

No. 47578-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shaun Johnson,

Appellant.

Clark County Superior Court Cause No. 13-1-01964-7

The Honorable Judge David E. Gregerson

Appellant's Reply Brief

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ARGUMENT

I. MS. JOHNSON’S CONVICTION VIOLATED HER JURY TRIAL RIGHT.

- A. Detective Luque’s opinion testimony violated *Quaale* and infringed Ms. Johnson’s right to an independent jury determination of the facts.

Over objection, Detective Luque was permitted to opine that Ms. Johnson was “impaired” by drugs. RP 496-497. He claimed scientific support for his opinion, even though he did not perform the twelve steps required under the DRE protocol. RP 365-408, 426-426, 461-471, 496-497.

This testimony exceeded the limits set by the Supreme Court in *State v. Quaale*, 182 Wn.2d 191, 340 P.3d 213 (2014) and *State v. Baity*, 140 Wn.2d 1, 991 P.2d 1151 (2000). Luque did not follow the twelve-step DRE protocol, but claimed scientific support for his opinion and improperly asserted an ability to judge impairment. *Quaale*, 182 Wn.2d at 198.

The trial court erred by overruling Ms. Johnson’s objection. *Id.*; RP 496-497. The improper admission of this opinion testimony infringed her right to a jury trial. *State v. King*, 167 Wn. 2d 324, 331, 219 P.3d 642 (2009).

Because Ms. Johnson specifically objected to the testimony, the error is preserved. Contrary to Respondent's argument, the error was not invited. *See* Brief of Respondent, pp. 8-9.

In addition, Respondent misrepresents the record. Ms. Johnson's attorney asked Detective Luque about his preliminary ("pre-step") determination of impairment, "before [Luque] started the evaluation." RP 461-462. This did not "open[] the door"¹ to improper expert testimony that exceeded the bounds of *Quaale* and violated *Baity*. RP 496-497.

Furthermore, Ms. Johnson did not have the power to "open the door" to the inadmissible testimony. *Cf. State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008) (addressing prosecutorial misconduct). When all twelve DRE steps are conducted, an expert may only testify that a suspect's behavior and attributes are consistent with drug use. *Quaale*, 182 Wn.2d at 198. Not even vigorous cross-examination opens the door to inadmissible, unsupported, and unscientific testimony of the type improperly admitted over objection here.

Nor does *Heatley* help Respondent. Brief of Respondent, pp. 11-12 (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993)). *Heatley* involved a lay opinion on intoxication based on general

¹ *See* Brief of Respondent, p. 9.

observations. Luque did not purport to give a lay opinion based on his general observations. RP 461-471; *cf. Heatley*, 70 Wn. App. at 580-583. Instead, he claimed a scientific basis for discerning “impairment” from drugs, despite his failure to follow the DRE protocol. RP 496-497.

This is the very issue addressed by *Quaale*.

Such false and misleading testimony is prohibited. *Quaale*, 182 Wn.2d at 198. Luque improperly “cast an ‘aura of scientific certainty to the testimony’”² and erroneously “predict[ed] the specific level of drugs present” by claiming he could tell that Ms. Johnson was “impaired.”³ *Id.*

The evidence should have been excluded.

Respondent does not suggest that the error was harmless beyond a reasonable doubt. This failure may be taken as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, Ms. Johnson’s conviction must be reversed and the case remanded with instructions to exclude Luque’s improper opinion testimony. *Quaale*, 182 Wn.2d at 201-202.

² *Id.*, (quoting *Baity*, 140 Wn.2d at 17).

³ RP 496-497.

B. Nelson's improper opinion should not have been admitted.

Respondent erroneously suggests that Nelson's testimony qualified as a "lay opinion" under ER 701. Brief of Respondent, pp. 14-16.⁴ But Respondent fails to show how Nelson's testimony qualified for admission under ER 701.

Respondent's argument contradicts the state's position at trial: in the lower court, the prosecution claimed that Nelson had "specialized knowledge," and sought to portray her as an expert. RP 273-286, 301-312. This should have resulted in exclusion under ER 701(c).

Respondent's failure to address ER 701(c) or to discuss the prosecutor's position at trial may be taken as a concession. *Id.*

Nor does Respondent explain how Nelson's opinion was "rationally based" on her perceptions, as required under ER 701(a). Brief of Respondent, pp. 14-16. Nelson improperly based her opinion on factors that do not logically relate to methamphetamine use, and admitted her ignorance of critical information. RP 303, 315, 319, 323-324; *see* Appellant's Opening Brief, p. 24.

