

No. 50064-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shaun Johnson,

Appellant.

Clark County Superior Court Cause No. 13-1-01964-7

The Honorable Judge David E. Gregerson

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

ISSUES AND ASSIGNMENTS OF ERROR..... 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 7

ARGUMENT..... 25

I. The trial court violated Ms. Johnson’s Sixth and Fourteenth Amendment right to an independent jury determination of the facts by allowing the state to introduce inadmissible opinions on her guilt. 25

A. The trial court improperly allowed Luque to testify that Ms. Johnson was “impaired,” in direct violation of the Supreme Court’s decisions in Quaale and Baity..... 26

B. The trial court should not have allowed Nelson to opine that Ms. Johnson was “high” and that her behavior was consistent with being “[under] the influence of methamphetamine.” 33

II. The evidence included an unconstitutional judicial comment directed at the primary contested issue at trial. 38

III. The admission of testimonial hearsay violated Ms. Johnson’s Sixth and Fourteenth Amendment right to confrontation. 41

	A.	Testimonial hearsay is inadmissible at trial unless the declarant is unavailable and the accused person had a prior opportunity for confrontation.....	41
	B.	The erroneous admission of testimonial hearsay supporting Luque’s improper opinion (that Ms. Johnson was “impaired”) violated her right to confront witnesses.	43
	C.	The hearsay was inadmissible under ER 802 and ER 805.	45
IV.		The court improperly denied Ms. Johnson’s motion to suppress evidence unlawfully obtained in violation of the Fourth Amendment and Wash. Const. art. I §7. ...	47
	A.	Ms. Johnson’s statement and the blood test results must be suppressed because they were tainted by the illegal search of her purse and the federal attenuation doctrine violates Wash. Const. art. I, §7.	48
	B.	If the attenuation doctrine applies, Ms. Johnson’s statement and the blood test result should have been suppressed as fruit of the poisonous tree.	55
	C.	The redacted search warrant application did not establish probable cause for a blood draw.	57
	D.	The trial court adopted unsupported findings and erroneous conclusions.	60
V.		The Information and instructions omitted ordinary negligence, an essential element of vehicular assault when committed by means of intoxicated driving.	62
	A.	When committed by means of intoxicated driving, vehicular assault required proof of ordinary negligence...	63
	B.	The Bash factors, McAllister, and Lovelace require proof of ordinary negligence for conviction of vehicular assault.....	72

C.	The omission of ordinary negligence from the Information and from the court’s instructions requires reversal of Ms. Johnson’s conviction.....	81
VI.	Prosecutorial misconduct and related errors require reversal.....	84
A.	The prosecutor committed misconduct by introducing an improper judicial comment into evidence.....	85
B.	The trial court erred by allowing the prosecutor to commit misconduct by introducing testimony that Carey will require a new prosthetic every two years at an uninsured cost of \$90,000.	86
C.	The prosecutor committed misconduct by suggesting that juries can presume guilt prior to deliberations.....	87
D.	Whether considered individually or cumulatively, the prosecutor’s misconduct requires reversal.....	88
E.	If the prosecutor’s misconduct and the associated errors are not preserved for review, Ms. Johnson was deprived of the effective assistance of counsel.....	89
	CONCLUSION	90

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Alleyne v. United States</i> , --- U.S. ---, 133 S.Ct. 2151, 186 L.Ed. 2d 314 (2013).....	41, 42, 44
<i>Brown v. Illinois</i> , 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975) .	57
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	45, 47
<i>Elkins v. United States</i> , 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669 (1960).....	57
<i>Herring v. United States</i> , 555 U.S. 135, 129 S.Ct. 695, 172 L.Ed. 2d 496 (2009).....	56
<i>Hodge v. Hurley</i> , 426 F.3d 368 (6 th Cir., 2005).....	101
<i>Idaho v. Wright</i> , 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990)	44
<i>Mapp v. Ohio</i> , 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).....	58
<i>Michigan v. DeFillippo</i> , 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed. 2d 343 (1979).....	56
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966)	11, 62
<i>Morissette v. United States</i> , 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).....	74, 75, 85
<i>Nardone v. United States</i> , 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939)	58
<i>New York v. Harris</i> , 495 U.S. 14, 110 S.Ct. 1640, 109 L.Ed. 2d 13 (1990)	57
<i>Pointer v. Texas</i> , 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)...	44
<i>Stone v. Powell</i> , 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976) .	56

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	100
<i>U.S. v. Ceccolini</i> , 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed. 2d 268 (1978).	57
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963).....	52, 56

WASHINGTON STATE CASES

<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000).....	48
<i>City of Richland v. Wakefield</i> , 186 Wn.2d 596, 380 P.3d 459 (2016).....	69
<i>City of Seattle v. Heatley</i> , 70 Wn.App. 573, 854 P.2d 658 (1993).....	31
<i>City of Seattle v. McCready</i> , 123 Wn.2d 260, 868 P.2d 134 (1994).....	55
<i>Davis v. Baugh Indus. Contractors, Inc.</i> , 159 Wn.2d 413, 150 P.3d 545 (2007).....	87
<i>Fergen v. Sestero</i> , 182 Wn.2d 794, 346 P.3d 708 (2015).....	32, 33
<i>Hendrickson v. Moses Lake Sch. Dist.</i> , 199 Wn.App. 244, 398 P.3d 1199 (2017).....	32, 34
<i>In re Det. of Pouncy</i> , 168 Wn.2d 382, 229 P.3d 678 (2010)	32, 34
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012)..	95, 97, 98, 99, 101
<i>In re Marriage of Katare</i> , 175 Wn.2d 23, 283 P.3d 546 (2012).....	36
<i>Life Designs Ranch, Inc. v. Sommer</i> , 191 Wn.App. 320, 364 P.3d 129 (2015), review denied, 185 Wn.2d 1022, 369 P.3d 500 (2016).....	36
<i>Matter of Adoption of T.A.W.</i> , 186 Wn.2d 828, 383 P.3d 492 (2016)	71
<i>McNear v. Rhay</i> , 65 Wn.2d 530, 398 P.2d 732 (1965).....	61
<i>Peralta v. State</i> , 187 Wn.2d 888, 389 P.3d 596 (2017)	32
<i>Smith v. Fourre</i> , 71 Wn.App. 304, 858 P.2d 276 (1993).....	79

<i>State v. Afana</i> , 169 Wn.2d 169, 233 P.3d 879 (2010).....	53, 58, 59, 60, 65
<i>State v. Anderson</i> , 141 Wn.2d 357, 5 P.3d 1247 (2000)..	72, 75, 76, 80, 81, 85, 91
<i>State v. Aumick</i> , 126 Wn.2d 422, 894 P.2d 1325 (1995)	32, 34, 94
<i>State v. Baity</i> , 140 Wn.2d 1, 991 P.2d 1151 (2000)...	27, 28, 29, 30, 33, 34, 35, 38, 67
<i>State v. Barry</i> , 183 Wn.2d 297, 352 P.3d 161 (2015).....	34
<i>State v. Bash</i> , 130 Wn.2d 594, 925 P. 2d 978 (1996)	69, 71, 72, 73, 74, 75, 76, 77, 79, 81, 88
<i>State v. Bauer</i> , 180 Wn.2d 929, 329 P.3d 67 (2014)	87
<i>State v. Becker</i> , 132 Wn.2d 54, 935 P.2d 1321 (1997).....	41
<i>State v. Beel</i> , 32 Wn.App. 437, 648 P.2d 443 (1982)	83
<i>State v. Birdsong</i> , 66 Wn.App. 534, 832 P.2d 533 (1992).....	60, 61, 63
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	36, 39
<i>State v. Burch</i> , 197 Wn.App. 382, 389 P.3d 685 (2016), <i>review denied</i> , 188 Wn.2d 1006, 393 P.3d 356 (2017)	73, 83, 84, 86, 87, 88, 89, 90, 91, 92
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	48
<i>State v. Byers</i> , 88 Wn.2d 1, 559 P.2d 1334 (1977).....	62
<i>State v. Byrd</i> , 178 Wn.2d 611, 310 P.3d 793 (2013)	64
<i>State v. Chenoweth</i> , 160 Wn.2d 454, 158 P.3d 595 (2007)	55, 59
<i>State v. Clark</i> , 139 Wn.2d 152, 985 P.2d 377 (1999).....	45
<i>State v. DeRyke</i> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	94
<i>State v. Eike</i> , 72 Wn.2d 760, 435 P.2d 680 (1967).....	70
<i>State v. Eserjose</i> , 171 Wn.2d 907, 259 P.3d 172 (2011)	53, 54

<i>State v. Evans</i> , 163 Wn.App. 635, 260 P.3d 934 (2011)	99
<i>State v. Everybodytalksabout</i> , 145 Wn.2d 456, 39 P.3d 294 (2002) .	51, 96, 98
<i>State v. Ferguson</i> , 76 Wn.App. 560, 886 P.2d 1164 (1995).....	79
<i>State v. Fisher</i> , 185 Wn.2d 836, 374 P.3d 1185 (2016).....	34, 35
<i>State v. Garrison</i> , 118 Wn.2d 870, 827 P.2d 1388 (1992)	66
<i>State v. Gonzales</i> , 46 Wn.App. 388, 731 P.2d 1101 (1986)	62
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	55
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994).....	61
<i>State v. Hursh</i> , 77 Wn.App. 242, 890 P.2d 1066 (1995)	70, 82
<i>State v. Ibarra-Cisneros</i> , 172 Wn.2d 880, 263 P.3d 591 (2011) .	53, 54, 61, 62, 63
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.3d 136 (2006), <i>as corrected</i> (Feb. 14, 2007)	42, 43, 96
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012)	46
<i>State v. Johnson</i> , 188 Wn.2d 742, 399 P.3d 507 (2017).....	83
<i>State v. Johnston</i> , 38 Wn.App. 793, 690 P.2d 591 (1984).....	61, 62
<i>State v. Jones</i> , 144 Wn.App. 284, 183 P.3d 307 (2008).....	97
<i>State v. King</i> , 167 Wn. 2d 324, 219 P.3d 642 (2009)	31, 40
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	31
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	92
<i>State v. Kronich</i> , 160 Wn.2d 893, 161 P.3d 982 (2007).....	45
<i>State v. Kyлло</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	94, 100, 101
<i>State v. Ladson</i> , 138 Wn.2d 343, 979 P.2d 833 (1999)	52

<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014)	46
<i>State v. Laramie</i> , 141 Wn.App. 332, 169 P.3d 859 (2007).....	34
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	41, 42, 44, 67
<i>State v. Lopez</i> , 93 Wn.App. 619, 970 P.2d 765 (1999).....	83
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	93
<i>State v. Lovelace</i> , 77 Wn.App. 916, 895 P.2d 10 (1995).....	70, 81, 82
<i>State v. Lyons</i> , 174 Wn.2d 354, 275 P.3d 314 (2012).....	64, 67, 69
<i>State v. McAllister</i> , 60 Wn.App. 654, 806 P.2d 772 (1991)	70, 81, 82
<i>State v. Meekins</i> , 125 Wn.App. 390, 105 P.3d 420 (2005).....	88
<i>State v. Morse</i> , 156 Wn.2d 1, 123 P.3d 832 (2005).....	55
<i>State v. Norman</i> , 61 Wn.App. 16, 808 P.2d 1159 (1991)	74
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010)	46
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	37
<i>State v. Pittman</i> , 185 Wn.App. 614, 341 P.3d 1024 (2015).....	92
<i>State v. Quaale</i> , 182 Wn.2d 191, 340 P.3d 213 (2014) ...	26, 27, 28, 29, 30, 31, 33, 34, 35, 41, 50
<i>State v. Reeder</i> , 184 Wn.2d 805, 365 P.3d 1243 (2015).....	64
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005)	70
<i>State v. Ross</i> , 141 Wn.2d 304, 4 P.3d 130 (2000).....	60, 63, 65
<i>State v. Russell</i> , 171 Wn.2d 118, 249 P.3d 604 (2011).....	45
<i>State v. Sample</i> , 52 Wn.App. 52, 757 P.2d 539 (1988)	73
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997) (<i>Smith I</i>).....	93, 94

