160 Wash.App. 1038

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

STATE of Washington, Respondent,
v.
Arthur J. BERGER, Jr., Appellant.

No. 28240–6–III. | March 24, 2011.
| Reconsideration Denied May 13, 2011.

Appeal from Yakima Superior Court; Honorable David A. Elofson, J.

**Attorneys and Law Firms**

Dennis W. Morgan, Attorney at Law, Ritzville, WA, for Appellant.

Kevin Gregory Eilmes, Prosecuting Attorney's Office, Yakima, WA, for Respondent.

**Opinion**

**UNPUBLISHED OPINION**

KULIK, C.J.

***1** Arthur J. Berger, Jr. appeals from Yakima County convictions of attempting to elude a pursuing police vehicle, driving while under the influence (DUI), and second degree driving while license suspended (DWLS).

We affirm the convictions but remand for correction of the statutory basis for the DUI suspended sentence/probation.

**FACTS**

In the early evening hours of July 23, 2008, two witnesses made 911 calls reporting a red car (a Cadillac driven by Mr. Berger) swerving in and out of lanes on I–82, driving off the roadway onto the shoulder, almost hitting other cars, and cutting off other drivers. One of the 911 callers, Socorro Trujillo, maintained some distance but followed Mr. Berger to the Granger exit, where he pulled into a Conoco station, parked near a gas pump, and entered the store. Ms. Trujillo parked next to a marked police car near the store entrance and also went inside. She was still on her 911 call and handed her cell phone to Officer David Leary who happened to be present. Ms. Trujillo told Officer Leary that he needed to arrest the man who was in the restroom.

The 911 dispatcher informed Officer Leary of the caller's reckless driving report and description of the vehicle. Officer Leary saw the vehicle outside. When Mr. Berger exited the restroom and Ms. Trujillo identified him, Officer Leary, who was in full police uniform, followed Mr. Berger outside and yelled for him to stop. Mr. Berger jogged to his car and got in. Officer Leary approached to within 20 feet and twice yelled at Mr. Berger not to start the engine. Mr. Berger started the car, smiled, made eye contact with Officer Leary, and gave him the middle finger as he accelerated from the parking lot some 60 feet onto Bailey Avenue.

Officer Leary ran to his patrol car, instantly activated his lights and sirens, and engaged pursuit. Mr. Berger's speed increased to an estimated 90 m.p.h. in a 25 m.p.h. residential zone. Officer Leary maintained clear sight behind Mr. Berger's car for one or two seconds on Bailey Avenue until Mr. Berger veered right at a curve onto Granger Avenue. In total, Officer Leary estimated that once his lights and siren were activated in the Conoco parking lot, he maintained a clear line of sight with Mr. Berger's vehicle for five to seven seconds prior to reaching the Granger curve. Officer Leary followed onto Granger Avenue to find Mr. Berger's totaled vehicle crashed into a fence and light pole at the Granger School District offices.

Officer Leary approached the wreckage with his service weapon drawn and Mr. Berger yelling profanities at him. Trooper William Rutherford arrived and handcuffed Mr. Berger. Both officers detected a strong odor of alcohol on Mr. Berger. His face was flush, his eyes watery and red, his speech repetitive, and his demeanor argumentative. Officer Leary found an open can of beer in the car. He also learned that Mr. Berger's driving privileges were currently revoked and ineligible for reinstatement.

***2** Trooper Rutherford read Mr. Berger his *Miranda*[1] warnings. Mr. Berger indicated he understood those rights and would speak with the officer. Mr. Berger said the vehicle was his and that he was coming from Mount Everest. Subsequently, as Mr. Berger was being treated by medical personnel in an ambulance, Trooper Rutherford again read him *Miranda* warnings, as well as implied consent warnings

for a blood-alcohol test. After hearing the implied consent warnings, Mr. Berger responded, " 'What the ... are they going to do, suspend my already suspended license?' " Report of Proceedings (RP) at 408. When Trooper Rutherford asked if he would be willing to submit to the blood test, Mr. Berger responded, "I'm not doing anything." [2] RP at 408. He refused the blood test.

