NO. 38402-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIELLE OLAGUE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz

No. 08-8-00113-7

09 MAY 12 PM 1:53
STATE OF WASHINGTON
BY
COURT OF APPEALS
DIVISION II

CORRECTED BRIEF OF RESPONDENT
****as to Table of Authorities only****

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does sufficient evidence support the trial court's findings of fact that were challenged by the defendant?
2. Does the defendant lack standing to challenge the search of the victim's memory card?
3. Were the searches of the memory card lawful?
4. Was the discovery of the photographic evidence inevitable?
5. Was any error in admitting the photos harmless?
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7. Did the defendant receive the effective assistance of counsel at trial?
8. Was there sufficient evidence that the defendant acted with disregard for the safety of others?

B. STATEMENT OF THE CASE.

1. Procedure

On January 30, 2008 Danielle Olague was charged with once count of vehicular homicide based upon an incident that occurred on July 26, 2007. CP 1. The charge was based on an allegation of reckless driving that was a proximate cause of the [fatal] injuries received by the victim.

CP 1. The respondent was arraigned on February 21. Memorandum of Journal Entry 02-21-2008.

The State filed a Motion for Declining Jurisdiction of Juvenile Court and the court scheduled decline hearing for March 6, 2008. [Memorandum of Journal Entry 02-21-2008; Motion for Declining Jurisdiction of Juvenile Court]. The court also entered an Order Extending Jurisdiction For Purposes of Declination Determination. CP 4. On March 6, 2008 the State moved to withdraw the motion for declining of jurisdiction and the court issued an order granting the State's request. CP 5-6. An amended declaration for probable cause was also filed at that time. CP 7-8.

Defense counsel filed a motion to suppress the images obtained from the memory chip in the camera on June 26, 2008.

On August 4, 2008 the State filed a Prosecutor's Statement giving notice and asking leave for the State to file an amended information alleging an alternative means to the commission of vehicular homicide by disregard for the safety of others.[1] CP 71. The amended information was filed August 5, 2008. CP 88.

The suppression motion was heard on August 5, 2008. [Witness record filed August 6, 2008; Memorandum of Journal Entry filed August

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[1] A second copy of this document was also filed a day later on August 5, 2008, presumably with the Amended Information. *See* CP 87.

15, 2008, p. 4.] On August 6, 2008 the court denied the motion to suppress. [Memorandum of Journal Entry of August 14, 2008.]

The case proceeded to a bench trial which commenced on August 6, 2008. Trial concluded and the court rendered its verdict of guilty on August 14, 2008. The court entered a Disposition Order on September 19, 2008 in which the court ordered the respondent to be placed with the Division of Juvenile Rehabilitation for 15-36 weeks. CP 98-104.

The notice of appeal was filed timely on October 3, 2008.

2. Facts

a. 3.6 Hearing

Unchallenged Findings of Fact Re: Suppression Hearing

The court made the following finding of fact regarding the suppression hearing to which the respondent has assigned no error on appeal.

I.1. On July 25th, 2007, Danielle Olague, hereinafter referred to as the respondent, was driving a vehicle that left the roadway and crashed along State Route 7, in Pierce County, Washington.

I.2. Respondent's vehicle was severely damaged and the passenger Ashley Magnusson died as a result of the injuries she sustained in the motor vehicle collision.

I.3. The respondent's vehicle was impounded by the Washington State Patrol ("WSP"), and it was inventoried prior to being towed from the collision scene.

I.4 [Appellant's Assignment of Error #2.]

I.5. The determination of ownership with regard to the two purses [found in the car] was made by Trooper Wickman who looked into the purses for identification.

I.6 [Appellant's Assignment of Error #3.]

I.7. Trooper Wickman observed pictures on the camera [found in the car] depicting the respondent and Ashley Magnusson drinking alcoholic beverages at a Lake on the day of the accident.

I.8. Trooper Wickman logged the camera into evidence under respondent's name.

I.9. On July 26th, 2008, the respondent and her mother contacted WSP Evidence Technician Ostrander at the WSP property room and asked if they could get a couple of items, including a cell phone, out of the vehicle.

I.10. WSP Detective Gunderman met with the respondent and respondent's mother at the evidence room. Technician Ostrander told the Olagues that the only item in evidence was a camera. Detective Gunderman asked respondent if the camera belonged to

her and the respondent said "Yes, but the memory chip is Ashley's."

I.11. The camera was maintained in the property room.

I.12. In the early evening of July 26th, Trooper Wickman contacted Detective Gunderman and told her that the memory card that was retained in property had numerous pictures of the respondent and Ashley Magnusson drinking alcoholic beverages at the lake on the day of the fatality accident.

I.13. On July 27th, 2008, Detective Gunderman contacted Ashley's father, Jeff Magnusson, and told Mr. Magnusson what had been found on the memory card and that the respondent said it belonged to Ashley.

I.14. Detective Gunderman asked Mr. Magnusson for permission to keep and use the memory card for evidentiary purposes related to her investigation. Mr. Magnusson agreed.

I.15. On August 1st, 2007, Detective Gunderman checked the camera out of evidence and removed the memory card. Using a computer that accepts memory cards the Detective printed out the images contained on the card. The detective resubmitted the camera and memory card into evidence under the respective owner's names.

I.16. All of the events described in paragraphs I.1. to I.15. occurred in the County of Pierce, State of Washington.

Challenged Findings of Fact Re: Suppression Hearing

The appellant has assigned error to the following findings of fact entered by the court.

I.4. During the inventory search of respondent's vehicle two purses and a camera were located. The purses were determined to belong to Ashley Magnusson and Danielle Olague.

I.6. Trooper Wickman turned on the camera to determine who it belonged to so he could log it into property under the owner's name.

b. Trial

Unchallenged Findings of Fact Re: Bench Trial

The trial court entered the following unchallenged findings of fact regarding the bench trial which the respondent has not challenged on appeal.

I.