<i>State v. Smith</i> , 177 Wn.2d 533, 303 P.3d 1047 (2013) (<i>Smith II</i>).....	54
<i>State v. Stein</i> , 144 Wn.2d 236, 27 P.3d 184 (2001)	94
<i>State v. Terrovona</i> , 105 Wn.2d 632, 716 P.2d 295 (1986)	65
<i>State v. VanNess</i> , 186 Wn.App. 148, 344 P.3d 713 (2015)	60, 63, 65
<i>State v. W.R., Jr.</i> , 181 Wn.2d 757, 336 P.3d 1134 (2014).....	84, 92
<i>State v. Walker</i> , 157 Wn.2d 307, 138 P.3d 113 (2006) (<i>Walker I</i>).....	56
<i>State v. Walker</i> , 182 Wn.2d 463, 341 P.3d 976 (2015), <i>cert. denied</i> , 135 S.Ct. 2844, 192 L.Ed. 2d 876 (2015) (<i>Walker II</i>).....	95
<i>State v. Warner</i> , 125 Wn.2d 876, 889 P.2d 479 (1995).....	61
<i>State v. Watt</i> , 160 Wn.2d 626, 160 P.3d 640 (2007).....	48, 63
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	55, 58
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065 (1984) (<i>Williams III</i>).	62
<i>State v. Williams</i> , 158 Wn.2d 904, 148 P.3d 993 (2006) (<i>Williams II</i>) ...	76, 78
<i>State v. Williams</i> , 171 Wn.2d 474, 251 P.3d 877 (2011) (<i>Williams I</i>).....	71
<i>State v. Williams-Walker</i> , 167 Wn.2d 889, 225 P.3d 913 (2010).	41, 42, 44
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009)..	53, 58, 59, 60
<i>State v. Youngs</i> , 199 Wn.App. 472, 400 P.3d 1265 (2017)	61, 65, 67
<i>State v. Zillyette</i> , 178 Wn.2d 153, 307 P.3d 712 (2013).....	92
<i>Taylor v. Bell</i> , 185 Wn.App. 270, 340 P.3d 951 (2014).....	36
<i>Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.</i> , 171 Wn.2d 88, 249 P.3d 607 (2011).....	51
<i>W. Packing Co., Inc. v. Visser</i> , 11 Wn.App. 149, 521 P.2d 939 (1974)...	79

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV 4, 53, 55, 56, 57, 62, 64
U.S. Const. Amend. V 5
U.S. Const. Amend. VI..... 1, 2, 3, 5, 27, 28, 42, 45, 48, 95, 101
U.S. Const. Amend. XIV 1, 2, 3, 5, 6, 27, 28, 42, 45, 48, 94, 95, 101
Wash. Const. art. I, §21..... 1, 2, 28, 42
Wash. Const. art. I, §22..... 1, 2, 6, 28, 42, 95
Wash. Const. art. I, §3..... 6, 28
Wash. Const. art. I, §7..... 4, 53, 54, 55, 56, 57, 59, 60, 64
Wash. Const. art. IV, §16..... 2, 42, 43, 45

WASHINGTON STATE STATUTES

Laws of 1991, Ch. 348 75
Laws of 1996, Ch. 199 75
Laws of 1998, Ch. 211 75
Laws of 2001, Ch. 300 75
RCW 46.61.502 27, 61
RCW 46.61.520 70, 73, 76
RCW 46.61.522 27, 67, 70, 73, 75, 79
RCW 46.61.5249 83
RCW 46.61.525 83
RCW 9A.36.011..... 78
RCW 9A.36.031..... 78

OTHER AUTHORITIES

Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing* (2016) 74

CrR 3.6..... 57

ER 401 24, 89

ER 402 6, 23, 24, 89

ER 403 6, 23, 24, 89

ER 701 1, 2, 34, 36, 38, 39, 40

ER 702 1, 2, 35, 36, 38, 39

ER 703 48

ER 801 48

ER 802 3, 47, 48

ER 803 11, 47, 48

ER 805 3, 47, 48

In re Jorge M., 23 Cal. 4th 866, 4 P.3d 297, 98 Cal. Rptr. 2d 466 (2000) 71

LaFave & Scott, *Substantive Criminal Law* (1986)..... 71

People v. Ellison, 14 P.3d 1034 (Colo. 2000)..... 68

RAP 2.5..... 41, 44, 45, 92

ISSUES AND ASSIGNMENTS OF ERROR

1. Ms. Johnson’s conviction was obtained in violation of her right to due process under the Fourteenth Amendment.
2. Ms. Johnson’s conviction was obtained in violation of her right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§21 and 22.
3. The trial court erroneously admitted improper opinion testimony, in violation of ER 701 and ER 702.
4. Deputy Luque’s improper opinion testimony infringed Ms. Johnson’s right to an independent jury determination of the facts.
5. Deputy Luque’s “expert” opinion that Ms. Johnson was “impaired” should have been excluded under ER 702 because the Supreme Court has prohibited such opinions from Drug Recognition Experts.
6. Deputy Luque’s opinion was inadmissible because of his failure to comply with the mandatory twelve-step DRE protocol.
7. Karen Nelson’s improper lay opinion testimony infringed Ms. Johnson’s right to an independent jury determination of the facts.
8. Nelson’s lay opinion was inadmissible under ER 701 because it was not rationally based on her perceptions or helpful to the jury, and because it fell within the scope of ER 702.
9. Nelson’s “expert” opinion that Ms. Johnson was “high” should have been excluded under ER 702.
10. Nelson’s “expert” opinion that Ms. Johnson’s demeanor and behavior were consistent with being “[under] the influence of methamphetamine” should have been excluded under ER 702.

ISSUE 1: An opinion on guilt violates an accused person’s right to an independent jury determination of the facts, even if given by inference. Did the improper admission of opinion testimony from Deputy Luque and Karen Nelson violate Ms. Johnson’s constitutional rights to due process and to a jury trial?

ISSUE 2: ER 702 permits introduction of expert opinion, but only if provided by a qualified expert, based on a theory generally accepted in the scientific community, and helpful to the jury. Did the trial court abuse its discretion by admitting “expert” opinions that failed to meet these requirements?

ISSUE 3: ER 701 prohibits introduction of a lay opinion unless rationally related to the witness's perception, helpful to the jury, and outside the scope of ER 702. Did the trial court abuse its discretion by admitting Nelson's opinion testimony under ER 701?

11. The court committed reversible error by rejecting the defendant's proposed instruction on DRE evidence.

ISSUE 4: Instructional error that favors the prevailing party is presumed prejudicial; the same is true when the court fails to instruct on a defense theory supported by the evidence. Did the trial court commit reversible error by rejecting Ms. Johnson's proposed instruction regarding Luque's DRE testimony, in which he claimed she was "impaired" despite his failure to complete the mandatory 12-step DRE protocol?

12. The evidence included an improper judicial comment on the evidence, in violation of Wash. Const. art. IV, §16.
13. The improper judicial comment violated Ms. Johnson's right to a jury trial under U.S. Const. Amend. VI and XIV and Wash. Const. art. I, §§21 and 22.
14. The prosecutor improperly introduced testimony that Luque "authored" a search warrant because he believed Ms. Johnson was "impaired," and that a search warrant is "run by the judge and a judge has approved it."

ISSUE 5: Judicial comments are presumed prejudicial and require reversal unless the record affirmatively shows that no prejudice could have resulted. Did Luque's testimony (that a judge had "approved" the search warrant he'd "authored") improperly notify jurors that a judicial officer agreed with his belief that Ms. Johnson was "impaired"?

15. The admission of testimonial hearsay violated Ms. Johnson's Sixth and Fourteenth Amendment right to confrontation.
16. The trial court erred by overruling Ms. Johnson's hearsay objection to out-of-court statements offered for their truth.
17. The trial court erred by admitting hearsay within hearsay without finding that each part of the combined statements conformed with an exception to the hearsay rule as required by ER 805.

18. The trial court should have excluded hearsay outlining the statements of hospital staff that were contained within Luque's recorded recollection.
19. The trial court should not have admitted the out-of-court testimonial statements of unnamed non-testifying hospital staff regarding the administration of opiate painkillers to Ms. Johnson minutes prior to Deputy Luque's contact with her.

ISSUE 6: The confrontation clause prohibits admission of testimonial hearsay unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. Did the admission of testimonial hearsay violate Ms. Johnson's constitutional right to confront the witnesses against her?

ISSUE 7: An out-of-court statement offered for its truth is inadmissible hearsay unless the proponent establishes an exception to ER 802. Did the trial court err by overruling Ms. Johnson's hearsay objection to the out-of-court statement of unnamed hospital staff indicating that Ms. Johnson had received Fentanyl and Dilauded, with the last dose purportedly administered minutes before Deputy Luque arrived at the hospital?

ISSUE 8: Under ER 805, the proponent of "hearsay with hearsay" must establish a basis for admitting each portion of the combined statements. Did Luque's recorded recollection (in the form of his prior trial testimony) include inadmissible hearsay outlining the statements of non-testifying hospital staff?

20. The trial court erred by denying Ms. Johnson's motion to suppress evidence obtained in violation of her right to be free from unreasonable searches and seizures under the Fourth Amendment.
21. The trial court erred by denying Ms. Johnson's motion to suppress evidence obtained in violation of her right to privacy under Wash. Const. art. I, §7.
22. The trial court erred by admitting evidence tainted by the initial warrantless search of Ms. Johnson's purse.
23. The federal attenuation doctrine applicable to tainted evidence violates Wash. Const. art. I, §7.

24. The trial court erred by admitting Ms. Johnson's statement that she'd used methamphetamine two days before the accident, which Deputy Luque obtained by exploiting a prior warrantless search of her purse.
25. Deputy Gosch's unlawful seizure of methamphetamine tainted Ms. Johnson's statements to him at the scene and her statements to Deputy Luque at the hospital.
26. The trial court erred by admitting the blood test results, which were obtained following issuance of a search warrant based in part on Ms. Johnson's tainted statements to Deputy Luque.
27. The trial court erred by refusing to suppress evidence seized pursuant to a search warrant that was not based on probable cause.
28. The trial court erred by adopting Finding of Fact No. 24.
29. The trial court erred by adopting Finding of Fact No. 26.
30. The trial court erred by adopting Finding of Fact No. 28.
31. The trial court erred by adopting Finding of Fact No. 29.
32. The trial court erred by adopting Finding of Fact No. 30.
33. The trial court erred by adopting Finding of Fact No. 31.
34. The trial court erred by adopting Conclusion of Law No. 4.
35. The trial court erred by adopting Conclusion of Law No. 6.
36. The trial court erred by adopting Conclusion of Law No. 7.
37. The trial court erred by adopting Conclusion of Law No. 8.