Mr. Berger testified on his own behalf. He admitted to driving terribly on the freeway. He also saw Officer Leary in full uniform in the Conoco parking lot and ignored his commands to stop. He admitted giving Officer Leary the middle finger and that he drove around the officer knowing he was being told to stop. He also admitted that he gunned the accelerator to the floor when fleeing the Conoco lot. He quickly increased his speed to 68 m.p.h. and then up over 100 m.p.h. on Bailey Avenue until he hit his brakes to take the right curve onto Granger Avenue. He denied hearing Officer Leary's sirens or knowing the officer was pursuing him. He claimed no recall of refusing the blood draw. He admitted to consuming alcohol a few hours before the accident.

The jury found Mr. Berger guilty as charged of eluding, DUI, and DWLS, and also found by special verdict for the DUI conviction that he had refused to submit to a blood test. The jury rejected Mr. Berger's theory that he had not consumed enough alcohol to affect his driving and that his belligerent behavior and flushed watery-eyed facial appearance was due to the airbag inflating into his face when he crashed. The jury also rejected his theory that he sped so fast in gaining an approximate one-half mile head start on the officer from the Conoco parking lot that he could not have been aware of the police pursuit prior to the crash and, thus, had no obligation to pull over.

The court imposed concurrent sentences of 18 months for the eluding conviction and 365 days for second degree DWLS, and a consecutive sentence of 365 days with 363 days suspended and five years' probation for the DUI. Mr. Berger appeals.

## ANALYSIS

*Admission of Blood Test Refusal.* Mr. Berger first contends that the trial court erred by admitting evidence that he refused to submit to a blood test after his arrest. We disagree.

A trial court's evidentiary rulings are not to be disturbed on appeal absent an abuse of discretion. *State v. Wilson*, 144 Wash.App. 166, 183, 181 P.3d 887 (2008). The court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

***3** RCW 46.20.308(1) is the implied consent statute for motor vehicle operators arrested for a suspected DUI:

> Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61 .506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503.

"The refusal of a person to submit to a test of the alcohol or drug concentration in the person's blood or breath under RCW 46.20.308 is admissible into evidence at a subsequent criminal trial ." RCW 46.61.517; *see State v. Long*, 113 Wash.2d 266, 272–73, 778 P.2d 1027 (1989).

RCW 46.61.506(5) requires that blood tests administered under the provisions of RCW 46.20.308 be performed only by certain qualified individuals such as a physician, registered nurse, or first responder, among others. But as discussed below, the State is correct that the statute is irrelevant in this case.

In *State v. Cohen*, 125 Wash.App. 220, 222, 104 P.3d 70 (2005), the defendant refused to submit to a breath test following an arrest for drunken driving. The parties stipulated that a required quality assurance procedure had not been performed on the machine the defendant would have used had she not refused the breath test and, thus, the results of any test conducted on that machine would have been inadmissible. The trial court extended that reasoning to also suppress the

refusal evidence. *Id.* at 222–23, 104 P.3d 70. In reversing the suppression order, the Court of Appeals explained:

> The rationale for admission of refusal evidence is that a refusal to take the test demonstrates the driver's consciousness of guilt. The refusal is the relevant fact, and the admissibility of the refusal does not depend on whether or not the results themselves, had any existed, would have been admissible. The hypothetical admissibility of the results of a test not taken is irrelevant to a consciousness of guilt analysis.

*Id.* at 224–25, 104 P.3d 70.

