Supreme Court No. 101730-8
(COA No. 82997-1-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JESSE ENGERSETH,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Jesse Engerseth, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

## B. COURT OF APPEALS DECISION

Mr. Engerseth seeks review of the Court of Appeals decision dated January 17, 2023, attached as an appendix.

## C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err when it allowed the government to use an unreliable recorded recollection in its case-in-chief?

2. Does the failure to properly consider the youthfulness of an emerging adult require resentencing?

D. STATEMENT OF THE CASE

Mr. Engerseth was only 22 when this incident occurred. His parents struggled with drug addictions and gave him little support as a child. CP 71. His grandparents tried to care for him, but he struggled with abandonment issues. CP 72. With his own drug issues, Mr. Engerseth mostly lived out of his car. RP 1361.

On June 27, 2019, Mr. Engerseth sat in his car with two friends. Living in a nearby RV, Michael Smith approached them and menaced Mr. Engerseth. RP 1339. He told Mr. Engerseth to leave, banging on the car with what Mr. Engerseth believed to be a gun. RP 674, 1341. They left the area.

The next day, Mr. Engerseth was parked at Safeway when he heard a car rev its engine. RP 1342.

Mr. Engerseth saw Mr. Smith and took Mr. Smith's actions to be an attempt to provoke him. RP 1344.

That night, Mr. Engerseth returned to Mr. Smith's RV. RP 1345. While a friend was driving his car, Mr. Engerseth attempted to throw a car jack at Mr. Smith's car through the sunroof. RP 1347. Mr. Smith was furious but refused to call the police. RP 674.

Mr. Engerseth reencountered Mr. Smith a few blocks away. RP 1346. Mr. Smith parked in an alley, blocking Mr. Engerseth's car. RP 847. He stepped out of his car, holding something resembling a bat or a club. RP 1347. Mr. Engerseth was "scared and frightened." RP 1347. Mr. Smith lifted the club to strike Mr. Engerseth's car, and Mr. Engerseth pulled forward, hitting Mr. Smith. RP 1350. Mr. Smith suffered a fatal injury to his head from his fall. RP

1254. Mr. Engerseth told the jury he was trying to escape Mr. Smith and never intended to hit or scare him. RP 1350, 1360.

Mr. Engerseth left the area, afraid Mr. Smith would chase him down. RP 1350. Early the following day, the police spoke to Brooke Wilson. RP 737. Ms. Wilson gave the police a statement where she told the police Mr. Engerseth "had ran a man over and hit his car and the guy was going to die." RP 1122. However, when asked to recall the statement, she could not remember whether she made it. RP 1144.

Methamphetamines had taken over Ms. Wilson's life. RP 1197. When asked to verify her statement, Ms. Wilson could not say it was true. RP 1200, 1205. Over objections, the court allowed the statement to be admitted as substantive evidence. RP 1163.

The police arrested Mr. Engerseth early the next day. RP 1356. He gave a statement to them after a lengthy interrogation the police conducted without a break. RP 1356. Over and over, Mr. Engerseth told the police that the incident was an accident. RP 1404. They did not believe him "whatsoever." *Id*.

The government charged Mr. Engerseth with felony murder and vehicular homicide. CP 145-46. Mr. Engerseth denied attempting to assault Mr. Smith. RP 1360. He told the jury he was trying to escape from Mr. Smith, who menaced him with a club and may have also been carrying a firearm. *Id*. After three days, the jury found Mr. Engerseth guilty. CP 98-99.

At sentencing, Mr. Engerseth asked the court to consider his youthfulness. RP 1549. Mr. Engerseth also asked the court to consider that he committed the crime under duress, coercion, threat, or compulsion

insufficient to constitute a complete defense, which significantly affected his conduct. CP 156.

Mr. Engerseth expressed his remorse at sentencing, stating, "There are no words with enough depth to express how truly sorry I am." RP 1566.

The court stated it considered youthfulness but believed Mr. Engerseth's independence and homelessness aggravated any mitigation that might result from his youthfulness, especially because his grandparents were still available. RP 1569-70. The court also believed Mr. Engerseth's contact with the courts demonstrated his maturity. RP 1570. The court imposed a sentence of 147 months. RP 1571.

E. ARGUMENT

**1. This Court should review whether the trial court admitted an out-of-court statement in error, prejudicing Mr. Engerseth.**

The Court of Appeals found no error in admitting Ms. Wilson's statement as a recorded recollection. App 10, 13. This Court should grant review because of the court's error in admitting Ms. Wilson's out-of-court statements because the Court of Appeals' decision conflicts with other decisions issued by the Court of Appeals and is an issue of substantial public interest. RAP 13.4(a).

*a. An unreliable recorded recollection should not be admitted.*

A recorded statement is inadmissible hearsay unless it falls under an exception to the hearsay rule. ER 802. To be admissible under ER 803(a)(5), the following four factors must be satisfied:

> (1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately.

*State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998) (citing *State v. Mathes*, 47 Wn. App. 863, 867-68, 737 P.2d 700 (1987)).