⁴ Respondent does not argue that the court properly admitted Nelson's opinion as expert testimony. Brief of Respondent, pp. 14-16. This may be taken as a concession that the opinion was not admissible under ER 702. *Pullman*, 167 Wn.2d at 212 n.4. Accordingly, Ms. Johnson provides no additional argument on that point. *See* Appellant's Opening Brief, pp. 21-23.

Instead of addressing Ms. Johnson’s arguments or the requirements of ER 701, Respondent relies again on *Heatley*,⁵ in which the Court of Appeals approved admission of lay opinion on *alcohol* intoxication. *Heatley*, 70 Wn. App. at 576. *Heatley* does not suggest that a lay witness may opine that a person is affected by drugs.

The evidence should have been excluded. ER 701; *King*, 167 Wn.2d at 331.

II. THE COURT IMPROPERLY DENIED MS. JOHNSON’S MOTION TO SUPPRESS EVIDENCE UNLAWFULLY SEIZED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH CONST. ART. I § 7.

Ms. Johnson rests on the argument set forth in her Opening Brief.

III. THE COURT’S INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF VEHICULAR ASSAULT.

A. The court’s instructions permitted jurors to convict even absent proof of ordinary negligence.

Vehicular assault by means of intoxication requires proof of ordinary negligence. *State v. Lovelace*, 77 Wn. App. 916, 919, 895 P.2d 10 (1995).⁶ The court’s “to convict” instruction did not require proof of

⁵ Respondent also cites *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). *Montgomery* did not involve an opinion on intoxication.

⁶ *But see State v. Hursh*, 77 Wn. App. 242, 246, 890 P.2d 1066 (1995). The conflict between the cases is discussed below.

ordinary negligence. CP 149. The error requires reversal. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Respondent does not claim that the error was harmless beyond a reasonable doubt. Brief of Respondent, pp. 24-26. This failure can be treated as a concession. *Pullman*, 167 Wn.2d 212 n.4.

Furthermore, Ms. Johnson did not invite the error. Although, as Respondent notes, she initially proposed an instruction including language similar to that in Instruction No. 11, she later withdrew her proposed instruction. RP 794-795; *see* Brief of Respondent, p. 24.

The state bears the burden of proof on invited error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Having withdrawn the proposed instruction, defense counsel's actions are more properly characterized as a failure to object rather than invited error. *Id.*

Failure to object does not preclude review of a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). Respondent does not contend that the error is non-constitutional, or that is not manifest. Accordingly, the court's failure to instruct on ordinary negligence may be raised for the first time on review. *Id.*

B. The legislature did not intend vehicular assault by means of intoxicated driving to be a strict liability crime.

Strict liability offenses are not favored. *State v. Warfield*, 119 Wn. App. 871, 876, 80 P.3d 625 (2003), *as amended* (Jan. 21, 2004). Absent an explicit *mens rea* element, courts consider a number of factors (the “*Bash* factors”) to determine whether or not the legislature intended to create a strict liability offense. *Id.*, at 879 (citing *State v. Bash*, 130 Wn.2d 594, 605-606, 925 P.2d 978 (1996)).

Analysis of these factors shows that the legislature did not intend vehicular assault to be a strict liability crime.⁷ Accordingly, ordinary negligence remains an element of the offense, and the court should have instructed jurors on the state’s burden to prove ordinary negligence. *Id.*

First, examination of the common law suggests that vehicular assault is not a strict liability crime. A statute must be construed “in light of the background rules of the common law, and its conventional *mens rea* element.” *State v. Anderson*, 141 Wn.2d 357, 363, 5 P.3d 1247 (2000) (internal quotation marks omitted, quoting *Bash*, 130 Wn.2d at 605-606). There is no direct common-law analogue for vehicular assault. *Cf. Warfield*, 119 Wn. App. at 879. The closest common-law antecedent is

⁷ As outlined below, most of the factors weigh against strict liability. Only two factors support strict liability: the minimal danger that entirely innocent conduct would be criminalized and the risk of serious harm to the public. *Id.*, at 363.

assault, which is not founded upon strict liability.⁸ This suggests that the legislature did not intend to impose strict liability.

Second, neither crime is a “public welfare offense,” and thus neither statute is likely to impose strict liability. *Anderson*, 141 Wn.2d at 363. Public welfare crimes are generally those which are regulatory in nature, with no direct or immediate injury to person or property. *Id.* Vehicular assault cannot be categorized as public welfare offenses; by definition, the offense requires harm to persons.

