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41098-2-II

BY 

**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

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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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**REPLY BRIEF**

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## II. SUMMARY OF THE CASE

The police responded in the immediate aftermath when a car went off the road off of Highway 101 at Valley Road on the Skohomish reservation. RP 117. The responding officers saw Appellant, Barbara Quintana, sitting dazed in the open passenger doorway. The officer saw the other occupant of the front seat, Dion Obi, climb out of the driver's side window and stagger away before collapsing. Obi would later deny being the driver, and Quintana was convicted of vehicular assault.

Quintana asks this Court to reverse her conviction and to dismiss the prosecution with prejudice.

Quintana contends the State's evidence that she was driving while intoxicated was fruit of the poisonous tree and should have been suppressed and that the admissible evidence was insufficient to support the conviction. Ms. Quintana also challenges the jury selection process whereby she was excluded from participating in the peremptory challenges. To the extent trial counsel failed to raise preserve the evidentiary issues for review, Quintana asks the Court to review them in the context of her claim of ineffective assistance.

### III. STATEMENT OF THE CASE

The State recites inadmissible evidence as proven facts. Please refer to the Appellant's Opening Brief.

Quintana was seriously injured when the car she was riding in missed a left turn, left the highway and crashed into a utility pole. RP 122. Quintana, and Dion Obi were in front. RP 122. Quintana and Obi each claimed the other was the driver. The back seat passenger, David Wahwassuck, suffered a broken leg. RP 144, 168. Wahwassuck was a good buddy of Obi but was barely acquainted with Quintana. RP 213.

The crash occurred moments after the vehicle passed a police station. Officers Tim Smith and Christopher Newton both saw the car speed past the police station. Newton thought a long-haired male was driving. They could see 200-300 feet down the road in both directions. RP 117. The officers gave chase in separate cars. RP 118, 134. Moments later, the car missed a turn on Highway 101 and crashed into a pole. Newton arrived first and saw Obi climbing out of the driver's side window. Quintana was sitting dazed in the open door of the passenger side. Obi tried to flee the scene, and Newton restrained him by threatening him with his taser gun. Newton heard Quintana screaming and saw her coming around from the passenger side. RP 138-141. Smith arrived in time to see Obi immobilized on the driver's side and Quintana sitting in

the open door of the passenger side. RP 120-22. Newton and Smith told emergency crews that Obi was the driver and Quintana was the passenger. RP 22, 25.

The police arrested Obi and charged him with vehicular assault. Quintana and Obi were both taken to Mason General Hospital. RP 26, 262. But Wahwassuck told detective Brian George that Quintana was driving, not his pal Obi.

George headed straight for Mason General. RP 177.

At the hospital, phlebotomist Maria Rigolo did both legal and medical blood draws on both Obi and Quintana and the lab tested for alcohol concentration. RP 278. When Quintana momentarily regained consciousness, a trooper held her fingers on the pen while she signed a release of her medical records. RP 35, 37.

The police would later drop the charges against Obi and instead charged Quintana with one count of vehicular assault by driving while intoxicated. CP 86-87. The State added the alternative means of driving recklessly. CP 84-85. The jury found Quintana guilty of vehicular assault and she was sentenced to 16 months on a standard range of 13-17 months. CP 5-7.

At the suppression hearing, the court found that Quintana had not been capable of giving a valid consent and suppressed all her 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, erroneously relying on *State v. Smith*, 84 Wn. App. 813, 815, 929 P.2d 191 (1997). 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>

#### IV. ARGUMENTS IN REPLY

##### 1. THE COURT VIOLATED QUINTANA'S RIGHT TO BE PRESENT AND CONTRIBUTE TO JURY SELECTION.

The State claims Quintana must prove she was not consulted on the for-cause dismissals. Brief of Respondent (BR) 6, 8. This is wrong.

As in *Irby*,<sup>2</sup> the burden is on the State to show that the defendant had a meaningful opportunity to participate in excusing jurors. In *Irby*, the Court reversed because the record did not show that defense counsel spoke to Irby before striking a couple of jurors. BR 6, citing *Irby*, 170 Wn.2d at 884.

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

<sup>2</sup> 170 Wn.2d 874, 246 P.3d 976 (2011).

In *Irby*, the defendant was not in the courtroom. Quintana was in the room, but that portion of the jury selection involving striking jurors for cause was conducted in a sidebar at the bench at which the record does not show Quintana was present. Moreover, the whole purpose of striking the jurors at the bench was to keep the process secret. BR 6; RP 106-07.

