IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WOODROW FRANKLIN DILLON, Appellant.	No. 39847-8-II UNPUBLISHED OPINION

Hunt, J. – Woodrow Franklin Dillon appeals his jury trial conviction for vehicular assault. He argues that (1) the trial court erred when it admitted statements he made to the arresting trooper before the trooper advised him of his *Miranda*[1] rights; and (2) the evidence was insufficient to support the jury's verdict. We affirm.

FACTS

I. Accident, Initial Investigation, and Blood Draw

At approximately 9:00 pm on April 13, 2007, Woodrow Franklin Dillon drove his car across the center line on Highway 106 in Mason County and collided head-on with a pickup truck that William Ronald Brown was driving. When Washington State Patrol Troopers Christopher

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

Magallon and Richard Charles Pigmon arrived at the accident scene, medical aid personnel were already there. Brown's Dodge pickup truck was facing westbound in the westbound lane; and Dillon's Ford Escape was partially in the eastbound lane and partially in a ditch.

When Magallon approached the Ford, Dillon was "kind of resting himself against the open driver's side door standing outside of the vehicle." IV Verbatim Report of Proceedings (VRP) at 58. Magallon noticed that Dillon had blood around his mouth and on his beard, and asked "if he was okay"; Dillon responded that "he was okay, but he had problems with his . . . legs." IV VRP at 58. In response to Magallon's question, Dillon confirmed that he was the Ford's driver. When Magallon asked for his driver's license, Dillon stated that he had not had one "in awhile" and provided Magallon with an identification card. IV VRP at 58. As he spoke to Dillon, Magallon noticed that (1) Dillon's eyes were red, bloodshot, and watery; (2) his breath smelled strongly of alcohol; and (3) his speech was slurred.

Magallon asked Dillon, "[W]hat happened?" IV VRP at 59. Dillon replied that he "just came around the corner and hit him." IV VRP at 59. Because of Dillon's appearance and the alcohol smell on Dillon's breath, Magallon asked Dillon "how many alcoholic beverages he [had] . . . consumed." IV VRP at 59. Dillon first responded that he did not know. When Magallon asked for an estimate, Dillon responded that he had consumed "about seven" alcoholic beverages. IV VRP at 60. Magallon then asked Dillon when he had consumed the alcohol, and Dillon responded, "[A]t the casino." IV VRP at 60. After Magallon verified that Dillon was referring to the Skokomish Casino, about six miles from the accident scene, Magallon asked Dillon again when he had had his last drink; Dillon responded that he had had his last drink about 30 minutes

earlier.

At that point, an emergency medical technician (EMT) approached and started to treat Dillon's injuries. Pigmon told Magallon that Brown had been injured and that he (Pigmon) thought this was "going to be a vehicular assault case." IV VRP at 60. After the EMT placed Dillon in the back of the ambulance, Magallon approached Dillon and asked if he would perform some voluntary field sobriety tests; Dillon stated that he would "rather not." IV VRP at 61. Magallon then advised Dillon of his *Miranda* rights and arrested him. After his arrest, Dillon said nothing else to Magallon.

From the time Magallon initially contacted Dillon until the ambulance left the accident scene, Magallon did not see Dillon ingest any alcohol. Magallon followed the ambulance to Mason General Hospital, "re-contact[ed]" Dillon at about 11:00 pm, and was present when the phlebotomist drew a sample of Dillon's blood. VI VRP at 315. Magallon transported Dillon's blood sample to the State Patrol Office and "entered them into the . . . State Patrol evidence system" at 2:10 am the next morning. VI VRP at 318. The blood sample showed that Dillon's blood alcohol content (BAC) at the time of the blood draw was 0.19 g/100 ml.[2]

II. Procedure

The State charged Dillon with vehicular assault. The case proceeded to a jury trial.

[2] One method of showing that a person is guilty of driving under the influence of intoxicating liquor is to establish that the person's breath or blood alcohol level is 0.08 or higher within two hours of having driven a vehicle. RCW 46.61.502(1)(a).