On January 30, 2008, a criminal information was filed charging the respondent with VEHICULAR HOMICIDE by Reckless Manner in Count I.

II.

On February 21, 2008 DANIELLE OLAGUE, was a juvenile, being born on 04/21/90, and entered a plea of Not Guilty to Count I.

III.

On March 6, 2008 the Court granted the State's motion to waive the Declination Hearing and entered an order retaining jurisdiction in Juvenile Court.

IV.

On August 5, 2008, an Amended Information was filed charging the respondent with VEHICULAR HOMICIDE by Reckless Manner and/or With Disregard for the Safety of Others in Count I.

V.

On July 25, 2007 around ten o'clock a.m., the respondent communicated with Jeff Ecklund and D.J. Thompson, and advised that she and Ashley Magnusson were heading to Alder Lake at noon to spend the afternoon. The weather on July 25, 2007 was sunny with temperatures in the 70's.

VI.

On July 25, 2007 the Respondent was driving on an Intermediate Driver's License issued on 08/11/2006 and re-issued on 06/06/2007.

VII.

Jeff Ecklund and D.J. Thompson decided to travel to Alder Lake in Ecklund's Mercury Mountaineer. Ecklund had a fifth of rum and some sixteen ounce cans of Busch beer in the vehicle. Ecklund and Thompson arrived at Alder Lake some time around 3:30 p.m. Upon arrival Ecklund and Thompson observed that the respondent and Magnusson were in possession of two six packs of Mike's Hard Lemonade (an alcoholic beverage).

VIII.

[Appellant's assignment of error number 11.]

IX.

[Appellant's assignment of error number 12.]

X.

At approximately 7:30 p.m. the group decided to leave Alder Lake. The Respondent inquired about some unopened alcoholic beverages and stated that she did not want to be driving with alcohol in her vehicle. The beverages were destroyed and/or thrown in the trash.

XI.

Respondent had driven over the roadway between Alder Lake and the crash site multiple times prior to July 25, 2007 and was familiar with the road.

XII.

Ecklund and Thompson occupied the Mercury Mountaineer. Ecklund was driving and made a left turn, exiting the park.

XIII.

Before the respondent could exit the park, a vehicle identified as an emergency vehicle or law enforcement patrol car, passed the park and was behind Ecklund.

XIV.

The respondent and Magnusson occupied the Respondent's Honda. The Respondent was driving and made a left turn, exiting the park behind the emergency vehicle.

XV.

While driving behind the emergency vehicle, the respondent, made every effort to be a model of driving behavior because the emergency vehicle acted as a "nanny car."

XVI.

[Appellant's assignment of error number 13.]

XVII.

On the straight away leading up to the crash site, the Department of Transportation installed a yellow triangular sign advising that a corner

was ahead, to include a recommended speed of thirty-five (35) miles per hour.

XVIII.

The respondent lost control of her vehicle as it approached a curve to the right, rotated, crossed over the oncoming lane of travel, left the roadway, vaulted through the air, struck the ground, struck a tree, and came to rest on its roof.

XIX.

According to the defense expert, at the time of the crash, the Respondent was traveling 13-18 mph above the recommended speed of 35 mph and according to the State's expert, at the time of the crash, the Respondent was traveling a minimum of 24 mph above the recommended speed of 35 mph.

XX.

Ashley Magnusson was removed from the Honda and taken by ambulance to Tacoma General Hospital where on July 26, 2007, she was removed from life support and died.

XXI.

Washington State Patrol Trooper Jeremy James was first representative from law enforcement on the scene and spoke with the respondent, who stated that she took the curve way too fast. The

Respondent told Trooper James that she had driven the road in the rain and the snow and never had problems with the curve before.

XXII.

Respondent does not have the same driving skills or judgment as that of an adult driver and had an obligation to her passenger to see that she was safe.

XXIII.

During their contact with the Respondent, Washington State Patrol Troopers did not smell the odor of intoxicants on the Respondent's person and did not believe that the Respondent was under the influence of alcohol and/or drugs. Neither a blood draw nor breath sample were obtained from the Respondent.

XXIV.

On July 27, 2007, Dr. Eric Kiesel, Chief Medical Examiner for Pierce County, performed an autopsy on the body of Ashley Magnusson and determined that Magnusson died as a result of fractures of the base and vault of the skull and fracture contusions and contrecoup contusions of the brain due to blunt impact of the head. Dr. Kiesel did not find any evidence of natural disease contributory to death.

XXV.

That all relevant events occurred in Pierce County, Washington.

Challenged Findings of Fact Re: Bench Trial

The court entered the following findings of fact regarding bench trial to which the respondent has challenged on appeal.

VIII.

From 3:30 p.m. to approximately 7:30 p.m., Ecklund, Thompson, Magnusson, and the respondent hung out at secluded area of the Alder Lake Park. During this time period the respondent and Magnusson consumed Mike's Hard Lemonade and Busch beer. The group used a digital camera to take photographs of each other.

IX.

Eighty four images were downloaded from the memory chip that was in the digital camera. Many of the images depict the respondent and Magnusson engaged in the consumption of alcoholic beverages.

XVI.

Once the emergency car pulled off at the Eatonville cutoff, the Respondent accelerated to catch up the Ecklund and Thompson in the vehicle ahead and there was no reason for the respondent to try and catch up.

C. ARGUMENT.

1. SUFFICIENT EVIDENCE SUPPORTED THE COURT'S FINDINGS OF FACT THAT WERE CHALLENGED ON APPEAL.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. ***State v. Hill***, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. ***Hill***, 123 Wn.2d. at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. ***Hill***, 123 Wn.2d at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In ***Henderson Homes, Inc v. City of Bothell***, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were, without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record,

and lack of any authorities preclude consideration of those assignments. The findings are verities. ***Henderson***, 124 Wn.2d at 244; *see also* ***State v. Jacobson***, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

a. Substantial Evidence Supported The Challenged Findings From The Suppression Hearing To Which Error Has Been Assigned.

i. Substantial Evidence Supported The Court's Finding That Two Purses And A Camera Were Located In The Vehicle And That They Were Determined To Belong To Ashley Magnusson And Danielle Olague.

