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COURT OF APPEALS
DIVISION II

No. 38402-7-II

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STATE OF WASHINGTON

BY _____

DEPUTY

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DANIELLE OLAGUE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 08-8-00113-7

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The court erred when it did not suppress the photographic depictions found as part of a warrantless search.

2. The court erred in entering findings of fact re: suppression number 1.4

3. The court erred in entering findings of fact re: suppression number 1.6.

4. The court erred in entering conclusions of law re: suppression number II.2.

5. The court erred in entering conclusions of law re: suppression number II.3.

6. The court erred in entering conclusions of law re: suppression number II.4.

7. The court erred in entering conclusions of law re: suppression number II.6.

8. The court erred in entering conclusions of law re: suppression number II.7.

9. Respondent was denied effective assistance of counsel.

10. The court erred when it refused to dismiss the charges and found respondent guilty of the offense of vehicular homicide.

11. The court erred in entering finding of fact re: bench trial number 8.

12. The court erred in entering finding of fact re: bench trial number 9.

13. The court erred in entering finding of fact re: bench trial number 16.

14. The court erred in entering conclusions of law re: bench trial number 2.3.

15. The court erred in entering conclusions of law re: bench trial number III.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether an individual's right to privacy is violated when a police officer accesses her digital camera without a warrant? (Assignments of Error 1-8).

2. Whether respondent was denied the effective assistance of counsel when character evidence was admitted, without any objection, regarding alleged alcohol use when the evidence was not relevant to the charge and it was subsequently used by the court to find her guilty of vehicular homicide? (Assignments of Error 9).

3. Whether sufficient evidence was presented to support a conviction for vehicular homicide based on the element of disregard for the safety of others? (Assignments of Error 10-15).

III. STATEMENT OF THE CASE

A. Procedural History

On January 30, 2008, Danielle Olague was charged with the crime of Vehicular Homicide. Initially, it was charged based on the element of "recklessness", but, after a motion to dismiss was filed, the charge was changed to reflect the "disregard for the safety of others" prong under the statute. CP 88. The charge resulted from an accident occurring on July 25, 2007, wherein Danielle Olague was driving a vehicle that went off the road at milepost 25 on SR 7 in Pierce County, Washington, resulting in the death of her friend, Ashley Magnuson. CP 1-3; 7-8; 88.

Prior to trial, the defense moved to suppress evidence taken from Danielle Olague's digital camera. RP 18-106. At the hearing, the state called Trooper Eric Wickman who testified, upon coming to the scene of the accident and accessing the vehicle, finding two purses and a digital camera. RP 32:15-17. The purses were located "around the center console towards the passenger's side". The camera was found by itself on the floorboard of the vehicle. RP 32:21-33:1. Once

Trooper Wickman had the camera in his possession, he activated it and looked at the photographs depicted in the camera. RP 33:18-25. The photographs themselves depicted individuals next to alcoholic beverages. The individuals depicted were Danielle and her friend, Ashley Magnuson. RP 34:4-9.

Afterward, the Trooper made the other investigating officers aware of the depictions on the camera. Specifically, he told Detective Julie Mitchell "a/k/a Julie Gunderman". This occurred on the 26th of July. RP 37:17-24.

After finding the camera and looking at the photographs, it was logged into the property report as evidence in the case. The disc remained inside the camera. RP 47:12-25. Detective Gunderman testified that after receiving information about the camera and the disc, she discussed the situation with Ms. Olague at which time Ms. Olague indicated that it was her camera, but the chip in the camera belonged to Ashley Magnuson. RP 61:10-15. At that point in time, the detective called Mr. Magnuson, Ashley's father, and asked him if they could look at the

disc. RP 61:25-62:3. Mr. Magnuson gave permission. RP 62:8-11. Afterwards, the photographs depicted were printed by Trooper Gunderman. RP 81:10-18. Ms. Olague never consented.

Upon hearing the testimony and argument, the court found that the search was legal because the camera was turned on to "see whether or not the photographs might show who owns it [the camera] certainly comes in under the inventory exceptions." RP 104:11-16. As a result, the court found that Ms. Olague's privacy rights did not extend or overcome the Magnuson's privacy rights because Mr. Magnuson gave consent. The motion was denied. RP 104:18-21. The court entered findings and conclusions on January 20, 2009 supporting its decision. CP 122-125.