Applying this reasoning, the presence or not of a person qualified under RCW 46.61.506(5) to perform the blood draw is likewise irrelevant to Mr. Berger's refusal to submit to the blood test after receiving implied consent warnings. Nothing in the plain language of RCW 46.61.517 requires the presence of any such individual as a predicate to admissibility of blood test refusal evidence. Mr. Berger's contention that admission of his blood test refusal without proof that a "qualified technician"[3] was available is without merit. The evidence was properly admitted under RCW 46.61.517 and *Cohen*, 125 Wash.App. at 224–25, 104 P.3d 70.

Mr. Berger's further contention that his request for an attorney when refusing the blood test precludes admission of his refusal into evidence is also without merit.

***4** When a driver arrested for suspicion of driving under the influence of drugs or alcohol is subject to a blood or breath test pursuant to RCW 46.20.308, the suspect must be advised of his or her *Miranda* rights, as well as the right to access counsel under CrRLJ 3.1. *State v. Kronich*, 131 Wash.App. 537, 542, 128 P.3d 119 (2006), *aff'd*, 160 Wash.2d 893, 161 P.3d 982 (2007). " 'If the defendant requests the assistance of counsel, access to counsel must be provided before administering the test.' " *Id.* at 542–43, 128 P.3d 119 (quoting *State ex rel. Juckett v. Evergreen Dist. Court*, 100 Wash.2d 824, 831, 675 P.2d 599 (1984)). If the right to counsel is denied, the remedy is to suppress "evidence acquired *after* the violation." *Kronich*, 131 Wash.App. at 543, 128 P.3d 119 (emphasis added).

Here, in addressing Mr. Berger's pretrial CrR 3.5 motion to suppress certain statements, the court ruled admissible his post-*Miranda* statement "I'm not doing anything and I want a lawyer." Clerk's Papers (CP) at 64; *see* RP at 18. As the trial court found, it is clear from this statement that Mr. Berger refused the blood test before invoking his right to counsel. No error is assigned to that ruling. Consistent with the pretrial ruling, Trooper Rutherford testified at trial that after he read Mr. Berger his *Miranda* rights and implied consent warnings, he asked Mr. Berger if he would submit to a blood test. Mr. Berger's initial response was "I'm not doing anything." RP at 408. There was no after-acquired blood test evidence to suppress because Mr. Berger refused the test. The refusal evidence was not obtained in violation of Mr. Berger's right to counsel and was properly admitted at trial.

*Enhanced Punishment.* The second amended information charging Mr. Berger with DUI under RCW 46.61.502(5) stated that the offense is a gross misdemeanor with a maximum penalty of one year imprisonment. The information did not allege his refusal to submit to a blood test. The DUI sentencing statute, RCW 46.61.5055(1)(a)(i), provides that a person convicted of DUI, who has not been previously convicted of the same offense in the previous seven years, is subject to "imprisonment for not less than one day nor more than one year." When a defendant refuses to take a blood test pursuant to RCW 46.20.308, the person is subject to "imprisonment for not less than two days nor more than one year. Two consecutive days of the imprisonment may not be suspended or deferred." RCW 46.61.5055(1)(b)(i).

Washington law requires that in order to be constitutionally sufficient, the charging document must allege facts supporting every element of the offense charged. *State v. Goodman*, 150 Wash.2d 774, 786, 83 P.3d 410 (2004) (quoting *State v. Leach*, 113 Wash.2d 679, 689, 782 P.2d 552 (1989)); *see State v. Powell*, 167 Wash.2d 672, 681, 223 P.3d 493 (2009). Mr. Berger specifically points to the essential elements rule, under which an allegation is an element of the offense that must be included in the charging document when it aggravates the maximum sentence with which the court may sentence the defendant. He cites to *State v. Pillatos*, 159 Wash.2d 459, 482–83, 150 P.3d 1130 (2007) (Sanders, J. concurring). The concept of "maximum" sentence referred to in these cases is addressed in *Apprendi*, which holds that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct.

