IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSEPH DEAN HUDSON, Appellant.	No. 40914-3-II UNPUBLISHED OPINION

Worswick, A.C.J. — A jury found Joseph Hudson guilty of vehicular homicide and vehicular assault based on a car crash that killed one of his passengers and injured two others. Police were not certain who was driving the vehicle, so they arrested all of the surviving occupants and tested them for blood-alcohol levels. Hudson appeals, arguing that he was arrested without probable cause and that evidence obtained from his arrest should have been suppressed. Because the police did not have individualized probable cause to arrest Hudson, we agree and reverse and remand for a new trial.[1]

[1] Hudson also argues that (1) the trial court issued insufficient findings and conclusions based on insufficient evidence to justify admission of his post-arrest statements, (2) the admission of a recorded jail phone call violated the Privacy Act, (3) the results of a blood test were admitted without adequate foundation and in violation of the confrontation clause, (4) he received ineffective assistance of counsel, (5) there was insufficient evidence to support a special verdict finding an egregious lack of remorse, and (6) the trial court gave an erroneous unanimity instruction regarding the special verdict. In a statement of additional grounds, Hudson argues that the witnesses against him were not credible and that the trial court improperly excused a witness from the stand. Because we reverse based on probable cause, we do not address these arguments.

FACTS

After a night of drinking, Hudson, Paula Charles, Tommy Underwood, and Leon Butler left a bar in Charles's car. According to Butler, Hudson was driving, Charles was in the front passenger seat, Tommy Underwood was in the rear driver's side seat and Butler was in the rear passenger side seat.

The car crashed. The first witness to arrive on the scene found Tommy Underwood dying, Charles and Butler injured, and Hudson gone from the scene. Hudson returned to the scene approximately two hours later and got into an altercation with a bystander on the scene who accused Hudson of being the driver. Hudson had grass and debris in his hair and his clothes were dirty. Hudson stated that he was just up the road and had noticed the emergency lights and had come over to see what was going on. Butler and Charles were transported to the hospital.

Sergeant Ramirez, the officer in charge of the scene, instructed Trooper Joshua Mullins to go to the Grays Harbor Community Hospital and to contact Charles and Butler for blood draws. He also instructed Trooper Ben Blankenship to arrest Hudson, which Trooper Blankenship did.

After his arrest, Hudson gave Trooper Blankenship a statement that Trooper Blankenship later characterized at Hudson's CrR 3.5 hearing as constantly changing, saying several times that Hudson did not know who had been the driver, and also that Charles had been the driver. Detective Dan Presba later interviewed Hudson and photographed his injuries. Hudson admitted to Detective Presba that he had been the driver and he complained that his stomach hurt.

Hudson made a phone call to Nancy Underwood, Tommy Underwood's sister, from the jail. In the call, which the jail recorded, Hudson told Nancy Underwood that he had taken

responsibility for the accident but that he could not remember who had been driving.

The State charged Hudson with vehicular homicide and vehicular assault. At trial, Trooper Blankenship testified that when he interviewed Hudson post-arrest, Hudson was "evasive" and gave a "jumbled" account stating that Charles and he were in the back seat and also stating that Charles was in the front passenger seat. 2 Report of Proceedings (RP) at 177-78. Trooper Blankenship testified that Hudson was highly intoxicated.

Detective Presba, a crash reconstruction expert, testified that Hudson's injuries were consistent with Hudson having been the driver. Hudson had an injury to his right knee consistent with a mark on underside of the driver's side dashboard, which showed his knee had struck the dashboard. Moreover, DNA analysis of blood found on the inside of the driver's side door matched Hudson, showing that he opened the driver's side door to exit the vehicle.

Detective Presba also testified about Hudson's statements. Detective Presba testified that Hudson said, "I was driving and I'll take responsibility." 2 RP at 201. Detective Presba further testified that Hudson complained that his stomach hurt, consistent with Hudson's stomach impacting the steering wheel. The State played the recording of Hudson's phone conversation with Nancy Underwood.