The defense had indicated that it had no motions in limine unless the state had "bad acts" evidence it intended to admit of which counsel might not be aware. RP 17:1-16.

Subsequently, the case proceeded to trial. During the course of trial, the state, without objection by the defense, repeatedly asked

witnesses about the depictions in the photographs showing Ms. Olague next to alcoholic beverages. There were no objections made by defense counsel. RP 191:1-15; 192:1-25; 194:1-25; 197:1-11; 229:16-25; 230:17-24.

After hearing the testimony, the court found Danielle guilty of the charge of vehicular homicide based on disregard for the safety of others, relying extensively on the photographs depicted in the camera showing Danielle next to containers of alcoholic beverages, as well as testimony from witnesses, notwithstanding the fact that there was no evidence that she was intoxicated. RP 890:1-897:1. Indeed, the court found:

the interesting thing about the photographs that were taken in the afternoon at the lake -- and, obviously, some of those were staged. Some of those were not; but setting aside the posing with the Mike's Hard Lemonade bottles and the posing with the beer cans, what I found striking, when looking at the background, is the complete lack or absence of any other beverage containers, other than alcoholic ones. Now, you can't spend 8 or 9 hours on a hot afternoon at a lake on a summer's day without taking in fluids; and the only fluids that apparently were available to all four of the parties involved were alcohol.

Now, we don't have any proof of any blood alcohol or breathalyzer; but there is no doubt that Ms. Olague was drinking; and she was conscious of the fact that as an intermediate driver, an underaged driver, she should not have had alcohol, whatsoever, by the fact that before they left the lake, the four remaining bottles, according to Mr. Eklund's testimony, of Mike's Hard Lemonade, were destroyed. She also denied to the police that night that she had been drinking. If she had been honest, they probably would have done the blood alcohol, but given the fact that they had been outside -- Mike's Hard Lemonade is not the same as imbibing in rum or whiskey. But she knew she shouldn't have been drinking; and yet, as an intermediate driver with limited skills, she chose to consume alcohol, even though she knew she was driving the vehicle home.

RP 892:19-893:24.

Further, the court's decision continued to reference the allegations of Ms. Olague drinking, ultimately finding her guilty as a result. RP 896:13-25. Likewise, the court entered findings and conclusions, relying in part on Ms. Olague's alleged drinking, on January 20, 2009. CP 115-121.

B. Facts

Trooper Jeremy James, upon arriving at the scene, testified that he found the vehicle upside down, approximately 30' off the roadway. RP 119:21-23. It was daylight at the time he arrived

at milepost 25 on SR 7 in Pierce County, Washington. RP 121:1-7. After seeing the vehicle, he then identified the driver as Danielle Olague after speaking to her. RP 121:15-17. Ms. Olague indicated that she had taken the curve too fast. RP 123:19-24. She also indicated that she had driven the roadway several times and she had never had a problem with it before. RP 124:1-5. She also indicated that the passenger in the car was Ashley Magnuson. RP 124:19-21. He, at that time, made a request that a collision tech respond to the scene because of the seriousness of the injuries to Ashley Magnuson. RP 130:3-12. He also noted skid marks on the road, which, in his opinion, are indicative of a vehicle braking for a long period of time or a vehicle travelling at a fast pace. RP 135:8-17. He could not determine how fast the vehicle was travelling simply by looking at the skid marks. RP 154:12-18. Nor could he tell the speed of the vehicle by looking at the damages sustained. RP 163:1-9.

Jeff Eklund, one of the individuals who was with Danielle Olague that evening, testified that he had been to this area with Ms. Olague once,

earlier that spring. RP 180:1-10. He also testified that he and the person he was driving with, Mr. Thompson, brought alcohol to the lake, specifically Busch Beer and Captain Morgan's Rum, which they drank (and finished) on the way to Alder Lake. RP 185:1-25. These questions were allowed without any objection. See also RP 191:1-15. He further testified that he had seen in the cooler at the lake bottles of Mike's Hard Lemonade, some sitting by Ms. Olague. Again, this was done without objection. RP 192:1-25. See also RP 194:1-25; 197:1-11. Subsequently, the photographs from the camera, Exhibits 147-160, were admitted into evidence without objection and there was more testimony about Ms. Olague posing with the lemonade. RP 202-204.

