Supreme Court No. _____
Court of Appeals No. 84054-1-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

HEATHER TROUTMAN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Heather Troutman, the petitioner, asks this Court to grant review of Court of Appeals' decision terminating review. The Court of Appeals issued a partly published opinion following the State's motion. This opinion and the order on Ms. Troutman's motion to reconsider, dated April 8, 2024, are attached in the appendix.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. The refusal to consent to search may not be used as evidence unless there is no constitutional right to refuse. Absent a warrant or exception to the warrant requirement, the State may not intrude upon a private affair under article I, section 7 of the Washington Constitution. The content of one's breath is a private affair. The search incident to arrest exception does not extend to the internal contents of one's body. Does a person have a constitutional right to refuse to submit to a breathalyzer

when the State does not seek a warrant and the search incident to arrest exception is inapplicable?

2. A law in effect during the pendency of Ms. Troutman's appeal instructs courts to not count prior juvenile adjudications in an offender score calculation. The legislature did so to remedy the injustice of automatically increasing a person's punishment based on the person's actions as a child. Ms. Troutman had prior juvenile adjudications that were counted in his offender score and increased his punishment. Given the expression of intent, does this law apply to pre-enactment cases, specifically non-final cases on direct appeal?

C. STATEMENT OF THE CASE

A complete statement of the case is set out in Ms. Troutman's opening brief. Br. of App. at 5-12.

In short, Ms. Troutman was prosecuted with felony driving under the influence. CP 16-17; 2/22/22 RP 189. Ms. Troutman testified and disputed that she had driven the car. RP 382-412. Following her arrest, Ms. Troutman refused take a

breathalyzer. RP 48, 396. Her refusal to take a breathalyzer was used by the prosecution at trial to argue consciousness of guilt and persuade the jury that Ms. Troutman had driven the vehicle. RP 439, 442. Following conviction, the court in sentencing Ms. Troutman counted several juvenile adjudications in calculating Ms. Troutman's offender score, which increased her punishment. CP 48.

On appeal, Ms. Troutman advanced several arguments in support of reversal of her conviction, including that the admission of her refusal to take a breathalyzer violated article I, section 7 of the Washington Constitution. Alternatively, she argued a new sentencing hearing was required because her juvenile adjudications should not have counted in her offender score under a new law that came into effect during the appeal.

The Court of Appeals issued an unpublished opinion rejecting Ms. Troutman's arguments on January 8, 2024. Ms. Troutman moved for reconsideration. The State moved to publish the portion of the opinion holding that the change in the

law did not apply to pre-act cases that were non final and on direct appeal. The Court of Appeals partly granted and partly denied Ms. Troutman's motion to reconsider, but its decision adhered to the same conclusions. The Court granted the State's motion to publish in part.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Under article I, section 7 of the Washington Constitution, a person has the right to not consent to a search or invasion of a private affair. Review should be granted to decide whether the prosecution may introduce evidence that a defendant refused to consent to a breathalyzer violates article I, section 7.

The Washington Constitution commands: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The United States Constitution also protects people from unreasonable searches and seizures. U.S. Const. amend. IV, XIV.

Requiring a person to breathe into a tube to estimate the person's blood alcohol content (BAC) is a search or disturbance upon a person's private affairs. *Birchfield v. North Dakota*, 579

U.S. 438, 455, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016); *State v. Baird*, 187 Wn.2d 210, 218, 386 P.3d 239 (2016) (plurality); *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010).

Notwithstanding that the use of a breathalyzer on a person is a "search," the United States Supreme Court has held the police may administer a breath test as a search incident to a lawful arrest for driving under the influence. *Birchfield*, 579 U.S. at 455. An exception to the warrant requirement is that law enforcement may conduct a warrantless search of a person incident to a lawful arrest. *Id.* at 457; *State v. Brock*, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015). This exception typically applies to searches of a person's outer body and personal items on the person. *Brock*, 184 Wn.2d at 154. The rationale for the exception is officer safety and evidence preservation. *Arizona v. Gant*, 556 U.S. 332, 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); *State v. Patton*, 167 Wn.2d 379, 386, 219 P.3d 651 (2009).

In *Birchfield*, the United States Supreme Court ruled this exception extended to breath tests, but not blood tests. 579 U.S. at 476. The Court reached this result after assessing the degree of intrusion on one's privacy and the degree of legitimate need by the government. *Id.* at 460-76.

This decision means that persons lawfully arrested for driving under the influence have no constitutional right under the Fourth Amendment to refuse a breath test. *Id.* at 478. And without a constitutional right to refuse, the rule that forbids a prosecutor from commenting on the exercise of a constitutional right is inapplicable. *Baird*, 187 Wn.2d at 223; *State v. Gauthier*, 174 Wn. App. 257, 267, 298 P.3d 126 (2013) (applying rule and holding that prosecutor improperly used defendant's invocation of his constitutional right to refuse consent as substantive evidence of guilt).

The analysis and result is different under article I, section 7 of the Washington Constitution. *See State v. Gunwall*, 106 Wn.2d 54, 59-61, 720 P.2d 808 (1986) (state constitutional

provisions may be more protective than their federal constitutional analogs).[1]

"The privacy protections of article I, section 7 are more extensive than those provided under the Fourth Amendment." *State v. Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). Unlike the Fourth Amendment, "article I, section 7 is not grounded in notions of reasonableness." *State v. Snapp*, 174 Wn.2d 177, 194, 275 P.3d 289 (2012); *see also State v. Villela*, 194 Wn.2d 451, 462, 450 P.3d 170 (2019) ("We do not use a balancing test to determine whether a statute violates article I, section 7.").

While a recognized exception to the warrant requirement provides the requisite authority of law under article I, section 7, these exceptions are "carefully drawn and narrowly applied." *Id.*

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[1] No Gunwall analysis is required to justify an independent state constitutional analysis of article I, section 7. *State v. Mayfield*, 192 Wn.2d 871, 879, 434 P.3d 58 (2019).

The history and rationale of the search incident to arrest exception does not support the use of warrantless breath tests for persons lawfully arrested for driving under the influence. The exception has not historically been applied to bodily contents. This makes sense because the exception is grounded in ensuring that weapons are removed from an arrested person and to preserve evidence of the crime the arrested person might destroy unless seized. *See State v. Ringer*, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983).[2] The exception is a "a narrow rule intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee." *Id.* at 698.

