IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DENNIS DARREL DePOE, Appellant.	No. 44886-6-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — A jury returned guilty verdicts in Pierce County Superior Court against Dennis Darrel DePoe for felony driving under the influence of intoxicating liquor (DUI), making a false or misleading statement to a public servant, first degree driving with a suspended license, and operating a motor vehicle without an ignition interlock device, all based on conduct that occurred on land held in trust for the Puyallup Tribe of Indians. DePoe, an enrolled member of the federally recognized Sauk-Suiattle Indian Tribe, appeals from the convictions entered on the jury's verdicts, arguing that (1) the trial court lacked jurisdiction over the charged crimes, (2) the State presented insufficient evidence to support a conviction on the DUI charge, (3) DePoe's attorney rendered ineffective assistance of counsel, and (4) the statute extending state jurisdiction over certain crimes in Indian country[1] and the DUI statute are unconstitutional as applied to DePoe. We affirm, holding that the trial court had jurisdiction over all the charged crimes and that DePoe's substantive arguments are not well founded.

[1] "Indian country" is a term of art defined at 18 U.S.C. section 1151, including, among other areas, land within a reservation held in trust by the federal government for a Native American Tribe.

FACTS

Puyallup Tribal Police Officer Ryan Sales responded to a report of an impaired driver in the parking lot of the Emerald Queen Casino I-5 in Tacoma. Sales found a Volkswagen Jetta in the parking lot matching the description of the car in the impaired driver report. The Jetta was straddling the lines of a parking stall, its front end in contact with a chain link fence in front of the stall. The Jetta was "high centered" over the curb in front of the stall, with the car's front wheels off the pavement such that it could not move. Verbatim Report of Proceedings (VRP) at 123-24. The Jetta's trunk lid and driver's side door stood open, and Sales noticed a cooler and a backpack outside the driver's side door.

Sales saw a man standing at the back of the Jetta and another man, later identified as DePoe, walking away. When Sales ordered DePoe to return, he complied. DePoe wore clothing matching the description in the initial report. When Sales asked if the Jetta belonged to DePoe, DePoe denied it, stating that the car belonged to someone who had just left.

Sales asked DePoe for identification, and DePoe claimed not to have any. DePoe identified himself as Desman David DePoe, born May 29, 1986. After a law enforcement database revealed no information associated with that name, Sales asked again, and DePoe gave the same information.

When Sales asked about the backpack, DePoe also denied owning it. Sales searched the backpack and found court documents showing DePoe's correct name, with a birthdate of May 30, 1985. When Sales searched the police database using DePoe's true name and birth date, he discovered that DePoe's driver's license had been suspended and that DePoe was required to have a functioning ignition interlock device on his car.

Sales checked the Jetta's interior and saw no interlock device. Sales smelled an odor of alcohol coming from DePoe and noticed that DePoe's speech was slurred and "his gait was a little off." VRP at 106-07. Sales thought that "possibly" DePoe might have been impaired. VRP at 107.

Puyallup Tribal Police Corporal John Scrivner arrived shortly after Sales and continued the investigation. Scrivner also observed that DePoe showed signs of intoxication. The officers noticed several empty beer cans in the trunk, three unopened cans on the ground near the front right side of the Jetta, and an open can on the floor of the car.

Scrivner arrested DePoe and placed him in the back of a patrol car. Scrivner then went in the casino and watched video recordings of the incident captured by the casino's surveillance cameras.

The video showed the Jetta drive down the paved roadway between the front of the casino building and the casino parking stalls, then park in the stall where the responding officers ultimately discovered the car. DePoe, wearing a backpack, got out of the driver's seat of the car and approached the casino entrance. The video showed DePoe return to the Jetta and get in the driver's seat a short time later, then showed the front of the car move forward over the curb and into the fence. The time stamp on the video showed that DePoe arrived at the casino more than an hour before Sales initially contacted him.

After watching the video, Scrivner returned to the patrol car and informed DePoe that he was under arrest for DUI, driving with a suspended license, and driving a car without an ignition interlock device. Scrivner then drove DePoe to the police station, where DePoe repeatedly refused to respond to requests to submit a breath sample.