The court entered the following finding number I.4 to which the appellant assigns error in assignment of error 2. Br. App., p. 1.

> I.4. During the inventory search of respondent's vehicle two purses and a camera were located. The purses were determined to belong to Ashley Magnusson and Danielle Olague. [CP 124.]

This finding was supported by substantial evidence. When the officers arrived the vehicle was off the roadway, down an embankment, upside down and mangled almost beyond recognition. RP 28, ln. 9-12; p. 32, ln. 10; p. 41, ln. 4-9. After walking through the scene and conferring with Trooper James, the officers determined to treat the scene as a possible vehicular assault scene and that they should process it as a felony crime scene. RP 24, ln. 2-21. The vehicle was evidence, so it was

photographed at the scene. RP 45, ln. 2-8. The vehicle was impounded, which is common where the vehicle may be evidence in a crime that is being investigated. RP 28, ln. 13-14; p. 31, ln. 10-12. Accordingly, a towing company pulled the vehicle up onto the roadway. RP 28, ln. 9-12; p. 32, ln. 13-14.

Trooper Wickman conducted an inventory search of the vehicle, which is done routinely to identify and protect any property that might be in the vehicle. RP 31, ln. 15 to p. 32, ln. 6. Inside the vehicle he found two purses and a digital camera. RP 32, ln. 15-17. The purses were located around the center console toward the passenger side. RP 32, ln. 23-24. The camera was found on the floorboard of the passenger side of the vehicle. RP 32, ln. 24 to p. 33, ln. 1. It is likely that in the course of the accident or the recovery of the vehicle the items were thrown about. RP 44, ln. 6-9. He then took those items into custody and secured them. RP 32, ln. 18-20.

Trooper Wickman sought to identify who owned the items. He looked into the purses and found identification inside respectively for Danielle Olague, the respondent, and Ashley Magnusson, the victim. RP 33, ln. 5-14.

ii. Substantial Evidence Supported The Trial Court's Finding That Trooper Wickman Turned The Camera On To Determine Who It Belonged To So He Could Log It Into Property

The court entered the following finding number I.6 to which the appellant assigns error in assignment of error 3. Br. App., p. 1.

> I.6. Trooper Wickman turned on the camera to determine who it belonged to so he could log it into property under the owner's name. [CP 124.]

This finding was supported by substantial evidence. Trooper Wickman sought to identify who owned the items. He looked into the purses and found identification inside respectively for Danielle Olague, the respondent, and Ashley Magnusson, the victim. RP 33, ln. 5-14. He also looked at the digital camera and saw images of the two females consuming alcoholic beverages at the lake near the accident scene. RP 33, ln. 15 to p. 34, ln. 13. As a result the camera was logged as evidence and the memory card was not removed. RP 47, ln. 12-25.

b. Substantial Evidence Supported The Challenged Findings From The Bench Trial To Which Error Has Been Assigned.

i. Substantial Evidence Supported The Trial Court's Finding That The Respondent Consumed Alcohol And That The Parties Took Pictures Of Themselves Doing So.

The court entered the following finding number eight to which the appellant assigns error in assignment of error 11. Br. App., p. 2.

VIII.

> From 3:30 p.m. to approximately 7:30 p.m., Ecklund, Thompson, Magnusson, and the respondent hung out at secluded area of the Alder Lake Park. During this time period the respondent and Magnusson consumed Mike's Hard Lemonade and Busch beer. The group used a digital camera to take photographs of each other. [CP 117.]

This finding was supported by substantial evidence. On July 25, 2007 Kenneth Thompson (a.k.a. D.J.) and Jeff Eklund arranged to drive to Alder lake and Meet Danielle Olague and Ashley Magnusson. RP 175, ln. 7-20; p. 178, ln. 3-5; p. 181, ln. 9 to p. 184, ln. 3. Upon arrival Jeff Eklund observed Danielle and Ashley with a big blue cooler that contained two six packs of Mike's Hard Lemonade with three or four bottles missing. RP 192, ln. 3-20, and with three or four open bottles sitting out on a picnic blanket. RP 192, ln. 21 to p. 194, ln. 16; p. 197, ln. 1-5.

Jeff Eklund also stated that about thirty minutes after their arrival he once observed Danielle Olague take out a bottle of Mike's Hard Lemonade while he was there. RP 195, ln. 7-8; p. 197, ln. 6-15. He further stated that once or twice he saw her with a bottle to her mouth. RP 204, ln. 4-13.

Jeff Eklund also observed photos being taken with a digital camera and took at least one of the pictures himself. RP 198, ln. 12-24; p. 202, ln. 8-22. The photos generally depicted drinking involving Danielle Olague and Ashley Magnusson. RP 201, ln. 21 to p. 22, ln. 7; Ex. 147 to Ex. 160, esp. Ex.158.

At about 7:45 p.m. the group left the lake. RP 199, ln. 12-1. At that time Danielle Olague told Jeff Eklund that there were four bottles of Mike's Hard Lemonade left and asked if he wanted them because she didn't want to be driving with any alcohol in her car.

Kenneth Thompson testified that they arrived at the lake at 1:30 and that he observed the girls with two six packs of Mike's Hard Lemonade and a six pack of Tall Boys Busch Light. RP 229, ln. 13-20. He observed Danielle Olague in possession of Mike's Hard Lemonade in her hand, but couldn't recall how many times. RP 230, ln. 17-21. He also testified that it was only the four persons in their group, which was located in a secluded area. RP 231, ln. 24 to p. 232, ln. 2; RP 233, ln. 5-9.

Thompson observed Olague in possession of a Mike's Hard Lemonade bottle. RP 237, ln. 9-11. He also saw her with a Mike's Hard Lemonade bottle to her mouth drinking a few times. RP 237, ln. 12-15; p. 238, ln. 2-4.