After leaving the lake, Mr. Eklund testified that he was maintaining a speed less than the posted speed limit because he saw a patrol vehicle. RP 207:1-25. As he proceeded, he saw Ms. Olague's vehicle leave the roadway at the curve in question. RP 211:1-17. Prior to this time, everything looked normal. RP 212:8-15. He speculated, over objection, that she was driving

approximately 55 miles per hour. RP 216:10-17. He also indicated that later, Ms. Olague told him that she hit her brakes when she went into the curve. RP 222:4-18.

Kenneth Thompson drove with Mr. Eklund to Alder Lake on July 25, 2007. RP 227:16-25. He also testified that they drank a 5th of rum on the way to Alder Lake. RP 228:15-25. Without objection, he also testified that there was alcohol in the vicinity of Danielle Olague, that being Mike's Hard Lemonade and Busch Lite Beer. RP 229:16-25. See also RP 230:17-24.

After leaving Alder Lake, he indicated that Ms. Olague was a distance of approximately the length of a football field behind the vehicle he was in with Mr. Eklund. RP 248:3-19. As she was catching up, he indicated that she "fish-tailed and went over". RP 248:17-19. He estimated the speed, without objection, at 70 to 80 miles per hour. RP 250:5-9. He had previously told Detective Mitchell that she was going approximately 50 miles per hour. RP 269:8-13. He also, again, was questioned regarding how much beer the girls drank. RP 271:1-10; 274:12-18.

Again, without objection. Over objection, but not based on relevance or prejudicial grounds, the photographs, Exhibits 161-230, were admitted. RP 284.

Trooper Gunderson then testified regarding her conversation with Ms. Olague, who indicated that she had misjudged the curve and started braking. RP 330:15-23. Ms. Olague indicated to her that she did not have any alcohol to drink. RP 333:17-22. Indeed, Trooper Wickman, in his conversation with Ms. Olague, indicated that there was no indication that she had been drinking. RP 421:1-24.

The speed at the curve, based on the signage, shows that the speed limit was 35 miles per hour. RP 346:15-20, Ex. 67. Prior to this, the signage indicated that the speed limit was 50 miles per hour. RP 347:17-20. At the time of the accident, the two intermediate licenses, dated August 11, 2006, and then a subsequent license dated June 6, 2007. RP 362:21-363:14.

In her investigation at the scene, the Detective found friction marks and yaw marks based on the braking. RP 370:20-371:15. See also 381:11-

14. Based on her evaluation of the markings, it was calculated that she was travelling at 39.84 miles per hour at the time she left the roadway and 59.63 miles per hour at the moment the braking began. RP 397:1-15. Conversely, Ms. Olague's expert witness testified that she was travelling 48-53 miles per hour at the time the braking began. RP 743:7-12; 829:13-22.

Trooper Wickman testified that the accident was the result of inexperience and speed. RP 428:5-12. Ms. Olague's expert testified that the accident occurred as a result of her over-correcting by turning too sharply. RP 748:1-19.

The court convicted Ms. Olague and she now appeals.

IV. ARGUMENT

- A. THE COURT SHOULD REVERSE THE CONVICTION BECAUSE THE PHOTOGRAPHS ADMITTED IN TRIAL WERE UNLAWFULLY OBTAINED WITHOUT A SEARCH WARRANT.

"A warrantless search is per se unreasonable under both the Fourth Amendment to the United States Constitution and Article 1 § 7 of the Washington State Constitution unless it falls within a specifically established and well-

delineated exception." State v. Ross, 141 Wn.2d 304, 313, 4 P.3d 130 (2000). These exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and Terry investigative steps. State v. Evans, 159 Wn.2d 402, 407-08 fn. 3, 150 P.3d 105 (2007).

Initially, a defendant must have "standing" to challenge a seizure. In Washington, standing is automatic, even though the individual may not technically have a privacy interest in the property to be searched. 159 Wn.2d at 406-07. Because Ms. Olaque owned the camera and it was in her vehicle, she has standing to challenge the search. Thus, the only issues are whether Ms. Olaque maintained a legitimate privacy interest in the camera and chip contained therein and whether the warrantless search was valid.