The State charged DePoe in Pierce County Superior Court with DUI, making a false statement to a public servant, driving with a suspended license, and failure to have an ignition interlock device. DePoe moved to dismiss the charges based on lack of jurisdiction.

At a hearing on the motion to dismiss, the parties stipulated that DePoe is an enrolled member of the federally recognized Sauk-Suiattle Indian Tribe and that the events at issue took place on land held in trust by the federal government for the Puyallup Tribe of Indians within the Puyallup Indian Reservation. The trial court denied the motion, ruling that it had jurisdiction under RCW 37.12.010, the statute asserting state court jurisdiction over Indians on tribal lands as to certain types of cases, because the roadway on which the video showed DePoe driving qualified as a "public street, alley, or road or highway." VRP at 23.

The jury returned guilty verdicts on all charges. The trial court entered convictions on the verdicts and sentenced DePoe to 60 months' confinement on the DUI charge, as well as lesser concurrent terms on the other charges. DePoe appeals and has submitted a statement of additional grounds for review (SAG) under RAP 10.10.

ANALYSIS

Because DePoe's jurisdictional argument, if correct, would require reversal of all his convictions, we first address that claim. We hold that our Supreme Court's recent decision in *State v. Shale*, ___ Wn.2d ___, 345 P.3d 776 (2015), compels the conclusion that the State had jurisdiction to try DePoe for all of the charged crimes. We then turn to DePoe's challenge to the sufficiency of the evidence supporting the DUI charge, which would, if successful, require dismissal of the charge with prejudice. We next address his claim that his attorney rendered ineffective assistance. Finally, we address DePoe's constitutional challenges to the State's assumption of jurisdiction over crimes in Indian country and to the DUI statute.

I. TRIAL COURT JURISDICTION OVER THE CHARGED CRIMES

DePoe argues that the trial court lacked jurisdiction to try him for making a false statement to a public servant, because the conduct underlying the charge occurred on tribal trust land within the Puyallup Indian Reservation and did not involve one of the enumerated types of matters over which the State has asserted nonconsensual jurisdiction in Indian country under RCW 37.12.010. Before the decision in *Shale* was issued, the State conceded that DePoe was correct.

DePoe further contends in his SAG and supplemental brief that the trial court lacked jurisdiction over the other charges. DePoe acknowledges that the State has by statute asserted jurisdiction over matters involving the operation of motor vehicles on public streets, alleys, roads, and highways in Indian country. DePoe points out, however, that the only road surface on which the State's evidence showed that he operated the Jetta was the roadway between the casino and the parking lot, and argues that, because this roadway does not qualify as "public" within the meaning of the relevant statute, the trial court lacked jurisdiction over the crimes. SAG at 17. Under *Shale*, we must reject both DePoe's jurisdictional arguments and the State's concession. 345 P.3d at 780-82.

The State bears the burden of establishing state court jurisdiction to prosecute someone for a crime. *State v. L.J.M.*, 129 Wn.2d 386, 392, 918 P.2d 898 (1996). Generally, the State meets this burden merely by showing that any essential element of the crime occurred in Washington. *L.J.M.*, 129 Wn.2d at 392. A defendant who then challenges the state court's jurisdiction must "point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction." *L.J.M.*, 129 Wn.2d at 395. The burden

then shifts back to the State, which must establish state court jurisdiction beyond a reasonable doubt. *L.J.M.*, 129 Wn.2d at 394-95.

To the extent the dispute turns on factual questions, those matters become elements to be proved to the trier of fact. *State v. Boyd*, 109 Wn. App. 244, 251, 34 P.3d 912 (2001). Where state court jurisdiction turns entirely on a question of law, as in cases where the parties do not dispute the location of the conduct at issue, but only whether the place at issue qualifies as Indian country, then the court properly decides the issue. *State v. Squally*, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997); *L.J.M.*, 129 Wn.2d at 396-97.

Absent an express grant from Congress, state courts have no jurisdiction over crimes committed by enrolled tribal members in Indian country. Jurisdiction instead rests with the tribes or with the federal government. Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law* 280, 87 WASH. L. REV. 915, 926-29 (2012) (citing, *e.g.*, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (U.S. 1832); *Wetsit v. Stafne*, 44 F.3d 823, 825 (9th Cir. 1995)). A tribe's jurisdiction over its reservation extends to members of other federally recognized tribes present there. *United States v. Lara*, 541 U.S. 193, 210, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004).