Thus, when the exception was unjustifiably expanded to permit categorical searches of vehicles that an arrested person had occupied, our Supreme Court "returned to the narrowly construed necessities of the exception" and ruled it did not authorize such searches. *Valdez*, 167 Wn.2d at 775. And while

[2] *Ringer* was overruled, but it is now good law again. *Snapp*, 174 Wn.2d at 194.

the United States Supreme Court took a similar path in limiting vehicle searches under the search incident to arrest exception, our Supreme Court went even further in limiting the exception under article I, section 7. *Snapp*, 174 Wn.2d at 191-197 (rejecting Fourth Amendment rule that would permit warrantless search of vehicle if it was reasonable to believe relevant evidence from crime of arrest might be found there).

"[S]earching an arrestee's breath for evidence of alcohol concentration is qualitatively different from a typical search incident to arrest in which the officer looks for tangible, confiscable items that may be present on the arrestee's person or within his effects." *City of Vancouver v. Kaufman*, 10 Wn. App. 2d 747, 758-60, 450 P.3d 196 (2019). The rationale for the exception does not apply to bodily contents, including one's breath. *Birchfield*, 579 U.S. at 494-95 (Sotomayor, J., dissenting). "It is hard to imagine how alcohol in the blood or breath of a defendant presents an officer safety concern." *State*

v. Nelson, 7 Wn. App. 2d 588, 607, 434 P.3d 1055 (2019) (Lawrence-Berry, J., dissenting).

While alcohol may dissipate in one's body, it is not a tangible item that an arrested person could destroy unless it is removed from the arrested person's control. "In those instances where the natural dissipation of alcohol in the blood or breath precludes obtaining a warrant, the exigent circumstances exception to the warrant requirement applies." *Id.* The search incident to arrest exception is inapplicable. *See also State v. Won*, 137 Hawai'i 330, 340 n. 23, 372 P.3d 1065 (2015) (recognizing this under Hawaii Constitution); *State v. Wilson*, 144 Hawai'i 454, 465 n.16, 445 P.3d 35 (2019) (adhering to this decision post-*Birchfield*).

Oddly, in a case concerning this issue, this Court did not address what article I, section 7 demands. *Baird*, 187 Wn.2d at 234-35 (Gordon McCloud, J., dissenting). For this reason, it is not controlling on the issue. *Nelson*, 7 Wn. App. 2d at 607 (Lawrence-Berry, J., dissenting). "Where the literal words of a

court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court." *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (cleaned up).

For the reasons advanced and the reasons set out by Justice Sotomayor, Justice Gordon McCloud, and Judge Lawrence-Berry, the search incident to arrest exception does not authorize warrantless breath testing of people arrested for driving under the influence. *Birchfield*, 579 U.S. at 494-96 (Sotomayor, J., dissenting); *Baird*, 187 Wn.2d at 235-40 (Gordon McCloud, J., dissenting); *Nelson*, 7 Wn. App. 2d at 606-09 (Lawrence-Berry J., dissenting). It follows that the implied consent statute is unconstitutional and that Ms. Troutman's refusal to consent to the breath test was improperly admitted. *Villela*, 194 Wn.2d 462 (statute authorizing

impoundment of vehicle unconstitutional under article I, section 7); *Kaufman*, 10 Wn. App. 2d at 764 (because search incident to arrest exception did not apply, defendant had constitutional right to refuse breathalyzer test and evidence of defendant's refusal was improperly admitted).

The Court of Appeals refused to address the issue on the grounds the issue was not preserved. But Ms. Troutman moved to exclude as evidence her refusal to take the breathalyzer, albeit on different grounds. 2/18/22 RP 51-53. And the trial court, in refusing to suppress, cited this Court's decision in *State v. Baird*, 187 Wn.2d 210, 386 P.3d 239 (2016) and reasoned excluding the refusal "would essentially defeat the whole purpose of the implied consent statute." 2/23/22 RP 209; CP 46.

Given this record, Ms. Troutman argued the issue was properly raised for the first time on appeal as manifest error affecting a constitutional right. Br. of App. at 44 n.8; Reply Br. at 13-15. The record is adequate to address the claim and the

claimed error is of constitutional dimension. This makes it "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. A.M.*, 194 Wn.2d 33, 38-40, 448 P.3d 35 (2019) (error in admitting statement in violation of right against self-incrimination "had practical and identifiable consequences at trial because the trial court admitted the evidence over the objection of counsel, albeit on different grounds.").

The Court of Appeals further reasoned that even if the claim were reached, the majority opinion in *Nelson* controlled. Slip op. at 18 n. 11. To the contrary, although the Court of Appeals' opinion in *Nelson* is precedent, it is not binding and the Court of Appeals was free to depart from it. *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 153-54, 410 P.3d 1133 (2018); *State v. Miller*, __ Wn. App. 2d __, 545 P3d 388, 392 (2024).

Whether evidence of a person's refusal to take a breath test is admissible under article I, section 7 is significant question of law under the Washington Constitution. RAP

13.4(b)(3). Given the scope driving under the influence prosecutions, this is also an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

2. Review should be granted to decide whether the law eliminating the use of juvenile adjudications in offender score calculations applies to sentencing on pre-act offenses where the case is not final.

Under the Sentencing Reform Act, the offender score and offense seriousness level determines the standard range sentence. RCW 9.94A.510, 530(1). The offender score is the total sum of points accrued from prior convictions rounded down to the nearest whole number. RCW 9.94A.525.

Ms. Troutman has four prior Class C non-violent juvenile adjudications that were counted in her offender score. CP 48. This increased her punishment by making her offender score a 6 rather than a 4. CP 48; *see* RCW 9.94A.525; Laws of 2017, ch. 272 § 3.[3]

[3] This was the session law in effect on the date that the State alleged Ms. Troutman to have committed the offense.

The legislature passed a law mandating that most prior juvenile felony adjudications do not count in the offender score. Laws of 2023, ch. 415, § 2.[4] The law took effect on July 23, 2023, while Ms. Troutman's case was on direct appeal.

In the published portion of its opinion, the Court of Appeals held this law does not apply to pre-act cases or to sentences that are pending on appeal.

Interpretation of a statute is a legal issue, reviewed de novo. *State v. Jenks*, 197 Wn.2d 708, 713, 487 P.3d 482 (2021).

In ruling that the law did not apply, the Court of Appeals relied on two statutes that generally require that sentences be determined based on the law in effect at the time of the offense. RCW 9.94A.345; RCW 10.01.040; Slip op. at 7.