ISSUE 9: Evidence is tainted by a prior illegal search unless the state proves the relationship between the prior illegality and the statement is sufficiently attenuated to dissipate the taint. Did the trial court err by denying Ms. Johnson's motion to suppress her statement, which police obtained by exploiting their discovery of methamphetamine during an unlawful search of her purse?

ISSUE 10: A tainted statement may not be admitted at trial where the State fails to meet its burden to prove attenuation. Should the court have suppressed Ms. Johnson's tainted statement, given the State's failure to present facts or argument showing that the relationship between the unlawful search and the statement was sufficiently attenuated to dissipate the taint?

ISSUE 11: Tainted statements may not be considered when assessing probable cause to issue a search warrant. Did the trial court err by upholding the search warrant based in part on Ms. Johnson's tainted statement?

ISSUE 12: Probable cause supporting a search warrant must be based on "reasonably trustworthy information." Did Deputy Luque fail to produce reasonably trustworthy information that Ms. Johnson drove while impaired by drugs?

38. Ms. Johnson's vehicular assault conviction violated her Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against her.
39. The vehicular assault conviction violated Ms. Johnson's state constitutional right to notice under Wash. Const. art. I, §§3 and 22.
40. The Information was deficient because it failed to allege ordinary negligence, an essential element of vehicular assault by means of intoxicated driving.

ISSUE 13: A criminal Information must set forth all of the essential elements of an offense. Did the State's failure to allege ordinary negligence violate Ms. Johnson's right to notice of the essential elements of vehicular assault?

41. Ms. Johnson's convictions violated her Fourteenth Amendment right to due process.
42. The court's instructions relieved the State of its burden to prove the essential elements of vehicular assault.
43. The court's instructions failed to make the relevant legal standard manifestly clear to the average juror.
44. The court's "to convict" instruction allowed conviction absent proof of ordinary negligence, an essential element of vehicular assault by means of intoxicated driving.
45. When considered as a whole, the court's instructions allowed the jury to convict Ms. Johnson of vehicular assault without proof of ordinary negligence.
46. The trial court erred by giving Instruction No. 11.

ISSUE 14: A “to convict” instruction must include every essential element of an offense. Did the court’s “to convict” instructions allow conviction without proof of ordinary negligence, an essential element of vehicular assault by means of intoxicated driving?

ISSUE 15: Jury instructions in a criminal case violate due process if they relieve the prosecution of its burden to prove the elements of an offense. Must Ms. Johnson’s convictions be reversed because the court’s instructions relieved the State of its burden to prove ordinary negligence?

47. Prosecutorial misconduct deprived Ms. Johnson of her Fourteenth Amendment right to a fair trial.
48. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by improperly introducing a judicial comment into evidence.
49. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by suggesting that the search warrant “authored” by Deputy Luque had been “approved” by a judge who agreed that Ms. Johnson showed signs of impairment.
50. The prosecutor committed prejudicial misconduct by introducing irrelevant, cumulative, emotional testimony calculated to inflame the passions of jurors.
51. The trial court erred by overruling Ms. Johnson’s ER 402 and ER 403 objection to Janette Chumley’s testimony.
52. The trial court erred by allowing the State to introduce evidence that Justin Carey would have to replace his prosthetic leg every two years, for the rest of his life, at an uninsured cost of \$90,000.
53. The prosecutor committed misconduct in closing argument.
54. The prosecutor improperly suggested that defendants could be presumed guilty prior to the start of deliberations.

ISSUE 16: Prosecutorial misconduct may deprive an accused person of a fair trial. Did the prosecutor’s prejudicial misconduct violate Ms. Johnson’s Fourteenth Amendment right to due process?

ISSUE 17: An erroneous evidentiary ruling requires reversal if it causes prejudice. Did the erroneous introduction of irrelevant, cumulative, and prejudicial evidence affect the outcome of the case?

55. If the arguments relating to prosecutorial misconduct are not preserved, Ms. Johnson was denied the effective assistance of counsel.

ISSUE 18: Generally, defense counsel's failure to object to prosecutorial misconduct falls below an objective standard of reasonableness. Did defense counsel provide ineffective assistance by failing to object to prosecutorial misconduct?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. Following a car accident Shaun Johnson was treated by paramedics, transported to the hospital, and administered opiate painkillers.

Shaun Johnson's attention left the road when she undid her seatbelt and reached for a dropped cigarette. While she was distracted, her tires hit gravel and the sedan she was driving slid off the pavement. RP 64-65, 244-245, 290, 373, 571, 604, 627. The car drove into a ditch, struck a culvert, and launched itself into the air. RP 219, 246, 270, 302, 308, 348, 352, 356, 358-359, 373, 646, 657, 665, 790.

Ms. Johnson was first treated at the scene, where paramedics may have given her pain medication. CP 161; RP 93, 244-245, 273, 585. She was then taken to a hospital for further treatment. CP 162; RP 249, 546.

Before the ambulance took Ms. Johnson away, Deputy Tim Gosch arrived and interacted with her. CP 161; RP 246-249. He saw no evidence that she was impaired. CP 161; RP 22, 95, 248. Gosch did not arrest Ms. Johnson or request the help of a Drug Recognition Expert (DRE), as he

would have done had she seemed under the influence of drugs. RP 95, 248, 259. This was so, even though he found methamphetamine in her purse, confronted her with it, and learned she was a self-described addict who admitted using methamphetamine two days earlier.¹ CP 3. Gosch left the crash scene when a tow truck arrived to recover the car. RP 249.

After pulling the sedan from the ditch, the tow driver heard a call for help and found Justin Carey in the bushes. CP 162; RP 309-315. Ms. Johnson, Deputy Gosch, as well as the two civilians who stopped after witnessing the accident, had not known that anyone had been hit by the car. CP 161-162; RP 249-250, 285-286, 290-291, 300-305.

Carey had severe injuries. CP 162; RP 313, 498-99. He was airlifted to a hospital, went through multiple surgeries, and ultimately had one leg amputated. CP 162; RP 504-506.

After Carey was found, Deputy Gosch returned to the accident scene, and more officers were called in. RP 250, 252. Detective Todd Young, an accident reconstruction expert, confirmed Ms. Johnson's statement that she was traveling at or below the speed limit when she left the pavement. RP 23, 45, 64, 371-372. He concluded that the car hit Carey after it struck the culvert and launched into the air. RP 373-374, 653, 655, 672. According to Detective Young, an unimpaired person with average

¹ The Court of Appeals later suppressed the methamphetamine seized from her purse. CP 2.

reaction time would likely have been unable to react before striking the culvert and colliding with Carey. RP 643, 644, 646, 649-651.²

2. Deputy Christopher Luque evaluated Ms. Johnson for impairment, three hours after the accident, when she had already been administered opiate painkillers.

Young also sent Deputy Christopher Luque to the hospital to evaluate Ms. Johnson. CP 162; RP 12, 13, 16-18, 334. At the time, Luque was a certified Drug Recognition Expert. CP 163; RP 26, 515, 544. The only reason Young summoned Luque was because the accident involved a serious injury; calling in a DRE was (according to Young) “purely protocol.” CP 162; RP 16-18, 21, 34.

Luque was sent to the hospital to determine “whether the Defendant was impaired by drugs.” CP 162. He arrived about three hours after the crash. CP 161, 163; RP 576. He spoke to hospital staff and learned that Ms. Johnson had been administered two painkillers: Fentanyl and Dilaudid. CP 164-165; RP 39-40, 433, 453, 550-551, 546.

He did not ask if she’d received the medication by tablet or intravenously. RP 68-69.³ Nor did he ask if either painkiller (or any other med-

² Detective Young agreed that Ms. Johnson, who was then 47, might have had a slower than average reaction time. RP 649. He did not test her reaction time. RP 650.

³ In his trial testimony, he told the jury that she’d received the medication intravenously. RP 563. When given intravenously, these medications act more rapidly than when provided in tablet form. RP 68-69.

ications) had been administered by EMTs in the field. RP 585.

Luque gave several different accounts regarding the timing of the medication. RP 42, 68-71, 86, 563, 584, 585.⁴ At trial, he testified that she'd received two doses of Dilaudid, with the second dose minutes before he arrived.⁵ RP 563. However, a blood test did not reveal the presence of either drug. RP 437. This result surprised WSP toxicologist Asa Louis, who knew of the timeframe claimed by Luque when the toxicologist did the testing. RP 459-460, 472.⁶

After speaking with medical personnel, Luque approached Ms. Johnson. CP 163; RP 546-547. She was in a hospital bed, with her arm in a sling, hooked up to monitoring equipment. CP 163; RP 546-547. Ms. Johnson waived her rights and agreed to speak with Luque. CP 163.

Ms. Johnson explained that she'd gone off the road after reaching for a dropped cigarette. RP 47, 571. She also reaffirmed what she'd told

⁴ At a pretrial suppression hearing, Luque first testified that he did not know when the drugs were given or how they were administered. RP 42, 68-71. He then claimed he'd written in his report that she'd received a dose of Dilaudid seconds before he arrived. RP 86. This differed from his trial testimony. RP 563, 584, 585.

⁵ Luque wrote in his report that the medication was given "prior to [his] arrival," but he did not document how much time had elapsed since it had been administered. RP 584, 585. When he testified in front of the jury, he could not remember what he'd been told by hospital staff, and his memory was not refreshed by his testimony at the first trial. RP 552-563. Instead, the state introduced his testimony from the prior trial regarding the statements hospital staff had made to him two years before the first trial. RP 554-563; *see* ER 803(a)(5) ("Recorded recollection.")

⁶ The toxicologist did not remember being surprised by the time of the second trial. RP 459-460. However, after reviewing interview notes, he agreed he had been surprised at the time of the testing, when he'd been able to consult his file. RP 459-460.

Gosch after he confronted her with the methamphetamine he'd found in her purse: that she'd used methamphetamine two days before the crash. CP 3, RP 51, 568.

Although he spent more than an hour at the hospital, Luque only interacted with Ms. Johnson for 15-20 minutes of that time. RP 47, 62, 548, 587.⁷ During his contact with her, hospital staff interrupted to provide treatment, take X-Rays and CAT scans, and perform "various medical procedures." CP 164.

During his brief time with Ms. Johnson, Luque did not attempt the entire 12-step DRE protocol. CP 165; RP 55, 591-594, 605.⁸ He did note that her pupils were normal, that her eyes showed no horizontal or vertical nystagmus, that her blood pressure was normal, and that her pulse was slightly elevated. RP 49-50, 72, 564-565. She did not appear to be agitated, jittery, or "accelerated," which are characteristics associated with methamphetamine use. RP 52, 83, 471, 569, 570.

Instead, Luque saw signs that were consistent with the narcotic painkillers she'd been administered. RP 76, 472, 567. Her movement was slow, her speech was slow and thick, and her answers to his questions

⁷ At one point, Luque admitted it could have been as little as 10 minutes. RP 62.

⁸ Luque later explained that he thought too much time had passed, that her injuries would prevent him from conducting some of the testing, and that the administration of pain medication would interfere with his ability to evaluate her. RP 604-605.

were delayed.⁹ RP 76, 472, 567.