Thompson couldn't say how much Olague consumed, but did know that she was drinking. RP 238, ln. 5-8. Thompson also stated that there were no unopened bottles and they were consumed by the girls because neither he nor Eklund consumed any of the Mike's Hard Lemonade. RP 229, ln. 1-4; 239, ln. 18 to p. 240, ln. 3. Upon further examination Thompson stated that in his interview with Det. Gundermann he stated that the girls drank a twelve pack between them in a five hour period and that was a true statement. RP 274, ln. 12-20.

ii. Substantial Evidence Supported The Trial Court's Finding That Many Of The Images Showed The Respondent Consumed Alcohol.

The court entered the following finding number nine to which the appellant assigns error in assignment of error 12. Br. App., p. 2.

IX.

> Eighty four images were downloaded from the memory chip that was in the digital camera. Many of the images depict the respondent and Magnusson engaged in the consumption of alcoholic beverages. [CP 117.]

This finding was supported by substantial evidence. Eklund testified that the photos generally depicted drinking involving Danielle Olague and Ashley Magnusson. RP 201, ln. 21 to p. 22, ln. 7; Ex. 147 to Ex. 230.

For purposes of the trial, the court took notice of Trooper Wickman's testimony from the CrR 3.6 suppression hearing. RP 404, ln. 15 to p. 405, ln. 4.

iii. Substantial Evidence Supported The Trial Court's Finding That The Respondent Sped Up In An Effort To Catch Up With Her Friends And That There Was No Good Reason For Her To Do So.

The court entered the following finding number sixteen to which the appellant assigns error in assignment of error 13. Br. App., p. 2.

XVI.

> Once the emergency car pulled off at the Eatonville cutoff, the Respondent accelerated to catch up the Ecklund and Thompson in the vehicle ahead and there was no reason for the respondent to try and catch up. [CP 118.]

This finding was supported by substantial evidence. Ecklund testified that at the time the police/emergency car pulled off at the Eatonville cutoff Olague was approximately 50 to 60 feet behind him. RP 210, ln. 23 to p. 211, ln. 7. However, Thompson testified that Olague was about 75 yards behind their vehicle when the police/emergency vehicle

pulled off. RP 242, ln. 13 to p. 243, ln. 5. The police/emergency vehicle slowed down a lot before it took the turn. RP 247, ln. 19-23. After the police/emergency vehicle turned off, Thompson saw Olague catching up speed to them. RP 248, ln. 8-16. Her vehicle was coming at a quick speed, getting bigger and bigger real fast. RP 248, ln. 22-25.

Thompson observed that Olague was about to go over the curve, and began fishtailing when he lost sight of her. RP 248, ln. 16-19; p. 249, ln. 1-5. Thompson stated that she was "mobbing" which meant that she was going really fast, and estimated her speed at 70 to 80 miles per hour. RP 250, ln. Based upon the forensic evidence, Dective Gunderman estimated Olague's speed to have been 59.63 mile per hour at the time Olague's vehicle began to lay down the three tire friction marks. RP 397, ln. 13-15. Trooper Wickman also testified that he believed she was driving too fast for the conditions based upon his observations of the scene. RP 428, ln. 8 to p. 429, ln. 16.

2. THE RESPONDENT LACKED STANDING TO CHALLENGE THE SEARCH OF THE MEMORY CARD WHERE SHE HAD NO PRIVACY INTEREST IN THE CONTENTS THEREOF.

The court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Under both the State and the Federal constitutions, the defendant has the burden to establish standing to challenge a search as unlawful. *See* ***State v. Picard***, 90 Wn. App. 890, 896-97, 954 P.2d 336 (1998), *review denied* 136 Wn.2d 1021 (1998) (citing ***State v. Jackson***, 82 Wn. App. 594, 601-02, 918 P.2d 945 (1996), *review denied*, 131 Wn.2d 1006, 932 P.2d 644 (1997); *See, e.g.*, ***Alderman v. United States***, 394 U.S. 165, 173, 89 S. Ct. 961, 22 L. Ed. 176 (1969). The burden of proof whether a defendant has standing never shifts to the government. *See* ***United States v. Singleton***, 987 F.2d 1444, 1449 (9th Cir. 1993) (citing ***United States v. Irizarry***, 673 F.2d 554, 556-57 (1st Cir. 1982) (allowing government to challenge defendant's standing for first time on appeal where defendant "never carried his initial burden of offering facts from which a court might reasonably infer his standing")).

a. The Defendant Had No Privacy Interest In The Victim's Memory Card.

To establish that a defendant has a reasonable expectation of privacy in an item, the defendant must satisfy a two-fold test: 1) Did the defendant "exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private?" and (2) "Does society recognize that expectation as reasonable?" ***State v. Evans***, 159 Wn.2d 402, 409, 150 P.3d 105 (2007)(citing ***State v. Kealey***, 80 Wn. App. 162, 168, 907 P.2d 319 (1995). However, it is axiomatic that a defendant does not have a

privacy interest in the property of third parties. *See, e.g.* ***State v. Neidigh***, 78 Wn. App. 78, 80-81, 895 P.2d 423 (1995).

This case appears to present a question of first impression. Here the officers found electronic images of evidentiary relevance on a digital memory card that belonged to the victim, but was located inside a camera that belonged to the defendant. A memory card is one of a wide variety of recordable digital storage devices that can be connected to any number of different types of devices. These can include external hard drives, recordable DVDs (digital video disks) or CDs (compact disks), thumb drives, etc. Here, the facts are most analogous to images being stored on an external hard drive that belongs to a third party, but happens to be connected to a defendant's computer. However, there is one important distinction from the analogy: computers generally contain an internal hard drive and memory chips with their own storage capabilities, while the camera is essentially a dumb device and unlike a computer has no internal storage mechanism other than the removable memory card.