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4 https://leg.wa.gov/CodeReviser/documents/sessionlaw/2023pam2.pdf. The exceptions are for first and second degree murder along with class A felony sex offenses.

The Court of Appeals reasoned that the language of the statute did not evince intent to apply to pre-act cases, including non-final cases on direct appeal. Slip op. at 7-8.

A statute need *not* have express language for it to operate at later sentencings or even "retroactively." *Jenks*, 197 Wn.2d at 720; *State v. Ross*, 152 Wn.2d 220, 238, 95 P.3d 1225 (2004); *State v. Rose*, 191 Wn. App. 858, 865-66, 365 P.3d 756 (2015); *Dorsey v. United States*, 567 U.S. 260, 274, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012). Laws purporting to create any kind of drafting requirement on the legislature are ineffective because a legislature cannot bind a future legislature from exercising its power. *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 174 P.3d 1142, 1151-52 (2007); *United States v. Winstar Corp.*, 518 U.S. 839, 872-73, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996).

As the United States Supreme Court has recognized, whether a statute applies must be analyzed based on its language. *Dorsey*, 567 U.S. at 274-75, 132 S. Ct. 2321, 183 L.

Ed. 2d 250 (2012). "No magical passwords" or express intent are required to supersede or exempt a law from a prior law. *Id.* at 274 (cleaned up). The analysis is whether the legislature did so "by necessary implication." *Id.* Or, as this Court has put it, the law is exempt from the prior law when the legislature expresses "an intent in words that fairly convey that intention." *Jenks*, 197 Wn.2d at 720 (cleaned up). Thus, the legislature is *not* required to say, "This act shall apply to pending cases." *Rose*, 191 Wn. App. at 865-66.

Here, the plain language of the new law expresses an intent to apply to all sentencings after its effective date, including to pre-act offenses. The intent section of the law, expressing the purpose of the law, shows this:

> The legislature intends to:
>
> (1) *Give real effect* to the juvenile justice system's express goals of rehabilitation and reintegration;
>
> (2) *Bring Washington in line* with the majority of states, which do not consider prior juvenile offenses in sentencing range calculations for adults;

> (3) *Recognize the expansive body of scientific research on brain development*, which shows that adolescent's perception, judgment, and decision making differs significantly from that of adults;
>
> (4) *Facilitate the provision of due process* by granting the procedural protections of a criminal proceeding *in any adjudication* which may be used to determine the severity of a criminal sentence; and
>
> (5) *Recognize how grave disproportionality within the juvenile legal system* may subsequently impact sentencing ranges in adult court.

Laws of 2023, ch. 415, § 1 (emphases added).

This statement of intent uses strong words that convey the legislature's intent to have this law apply, to all sentencings: "Give real effect," "Bring Washington in line," "Recognize the expansive body of scientific research on brain development," "Facilitate the provision of due process . . in any adjudication," and "Recognize [the] grave disproportionality within the juvenile legal system." *Id.*

This statement of intent shows it is fundamentally unfair and out-of-step to increase a person's punishment based on what that person did as a child. Consequently, the legislature's

intent was to end this harmful practice in all sentencings on or after July 23, 2023. *See Dorsey*, 567 U.S. at 273-281 (several considerations showed that Congress intended more lenient penalties to apply when sentencing offenders whose crimes preceded enactment of law, including avoiding sentencing disparities that the act was intended to remedy); *State v. Grant*, 89 Wn.2d 678, 684, 575 P.2d 210 (1978) (language that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages" expressed sufficient intent to apply to all cases); *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970) (amendment was not merely prospective given the language, "the provisions of this chapter shall *not ever* be applicable to any form of cannabis") (emphasis added); *Rose*, 191 Wn. App. at 869 (statement of intent saying that "the people intend to stop treating adult marijuana use as a crime" and "allow law enforcement resources to be focused on violent and property

crimes" expressed an intent to have law apply to pending cases).

The Court of Appeals reasoned that the intent section did not support the conclusion that the law applied to all pending cases because "the plain language says nothing about retroactivity." Slip op. 7. But neither did the statutes in *Dorsey*, *Zornes*, *Grant*, or *Rose*. The Court of Appeals reasoning effectively requires an explicit statement, which is not the rule.

This Court's decision in *State v. Jenks*, 197 Wn.2d 708, 487 P.3d 482 (2021) is not to the contrary. The statute in *Jenks* concerned eliminating second degree robbery as a strike offense for purposes of Washington's "three strikes and you're out" life-sentence law. Unlike the law here, it did *not* have a statement of intent. *Compare* Laws of 2023, ch. 415, § 1 *with* Laws of 2019, ch. 187. Thus, the language of the statute did "not fairly convey intent to exclude the saving clause" statute. *Jenks*, 197 Wn.2d at 720.

The more relevant case from this Court is *Ross*. 152 Wn.2d 220. There, the legislature reduced the amount of points in the offender score for prior drug convictions by amending RCW 9.94A.525. The Court determined this change in the law did not apply to crimes committed before the effective date of the law. *Ross*, 152 Wn.2d at 239. The legislature expressed the intent that the statute would *not* apply "retroactively" by stating the amendments "apply to crimes committed on or after July 1, 2002." *Id.* (quoting Laws of 2002, ch. 290, § 29).

In contrast to *Jenks* and *Ross*, the statement of intent here fairly conveys the message that it applies to any future sentencing (as opposed to just offenses committed after its effective date).[5] Otherwise the goals expressed in the statement

[5] This is not an issue of "retroactivity" on whether the law applies to people serving sentences where their cases are final. Rather it is an issue of *prospective* application. Does the law apply to all new sentencings going forward, including pre-act offenses? Or does it apply just to sentences for crimes committed on or after July 23, 2023, the effective date of the act?

of intent make little sense. And unlike in *Ross*, the legislature did *not* include a comparable statement that the law would only "apply to crimes committed on or after" a particular date. *Ross*, 152 Wn.2d at 239.

Jenks is also distinct because it did not consider whether the statute there was remedial. 197 Wn.2d at 726. The statute is plainly remedial. A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right." *State v. Pillatos*, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007) (internal quotation omitted). "[R]emedial statutes are liberally construed in order to effectuate the remedial purpose for which the statute was enacted." *Grant*, 89 Wn.2d at 685. "[R]emedial statutes are generally enforced as soon as they are effective, even if they relate to transactions predating their enactment." *Pillatos*, 159 Wn.2d at 473.

