be taken into custody. Instead, the trooper asked the motorist to perform a field sobriety test, commonly known as a “balancing test.” The motorist was unable to complete the balancing test without falling.

While still at the scene of the traffic stop, Trooper Williams asked the motorist whether he had been using intoxicants, to which he replied that “he had consumed two beers and smoked several joints of marijuana a short time before.” The trooper noted that the motorist’s speech was also slurred, and that he had difficulty understanding him. At this point, Trooper Williams formally placed the motorist under arrest.

⁴ Berkemer v. McCarty, 468 U.S.420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

Writing for the majority, Justice Marshall reasoned that nothing in this record indicates that the motorist should have been given Miranda warnings at any time prior to that which Trooper Williams placed him under arrest. Berkemer, 468 U.S. at 441. Only a short period of time elapsed between the stop and the arrest, and at no point during that interval was the motorist informed that his detention would not be temporary. Berkemer, 468 U.S. at 441-442.

Although Trooper Williams apparently decided from the moment the motorist exited his vehicle that he would be taken into custody and charged with a traffic offense, the trooper never communicated his intention to the motorist. Berkemer, 468 U.S. at 442. A policeman's unarticulated plan, reasoned Justice Marshall, has no bearing on the question of whether a suspect was "in custody" at a particular time. The only relevant inquiry is how a reasonable [person] in the suspect's position would have understood his [her] situation.

Justice Marshall advanced his reasoning further, and declined to find that other aspects of the interaction between Trooper Williams and the motorist exposed him to "custodial interrogation" at the scene of the stop. Based on the record before the Court, a single police officer asked the motorist a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. As the

Court found, treatment of this sort cannot be fairly characterized as the functional equivalent of formal arrest. Accordingly, the motorist was not taken into custody for the purposes of Miranda until Trooper Williams arrested him, and the statements the motorist made prior to that point were admissible against him.

The rationale of Berkemer is applicable to Dillon's case, because Trooper Magallon, just as Trooper Williams, asked Dillon a modest number of questions and asked whether he wanted to perform FSTs before actually arresting him, triggering Miranda. The trial court did not err by admitting the statements Dillon made prior to his arrest, because they were not given in response to the "custodial interrogation" that the Court in Berkemer employed in its rationale. When Trooper Magallon noted that the nature of the investigation had changed to vehicular assault and he re-contacted Dillon in the back of the ambulance, Dillon was formally arrested and read his Miranda warnings. RP Vol.4 63: 5-6. Once Dillon was formally under arrested and Trooper Magallon made sure that he understood his rights, Dillon made no further statements. RP Vol.4 62: 17-21.

Factually, this is quite similar to Berkemer, because after the motorist there admitted to drinking beer and smoking marijuana, Trooper Williams placed him under arrest. This nearly identical to what occurred

in Dillon's case, as Trooper Magallon arrested him after Dillon said that he had drank "about 7" alcoholic beverages at the "Skokomish Casino," the last of which was about "30 minutes" before the crash. RP Vol.4 59: 23-25; 60: 3-4, 9-13. Once Dillon made those statements to Trooper Magallon, a reasonable person in Dillon's position would not have felt free to leave the scene, just as the motorist in Berkemer was arrested shortly after making his statements. In similarity to Trooper Williams' investigation of the motorist's erratic driving in Berkemer, Trooper Magallon's preliminary questioning of Dillon did not constitute custodial interrogation triggering Miranda warnings, and the trial court did not err by admitting Dillon's pre-Miranda statements at trial.

2. THE TRIAL COURT DID NOT ERR BY NOT TAKING DILLON'S CASE AWAY FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE THE STATE PROVED ITS CASE BEYOND A REASONABLE DOUBT.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. State v. Alvarez, 128 Wash.2d 1, 13, 904 P.2d 754 (1995).

A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201. Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. State v. O'Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007).

Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992).