He did not administer a breath alcohol test, which is the first step in the DRE protocol. RP 74, 610, 619. Nor did Luque attempt a dark-room eye exam, a test for reaction to light, or an eye convergence test, all of which are part of the protocol. RP 78, 541. He did not assess Ms. Johnson's muscle tone, search for injection sites, or even ask her to do the divided attention tests she was capable of in her condition. RP 78-82, 594.

3. Luque obtained a search warrant authorizing a blood draw, based in part on his partial DRE evaluation and Ms. Johnson's statement admitting drug use two days prior.

After speaking with Ms. Johnson, Luque sought and obtained a search warrant for a blood draw. CP 164; RP 576. In his search warrant affidavit, Luque acknowledged that he saw Ms. Johnson about three hours after the accident, and that "she had received 150 MG of Fentanyl and 1 MG of Dilaudid for pain prior to [his] arrival." Ex. 2, pp. 3-4.

He relayed his observations regarding her pupils, pulse, blood pressure, movement, speech, and alertness. Ex. 2, p. 4. Deputy Luque went on to say that "Dilaudid and Fentanyl are opiate based narcotics and will present [sic] with depressed vital signs to include pupil constriction." Ex. 2, p. 4. In his warrant application, he did not suggest that Ms. Johnson

⁹ Despite this, he described her as "alert". RP 566.

had been impaired, under the influence, or affected by drugs while driving.

Ex. 2. Instead, he wrote that at the time he interviewed her (starting three hours after the crash), Ms. Johnson was not meeting his expectations for someone who had been administered opiate painkillers:

I have contacted persons under the use [sic] of these highly influential [sic] medications and know these persons often have difficulty staying awake with their vital signs presenting low. I have found Johnson's vital signs to be elevated^[10] while her physical state is alert and awake. Johnson's pupils are additionally dilated when in comparison to [sic] what would be expected with the use of these narcotics.

Ex. 2, p. 5.

In his warrant application, Luque did not say when medical personnel administered the narcotics, nor whether any medication had been given by paramedics in the field. Ex. 2, pp. 3-5. Nor did he outline what he knew about how quickly Fentanyl and Dilaudid act, how their effects vary from person to person, how their effects might be influenced by a recent meal or the intense shock of a car accident, or how long they continue to impact a person's demeanor, behavior, vital signs, pupil size, and so forth. Ex. 2, pp. 3-5.

In his affidavit, Luque also relayed Ms. Johnson's statement regarding the cause of the crash, her admission that she had used metham-

¹⁰ This was not accurate. Ms. Johnson's pulse was slightly elevated; her other vital signs were normal. RP 49-50, 72, 564-565.

phetamine two days earlier, and her prior conviction for possession.¹¹ RP 57; Ex. 2, p. 3. Following issuance of the warrant, Luque obtained a blood sample and sent it to the state toxicology lab. RP 577.¹²

The blood sample was tested twice.¹³ RP 427-432. The test did not reveal the presence of any opiates. RP 437, 459-460. Toxicologist Louis reported methamphetamine levels of .11 and .16. RP 427, 431-432. He later testified that this level might impair someone; however, he could not say that it had impaired Ms. Johnson. RP 432, 464-467.

Toxicologist Louis opined that these levels could be consistent with Ms. Johnson's statement that she'd used two days prior. RP 465. He made no attempt to extrapolate to the levels present at the time of the accident. RP 395-473. According to Louis, people metabolize methamphetamine differently, and impairment would depend (in part) on the person's history with the drug rather than the blood concentration. RP 464, 466. Given a blood concentration value, Louis would not be able to say "if that

¹¹ The application also referred to the unlawfully discovered methamphetamine from Ms. Johnson's purse, which was later suppressed by the Court of Appeals. Ex. 2, p. 3; CP 2. On remand, this information was redacted from the warrant for purposes of Ms. Johnson's suppression motion. Ex. 2, p. 3.

¹² On the form Luque submitted to the lab with the blood sample, Luque did not check the preprinted box indicating that he'd reached any opinion as a DRE. RP 599-602; Ex. 63.

¹³ This occurred because of a Court of Appeals decision, later overturned, which required a second search warrant to authorize testing of blood samples seized pursuant to a prior warrant. RP 178-179.

person is functional or if that person is deceased.” RP 467.¹⁴ Low levels of the drug might be toxic to a “naïve user,” while an experienced user could tolerate a level “in the milligram per liter range,” nearly ten times the levels reported in Ms. Johnson’s blood. RP 427, 431-432, 466.

4. Ms. Johnson’s conviction for vehicular assault was overturned on appeal because the police unlawfully searched her purse and the state introduced the fruits of that search at trial.

Ms. Johnson was charged with vehicular assault.¹⁵ Second Amended Information filed 4/22/15, Supp. CP. The operative language of the charging document provided that Ms. Johnson “did operate or drive a vehicle while under the influence of or affected by... any drug, and did cause substantial bodily harm to another.” Second Amended Information filed 4/22/15, Supp. CP.¹⁶ It did not allege ordinary negligence.

Ms. Johnson was convicted, but the conviction was reversed on appeal.¹⁷ CP 2. The Court of Appeals found Gosch’s warrantless search of

¹⁴ When the prosecutor gave the toxicologist a hypothetical combining the blood concentration result with symptoms that differed from Luque’s observations, Louis could still only say that it was possible the patient was impaired. RP 468.

¹⁵ A possession charge was later dismissed following reversal on appeal. Ms. Johnson also pled guilty to bail jumping following a missed court appearance. Second Amended Information filed 4/22/15, Supp. CP; CP 2, 179; RP 919. Neither charge is at issue in this appeal.

¹⁶ The state also notified Ms. Johnson it would seek an exceptional sentence because Carey’s injuries “substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense.” Second Amended Information, filed 4/22/15, Supp. CP.

¹⁷ A conviction for possession of methamphetamine was also reversed, and the state did not retry that charge. CP 12.

Ms. Johnson's purse unlawful. CP 2. The court suppressed the methamphetamine seized from the purse and remanded the case for a new trial. CP 2, 13.¹⁸

5. Prior to Ms. Johnson's second trial, the court denied her motion to suppress her statements and the blood test results.

Ms. Johnson moved to suppress her admission that she'd used methamphetamine two days before the accident. RP 7-8, 108-109; CP 15-16, 40. She argued (in part) that the illegal warrantless search of her purse (and questioning by Gosch at the scene) tainted her answers to Luque's questions. RP 7-8, 108-109, 202-204; CP 15-16, 40. The court denied the motion and the statement was introduced at trial. RP 568; CP 160-167.

Ms. Johnson also moved to suppress the blood test results. CP 15-40; RP 102-108, 113-115. She argued that the warrant was based in part on her tainted statements, that Luque's opinions should not have been considered because he failed to complete the 12-step DRE protocol, and the warrant application did not establish probable cause to believe she had been impaired while driving. CP 15-40; RP 102-108, 113-115, 202-204.

The court denied her motion. CP 160-167; RP 117-121, 123-128, 147, 205.¹⁹ The blood test results were admitted at trial. RP 427-432. The

¹⁸ The Court of Appeals declined to reach several other issues. CP 13-14.

¹⁹ The court also denied Ms. Johnson's post-trial motion for arrest of judgment or a new trial, which incorporated by reference the motion to suppress. CP 157.

toxicologist opined that they could be consistent with Ms. Johnson's statement that she'd used two days prior. RP 465. He was not able to conclude that she'd been impaired at the time of the accident. RP 427, 431-432, 464, 466, 467.

6. Over objection, the trial court permitted Luque to testify that Ms. Johnson was "impaired," based on his partial DRE assessment.

Ms. Johnson asked the court to prohibit Luque from testifying to any opinions based on his incomplete DRE assessment. RP 162, 170-171. The court declined, allowing Luque to relay the conclusions he drew from his partial administration of the DRE protocol. RP 174-175.

The defense also renewed this request prior to Luque's testimony, but the court refused to change its decision. RP 511-512. Luque gave the jury a lengthy account of his training and experience, outlined the DRE protocol, and explained that maintaining his certification required continuing education, independent review of each DRE report he submitted, and annual testing. RP 514-543.

Despite his failure to complete the 12-step DRE protocol in Ms. Johnson's case, Luque opined that she was "impaired," and implied that the only difficulty he had was in pinpointing the correct drug category causing the impairment:

A. I believed that obviously -- that at the time that I was seeing her that she was *impaired* under something else besides the narcotic analgesics that were administered by the hospital staff.

Q. Okay. But you couldn't pin -- pinpoint what -- what drug category?

A. No, sir.

Q. Okay. It was something else other than the pain -- pain medicine on board?

A. Yes, sir.

RP 576 (emphasis added).

The court also overruled a hearsay objection²⁰ to Luque's testimony that he'd learned Ms. Johnson was administered a dose of Dilaudid intravenously just minutes before he spoke with her.²¹ RP 554-563. The information given him by an unidentified medical provider was important to his opinion that Ms. Johnson was "impaired" by something other than the painkillers. RP 563-566, 576, 579-580.

Luque based his opinion that Ms. Johnson was impaired on his belief that there was "an antagonistic effect between a CNS stimulant and a narcotic analgesic." RP 579-580.²² However, according to the toxicologist, Louis, stimulants (such as methamphetamine) and opiates (such as Fentanyl and Dilaudid) do not have true antagonistic effects. RP 433, 460. Instead, because they work through different neural pathways, they do not

²⁰ Defense counsel did not raise a confrontation objection. RP 554-563.

²¹ Because Luque could not remember what he'd been told, the state introduced the statements from hospital staff through a recorded recollection: Luque's testimony from the first trial, which was held two years after the accident. RP 552-564.

²² When defense counsel sought to reconfirm this, the state's objection ("Asked and answered") was sustained. RP 605.

directly interfere with each other. RP 433, 460. Louis testified that the combined effect of methamphetamine and opiates during a given period would depend on the time each drug is administered, the dosage, and their absorption and decay curves. RP 420-421, 433-435.

Prior to closing arguments, Ms. Johnson asked the court to instruct jurors on the law relating to DRE opinion testimony. CP 130; RP 760-766. The State objected to instruction and the court did not give it. RP 766-767.

In opening statements and closing arguments, the prosecutor relied heavily on Luque's DRE expertise and his opinion regarding Ms. Johnson's impairment. RP 218-233, 790, 809, 848. Defense counsel also focused much of his closing argument on Luque's testimony. RP 823-825, 832-843.

Following the presentation of evidence, Ms. Johnson moved for a mistrial based on the admission of Luque's opinion testimony. RP 734-736, 743-744. She also moved for a new trial following the verdict. CP 156-159; RP 895-897. The court denied both motions. RP 746, 897-898.

7. The prosecution introduced testimony that Luque had "authored" a search warrant (based on his belief that Ms. Johnson was "impaired"), and that a search warrant is "run by the judge and a judge has approved it."

In his opening statement, the prosecutor told jurors that Luque suspected Ms. Johnson was under the influence based on his expertise, and

then “prepared what’s called a search warrant... asking for a judge to allow him to obtain” a blood sample. RP 228-229. The prosecutor went on to tell the jury “that was done.” RP 229.

Luque testified that he “authored a search warrant to obtain a sample of her blood” because he believed Ms. Johnson was “impaired under [sic] something else besides the narcotic analgesics that were administered by the hospital staff.” RP 575, 576. He later testified that a search warrant is “run by the judge and a judge has approved it.” RP 627.

