

41098-2-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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State of Washington  
Respondent

v.

**BARBARA H. QUINTANA**  
Appellant

41098-2

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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On Appeal from the Superior Court of Mason County

09-1-00485-4

The Honorable Amber Finlay

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**BRIEF OF APPELLANT**

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## II. ASSIGNMENTS OF ERROR AND ISSUES

### A. Assignments of Error

1. The trial court violated Appellant's Due Process right to be present at a critical phase of jury selection.
2. In a prosecution for vehicular assault, the court erroneously admitted a photograph that was obtained in violation of Wash. Const. art. 1, § 7 and the Fourth Amendment as evidence Appellant drove a vehicle.
3. The admissible evidence was insufficient to prove Appellant was driving.
4. The court erroneously admitted blood test evidence that was obtained in violation of Wash. Const. art. 1, § 7 and the Fourth Amendment.
5. The court erroneously admitted blood test evidence that was obtained in violation of statute.
6. The blood test result was inadmissible hearsay.
7. The admissible evidence was insufficient to prove Appellant was intoxicated.
8. The evidence was insufficient to prove Appellant drove recklessly.
9. Appellant received ineffective assistance of counsel.
10. The court did not ensure juror unanimity.

B. Issues Pertaining to Assignments of Error

1. Is reversal required where the court heard peremptory challenges in a sidebar at the bench rather than “out loud,” where Appellant was not present or able to participate?
2. Is a photograph taken of Appellant in her hospital bed, supine and unconscious with her breasts exposed, admissible in any Washington court for any purpose?
3. Was the admissible evidence sufficient to prove beyond a reasonable doubt that Appellant was driving?
4. Was a blood test result admitted in violation of the privacy protection of Wash. Const. art. 1, § 7 and the Fourth Amendment where the police had no warrant, Appellant was not arrested, and no exception to the warrant requirement applied?
5. Was Appellant’s blood drawn and tested in compliance with RCW chapter 42.61.506?
6. Was the blood test evidence inadmissible hearsay?
7. Was the evidence insufficient as a matter of law to establish the essential element of intoxication?
8. Was the evidence insufficient as a matter of law to establish the essential element that Appellant drove in a reckless manner?
9. Was trial counsel ineffective for not objecting to violations of the implied consent statute and the blood draw and testing procedures, violation of which rendered Appellant’s blood test results inadmissible?
10. Where the jury was instructed it need not be unanimous, is reversal required where the evidence is insufficient to prove one or more of the alternative means of committing the crime?

### III. SUMMARY OF THE CASE

Appellant asks this Court to reverse her conviction for vehicular assault and to dismiss the prosecution with prejudice. Quintana contends that the State's evidence that she was driving and that she was intoxicated was fruit of the poisonous tree and should have been suppressed. The admissible evidence was insufficient to prove that she was driving, that she was intoxicated, or that she drove recklessly. Ms. Quintana also challenges the jury selection process which excluded her from participation in the peremptory challenges. To the extent her trial counsel failed to raise sufficient objections to preserve the issues for review, Appellant received ineffective assistance.

### IV. STATEMENT OF THE CASE

On August 23, 2009, at 6:00 p.m., a green Chevy Blazer missed a left turn off of Highway 101 at Valley Road on the Skohomish reservation. RP 117. The Blazer left the highway and crashed into a utility pole. RP 122. All three occupants were unrestrained. The back seat passenger, David Wahwassuck, suffered a broken leg. RP 144, 168.

Appellant, Barbara H. Quintana, and Mr. Dion Obi were in the front compartment. RP 122. Wahwassuck and Obi were good buddies,

but Wahwassuck was barely acquainted with Quintana. RP 213.

Quintana and Obi each denied being the driver.

Obi was arrested immediately and charged with vehicular assault against Quintana and Wahwassuck. In the months that followed, however, the police would come to believe that Quintana had actually been driving.

On January 4, 2010, the State filed an Information in the Mason County Superior Court charging Quintana with one count of vehicular assault against David Wahwassuck, allegedly committed on August 23, 2009, by driving a motor vehicle with a blood alcohol concentration of greater than 0.08 or while under the influence of intoxicants. CP 86-87. On June 15, 2010, at the commencement of the jury trial, the State amended the Information to include the alternative means of driving in a reckless manner. CP 84-85. The jury found Quintana guilty and she received a sentence of 16 months on a standard range of 13-17 months. CP 5-7. She appeals. CP 3.

**The Evidence:** Moments before the crash, Skohomish police officers Tim Smith and Christopher Newton were standing outside the police station next to Reservation Road. RP 117. They both watched the Blazer speed past, headed for Highway 101. Both testified that the road was visible for 200-300 feet. RP 117, Officer Newton thought he could make out that a long-haired male was in the driver's seat. Each officer

jumped in his patrol car and gave chase with active lights and sirens. 118, 134. After entering Highway 101, the Blazer apparently missed a turn, shot off the roadway, and crashed into a pole. Newton arrived at the crash site almost immediately. RP 137.

Newton saw Dion Obi climbing out of the driver's side window. Obi had one foot on the ground and one foot still inside the car, following Obi out the window. Obi stumbled and tried to flee the scene. Newton told him to stop, but Obi said, "fuck you," and kept going. Newton controlled Obi by threatening him with his taser gun. Newton heard Barbara Quintana screaming and saw her coming around from the passenger side. RP 138-141.

Officer Smith, who had overshot the crash, turned around and head back, arriving in time to see Quintana sitting in the open door of the passenger side, with her feet on the ground. RP 120, 122. He saw Obi immobilized on the driver's side, some distance from the car. RP 122.

Emergency crews including fire department and medical transport teams arrived, along with Washington State Patrol personnel. RP 21, 127, 145. Newton and Smith passed along their information that Obi was the driver and Quintana was the passenger. RP 22, 25. Quintana and Obi were both taken to Mason General Hospital. RP 26, 262.

When Patrol Detective Brian George arrived at at the crash scene at 8:20 p.m., David Wahwassuck was still at the scene. Wahwassuck told George that Quintana, not his friend Obi, was driving. George headed straight for Mason General. RP 177.