A trial court's finding admitting a recorded recollection will only be upheld if supported by substantial evidence. *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993). Substantial evidence is a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Factors a court must consider in determining the admissibility of a recorded recollection include (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement. *Alvarado*, 89 Wn. App. at 552.

*b. Substantial evidence did not support the court's finding that Ms. Wilson's out-of-court statement was reliable.*

Ms. Wilson could not verify the reliability of her statement. RP 1151. Her inability to confirm it was unsurprising, as Ms. Wilson had been heavily involved in drug use when she made her statement. RP 1145. She admitted she had been high for several weeks when she spoke to the police. RP 1144. She had only a vague memory of the night. RP 1142.

To be admissible, the court must determine whether the declarant ever had knowledge of the recorded memory. ER 803(a)(5*); In Re Det. of Peterson*, 197 Wn. App. 722, 727, 389 P.3d 780 (2017). This is why courts will frequently use this exception for people involved in record-keeping or other tasks which are reliable and cannot possibly be remembered.

It is also why this exception does not apply where the faded memory results from extreme drug use. The court was required to determine whether Ms. Wilson's statement was true and whether she was a reliable interpreter of Mr. Engerseth's supposed statement. There was no evidence Ms. Wilson was a reliable narrator. She was high and had been so for weeks. RP 1143. She was using methamphetamines several times a day. RP 1146. Her drug use affected her memory and reliability. RP 1152. Ms. Wilson's unreliability should

have been sufficient to deny admission of her out-of-court statement. ER 803(a)(5).

Everything Ms. Wilson described her memory loss and confusion when she spoke with the police is consistent with what science knows about heavy methamphetamine use. Nora Volkow, et al., *Association of Dopamine Transporter Reduction with Psychomotor Impairment in Methamphetamine Abusers*, Am. J. Psychiatry 377 (2001).[1] And even though Ms. Wilson may have recovered some of her cognitive abilities with her sobriety, some of the changes that occur with methamphetamine use may never return. Gene-Jack Wang, *Partial Recovery of*

[1] https://ajp.psychiatryonline.org/doi/pdf/10.1176/appi.ajp.158.3.377

*Brain Metabolism in Methamphetamine Abusers after Protracted Abstinence*, Am. J. Psychiatry 242 (2004).[2]

In other opinions, the Court of Appeals recognizes the unreliability of statements made by drug users. Evidence of controlled substance use is admissible if the witness was under the influence of substances during the incident or when they testified. *State v. Perez*, 139 Wn. App. 522, 529-30, 17 161 P.3d 461 (2007); *State v. Tigano*, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991). This Court of Appeals has also recognized that using substances affects the ability to perceive and explain events accurately. *State v. Brown*, 48 Wn. App. 654, 660, 739 P.2d 1199 (1987). As a threshold matter, a statement recorded when the narrator cannot provide

[2] https://ajp.psychiatryonline.org/doi/pdf/10.1176/appi.ajp.161.2.242

more than a vague memory of the day because of drug use is unreliable and should not be admitted.

Mr. Engerseth asked the Court of Appeals to rely on *State v. Keohokapu*, 127 Hawai'i 91, 107, 276 P.3d 660 (2012). In *Keohokapu*, Hawai'i's Supreme Court reviewed the unreliability of statements made by long-term substance abusers. *Id*. In that case, the declarant could not recall making his statement because of his drinking problem. *Id*. Further, no other evidence supported the witness's account. *Id*. As a result, the court held that the proponent of the statement failed to establish that it accurately reflected the proponent's knowledge at the time it was made. *Id*.

Rather than focus on drug use's effect on a declarant, the Court of Appeals focused on distinguishing factors, like when the statement was made and when the declarant testified. App 9. The

factors the court relied on are going to exist in every case. The more important question is whether drug use impacts the reliability of a statement. In *Keohokapu* and this case, the only conclusion is that it did. *Keohokapu* should not be discarded as a persuasive examination of when recorded recollections should be excluded.

Finally, the Court of Appeals holds that Ms. Wilson's statement should not be deemed unreliable simply because of her drug use. App. 10. Nor is Mr. Engerseth arguing such a position. Drug use does not make a statement unreliable. It is the extreme use that causes a person to have nothing but vague memories of an entire chapter of their life. Ms. Wilson did not believe she was a reliable narrator; the court should not have found otherwise.

*c. This Court should accept review.*

The Court of Appeals found the error, if it occurred, to be harmless. App. 10. The court's focus on the act, rather than Mr. Engerseth's intent, is flawed. Instead, this Court should be mindful that Ms. Wilson's statement is the only evidence in the government's case that suggested Mr. Engerseth intended to strike Mr. Smith with his car. RP 1360.

Ms. Wilson's statement to the police was critical evidence to establish intent. The only other evidence of intent was Mr. Engerseth's in-custody statement to the police, which Mr. Engerseth asserted was made under duress. RP 1387. Without Ms. Wilson's statement, the outcome of Mr. Engerseth's trial could have been different. *State v. Gunderson*, 181 Wn.2d 916, 927, 337 P.3d 1090 (2014). Clearly, the jury struggled with this question as their deliberations took days to complete.