Here, the statute "relate[s] only to procedures and does not affect a substantive or vested right." *Id.* The State does not

have a substantive or vested right in having a person's juvenile adjudications count in their offender score. Thus, the statute applies to Ms. Troutman's sentencing. Because Ms. Troutman's case is not final and on appeal, she is entitled to relief. *State v. Jefferson*, 192 Wn.2d 225, 245-47, 429 P.3d 467 (2018); *see* slip op. at 8 ("Because Troutman's sentence is still on direct appeal, the amendment would apply prospectively *if* the saving clause did not apply.").

Review is warranted on this important issue. The mode of analysis by the Court of Appeals is in conflict with precedent. RAP 13.4(b)(1), (2). And this issue undoubtedly "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3). There are many (non-final) pre-act cases where courts have or will count juvenile adjudications, increasing the punishment imposed. No one should needlessly serve sentences in excess of the law.

And this is happening notwithstanding the legislature's statement of intent saying this is unjust and "[r]ecogniz[ing]

how grave disproportionality within the juvenile legal system may subsequently impact sentencing ranges in adult court." Laws of 2023, ch. 415, § 1. This disproportionately has affected people of color and indigenous persons the most. [6] This Court should grant review and decide this critical issue.

[6] Crosscut, Luna Reyna, *WA may end mandatory sentencing points based on juvenile convictions* (Apr. 20, 2023), available at: https://crosscut.com/politics/2023/04/wa-may-end-mandatory-sentencing-points-based-juvenile-convictions (recounting data showing that "People of color are facing longer sentences because they were involved in the juvenile system as children" and that "Indigenous youth are 3 times more likely than white youth to enter the prison pipeline through referral into the juvenile justice system than to have criminal charges dropped."); *see also State v. Tesfasilasye*, 200 Wn.2d 345, 358, 518 P.3d 193 (2022) ("Our Black, Indigenous, and other People of Color communities are arrested, searched, and charged at significantly higher rates than White communities"); *State v. Waits*, 200 Wn.2d 507, 521, 520 P.3d 49 (2022) ("It goes without saying that the criminal legal system disproportionately affects the poor and people of color."); *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018) (taking "judicial notice of implicit and overt racial bias against black defendants in this state").

E. CONCLUSION

Ms. Troutman's petition for review presents important issues that this Court should decide. The Court should grant the petition for review.

This document contains 4,085 words and complies with RAP 18.17.

Respectfully submitted this 3rd day of May, 2024.

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Appendix

FILED
4/8/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HEATHER D. TROUTMAN, Appellant.	No. 84054-1-I DIVISION ONE ORDER GRANTING MOTION FOR RECONSIDERATION IN PART AND DENYING IN PART, WITHDRAWING AND SUBSTITUTING OPINION, AND GRANTING MOTION TO PUBLISH IN PART

Appellant Heather Troutman filed a motion for reconsideration of the opinion filed on January 8, 2024 in the above case. Respondent the State of Washington filed an answer to the motion. The panel has determined that reconsideration of the opinion should be granted in part to delete all but the first sentence of footnote 4 on page 11 of the original opinion (now footnote 8 on page 16 of the substitute opinion). We otherwise deny the motion for reconsideration.

The State filed a motion to publish in part the portion of the opinion that holds that new legislation that requires excluding prior juvenile dispositions in the calculation of adult offender scores does not apply. Troutman filed an answer and did not oppose publication in part but urged reconsideration on the issue. We grant the motion to publish in part and order that the opinion filed on January 8, 2024 be withdrawn and a substitute opinion filed and published in part.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is granted in part and denied in part. It is further ordered that the State's motion to publish in part is granted and the opinion filed on January 8, 2024 shall be withdrawn and a substitute opinion shall be filed.

Chung, J.

Feldman, J.

Díaz, J.

FILED
4/8/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HEATHER D. TROUTMAN, Appellant.	No. 84054-1-I DIVISION ONE OPINION PUBLISHED IN PART

CHUNG, J. — Heather Troutman was convicted of felony driving under the influence (DUI) following a trial in which the key issue was whether she was the driver of a car that was found off the road. On appeal, she challenges the admission of her statements in violation of the doctrine of corpus delicti, the sufficiency of the evidence to support her conviction, and the admission of evidence that she refused to take a breath test in violation of CrR 3.1 and article I, section 7 of Washington's Constitution. She also challenges her sentence based on the calculation of her offender score, because it included her juvenile dispositions, and the imposition of supervision fees and the Victim Penalty Assessment (VPA).

In the published portion of our opinion, we address Troutman's claim regarding LAWS OF 2023, ch. 415, § 2 (codified at RCW 9.94A.525(1)(b)), which provides that adjudications of guilt for juvenile offenders by juvenile courts, other than murder in the first or second degree or class A felony sex offenses, may not

be included in the calculation of an adult offender score. We conclude that because the plain language of the 2023 amendment conveys no legislative intent that it applies retroactively, under RCW 9.94A.345 and the savings clause, RCW 10.01.040, the law in effect at the time of the offense applies to Troutman's sentence, so the amendment does not alter the calculation of Troutman's offender score. Also, the 2023 amendment does not apply prospectively to sentences that are pending on appeal.

In the unpublished portion of our opinion, we address the remainder of Troutman's claims. Finding no error, we affirm Troutman's conviction. However, we remand to the trial court to strike the supervision fees and the VPA from her sentence.

FACTS

Sometime after 11 p.m. on May 30, 2019, Jennifer Moldver took the North Lake Samish exit off Interstate 5 near Bellingham and encountered a car that had gone "off the off ramp into the brush and woods," still running, with its lights still on. Moldver immediately pulled over, called 911, and walked toward the car, where she watched "one person in the car in the driver's seat . . . rummage around a little bit and then climb over to the passenger seat and exit the vehicle." While she was on the phone, the person who had exited the car, Troutman, approached her and "begg[ed]" Moldver not to call 911. Moldver testified that "the alcohol smell coming off her was very, very powerful."

An emergency medical technician (EMT) who responded to the scene two minutes later could smell alcohol on Troutman. Troutman told the EMT "I wasn't

driving," "I'm not supposed to be driving," and "Please don't tell them I was driving."