Meanwhile, Trooper Jason Roe relieved Trooper Merritt at the hospital. RP 34. Merritt told Roe to try to get a signed release from Quintana for her medical records. Quintana was hovering in and out of consciousness. Roe looked in on her several times until he finally found her with her eyes open. She acquiesced in signing the release while Roe held her fingers on the pen. RP 35, 37.

At some point phlebotomist Maria Rigolo took blood from both Obi and Quintana. She was instructed to do both medical and legal draws on both patients. Lab tech Linda ran a test for blood alcohol concentration. RP 278.

At a CrR 3.6 hearing, the court found that Quintana was not capable of giving a valid consent and suppressed all Quintana's medical records from Mason General. RP 72. The sole exception was the blood test result. The court ruled that this was admissible without Quintana's consent, citing *State v. Smith*, 84 Wn. App. 813, 815, 929 P.2d 1191 (1997) (physician-patient privilege does not apply to blood alcohol testing.) Conclusion No. 2, CP 80; RP 72.

At 8:50 p.m., Detective George arrived at Mason General to follow up on the suggestions that Quintana might have been driving. George was particularly interested in the alleged bruise, which he thought might be evidence that Quintana struck the steering wheel.

When Det. George arrived at the hospital, a trooper told him that one of the fire department responders had said Quintana had a bruise across her chest. George asked an emergency room doctor about the bruising. The doctor agreed to check, and entered Quintana's room. George followed the doctor in and stood by with his camera. Quintana was lying on her back, intubated and unconscious. The doctor pulled down her covering, and George took a photograph of her bare chest. RP 178. Over defense objections, the trial court admitted this photograph as State's trial exhibit no. 33. RP 181.

Later, George sent out State Patrol crime lab personnel to collect samples from the impounded Blazer. Forensic scientist Kari O'Neill took 23 swabs and fabric snips of various bodily fluids splashed around the Blazer's interior, as well as the inside and outside handles on the driver and passenger side doors. Following George's instructions, O'Neill ran DNA tests on three samples. One from a blood drip on the left side of the steering wheel and one from a crack in the windshield on the passenger side and one from spatter on the steering wheel. RP 330. O'Neill

determined that the blood on the steering wheel was from Quintana and the hairs were from Obi. RP 332-33.

The jury found Quintana guilty. She was sentenced to the high end of the standard range. This timely appeal followed.<sup>1</sup>

V. **ARGUMENT**

1. **THE COURT VIOLATED QUINTANA’S RIGHT TO BE PRESENT AND CONTRIBUTE TO JURY SELECTION.**

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *State v. Irby*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, (2011 WL 241971), Slip Op. 82665-0 at 4. This right is protected by the Fourteenth Amendment Due Process Clause. *Id.* A defendant has a right to be present at every proceeding where her presence has a reasonably substantial relationship to her ability to defend. *Irby*, Slip Op. at 6. A defendant’s right to be present, while not absolute, is a “condition of due process” if her absence would deny a fair and just hearing. *Id.*

The United States Supreme Court has affirmed that jury selection is a critical stage of criminal proceedings during which “the defendant has a constitutional right to be present.” *Irby*, The United States Supreme

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<sup>1</sup> Where appropriate, additional citations to the record are included in the arguments.

Court has affirmed that jury selection is a critical stage of criminal proceedings during which “the defendant has a constitutional right to be present.” *Irby* at 10, quoting *Gomez v. United States*, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989). Jury selection is “the primary means by which a court may enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant’s culpability. *Id.* This due process right to be present extends to jury voir dire. *Irby*, Slip Op. at 9. The right attaches when the process of empanelling the jury begins. *Irby*, Slip Op. at 10. Specifically, the right extends to the exercise of peremptory challenges as well as to challenges for cause. *Irby*, Slip Op. at 9.

Analysis under Wash. Const. art. 1, § 22 leads to the same result. *Irby*, Slip Op. at 11.

In *Irby*, the Court distinguished between jury selection proceedings that merely address general qualifications from those that test the jurors’ fitness to serve in the particular case. The latter constitute a critical stage of the prosecution and invoke the defendant’s due process right to attend and participate. *Irby*, Slip Op. at 7-8. To exclude the defendant from fitness-related voir dire requires the defendant’s affirmative waiver. *Irby*, Slip Op. at 8. The defendant’s presence at voir dire is substantially related to her defense and she must have an opportunity to give advice or make

suggestions to defense counsel or even countermand counsel's decisions.  
*Irby*, Slip Op. at 6.

The fact that the erroneous selection procedure was proposed by defense counsel is immaterial. *Irby*, Slip Op. at 4, citing *United States v. Gordon*, 829 F.2d 119, 124 (1987) (defendant absent from the whole of voir dire at his attorney's request and never told of his right to attend); *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

Proceedings On the Record But Not Transcribed: The transcriber noted the following untranscribed jury voir dire proceedings:

Jury selection began with preliminary questions addressed to the entire panel in open court. Then the panel was excused and individual jurors were questioned in open court. A handful were excused for cause. Then the entire panel returned to the courtroom and a few were excused for hardship based on time constraints. More voir dire of the whole panel followed in open court, after which a few more were excused for time constraints. Then both counsel passed the panel for cause. Then, following a sidebar, the venire was removed from the courtroom, and the court adjourned the proceedings. Later that same day, the court reconvened with all parties present and the jurors still out.

RP 102, Transcriber's Notes.

Transcribed Proceedings: When the court reconvened, both counsel asked the court to receive their peremptory challenges at the

bench, rather than “out loud.” RP 102-03. The idea was that the peremptories would be tape recorded at sidebar and later transcribed for the record. The public could be present in the courtroom during the sidebar, but not privy to the discussion. Interested parties could consult the transcript later and find out which side dismissed which jurors. RP 103.