CP 98-99. This Court cannot say the trial court's decision to allow the jury to hear Ms. Wilson's unreliable statement was harmless.

This Court should accept review. The Court of Appeals' decision conflicts with their past decisions examining the reliability of statements affected by drug use and memory loss. As such, this interpretation of ER 803 expands which statements can be admitted, opening the gates to unreliable statements. As such, this Court can find RAP 13.4 is satisfied and that review should be granted.

**2. This Court should review whether the failure to account for youthfulness at sentencing properly requires a new sentencing hearing.**

The Eighth Amendment and Art. I, § 14 of the state constitution require punishment to be proportional to the crime committed. *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793

(1910); *State v. Bassett*, 192 Wn.2d 67, 91, P.3d 343 (2018); U.S. Const. amend. XIII; Const. Art. I, § 14. In light of this principle, the U.S. Supreme Court has held that individuals with "lessened culpability are less deserving of the most severe punishments." *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). This Court provides that Art. I, § 14 of the state constitution provides greater protection. *Bassett*, 192 Wn.2d at 82.

For a sentence to be constitutional, the sentencing court must meaningfully consider youth as a mitigating circumstance. *State v. O'Dell*, 183 Wn.2d 680, 696, 358 P.3d 359 (2015). *O'Dell* recognizes that an exceptional sentence below the standard range can apply to youthful offenders like Mr. Engerseth, who are still emerging adults. 183 Wn.2d at 696.

The Court of Appeals found that the trial court did not err in imposing a sentence of 147 months for Mr. Engerseth's conviction for second-degree murder. App. 16. Mr. Engerseth asks the court to accept review of this holding, as this is a significant question of constitutional law and involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(a).

*a. Emerging adults lack the culpability of fully formed adults.*

"Neurological research over the last two decades has found that brain development continues into early adulthood (mid-20s or beyond) and that adolescents are particularly prone to risky behavior, a proclivity that naturally declines with maturity." Vincent Schiraldi, and Lael Chester, *Public Safety and Emerging Adults in Connecticut: Providing Effective and Developmentally Appropriate Responses for Youth*

*Under Age 21*, MA: Harvard Kennedy School, Malcolm Weiner Center for Social Policy, Harvard University, 9-10 (2016)[3].

Adolescents and young adults are more impulsive, more sensitive to immediate rewards, less future-oriented, more volatile in emotionally charged settings, and highly susceptible to peer and other outside influences. Schiraldi, at 9. These tendencies are especially pronounced among young adults who have experienced trauma, which is true for most justice-involved youth. *Id*.

But because young persons are still developing, their persistent and rapid physical, emotional, and cognitive development of adolescents also makes them particularly susceptible to positive influences.

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[3] https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/public_safety_and_emerging_adults_in_connecticut.pdf

Schiraldi, at 10. Most children will grow up and out of risky (and sometimes criminal) behavior. *Id.* As many parents know from experience, it takes time to grow up. *Id.*

*b. This Court's application of this scientific analysis requires lower courts to consider the mitigating qualities of youth when it sentences emerging adults.*

Trial courts must meaningfully consider youth as a possible mitigating circumstance. *O'Dell*, 183 Wn.2d at 696. In that case, the court sentenced Mr. O'Dell to 95 months. *Id.* at 686. In reversing the Court of Appeals, this Court held "that a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is." *Id.* at 698–99.

In Bassett, this Court affirmed how a court should examine youthfulness. 192 Wn.2d at 73. Mr.

Bassett was still an adolescent when he committed his crime, but the analysis is useful here. Mr. Bassett shot his parents and then drowned his brother. *Id*. At resentencing, the sentencing court re-imposed three life without parole sentences. *Id*. The sentencing court believed Mr. Bassett's lack of a home showed he was mature in making this decision. Further, the court rejected his mitigation evidence. *Id*. In rejecting the sentencing court's analysis, this Court recognized that sentencing courts may make imprecise and subjective judgments at sentencing. *Id*.

This Court addressed sentencing emerging adults in *Matter of Monschke*, 197 Wn.2d 305, 306, 482 P.3d 276 (2021). *Monschke* addresses 18 to 20-year-olds and holds that courts must exercise the same discretion when considering the mitigating qualities of youth for these persons as they do with 17-year-olds. *Id*. at 329.

The Court recognized that "modern social science, our precedent, and a long history of arbitrary line drawing have all shown that no clear line exists between childhood and adulthood." *Id.* at 306-07.

In *Monschke*, the defendants were 19 and 20 years old when they committed aggravated first-degree murder and were sentenced to life in prison without the possibility of parole. 197 Wn.2d at 308. *Monschke* relies on *O'Dell*, recognizing that "the 'parts of the brain involved in behavior control' continue to develop well into a person's 20s" and states that these "same scientific developments compel us to come to a similar conclusion under article I, § 14" of the Washington State Constitution. *Id.* at 321.