A. CrR 3.5 Hearing

The trial court held a CrR 3.5 hearing addressing the admissibility of Dillon's pre-*Miranda* statements to Magallon. Magallon was the only witness. In addition to the facts described above, Magallon testified that (1) Dillon would not have been free to leave the accident scene before he (Magallon) arrested him because the troopers were investigating the accident; and (2) despite having seen indications of intoxication and having questioned Dillon, Magallon was not "specifically" investigating a possible driving under the influence (DUI) charge, as opposed to the accident in general, until after he "re-contacted" Dillon in the ambulance. IV VRP at 65. But Magallon admitted that once he smelled alcohol on Dillon's breath, he (Magallon) was investigating a "potential DUI," as well as the collision. IV VRP at 66.

The State argued that Dillon's pre-*Miranda* statements were admissible because Dillon had not been subject to a custodial interrogation until after Magallon had formally arrested him. Dillon argued that Magallon should have advised him (Dillon) of his *Miranda* rights at the point that he was not free to leave, namely, once Magallon started asking questions about Dillon's possible intoxication.

The trial court issued detailed oral findings of fact. It also concluded that Dillon had not been in custody for *Miranda* rights purposes until Magallon formally arrested him and that his pre-*Miranda* statements were, therefore, admissible.

B. Trial

At trial, EMT Tammy Dawn Johnson testified that she had treated Dillon at the accident site. While she was treating him, he told her that (1) he had been traveling about 45 miles per

hour when he "hit another car" head-on, without describing exactly how the accident had occurred; and (2) he had consumed "six to seven drinks."[3] V VRP at 167. After quickly assessing Dillon, the ambulance left the accident site at about 10:20 pm, arriving at the hospital with Dillon at 10:43 pm; Johnson left Dillon in the emergency room. The phlebotomist who had taken the blood sample testified that he had drawn Dillon's blood on the night of the accident, but he could not recall the exact time. He testified, however, that most blood draws are performed less than 30 minutes after a patient enters the emergency room.

Brown testified that he had been driving west on the highway at about 9:00 pm, when Dillon's vehicle came around a curve too fast, crossed the center line, and hit his (Brown's) truck head-on. Brown sought out help immediately upon extricating himself from his truck, and a woman from a nearby house told him that someone had called 911 and then helped care for him until the ambulance arrived. Once the ambulance arrived, the EMTs treated Brown at the scene then transported him by helicopter to Harborview. Brown suffered a broken sternum, several broken ribs, a fractured skull, lacerations, back and shoulder injuries, and nerve damage. At the time of trial, not all of the injuries had "resolved."[4] V VRP at 202.

Washington State Patrol Detective David Bryan Killeen, who investigated the accident, testified that someone reported the accident at about 9:05 pm. Killeen concluded from his investigation that Dillon had crossed the center line as he rounded the curve and then hit Brown's

[3] Defense counsel did not object to this testimony, and Dillon does not challenge the admission of this testimony on appeal.

[4] Brown also testified about his medical marijuana use and the various pain medications he had taken on the night of the accident.

truck.[5]

C. Jury Instructions and Jury Question

The trial court's jury instructions told the jury that to convict Dillon it had to find that he had driven a vehicle "while under the influence of intoxicating liquor or any drug and proximately cause[d] substantial bodily harm to another." CP at 42 (Instruction 7); *see also* CP 47 (Instruction 12). Instruction 8 defined "under the influence":

> 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 drug.

CP at 43 (emphasis added).[6]

The jury found Dillon guilty of vehicular assault. Dillon appeals.

ANALYSIS

Dillon challenges the trial court's denial of the suppression motion and the sufficiency of the evidence. Both of these arguments fail.

[5] Dillon's only witness testified about how marijuana and various drugs affect human performance.

[6] During deliberations, the jury asked the trial court, "Does the blood have to be drawn within 2 hrs. of accident[?]" CP at 33. The trial court responded, "Refer to your instructions." CP at 33.