Counsel explained they were concerned that, if they simply announced their peremptories in open court in the presence of the jury venire, this would open the door for manipulation, whereby one side could repeatedly approve the panel after each of the other’s peremptory challenges. This would ingratiate the accepting attorney with the jurors and subject the challenging lawyer to the jurors’ resentment. RP 103-04. The State agreed that peremptory challenges created the danger that the jurors would be infected by “subtle bias.” RP 104-05.

The court accepted this and agreed to hear the peremptories off the record at the bench after the jurors were excused for the day. The court would then read the results into the record. RP 105.

The venire then came back into the courtroom, and the judge and counsel discussed peremptories at sidebar. RP 106. Then the judge explained the peremptory challenge process to the venire and

excused 12 potential jurors. RP 106. Then the court read into the record which side had challenged which juror. RP 106-07.

Neither the court nor counsel addressed Ms. Quintana on the record. The record does not suggest that Quintana was included in the sidebar or that she had any opportunity to contribute to her lawyer's selection decisions. RP 104-07. On this record it appears Ms. Quintana was in no way privy to the peremptory challenge process.<sup>2</sup>

This violated Quintana's due process right to participate in all critical stages of her prosecution. The remedy is to reverse and remand for a new trial.

**REGARDLESS OF THE DECISION ON THE JURY  
SELECTION ISSUE, THE COURT SHOULD ADDRESS  
THE REMAINING ISSUES TO AVOID THE SAME  
ERRORS ON REMAND.**

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<sup>2</sup> Therefore, the Court assumes it did not happen. See *Irby*, Slip Op at 5.

2. A PHOTOGRAPH OF QUINTANA'S BARE CHEST TAKEN BY THE POLICE WHILE SHE WAS UNCONSCIOUS WAS ADMITTED IN VIOLATION OF WASH. CONST. ART. 1, § 7 AND THE FOURTH AMENDMENT.

**Pertinent Facts:** Over a continuing defense objection, the court admitted State's Exhibit 33. This is a photograph the police took of Ms. Quintana while she was unconscious and intubated in her room in Mason General's emergency ward. Quintana is seen lying on her back. Her covering is pulled down, and her breasts and her entire upper body are exposed. RP 154.

Defense counsel argued that Ex. 33 was part of Quintana's Mason General medical record, which the court had already suppressed (with the sole exception of blood test results) based on Quintana's manifest lack of consent. RP 154-56. If the photograph somehow was exempt from the existing suppression order, counsel argued that it must nevertheless be suppressed as a violation of Quintana's constitutional right to privacy. RP 157, 179.

The State was adamant that Exhibit 33 was not a medical record. RP 154, 179. According to the prosecutor, the photograph was unobjectionable so long as it contained relevant evidence that was more probative than prejudicial. RP 155. The State argued that the photograph was relevant because it showed a bruise across Quintana's chest that could

be argued as consistent with striking the steering wheel. The State argued that the picture was merely embarrassing to Quintana, not prejudicial, and that humiliation was not a factor the court needed to consider. RP 155. The State failed to see any constitutional implications, arguing that police routinely take pictures of victims at accident scenes, and that Exhibit 33 was no different. RP 155, 157-58, 179.

In addition to the constitutional violation, the defense characterized the naked picture as a “strip search” that was prohibited by statute. “I’m not objecting to someone taking pictures at the scene, I’m objecting to someone taking her clothes off and taking a picture of her breasts.” RP 158.

The defense presented an offer of proof based on the report of Detective Brian George. RP 177. George arrived at the accident scene at 8:20 p.m. on August 23. By 8:30, George had been told by the back-seat passenger that Quintana, not Obi, was the driver. By 8:55, George and his camera were at Mason General, where Quintana was unconscious in the emergency room. RP 177. State Trooper Merritt was on duty at the hospital. Merritt told George that fire department personnel working the scene had reported that Quintana had a bruise across her chest. RP 178.

George told a doctor he needed to know if Quintana’s chest was bruised. The doctor did not think it was, but agreed to check. The doctor

entered Room 164, where Quintana was supine and unconscious on a gurney. Detective George followed with his camera. When the doctor pulled down Quintana's covering, George photographed her bare chest. RP 178.

Defense counsel argued that Quintana had a reasonable expectation of privacy in her hospital room and that George went in there for the sole purpose of investigating a crime. RP 178. The State argued that the State Patrol did not officially notify the prosecutor that the identity of the driver was in doubt until five days later, and therefore, Quintana was not a suspect and enjoyed no constitutional protection from government agents taking advantage of her helpless condition to photograph her breasts while she was unconscious. RP 179-80.

The court denied the motion to suppress. The court conceded that the photograph was "technically" a search, but characterized it as a "minimal intrusion," comparable to fingerprints, hair samples, and other discovery that the State is entitled to demand under the court rules from suspects who (unlike Quintana) have been arrested. RP 180-81. "[T]he court would find that the picture is a minimal – it's a minimal intrusion. And so, the court will go ahead and deny the motion." RP 181. Minimal intrusion. The court was of the opinion that the defense objections went to weight, not admissibility. RP 181.

The court's sole concern regarding Exhibit 33 was to shift the balance of relevance versus prejudice by somehow "sanitizing" the photograph to mask the breasts without compromising the image of the bruise. RP 161, 182. The prosecutor assured the court this was not possible, so the court ruled that Exhibit 33 could be published to the jury provided it was not blown up on the courtroom projector. RP 183.

***Constitutional Violation:*** Subject to a few "jealously and carefully drawn exceptions" warrantless searches and seizures are unreasonable per se under art. 1, § 7 of the Washington Constitution. *State v. Rulan C.*, 97 Wn. App. 884, 886, 970 P.2d 821 (1999) (strip search); *State v. Hendrickson*, 129 Wn.2d 61, 70-71, 917 P.2d 563 (1996). The burden is on the prosecutor to show that a warrantless search is reasonable under one of the recognized exceptions. *Id.*

Art 1, § 7 and the Fourth Amendment mandate that all evidence derived from government illegality be excluded from our courts for all purposes. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Evidence need not be suppressed if the causal connection between its acquisition and the unlawful activity is attenuated. *Wong Sun*, 371 U.S. at 488. But suppression must inevitably follow whenever there is a

meaningful causal connection between the State's unlawful activity and the acquisition of the evidence. That is, if the evidence is "the fruit of the poisonous tree." *Wong Sun*, 371 U.S. at 487-88.