1. Ms. Olaque had a privacy interest in the camera and chip.

To establish a privacy interest in the area where property is found, a defendant "must satisfy a two fold test: (1) Did she exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private? and (2) does

society recognize that expectation as reasonable?"
Evans, 159 Wn.2d at 409, 150 P.3d 105.

In determining whether a certain interest is a private affair deserving Article 1 § 7 protection, a central consideration is the nature of the information sought. In other words, whether the information obtained via the governmental trespass reveals intimate or discrete details of a person's life. State v. Jordan, 160 Wash.2d 121, 126, 156 P.2d 893 (2007).

While no Washington case has addressed whether a reasonable expectation of privacy exists in a storage device for a digital camera, other courts have found a reasonable expectation of privacy exists if an individual has control over the electronically stored information. United States v. Chan, 830 F.Supp. 531, (N.D. Cal. 1993) (expectation of privacy in electronic repository for personal data is analogous to a personal address book or other repository for such information). These types of files have been found to have the same protections afforded closed containers. See United States v. Barth, 26 F.Supp.2d 929, 936 (W.D. Tex. 1998) (the

protection afforded to computer files and hard drives are not well-defined, but the protection of these is similar to the protection afforded closed containers and closed personal effects). Indeed, the United States Supreme Court has found a privacy interest in the contents of a film carton. See Walter v. United States, infra.

Here, it is apparent that Ms. Olague did have a privacy interest and the court essentially, found as much, but indicated that it had been diminished to the extent that the authorities had the right to examine it to determine its owner. CP 122-125. Thus, the only issue is whether the inventory search was valid.

2. The search of the camera was not a valid inventory search.

While an officer may, in fact, conduct an inventory search, his authority to possess a package is distinct from his authority to examine its contents. Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (Court found reasonable expectation of privacy in contents of film carton). A warrant may be required under those circumstances. United States v. Chadwick, 433 U.S. 1, 10-11, 97 S.Ct. 2476,

2843, 53 L.Ed.2d 538 (1977). The trial court, in finding the search valid, orally ruled it fell within the "inventory exception." RP 104:11-16. It subsequently entered written findings confirming that her decision was based on it being an inventory search and that it was reasonable to access the camera to determine the rightful owner. CP 122-125.

However, Washington courts have rejected this analysis, restricting the parameters of what qualifies as a legitimate inventory search. See State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980). As stated in Houser, the criteria for these searches are restricted to effectuating the purposes which justify their exceptions to the Fourth Amendment. Initially, not every inventory search is lawful. They are only proper when conducted in good faith for the sole purposes of finding, listing and securing from loss during detention property belonging to the detained person, as well as, protecting police from liability due to dishonest claims of theft. 95 Wn.2d at 153-54.

The Washington State Supreme Court has held that because the inventory search may be abused, it is incumbent upon the state to demonstrate that it was conducted in good faith and not as a pretext for an investigatory search. Moreover, it should be limited to protecting the police against substantial risks to the property and the vehicle and not enlarged on the basis of some remote risk. Id. at 155.

In Houser, the Washington State Supreme Court found unreasonable an inventory search of the trunk of an automobile because there was no danger of theft from the locked trunk. Id. at 155-156. Moreover, the court stated that had it been reasonable to do an inventory search of the locked trunk, it was unreasonable to search the closed container of luggage contained therein, unless the owner consented. Id. at 158. As stated therein, the only legitimate inventory search at that time was to note that such an item was a sealed unit. Id.

Here, the court, relying on State v. Kealey 80 Wn.App. 162, 907 P.2d 319 (1995) stated that the inventory search was reasonable in order to

determine the identity of the owner. RP _____. CP 122-125. However, the court's reliance on State v. Kealey itself is unreasonable. Kealey involved a situation where the individual misplaced her purse in a store and left the premises. An inventory search was conducted to find identification for the sole purpose of returning the purse after the store employees had found it. 80 Wn.App. at 174-75. There was no misplacement here -- the camera was in the car in the vehicle driven by Danielle Olague. There was no indication at all that the camera had been misplaced or that the officer needed to identify the owner of the camera so he/she could be reunited with the property.

As such, the search was not a valid inventory search. As in Houser, it was not conducted in good faith. Indeed, Danielle Olague, who was present, could have been asked and, in fact, was asked who owned the camera and she indicated she did. Moreover, to be a valid inventory search, the police officer was only allowed to inventory the camera, not look at its contents. There was

no indication that there was a threat of theft or an invalid claim.