The fact that Quintana was present in the room is not sufficient to establish that she was meaningfully present, where the court and counsel removed themselves and the discussion from open court and conducted a crucial phase of jury selection out of earshot of Quintana as well the potential jurors. The State throws up a “Chicken Little” argument that a holding by this Court that either jurors should be stricken for cause in open court or the record must show that the defendant was meaningfully included in the discussions would somehow destroy lawyer-client confidentiality between defendants and their counsel for all purposes. BR 7. This is just silly.

The Court should reverse.

2. ADMITTING THE PHOTO OF QUINTANA'S  
BARE CHEST VIOLATED CONST. ART 1, § 7  
AND THE FOURTH AMENDMENT.

The State concedes that the photograph of Quintana's bare breasts obtained without a warrant, and also argues that admitting it into evidence was completely unnecessary. BR 10. After cogently arguing at BR 5 that

review should be confined solely to evidence in the record, the State now asks the Court to consider allegations by emergency responders that the State chose not to put into evidence. This appears to be some form of harmless error theory.

The State cites a Fourth Amendment case holding that police may enter an arrested person's hospital room and search for drugs in a bedpan there. BR 11, citing *U.S. v. George*, 987 F.2d 1428, 1432 (9<sup>th</sup> Cir. 1993).

First, the privacy rights of arrestees are not comparable to those of other hospital patients. Quintana was not under arrest. She was in the hospital for the sole purpose of receiving life-saving medical treatment. Second, entering a room and searching objects therein is not comparable to removing the covering from an unconscious woman's chest and photographing her bare breasts. Third, even supposing the Fourth Amendment would condone such an outrage, Wash. Const. art. 1, § 7 would not.

The State claims, Det. George had probable cause to strip search Quintana. BR 11. If so, art. 1, § 7 required him to approach a neutral magistrate and obtain a search warrant. The State also suggests that Quintana's bare chest was exposed to all comers. BR 11. This is false. Quintana was decently covered with a blanket until George asked a doctor to remove it for solely to facilitate George's criminal investigation.

The State claims this error was harmless because it was overwhelmed by untainted evidence. BR 11-12. But the police pursued the investigation of Quintana as a suspect and sought additional evidence solely on the basis of George's photograph. Accordingly, there is no untainted evidence. The subsequently-obtained evidence was fruit of the poisonous tree and as such was not admissible in any Washington court for any purpose. *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, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

This egregious violation requires reversal.

3. THE BLOOD EVIDENCE WAS INADMISSIBLE UNDER ANY EVIDENTIARY THEORY.

The State claims the police could not have done a forensic blood draw because Quintana was not a suspect. BR 14-15, 18-19. This is false. The fact that Quintana was believed to be a passenger simply meant there was no probable cause for a forensic blood draw.

The State further denies that the police ordered any blood draw in fact. BR 16. But the State's own witness, phlebotomist Maria Rigolo, testified that she was instructed to do both medical and legal blood draws on Quintana and that a legal draw could only have been ordered by a State

Patrol Officer. RP 263-64, 278. Moreover, the purported forensic nature of the blood test was the sole reason the trial court excluded the blood results from its order suppressing Quintana's medical records because her consent to their release was unconstitutionally obtained while she was semi-conscious and not competent. Accordingly, art. 1, § 7 mandates that the medical test results must be suppressed for all purposes. The court excluded the blood test results from this blanket suppression order solely because the State claimed it was drawn pursuant to the implied consent statute. RP 72.

Moreover, the State misrepresents Quintana's argument. She does not say that no forensic blood draw was done. She says the State did a forensic blood draw unlawfully because the forensic draw did not comply with statutory prerequisites set forth at RCW 46.61.506 and RCW 46.20.308, as required by RCW 46.61.502(1)(a).

The State concedes that the blood results are inadmissible under the statutes, but claims it offered Quintana's hospital blood work as a medical draw, not a forensic draw. BR 15. The State claims the court admitted the blood as a medical waiver. BR 17. This misrepresents the record. The court suppressed all non-forensic medical records. The judge excluded the blood results from the suppression order solely to the extent the blood was tested for forensic — not medical — reasons. RP 72.

In excluding the blood from the suppression order, the trial court erroneously relied on *State v. Smith*, 84 Wn. App. 813, 929 P.2d 1191 (1997). *Smith* holds that while the implied consent statute does not allow the State to seize and test blood taken by a physician when the defendant is not under arrest, the statute does not prevent the court from admitting evidence obtained by alternative constitutional means. *Smith*, 84 Wn. App. at 819.