See LaFave, Wayne R., Search and Seizure, Fourth Edition, § 2.6(f) and 8.6(f).

b. <u>The Defendant Abandoned The Memory Card Even If The Court Were To Hold That The Defendant Did Have An Interest In It.</u>

A defendant who disavows an item can thereby abandon the item such that. *See* ***State v. Foulkes***, 63 Wn. App. 643, 821 P.2d 77 (1991).

"Law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individuals rights under article I, section 7." ***State v. Reichenbach***, 153 Wn.2d 126, 135, 101 P.3d 80 (2004) (citing ***State v. Reynolds***, 144 Wn.2d 282, 287, 27 P.3d 200 (2001)). Abandonment can occur in either of two ways. Involuntary abandonment occurs where a suspect abandons the property: 1) as a result of unlawful police conduct; and 2) a causal nexus exists between the unlawful conduct and the abandonment. ***Reichenbach***, 153 Wn.2d at 135. Abandonment can also occur voluntarily. ***Evans***, 159 Wn.2d at 408. Voluntary abandonment is an ultimate fact or conclusion based upon a combination of act and intent. ***Evans***, 159 Wn.2d at 408 (citing 1 Wayne R. LaFave, Search and Seizure § 2.6(b), at 574 (3d ed. 1996)). Intent should be inferred from all the relevant circumstances at the time of abandonment. ***Evans***, 159 Wn.2d at 408. The issue is whether the defendant has relinquished a reasonable expectation of privacy so that the search and seizure is valid. ***Evans***, 159 Wn.2d at 408. The defendant must show a reasonable expectation of privacy in the item and that it was not voluntarily abandoned. ***Evans***, 159 Wn.2d at 408-09.

Here, the defendant voluntarily abandoned the memory card even assuming for the sake of argument that she had a claim on it in the first place.

When the camera containing the card was secured subject to the impound, it was not unlawful for the officer to do so. Even assuming for

the sake of argument that the trooper's viewing of the contents of the memory card was unlawful, any illegality from that act was causally unconnected to the abandonment of the card. At the time the defendant stated that the card belonged to the victim, the defendant was unaware that Trooper Wickman had viewed the contents of the memory card. Moreover, the reasonable inference from the facts is that the defendant was not seeking to disavow the card because she thought it could be used against her. Rather, the only reasonable inference is that she was making an accurate statement of the true ownership of the memory card.

Additionally, the defendant had no reasonable expectation of privacy in the victim's memory card. However, even assuming for the sake of argument that the defendant did have such an interest, the defendant abandoned the card. By identifying the card as the victim's, the defendant clearly indicated her subjective belief that the memory card was not hers and she was not entitled to it, thereby voluntarily abandoning the card even if she had a claim on it.

Even if the defendant had an expectation of privacy in the memory card, she voluntarily abandoned it.

c. The Victim's Father had Valid Authority Over The Memory Card.

Where a child is essentially a dependent of the parent, the parents can generally consent to the search of a child's bedroom. *See* ***State v.***

Summers, 52 Wn. App. 767, 764 P.2d 250 (1988). This is because generally a parent has a superior right over the space, even if the parent fails to exercise actual control over the space. However, in this context a separate consideration, is that the parent generally has authority and control over the child, which by implication means control over the child's property as well. Moreover, the property of a person who dies intestate, without spouse or issue, passes to the parents. RCW 11.04.015(2)(b).

Here, where the victim was the minor child of her parents, her father had lawful authority to consent to the search of the memory card.

d. The Defendant Was Not Entitled To Automatic Standing Notwithstanding Defense Claims To The Contrary Because The DefendantWas Not Charged With A Possessory Offense.

The defense claims automatic standing and cites ***State v. Evans*** for that proposition. *See*, Br. App. 14 (citing ***State v. Evans***, 159 Wn.2d 402, 406-07, 150 p.3d 105 (2007)). However, as the court ***Evans*** goes on to specify in the very same paragraph, in order to be entitled to automatic standing, the defendant must meet a two part test: 1) possession must be an essential element of the offense; and 2) the defendant was in possession of the contested contraband at the time of the contested search or seizure. ***Evans***, 159 Wn.2d at 407.

Here, the defendant fails the two part test because possession is not an essential element of the charged offense. The defendant was charged

with vehicular homicide. As pertains to this case, the elements of that crime as charged are that:

1) On or about the date of violation the defendant operated a motor vehicle;
2) That the defendant's operation of the motor vehicle proximately caused injury to another person;
3) That at the time of causing the injury the defendant was operating the motor vehicle
    a) in a reckless manner; or
    b) with disregard for the safety of others.

See RCW 46.61.520; ***State v. Miller***, 60 Wn. App. 767, 807 P.2d 893 (1991); ***State v. McAllister***, 60 Wn. App. 654, 806 P.2d 772 (1991); WPIC 90.02.

None of those elements include possession.

3. THE SEARCH OF THE MEMORY CARD WAS LAWFUL.

a. <u>The Trooper's Initial Review Of The Photos Was Lawful Where It Was Done In An Effort To Identify The Owner Of An Item Collected As Part Of The Impound Of The Vehicle</u>.

Here, the contents of the vehicle were inventoried subject to an impound. Inside the car, Trooper Wickman found two purses and a camera. He sought to identify the owners of the items and therefore looked into the purses to determine their ownership if possible. He also viewed the images on the camera to the same end. As the trial court held,

the reviewing of the images to identify the owner was permissible under ***State v. Kealey***. ***Kealey***, 80 Wn. App. 162.

Kealey involved the search of a purse for identity of the owner after the purse had been found inside a store. Drugs were found in the purse. The court held that the purse could lawfully be searched to determine the identity of the owner. ***Kealey***, 80 Wn. App. at 173. The court held that Kealey had a diminished expectation of privacy in her lost purse. ***Kealey***, 80 Wn. App. at 173.

b. The Detective's Search Of The Memory Card Was Proper Where She Had The Permission Of The Victim's Father To Do So.