In sum, there was no reason to look into the contents of the camera as part of an inventory search when the only basis for doing so is to

1) find, list, and secure from loss during detention property belonging to a detained person or 2) protecting police and temporary storage bailees from liability due to dishonest claims of theft.

Houser, supra. None of these reasons existed here.

Thus, prior to searching the camera, consent was required. Because the police failed to obtain consent and went well beyond a valid inventory search, the search was invalid and the court's decision determining that it was reasonable was in error and this court should reverse.

B. THE COURT SHOULD REVERSE BECAUSE DEFENDANT'S CONSTITUTIONAL GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

Both the Sixth Amendment to the United States Constitution and Art. I § 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S.

668, 684-86, 104 S.Ct. 2052, 80 L.ED.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. Strickland, 466 U.S. at 687-88. It may be established by demonstrating "that counsel failed to conduct appropriate investigations or by demonstrating the absence of legitimate, strategic or factual reasons supporting the challenged conduct." State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006).

Additionally, the failure to object to the introduction of inadmissible evidence supports an ineffectiveness claim. State v. Courtney, 137 Wn.App. 376, 153 P.3d 238 (2007). When this allegation is the basis of the claim, as it is here, appellant must demonstrate:

- 1) an absence of legitimate trial strategy or tactical reasons supporting the challenged conduct;
- 2) that the objection to the evidence likely would have been sustained; and
- 3) that the result of the trial would have been different had the evidence not been admitted.

State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998) (citations omitted).

1. No Legitimate Strategy Supports Counsel's Failure to Object.

First, appellant must demonstrate an absence of legitimate trial strategy. The admission of the photos and testimony was addressed in the pre-trial hearing when the defense attempted to have the evidence suppressed based on an illegal search. That motion was denied.

Subsequently, all officers testified that there was no evidence of intoxication to any degree or even that there was any indication that Ms. Olague had been drinking at all. Given that the charge itself was not charged as a vehicular homicide by intoxication or recklessness, there is no legitimate trial strategy that exists for failure to object to the admission of the evidence. Thus, the first prong is met.

2. It is likely that an objection, had it been made, would have been sustained.

Secondly, appellant must demonstrate that the proposed objection, had it been made, would likely have been sustained. State v. Johnston, 143 Wn.App. 1, 22-23, 177 P.3d 1127 (2007). To do so

in this case necessitates a discussion of ER 401, ER 403 and ER 404.

Implicit in the analysis, is the following three part test laid out in State v. Saltarelli, 98 Wn.2d 358, 655 P.2d 697 (1982):

1. The court must identify the purpose for which the evidence is being admitted.

2. The court must determine the relevancy of the evidence.

- a. The relevancy of the evidence offered "must be of consequence to the outcome of the action."

- b. "The evidence must tend to make the existence of the identified fact more ... probable" and

3. After the court has determined the relevance, it must then balance the probative value against the prejudicial effect.

Because of the lack of an objection, there was no identification for the basis of its admission. Thus, that part of the analysis is not applicable.

- a. *The evidence was not relevant to prove an element at issue in the trial.*

The evaluation of relevant evidence is analyzed under ER 401. ER 401 defines relevant

evidence of that evidence having the tendency to make the existence of any fact as a consequence to the determination of the action more probable or less probable than it would be without the evidence. Moreover, the admissibility of evidence, while generally within the sound discretion of the trial court, will only be reversed if there is an abuse of discretion. An abuse of discretion exists when no reasonable person would take the view adopted by the trial court. State v. Atsbeha, 142 Wn.2d 904, 913-914, 16 P.3d 626 (2001).

In State v. Cissne, 72 Wn.App. 677, 865 P.2d 564 (1994), Division III of the Court of Appeals discussed whether statements made by the defendant in the course of the arrest were relevant to prove an element of the crime of driving under the influence. While reversing on other grounds, the court found that particular statements that the defendant made to the police officer were relevant because "objective manifestations of insobriety, personally observed by the officer, are always relevant where ... the defendant's physical condition is an issue." 72 Wn.App at 687 (*quoting*

State v. Nagel, 30 Ohio.App.3d 80, 80, 506 NE.2d 285, 286 (1986). The court, therefore, ruled that defendant's statements were properly admitted because the issue in that case was the defendant's intoxication. Id.