On January 22, 2008, the State charged Dillon with one count of vehicular assault:

In the County of Mason, State of Washington, on or about the 13th day of April, 2007, the above-named Defendant, WOODROW F. DILLON, did commit VEHICULAR ASSAULT, a Class B felony, in that said defendant, 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: William R. Brown; contrary to RCW 46.61.522(1)(b) (Laws of 2001, ch. 300, ' 1) and against the peace and dignity of the State of Washington. CP 3.

The “to convict” instruction that the jury received read as follows:

To convict the defendant of the crime of vehicular assault, each of the following four elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 13th day of April, 2007, the defendant drove a vehicle;
- (2) That the defendant’s driving proximately caused substantial bodily harm to another person;
- (3) That at the time the defendant was under the influence of intoxicating liquor or drugs; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that all of the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. CP 48.5, Instruction No. 12.

Through Instruction No. 8, the jury was advised that:

A person is under the influence or affected by the use of intoxicating liquor or any drug when he or she has sufficient alcohol in his or her body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable analysis of the person’s blood, or the person’s ability to drive a motor vehicle is lessened in any appreciable degree as a result of intoxicating liquor or any drug.⁵ CP 48.5, Instruction No. 8.

While Dillon argues that the State did not prove beyond a reasonable doubt that his blood alcohol content (BAC) was at least 0.08

⁵ Emphasis added.

within two hours after driving, the State satisfied the RCW 46.61.522 because it proved that Dillon’s “ability to drive a motor vehicle” was “lessened” to an “appreciable degree as a result of intoxicating liquor.” CP: 48.5. Based on Dillon’s statement to Trooper Magallon that he had “about 7” alcoholic beverages at the “Skokomish Casino,” the last of which was about “30 minutes” before the crash, the jury had ample evidence on which find this prong of RCW 46.61.522 had been met. RP Vol.4 59: 23-25; 60: 3-4, 9-13. As the deputy prosecutor correctly argued in closing, “[W]hat we’re really focused on here is the intoxicating liquor.” RP Vol.7 426: 22-23.

Dillon’s argument that “the State was required to prove” that Dillon had a BAC level “of greater than 0.08% within two hours of driving” is misplaced, because that is: (a) inconsistent with the plain language of RCW 46.61.522; (b) the information; and (c) the jury instructions. AB: 16. As noted above, Instruction No. 8 allowed the jury to find that the State satisfied its burden by proving that Dillon drove with a BAC level of 0.08 within two hours of driving or that Dillon’s ability to drive a motor vehicle [was] lessened in any appreciable degree as a result of intoxicating liquor or any drug.⁶ CP 48.5. The “to convict” instruction

⁶ Emphasis added.

(No.12), the definition of vehicular assault (No. 7⁷) and the information support this argument. CP 48.5.

Conversely, the State also proved the timing element of Dillon's blood draw for the BAC through the following evidence and testimony: Trooper Magallon testified that he was dispatched to investigate the crash "out on Highway 106" at a "[l]ittle after 9:00 PM" on April 13, 2007, and that it took him "ten to fifteen minutes" to get there. RP Vol.6 307: 12-24. Dillon was read his Miranda warnings by Trooper Magallon at 10:09 PM on April 13, 2007. RP Vol.6 313: 1-25; 314: 1. After Dillon had been read his rights, he left the scene "...almost immediately," and was taken to Mason General Hospital for a blood draw. RP Vol.6 315: 6-12.

While Trooper Magallon could not remember the exact time that the blood draw was taken, he did recall that it was performed by "Mr. Bonilla" at Mason General, "about quarter to 11:00 or so." RP Vol.6 315: 15-21. In State's Exhibit No. 55, which was admitted into evidence, Trooper Magallon noted that he obtained the blood draw at Mason General Hospital on "04/13/07" at "2258" hours, or 10:58 PM. CP 48.4 (List of Exhibits), 55 (WSP Property/Evidence Report). Trooper

⁷ "A person commits the crime of vehicular assault when he operates or drives any vehicle while under the influence of intoxicating liquor or any drug and proximately causes substantial bodily harm to another." CP 48.5.