Defense counsel did not object to the testimony. RP 575-576, 627.

8. Over objection, the trial court permitted Karen Nelson to testify that she believed Ms. Johnson was “high” and she showed signs consistent with being “[under] the influence” of methamphetamine.

The prosecutor moved in limine to admit the opinion testimony of Karen Nelson, who sat with Ms. Johnson while awaiting arrival of the medics. CP 108; RP 175, 265-277. The State cited ER 701 (relating to lay opinions), but argued that Nelson’s knowledge from her own past methamphetamine use qualified her to give an opinion outside the experience of most jurors. RP 175; CP 108.

Defense counsel objected prior to trial, and again when Nelson testified. RP 176, 279. The court overruled the objections. RP 177, 279-281.

In opening statements, the prosecutor told jurors that Nelson would testify that Ms. Johnson “appeared to be under the influence of drugs.” RP 221. He also outlined Nelson’s background and experience with drugs, and told the jury that she would testify “that the actions and demeanor that she saw in Shaun Johnson that morning was [sic] consistent with her experience of seeing those same signs, manifestations in other people who have used methamphetamine.” RP 222.

Nelson had no real medical training, and admitted she could not separate the effects of the accident from the signs of methamphetamine use. RP 280-281, 296. Based on her own prior drug use, she testified that she believed Ms. Johnson was “high.” RP 283. She also told jurors that Ms. Johnson’s behavior was “similar to the behavior that [she’d] seen in people who have been [under] the influence of methamphetamine.” RP 283. She did not specify the behavior.

Nelson had not mentioned her observations or opinions to any of the police officers, even when contacted days after the accident. RP 283-285, 289-292, 295. In fact, Deputy Gosch did not even list Nelson’s name in his report. RP 262.

In closing argument, the prosecutor praised Nelson for her “courage” in testifying, and asserted that she did so “because she knew it was

the right thing to do.” RP 792.²³ He again outlined her drug history, and reiterated that “[s]he knows and remembers and has seen the effects of those drugs in others... She has seen the effects and felt the effects in her own body.” RP 792-793. He juxtaposed her “personal experience” with Luque’s training, and argued that both had “the experience to observe and see signs of impairment.” RP 805. Because of this, he argued, Nelson was able to conclude that Ms. Johnson exhibited “signs” that Nelson “saw, knew, and herself had experienced in the past about somebody who had used methamphetamine.” RP 793.

Following the verdict, Ms. Johnson brought a motion for a new trial, based in part on the erroneous admission of Nelson’s opinion testimony. RP 894; CP 157. The court denied the motion. RP 897-898.

9. The trial court overruled Ms. Johnson’s ER 402 and ER 403 objection to the emotional testimony of Carey’s mother, which included information that he’d need replacement prosthetics for the rest of his life at an uninsured cost of \$90,000.

The State notified Ms. Johnson that it would seek an exceptional sentence because Carey’s injuries “substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense.” Second

²³ He reiterated this in his rebuttal closing after defense counsel implied that Nelson had an agenda. RP 851.

Amended Information, filed 4/22/15, Supp. CP. Defense counsel conceded the severity of the injuries in his opening statement. RP 234, 238.

The State presented the testimony of a physician's assistant who had been involved in Carey's treatment. RP 492-510. She described his condition upon arrival, the surgeries he underwent, and the amputation. RP 492-510. In addition, Carey testified about his injuries, the nightmares he suffered, and the significant changes in his life that resulted from the loss of his leg. RP 688-700.

Ms. Johnson objected (under ER 402 and ER 403) when the State sought to conclude its case with the testimony of Jannette Chumley, Carey's mother.²⁴ RP 702-703. Defense counsel argued that the mother's emotionally charged testimony would be irrelevant, cumulative, prejudicial, and calculated to inflame the jury's passions. RP 702-703. He pointed out that Ms. Johnson had openly conceded the severity of Carey's injuries. RP 702. The court approved a "limited inquiry." RP 704.

Defense counsel interrupted the direct examination of Chumley to object a second time, and warned that the testimony did nothing but "in-flame passions," and that "this isn't evidence at this point." RP 722.²⁵ The

²⁴ Although defense counsel did not cite ER 401 and ER 402, his arguments made clear that he his objection was based in part on relevance.

²⁵ He later pointed out that his decision to object was "fraught with risk," and that the "jury might hate me because a mother is recounting the most difficult day of her life and that creates a great deal of risk for a defendant." RP 735.

prosecutor assured the court he was almost finished, and then introduced testimony that Carey would have to replace his prosthetic every two years for the rest of his life and that his insurance wouldn't cover the \$90,000 cost. RP 722-723.

Ms. Johnson moved for a mistrial based on the improper admission of Chumley's testimony. RP 734-736, 743-744. The court denied the motion. RP 745-746. The court also denied the post-trial motion for a new trial. CP 156-159; RP 884, 896-898.

10. Ms. Johnson objected to the prosecutor's remarks in closing.

The prosecutor began his closing argument by declaring that "every time we have a criminal trial that goes on – be it this courtroom or any other courtroom in this courthouse – there's one reason why everyone is gathered here in that particular courtroom, it is because of the actions and the choices of the defendant." RP 789. When the State concluded, the jury was excused. RP 818.

Defense counsel objected to the State's remarks and moved for a mistrial. RP 818, 819. He pointed out that the argument "presumes that somebody is guilty...that they did what the Government says." RP 818.²⁶ The court denied the motion. RP 819. Defense counsel raised the issue

²⁶ The prosecutor responded by arguing "[W]hat I said was the absolute complete truth," but focused on the part of the closing that followed the objectionable language. RP 818-819.

again in a post-trial motion, but the court again denied the motion. RP 885, 897-898.²⁷

11. Ms. Johnson was convicted of vehicular assault, and she appealed following denial of her post-trial motions and the imposition of an exceptional sentence.

The jury returned a guilty verdict, and concluded that Carey's injuries substantially exceeded those necessary to prove the offense. CP 150-151. Ms. Johnson filed a motion for arrest of judgement or for a new trial, outlining several alternative grounds. CP 156-157. The court denied her motions. RP 884-898. The court sentenced Ms. Johnson to an exceptional term, and she timely appealed. RP 921-925; CP 184.

ARGUMENT

I. THE TRIAL COURT VIOLATED MS. JOHNSON'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO AN INDEPENDENT JURY DETERMINATION OF THE FACTS BY ALLOWING THE STATE TO INTRODUCE INADMISSIBLE OPINIONS ON HER GUILT.

A witness's opinion on guilt is improper whether made directly or by inference. *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). An opinion on guilt "violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *Id.*

²⁷ Defense counsel erroneously based his argument on the "flagrant and ill-intentioned" standard applicable when no objection is made in the trial court. CP 159; RP 885.

The trial court allowed the State to introduce inadmissible opinion testimony. Each opinion was an “improper opinion on guilt by inference because [it] went to the core issue and the only disputed element.” *Id.* Luque provided expert testimony that Ms. Johnson was “impaired” or “under the influence,” even though he failed to complete the 12-step DRE protocol. RP 576. Without proper foundation, Nelson also testified to her belief that Ms. Johnson was “high” and showed signs consistent with being “[under] the influence.” RP 280-283.

The improperly admitted opinion testimony was the State’s main evidence suggesting that Ms. Johnson was under the influence of or affected by drugs, an essential element of vehicular assault. RCW 46.61.502, RCW 46.61.522. The admission violated Ms. Johnson’s constitutional rights to due process and to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§3, 21, and 22. *Id.*

A. The trial court improperly allowed Luque to testify that Ms. Johnson was “impaired,” in direct violation of the Supreme Court’s decisions in *Quaale* and *Baity*.

1. Deputy Luque exceeded the limits set by the Supreme Court in *Quaale* and *Baity*.

The Supreme Court has placed limits on testimony from Drug Recognition Experts. A properly qualified DRE who has undertaken the entire twelve-step drug recognition protocol “may express an opinion that

a suspect's behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs.” *State v. Baity*, 140 Wn.2d 1, 17–18, 991 P.2d 1151 (2000).

However, the DRE “may not testify in a manner that casts an ‘aura of scientific certainty to the testimony.’” *Quaale*, 182 Wn.2d at 198 (quoting *Baity*, 140 Wn.2d at 17). In *Quaale*, an officer administered the Horizontal Gaze Nystagmus (HGN) test²⁸ and testified at a subsequent DUI trial that “[t]here was no doubt [the driver] was impaired.” *Id.*, at 195. This testimony “violated the limitations set out in *Baity*.” *Quaale*, 182 Wn.2d at 198. There, the officer improperly “cast his testimony in a way that gave it an aura of scientific certainty.” *Id.* He also improperly implied that the HGN could reveal that someone is *impaired*, when, in fact, it “simply shows physical signs consistent with alcohol consumption.” *Id.*, at 198–199. Testimony regarding this consistency is the most that a DRE can provide. *Baity*, 140 Wn.2d at 17–18.

By using the word “impairment,” the officer improperly “testified to a specific level of intoxication.” *Quaale*, 182 Wn.2d at 199. The *Quaale* court decided that expert testimony regarding impairment “implicitly includes a specific level of intoxication; that the alcohol consumed impaired

²⁸ The HGN test is one of the twelve steps of the drug recognition protocol. *Id.*

the defendant, which is the legal standard for guilt.” *Id.*²⁹

Ms. Johnson’s case is directly controlled by *Quaale*.

Over objection, Detective Luque opined that Ms. Johnson was “impaired,” despite having even less evidence than the officer in *Quaale*. RP 576.³⁰ Luque described his training and experience at length, made clear that he was testifying as an expert, and used the DRE chart referred to in *Baity*.³¹ RP 515-521, 524-543; *see* Ex. 60. He implied that the drug recognition protocol did not require him to perform all twelve steps to reach an opinion on impairment.³² RP 535, 536, 616.

Luque told the jury he’d done numerous DRE evaluations, achieving at least the 90% accuracy rating needed to maintain his certification. RP 519-520, 589, 602. He claimed his ability to opine on Ms. Johnson’s impairment stemmed not just from his observations, but also from his knowledge base and his training and experience as a DRE. RP 521, 563-567, 569-570, 575-576, 579-580, 610.

As in *Quaale*, this exceeded the limits set by *Baity*. *Id.* Luque did

²⁹ By telling jurors he had “no doubt,” the officer improperly “cast his testimony in a way that gave it an aura of scientific certainty.” *Id.* He

³⁰ Indeed, Luque went further than the officer in *Quaale* by adding the word “obviously” to his assessment: “I believed that *obviously* -- that at the time that I was seeing her that she was *impaired* under something else besides the narcotic analgesics that were administered by the hospital staff.” RP 576 (emphasis added).

³¹ *See Baity*, 140 Wn.2d at 17.

³² Instead, both Luque and the prosecutor appear to believe that the 12-step protocol is necessary only to decide the category of drug causing impairment. RP 576, 589, 738.

not follow the twelve-step drug recognition protocol, yet claimed an ability to judge impairment. His testimony “implicitly include[d] a specific level of intoxication; that the [drugs] consumed impaired the defendant, which is the legal standard for guilt.” *Quaale*, 182 Wn.2d at 199. He gave his opinion an improper “aura of scientific certainty” by linking it to his expertise as a DRE, and by implying that the protocol did not require completion of all twelve steps. *Id.*, at 198.