The State's claim that George's conduct was indistinguishable from routine documentation of accident scenes is essentially a "good faith" argument. Such arguments are to avail. A 'good faith' exception is "incompatible with the nearly categorical exclusionary rule under article 1, §7." *State v. Afana*, 169 Wn.2d 169, 181-82, 233 P.3d 879 (2010). "With very few exceptions, whenever the right of privacy is violated, the remedy follows automatically." *Id.* "[I]f a police officer disturbs a person's 'private affairs,' we do not ask whether the officer's belief that this disturbance was justified was objectively reasonable, but simply whether the officer had the requisite 'authority of law.'" *Afana*, 169 Wn.2d at 879, citing *White*, 97 Wn.2d at 110.

Moreover, the analogy to routine accident-documentation is factually false. George was not routinely photographing an accident scene on a public highway — where arguably exigent circumstances existed and a reasonable expectation of privacy did not. He was following up on an informant's tip that Quintana's chest might bear evidence that she committed a crime. George was investigating Quintana as a possible suspect when he intruded into the privacy of the woman's hospital room

and took advantage of her helpless condition to conduct the most intrusive search imaginable in pursuit of potentially incriminating evidence.

**Statutory Violation:** Mandatory suppression is not limited to constitutional violations. It applies equally evidence obtained in violation of statute. *See State v. Bartels*, 112 Wn.2d 882, 886-90, 774 P.2d 1183 (1989).

Strip searches are prohibited by statute. RCW10.79.060.<sup>3</sup> To “strip search” means to have a person “remove or arrange some or all of his or her clothing so as to permit an inspection of the...breasts of a female person.” RCW 10.79.060(1). Absent exigent circumstances or some other exception, the government must obtain a search warrant before engaging in such a search. RCW 10.79.080; *Rulan C.*, 97 Wn. App. at 886, 888.<sup>4</sup>

No exigent circumstances existed here and none were alleged.

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<sup>3</sup> Strip, body cavity searches — Legislative intent. It is the intent of the legislature to establish policies regarding the practice of strip searching persons booked into holding, detention, or local correctional facilities. It is the intent of the legislature to restrict the practice of strip searching and body cavity searching persons booked into holding, detention, or local correctional facilities to those situations where such searches are necessary. RCW 10.79.060.

<sup>4</sup> *Mulan* notes that the statute specifies searches in correctional facilities. *Mulan*, 97 Wn. App. at 889. But the statute extends the universal warrant requirement to protect previously vulnerable detainees. It does not divest the rest of us from protection from warrantless strip searches.

The fact that a doctor removed his patient's covering and exposed her breasts to public view for George's benefit is immaterial. The doctor could have given vicarious consent to a search of clothing or other personal effects in which a hospital patient has no reasonable expectation of privacy. *State v. Smith*, 88 Wn.2d 127, 139, 559 P.2d 970, *cert. denied*, 434 U.S. 876 (1977) (clothing under the bed); *State v. Puapuaga*, 164 Wn.2d 515, 527, 192 P.3d 360 (2008) (personal effects in a box). But no Washington case authorizes a police officer, in a non-emergency situation, to examine and photograph a woman's breasts. Not only should Detective George's handiwork be excluded from any Washington court for any purpose. Arguably, both police officer and physician should be facing criminal charges.

The prohibition is particularly forceful where, as here, the woman was not under arrest or even in custody. RP 176. But in a bizarre twist of logic the State seemed to claim that only people suspected of criminal activity have legitimate expectations of privacy so that constitutional protections did not cover Quintana (no pun intended). RP 180.

The State also argued that the sole purpose of Wash. Const. art. 1, § 7 is to deter police misconduct. RP 59-60. This is wrong. In Washington, it is protection of the people's privacy that is paramount:

The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.

*Chenoweth*, 160 Wn.2d at 472, n.14, citing *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

**Prejudice:** A constitutional error is presumed prejudicial. The State bears the burden of showing the error was harmless. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). A constitutional error is harmless only if this Court is convinced beyond a reasonable doubt that every reasonable juror would have reached the same result absent the error, and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995); *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). Where the error was not harmless, the defendant must have a new trial. *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979).

The failure to suppress Exhibit 33 cannot be deemed harmless. All the State's driver-identification evidence was fruit of this poisonous tree. It was the photograph that prompted George to burden the crime lab with a forensic investigation. As discussed in Issue 3, everything, including the

physical facts on the ground as reported by two experienced police officers, pointed to Obi as the driver, except for his own self-serving statements and those of his good buddy David Wahwassuck — who had made a career of dishonesty. RP 206, 213.

Accordingly, the suppression error cannot be said with confidence not to have affected the verdict. The Court should reverse and dismiss.

3. THE ADMISSIBLE EVIDENCE WAS  
INSUFFICIENT TO PROVE QUINTANA WAS  
DRIVING.

Evidence is sufficient to support a conviction when any rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A challenge to the sufficiency of the evidence assumes the truth of the State's evidence and all inferences reasonably to be drawn from that evidence. *Thomas*, 150 Wn.2d at 874. As a matter of law, a conviction based on insufficient evidence must be dismissed with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

The evidence was insufficient to establish beyond a reasonable doubt that Quintana was driving this car when it crashed. Officer Chris Newton saw a male driving the speeding car past the police station, and

definitely saw the same man climbing out of the driver's side window at the crash scene. The man had facial lacerations. RP 41. Officer Tim Smith corroborated that a male was on the driver's side immediately after the crash and a female was on the passenger side. RP 122. Smith testified that the driver had a large cut above his left ear. RP 123. The man swore at Newton, who had to threaten him with his taser gun to prevent him from fleeing the scene. RP 147-48.