Third, the high penalty that attends conviction suggests the legislature did not intend strict liability. *Id.*, at 364-365. Crimes resulting in harsh penalties are more likely to require proof of a culpable mental state. *Id.* Vehicular assault is a class B felony. RCW 46.61.520; RCW 46.61.522.

Fourth, the ease with which a person can “ascertain the true facts” suggests that the legislature did not intend strict liability. *Id.* Any person who drinks and drives knows that negligent driving may result. This weighs against strict liability. *Id.*

Fifth, proof of fault will not be “difficult and time-consuming”⁹ for the state, given the “hundreds of minor oversights and inadvertences” that

⁸ See *State v. Sample*, 52 Wn. App. 52, 55, 757 P.2d 539 (1988) (noting that negligent conduct would not constitute assault at common law).

can comprise ordinary negligence. *State v. Ferguson*, 76 Wn. App. 560, 569, 886 P.2d 1164 (1995) (internal quotation marks and citation omitted). This, too, weighs against strict liability. *Anderson*, 141 Wn.2d at 363.

Sixth, the number of prosecutions for vehicular assault is relatively low.¹⁰ This makes it more likely that the legislature intended conviction to require proof of a culpable mental state. *Id.*, at 365.

For all these reasons, the statute should be interpreted to require proof of ordinary negligence. *Id.* The omission of that element from the “to convict” instruction requires reversal of Ms. Johnson’s vehicular assault conviction. *Id.*, at 367.

- C. The 2001 amendment to the vehicular assault statute did not impose strict liability.
 - 1. The Supreme Court did not resolve the conflict between *Hursh* and *Lovelace* prior to enactment of the 2001 amendment to RCW 46.61.522.

Within the span of a few months in 1995, Division 1 of the Court of Appeals issued conflicting decisions regarding the necessity of proving ordinary negligence in vehicular assault cases. Both decisions preceded

⁹ *Id.*

¹⁰ In 2014, the combined total for vehicular assaults committed by means of intoxication or reckless driving was 103. See Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing*, p. 12 (2014) (available at www.cfc.wa.gov). The state saw far fewer convictions for this offense than, for example, second-degree assault (715), second-degree burglary (1,191), or first-degree trafficking in stolen property (396). Caseload Forecast Council, pp. 4, 12.

the Supreme Court's decision in *Bash*, and thus neither had the benefit of the multi-factor analysis set forth in that case.

First, in *Hursh*, the court unequivocally concluded that “RCW 46.61.522 cannot be construed to require a showing of negligent conduct as an element of vehicular assault.” *Hursh*, 77 Wn. App. at 246.¹¹ According to the *Hursh* court, “[t]o attempt such a construction would be to read into the statute an element which is not there.” *Id.*, at 246-47. The *Hursh* court did not analyze the statute to determine whether or not the legislature intended a strict liability offense.

Two months after publication was ordered in *Hursh*¹², and without reference to that decision, Division 1 issued *Lovelace*. The *Lovelace* court found that conviction of vehicular assault requires proof of “ordinary negligence and intoxication while driving.”¹³ *Lovelace*, 77 Wn. App. at 919. The *Lovelace* court did not analyze the statute to determine whether or not the legislature intended a strict liability offense. *Id.*

The Supreme Court has not resolved the conflict between *Hursh* and *Lovelace*. *Rivas*, upon which Respondent relies, involved the

¹¹ *Abrogated on other grounds by State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005).

¹² The opinion issued in January of 1995; publication was ordered on March 13, 1995. *Id.*

¹³ Curiously, Chief Judge Pekelis authored *Lovelace* and joined the decision in *Hursh*.

vehicular homicide statute.¹⁴ Brief of Respondent, p. 25 (citing *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995)). The *Rivas* court did not address ordinary negligence, which had previously been recognized as an element of vehicular homicide.¹⁵ Nor did the *Rivas* court mention the vehicular assault statute, *Hursh*, or *Lovelace*.

2. The *Bash* factors suggest that vehicular assault is not a strict liability offense; the 2001 amendment does not affect the ordinary negligence element.

As outlined above, the *Bash* factors weigh in favor of a mens rea requirement, suggesting that *Lovelace* was correctly decided.