Mr. Engerseth's chaotic childhood made him less mature than most youthful offenders. His parents were drug addicts, and his father was absent. CP 71-72. His

grandparents tried to provide a stable household for him, but his mother frequently took him away from this environment, throwing him back into chaos. *Id.*

This neglect played on Mr. Engerseth's ability to mature. When he was 15, his grandparents found him abandoned on the street after his mother had secured state support for caring for a minor. CP 72. By the time his grandparents had full custody of him, Mr. Engerseth already had abandonment issues he likely has still not overcome. *Id.*

Nor was Mr. Engerseth able to escape from this history of drug dependency. He began abusing controlled substances as an 11 to 12-year-old. CP 73. His school expelled him in 10th grade. *Id.* He started using methamphetamines at 19. CP 74. And no one helped him stop, as he never received treatment for his drug use. *Id.*

The forensic report completed for Mr. Engerseth concluded that he had "an incredibly tumultuous upbringing with multiple incidents of trauma that expanded across repeated incidents of neglect starting at a very young age." CP 78. As a result, the expert on brain development concluded that "despite chronologically being 22, he was not a fully functioning adult." *Id.* at 81. "Rather, he was more akin to a 16- or 17-year-old adolescent male." *Id.*

The facts of this case also demonstrated Mr. Engerseth's youthfulness. Hanging out with a group of peers, he was encouraged to escalate the conflict with Mr. Smith. RP 1344. Later, he decided it would be "cool" to throw a car jack at the car in front of Mr. Smith's home, hoping to set off the car alarm. *Id.* Like other youth, this demonstrated a hallmark of youthful behavior.

Likewise, the commission of the crime, along with Mr. Engerseth's reaction afterward, demonstrated his youthfulness. This crime did not involve purposeful thought but an instant response to Mr. Engerseth's belief that Mr. Smith was going to assault him, potentially with a firearm. RP 1347. He acted as he did because he was "scared and frightened." RP 1347. Even his departure from the scene shows the same youthfulness, as all Mr. Engerseth did was seek out older friends who could comfort him. RP 1350.

Unlike some youthful offenders, the court did not need to guess at Mr. Engerseth's maturity level. The trauma and lack of care in his life helped shape Mr. Engerseth into an immature 22-year-old with the developmental and emotional maturity of a 16 to 17-year-old youth. CP 81. He was not fully culpable for his actions.

The Court of Appeals determined that the trial court considered youthfulness, but this conclusion contradicts the evidence. Rather than finding Mr. Engerseth's homelessness and living without family were signs of immaturity, these facts were held against him. RP 1569-70. The Court also discounted his drug addiction, finding he could have turned to his grandparents. *Id.* The court also found his limited contact with the courts demonstrated his maturity. RP 1570. None of these factors showed maturity. *See, e.g.*, *Bassett*, 192 Wn.2d at 73.

Washington must continue to address the unconstitutionality of excessive sentences for all youth under 25. A quarter of those sentenced to ten to twenty years or life in prison without the possibility of parole, and one in three of those sentenced to twenty to forty years were younger than 25 at their sentencing.

Katherine Beckett and Heather Evans, *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, ACLU of Washington, 54 (2020).

The science compels this Court to find that incarcerating young persons for long periods beyond their 25th birthday does nothing to improve community safety. Imposing a sentence about half of Mr. Engerseth's life failed to account for youthfulness and requires resentencing.

Despite the Court of Appeals' finding, this Court can find that there has been "a clear abuse of discretion or misapplication of the law." *State v. Blair*, 191 Wn.2d 155, 159, 421 P.3d 937 (2018) (quoting *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)). Because this issue is a significant question of constitutional law and involves an issue of substantial public interest that

should be determined by this Court, this Court should take review. RAP 13.4(a).

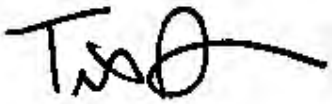
F. CONCLUSION

Based on the preceding, Mr. Engerseth asks this Court to grant review. RAP 13.4(b).

This petition is 3,569 words long and complies with RAP 18.17.

DATED this 16th day of February 2023.

Respectfully submitted,



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br>Respondent,<br>v.<br>JESSE CHRISTIAN ENGERSETH,<br>Appellant. | No. 82997-1-I<br>DIVISION ONE<br>UNPUBLISHED OPINION |

HAZELRIGG, J. — Jesse Engerseth appeals his convictions for murder in the second degree and vehicular homicide, as well as the sentence imposed. Engerseth assigns error to the trial court's admission of an out-of-court statement as a recorded recollection under ER 803(a)(5), and asserts the court failed to properly consider the potentially mitigating factors of youthfulness at sentencing. Finding no abuse of discretion in either the trial court's decision to admit the recorded recollection, or its imposition of a standard range sentence after considering Engerseth's youth, we affirm the convictions and sentence.

## FACTS

On June 27, 2019, Jesse Engerseth parked his car outside the residence of Michael Smith and Ashley McGinley in Everett. Smith asked Engerseth to leave with his passengers, but he refused. Smith went back inside the residence, retrieved a power drill, and pushed it into the driver's door of Engerseth's car. Engerseth claimed he thought the object in Smith's hand was a gun and drove

away. On the following day, June 28, Engerseth and Smith had another encounter behind a store where Engerseth had been napping in his car. Engerseth later testified he felt threatened by that interaction, and that he returned to Smith's home that night and threw a metal car jack at Smith's car. After investigating the noise caused by the car jack incident, Smith grabbed a stick from their home and left it in his car, telling McGinley that he knew who had done it.