I. No Custodial Interrogation

Dillon first argues that the trial court erred when it ruled that his pre-*Miranda* statements to Magallon were admissible because he (Dillon) was not subject to custodial interrogation until after Magallon formally arrested him.[7] This argument fails.

We review whether a defendant was in custody for *Miranda* purposes de novo. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). Under the federal and state constitutions, a defendant possesses rights against self-incrimination. U.S. Const. amend. V; Wash. Const. art. I, § 9. *Miranda* warnings protect these rights in custodial interrogation situations. *Lorenz*, 152 Wn.2d at 36. But *Miranda* does not apply outside the context of custodial interrogation. *Roberts v. United States*, 445 U.S. 552, 560, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980).

In determining whether the defendant was subject to a custodial interrogation, we apply an objective test—whether a reasonable person in the suspect's position would have felt that state agents had curtailed his freedom to the degree associated with a formal arrest. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) (citing *Berkemer v. McCarty*, 468 U.S. 420, 421-42, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). It is irrelevant to this inquiry whether the police had probable cause to arrest a suspect. *Lorenz*, 152 Wn.2d at 37.

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[7] Dillon also argues that the trial court erred in failing to enter written findings of fact and conclusions of law following the CrR 3.5 hearing. Although the trial court failed to enter written findings of fact and conclusions of law following the CrR 3.5 hearing as required under CrR 3.5(c), a trial court's failure to enter such written findings is harmless if the trial court's oral opinion and the hearing record are sufficiently comprehensive and clear that written facts would be a mere formality. *State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994), *review denied*, 126 Wn.2d 1003 (1995). Here, the trial court's oral ruling is sufficiently clear to facilitate appellate review.

Mere investigative detentions (*Terry*[8] stops) are not custodial for *Miranda* purposes because they are brief, occur in public, and are less police dominated. *Heritage*, 152 Wn.2d at 218; *see also State v. Marcum*, 149 Wn. App. 894, 910, 205 P.3d 969 (2009) (citing *Heritage*, 152 Wn.2d at 218); *State v. Walton*, 67 Wn. App. 127, 128-31, 834 P.2d 624 (1992). Thus, although a reasonable person might not feel free to leave, a law enforcement officer may ask a moderate number of questions during an investigative detention to determine the suspect's identity and to confirm or to dispel the officer's suspicions without advising the suspect his or her *Miranda* warnings. *Heritage*, 152 Wn.2d at 218; *see also Walton*, 67 Wn. App. at 128-31 (officer questioning juvenile about his age asked if he had been drinking, upon smelling alcohol on juvenile's breath during a *Terry* stop, was not a custodial interrogation for *Miranda* purposes).

Here, the trial court concluded that Dillon was subject to a brief investigative detention, rather than a custodial interrogation, when he spoke to Magallon; the record supports this conclusion. During his short initial contact with Dillon, Magallon did not handcuff or physically restrain Dillon or tell Dillon that he was not free to go. Furthermore, Magallon's questions were directed at determining how the accident had happened, who Dillon was, and whether Dillon might require medical assistance. We hold that under these facts, a reasonable person would not have felt that his freedom was curtailed to a degree associated with formal arrest. Accordingly, the trial court did not err when it refused to suppress Dillon's pre-*Miranda* statements.

Furthermore, even if the trial court had erred in admitting Dillon's admissions to Magallon that he (Dillon) had been drinking, that he had had six to seven drinks, and that he had had his last

[8] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

drink about 30 minutes earlier, any such error was clearly harmless[9] given the other evidence presented at trial: (1) Magallon observed that Dillon's eyes were bloodshot and watery, that Dillon was slurring his speech, and that Dillon's breath smelled strongly of alcohol; (2) Dillon told the EMT that he had been drinking and that he had had consumed six or seven drinks; and (3) Dillon's BAC was still significantly over the legal limit of 0.08 g/100 ml[10] when the blood draw occurred at least two hours after the accident and there was no evidence that Dillon consumed any additional alcohol after the accident.