Newton witnessed Quintana, by contrast, coming around from the passenger side. RP 141. Smith also saw Quintana sitting dazed in the passenger seat with her feet extending out the open door. RP 122. Even after learning (a week before trial) that the State Patrol claimed DNA evidence implicated Quintana as the driver, Officer Newton was still confident that the person he saw driving and the person he interacted with at the scene were one and the same and that the person was a male. RP 151.<sup>5</sup>

We must also assume the truth of the evidence from the State's accident reconstruction expert Debbie Laur. Officer Laur testified that Newton's First Law<sup>6</sup> would predict that everything not tied down when a car strikes a pole head-on will continue to move forward at the pre-crash

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<sup>5</sup> The State argued that Newton was hallucinating or otherwise inventing this testimony. But the prosecutor never addressed Tim Smith. RP .

<sup>6</sup> That would be Sir Isaac, not Officer Christopher.

speed. RP 196. But Laur also gave testified that, unless the vehicle's speed is diminishing immediately before impact, "then the vehicle could actually be in a yaw where the driver is accelerating and turning at the same time, kind of like doing a brodey [phonetic] that teenagers sometimes like to do out there." RP 199.

According to Laur, there definitely were no brake marks at this crash scene. RP 189, 199. Therefore, by Newton's First Law, the Blazer's speed was not diminishing. Therefore, assuming the truth of Laur's evidence, the vehicle very well could have been "in a yaw." In fact, Laur affirmatively testified that the driver's attempt to turn left in this particular crash did indeed create centrifugal force. RP 192. The vehicle rotated somewhat, even after it hit the pole. RP 193, 195.

Therefore, the State failed to prove beyond a reasonable doubt that the personal effects and miscellaneous spatters of bodily fluids in this particular crash were not thrown around and laterally displaced by the combined effect of impact and centrifugal forces.

This leaves the DNA evidence. This evidence cannot, on its face, support a criminal conviction.

The State's expert DNA witness was Washington State Patrol forensic scientist Kari O'Neill. RP 308. Ms. O'Neill's qualifications consisted merely of a bachelor's degree and on-the-job training. RP 309.

She thinks you get one chromosome from your mother and one from your father. RP 312.

First, O'Neill conceded that she was was not an independent investigator, but was operating entirely at the direction of Detective George, for the sole pupose of gathering evidence to support George's theory of the case. Asked whether any law enforcement person had told her Dion Obi was behind the wheel, O'Neill said:

I was told that that was kind of the purpose of our assistance was to try to collect any evidence that we might find, that's forensically valuable, and to see if we could answer that question with that evidence. But — and it was stated that, you know, there were — there was a little background on who people thought might have been and it was in question.

RP 334-35. The Court will read this as it will, but it looks like, "Yes, but I'm not allowed to say that." If the answer had been "No," Ms. O'Neill would simply have said so.

Second, O'Neill's testimony was gibberish. As to the apparent downward pull of gravity on a blood drip on the steering wheel, she testified:

The fact that it's on the steering wheel and has that flow down, there is a — a stain happened — a deposit was made on the steering wheel that then flowed down either positioned — you know, with the gravity it was — it came down from that point." Okay. "So it was right in that area for that to occur."

RP 321. O'Neill was not asked, and did not explain, precisely how gravity could have produced a downward direction of flow of a drop of blood that squirted from a human body at the instant of a high-speed impact with a stationary pole. RP 320. Sir Isaac was not invoked. This evidence supports Quintana's conviction only if we abandon Newton's First Law and assume that the blood, et cetera, remained static during the crash such that its relative placement when the dust settled was the same as at the instant of impact.

Third, following Detective George's instructions, O'Neill tested only three of the 23 biological samples she collected from various points inside the car, including the driver and passenger seats, headrests, and footwells, and the interior and exterior door handles. RP 335-48.

Finally, the reference sample for Quintana was a buccal (cheek) swab. RP 322. The record is silent as to when, where, and under what circumstances government agents poked sticks inside Quintana's mouth. George just says it was "later." RP 233. We do know that Obi was still the only person arrested when O'Neill processed the impounded car. RP 233; 316-17. Yet there is no hint of a warrant or facts supporting an exception to the requirement for a warrant.

In summary, the DNA evidence was inadmissible, and even if properly admitted, it was so unreliable as to be insufficient as a matter of

law to overcome the legal presumption of Quintana's innocence and the overwhelming eye-witness evidence establishing her innocence in fact.

4. THE BLOOD TEST EVIDENCE WAS  
INADMISSIBLE UNDER ART.1, § 7 AND THE  
FOURTH AMENDMENT.

The State must prove the essential elements of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The essential elements of vehicular assault that the State was required to prove here are that Ms. Quintana caused substantial injury by operating a motor vehicle either recklessly, with a blood alcohol content greater than .08, or while under the influence of intoxicants. RCW 46.61.522(1); CP 84-85; Instr. 7, RP 436. As discussed in Issues 2 and 3, there was no admissible evidence that Quintana operated a motor vehicle. But, even supposing Quintana was driving, the State also failed to prove that she was intoxicated as defined by RCW 46.61.502.

***Prerequisites for Admission of Blood Alcohol Tests:*** The State must make a prima facie showing satisfying three prerequisites for the admission of blood evidence.

- (a) The State must have lawful authority to draw the blood, RCW 46.20.308(1).

- (b) The blood must be drawn in compliance with statutory prerequisites.
- (c) The method and equipment used to test the blood must be approved by the state toxicologist. And —
- (d) The technician performing the test must be certified by the State toxicologist. RCW 46.61.506(3).

Here, the court concluded that the State had some sort of lawful authority to draw Quintana's blood without a warrant and without her consent. This was wrong.

(a) **No Lawful Authority:** A legally valid blood draw requires that the State either (i) obtain the subject's consent; (ii) obtain a search warrant; or (iii) satisfy the provisions of RCW 46.61.503, the implied consent law. RCW 46.20.308(1). None of these prerequisites was met here.