2348, 147 L.Ed.2d 435 (2000). In *Blakely*, the Supreme Court clarified *Apprendi* to mean that the statutory maximum "is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *see State v. Evans*, 154 Wash.2d 438, 441–42, 114 P.3d 627 (2005) (maximum sentence a judge can impose without finding additional facts for Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, purposes is the top of the standard sentencing range).

***5** These concepts are not helpful to Mr. Berger. RCW 46.61.5055, the DUI sentencing statute, simply requires a one-day increase in the penalty for a blood test refusal. This minimum penalty is within the prescribed statutory maximum for gross misdemeanors, which, unlike SRA offenses, have no standard range. This penalty increase is not an element of gross misdemeanor DUI under RCW 46.61.502 for which formal notice in the charging document is required. Mr. Berger received notice in the charging document of all of the elements of DUI.

Moreover, the jury found that Mr. Berger refused to submit to the blood test. He was able to mount a defense, albeit unsuccessfully, that his mental condition immediately after the accident precluded his recalling whether he made a voluntary refusal. The fact of his refusal as found by the jury did not increase his maximum sentence nor did it expose him to a sentence greater than one year. Instead, it simply increased the minimum jail time from one day to two days. The sentence does not implicate *Apprendi/Blakely*.

Mr. Berger's other cited authorities requiring notice in the charging document of the elements of an offense, or notice/special verdicts for enhanced penalties not already included within the prescribed range, are likewise inapposite.

*Sufficiency of the Evidence*. Mr. Berger conceded in oral argument that sufficient evidence supports his conviction for attempting to elude. We agree.

*One Year Statutory Maximum Penalty for a Gross Misdemeanor*. The district court and superior court exercise concurrent jurisdiction over all misdemeanors and gross misdemeanors committed within their jurisdiction. RCW 3.66.060; *see also* RCW 2.08.010 (superior court has original jurisdiction over all misdemeanors). RCW 3.66.068 expressly confers upon sentencing courts the "continuing jurisdiction and authority" to suspend or defer sentences entered pursuant to RCW 46.61.5055 for "a period not to exceed five years after imposition of sentence."

Former RCW 46.61.5055 (2007) provides in pertinent part:

> (1) Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has no prior offense within seven years shall be punished as follows:
>
> ....
>
> (b) In the case of a person ... for whom by reason of the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:
>
> (i) By imprisonment for not less than two days nor more than one year. Two consecutive days of the imprisonment may not be suspended or deferred.
>
> ....
>
> (10)(a) *In addition to any nonsuspendable and nondeferrable jail sentence* required by this section, whenever the court imposes less than one year in jail, *the court shall also suspend* but shall not defer *a period of confinement for a period not exceeding five years.* The court shall impose conditions of *probation* that include: (i) Not driving a motor vehicle within this state without a valid license to drive and proof of financial responsibility for the future; (ii) not driving a motor vehicle within this state while having an alcohol concentration of 0.08 or more within two hours after driving; and (iii) not refusing to submit to a test of his or her breath or blood to determine alcohol concentration upon request of a law enforcement officer who has reasonable grounds to believe the person was driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor. The court may impose conditions of probation that include nonrepetition, installation of an ignition interlock device on the probationer's motor vehicle, alcohol or drug treatment, supervised probation, or other conditions that may be appropriate. *The sentence may be imposed in whole or in part upon violation of a condition of probation during the suspension period.*

***6** (Emphasis added.)

Statutory interpretation is a legal question reviewed de novo. *Stuckey v. Dep't of Labor & Indus.*, 129 Wash.2d 289,

295, 916 P.2d 399 (1996). If the language of a statute is unambiguous on its face, the meaning must be derived solely from the language of the statute. *State v. Speaks*, 119 Wash.2d 204, 209, 829 P.2d 1096 (1992). "Statutory language clear on its face does not require or permit judicial interpretation." *Id.*

Here, consistent with the plain language of the statute, the judgment and sentence requires Mr. Berger to serve a mandatory two days of his DUI sentence consecutive to his concurrent sentences for the other offenses. In addition to the nonsuspendable two-day jail sentence, the court suspended a period of confinement (the remaining 363 days of the one-year consecutive sentence) for five years. The statute expressly characterizes this period as probation, for which the court shall impose conditions. Thus, following the statute's plain meaning, the court actually imposed the minimum nonsuspendable two days of the sentence, not 365 days as Mr. Berger contends. This conclusion coincides with the provision that the sentence (here 363 additional days) may be imposed in whole or in part for a violation of a condition of probation during the 60–month probation period.