II. Sufficient Evidence of Intoxication

Dillon next argues that the evidence was insufficient to support his conviction because the State failed to prove that he had a BAC of at least 0.08 g/100 ml within two hours of driving.[11] We disagree.

When evaluating the sufficiency of the evidence, we view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994) (quoting *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990)). We consider circumstantial evidence to be equally reliable as direct evidence.

[9] Erroneous admission of a statement in violation of *Miranda* is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Ng*, 110 Wn.2d 32, 38, 750 P.2d 632 (1988) (citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)).

[10] RCW 46.61.502(1)(a).

[11] Dillon does not assert that the evidence was insufficient to establish any other element of the offense.

State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

First, to the extent Dillon is arguing that the blood draw had to have occurred within two hours of his having driven, he is incorrect. RCW 46.61.502(4) allows the State to introduce blood draws taken *more than* two hours after the defendant's having driven as evidence of the defendant's BAC levels within two hours of the alleged driving.[12]

Second, although none of the evidence before us establish the exact time of the blood draw in relation to the time of the accident,[13] taken in the light most favorable to the State, there

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[12] RCW 46.61.502(4) provides in part:

> Analyses 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 of subsection (1)(a) of this section.

(Emphasis added). Although the legislature amended RCW 46.61.502(6) in 2008, Laws of 2008, ch. 282, §20, this amendment did not alter subsection (4).

[13] In its response, the State asserts that Magallon testified that the blood draw occurred about 10:45 pm. The State mischaracterizes the record. Magallon testified that (1) he contacted Dillon at the hospital at 10:45 pm, and (2) the blood draw took place at the hospital—he did not testify that the blood draw occurred at 10:45 pm.

The State also refers us to information in Exhibit 55, which appears to be Magallon's "property evidence report." VI VRP at 274. Although the trial court admitted Exhibit 55 and the State asserted in its closing argument that the report showed that the blood draw took occurred at 10:58 pm and that the jury would have this exhibit available to it during its deliberations, no witness testified about the time indicated in this exhibit, the prosecutor's argument is not evidence, and the parties have not included Exhibit 55 as part of the record designated on appeal. Accordingly, we cannot consider this exhibit. The record does, however, contain a copy of Detective Killeen's report that he filed with the affidavit of probable cause in which Killeen states that the phlebotomist performed the blood draw at 10:58 pm. There is, however, nothing in the record showing that the jury had access to this report.

is sufficient circumstantial evidence that Dillon's BAC was over 0.08 g/100 ml within two hours of his having driven. First, there is evidence showing that the accident occurred at approximately 9:00 pm: (1) Brown testified that the accident occurred at approximately 9:00 pm, that he sought out help immediately, and that a nearby resident told him that someone had called 911 shortly after the accident; and (2) Detective David Killeen testified that someone reported the accident at about 9:05 pm. Second, there is evidence that would allow the jury to conclude that Dillon's BAC was well over 0.08 g/100 ml within two hours of the accident: (1) Dillon told Magallon that he (Dillon) had his last drink about 30 minutes before the accident; (2) the ambulance arrived at the hospital emergency room at 10:43 pm; (3) the phlebotomist testified that most blood draws are done within a half hour to an hour of a patient's arrival at the emergency room; (4) there was no evidence that Dillon consumed any alcohol after the accident; (5) Magallon logged in the blood sample into evidence at 2:10 am the next morning; and (6) when the phlebotomist performed the blood draw, Dillon's BAC was 0.19 g/100 ml. Even if we presume that phlebotomist did not perform the blood draw until shortly before 2:10 am the following morning, a reasonable jury could conclude that Dillon's BAC was at *least* 0.19 g/100

ml within two hours of the accident because there was no evidence that Dillon had consumed any additional alcohol after about 8:30 pm. Accordingly, this argument fails.

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, A.C.J.

Van Deren, J.