The facts here are distinguishable. First, Smith invoked the doctor-patient privilege to exclude blood results obtained for medical purposes. *Smith*, 84 Wn. App. at 821. By contrast, Quintana invokes article 1, section 7. The court expressly ruled that the police could not obtain Quintana's medical blood test results by constitutional means because her consent was unlawfully obtained. Coercing her consent to release her records while she was virtually unconscious violated art. 1, § 7 and required suppression of the blood test results on constitutional grounds for all purposes. This distinguishes this case from *Smith* as a matter of law. There, excluding the blood would serve no legitimate purpose. *Smith*, 84 Wn. App. at 819. Here, suppressing the blood serves the legitimate purpose of upholding protected privacy rights under Const. art 1, § 7. The State recognizes that *Smith* addressed blood that was taken "in accordance with general search and seizure law." BR 19, citing *Smith*, at 819-20.

The State claims it did not use the blood evidence to prove a particular numerical alcohol concentration, but merely alleged generally that Quintana's intoxication level exceeded the lawful limit for driving in Washington. RP 15. Later in the brief, the State cites testimony that Quintana was per se impaired because her alcohol level exceeded .08%. BR 21-22, citing RP 288. But regardless of whether it was offered to prove per se intoxication or merely alleged intoxication, either the unlawfully-obtained blood evidence was admissible or it was not. Clearly, it was not. The jury was instructed to consider the inadmissible evidence in its deliberations on the elements of the charged offense. CP 67, 69. Therefore, reversal is required.

The State appears to argue that Quintana had no reasonable expectation of privacy in the contents of her veins. BR 16. This attempt to limit Quintana's privacy protection to that encompassed by the physician-patient privilege is solely to resuscitate *Smith*, where the physician privilege was the sole ground argued to suppress the blood of the non-arrested patient. Moreover, Quintana is invoking Washington's state constitutional protections as well as the Fourth Amendment. The State cites *Smith* for the proposition that, if the physician privilege does not apply, there is no ground on which to suppress medical evidence. BR

17. This is wrong. That was the case in *Smith*, but here Const. art 1, § 7 governs the analysis.

Some of the State's authorities on the blood issue are bizarre. BR 16-17. The State invites comparison with boxes kept on property not owned by the defendant. BR 16. The State even seems to suggest that hospital patients' medical records are not private because they are in the hospital's "stream of communications." BR 17. This is meritless, as even the deputies at the hospital realized, which is why Quintana's signature was placed on a release form by manipulating her unconscious fingers.

The State offers no authority for claiming that the statutory technical and procedural prerequisites for an admissible blood draw do not apply to evidence offered solely to prove the essential element that an accused was affected by alcohol rather than having attained a per se numerical blood alcohol concentration. BR 17. When no authority is cited, this Court may presume that counsel, "after diligent search, has found none." *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000).

The State concedes that the record does not demonstrate the statutorily required proficiency credentials of Maria Rigolo and Linda Jacobson. BR 18. But the State again denies that the blood was offered under chapter 46 RCW, which is the only mechanism by which the blood

could have been rescued from the blanket suppression order for medically obtained evidence.

Quintana was convicted of vehicular assault under RCW 46.61.522(1)(a) and (1)(b). CP 4. RCW 46.61.522(1)(a) is driving in a reckless manner; RCW 46.61.522(1)(b) is driving while under the influence of intoxicating liquor as defined by RCW 46.61.502.<sup>3</sup>

The State cites *State v. Donahue*, 105 Wn. App. 67, 18 P.3d 608 (2001), for the proposition that the State can offer other competent evidence in addition to blood alcohol concentration to prove a person was under the influence of alcohol. *Donahue*, 105 Wn. App. at 72. But the Supreme Court overruled *Donahue*, to the extent it implied that breath blood tests that do not meet the technical requirements of chapter 46.61 RCW and state toxicology regulations are admissible as “other competent evidence” of intoxication. *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 50, 93 P.3d 141 (2004).<sup>4</sup>

In Quintana’s case, without the blood tests, there was no other evidence of intoxication, competent or otherwise.

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<sup>3</sup> The State correctly cites .502’s alternative definitions of being under the influence as either being intoxicated as determined by testing, or simply as being under the influence, period. BR 22, citing RCW 46.61.502. But the tautology that under the influence means under the influence does not define anything. Therefore, it cannot be what RCW 46.61.506 refers to as “as defined by RCW 46.61.502.”

<sup>4</sup> *Clark-Munoz* was superseded by regulation regarding breath test machines, but not blood tests. See, *Ludvigsen v. City of Seattle*, 162 Wn.2d 660, 664, 174 P.3d 43 (2007).