About 30 minutes after throwing the car jack, Engerseth returned to an area near Smith's residence. Shortly thereafter, Engerseth's passenger alerted him that Smith's car was coming towards them. Engerseth later testified that Smith parked his car, opened the driver's door, and grabbed something off of the floorboard of his car. Engerseth said he was frightened and quickly started his car before turning his wheel hard to the left to avoid Smith's vehicle. Engerseth testified that one of the last things he remembered was accelerating and hearing a thud as Smith swung a "baseball bat" at his car. Subsequently, the passenger told Engerseth he had struck Smith with his car, but Engerseth stated he "was in denial" at the time and did not stop driving. As a result of the collision, Smith suffered multiple severe injuries including blunt force trauma to his head, which led to his death.

Engerseth went to Brooke Wilson's house after the incident. Wilson recalled Engerseth was "really upset and frantic and said he had got into an accident and that he was really scared." Sometime between 3:20 a.m. and 4:00 a.m. on June 29, police officers contacted Wilson. She provided a written statement of her encounter with Engerseth. Engerseth was arrested and charged with murder in the second degree, and vehicular homicide. He proceeded to trial

and testified in his own defense, claiming that he neither intended to scare nor hit Smith. According to Engerseth, he "just wanted to get the hell out of there" because he was scared of Smith.

Wilson's written police statement was ultimately read to the jury as a recorded recollection. At trial, Wilson was unable to recall writing the statement as she had been under the influence of methamphetamine when she provided it to police. In proceedings outside the presence of the jury, Wilson was shown the statement and confirmed it was in her handwriting and contained her signature on both pages. Wilson further noted the biographical information and email address on her statement were accurate. She also reviewed the penalty-of-perjury language included in the statement, which she attested to understanding.

The jury found Engerseth guilty on both counts. Based on his offender score, the standard range sentence was determined to be 123-220 months for murder in the second degree, and 15-20 months for vehicular homicide. Engerseth requested an exceptional downward sentence of 60 months. He urged the court to consider the potentially mitigating factors of youth in supporting a downward departure from the standard range. While the court acknowledged its discretion to impose a sentence below the standard range, and considered the 22-year-old defendant's youthfulness as a possible mitigating circumstance, the judge determined the mitigation evidence did not warrant an exceptional sentence. Accordingly, the court imposed a standard range sentence of 147 months for murder in the second degree and 17 months for vehicular homicide.

Engerseth timely appealed.

ANALYSIS

I. Admission of Recorded Recollection

Engerseth first assigns error to the trial court's decision admitting Wilson's written statement as a recorded recollection. He argues the statement was not admissible because it failed to meet the reliability requirements of ER 803(a)(5). The State responds that the trial court's decision to admit Wilson's statement was not error because it was based on tenable grounds and supported by substantial evidence.

We review evidentiary decisions, including the admission of statements under ER 803(a)(5), for an abuse of discretion. State v. Alvarado, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). An abuse of discretion occurs "when the trial court's decision is manifestly unreasonable or based on untenable grounds or reasons." State v. Gonzales, 1 Wn. App. 2d 809, 819, 408 P.3d 376 (2017). "A recorded statement given to police is inadmissible hearsay unless it qualifies for an exception to the hearsay rule." State v. Nava, 177 Wn. App. 272, 290, 311 P.3d 83 (2013). The exception for a "recorded recollection" is defined as:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

ER 803(a)(5).

For the evidence to be admissible under ER 803(a)(5), the following four factors must be satisfied:

> (1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately.

Alvarado, 89 Wn. App. at 548 (citing State v. Mathes, 47 Wn. App. 863, 867-68, 737 P.2d 700 (1987)). The proponent of the evidence has the burden to establish these foundational factors by a preponderance of the evidence. Nava, 177 Wn. App. at 289-90. "The trial court's preliminary finding," as to whether the required evidentiary foundation has been established, "will be upheld if supported by substantial evidence." State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289 (1993). Substantial evidence is a "sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

The first three foundational factors of ER 803(a)(5) are plainly supported by substantial evidence. First, Wilson's written statement addresses her experience with Engerseth on the night of the incident. The statement shows that, at the time it was written, Wilson attested to personal knowledge of her interaction with Engerseth, and recalled what he had told her about hitting a man with his car. Second, Wilson testified that she only vaguely recalled the incident with Engerseth and, at the time of trial, her memory of the event was poor because she was "under a lot of narcotics at the time." While Wilson remembered Engerseth coming up to her on the night of the incident and telling her that he was scared, she could not remember writing the statement for police or the substance of what he said to her about the incident. Third, Engerseth hit Smith with his car on June 28, 2019, and

Wilson's written statement is dated June 29, 2019. Wilson confirmed on the record that the date on her statement reflected it was written the "day after"[1] she saw Engerseth. Accordingly, this establishes she wrote the statement while the interaction with Engerseth was fresh in her memory.