Conversely, the issue in this case was not intoxication, but Ms. Olague's disregard for the safety of others. Because intoxication was not an issue, it did not tend to make any fact or consequence more or less probable. The evidence was simply not relevant for any purpose. As such, an objection should have been made based on relevancy and that its probative value was outweighed by its prejudicial effect. However, if this court finds that the evidence was relevant, the probative value was greatly outweighed by the prejudicial effect.

b. The probative value of the evidence was outweighed by its prejudicial effect.

ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Unfair prejudice is evidence that is more likely to arouse an emotional response rather than a rational decision by the jury. State v. Stackhouse, 90 Wn.App. 344, 356, 957 P.2d 218, rev. denied 136 Wn.2d 1002, 966 P.2d 902 (1998). Moreover, the court is required to weigh the evidence to determine unfairness during trial. 90 Wn.App. at 356. The court's decision is reviewed on an abuse of discretion standard. State v. Ames, 89 Wn.App. 702, 706, 950 P.2d 514, rev. denied 136 Wn.2d 1009, 966 P.3d 903 (1998). Evidence of other acts is inadmissible to prove the character of the defendant. ER 404(b).

In State v. Trickler, 106 Wn.App. 727, 25 P.3d 445 (2001), the Court of Appeals addressed the admission of evidence of other crimes, wrongs or acts. In Trickler, the defendant was prosecuted for possession of stolen credit cards, the various witnesses all testified to the defendant's possession of other stolen items. In reversing the conviction, the Court of Appeals held that this testimony was highly prejudicial because he was not on trial for possessing any of those other items. 106 Wn.App. at 733. Moreover,

the state's theory that it was admissible under a res gestae theory was meritless because it had not been demonstrated that his possession of the other items was "an inseparable part of his possession of the stolen credit card." Because of its admission, the jury was left to conclude that the defendant was a thief, which is prohibited under ER 404(b). Id. at 734.

As in Trickler, the evidence, assuming it meets the other standards of admissibility, was more prejudicial than probative in this situation. It is difficult to imagine how any evidence of intoxication, when the police testified that they found none, had any probative value. To be probative at all, it must be related to evidence that she was under the influence. None was presented here.

Finally, the potential for prejudice was extremely high, with it leaning towards propensity evidence. It was admitted to show that Ms. Olague was nothing more than an uncaring, drunken party girl -- evidence that ER 404(b) is designed to preclude. Thus, the prejudicial effect outweighed

any probative value and an objection should have been sustained.

3. The introduction of this evidence affected her trial's outcome.

Finally, prejudice must be established to establish this claim. Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78 (citing State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn.App. 348, 359, 743 P.2d 270 (1987).

In this case, the court needs to look no further than the court's oral decision, as well as the written findings. Notwithstanding the testimony from the investigating officers that there was no indication that Ms. Olague had been drinking or was intoxicated, the court focused on the photos and testimony of alcoholic beverages throughout her decision finding her guilty. 2RP 892-96. Moreover, in an outlandish statement, the court sated that the only reason there was no evidence of intoxication was because Ms. Olague

told them she had not been drinking and, as a result, the police did not take her in for a blood sample. RP 893:7-24. This statement was made notwithstanding the existence of RCW 46.20.308(3), which makes it lawful to take a blood sample in a vehicular assault/homicide case without the consent of the defendant.

Because there is a reasonable probability sufficient to undermine the confidence in the outcome, prejudice has been established and the court should find that Ms. Olague did not receive effective assistance of counsel and reverse.

C. THE COURT SHOULD REVERSE THE CONVICTION BECAUSE THERE WAS INSUFFICIENT EVIDENCE INTRODUCED TO SUPPORT A CONCLUSION THAT RESPONDENT WAS DRIVING HER VEHICLE IN A MANNER INDICATING A DISREGARD FOR THE SAFETY OF OTHERS.

As this court is aware, due process requires the state to prove its case beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). When challenging the sufficiency of evidence, this court must determine:

Whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). See also State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

This court must view the evidence in the light most favorable to the state in order to determine whether any "rational trier of fact could have found the elements of the crime beyond a reasonable doubt." State v. Gallagher, 112 Wn.App. 601, 612, 51 P.3d 100 (2002) (citations omitted).