When consent is sought from someone other than the defendant, a two-part test is applied. First, the consenting party must be able to permit a search in his own right because the consenting party has actual, not just apparent authority to consent to the search. ***State v. Morse***, 156 Wn.2d 1, 11-12, 15, 123 P.3d 832 (2005). Second, it must be reasonable to find that the defendant assumed the risk that someone else might permit a search. ***Morse***, 156 Wn.2d at 11, 15 (citing ***State v. Hoggatt***, 108 Wn. App. 257, 30 P.3d 448 (2001)).

First, as stated in section 2 c the victim's father had actual authority over the memory card. Second, the photos taken on the defendant's camera were stored on a memory card that belonged to the

deceased victim. By using a third party's memory card to store the photos, the defendant assumed the risk that the third party would consent to a search of the memory card. Indeed, the defendant implicitly acknowledged as much by telling Detective Gundermann that the camera was hers but that the memory card was the deceased victims. It should be noted that unlike ***Morse***, this is not a case of consent by a co-habitant, but rather one of consent by the owner of the item searched, which owner was not the defendant.

4. EVEN IF THE COURT WERE TO HOLD THE SEARCH OF THE CARD UNLAWFUL, THE ADMISSION OF THE PHOTOS SHOULD BE UPHELD AS INEVITABLE DISCOVERY.

When evidence is discovered during an impermissible search, the evidence may still be admissible if the State can prove that the illegally discovered evidence would have been inevitably discovered. *See* ***Nix v. Williams***, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984); ***State v. Richman***, 85 Wn. App. 568, 573, 933 P.2d 1088 (1977). The inevitable discovery doctrine differs from other doctrines utilized by Washington Courts, in that the court does not analyze whether the police actions were a tolerable invasion of a person's right to privacy; rather the doctrine starts with the assumption that police have committed an intolerable act that violated the State Constitution. ***Richman***, 85 Wn. App. at 575. The issue under the inevitable discovery rule is: "Does the

admission of improperly obtained evidence violate the privacy interests of Washington citizens when it is proved that the evidence would have inevitably been obtained by police using proper procedures. ***Richman***, 85 Wn. App. at 575.

The doctrine of inevitable discovery was adopted in light of the high social cost of the exclusionary rule, which, for the purpose of protecting society's interest in deterring unlawful police conduct, sacrifices society's interest in having all of the relevant and probative evidence before a jury. ***Richman***, 85 Wn. App. at 576. Inevitable discovery was adopted because it puts "the police in the same, not a worse, position than they would have been in if no police error or misconduct had occurred," thus limiting when [t]he criminal is to go free because the constable has blundered. ***Nix***, 467 U.S. at 443, 447; ***Richman***, 85 Wn. App. at 576.

The doctrine of inevitable discovery is akin to the doctrine of harmless error. Inevitable discovery, like harmless error, asks whether the outcome would have been the same, but for the constitutional error. ***Richman***, 85 Wn. App. at 576. When the evidence would inevitably come to light, "it defies logic and common sense to exclude evidence and place the police in a worse position than if no misconduct had taken place. ***Richman***, 85 Wn. App. at 577.

The investigation that would ultimately discover the evidence need not be an independent investigation; rather, means that would have

ultimately discovered the evidence must simply not be tainted by the illegality. *See* ***Richman***, 85 Wn. App. at 578-79 (holding that the doctrine applied because the same officer who searched the defendant's briefcase had grounds to arrest the defendant and could have searched the briefcase incident to that arrest); ***State v. White***, 76 Wn. App. 801, 808-09, 888 P.2d 169 (1995), *aff'd* 129 Wn.2d 105, 915 P.2d 1099 (1996) (holding that the doctrine applied because the same officer who looked into the toilet stall had grounds to arrest the defendant when the defendant exited the stall).

Under the Washington Constitution, the inevitable discovery doctrine applies and illegally obtained evidence should not be excluded from trial if the State can satisfactorily satisfy the following three factors by a preponderance of the evidence: (1) that the police did not act unreasonably for the purpose of accelerating the discovery of evidence; (2) that the police would have used proper and predictable investigatory procedures; and (3) that these procedures would have inevitably resulted in the discovery of the evidence. *See* ***State v. White***, 76 Wn. App. 801, 809, 888 P.2d 169 (1995), *aff'd* 129 Wn.2d 105, 915 P.2d 1099 (1966); *See also* ***State v. Reyes***, 98 Wn. App. 923, 930, 993 P.2d 921 (2000) (ruling that the preponderance standard applies to all three prongs).

If Trooper Wickman's initial viewing of the photos to attempt to determine ownership of the camera was error, that was the extent of the error. That error did not taint the subsequent viewing of the images by Detective Gundermann.

It was proper for Trooper Wickman to collect the camera and preserve it pursuant to the impound of the vehicle. The camera was therefore properly in police custody and Tropper Wickman's viewing of the photos did not affect the exchange that transpired when the defendant asked Detective Gundermann for the return of the camera. Upon informing the Trooper that the memory card was not hers, the Trooper could not turn the memory card over to the defendant because it was not the defendant's property. It was therefore proper for Detective Gundermann to contact the deceased victim's father about the memory card. Detective Gundermann was entitled to ask to view the contents of the memory card and the victim's father had authority to consent to that viewing.

Because Detective Gundermann viewed the card with proper consent from the victim's father, a prior improper viewing of the images by Trooper Wickman was harmless error.

5. EVEN IF THE COURT WERE TO HOLD THAT THE ADMISSION OF THE PHOTOS WAS ERROR, IT WAS HARMLESS.

Two different standards for harmless error have been applied to Washington cases. In ***State v. Whelchel***, the Washington Supreme Court held that a Constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. ***State v. Whelchel***, 115 Wn.2d

708, 728, 801 P.2d 948 (1990) (holding the error was harmless were statements were admitted in violation of the defendant's rights under the confrontation clause). The court in ***Whelchel*** held that independent of the improperly admitted statements, there was overwhelming evidence to support the defendant's conviction so that he erroneous admission was harmless beyond a reasonable doubt. ***Whelchel***, 115 Wn.2d at 730.