As in *Quaale*, Luque’s testimony was an improper opinion on guilt. Luque’s opinion that Ms. Johnson was impaired “went to the core issue and the only disputed element: whether [she] drove while under the influence of [drugs].” *Quaale*, 182 Wn.2d at 200. The importance of the issue can be seen by examining defense counsel’s closing arguments. RP 823-825, 832-843.

Furthermore, the State based its opening statement and closing argument on Luque’s expertise. RP 218-233, 790, 809, 848. The improper testimony cannot be dismissed as a mere expression of lay opinion based solely on his observations. *Cf. Quaale*, 182 Wn.2d at 200-201 (distinguishing *City of Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993)). The error is presumed prejudicial, and the State bears the burden of proving harmlessness beyond a reasonable doubt. *Id.*, at 201-202. Respondent cannot meet that burden here.

The improper admission of opinion testimony from a law enforcement officer “may be especially prejudicial.” *State v. King*, 167 Wn. 2d 324, 331, 219 P.3d 642 (2009). Such testimony “often carries a special aura of reliability.” *Id.* (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)).

Here, as in *Quaale*, Luque’s improper opinion testimony provided the main evidence of actual impairment. *Quaale*, 182 Wn.2d at 201-202. Without it, a reasonable jury could have decided to acquit. *Id.* The improper admission of Luque’s opinion infringed Ms. Johnson’s right to due process and to a jury trial. *Quaale*, 182 Wn.2d at 197. Her conviction must be reversed and the case remanded for a new trial. *Id.*

2. The error was compounded by the court’s failure to provide an instruction outlining the law relating to DRE testimony, as requested by defense counsel.

Appellate courts review instructions *de novo*. *Peralta v. State*, 187 Wn.2d 888, 894, 389 P.3d 596 (2017). Jury instructions must be “supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law.” *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). Instructions are erroneous if any of these elements is absent. *Hendrickson v. Moses Lake Sch. Dist.*, 199 Wn.App. 244, 249, 398 P.3d 1199 (2017).

Instructions are not sufficient merely because they don't contradict a party's argument: "lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is." *In re Det. of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010); *see also State v. Aumick*, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995) ("A jury should not have to obtain its instruction on the law from arguments of counsel.")

Here, the instructions were insufficient. The court should have given the instruction on DRE evidence proposed by defense counsel. CP 130. The instruction was based on *Baity* and *Quaale*, which prohibit a DRE from providing an opinion without undertaking the entire 12-step DRE protocol. *Baity*, 140 Wn.2d at 17–18; *Quaale*, 182 Wn.2d at 198–199. No DRE is permitted to testify, as Luque did, that a suspect is "impaired," even after completing the protocol. *Baity*, 140 Wn.2d at 17–18; *Quaale*, 182 Wn.2d at 198–199.

The proposed instruction would have allowed the jury to properly evaluate Luque's opinion that Ms. Johnson was "impaired under something else besides the narcotic analgesics that were administered by the hospital staff." RP 576. The instruction would have "properly inform[ed] the trier of fact of the applicable law" established by *Baity* and *Quaale*. *Fergen*, 182 Wn.2d at 803.

Without the instruction, jurors were free to take at face value Luque’s opinion that Ms. Johnson was “impaired.” RP 576.³³ Defense counsel was left in the position of “having to convince [jurors] what the applicable law is.” *Pouncy*, 168 Wn.2d at 392. The jury here had “to obtain its instruction on the law from arguments of counsel.” *Aumick*, 126 Wn.2d at 431.

Instructional error that favors the prevailing party is presumed prejudicial. *See State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015); *State v. Laramie*, 141 Wn.App. 332, 342–43, 169 P.3d 859 (2007); *see also Hendrickson*, 199 Wn.App. at 249. Similarly, failure to instruct on a party’s theory is reversible error if there is evidence to support that theory. *State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016).

Here, the instructions did not allow defense counsel to argue Ms. Johnson’s theory. Without the proffered instruction, counsel could not tell jurors that the law required them to disregard Luque’s testimony that Ms. Johnson was “impaired.” *Baity*, 140 Wn.2d at 17–18; *Quaale*, 182 Wn.2d at 198-199.³⁴ The error is presumed prejudicial, and requires reversal. *See Fisher*, 185 Wn.2d at 849.

³³ Instruction No. 5 told jurors they were not “required to accept [Luque’s] opinion.” CP 138. However, it did not make clear the limits imposed by the Supreme Court.

³⁴ It also precluded counsel from arguing that jurors should disregard Nelson’s assessment that Ms. Johnson was “high” and showed signs consistent with being “under the influence.” RP 280-283. Nelson could not provide these opinions because she was not a DRE and did

- B. The trial court should not have allowed Nelson to opine that Ms. Johnson was “high” and that her behavior was consistent with being “[under] the influence of methamphetamine.”

Although the State argued for admission of Nelson’s opinion under ER 701 (governing lay opinion testimony), the prosecution presented her to the jury as an expert. In the prosecutor’s Motion in Limine, opening statement, direct examination, and closing argument, he asserted Nelson’s experience with drugs qualified her to give an opinion on matters outside the experience of most jurors. RP 222, 278-283, 792-793, 805; CP 108.

Nelson was permitted to opine that Ms. Johnson was “high” and that her behavior was “similar to the behavior that [she’d] seen in people who have been [under] the influence of methamphetamine.” RP 283. This opinion should have been excluded, because it did not qualify for admission as either an expert or a lay opinion.

1. Nelson’s opinion did not qualify as an expert opinion.

Nelson’s testimony was not admissible under ER 702, which governs expert testimony. Under the rule,

If scientific, technical, *or other specialized knowledge* will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge, skills, experience, training, or education* may testify thereto in the form of an opinion or otherwise.

not go through the 12-step protocol, as argued below. *Baity*, 140 Wn.2d at 17–18; *Quaale*, 182 Wn.2d at 198-199.

ER 702 (emphasis added).³⁵ If an appropriate foundation is laid, a witness without formal education or training may testify as an expert based on their own knowledge and experience. ER 702; *see Life Designs Ranch, Inc. v. Sommer*, 191 Wn.App. 320, 360, 364 P.3d 129 (2015), *review denied*, 185 Wn.2d 1022, 369 P.3d 500 (2016) (“Witnesses may qualify as experts by practical experience”); *Taylor v. Bell*, 185 Wn.App. 270, 285–86, 340 P.3d 951 (2014) (“It is beyond cavil that ‘an expert may be qualified’ to testify ‘by experience alone’”) (quoting *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012)); *see also State v. Ortiz*, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992).

Although the prosecutor cited ER 701 (pertaining to lay opinions), the State sought to show that Nelson had specialized knowledge that was outside the realm of the jury’s experience. CP 108; RP 278-279, 283. It is therefore appropriate to first analyze her testimony under ER 702.

Nelson’s opinion was not admissible as an expert opinion, because the State did not establish an adequate foundation. She was not qualified to opine that Ms. Johnson was “high” or “under the influence.” RP 280-283. Nelson had no medical training, and did not know how to assess

³⁵ Under this rule, “(1) the witness must be qualified as an expert; (2) the opinion must be based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony must be helpful to the trier of fact.” *State v. Black*, 109 Wn.2d 336, 341, 745 P.2d 12 (1987).

someone for drug use following a serious car crash. RP 280-281.³⁶ Regardless of her knowledge, experience, and ability to recognize behaviors associated with methamphetamine use under ordinary circumstances, she did not have the qualifications to render such an opinion regarding a person who had just suffered a broken limb (and possibly a concussion). RP 280-281.

Nor was her testimony based on “an explanatory theory generally accepted in the scientific community.” *Id.* She had not undergone the rigorous DRE training described by Deputy Luque. RP 278-283, 514-521, 530-543. Despite this, she concluded from her observations³⁷ that Ms. Johnson was “high” and that her behavior was “similar to the behavior that [she’d] seen in people who have been [under] the influence of methamphetamine.” RP 283.³⁸ In other words, Nelson drew the kind of conclusion that a DRE would make after undergoing the entire twelve-step drug recognition protocol, which *is* based on generally accepted principles. *See*

³⁶ She did say she’d been in a car crash while under the influence, but had never been in a crash where someone was injured, or at speeds similar to Ms. Johnson’s crash. RP 280-281.

³⁷ She said Ms. Johnson was “nervous, she was scared, she looked real fidgety, she was paranoid. She kept asking for—well, not asking for but saying she couldn’t find her pot or her phone.” RP 282.

³⁸ This latter opinion is limited in the way a DRE opinion should be: “[A] DRE officer, properly qualified, may express an opinion that a suspect’s behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs.” *Baity*, 140 Wn.2d at 17–18.

Baity, 140 Wn.2d at 17-18 (“The DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes *are or are not consistent* with the behavioral and physical signs associated with certain categories of drugs) (emphasis added).

Nelson was not trained on the protocol and did not undertake the 12 steps. She should not have been allowed to give the kind of opinion that would only be appropriate from a trained DRE who properly applied the protocol. *Cf. Baity*, 140 Wn.2d at 17-18. Nor was the opinion testimony helpful to the jury. Ms. Johnson’s demeanor and behavior—nervous, scared, fidgety, “paranoid,”³⁹—could be explained by the shock of the accident and her injuries. Nelson didn’t have the training or experience to take these factors into account. RP 280-283.

Nelson’s opinion was thus nothing more than speculation. At most, she should have been permitted to describe her observations.⁴⁰ The evidence should not have been admitted under ER 702. *State v. Black*, 109 Wn.2d 336, 341, 745 P.2d 12 (1987).

2. Nelson’s testimony did not qualify as a “lay opinion,” and should have been excluded under ER 701.

³⁹ Nelson did not list any behaviors that qualified as “paranoid.” RP 280-283.

⁴⁰ The state could have followed up by tying Nelson’s observations to expert testimony on the general demeanor associated with methamphetamine use.

A lay witness may testify to opinions or inferences that are “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) *not based on... specialized knowledge* within the scope of rule 702.” ER 701 (emphasis added).

Nelson’s testimony should not have been admitted as a lay opinion. First, as outlined above, her opinion testimony should be analyzed as an expert opinion under ER 702, not ER 701. In opening statements and closing arguments, the State painted Nelson as an expert. RP 222, 792-793, 805. The prosecutor acknowledged that her knowledge was outside the realm of the jury’s experience. CP 108. “Based on... specialized knowledge,” the evidence did not meet the requirements of ER 701(c)

Second, Nelson’s opinion was not “rationally based” on her perceptions. ER 701(a). She admitted she had no experience untangling the effects of possible drug use from the effects of concussion or the shock of the accident. RP 280-281. Her opinion that Ms. Johnson was high or possibly “[under] the influence” was no more than speculation. RP 283.

Third, Nelson’s opinion was not “helpful.” ER 701(b). A person involved in a serious accident may act, nervous, scared, fidgety, or “paranoid” because of shock. It is not surprising that Ms. Johnson became fixated on finding her cell phone—and even her marijuana—given what

she'd just experienced and the pain she suffered before the paramedics arrived. RP 282- 283.