Hudson testified that he had had a great deal to drink. He testified that he had no memory of leaving the bar and that his next memory was of walking down the road, believing he had been kicked out of the car. He further testified that he told the police he would take responsibility for the crash although he could not remember who was driving. But Hudson testified that he could not have been the driver because Tommy Underwood would not have gotten into the car with

Hudson driving when Hudson was blacked out.

The jury found Hudson guilty of vehicular homicide and vehicular assault as charged. Hudson appeals.

ANALYSIS

Probable Cause

Hudson argues for the first time on appeal that he was arrested without probable cause and therefore the trial court erred by admitting evidence obtained after he was arrested. We hold that Hudson raises a manifest constitutional error that may be reviewed for the first time on appeal. We further hold that he was arrested without probable cause and admission of the evidence obtained from this arrest was not harmless. We accordingly reverse Hudson's convictions and remand for a new trial.

A. *Manifest Error*

Although Hudson raises the issue of probable cause for the first time on appeal, manifest error affecting a constitutional right may generally be raised for the first time on appeal under RAP 2.5(a)(3). There is no dispute that a warrantless arrest without probable cause is constitutional error. But in order to show that the error is "manifest," there must be a sufficient record for us to review. *See State v. Kirkpatrick*, 160 Wn.2d 873, 880-81, 161 P.3d 990 (2007) *overruled on other grounds by State v. Jasper*, ____ Wn.2d. ____, 271 P.3d 876 (2012).

"Manifest" error is error that resulted in actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice is demonstrated by showing practical and identifiable consequences at trial.

O'Hara, 167 Wn.2d at 99. To distinguish this analysis from that of harmless error, "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 99-100.

Here, the record regarding probable cause is sufficient for us to determine that the asserted error is manifest. The facts relevant to probable cause were not brought out at Hudson's CrR 3.5 suppression hearing. But at trial, Sergeant Ramirez, the officer who made the decision to arrest Hudson, testified candidly about the basis for the arrest:

> A. To my knowledge, at least I know for sure that I directed Trooper Blankenship to take a blood sample from Mr. Hudson. And then I directed Trooper Mullins to take—go to the Community Hospital and contact Butler and—and Paul—I—the other two were in the ambulances that I had previously contacted, I asked him to go to the hospital and contact them, draw blood as well. We did not know who the driver of the vehicle was so I asked him to establish probable cause for an arrest and special evidence warnings.
>
> Q. Okay. Is this routine procedure to get blood draws of everybody that's involved in the collision?
>
> A. It's not routine. It's routine if you can establish who the driver is. Usually that's when you narrowly focus on—you have to establish your probable cause as to somebody [sic] been drinking or impaired by something and then you'll gather that fleeting evidence or the blood, if you will, to be analyzed. But since we had people ejected, we didn't have any—at least as far as we had so far, which is in the early stages of the investigation, we didn't have people that were narrowed as to who was driving. *We couldn't figure any of that out initially, but the blood is, you know, that fleeting evidence that's going away as—as time goes by. We needed to obtain that and the sooner the better. So we had to go ahead and initiate on everybody and then as we were able to eliminate folks who were passengers and narrow in on who might be the driver, then we can.* But that way we'll have the blood from everybody. So in this case I had to make that call that we get blood from all three.

1 RP at 43-44 (emphasis added). On cross examination, Sergeant Ramirez testified that he did not know any information that would be relevant to determining who the driver was when he ordered Hudson's arrest, such as the car's owner, the seat position, or who had the keys. He also admitted, "Since it was unknown who was driving I decided to obtain fleeting evidence and worry about who was driving later." 1 RP at 51.

This ample record on probable cause is sufficient to determine that the error is manifest. It actually prejudiced Hudson by allowing the admission of the evidence obtained from his arrest, and is so obvious on the record that it warrants appellate review. We accordingly address probable cause for the first time on appeal under RAP 2.5(a)(3).