The court also imposed the exact probation conditions specified in Former RCW 46.61.5055(10)(a) as well as other conditions it deemed appropriate. In substance, nothing in Mr. Berger's judgment and sentence requiring 60 months' probation on top of the two-day minimum sentence with 363 additional days suspended offends the plain meaning of RCW 3.66.068 and RCW 46.61.5055.

However, the judgment and sentence erroneously cites RCW 9.95.200 (authorizing the court to summarily grant or deny probation) as the statutory basis for Mr. Berger's department of corrections-supervised probation. CP at 15, section 4.B.1. Mr. Berger suggests that apparent oversight is grounds for reversal. We disagree but remand for correction of the statutory citation.

Mr. Berger cites cases interpreting RCW 9.95.200 and .210, which are general in nature and not specifically applicable to DUI cases. Both *State v. Parsley*, 73 Wash.App. 666, 870 P.2d 1030 (1994) and *Avlonitis v. Seattle District Court*, 97 Wash.2d 131, 646 P.2d 128 (1982) are inapposite because the versions of the general statutes at issue in those cases are no longer applicable to DUI cases such as Mr. Berger's. The version of RCW 3.66.068 in effect in *Avlonitis* predated a 1999 amendment to the statute which expressly conferred upon sentencing courts the "continuing jurisdiction and authority" to suspend or defer sentences entered pursuant to RCW 46.61.5055 for "a period not to exceed five years after imposition of sentence." *See* LAWS OF 1999, ch. 56 § 2. There was no reference to chapter 46.61 RCW in the prior version.

RCW 9.95.210(1) provides:

> ***7** In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence *or two years*, whichever is longer.

(Emphasis added.)

Thus, RCW 9.95.210(1) conflicts with RCW 3.66.068 and RCW 46.61.5055, which specifically pertain to DUI sentences. A more specific statute supersedes a general statute when they pertain to the same subject matter and conflict to the extent they cannot be harmonized. *In re Estate of Kerr*, 134 Wash.2d 328, 343, 949 P.2d 810 (1998).

Such is the case here. The later-enacted, more specific statutes pertaining to DUI suspended sentences and probation are controlling over the more general provisions in RCW 9.95.210. The five-year suspension period with probation is expressly authorized by the legislature, whose province it is to fix punishment. Unlike in Mr. Berger's cited case *In re Personal Restraint of Brooks*,[4] where the combination of incarceration and community custody potentially exceeded the statutory maximum punishment, Mr. Berger's overall punishment for DUI will not exceed that allowed under Former RCW 46.61.5055(10)(a).

Mr. Berger's judgment and sentence incorrectly cites RCW 9.95.200 as the statutory basis for his suspended sentence/ probation. The correct citations should be RCW 3.66.068 and RCW 46.61.5055, which authorize the probation imposed here. The matter should be remanded for the limited purpose of correcting the judgment and sentence to reflect the correct statutory bases for the suspended sentence and probation. *See In re Pers. Restraint of West*, 154 Wash.2d 204, 215, 110 P.3d 1122 (2005) (correction of erroneous portion of judgment does not require vacation of entire judgment).

**STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW**

Mr. Berger contends in his statement of additional grounds for review that the trial court erred by refusing to allow the defense to impeach Officer Leary regarding alleged prior bad acts.