Congress authorized certain states to impose concurrent state court jurisdiction in Indian country without tribal consent. PUB. L. NO. 83-280, 67 Stat. 588 (1953) (codified, as amended, as 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-26; 28 U.S.C. § 1360).[2] The Washington legislature exercised this grant of authority to extend, without tribal consent, limited state criminal and civil

[2] Congress subsequently revoked the states' power under Public Law 280 to impose jurisdiction without tribal consent. 25 U.S.C. § 1321. The revocation was not retroactive, however. Unless retroceded, states retain whatever jurisdiction they imposed before the congressional revocation. *State v. Hoffman*, 116 Wn.2d 51, 68-69, 804 P.2d 577 (1991) (citing 25 U.S.C. § 1323(a)).

jurisdiction over enrolled members of federally recognized tribes on lands within the boundaries of an established reservation that are allotted to particular tribal members or, like the parcel at issue here, held in trust by the federal government for a recognized tribe. RCW 37.12.010; *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, 652 (9th Cir. 1966); *State v. Sohappy*, 110 Wn.2d 907, 909, 757 P.2d 509 (1988).

The legislature limited the state's assumption of nonconsensual jurisdiction to enumerated categories of cases. *State v. Pink*, 144 Wn. App. 945, 950-51, 185 P.3d 634 (2008). In relevant part, the statute imposing jurisdiction provides that

> [t]he state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by [Public Law 83-280], but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States . . . except for the following:
>
> . . .
>
> (8) Operation of motor vehicles upon the public streets, alleys, roads and highways.

RCW 37.12.010. The parties' jurisdictional dispute focuses on the trial court's determination that the roadway between the casino and the parking lot qualified as a "public street[], alley[], road[or] highway[]" under RCW 37.12.010.

After the parties submitted their briefing, however, the *Shale* court interpreted this statute to give state courts jurisdiction to prosecute enrolled members of one tribe accused of an offense taking place on another tribe's reservation. 345 P.3d at 779-82. DePoe is an enrolled member of the Sauk-Suiattle Indian Tribe accused of committing crimes on the Puyallup Indian Reservation. Therefore, it is not necessary either to engage in the jurisdictional analysis of *L.J.M.* or *Squally* or to determine whether the road at issue is a public street, alley, road, or highway under RCW

37.12.010. *Shale* is directly on point and controls. Under that decision, the trial court had jurisdiction over all of the charges against DePoe.

II. SUFFICIENCY OF THE EVIDENCE ON THE DUI CHARGE

DePoe contends that the State did not present sufficient evidence to sustain the DUI conviction. Although DePoe concedes that the State presented evidence that he was intoxicated at the time Sales and Scrivner contacted him and that he operated the Jetta, DePoe argues that the evidence does not establish that he operated the Jetta while intoxicated.

In evaluating the sufficiency of the evidence, we review the evidence in the light most favorable to the State. *State v. Ehrhardt*, 167 Wn. App. 934, 943, 276 P.3d 332 (2012) (citing *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010)). We ask "'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). An appellant who claims that insufficient evidence supports his conviction "admits the truth of the State's evidence and all reasonable inferences therefrom." *Ehrhardt*, 167 Wn. App. at 943 (citing *Drum*, 168 Wn.2d at 35).

Where "the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilt beyond a reasonable doubt, a conviction may be properly based on 'pyramiding inferences.'" *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (quoting 1 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 5.17, at 450 (7th ed. 1992)). Inferences drawn from circumstantial evidence, though, "must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

As charged here, the State had to prove that Depoe (1) operated a vehicle and (2) "[was] under the influence of or affected by intoxicating liquor, marijuana, or any drug" at the time.[3] RCW 46.61.502(1)(c). DePoe points out that "'[p]roof that a car ran off the road, caused an accident or stopped in a traveling lane does not establish that an element of the offense [of DUI] was committed[, and] proof that someone was intoxicated does not prove that the person drove . . . the car.'" SAG at 19 (quoting *City of Bremerton v. Corbett*, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986) (involving a challenge to the admission of inculpatory statements under the corpus delicti rule)). "'To be guilty of driving while intoxicated,'" DePoe also notes, "'a driver must be in physical control and also must have had the vehicle in motion at the time in question.'" SAG at 19 (quoting *State v. Beck*, 42 Wn. App. 12, 15, 707 P.2d 1380 (1985). (Internal quotation marks omitted.)