The fourth factor requires deeper analysis. As ER 803(a)(5) provides no specific method to establish the accuracy of the witness's prior knowledge, courts examine the totality of the circumstances. Alvarado, 89 Wn. App. at 551. The pertinent considerations include:

> (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

Id. at 552. A recorded recollection may still be shown to accurately reflect the witness's knowledge "without the witness'[s] direct averment of accuracy at trial." Id. at 551. If other reliable evidence shows that a statement accurately reflects the witness's prior knowledge, and the court articulates a reason, supported by the record, for not believing the present disavowal, a recorded statement may still be admissible even after a declarant directly disavows it. Nava, 177 Wn. App. at 294-95.

Here, the trial court engaged in the proper analysis to determine whether Wilson's statement was admissible as a recorded recollection. First, the judge noted Wilson did not specifically disavow the accuracy of the statement. While Wilson testified that she would be concerned as to the accuracy of her statement, she confirmed there was "absolutely" no other reason for this concern besides her

[1] Wilson's statement was given to police officers in the early morning hours of June 29.

intoxication at the time the statement was written and subsequent lack of memory. The trial court stated that those considerations were "material for cross-examination and may be gone into significantly." Essentially, the jury could consider those factors when making credibility determinations and deciding what weight to give the statement.

Second, the trial court found that Wilson conceded the authenticity of the statement, based on her testimony that she recognized her handwriting and signature on both pages. Further, Wilson's signatures were "below the declaration portion on each of the two pages declaring facts contained in the two pages as true." Although Wilson also testified that the phone number listed on the statement was incorrect, she confirmed the information regarding her date of birth, height, weight, and email was accurate. She also verified her understanding of the penalty-of-perjury language above her signature at the bottom of each page. Third, because Wilson testified this was her own handwriting, the trial court found the recording process reliable, explaining, "she wrote it out in her own hand, so whatever she wrote, it's accurate as to how she wrote it." Finally, the court concluded the surrounding circumstances indicated the statement was generally trustworthy, based in large part on testimony of one of the officers who noted that they did not observe signs of impairment during their contact with Wilson. That officer specifically said that Wilson appeared to be in control of her person, understood why she was being contacted, was able to answer questions, and her responses to the questions were appropriate.

Engerseth argues Wilson's statement was unreliable due to her methamphetamine use, which affected her memory. He provides a number of articles in briefing regarding the impact of methamphetamine use on memory function, but no such studies were presented to the trial court. Further, he appears to aver that Wilson's methamphetamine use at the time of the incident impacted her ability to comprehend or recall what Engerseth purportedly conveyed to her that night, such that the content of her statement is unreliable, and does not focus on her ability at trial to recall the events.

Engerseth urges this court to follow State v. Keohokapu as persuasive authority for considering the admissibility of recorded recollections made by those with substance abuse problems. 127 Haw. 91, 107, 276 P.3d 660 (2012). However, the case is factually distinguishable and unpersuasive here. In Keohokapu, the State called a declarant to testify at sentencing about an incident which took place over a decade before the offense. Id. at 97-98. The declarant testified he had a drinking problem generally, and that he had been drinking heavily on the night in question and could not remember whether the defendant had come to his house. Id. at 97. The State showed the declarant the police report he had filed concerning the incident, but he could not recall what happened. Id. at 97-98. While he identified his handwriting and signature, as well as the date and time on the report, he did not remember writing it. Id. The declarant was also unable to remember an officer coming to his apartment on the night of the incident, and "there was no other evidence that buttressed [his] account." Id. at 107.

Accordingly, the court held the statement failed to meet the reliability requirements for a recorded recollection and was admitted in error. Id.

While both Wilson and the declarant in Keohokapu struggled with substance abuse at the time of their respective statements to police, and later memory deficits, the circumstances of their written statements are distinct. Unlike the declarant in Keohokapu, who could not recall seeing either a police officer or the defendant on the night of the incident, Wilson testified she remembered seeing both Engerseth and the officers shortly after the incident. Further, unlike the evidence supporting Wilson's statement, including the testimony of two officers who stated she did not appear impaired when they questioned her, there was no other evidence supporting the Keohokapu declarant's record of the alleged incident which occurred over a decade prior.

Our case law supports the trial court's decision to admit Wilson's recorded recollection even though she could not remember writing it. In In Re Detention of Peterson, Division Two of this court explained the distinction between the accuracy of the recorded recollection generally and the credibility of the witness's statement itself. 197 Wn. App. 722, 728, 389 P.3d 780 (2017). Importantly, "a record can be considered accurate for the purposes under ER 803(a)(5) even when a witness's credibility is clearly questionable." Id. at 729 (citing Alvarado, 89 Wn. App at 552-53). Accordingly, a witness's lack of memory surrounding a written statement goes "to the weight of their statements, not their admissibility." Nava, 177 Wn. App. at 297.

For example, in State v. Derouin, the witness provided a written statement to police, but she testified at the trial that she could remember neither writing the statement nor anything about the alleged incident. 116 Wn. App. 38, 41, 64 P.3d 35 (2003). Considering the totality of the circumstances, we held the recorded recollection was sufficiently reliable and should have been admitted under ER 803(a)(5). Id. at 46-47. Similarly, in State v. White, we found no error in the trial court's admission of a recorded recollection from a witness who was "too intoxicated" to recall whether the record accurately reflected what she had told police. 152 Wn. App. 173, 185, 215 P.3d 251 (2009). Following the reasoning in White, we decline to hold that Wilson's statement is unreliable simply because she was using methamphetamine at the time.