However, when the same case went before the Ninth Circuit Court of Appeals on an appeal to a habeas corpus motion, the Ninth Circuit held that the standard for harmless error was whether a given error had a substantial and injurious effect or influence in determining the jury's verdict. ***Whelchel v. Washington***, 232 F.3d 1197, 1205-06 (9th Cir. 2000). In ***Whelchel***, the Ninth Circuit affirmed the Federal District Court's grant of habeas corpus relief to the defendant, holding that the statements were not cumulative of other evidence and were inherently suspect. ***Whelchel***, 232 F.3d at 1208. The court also noted that the other evidence did not point overwhelmingly to Whelchel's guilt. ***Whelchel***, 232 F.3d at 1208. The court did find harmless error as to other improperly admitted statements where they were merely cumulative. ***Whlechel***, 232 F.3d at 1211.

Additionally, the court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, the photos challenged by the defendant depict the defendant holding open alcohol containers over the course of the day. However, even if the court erred when it failed to grant the defendant's motion to suppress the error was harmless.

Kenneth Thompson testified that he saw the defendant in possession of Mike's Hard Lemonade at the park. RP 237, ln. 9 to p. 238, ln. 10. Similarly, Jeffrey Ecklund observed the defendant with Mike's Hard Lemonade. RP 192, ln. 7-25; RP 195, ln. 13 to p. 197, ln. 15. In their testimony, both witnesses indicated that the defendant had a significant quantity of alcohol when they arrived and that several bottles had been opened and at least partially consumed.

Even if the court should have held that the photos were obtained in a search that violated the defendant's rights and should have granted the motion to suppress, the admission of the photos was harmless where substantially the same evidence was admitted through the testimony of Jeffrey Ecklund and Kenneth Thompson.

6. THE COURT PROPERLY ADMITTED THE EVIDENCE OF THE RESPONDENT'S CONSUMPTION OF ALCOHOL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), ***State v. Swan***, 114 Wn.2d 613, 658, 700 P.2d 610 (1990). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. ***Thomas***, 150 Wn.2d at 856; ***Guloy***, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

The evidence of alcohol consumption was relevant to the question of the defendant's disregard for the safety of others for two reasons. First, her consumption of alcohol could do nothing to improve her driving, and it was reasonable to infer it further compounded her inexperience as driver with an intermediate license, as well as the effects of her excessive speed. Second, her consumption of the alcohol was reflective of her consideration of the safety of others as her willingness to drive after consuming alcohol

reflected on her respect, consideration and adherence to the laws regarding alcohol consumption by minors generally as well as the strict limits minors driving after having consumed alcohol. Thus, the evidence of the consumption of alcohol was relevant to the ultimate question of disregard for the safety of others.

Moreover, one of the photos depicts Danielle Olague holding an open Mike's Hard Lemonade bottle while she was laying face down on a towel on the grass. (Exhibit # [TBD].) Notably, the shadows are quite long, especially the shadow cast by the bottle of Mike's Hard Lemonade, which is sitting upright on the ground while it is being held. The length of the shadow indicates that the photo was taken late in the day. This court can take notice of the fact that the official time of sunset on the date of the incident (July 25) was 8:53 p.m. *See* http://exhibits.pacsci.org/weather/Sunrise.html (listing the time of official sunset as 7:53, but requiring in a note the addition of 1 hour to adjust for daylight savings time). This photo, the second to the last in the series, strongly suggests that the defendant was consuming alcohol until shortly before she left. The defendant left the park about 7:45 p.m. and the crash occurred very soon thereafter. RP 199, ln. 13-14.

Thus, this photo, along with all the other photos are relevant evidence of the consumption of alcohol by the defendant over a period of

time and up to shortly before she left the park and the accident occurred. Accordingly, the photos constitute relevant evidence of the defendant's disregard for the safety of others. Similarly, the testimony of both Jeffrey Eklund and Kenneth Thompson supported a reasonable inference of alcohol consumption by the defendant over the course of the day and up until they left the park.

Indeed, in discussing the defendant's intermediate driver's license the court specifically discussed alcohol in combination with speed, inattentiveness, and an inexperienced driver as being related to the disregard for the safety of others. RP 892, ln. 5-9. The court went on to make the inference that the defendant had been drinking prior to leaving, that in doing so she was in violation of the prohibition of her consuming alcohol at all, and again connected that fact to her limited skills as an inexperienced driver with an intermediate license. RP 894, ln. 7-24.

The evidence of alcohol consumption was relevant and not unfairly prejudicial. Accordingly, the court properly admitted the evidence of the defendant's alcohol consumption.

7. THE TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE.

To demonstrate ineffective assistance of counsel, an appellant must make two showings: (1) defense counsel's representation was deficient,

i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the appellant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d 1251 (1995).

However, where an appellant claims ineffective assistance of counsel for trial counsel's failure to object to the admission of evidence, the burden on the appellant is even higher. To prove that the failure of trial counsel to object to the admission of evidence rendered the trial counsel ineffective, the appellant must show that: not objecting fell below prevailing professional norms; that the proposed objection would likely have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). To prevail on this issue, the appellant must also rebut the presumption that the trial counsel's failure to object "can be characterized as legitimate trial strategy or tactics." ***In re Pers. Restraint of Davis***, 152 Wn.2d at 714 (quoting ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added in original)). Deliberate tactical choices may only constitute ineffective assistance if they fall outside the wide range of professionally competent assistance, so that "exceptional deference must be given when evaluating

counsel's strategic decisions." ***In re Pers. Restraint of Davis***, 152 Wn.2d at 714 (quoting ***State v. McNeal***, 145 Wn.2d at 362).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on an appellant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. ***McFarland***, 127 Wn.2d at 334.