A Washington State Patrol trooper, Officer Lipton, responded to the scene approximately ten or fifteen minutes after the 911 call was made. It appeared to Lipton that the car had skidded off the roadway, slid though grass, and ended up in roadside brush. Lipton testified that when he asked her what happened, Troutman immediately told him "she wasn't driving." Lipton further testified that Troutman failed seventeen of eighteen field sobriety test clues, and she told him that she thought if she took a breath test, her score would be "very high." Lipton placed Troutman under arrest and apprised her of her Miranda[1] rights at the scene.

The accident occurred in a "fairly remote" part of the county with "no houses in the immediate area" and only a park and ride lot and a gas station on the other side of the freeway. Moldver, the EMT, and Lipton did not see anyone else at the scene. The keys were still in the car's ignition, and Lipton observed the driver's seat was in a position consistent with a driver of Troutman's height, which was five feet, four inches.

After transporting her to jail, Lipton began the breath test procedure, but Troutman said she did not want to answer any further questions and asked for an attorney. After Lipton attempted to put her in touch with an attorney, he resumed the breath test procedure. Troutman refused to take the test.

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

In June 2019, the State charged Troutman with several crimes, including felony DUI. Later that year, her first trial ended in a mistrial.

In February 2022, the State amended the information to a single count of felony DUI. Before her second trial, Troutman stipulated to prior convictions that would elevate the charge to felony DUI. See RCW 46.61.5055. The State moved to admit several statements by Troutman under CrR 3.5. Following the CrR 3.5 hearing,[2] the court entered a written order admitting Troutman's statements to the EMT and Lipton prior to her arrest, but excluding her statements at jail except for the fact of her refusal to take a breath test.

At trial, after the State rested, Troutman moved to dismiss the charges against her based on the insufficiency of its evidence against her and the corpus delicti doctrine. The court denied the motion.

The jury found Troutman guilty as charged. Troutman timely appealed.

DISCUSSION

Inclusion of Juvenile Dispositions in Offender Score Calculation

Troutman's statement of additional grounds states her belief that her "juv[enile] record should not have been counted against me as points." She attaches her criminal history and the court's sentencing data showing an offender score of six. The standard range for her level IV offense is 33 to 48 months, and the court sentenced her to 35 months. Her juvenile dispositions contributed two

[2] The court's written findings of fact and conclusions of law from the CrR 3.5 hearing were not filed until after the trial, the same day as the judgment and sentence, on March 23, 2022.

points to her offender score. WASH. STATE CASELOAD FORECAST COUNCIL, 2022 WASHINGTON STATE ADULT SENTENCING GUIDELINES MANUAL 311 (2022), https://cfc.wa.gov/sites/default/files/Publications/Adult_Sentencing_Manual_2022.pdf [https://perma.cc/9ZJX-45RC]. Removing her juvenile dispositions would reduce her offender score to four and the standard range to fifteen to twenty months. Id.

At the time of Troutman's sentencing, the Sentencing Reform Act (SRA), RCW 9.94A.589(1)(a), required juvenile dispositions to be counted when calculating an offender score subject only to the same limitations that apply to adult convictions. But pursuant to Engrossed House Bill (EHB) 1324, 68th Leg. (Wash. 2023), a new provision effective July 23, 2023, states: "For the purposes of this section, adjudications of guilt pursuant to Title 13 RCW[3] which are not murder in the first or second degree or class A felony sex offenses may not be included in the offender score." LAWS OF 2023, ch. 415, § 2 (codified at RCW 9.94A.525(1)(b)).

Sentences imposed under the SRA of 1981, ch. 9.94A RCW, "are generally meted out in accordance with the law in effect at the time of the offense. See RCW 9.94A.345[4]; RCW 10.01.040.[5]" State v. Jenks, 197 Wn.2d

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[3] The title of Title 13 RCW is "Juvenile Courts and Juvenile Offenders."

[4] RCW 9.94A.345 states, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."

[5] RCW 10.01.040 states in relevant part:

> Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or

708, 714, 487 P.3d 482 (2021). Because " 'the fixing of legal punishments for criminal offenses is a legislative function,' . . . [i]t is therefore 'the function of the legislature and not the judiciary to *alter* the sentencing process.' " Id. at 713 (internal quotation marks omitted) (quoting State v. Ammons, 105 Wn.2d 175, 180, 713 P.2d 719 (1986), abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). Thus, to determine whether the newly amended statute relating to Troutman's sentence applies, we must interpret the statute based on its plain language, including that of the amendments. Jenks, 197 Wn.2d at 714. If unambiguous, the plain language provides "the beginning and the end of the analysis." Id.[6]

The amendment has the effect of removing a person's prior juvenile dispositions from use when calculating a person's offender score for any

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> repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

This "savings clause" was enacted to " 'render[] unnecessary the incorporation of an individual saving clause in each statute which amends or repeals an existing penal statute.' " Jenks, 197 Wn.2d at 719 (quoting State v. Hanlen, 193 Wash. 494, 497, 76 P.2d 316 (1938)) (internal quotation marks omitted). Thus, in Jenks, the court held that where the plain language—there, an amendment to the Persistent Offender Accountability Act, LAWS OF 2019, ch. 187, § 1(33)(o), part of the SRA—did not convey the intent for the bill to be retroactive, or to be excluded from the savings clause, the amendment applied only prospectively. Id. at 714, 720. Similar to the amendment at issue in Jenks, here, where the amendment to the SRA includes no contrary intent, the savings clause applies.

[6] Troutman also argues that the statute is remedial, and thus requires liberal construction to effectuate the remedial purpose of the statute. While the Jenks court did not address this argument, it did nevertheless interpret the statute at issue in that case not to express an intent to apply retroactively. And as the State notes, this court in Jenks at the appellate level rejected a similar argument, holding that the general rule that a remedial statute applies retroactively "does not apply when a statute is subject to RCW 10.01.040," and " '[a]bsent language indicating a contrary intent, an amendment to a penal statute – even a patently remedial one – must apply prospectively under RCW 10.01.040.' " State v. Jenks, 12 Wn. App. 2d 588, 600, 459 P.3d 389 (2020) (quoting State v. McCarthy, 112 Wn. App. 231, 237, 48 P.3d 1014 (2002)), aff'd, 197 Wn.2d 708, 487 P.3d 482 (2021).

subsequent adult convictions, except for juvenile adjudications of guilt for murder in the first degree, murder in the second degree, and class A felony sex offenses. Troutman points to the intent section of the amending law to support her argument that the plain language "expresses an intent to apply to pending cases that are not final." The intent section states

> The legislature intends to:
> (1) Give real effect to the juvenile justice system's express goals of rehabilitation and reintegration;
> (2) Bring Washington in line with the majority of states, which do not consider prior juvenile offenses in sentencing range calculations for adults;
> (3) Recognize the expansive body of scientific research on brain development, which show that adolescent's perception, judgment, and decision making differs significantly from that of adults;
> (4) Facilitate the provision of due process by granting the procedural protections of a criminal proceeding in any adjudication which may be used to determine the severity of a criminal sentence; and
> (5) Recognize how grave disproportionality within the juvenile legal system may subsequently impact sentencing ranges in adult court.