The trial court's decision to admit Wilson's statement as a recorded recollection was not based on untenable grounds and was supported by substantial evidence. Accordingly, we find no error.

A. Harmless Error Analysis

Engerseth avers Wilson's statement was critical evidence to establish intent, and without it, the outcome of his trial could have been different. The State points to substantial evidence, beyond Wilson's statement, that supports a finding by the jury as to the intent element of the charges, and argues that, "within reasonable probabilities, the trial's outcome would not have differed had the statement from Ms. Wilson not been read to the jury." Even if we were to assume that the trial court erred in admitting Wilson's statement, any such error would have been harmless.

"An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). When a trial court ruling violates a constitutional mandate, the reviewing court applies the rigorous "harmless beyond a reasonable doubt" test to determine whether reversal is warranted. Id. at 403. However, here, where the evidentiary error does not constitute constitutional error, we apply the less-stringent standard "that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." Bourgeois, 133 Wn.2d at 403.

Based on the charging document, for count 1, murder in the second degree, the State was required to prove that Engerseth intended to commit an assault in the second degree against Smith and, in furtherance of that crime or flight therefrom, he caused Smith's death. Even without Wilson's recorded recollection, the other evidence adduced at trial demonstrates that the outcome of this trial would not have been materially affected.

Engerseth testified that, after hitting Smith with his car, he heard a "thud," and that his passenger told him that Smith had been hit. Another witness testified Engerseth drove his car into Smith, which resulted in what sounded like a car crash. Engerseth neither stopped nor called 911. Instead, he drove to a street near Wilson's house, left his car, went into Wilson's residence, and put on a mask

to conceal his face. Further, after he was arrested, Engerseth agreed to speak with officers and gave multiple conflicting accounts of the events. Initially, his story was limited to one interaction between himself and Smith, which concluded when, Engerseth asserted, Smith put a gun up to his car. Next, Engerseth acknowledged throwing the car jack and subsequently being approached by Smith, but he claimed that a second car had hit Smith. Later, he alleged not knowing whether he hit Smith with his car, then claimed it was an accident, and ultimately asserted it was self-defense. The State avers this evidence demonstrates Engerseth's consciousness of guilt.

The series of escalating encounters between Engerseth and Smith evinces intent. The first ended with Smith grabbing a drill, which Engerseth thought was a gun, and pushing it against Engerseth's car door. In a store parking lot the following day, Smith revved his engine and glared at Engerseth, who testified that he felt, "Threatened, like [he] wasn't safe anywhere." In response, Engerseth told law enforcement he decided to "send a message" to Smith by returning to Smith's residence and throwing a car jack at Smith's car. Engerseth stated he knew Smith would be looking for him that night. In fact, Smith did come looking for Engerseth and was ultimately run over and died from his injuries.

Further, the testimony of expert witnesses supports a finding of Engerseth's intent. Based on Smith's injuries, the medical examiner opined that he was struck from the right side and possibly the back. A forensic scientist from the Washington State Patrol Crime Lab testified that the tire impressions from both Engerseth's car and Smith's pants were consistent with a tire rolling over someone's leg. A jury

could reasonably conclude that this testimony supports a finding of intentional assault, plainly contradicting Engerseth's story of trying to escape from an attacker and unknowingly or accidentally hitting Smith.

Considering the evidence of Engerseth's intent to commit an assault, Wilson's written statement was of minor significance, and within reasonable probabilities, the outcome of this trial would not have changed had the recorded recollection not been admitted.

II. Consideration of Youthfulness at Sentencing

Engerseth next asserts the court failed to properly consider his "reduced culpability as an emerging adult" at sentencing. Specifically, Engerseth argues the sentencing court abused its discretion by not meaningfully considering youthfulness as a possible mitigating factor.

We review a sentencing court's decision for a "clear abuse of discretion or misapplication of the law." State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). An abuse of discretion occurs when the trial court's exercise of discretion is "'manifestly unreasonable or based upon untenable grounds or reasons.'" State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

When faced with a discretionary sentencing decision, the trial court "must meaningfully consider the [defendant's] request in accordance with the applicable law." State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). The State properly notes in briefing that a sentence within the standard range may not be appealed. RCW 9.94A.585(1). However, "this rule does not preclude a defendant

from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision." McFarland, 189 Wn.2d at 56. When a defendant appeals such underlying legal determinations, our "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence." State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). The trial court errs when it: (1) fails to actually consider an exceptional sentence, (2) "refuses categorically to impose an exceptional sentence below the standard range under any circumstances," or (3) "operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence.'" Id. at 330; McFarland, 189 Wn.2d at 56 (quoting In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)).