Moreover, as defined by RCW 46.61.502, driving under the influence of less than a .08 concentration under .502(1)(b) and (c) is proved by blood or breath analysis. RCW 46.61.502(4). Where, as here, blood analysis was the only way the State could establish that the person was under the influence, RCW 46.61.506 unequivocally and unambiguously requires that analysis of blood can be considered valid under the provisions of RCW 46.61.502 only if it was “performed according to methods approved by the state toxicologist and by an individual possessing a valid permit issued by the state toxicologist for this purpose.” RCW 46.61.506(3).

The Legislature made no distinction in the manner of proving an alcohol concentration of more than or less than .08%. Nor can any logical reason be conceived for doing so. Where a statute is unambiguous, judicial interpretation cannot change the meaning. “In interpreting a statute, this court looks first to its plain language. If the plain language of the statute is unambiguous, then this court’s inquiry is at an end. The statute is to be enforced in accordance with its plain meaning.” *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Moreover, when a criminal statute is ambiguous, the rule of lenity requires the Court to

construe the statute in favor of the defendant, absent legislative intent to the contrary. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

Had the Legislature intended that only alcohol levels above .08% must be established by reliable means — while harder-to-determine lesser concentrations can be established by mere unsupported allegation — it defies reason to suppose that the statute would not have been drafted to include this bizarre intent squarely in the language of the law. Since the Legislature did not do this, the only interpretation that makes any sense is that “other competent evidence” by which being under the influence can be determined refers to such things as “field sobriety tests, other scientific tests, observation, smell, etc.,” as discussed in *Donahue*, not blood tests obtained by methods that do not meet statutory reliability standards. *See Donahue*, 105 Wn. App. at 74. In *Donahue*, moreover, the State showed that the blood tests conformed to Oregon statutory standards. *Donahue*, 105 Wn. App. at 74. Here, we have only a hand-waving argument unsupported by any evidence that any standards whatsoever pertained.

The State finally claims that Jacobson’s hearsay testimony regarding the blood test results was admissible as a business record under ER 803(a)(6) or RCW 5.45.020. BR 19-20. But Quintana’s whole point was that the State produced no records whatsoever. Appellant’s Brief

(AB) at 30-31. Jacobson purported to testify from memory; her oral testimony bore no indicia of reliability and was inadmissible hearsay.

Under the trial court's own analysis, the lawfully obtained medical evidence was inadmissible under the suppression rule due to government illegality in manipulating her consent to its release. And the State concedes there is no statutory basis for a forensic draw. Therefore, the convictions cannot be sustained on the blood evidence. Reversal is required.

4. THE BLOOD EVIDENCE IS NOT RESCUED BY THE HEARSAY RULE.

The State asks the Court to admit the blood evidence because trial counsel did not challenge it as inadmissible hearsay. BR 21. But trial counsel vigorously challenged the admissibility of the blood evidence on constitutional and statutory grounds, which are squarely before this Court on appeal. The Court will reach the hearsay challenge only if the those challenges fail. In that event, in the interests of justice and completeness and to guide the trial court on remand, the Court should address all evidentiary issues touching on the blood tests.

The Court may address the hearsay challenge in the context of Quintana's ineffective assistance claim. Quintana assigned error to her counsel's failure to supplement his cogent suppression argument with a

challenge to the applicability of *Smith* and the absence of mandatory statutory prerequisites for blood testing in the absence of a warrant or valid consent. AB 38-39. The failure to challenge the evidence as manifestly inadmissible hearsay comes before the Court under the same banner.

Neither Jacobson's nor Dr. Hautala's evidence was characterized by any indicia of reliability whereby it could be deemed reliable and admissible under the hearsay rules.

This argument does not affect the inevitable conclusion that the erroneous admission of the blood evidence requires reversal.

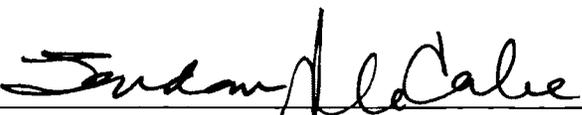
5. A UNANIMITY INSTRUCTION WAS REQUIRED.

Finally, the State contends that the jury did not need a unanimity instruction. BR 27. But Quintana was charged with all three alternative means of committing vehicular assault, and none of the alternatives was supported by sufficient evidence. If the Court finds that even 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. *State v. Randhawa*, 133 Wn.2d 67, 73-74, 941 P.2d 661 (1997). 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 23<sup>rd</sup> day of May, 2011.

  
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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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