Prior to trial, the trial court granted a motion in limine by the State to exclude evidence that at the time of trial, Officer Leary was on paid administrative leave with the Granger Police Department for allegedly falsifying reports. The matter was unrelated to Mr. Berger's case. It was only an allegation with an internal investigation pending, and Officer Leary was not on leave at the time of Mr. Berger's arrest. The court ruled that the defense's inquiry into the subject would be improper impeachment unless the prosecutor or Officer Leary opened the door.

Subsequently, during a mid-trial offer of proof by the defense, Officer Leary reiterated that the investigation was in its preliminary stages, nothing about the allegations had been explained to him, and he had not been criminally charged. He said the allegations were that he falsified a report, failed to report to his supervisor, and engaged in the unlawful use of deadly force. The court adhered to its earlier ruling to preclude inquiry into Officer Leary's employment issues for impeachment purposes. The court also excluded, as irrelevant for impeachment purposes evidence, that Officer Leary had been investigated for alleged sexual misconduct with a minor during past employment as a Washington State Trooper.

***8** Mr. Berger contends in his statement of additional grounds for review that the trial court erred by granting the State's motion to exclude evidence of Officer Leary's administrative leave for allegedly falsifying police reports, and the past investigation for alleged sexual misconduct with a minor while serving as a Washington State Trooper.

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *State v. Binh Thach*, 126 Wash.App. 297, 315, 106 P.3d 782 (2005). ER 608(b) provides that specific instances of a witness's conduct, introduced for the purpose of attacking a witness's credibility, may not be proved by extrinsic evidence, but may "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness ... concerning the witness' character for truthfulness or untruthfulness." "In exercising its discretion, the trial court may consider whether the instance of misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial." *State v. O'Connor*, 155 Wash.2d 335, 349, 119 P.3d 806 (2005).

Given the preliminary nature of the pending Granger Police Department's investigation and the fact no wrongdoing had been substantiated and nothing in the record indicates the investigation bore relationship to Mr. Berger's case, the trial court did not abuse its discretion by excluding the evidence. Likewise, nothing in the record indicates the investigation into the alleged sexual misconduct with a minor resulted in any criminal charges or a finding of misconduct, or that the matter was otherwise relevant to Officer Leary's veracity or truthfulness while testifying in Mr. Berger's trial. The trial court thus acted well within its discretion when it refused to allow defense counsel's questioning on this topic.

Mr. Berger further contends that Officer Leary opened the door by lying when he gave trial testimony that conflicted with his police report. According to his written report, he made contact with Mr. Berger's car in the Conoco lot to check the license plate. However, he testified at trial that he observed the license plate through the window of the station's store. When asked about this discrepancy, he testified that the report was the accurate version of events because he had written it within 24 hours of the event. He explained that his testimony differed only because he failed to refresh his memory thoroughly prior to testifying. The explanation is reasonable given that the arrest occurred nearly one year prior to the trial. In any event, the discrepancy is a matter of weight and does not rise to the level of a lie that opened the door to questioning regarding alleged prior bad acts.

*Conclusion.* We affirm the convictions for attempting to elude a pursuing police vehicle, DUI, and DWLS. We remand for the limited purpose of correcting the judgment and sentence to reflect the statutory basis for the DUI suspended sentence/ probation.

***9** A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: BROWN and KORSMO, JJ.

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**Parallel Citations**

2011 WL 1048614 (Wash.App. Div. 3)

Footnotes

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

2 Prior to trial, the court denied Mr. Berger's CrR 3.5 motion to exclude evidence of his refusal to submit to a blood test for violation of *Miranda* rights. His full statement to Trooper Rutherford was, “I'm not doing anything and I want a lawyer.” RP at 18. The court rejected Mr. Berger's argument that he had already unequivocally requested an attorney when he refused the blood draw.

3 Appellant's Br. at 7.

4 *In re Pers. Restraint of Brooks*, 166 Wash.2d 664, 675, 211 P.3d 1023 (2009).