"A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence." 112 Wn.App. at 613 (citations omitted).

Substantial evidence must exist to support the State's case. Id. Substantial evidence is evidence that "'would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.'" Id.

As it relates to vehicular homicide committed by the prong of disregard for the safety of others, more than negligence is required. See

State v. Eike, 72 Wn.2d 760, 435 P.2d 680 (1967).

As stated therein,

...ordinary negligence will not support a conviction of negligent homicide. If one drives a motor vehicle upon the public highways with disregard for the safety of others, this implies an aggravated kind of negligence or carelessness, while falling short of recklessness, but, constituting a more serious dereliction in the hundreds of minor oversights and inadvertences encompassed within the term "negligence". Any violation of a positive statute, from a defective tail light to an inaudible horn may constitute negligence under the motor vehicle statutes, yet be unintentional, committed without knowledge, and amount to no more than oversight or inadvertence, but would probably not sustain a conviction of negligent homicide. To drive with disregard for the safety of others, consequently, is a greater and more marked dereliction than ordinary negligence. It does not include the many minor inadvertencies and oversights which might well be deemed ordinary negligence under the statutes.

72 Wn.2d at 765-766.

In Eike, the court found that there was sufficient evidence of disregard for the safety of others and, thereby, upheld the conviction where there was evidence demonstrating that the defendant was driving at an excessive speed on a dark, wet and well marked highway while rounding a

sweeping curve on the wrong side of the road at night and hitting another car head-on. Id.

As in Eike, Division I of the Court of Appeals affirmed the conviction for vehicular homicide wherein the state had demonstrated that the defendant had smoked marijuana and was drinking beer prior to the accident and the toxicologist indicated that the blood alcohol content demonstrated that the defendant would be impaired at the time of the accident. This, in combination with evidence that he had driven into a blind curve in the wrong lane at a speed of at least 22 miles per hour over the posted cautionary speed supported the conviction. See State v. Knowles, 46 Wn.App. 426, 431, 730 P.2d 738 (1986).

Conversely, in State v. Lopez, 93 Wn.App. 619, 970 P.2d 765 (1999), Division III of the Court of Appeals found that there was insufficient evidence to convict the 14 year old defendant with vehicular homicide under the same prong utilized here. Citing Eike, supra, the court noted that the state had presented no evidence that the defendant was an inexperienced driver or that she participated in speeding, horseplay or driving

under the influence of intoxicants. It held that something more was needed other than demonstrating that the defendant was an unlicensed minor without a formal driver's education. Some evidence of the defendant's "conscious disregard of that danger" was required. 93 Wn.App. at 623.

As in Lopez, there was no evidence presented here to demonstrate that Ms. Olague was intoxicated or that she was driving on the wrong side of the road other than when she "over corrected" after realizing that she wasn't going to make the turn. With the exception of the speed, the court relied primarily on the photographs and the testimony suggesting that she was drinking beforehand. However, unlike Knowles, there was no indication that she was intoxicated, and, in fact, there was testimony to the effect that the police believed that she wasn't intoxicated and there was nothing to support that she consciously disregarded the safety of others.

Consequently, there was insufficient evidence to demonstrate the element of a conscious disregard for the safety of others. At best,

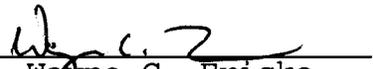
negligence was demonstrated. Thus, the court should reverse.

V. CONCLUSION

Based on the files and records herein and the points and authorities stated above, Ms. Olague requests that this court reverse her conviction.

RESPECTFULLY SUBMITTED this 28th day of January, 2009.

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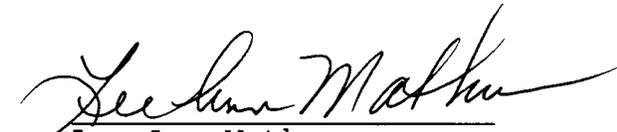
CERTIFICATE OF SERVICE

Lee Ann Mathews, by certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Kathleen Proctor
Deputy Prosecuting Attorney
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Danielle Olague
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Signed at Tacoma, Washington this 28th day of January, 2009.


Lee Ann Mathews

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