In State v. O'Dell, our Supreme Court addressed whether a defendant's youthfulness could justify an exceptional sentence below the standard range if the defendant was over 18 when the offense was committed. 183 Wn.2d 680, 689-97, 358 P.3d 359 (2015). Less than two weeks after O'Dell turned 18, he had sex with a 12-year-old girl, which led to his conviction for rape of a child in the second degree. Id. at 683-84. At sentencing, O'Dell requested an exceptional sentence below the standard range, raising his youthfulness as a mitigating circumstance. Id. at 685. However, the trial court ruled that it "could not" consider youth as a mitigating circumstance for a downward departure under the Sentencing Reform Act (SRA).[2] Id. at 685-86.

[2] Ch. 9.94A RCW.

Upon review, our Supreme Court remanded for a new sentencing hearing, concluding the trial court incorrectly ruled that it "could not" consider a defendant's youth at sentencing and thus failed to meaningfully consider O'Dell's youth as a possible mitigating factor. Id. at 689. The Court held that "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like O'Dell, who committed his offense just a few days after he turned 18." Id. at 696. While youth can amount to a "substantial and compelling factor, in particular cases," the Court explained, "age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence." Id. at 695-96.

Engerseth was convicted of count 1, murder in the second degree, and count 2, vehicular homicide. Based on Engerseth's offender score, these offenses carried standard range sentences of 123-220 months and 15-20 months respectively. While the State recommended a high-end sentence of 220 months for count 1 and 20 months for count 2, Engerseth requested an exceptional downward sentence of 60 months.

At the sentencing hearing, the trial court acknowledged its discretion in deciding whether Engerseth's sentence should be within the standard range. The judge expressly stated:

> The [c]ourt also has authority to take other factors into consideration and go outside the standard range sentence. Youthfulness of the offender is one such factor as are other factors which, based on various facts surrounding convictions, can distinguish the blameworthiness of a particular defendant's conduct from that normally present in that particular crime.

Further, the court noted its careful consideration of Engerseth's mitigation evidence and stated, "I have the discretion based on Dr. Stanfill's report that Mr. Engerseth's past childhood trauma and adolescent brain development limited his capacity to appreciate his conduct." After weighing the information provided, the trial court found that the mitigating evidence was insufficient to justify a sentence below the standard range:

> While Mr. Engerseth had adverse childhood experiences and is less mature than his chronological age and, therefore, of course, more impulsive and susceptible to outside influences, he has also shown an ability to stay mostly out of trouble with the courts until June 28, 2019. He is not disabled, and he has some family support in his paternal grandparents that many young people we see in our courts do not.

Although the court did not order an exceptional downward sentence, it did recognize Engerseth's youth, capacity for rehabilitation, and genuine remorse for his actions as the reasons for imposing a sentence below the midpoint of the standard range. Ultimately, the trial court sentenced Engerseth to 147 months for murder in the second degree and 17 months for vehicular homicide. As the sentences were to be run concurrently, the actual term of total confinement ordered was 147 months.

The record shows no abuse of discretion, no failure to exercise discretion, and no misapplication of the law at sentencing. While Engerseth argues the trial court failed to meaningfully consider youthfulness as a mitigating factor at sentencing, the record demonstrates the opposite. The mere fact that a trial court declined a defense request for a downward departure does not, alone, mean that the information presented was not meaningfully considered.

Engerseth relies on State v. Bassett, 192 Wn.2d 67, 428 P.3d 343 (2018), and State v. Delbosque, 195 Wn.2d 106, 456 P.3d 806 (2020), to support his contention that the trial court failed to meaningfully consider his youthfulness. Neither case governs here, as both address juvenile defendants being resentenced pursuant to Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In Bassett, the State Supreme Court addressed juvenile life without parole sentences, found that "children are less criminally culpable than adults," and held that it was unconstitutional to sentence a juvenile offender to life without the possibility of parole. 192 Wn.2d at 90. In Delbosque, after receiving a mandatory life sentence without the possibility of release, Delbosque was resentenced to a minimum term of 48 years. 195 Wn.2d at 111. Our Supreme Court noted that, "Bassett's prohibition on juvenile life without parole sets a high standard for concluding that a juvenile is permanently incorrigible." Id. at 118. In remanding for a new sentencing hearing, the Court held, "Miller hearings require sentencing courts to meaningfully consider 'mitigating factors that account for the diminished culpability of youth,' including 'the youth's chances of becoming rehabilitated.'" Id. at 120 (quoting RCW 10.95.030(3)(b)).

Engerseth was not a juvenile at the time he committed the offense; the record establishes that he was 22-years-old. While youth may still be a mitigating factor for individuals over the age of 18, O'Dell only went so far as to say "a trial court must be allowed to consider youth as a mitigating factor" in such circumstances. 183 Wn.2d at 696. Here, the trial court acknowledged its discretion in considering Engerseth's youthfulness as a mitigating factor to

potentially justify an exceptional sentence, but simply determined it was insufficient. This decision was within the trial court's discretion and was not based on untenable reasons. Accordingly, the standard range sentence imposed on this 22-year-old offender is affirmed.

WE CONCUR:

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82997-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: February 16, 2023

# WASHINGTON APPELLATE PROJECT

## February 16, 2023 - 4:23 PM

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