(i) It was not disputed that Quintana did not consent to a blood draw. She was either unconscious or hovering on the edge of consciousness and under the influence of several incapacitating sedatives. The trial court found unequivocally that Quintana was incapable of giving valid consent. CP 80; RP 72-73.

(ii) There is no evidence of a search warrant, and the State does not claim to have obtained one.

(iii) The implied consent law, RCW 46.61.308, does not authorize a warrantless blood draw unless the subject has been arrested and the arresting officer has probable cause to believe the subject operated a motor vehicle while intoxicated. RCW 46.20.308(1); *State v. Smith*, 84 Wn. App. at 815.

The trial court erroneously relied on *Smith* in admitting Quintana's blood test results. *Smith* is clearly distinguishable.

First, in *Smith*, police had probable cause to arrest when the accident occurred, and could have seized a blood sample under the implied consent statute. *Smith*, 84 Wn. App. at 816. Here, the police did not develop probable cause against Quintana until six months later. CP 86. Second, *Smith* claimed the protection of the physician-patient privilege.<sup>7</sup> *Smith*, 84 Wn. App. at 816. Quintana did not.

Third, *Smith* did not claim a violation of art.1, § 7 and the Fourth Amendment. *Id.* Quintana did.

Fourth, *Smith* opened the door to admission of the blood evidence by testifying at trial that his alcohol consumption was minimal on the day of the accident. *Smith*, 84 Wn. App. at 816. Quintana did not.

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<sup>7</sup> Subject to certain statutory limitations, "a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient [with non-germane exceptions]." RCW 5.60.060(4).

After unequivocally holding that nothing in the implied consent statute allows the State to seize and test blood taken from a defendant who is not under arrest, *Smith* holds merely that blood evidence is no less admissible than any other evidence under general search and seizure law. *Smith*, 84 Wn. App. at 818-19. That is, the implied consent statute does not prevent a court from admitting evidence that was obtained by alternative constitutional means. That is to say, where probable cause and exigent circumstances exist. *Smith*, 84 Wn. App. at 819, citing *State v. Zielke*, 137 Wis.2d 39, 403 N.W.2d 427, 432-33 (1987), and *Schmerber v. California*, 384 U.S. 757, 766-72, 86 S. Ct. 1826, 1833-36, 16 L. Ed. 2d 908 (1966).

*Smith* goes on to discuss public policy — not as support for ignoring the plain language of the implied consent statute — but as support for declining to apply the physician-patient privilege. 84 Wn. App. at 821-22.

The governing law in this case is Art. 1, § 7 and the Fourth Amendment, not *Smith*. The blood evidence was unlawfully seized and erroneously admitted, and the remaining evidence is insufficient to prove the essential element of intoxication, and the Court should reverse the conviction and dismiss the prosecution with prejudice.

5. THE BLOOD WAS NOT DRAWN OR TESTED  
IN COMPLIANCE WITH MANDATORY  
STATUTORY CONDITIONS.

Even if taking Quintana's blood somehow was lawful, the State failed to present even minimally sufficient evidence that the blood was drawn tested in a manner that complied with mandatory statutory requirements.

When offered in support of a criminal conviction, blood analysis is invalid unless it was drawn by a qualified individual. RCW 46.61.506(5). A blood draw for the purpose of determining its alcohol content may only be performed by a physician, a registered nurse, a licensed practical nurse, a nursing assistant as defined in chapter 18.88A RCW,<sup>8</sup> a physician assistant as defined in chapter 18.71A RCW, a first responder as defined in chapter 18.73 RCW, an emergency medical technician as defined in chapter 18.73 RCW, a health care assistant as defined in chapter 18.135 RCW, or a technician trained in withdrawing blood. *Id.*

Here, Quintana's blood was drawn by Maria Rigolo.<sup>9</sup> RP 262. Ms. Rigolo was not a physician, registered nurse, et. cetera. The State did not even show that Rigolo was a technician trained in drawing blood. She

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<sup>8</sup> A "nursing assistant" is a person who is either certified or registered under RCW chapter 18.88. RCW 18.88.020(7) (a) & (b).

<sup>9</sup> Both Rigolo and Jacobsen claimed personally to have centrifuged Quintana's blood. RP 265, 275.

testified merely that she was a lab assistant and that drawing blood was what she did. RP 261-62. “Lab assistant” is undefined. It could be a person trained in washing laboratory glassware for all we know.

Likewise, when offered in support of a criminal conviction, blood analysis cannot be considered valid unless it was performed “by an individual possessing a valid permit issued by the state toxicologist for this purpose.” RCW 46.61.506(3). Analyst Linda Jacobson apparently sat for a some sort of national registry exam, but the State elicited no evidence about the state-toxicologist permit mandated by RCW 46.61.506(3). RP 272.

Further, when offered in support of a criminal conviction, blood analysis cannot be considered valid unless it was performed according to methods approved by the state toxicologist. RCW 46.61.506(3).

The State offered zero evidence that either the method used to test Quintana’s blood or the machine used to perform the test had the requisite state-toxicologist approval as required by RCW 46.61.506(3).

Jacobson testified that, in Mason General’s lab, “oh, gosh, there is several different analyzers, or instruments” for testing blood. RP 273. Asked for specifics about the machine employed here, the best Jacobson could do was, “our larger analyzer. It runs several different types of testing, but alcohol is one that we run on that.” RP 274. This is not

sufficient to qualify the testing method or equipment under RCW 46.61.506(3).

Accordingly, the State failed to satisfy a single statutory prerequisite sufficient to admit the blood evidence. Therefore, the admissible evidence was insufficient to prove the essential element of intoxication and the Court should reverse the conviction and dismiss the prosecution with prejudice.

6. THE BLOOD ALCOHOL EVIDENCE WAS INADMISSIBLE HEARSAY.

Mason General Lab tech Lisa Jacobson performed the testing of Quintana's blood. RP 272. After describing the testing procedure in the most general terms, Jacobson declared that Quintana's blood alcohol was "261 milligrams." RP 278.