Nelson had no way to separate the effects of the accident from Ms. Johnson's alleged insobriety. RP 280-283. The evidence should have been excluded. ER 701; *King*, 167 Wn.2d at 331. Because Nelson's testimony amounted to an improper opinion on Ms. Johnson's guilt, it invaded Ms. Johnson's constitutional right to an independent jury determination of the facts. *Quaale*, 182 Wn.2d at 199. The conviction must be reversed, and the case remanded with instructions to exclude the evidence on retrial. *Id.*

II. THE EVIDENCE INCLUDED AN UNCONSTITUTIONAL JUDICIAL COMMENT DIRECTED AT THE PRIMARY CONTESTED ISSUE AT TRIAL.

The Washington constitution provides "Judges shall not charge juries with respect to matters of fact, nor comment thereon..." Wash. Const. art. IV, §16. The prohibition against judicial comments also protects the right to a jury determination of the facts required for conviction and punishment. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22; *see Alleyne v. United States*, --- U.S. ---, ___, 133 S.Ct. 2151, 186 L.Ed. 2d 314 (2013); *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010).⁴¹

⁴¹ Judicial comments invade a fundamental right, and thus can always be raised for the first time on review. RAP 2.5(a)(3); *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); *State v. Levy*, 156 Wn.2d 709, 720, 132 P.3d 1076 (2006). In addition, defense counsel objected to the admission of Ex. 6, arguing relevance, confusion, and prejudice. CP 14-15;

Here, Luque testified that he “authored a search warrant” that was “approved” by a judge. RP 575, 576, 627. He sought the search warrant “[t]o obtain sample of her blood” because he believed Ms. Johnson was “impaired under [sic] something else besides the narcotic analgesics that were administered by the hospital staff.” RP 576.

When Luque testified that a search warrant is “run by the judge and a judge has approved it,” the clear implication was that a judicial officer agreed with Luque’s assessment. RP 627. This violated Ms. Johnson’s rights under Wash. Const. art. IV §16. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136, 140 (2006), *as corrected* (Feb. 14, 2007). It also infringed her right to a jury determination of all facts necessary for conviction and punishment. *Alleyne*, --- U.S. at ___; *Williams-Walker*, 167 Wn.2d at 895-96.

Judicial comments are presumed prejudicial. *Levy*, 156 Wn.2d at 725. A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Id.* This is a higher standard than normally applied to constitutional errors. *Id.*

RP 33-43. The objection should have prompted the court to consider redacting objectionable material from the exhibit.

In *Jackman*, for example, the Supreme Court reversed even though undisputed evidence established each child’s date of birth.⁴² *Jackman*, 156 Wn.2d at 743, 745. The Supreme Court also noted that the defendant had not “challenged the *fact* of [the boys’] minority.” *Id.*, at 745 (emphasis in original). Despite this, the *Jackman* court found that the State had failed to meet its burden of affirmatively showing that no prejudice could have resulted from the error:

Nevertheless, it is still conceivable that the jury could have determined that the boys were *not* minors at the time of the events, if the court had not specified the birth dates in the jury instructions.

Id., at 745.

Likewise, in this case the record does not affirmatively show an absence of prejudice. *Id.* The defense theory focused on the lack of evidence proving impairment. *See* RP 821-843. Luque’s testimony suggested that a judge agreed there was evidence of impairment. RP 576, 627. This was the only matter the defense contested at the trial.

The judicial comment infringed Ms. Johnson’s rights under Wash. Const. art. IV, §16 and her constitutional right to a jury determination of

⁴² The defendant in *Jackman* was charged with several crimes against four minor boys. *Jackman*, 156 Wn.2d at 740. The children provided their birth dates in testimony, the State introduced corroborating evidence for three of the four boys, and the defendant did not contest the children’s ages at trial. *Id.*, at 740, 743, 745. To link each count with a specific child, each “to-convict” instruction included the minor victim’s initials and date of birth. *Id.*, at 740-741. The defendant did not object to these instructions. *Id.*, at 741. Despite this, the Supreme Court reversed. *Id.*, at 745.

the facts necessary for conviction and punishment. *Id.*; *Alleyne*, --- U.S. at ___; *Williams-Walker*, 167 Wn.2d at 895-96. Her convictions must be reversed and the charge remanded for a new trial. *Levy*, 156 Wn.2d at 725.

III. THE ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MS. JOHNSON’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.

A. Testimonial hearsay is inadmissible at trial unless the declarant is unavailable and the accused person had a prior opportunity for confrontation.

The Sixth Amendment to the U.S. Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. Amend. VI.⁴³ A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The core definition of testimonial hearsay includes statements “made under circumstances which

⁴³ This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV.

would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Crawford*, 541 U.S. at 52.

Confrontation issues may be raised for the first time on appeal, even absent any objection in the trial court.⁴⁴ RAP 2.5(a)(3); *State v. Clark*, 139 Wn.2d 152, 156, 985 P.2d 377 (1999); *see also State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007), *overruled on other grounds by State v. Jasper*, 174 Wn.2d 96, 100, 271 P.3d 876 (2012). To raise a manifest error, an appellant need only make “a plausible showing that the error... had practical and identifiable consequences in the trial.” *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).⁴⁵ An error has practical and identifiable consequences if “given what the trial court knew at that time, the court could have corrected the error.” *State v. O’Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

⁴⁴ In this case, defense counsel objected on hearsay grounds. This should be sufficient to preserve the confrontation error for review. If not, the error should be reviewed under RAP 2.5(a)(3), as argued here. In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

⁴⁵ The showing required under RAP 2.5(a)(3) “should not be confused with the requirements for establishing an actual violation of a constitutional right.” *Id.*

Here, the trial judge knew that the prosecution wished to introduce hearsay over defense counsel's objection, and that the out of court statements were made by a non-testifying, unnamed hospital staff person.⁴⁶ CP 164-165; RP 39-40, 433, 453, 550-551, 546, 554-563. The statements were made to Luque while he was investigating a vehicular assault charge. RP 544-546, 554-563. The court "could have corrected" the problem. *Id.* The error can be reviewed for the first time on appeal. *Id.*; RAP 2.5(a)(3)

- B. The erroneous admission of testimonial hearsay supporting Luque's improper opinion (that Ms. Johnson was "impaired") violated her right to confront witnesses

Over defendant's hearsay objection, the prosecutor introduced the out-of-court statements of an unnamed medical provider. RP 544-546, 554-563. The provider told Luque, who was investigating a vehicular assault, that opiate painkillers had been administered to Ms. Johnson prior to his arrival, with the most recent dose just minutes before. RP 554-563.

The statement falls within *Crawford's* core definition of testimonial hearsay. It was made to police during an investigation into a serious felony charge. Under the circumstances, a reasonable person would "believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52.

⁴⁶ As noted elsewhere, Luque could not remember the statements; they were introduced as hearsay contained within a recorded recollection. RP 554-563.

There was no showing the declarant was unavailable, and Ms. Johnson had no prior opportunity for cross-examination. The admission of this testimonial hearsay violated her Sixth and Fourteenth Amendment right to confront adverse witnesses. *Crawford*, 541 U.S. at 58-59.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption of prejudice, the State must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the State can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The State cannot make the required showing. Luque's testimony that Ms. Johnson was "impaired" rested on the statement he received from the provider. RP 576. Without the evidence, a reasonable juror could have voted to acquit. Accordingly, the conviction must be reversed, and the case remanded for a new trial. *Id.*

C. The hearsay was inadmissible under ER 802 and ER 805.

Luque's "expert" opinion rested on information provided by hospital staff. RP 563-564. Specifically, Luque claimed that Ms. Johnson's pupil size and her pulse were inconsistent with the most recent dose of Dilaudid, and that he'd learned she'd been administered that drug just "minutes before [he] arrived" at the hospital.⁴⁷ RP 563-564. When the State sought to introduce this evidence of an out-of-court statement of hospital staff, Ms. Johnson raised a hearsay objection. RP 554-555.

Because Luque could not remember what he'd been told,⁴⁸ the State offered Luque's prior testimony about what he'd had been told as a recorded recollection under ER 803(a)(5). RP 553-554. Even assuming the requirements of ER 803(a)(5) were met, the hearsay consisted of the statements by hospital staff contained *within* the recorded recollection.

As defense counsel phrased the objection:

It's hearsay within prior testimony that Detective Luque does not remember. So I believe that is objectionable, and I don't think it should be admitted to the Court. It's the hearsay within something that he, as he testified today, doesn't remember.
RP 555.⁴⁹

⁴⁷ Luque gave several different accounts regarding the information he received about the timing and about what he'd written about it in his report. RP 42, 68-71, 86, 563, 584, 585.

⁴⁸ See RP 552-554. Luque's recollection was not refreshed by a transcript of his testimony from the first trial, which took place two years after the accident. RP 552.

⁴⁹ Counsel went on to raise an additional objection for lack of foundation under the recorded recollection exception, ER 803(a)(5). See RP 555-556, 557-558. The court overruled this

Although the State outlined its argument regarding the admissibility of the prior testimony as a recorded recollection (under ER 803(a)(5)), the prosecutor did not address the original hearsay-within-hearsay objection raised by Ms. Johnson's attorney. RP 555-561.

Even assuming the transcribed testimony was admissible as a recorded recollection, the hearsay within that testimony should have been excluded. ER 805 ("Hearsay within hearsay"), requires the State to show that "each part of the combined statements conform[ed] with an exception to the hearsay rule." ER 805. It failed to do so. The State offered no basis for admission of the hospital staff's out-of-court statements. RP 552-561. Nor did the trial court articulate a basis for admission. RP 558-559, 560-561.⁵⁰ The hearsay should have been excluded. ER 802, ER 805.

An erroneous evidentiary ruling requires reversal if, within reasonable probability, it materially affected the outcome. *State v. Every-*

objection and also speculated that the prior testimony might be admissible under ER 801(d)(1) if it were inconsistent with Luque's in-court testimony. RP 561.

⁵⁰ It is possible the evidence may have been admissible for the limited purpose of explaining Luque's "expert" testimony. *See* ER 703. However, the state did not offer it for this purpose, and the court did not provide a limiting instruction. RP 552-563. Furthermore, Luque's testimony was not admissible as an expert opinion under ER702, as argued above. *See Quaaale*, 182 Wn.2d at 198-199.

bodytalksabout, 145 Wn.2d 456, 468–69, 39 P.3d 294 (2002). Such an error is “harmless if the evidence is of minor significance compared to the overall evidence as a whole.” *Id.*⁵¹

The error here requires reversal. The State presented no direct evidence that Ms. Johnson was impaired at the time of the accident. It relied on Luque’s opinion, which in turn depended on his understanding that Ms. Johnson had been administered opiate painkillers just prior to his arrival.

The evidence was critical to the State’s case. It is reasonably probable that its erroneous admission materially affected the outcome of the trial. *Everybodytalksabout*, 145 Wn.2d at 468–69. Ms. Johnson’s conviction must be reversed, and the case remanded for a new trial. *Id.*

IV. THE COURT IMPROPERLY DENIED MS. JOHNSON’S MOTION TO SUPPRESS EVIDENCE UNLAWFULLY OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT AND WASH. CONST. ART. I §7.

Following the unlawful search of her purse and the discovery of methamphetamine, Ms. Johnson admitted that she had used methamphetamine two days prior to the accident. CP 2-3. She repeated it to Deputy Luque, who used it in his search warrant application. RP 51, 568; Ex. 2.

⁵¹ An evidentiary error is harmless if it is “trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011) (internal quotation marks and citations omitted).

Even with the statement, Luque's affidavit did not provide probable cause to believe Ms. Johnson was impaired at the time of the accident. Ex. 2.