Magallon also noted that he witnessed the process of Mr. Bonilla drawing Dillon's blood "in it's entirety." RP Vol.6 316: 19-21.

Because the Trooper received the call at "a little after 9:00 PM" and personally saw Mr. Bonilla draw Dillon's blood at "about quarter to 11:00 or so," the State presented sufficient evidence for the jury, even absent the admission of State's Exhibit No. 55, to determine whether Dillon drove with a BAC level of 0.08 within two hours of driving, here the crash. Additionally, Asa Louis, a forensic scientist from the Washington State Patrol's Toxicology Laboratory testified that Dillon's BAC was, "0.19 grams of ethanol per 100 milliliters of blood." RP Vol.6 345: 15-19; RP Vol.7 373: 9-10. Dillon's argument that "...there was no evidence presented that the blood draw occurred within two hours of Mr. Dillon's driving" is erroneous, and the trial court was correct to allow this case to proceed to the jury. AB: 16-17.

3. BECAUSE THE TRIAL COURT MADE A CLEAR AND SPECIFIC RECORD OF ITS FINDINGS AND CONCLUSIONS FROM THE CrR 3.5 HEARING WHICH WERE TRANSCRIBED ERROR DID NOT OCCUR BECAUSE SEPARATE WRITTEN FINDINGS WERE NOT ENTERED.

Although formal findings and conclusions are required, the court's failure to enter them following a suppression hearing does not constitute prejudicial error if the court's comprehensive oral opinion and the record

of the hearing render the error harmless. State v. Clark, 46 Wash.App. 856, 859, 732 P.2d 1029 (1987).

Here, the trial court made very specific findings and conclusions following the CrR 3.5 hearing that were transcribed on pages 77-81 in Volume 4 of the Official Report of Proceedings. Considering the Court's rationale in State v. Head, no party in Dillon's case had to "comb" through the "oral ruling to determine whether appropriate 'findings' have been made," as they were succinctly rendered over four consecutive pages of transcript. State v. Head, 136 Wash.2d 619, 624, 964 P.2d 1187 (1998).

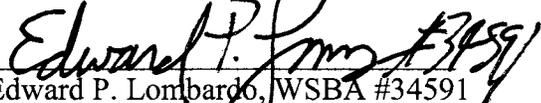
Under a rational reading of CrR 3.5(c) Duty of Court to Make a Record, in conjunction with reasoning in Clark, the trial court in Dillon's case has satisfied its obligation. At most, the trial court's omission in entering separate findings and conclusions in Dillon's case constitutes harmless error. Should the Court disagree with this analysis, a remand on solely this issue for the entry of separate, written findings and conclusion under CrR 3.5 may be necessary.

F. CONCLUSION

The State respectfully requests the Court to affirm the judgment and sentence.

Dated this 14TH day of MAY, 2010

Respectfully submitted by



Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)	
)	No. 38923-1-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
WOODROW F. DILLON,)	
)	
Appellant,)	
_____)	

I, EDWARD P. LOMBARDO, declare and state as follows:

On FRIDAY, MAY 14, 2010, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached the: STATE'S BRIEF OF

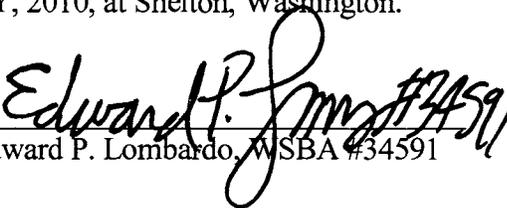
RESPONDENT, to:

Thomas M. Kummerow
Attorney at Law
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

FILED
 COURT OF APPEALS
 DIVISION II
 10 MAY 17 AM 10:14
 STATE OF WASHINGTON
 BY _____
 DEPUTY

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 14TH day of MAY, 2010, at Shelton, Washington.


 Edward P. Lombardo, WSBA #34591