First, this is a meaningless number. A blood alcohol concentration cannot be expressed as an absolute number. Blood is a solution, the components of which must be expressed as a ratio: some unit of substance per some volume of liquid. For blood alcohol this ratio is expressed in terms of percent — grams per 100 milliliters. RCW 38.38.760(2).

Second, it is clear from the record that Jacobson was not testifying from her personal recollection. She freely admitted that she could not remember any particular test she ran as long ago as the previous August.

RP 280. She had no recollection of testing Obi's blood, for example. RP 280. But we know Obi's blood was tested. RP 262-63. Moreover, Rigolo testified that August 23, 2009 was a particularly busy day. RP 262. It is simply inconceivable that Jacobsen just happened to remember this particular blood test from eleven months ago and miraculously recalled that the result was precisely 261 milligrams.

Without personal recollection, Jacobsen was testifying either to what she wrote in her report back in August or what the machine said the result was.

(a) The State needed to produce Jacobson's record of Quintana's result and have Jacobson authenticate it. The State did not produce Jacobson's report. Therefore, unless Jacobson testified from personal knowledge based on actual recollection of the test, evidence based on her contemporaneous written report is inadmissible hearsay for which no exception exists.

(b) Even assuming Jacobson actually recalled the specifics of Quintana's test and was testifying from memory, her statement that the alcohol level was 261 mg simply reflects her contemporaneous reading of the numbers displayed or printed out by the machine. The State did not produce a print-out from the machine. Therefore, Jacobsen's evidence is still inadmissible hearsay.

Moreover, given Jacobson's demonstrated lack of understanding of what blood alcohol concentration actually means, maybe she transposed digits or otherwise garbled the data. We know, for instance that decimal point placement was not Ms. Jacobson's forte. See RP 277.

(c) The State called John Hautala, an emergency room physician, to express Jacobson's blood alcohol level testimony in scientifically meaningful terms. He stated it represented a concentration of 261 mg/deciliter, or expressed as a statutory "percent solution," (grams per 100 mls) .261 percent. RP 283.

But Hautala's evidence was triple hearsay. Hautala's expert credentials could not overcome the fact that his opinion reflect solely what Jacobson had told him the "big machine" had told her was the magic number.

Accordingly, the blood alcohol concentration evidence was utterly lacking in indicia of reliability and was, therefore, inadmissible under the rules of evidence.

RCW 46.61.506(2) permits the State to introduce alternative evidence of intoxication, but the State did not do that here. Accordingly, the State failed to prove beyond a reasonable doubt that Quintana was intoxicated as defined by RCW 46.61.502. Therefore, her conviction for vehicular assault must be reversed.

7. THE EVIDENCE WAS INSUFFICIENT TO PROVE QUINTANA DROVE IN A RECKLESS MANNER.

As discussed in Issues 4 and 5, the State failed to produce admissible evidence that Quintana was intoxicated. The State also offered no evidence other than intoxication to establish vehicular assault under the recklessness prong.

Driving in a reckless manner in the context of vehicular assault means driving in a manner that is rash or heedless and indifferent to the consequences. *State v. Roggenkamp*, 153 Wn.2d 614, 622, 106 P.3d 196 (2005). Driving under the influence of intoxicants does not necessarily constitute reckless driving in and of itself. *State v. Amurri*, 51 Wn. App. 262, 265, 753 P.2d 540 (1988), citing *State v. Birch*, 183 Wash. 670, 673, 49 P.2d 921 (1935).

Excessive speed can be evidence of reckless driving. RCW 46.61.465; *Amurri*, 51 Wn. App. at, 266. But recklessness cannot be inferred from evidence of speed alone. *State v. Randhawa*, 133 Wn.2d 67, 941 P.2d 661 (1997). Therefore, the State also has the burden to prove beyond a reasonable doubt that the accused drove in a rash or heedless manner, indifferent to the consequences. *Id.*

In *Randhawa*, a speed of 10 to 20 m.p.h. over a posted limit of 50 m.p.h. was not so excessive as to give rise to an inference that the driver

was a rash, heedless or indifferent. *Randhawa*, 133 Wn.2d at 77-78. By comparison, the Court cites a case where a driver was traveling at 103 m.p.h. at the time of the fatal collision. *Randhawa*, 133 Wn.2d at 76, citing *State v. Hanna*, 123 Wn.2d 704, 707, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994). In *Hanna*, the presumed fact of recklessness more likely than not flowed from the driver's excessive speed. *Randhawa*, 133 Wn.2d at 77. Thus, *Randhawa* tells us that sometimes speed alone will permit a jury to infer reckless driving and sometimes it will not. *Randhawa*, 133 Wn.2d at 78. Here, it does not.

Viewing the evidence in a light most favorable to the State, the Blazer reached a speed of approximately 70 m.p.h. shortly before the crash. But the State produced no evidence of speed at the relevant time — the point when it left the road. RP 189. The best the State's expert could do, based on the degree of damage to the vehicle, was to speculate that its speed was at least 40 m.p.h.. RP 198.

Moreover, the doctrine of judicial estoppel bars the State from adopting inconsistent positions as to the facts. *King v. Clodfelter*, 10 Wn. App. 514, 521, 518 P.2d 206 (1974). Here, the State is estopped from arguing that Officers Smith and Newton were able to estimate the car's speed as between 70 and 80, because the prosecutor went to great lengths to persuade the jury the officers were deluded on this point. RP 337.

The weakness of the evidence that speed was a factor is seen in closing argument where the prosecutor is reduced to claiming that passing cars pulling over in the presence of police cars with lights and sirens was evidence the Blazer was being driven recklessly. RP 444.

Moreover, the jury heard not a scintilla of evidence that 40 m.p.h. — or even 70 m.p.h. — exceeded the posted speed on that stretch of Highway 101. The State also presented no evidence from which a jury could infer that the Blazer's speed was "grossly excessive for the conditions" on Highway 101 that day. To the contrary, the State established that conditions were dry, with no wind, good light, and excellent visibility in both directions, and that traffic volume was no more than moderate. RP 120-21, 187, 136.