LAWS OF 2023, ch. 415, § 1. Troutman argues that this section "uses strong words that convey an intent" for the law to apply to all pending cases. But the plain language says nothing about retroactivity.

Because the plain language is unambiguous and does not evince a legislative intent for EHB 1324 to apply retroactively, we conclude that under the SRA, RCW 9.94A.345, and the savings clause, RCW 10.01.040, the law in effect at the time of the offense applies to Troutman's sentence.

Finally, Troutman argues that EHB 1324 should apply prospectively. " '[A] statute applies prospectively,' rather than retroactively, 'if the precipitating event

under the statute occurred after the date of enactment.' " Jenks, 197 Wn.2d at 722 (quoting In re Pers. Restraint of Carrier, 173 Wn.2d 791, 809, 272 P.3d 209 (2012)). "To determine what event precipitates or triggers application of the statute, we look to the subject matter regulated by the statute." Carrier, 173 Wn.2d at 809, quoted in Jenks, 197 Wn.2d at 722.

In support of her argument, Troutman cites to State v. Ramirez, in which the court held that an amendment to the criminal filing fee statute applied prospectively because the precipitating event was "the termination of all appeals, at which point the costs were finalized. 191 Wn.2d 732, 749, 426 P.3d 714 (2018). But in Ramirez, the subject matter was "costs imposed upon conviction." 191 Wn.2d at 749. The Jenks court "decline[d] to expand Ramirez" as it was "not analogous to the determination of whether a defendant qualifies as a persistent offender," Jenks, 197 Wn.2d at 723, a determination that is regulated by the Persistent Offender Accountability Act and the SRA. Id. at 722.

Here, the statute at issue regulates which prior offenses are included in an offender score calculation, so the triggering event is sentencing. See State v. Jefferson, 192 Wn.2d, 225, 247-49, 429 P.3d 467 (2018). Because Troutman's sentence is still on direct appeal, the amendment would apply prospectively *if* the savings clause did not apply. But the plain language of EHB 1324 conveys no intent that it applies retroactively. See Jenks, 197 Wn.2d at 715-19. Thus, as analyzed above, we hold that the amendment does not apply to the calculation of Troutman's offender score.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.404, it is so ordered.

UNPUBLISHED OPINION

Admission of Statements and Corpus Delicti Doctrine

Troutman argues that her statements were not admissible under the corpus delicti doctrine. We disagree.

"Corpus delicti means the 'body of the crime.' " State v. Brockob, 159 Wn.2d 311, 327, 150 P.3d 59 (2006) (quoting State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996) (internal quotation marks omitted)). "[T]he underlying purpose of corpus delicti is to prevent convictions based solely on confessions." State v. Cardenas-Flores, 189 Wn.2d 243, 260, 401 P.3d 19 (2017).

"The corpus delicti 'must be proved by evidence sufficient to support the inference that' a crime took place, and the defendant's confession 'alone is not sufficient to establish that a crime took place.' " Cardenas-Flores, 189 Wn.2d at 252 (quoting Brockob, 159 Wn.2d at 327-28). "Washington case law treats corpus delicti as a rule of sufficiency, not merely a rule of evidence." Cardenas-Flores, 189 Wn.2d at 257. We review de novo the sufficiency of the evidence for purposes of corpus delicti. State v. Sprague, 16 Wn. App. 2d 213, 226, 480 P.3d 471 (2021). "In determining whether there is sufficient evidence of the corpus delicti independent of the defendant's statements, we assume the 'truth of the State's evidence and all reasonable inferences from it in a light most favorable to

the State.' " Cardenas-Flores, 189 Wn.2d at 264 (quoting Aten, 130 Wn.2d at 658).

For the charge of driving while intoxicated, the corpus delicti "is met by proof that petitioners were driving or in actual physical control of a vehicle while intoxicated." City of Bremerton v. Corbett, 106 Wn.2d 569, 578, 723 P.2d 1135 (1986). "Inherent in the offense is the requirement that the intoxicated person was the driver . . . the corpus delicti of the offense[ ] . . . cannot be established absent proof connecting [a defendant] with operation or control of a vehicle while intoxicated." Id. at 574.

"Under the Washington rule . . . the evidence must independently corroborate, or confirm, a defendant's" confession. Brockob, 159 Wn.2d at 328-29. "The independent evidence need not be of such a character as would establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it *prima facie* establishes the *corpus delicti*." State v. Meyer, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951), quoted in Cardenas-Flores, 189 Wn.2d at 258. "Prima facie corroboration . . . exists if the independent evidence supports a 'logical and reasonable inference of the facts' " that the State seeks to prove. Brockob, 159 Wn.2d at 328 (internal quotation marks omitted) (quoting Aten, 130 Wn.2d at 656). The independent evidence also " 'must be consistent with guilt and inconsistent with a[ ] hypothesis of innocence.' " Cardenas-Flores, 189 Wn.2d at 264 (quoting Brockob, 159 Wn.2d at 329).

At trial, Troutman testified that she was not the driver, her friend Noell was. Troutman argues there is no direct evidence she was the driver because no one saw her driving that night. But "[t]he *corpus delicti* can be proved by either direct or circumstantial evidence." Aten, 130 Wn.2d at 655. Troutman further argues the evidence did not establish the corpus because the car's driver seat position was not measured and no dog was called to search the area for Noell and his friend, who she testified had joined them on the way back from Seattle and was in the back seat. She also points to the lack of evidence that she was the car's registered owner, distinguishing Corbett and other cases where the defendants were the registered owners. However, none of these specific types of evidence is needed, as long as other independent evidence is sufficient to support a "logical and reasonable inference" that Troutman was the car's driver. Brockob, 159 Wn.2d at 328.