Here, it was reasonable that defense counsel did not object to the admission of the evidence of the defendant's consumption of alcohol. As indicated above, that evidence was directly relevant to the defendant's disregard for the safety of others, as an indication of her disregard for safety regulations that prohibit alcohol consumption by minor drivers. The defendant's alcohol consumption was also relevant in with regard to the compound effect it could have in conjunction with the defendant's intermediate driver status and her unsafe approach to the curve where she attempted to catch up to the other vehicle and was traveling well in excess of the suggested speed for the curve.

It is also worth emphasizing that the defendant's claims that the evidence of alcohol consumption was unfairly prejudicial is mooted by the fact that this was a bench trial. Because the court was also the ultimate trier of fact, even if defense counsel had objected to the admission of the

evidence of alcohol consumption, the court, which had to rule on admissibility, would be aware of the evidence. Thus, this case is highly distinguishable from a situation in which the trier is a jury. Even if defense counsel had objected to the photos, the court would have been aware of the evidence, so that any unfairly prejudicial effect that the defendant now claims would not have been eliminated by the exclusion of the photos. It would merely have been hidden.

However, a review of the court's ruling indicates that the court was not unfairly prejudiced by the evidence of alcohol consumption. In discussing the alcohol consumption, the court neither expressed prejudice nor was particularly judgmental toward the defendant as a result of the alcohol consumption. Instead the court discussed the alcohol consumption as one of several factors the court considered with regard to how it related to her disregard for the safety of others. The court weighted it relatively lower and to have placed greater emphasis on the defendant's inexperience as a driver and the unnecessarily excessive speed as she entered into the turn where the accident occurred. RP 893, ln. 25 to p. 896, ln. 25. As the court noted, even the defendant's own expert testified that she took the curve way too fast. RP 895, ln. 14-18.

In light of that fact, the defense counsel's strategy in not objecting makes sense. Recognizing that the court was going to be aware of the

evidence of alcohol consumption in any case, it was a reasonable trial strategy of defense counsel not to object to the admission of the evidence, and instead argue that the evidence was weak and not relevant to the ultimate question before the court. Here the trier of fact was no lay member of the public easily susceptible to prejudice. The trier of fact was an experienced trial judge who routinely has to distinguish and set aside the improperly prejudicial aspects of evidence and weigh and use that evidence in an appropriate and unprejudiced manner.

Trial counsel was effective where the evidence was relevant to the question of the defendant's disregard for the safety of others. The court did not abuse its discretion by admitting the evidence of alcohol consumption. By not objecting to evidence that was relevant and not unfairly prejudicial, trial counsel was in a better position to argue to the court the weight and relevance that the evidence of alcohol consumption bore to the ultimate question of the defendant's disregard for the safety of others.

8. THERE WAS SUFFICENT EVIDENCE THAT THE DEFENDANT ACTED WITH DISREGARD FOR THE SAFETY OF OTHERS.

The defendant argues that there was insufficient evidence that she drove her vehicle with disregard for the safety of others. Br. App. 29. Due process requires that the State bear the burden of proving each and

every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle v. Gellein***, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing 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. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

> [...]great deference [. . .] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

> Disregard for the safety of others means an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than ordinary negligence. Ordinary negligence is the failure to failure to exercise ordinary care.
>
> [....]

WPIC 90.05 (adapting ***State v. Eike***, 72 Wn.2d 760, 435 P.2d 680 (1967)); *See also* ***State v. May***, 68 Wn. App. 491, 843 P.2d 1102 (1993); ***State v. A.G.,*** 117 Wn. App. 462, 72 P.3f 226 (2003), affirmed in ***State v. Graham***, 153 Wn.2d 400, 103 P.3d 1238 (2005).

Here, the defendant stated to Officer James that she had driven that roadway many times, throughout the year, under different weather

conditions and never had a problem with it before. RP 124, ln. 2-16; 330, ln. 5-7. When she was interviewed by Detective Gundermann, Olague herself stated that she misjudged the curve and started braking. RP 330, ln. 21-24. When asked what happened, she also admitted that she took the curve way too fast. RP 123, ln. 23-24. The defendant's own expert testified that she took the curve way too fast. RP 895, ln. 14-18.

This evidence alone provided sufficient evidence to establish beyond a reasonable doubt that the defendant acted with disregard for the safety of others. However, additional evidence put forth at trial further reinforces the sufficiency of the totality of the evidence to support the defendant's conviction. Kenneth Thompson testified that the defendant drove at a quick speed to catch up to them as she entered the turn. RP 248, ln. 8-25. Thompson testified that he estimated the defendant's speed at 70-80 miles per hour and that the defendant's vehicle was "mobbing" which meant going really fast. RP 250, ln. 1-19. Detective Gundermann testified that at the time the defendant's vehicle began to loose control and leave friction marks on the roadway, the vehicle speed was 59.63 miles per hour. RP 397, ln. 7-15. The suggested speed on the turn was 35 miles per hour. RP 345, ln. 15 to p. 346, ln. 20.

D. CONCLUSION

The defendant lacks standing to challenge the search of the memory card where the memory card belonged to the victim and the victim's father had actual authority to consent to its search after her death. Even if Trooper Wickman's initial review of the photos was unlawful, Detective Gundermann would have inevitably discovered the photos where they were on the victim's memory card and the victim's father would have been contacted in any case. Any error from the admission of the photos was harmless where substantially similar evidence was entered through the testimony of Jeffrey Eklund and Kenneth Thompson. The court did not abuse its discretion in admitting the evidence of the defendant's alcohol consumption where it was relevant to the defendant's disregard for the safety of others. Defense counsel was not ineffective for failing to object to the inadmissible evidence. The evidence was sufficient to support the court's challenged findings and to support that the defendant exhibited disregard for the safety of others.

DATED: May 11, 2009

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/12/09 [signature]
Date Signature

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