Unfortunately, both *Hursh* and *Lovelace* preceded *Bash*, and thus did not rely on the correct analysis for reaching the proper result. Instead, *Lovelace* (a vehicular assault case) simply cited to *McAllister* (a vehicular homicide case).

Because the cases involved different crimes, the *Lovelace* court's reliance on *McAllister* is questionable.¹⁶ The *Lovelace* court created additional problems by implying that ordinary negligence was necessary

¹⁴ The vehicular homicide statute, RCW 46.61.520, employs different language and has a different legislative history.

¹⁵ See *State v. McAllister*, 60 Wn. App. 654, 659, 806 P.2d 772 (1991), *abrogated on other grounds by Roggenkamp*, 153 Wn.2d 614. In fact, the *Rivas* court cited *McAllister* with approval. *Rivas*, 126 Wn.2d at 453.

¹⁶ Furthermore, in the absence of the *Bash* factors, the *McAllister* court's decision lacked a proper foundation. However, as outlined above, the court reached the correct result under *Bash* and its progeny.

to establish proximate cause. *Lovelace*, 77 Wn. App. at 919 (citing *McAllister*, 60 Wn. App. at 658-59.)

In fact, as discussion of the *Bash* factors shows, ordinary negligence is an implied element, independent of the other elements required to prove vehicular assault. This is important because the 2001 amendment removed the state's burden to prove that the driver's intoxication proximately caused bodily harm. Laws of 2001, Ch. 300, §1.¹⁷ The 2001 amendment did not purport to create a strict liability offense.¹⁸ Thus, under the *Bash* factors, RCW 46.61.522 should not be construed to impose strict liability.

The legislature has not clearly stated an intent to impose strict liability for vehicular assault committed by means of intoxication. RCW 46.61.522. The requirement of ordinary negligence fits within the overall statutory scheme, which requires proof of recklessness or aggravated negligence for sober drivers who injure others.

¹⁷ The prior and current statutes are set forth in the Appendix. An amendment in 1996 affected only the penalty. Laws of 1996, Ch. 199, §8.

¹⁸ Nor should it be interpreted as a response to either *Hursh* or *Lovelace*, since it came more than five years after those cases were decided. Furthermore, the legislature was presumably familiar with *Lovelace*, the more recent of the two cases addressing ordinary negligence. See *State v. Ervin*, 169 Wn.2d 815, 825, 239 P.3d 354 (2010). Absent evidence of legislative intent "to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions." *Id.* (internal quotation marks and citation omitted).

Because the trial court failed to instruct jurors on the state's obligation to prove ordinary negligence, Ms. Burch's vehicular assault conviction must be reversed. *Smith*, 131 Wn.2d at 263. On retrial, the court must instruct jurors that conviction of vehicular assault by means of intoxicated driving requires proof of ordinary negligence. *Lovelace*, 77 Wn. App. at 919.

IV. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF VEHICULAR ASSAULT.

Ms. Johnson relies on the argument set forth in her Opening Brief.

V. THE PROSECUTOR IMPROPERLY TOLD JURORS TO DRAW NEGATIVE INFERENCES FROM MS. JOHNSON'S EXERCISE OF HER CONSTITUTIONAL RIGHTS.

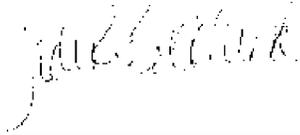
Ms. Johnson relies on the argument set forth in her Opening Brief.

CONCLUSION

For the foregoing reasons and those set forth Appellant's Opening Brief, Ms. Johnson's convictions must be reversed.

Respectfully submitted on January 26, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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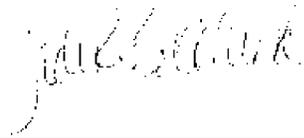
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 26, 2016.



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APPENDIX

Effect of the 2001 Amendment to RCW 46.61.522 (Vehicular Assault)

Former RCW 46.61.522(1)
(Effective until July 22, 2001)

46.61.522. Vehicular assault—Penalty

- (1) A person is guilty of vehicular assault if he operates or drives any vehicle:
- (a) In a reckless manner, and this conduct is the proximate cause of serious bodily injury to another; or
 - (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and this conduct is the proximate cause of serious bodily injury to another.

RCW 46.61.522(1)
(Effective July 22, 2001)

46.61.522. Vehicular assault—Penalty

- (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
- (a) In a reckless manner and causes substantial bodily harm to another; or
 - (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or
 - (c) With disregard for the safety of others and causes substantial bodily harm to another.

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