Troutman relies primarily on Sprague, 16 Wn. App. 2d at 213, to argue that the independent evidence is "not inconsistent with a hypothesis of innocence," and it would not be "an unreasonable hypothesis to conclude that Ms. Troutman was not the driver." In Sprague, the defendant was found guilty of one count of possession with intent to deliver methamphetamine. Id. at 225. At the scene, Sprague was in possession of nine to 10 grams of methamphetamine, and officers found a homemade pipe, a weighing scale, and "a bundle of plastic grocery bags." Id. at 230. That amount of methamphetamine was not sufficient to support an inference of intent to deliver. Id. The State argued the evidence of intent was the scales and the grocery bags. Id.

The Sprague court reasoned the scales could be consistent with both an intent to deliver and personal use. Id. As for the bags, officers testified that while methamphetamine is typically packaged in small ziplock-style bags, plastic grocery bags were also commonly used and are torn or cut and tied or melted around the methamphetamine. Id. However, the plastic grocery bags in Sprague's apartment were not torn into small pieces or wrapped around methamphetamine. Id. at 231. Moreover, "Sprague was using one of the grocery bags as a garbage can liner." Id. Thus, the court reasoned that the presence of the scale and grocery bags "is 'no more indicative of an intent to deliver than . . . mere possession,' " so the evidence was "insufficient to establish corpus delicti of the specific crime of possession with intent to deliver." Id. at 231-32 (quoting State v. Cobelli, 56 Wn. App. 921, 925, 788 P.2d 1081 (1989)).

Unlike the independent evidence in Sprague, which was consistent with both mere possession and with possession with intent to deliver, here, the independent evidence is inconsistent with the conclusion that Troutman was not the driver. Moldver observed a single person, Troutman, in the car's driver's seat. The car was still running, and the keys were still in the car's ignition, so the logical and reasonable inference is that the accident had just happened when Moldver encountered the car. Moldver and the EMT, who arrived within two minutes of the 911 call, observed no other persons at the scene. Though Troutman testified Noell and his friend had been in the car, she did not ask for help finding them at the scene. As the area was remote, it was a reasonable inference that no one else had been the driver and had left the scene. Lipton,

who arrived ten or fifteen minutes after the 911 call, found the keys still in the car and observed that the car's seat was adjusted to fit a person of Troutman's height. Lipton also observed no other people at the remote scene who could have been the car's driver.

Viewed in the light most favorable to the State, the evidence independent of Troutman's statements supports a logical and reasonable inference that Troutman was the car's driver. Therefore, we conclude that the corpus delicti rule is satisfied.

Sufficiency of the Evidence

Troutman argues that the evidence is insufficient to support her conviction "for the same reason the evidence was insufficient to corroborate Ms. Troutman's statements." We disagree and conclude that the evidence is sufficient to support her conviction.

"Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt." Cardenas-Flores, 189 Wn.2d at 265. "A claim of evidentiary insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence." State v. Rodriguez, 187 Wn. App. 922, 930, 352 P.3d 200 (2015). "[U]nlike the corpus delicti analysis, the sufficiency of the evidence analysis does not involve evaluation of hypotheses of innocence." Sprague, 16 Wn. App. 2d at 235.

To prove the crime of felony DUI, the State had to prove that Troutman drove a motor vehicle while under the influence of or affected by intoxicating

liquor and had three or more prior offenses within 10 years. RCW 46.61.502(1), (6)(a). Troutman stipulated to the prior convictions necessary for a felony DUI charge under RCW 46.61.502(6)(a). She testified that she had four cups of a "strong" drink with fruit in it from a punchbowl before leaving a party around 11 p.m. and was intoxicated on the night in question. Further, Moldver and the EMT testified that Troutman smelled of alcohol.

The key contested issue was whether Troutman was the driver. Troutman testified that "[she] was not" the car's driver, that the car was her godfather's, and that she allowed her friend Noell to drive the car. But on review for sufficiency of the evidence, we must view the evidence in the light most favorable to the State. See Cardenas-Flores, 189 Wn.2d at 265. As discussed above, not only Troutman's statements, but independent corroborating evidence supported the inference that Troutman was the car's driver. We conclude that any rational trier of fact viewing the evidence in the light most favorable to the State would find the elements of the charged crime beyond a reasonable doubt.

CrR 3.1 Right to Counsel

Troutman argues the trial court violated her CrR 3.1 right to an attorney by admitting evidence that she refused to take a breath test after Lipton failed to make reasonable efforts to put her in contact with an attorney. The State counters that the issue is not properly before this court under RAP 2.5 because Troutman did not raise CrR 3.1 below, and the violation of a court rule cannot be manifest error affecting a constitutional right. We agree with the State.

CrR 3.1 provides a statutory right to counsel that extends "beyond the requirements" of our federal or state constitutions. State v. Templeton, 148 Wn.2d 193, 211, 59 P.3d 632 (2002) (quoting Heinemann v. Whitman County, 105 Wn.2d 796, 802, 718 P.2d 789 (1986)). The rule-based right to an attorney accrues "as soon as feasible after the defendant is taken into custody." CrR 3.1(b)(1). "At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer." CrR 3.1(c)(2). The rule does not require police to actually connect the accused with an attorney, but it does require the police to make reasonable efforts to assist the person in contacting an attorney at the earliest opportunity. State v. Pierce, 169 Wn. App. 533, 548, 280 P.3d 1158 (2012).

At the CrR 3.5 hearing, Troutman argued that "although [Lipton] did make his best efforts to contact an attorney[,] they were ultimately not successful, [and] at that point she had invoked her right to an attorney and the questioning needed to stop" because "her right to counsel is a constitutional right." But Troutman never cited CrR 3.1; she argued that Lipton "violate[d] her *constitutional right* to counsel." Rep. of Proc. at 53 (emphasis added).

The court concluded that Troutman "invoked her right to an attorney when she requested to speak to a public defender at the station." It further concluded her statements "made in response to questions on the 'DUI packet' " after she invoked her right to counsel were inadmissible, except for her refusal to take the

breath test.[7] The court's written findings of fact and conclusions of law following the hearing are silent about CrR 3.1.