8. THE REMEDY IS TO REVERSE AND DISMISS.

After suppressing the unlawfully obtained evidence, the remaining evidence is insufficient to establish the essential elements of the crime. "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

Therefore, the Court should reverse Ms. Quintana's conviction and dismiss the prosecution with prejudice.

9. QUINTANA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant may challenge the sufficiency of the evidence for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Thus, Quintana can challenge for the first time in this Court the sufficiency of the evidence that she was driving, that she was intoxicated, and that she drove recklessly.

Further, where defense counsel, the prosecutor and the trial judge all understood the grounds for an evidentiary objection, and the trial court ruled on that ground, the issue is not being raised for the first time. The issues are preserved for appeal because the reasons for requiring an objection have been served. *State v. Powell*, 166 Wn.2d 73, 83, 206 P.3d 321 (2009), Stephens, J concurring. Moreover, ER 103(a)(1) allows appellate review when grounds for an evidentiary objection, though not specifically lodged at trial, are readily apparent from circumstances. *State v. Black*, 109 Wn.2d 336, 340, 745 P.2d 12 (1987); 5 Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.11, at 58-59 (5th ed.2007) (even if the specific appropriate objection was not made, under ER 103(a) "the propriety of the ruling will be examined on appeal if

the specific basis for the objection was ‘apparent from the context.’” *Id.*, quoting ER 103(a)(1). So long as the trial court had sufficient notice of an issue to know what legal precedent was pertinent, it is not being raised for the first time on appeal and this court will consider it. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 499, 933 P.2d 1036 (1997). The Court may grant relief where, as here, the record is sufficiently developed for meaningful review. *State v. Millan*, 151 Wn. App. 492, 502, 212 P.3d 603 (2009). This record is sufficiently developed both to establish the essential facts pertaining to the trial court rulings to which Quintana has assigned error and to show that the court was on notice as to what the legal issues were.

Suppression errors, however, can be raised for the first time only if the Court deems them manifest and constitutional, or if trial counsel’s failure to challenge admission of the evidence constituted ineffective assistance. *State v. Soonalole*, 99 Wn. App. 207, 215, 992 P.2d 541 (2000). Accordingly, to the extent counsel failed to preserve evidentiary violations with timely objections so as to preserve the issues for review, counsel was ineffective.

A defendant has the constitutional right to the effective assistance of counsel. Const. art. 1, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both

deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Appellant will prevail by showing both that her counsel erred and that the error was so significant, in light of the entire trial record, that it deprived her of a fair trial. *Strickland*, 466 U.S. at 690-692.

Alleged deficient performance cannot rest on matters that go to legitimate trial strategy or tactics. *Hendrickson*, 129 Wn.2d at 77-78. Reviewing courts give considerable deference to counsel's performance and begin by presuming it was effective. *Thomas*, 109 Wn.2d at 226. But inherent in the concept of effective assistance in criminal matters is the duty to research the relevant law. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *Strickland*, 466 U.S. at 690-91. Thus, a claim of ineffective assistance based on failure to challenge the admission of evidence is established by showing an absence of legitimate strategic or tactical reasons supporting the challenged conduct; that an objection to the evidence likely would have been sustained; and that the result of the trial would have been different if the evidence had not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

It is per se deficient performance to neglect to bring a dispositive motion that likely would have been granted. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Rainey*, 107 Wn. App.

129, 136, 28 P.3d 10 (2001); *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006). And counsel's failure to investigate the relevant statutes supporting the charge against his client cannot be characterized as a legitimate tactic. *In re Hubert*, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007).

Finally, prejudice is established if it is reasonably probable that, but for counsel's errors, the result of the trial would have been different. *Thomas*, 109 Wn.2d at 226.

Here, counsel strenuously opposed admission of the naked picture and succeeded in suppressing the medical records with the exception of the blood test evidence. Counsel also made a cogent argument to suppress the blood. But counsel fell short by neglecting to distinguish *Smith* and failing to inform the court of the mandatory prerequisites for conducting a legal blood draw and testing in the absence of a warrant or valid consent. Had counsel presented effective argument on this, the trial court would have perceived no grounds to deny exclusion the blood evidence.

Even assuming the jury was satisfied beyond a reasonable doubt that Quintana was driving, with no evidence of intoxication and considering the weakness of the recklessness evidence, the prosecution would have collapsed, and the court likely would have granted a motion to dismiss.

10. THE JURY INSTRUCTIONS DO NOT GUARANTEE UNANIMITY.

If the Court determines that the evidence was insufficient to prove either intoxication or recklessness, but not both, then reversal is required for lack of juror unanimity.

Jury instructions that relieve the State of its burden of proof constitute a manifest error of constitutional magnitude and will be reviewed, even if trial counsel did not object. *State v. Goble*, 131 Wn. App. 194, 203-04, 126 P.3d 821 (2005); *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996).

A criminal defendant has a constitutional right to a unanimous jury verdict. U.S. Const. amend. VI, XIV; Const. art. I, § 21; *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). Accordingly, if the charged crime can be committed by alternative means, the State must prove by substantial evidence each of the means charged. *State v. Arndt*, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976). Unanimity is not required as to the alternative means for committing the crime, provided substantial evidence supports each alternative means. *Randhawa*, 133 Wn.2d at 73-74; *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). In the event of reversal for insufficiency of the evidence to prove one of the means, the instructions must ensure unanimity on the remaining means. *State v.*

*Scott*, 145 Wn. App. 884, 894, 189 P.3d 209, 214 (2008), citing *State v. Fortune*, 128 Wn.2d 464, 467, 909 P.2d 930 (1996).

Here, the State charged Quintana with all three alternative means of committing vehicular assault. Quintana contends that none of the alternatives were supported by substantial evidence. If the Court finds that one of the alternatives was not proved by sufficient admissible evidence, then the conviction will stand only if the jury was unanimous on another alternative.

But Quintana's jury was specifically instructed it need not be unanimous. CP 72. Therefore, reversal is required.

V. CONCLUSION

For the foregoing reasons, Ms. Quintana asks this Court to reverse her conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this 8th day of February 2011



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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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