B. *Lack of Probable Cause*

Under article I, section 7 of the Washington Constitution, warrantless searches or seizures are presumed invalid. *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). The State bears the burden to show that an exception to the warrant requirement applies. *Grande*, 164 Wn.2d at 141. One such exception is that police may make warrantless arrests based on probable cause to believe that the arrestee has committed a felony. RCW 10.31.100; *see State v. Walker*, 157 Wn.2d 307, 319, 138 P.3d 113 (2006) (holding RCW 10.31.100 constitutional).

Probable cause exists when the arresting officer knows of facts and circumstances sufficient to justify a reasonable belief that an offense has been committed. *State v. Vasquez*, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001). This inquiry is based on the factual considerations that a prudent person would rely on, rather than any legal technicalities. *State v. Bellows*, 72 Wn.2d 264, 266-67, 432 P.2d 654 (1967). But probable cause must be based on more than a bare

suspicion of criminal activity. *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

In *Grande*, 164 Wn.2d at 145-46, our Supreme Court held,

> Our state constitution protects our individual privacy, meaning that we are free from unnecessary police intrusion into our private affairs unless a police officer can clearly associate the crime with the individual. . . . Unless there is specific evidence pinpointing the crime on a person, that person has a right to their own privacy and constitutional protection against police searches and seizures.

Based on this rule, the *Grande* court held that a police officer lacked probable cause to arrest two occupants of a vehicle when he smelled marijuana emanating from the vehicle without establishing individualized probable cause as to either occupant. 164 Wn.2d at 146.

The situation here is analogous. According to Sergeant Ramirez's forthright testimony, the police had no reason to suspect that any particular one of the surviving occupants of the vehicle had been the driver. Instead, Sergeant Ramirez decided to order Hudson's arrest to preserve fleeting blood-alcohol evidence. Just as in *Grande*, this arrest was made without individualized probable cause and was unconstitutional.

C. *Not Harmless Error*

Washington's exclusionary rule requires suppression of unconstitutionally obtained evidence. *State v. Doughty*, 170 Wn.2d 57, 65, 239 P.3d 573 (2010) (quoting *State v. Garvin*, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009)). Accordingly, given that the police lacked probable cause to arrest Hudson, the evidence obtained as a result of his arrest should have been suppressed. And we hold that admission of this evidence was not harmless and thus requires reversal.

Constitutional error is harmless when we are convinced beyond a reasonable doubt that

the error did not affect the verdict. *State v. Brousseau*, 172 Wn.2d 331, 363, 259 P.3d 209 (2011). Put another way, an error is harmless beyond a reasonable doubt if the overwhelming untainted evidence necessarily leads to a finding of guilt. *State v. Davis*, 154 Wn.2d 291, 305, 111 P.3d 844 (2005); *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

The State introduced several pieces of evidence as the fruits of Hudson's arrest: (1) Hudson's evasive and inconsistent statements to Trooper Blankenship, (2) his blood-alcohol level, (3) his admission of guilt and statement that his stomach hurt to Detective Presba, (4) photographs of and testimony about Hudson's injuries, and (5) a recording of Hudson's phone call from the jail.

The other evidence the State presented to show Hudson's guilt included (1) Butler's testimony that Hudson was the driver, (2) Hudson's blood on the inside driver's side door, and (3) Detective Presba's accident reconstruction concluding that Hudson was the driver. But Leon Butler made a prior inconsistent statement that Tommy Underwood was the driver. Also, Hudson could have exited the vehicle through the driver's side door without having been the driver, and Hudson presented his own accident reconstruction specialist who disagreed with Detective Presba's conclusion. Moreover, Hudson testified that he was not the driver because Tommy Underwood would not have gotten into the car if Hudson was blacked out and driving. Consequently, the untainted evidence that Hudson was the driver was not overwhelming.

Because Hudson was arrested without probable cause and because admittance of evidence obtained after his arrest was not harmless beyond a reasonable doubt, we reverse Hudson's convictions and remand for a new trial.

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.

Worswick, A.C.J.

We concur:

Armstrong, J.

Van Deren, J.