RAP 2.5 generally prohibits our review of errors not raised below. RAP 2.5(a). However, this court has discretion to reach an issue not raised at trial if the party seeking review demonstrates manifest error affecting a constitutional right. RAP 2.5(a)(3). The defendant has the burden to identify the constitutional error and how it actually prejudiced their defense. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). "Manifest" means actual prejudice. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

A violation of CrR 3.1 is not of "constitutional dimension" for the purposes of RAP 2.5(a)(3). State v. Guzman-Cuellar, 47 Wn. App. 326, 334, 734 P.2d 966 (1987) (CrR 3.1 is a court rule "not of constitutional origin"); State v. Clark, 48 Wn. App. 850, 863, 743 P.2d 822 (1987) (same). Because Troutman did not raise CrR 3.1 below and it is not manifest constitutional error, we decline to review Troutman's claim of a CrR 3.1 violation.[8]

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[7] Here, as Troutman notes, "[t]he trial court excluded Ms. Troutman's responses to other questions . . . because she had invoked her right to counsel under Miranda," and Miranda protections do not extend to refusals to take breath tests because refusal is a non-testimonial act. See South Dakota v. Neville, 459 U.S. 553, 564 n.15, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) ("In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of Miranda."); State v. Zwicker, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986) ("[T]here is no coercion in obtaining refusal evidence where the accused is fully informed of the consequences of exercising the statutory right of refusal.").

[8] While we decline to review this claim, we note that Troutman does not assign error to the court's failure to include a conclusion of law regarding CrR 3.1.

Article I, Section 7

Washington's implied consent statute provides that any person who operates a motor vehicle within this state is deemed to have given consent to breath tests to determine alcohol concentration if the arresting officer has reasonable grounds to believe the person has been driving under the influence. RCW 46.20.308(1). Prior to obtaining a breath sample, the officer must advise the driver that he or she still has the right to refuse to consent to the test, but that license revocation and use of that refusal at trial are among the consequences that follow if the driver declines the test. RCW 46.20.308(2).

Troutman argues that the admission of her refusal to take a breath test violates article I, section 7 of the Washington Constitution.[9] The State argues Troutman did not raise this issue below and cannot meet her burden under RAP 2.5(a)(3) to show manifest error affecting a constitutional right. We agree with the State.

At her CrR 3.5 hearing, Troutman did not challenge the implied consent statute's authorization of a warrantless breath test as a violation of article I, section 7. Under RAP 2.5(a), we will not review claims not raised before the trial court unless the party seeking review demonstrates a manifest error affecting a constitutional right.

[9] Troutman correctly notes that she did not need to brief an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), because the Washington Supreme Court has already held that article I, section 7 provides privacy protection more extensive than the Fourth Amendment. See State v. Mayfield, 192 Wn.2d 871, 880, 434 P.3d 58 (2019).

In a footnote in her opening brief, Troutman contends that her article I, section 7 argument "is properly raised for the first time on appeal as manifest error affecting a constitutional right," citing RAP 2.5(a)(3), then concludes that "[t]he record is adequate to address the claim and the claimed error is of constitutional dimension. Therefore, the issue is properly before this Court." Troutman then cites two cases as examples of claims that satisfied the manifest constitutional error test. [10] But not until her reply brief does Troutman provide argument as to how the facts *in this case* demonstrate a manifest constitutional error under RAP 2.5(a)(3). "This court will not consider claims insufficiently argued by the parties." State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); see also Westmark Dev't Corp. v. City of Burien, 140 Wn. App. 540, 556, 166 P.3d 813 (2007) (argument made only in a footnote was insufficient to merit consideration). Nor do we consider issues argued for the first time in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). We decline to reach the claim that admission of Troutman's refusal to take a breath test, as allowed under the implied consent statute, violates article 1, section 7.[11]

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[10] State v. A.M., 194 Wn.2d 33, 448 P.3d 35 (2019); State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013).

[11] Even if we were to reach her claim, this court has already addressed this precise issue in State v. Nelson, 7 Wn. App. 2d 588, 605, 434 P.3d 1055 (2019). Nelson examined State v. Baird, 187 Wn.2d 210, 386 P.3d 239 (2016), in which a majority of the court concluded that a breath test conducted under Washington's implied consent law is a valid search incident to arrest. Nelson, 7 Wn. App. 2d at 600. After conducting an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), the Nelson majority held that, "in light of the long history of both our implied consent statute and of our case law rejecting arguments for giving art. I, § 7 an expanded interpretation . . . [w]e therefore conclude that the implied consent law provides authority of law to conduct a warrantless breath test as a search incident to arrest." Id. at 605.

Supervision Fees

Troutman argues her judgment and sentence includes community custody supervision fees that the court intended to waive. When she was sentenced in March 2022, Troutman asked the court to find her indigent and waive non-mandatory fines and fees. The State did not object. The court found her indigent and stated, "My intent is to waive whatever I can." The statute in effect at the time, former RCW 9.94A.703(2)(d) (2018), allowed courts to waive supervision fees for community custody.[12] Regardless, Troutman's judgment and sentence included a provision that she "pay supervision fees as determined by" the Department of Corrections while on community custody.

The State concedes remand is appropriate because the trial court did not intend to impose supervision fees. We accept the State's concession and remand to the trial court to strike the community custody supervision fee.

Victim Penalty Assessment (VPA)

After Troutman appealed and filed her opening brief, the Legislature passed Engrossed Substitute House Bill (ESHB) 1169. LAWS OF 2023, ch. 449. The court in State v. Ellis described this new law as follows:

> ESHB 1169 added a subsection to RCW 7.68.035 that prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). LAWS OF 2023, ch. 449 § 1; RCW 7.68.035(4). The amended statute also requires trial courts to waive any VPA imposed prior to the effective date of the amendment if the offender is indigent, on the offender's motion. LAWS OF 2023, ch. 449 § 1; RCW 7.68.035(5)(b). This amendment will take effect on July 1, 2023. LAWS OF 2023, ch. 449 § 1.

[12] The current RCW 9.94A.703(2), which went into effect in June 2022, omits those fees altogether.

27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). The new provision applies to cases pending on direct appeal. Id. (citing Ramirez, 191 Wn.2d at 748-49).

The trial court found Troutman indigent. Based on ESHB 1169, Troutman moves this court to strike the VPA from her sentence. The State has indicated it has "no objection to striking the [VPA] during the course of Troutman's appeal rather than requiring her to file a motion." We remand with instructions to strike the VPA.

CONCLUSION

We affirm Troutman's felony DUI conviction, but we remand to the trial court to strike from her sentence the community custody supervision fee and the VPA.

Chung, J.

WE CONCUR:

Feldman, J.

Díaz, J.

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. 84054-1-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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Date: May 3, 2024

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