Presumably, DePoe's argument relies on the same theory argued to the jury by his defense counsel: that the State's evidence was also consistent with DePoe having arrived at the casino sober, then having become intoxicated in the 1 hour and 10 minutes that passed before Sales arrived.

The surveillance video, which the trial court admitted into evidence, showed the Jetta jump up on the curb and hit the fence shortly after DePoe arrived and casino staff refused him entry. Sales and Scrivner both gave testimony tending to establish that DePoe was impaired when they contacted him and that he refused to submit a sample for blood alcohol testing or take a field sobriety test. The trial court instructed the jury, in accordance with RCW 46.61.517, that it could consider DePoe's refusal to submit to blood alcohol testing against him.

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[3] DePoe stipulated that he had convictions for four or more prior offenses as defined in RCW 46.61.5055, one of the alternative means of raising a DUI charge to a felony. RCW 46.61.502(6)(a).

The jury could have reasonably inferred from Sales's and Scrivner's testimony that DePoe was impaired when they encountered him. From this evidence, a rational juror could further have inferred, based on the video, the position of the Jetta when Sales and Scrivner arrived, and DePoe's refusal to submit to testing that he was impaired at the time he operated the Jetta. The jury could reasonably have concluded that the State had proved each element of felony DUI beyond a reasonable doubt.[4] Therefore, DePoe's challenge to the sufficiency of the evidence fails.

DePoe's challenge to the sufficiency of the evidence also appears to rest in part on the contention that the trial court erred under the confrontation clause in admitting the surveillance video. DePoe, however, has waived this argument.

In all federal and state criminal prosecutions, the Sixth Amendment's confrontation clause guarantees that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Appellate courts review confrontation clause challenges de novo. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007).

Under the confrontation clause, a trial court may admit "testimonial statements" of witnesses not present at trial only if (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant concerning the statements. *Crawford*, 541 U.S. at 53-54, 59-61. The defendant, however, must timely raise the issue in the trial court. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

[4] DePoe also appears to argue that the State failed to prove the jurisdictional element of the charges, reprising his argument based on RCW 37.12.010 and *L.J.M.*, 129 Wn.2d at 394-95. SAG 17-20. We reject this claim for the reason already articulated in Part I, above.

Although DePoe objected in the trial court to the admission of the surveillance video due to lack of sufficient foundation, he did not raise the confrontation clause. He has thus waived any confrontation clause challenge, and we need not consider whether a surveillance video qualifies as "testimonial" under *Crawford*, 541 U.S. at 53-54.

III. Ineffective Assistance of Counsel

DePoe contends that his trial counsel rendered ineffective assistance, depriving DePoe of the right to counsel guaranteed by the Sixth and Fourteenth Amendments. Specifically, DePoe argues that his attorney's performance was deficient because defense counsel did not assert the "two hour rule" or request an instruction on physical control of a vehicle while under the influence under RCW 46.61.504 as an included offense. We disagree.

Appellate courts review claims of ineffective assistance of counsel de novo, as they present mixed questions of law and fact. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). A defendant who raises an ineffective assistance claim "bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at 109. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Although "[t]here is a strong presumption that defense counsel's conduct is not deficient," that presumption is rebutted if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

DePoe's attorney did not propose an instruction on the included offense or object to the absence of such an instruction. DePoe, however, was not entitled to such an instruction. Our

Supreme Court has held that "physical control while under the influence is an included offense of DUI." *State v. Huyen Bich Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008). Under the factual prong of the governing test, however, to be entitled to an instruction on the included offense, the evidence would have to "'permit a jury to rationally find [DePoe] guilty of the lesser offense and acquit him of the greater.'" *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1160 (2000) (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

Here, the State relied on two instances in which DePoe was in control of the Jetta: first, when he initially arrived and attempted to enter the casino, and second, when he returned to the parking stall and "high-centered" the car. In both instances, Depoe operated the vehicle. Thus, the evidence did not give rise to a reasonable inference that DePoe committed only the included offense. *See State v. Daily*, 164 Wn. App. 883, 887-88, 265 P.3d 945 (2011). Counsel did not perform deficiently by requesting an instruction to which the evidence did not entitle DePoe.

DePoe apparently refers to the "two hour rule" based on a misunderstanding of the law. The DUI statute provides that a person is guilty of DUI if, "within two hours after driving [a vehicle within the State, the person has] an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood." RCW 46.61.502(1)(a).

This statutory provision describes only one of several alternative means by which a driver could commit DUI. RCW 46.61.502(1)(a)-(d); *see also State v. Ortiz*, 80 Wn. App. 746, 749-50, 911 P.2d 411 (1996). Here, the State relied on the RCW 46.61.502(1)(c) alternative, which required it to prove that DePoe drove "under the influence of or affected by intoxicating liquor." VRP at 252. Because DePoe did not submit a sample, and the State thus presented no blood alcohol content measurement, the two hour rule has no bearing on the issues in this case, and his attorney had no reason to raise it.

DePoe fails to show that his attorney's performance fell below an objective standard of reasonableness. Thus, his ineffective assistance claim fails.

IV. CONSTITUTIONAL CHALLENGES TO THE DUI STATUTE AND THE STATE'S ASSERTION OF JURISDICTION OVER INDIAN COUNTRY

DePoe contends that both RCW 37.12.010(8), the statute imposing state court jurisdiction over enrolled tribal members for matters involving the operation of motor vehicles on public roadways, and RCW 46.61.502, the DUI statute, are "overbroad and unconstitutionally vague" as applied to this case. SAG at 21-27. The first claim appears to merely recast DePoe's challenge to the trial court's jurisdiction, rejected above: essentially, DePoe argues that, if we agree with the State that the roadway between the casino and the parking stalls falls within the purview of the jurisdictional statute, then the statute is unconstitutional.

This claim is too vague and conclusory to merit review. "Parties raising constitutional issues must present considered arguments," and "naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (internal quotation marks omitted). We decline to address it further.

Turning to his challenge to the DUI statute, DePoe points out that the State offered no evidence of the results of a field sobriety test or blood alcohol test, relying instead on "unscientific facts, inter alia, that Mr. DePoe had been drinking, was wavering in his walking, high-centered the subject vehicle . . . and refused to submit to testing." SAG at 26. From this, he argues that the jury "reach[ed] an unconstitutional mandatory conclusion that Mr. DePoe's [blood alcohol content] met or exceeded the statutory limit of .08 and convicted him on that basis." SAG at 26.

We presume statutes are constitutional, a presumption the appellant overcomes only by proving it unconstitutional beyond a reasonable doubt. *State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988). A conclusive presumption offends the constitution only if "it requires a trier of fact to presume from the State's proof of one fact some other fact that constitutes a necessary element of the crime." *State v. Crediford*, 130 Wn.2d 747, 757, 927 P.2d 1129 (1996) (citing *Brayman*, 110 Wn.2d at 189-91).

As discussed above in Part III, the blood alcohol test is merely one means by which the State may prove a DUI charge. RCW 46.61.502(1)(a)-(d); *see also Ortiz*, 80 Wn. App. at 749-50. Because it relied on a different alternative, the State did not have to prove any particular blood alcohol level. It did not rely on a conclusive presumption. This conclusion is directly buttressed by *State v. Franco*, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982), in which our Supreme Court rejected an argument not meaningfully distinguishable from DePoe's in the following terms:

> Under the present statutory scheme, however, the presumptions have been abolished. Instead, the statute sets out alternate methods of committing the crime of driving while under the influence. The statute does not presume, it defines.

The DUI statute does not create an unconstitutional presumption.

DePoe's constitutional challenges fail.

CONCLUSION

The State had jurisdiction to prosecute DePoe for the charged crimes under *Shale*, and sufficient evidence supports his convictions. DePoe fails to show that his attorney performed deficiently or that the DUI statute is unconstitutional. His remaining claims are too vague and

conclusory to merit review. We affirm the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, A.C.J.
BJORGEN, A.C.J.

We concur:

Maxa, J.
MAXA, J.

Melnick, J.
MELNICK, J.