Ms. Johnson's statement and the blood test results should have been suppressed. Both were obtained in violation of the Fourth Amendment and Wash. Const. art. I, §7.

A. Ms. Johnson's statement and the blood test results must be suppressed because they were tainted by the illegal search of her purse, and the federal attenuation doctrine violates Wash. Const. art. I, §7.

The exclusionary rule applies to derivative evidence tainted by a prior illegality. *Wong Sun v. United States*, 371 U.S. 471, 487, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). Such evidence "becomes fruit of the poisonous tree and must be suppressed." *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

Under federal law, the State may make use of tainted evidence if it can show that the relationship between the prior illegality and the statement is sufficiently attenuated to dissipate the taint. *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885, 263 P.3d 591 (2011). Unlike the federal exclusionary rule, Washington's rule is "nearly categorical." *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010). Thus, for example there are no exceptions for "good faith" or "inevitable discovery." *Id.*; *State v. Winterstein*, 167 Wn.2d 620, 636, 220 P.3d 1226 (2009).

The Supreme Court has yet to decide if the federal attenuation doctrine applies under Wash. Const. art. I, §7. *Ibarra-Cisneros*, 172 Wn.2d at 884. Indeed, the issue has been the subject of fierce debate among members of the Washington Supreme Court. See *State v. Eserjose*, 171 Wn.2d 907, 927, 259 P.3d 172 (2011) (lead opinion); *Id.*, at 931 (Madsen, C.J., concurring); *Id.*, at 937 (C. Johnson, J., dissenting).⁵²

The lead opinion in *Eserjose*, which found the doctrine compatible with the state constitution, was signed by only three justices, with one justice concurring in the result only.⁵³ Four justices dissented, opining that “nothing in the attenuation doctrine apparently embraced by the lead opinion suggests how time, intervening circumstances, or less egregious misconduct can infuse the fruits of an illegal seizure with the authority of law required by article I, section 7.” *Id.*, at 940 (C. Johnson, dissenting).⁵⁴

1. Wash. Const. art. I, §7 is more protective than the Fourth Amendment.

⁵² See also *Ibarra-Cisneros*, 172 Wn.2d at 884-885 (majority); *Id.*, at 886-88 (Alexander, J., concurring); *Id.*, at 905-916 (J.M. Johnson, J., concurring); *State v. Smith*, 177 Wn.2d 533, 545 n. 4, 303 P.3d 1047 (2013) (*Smith II*) (plurality); *Id.*, at 545 (Madsen, C.J., concurring); *Id.*, at 553 (Gonzalez, J., concurring in result); *Id.*, at 559 (Chambers, J.P.T., dissenting).

⁵³ A fifth vote was provided by Chief Justice Madsen, who concurred in the result without reaching the attenuation issue. *Id.*, at 930-931 (Madsen, C.J., concurring).

⁵⁴ Justice C. Johnson was joined by Justices Chambers and Owens and by Justice Pro Tem Sanders.

The state constitution prohibits the State from disturbing a person’s “private affairs... without authority of law.” Wash. Const. art. I, §7. This language provides greater privacy protections than the federal constitution. *State v. Morse*, 156 Wn.2d 1, 10, 123 P.3d 832 (2005). While the Fourth Amendment protects against “unreasonable searches and seizures,” art. I §7 “clearly recognizes an individual's right to privacy with no express limitations.” *State v. White*, 97 Wn.2d 92, 104-105, 110, 640 P.2d 1061 (1982). The state constitutional provision “differs qualitatively from the Fourth Amendment,” and is often more protective of individual rights than the Fourth Amendment. *State v. Chenoweth*, 160 Wn.2d 454, 462-463, 158 P.3d 595 (2007).⁵⁵

To determine the scope of constitutional protection under art. I, §7, courts focus on “the unique characteristics of the state constitutional provision and its prior interpretations” to see if they “actually compel a particular result.” *Id.* (quoting *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)). This requires “an examination of the history of the interest at stake, relevant case law and statutes, and the current implications of recognizing or not recognizing the interest.” *State v. Walker*, 157 Wn.2d 307, 314, 138 P.3d 113 (2006) (*Walker I*).

⁵⁵ Because of this, a *Gunwall* analysis is unnecessary. *Id.* (citing *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986)).

The federal and state exclusionary rules are based on different concerns and further different goals. While the federal attenuation doctrine (like the "good faith" and "inevitable discovery" doctrines) serves its intended goals under the Fourth Amendment, it is wholly inconsistent with Wash. Const. art. I, §7.

2. The federal attenuation doctrine is compatible with the deterrent purpose of the federal exclusionary rule.

The primary justification for the exclusionary rule under the Fourth Amendment is deterrence of police misconduct. *Herring v. United States*, 555 U.S. 135, 141, 129 S.Ct. 695, 172 L.Ed. 2d 496 (2009); *Michigan v. DeFillippo*, 443 U.S. 31, 38 n.3, 99 S.Ct. 2627, 61 L.Ed. 2d 343 (1979); *Stone v. Powell*, 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976); *Wong Sun, supra*. Thus, the federal rule

is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed. 2d 1669 (1960).

The federal attenuation doctrine accommodates law enforcement needs while serving this goal of deterrence. *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975); *Id.*, at 609-610, 612

(Powell, J., concurring). Instead of a “but for” rule of exclusion, federal courts apply a case-specific balancing approach. *Id.* at 603.

The attenuation doctrine thus permits the admission of tainted evidence if exclusion would not serve the deterrent purpose of the federal rule. *Id.*; see also *New York v. Harris*, 495 U.S. 14, 19, 110 S.Ct. 1640, 109 L.Ed. 2d 13 (1990); *U.S. v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed. 2d 268 (1978); *Nardone v. United States*, 308 U.S. 338, 340-341, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

3. Washington’s exclusionary rule protects privacy rights; it is not aimed at deterring police misconduct.

Our state’s exclusionary rule is not tied to the federal rule. It predates the U.S. Supreme Court’s decision applying the federal rule to state prosecutions,⁵⁶ and is generally broader and more protective than the federal rule. See, e.g., *Afana*, 169 Wn.2d at 180; *Winterstein*, 167 Wn.2d at 636. Our Supreme Court has ruled that the language of art. I, §7 mandates

that the right to privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary remedy... [T]he emphasis is on protecting personal rights rather than on curbing governmental actions...[W]henver the right is unreasonably violated, the remedy must follow.

White, 97 Wn.2d at 110 (citations omitted).

⁵⁶ See *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

The difference between the federal and state exclusionary rules stems from the difference in each rule’s underlying purpose. While “[t]he federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct,” the state exclusionary rule “is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful government intrusions.” *Chenoweth*, 160 Wn.2d at 472 n.14 (citing cases).

The state exclusionary rule thus “provides a remedy for individuals whose rights have been violated and protects the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence. *Winterstein*, 167 Wn.2d at 632. Because of this, “[w]ith very few exceptions, whenever the right of privacy is violated, the remedy follows automatically.” *Afana*, 169 Wn.2d at 180.

Only those exceptions that “disregard illegally obtained evidence” are compatible with art. I, §7. *Id.*, at 181; *Winterstein*, 167 Wn.2d at 634. Like the inevitable discovery exception rejected in *Winterstein*, and the good faith exception rejected in *Afana*, the attenuation doctrine allows illegally obtained evidence to be admitted.

The court should reject attenuation as wholly incompatible with Wash. Const. art. I, §7. *Winterstein*, 167 Wn.2d at 632; *Afana*, 169 Wn.2d at 180-181. Evidence tainted by illegal search or seizure must be excluded.

4. Ms. Johnson's statement and the blood test results must be suppressed under art. I, §7 because both are tainted by the unconstitutional search of her purse.

Deputy Gosch confronted Ms. Johnson with the methamphetamine he'd discovered by unlawfully searching her purse. CP 3. This prompted her to admit that she'd used methamphetamine two days earlier. CP 3. Gosch told Luque what he'd learned, and Luque questioned Ms. Johnson, confirming her prior statement. RP 51, 55, 58, 61, 84, 100, 568; CP 164.

The methamphetamine from Ms. Johnson's purse was excluded. CP 2; RP 102. Her statements were tainted by the illegal search.

Under Wash. Const. art. I, §7, her statements should have been suppressed. *Winterstein*, 167 Wn.2d at 632; *Afana*, 169 Wn.2d at 180-181; see *State v. Birdsong*, 66 Wn.App. 534, 539–40, 832 P.2d 533 (1992) (excluding tainted statement based on lack of attenuation).

In addition, the statements should have been redacted from the search warrant affidavit. *State v. VanNess*, 186 Wn.App. 148, 165, 344 P.3d 713 (2015); *State v. Ross*, 141 Wn.2d 304, 4 P.3d 130 (2000);⁵⁷ see Ex. 2. In the absence of the methamphetamine seized from her purse and her statements to Gosch and Luque, the affidavit did not provide probable cause for a blood draw. Without probable cause, the blood sample and test

⁵⁷ See also *McNear v. Rhay*, 65 Wn.2d 530, 540–41, 398 P.2d 732 (1965), *rejected on different grounds*, *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

results must be suppressed. *See State v. Youngs*, 199 Wn.App. 472, 485, 400 P.3d 1265 (2017).

Ms. Johnson’s convictions must be reversed. *Id.* The case must be remanded for dismissal or a new trial without the tainted evidence. *Id.*

B. If the attenuation doctrine applies, Ms. Johnson’s statement and the blood test result should have been suppressed as fruit of the poisonous tree.

Under the Fourth Amendment, the State may make use of tainted evidence, but first it must show that the relationship between the prior illegality and the statement is sufficiently attenuated to dissipate the taint. *Ibarra-Cisneros*, 172 Wn.2d at 885; *see also Birdsong*, 66 Wn.App. at 539–40; *State v. Warner*, 125 Wn.2d 876, 888–89, 889 P.2d 479 (1995); *State v. Johnston*, 38 Wn.App. 793, 799–800, 690 P.2d 591 (1984). However, courts should not consider grounds to limit application of the exclusionary rule when the State at a CrR 3.6 hearing offers no supporting facts proving attenuation. *Ibarra-Cisneros*, 172 Wn.2d at 885.⁵⁸

⁵⁸ *Miranda* warnings are not by themselves sufficient to purge the taint. *Johnston*, 38 Wn.App. at 799–800. In fact, the voluntariness of the statement is irrelevant. *State v. Byers*, 88 Wn.2d 1, 7–10, 559 P.2d 1334 (1977) (explaining that voluntariness relates to the Fifth Amendment rather than “the Fourth Amendment question of whether a confession is a ‘fruit of the poisonous tree’”) (citation omitted), *overruled on other grounds by State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984) (*Williams III*). However, an illegal search or seizure can contribute to a finding of involuntariness. *See State v. Gonzales*, 46 Wn.App. 388, 401, 731 P.2d 1101 (1986).

Here, defense counsel argued that the statements and the blood draw were tainted, but the State failed to produce facts proving attenuation sufficient to dissipate the taint. RP 5-1128, 201-205; CP 15-40. This amounts to a waiver. *Id.*

Even if the State is permitted to argue attenuation, the record does not support that the taint was dissipated. The State failed to prove that her statements were sufficiently attenuated from the illegal search of the purse. *Id.* There is a direct line between Gosch's illegal search, the confrontation that produced Ms. Johnson's first admission, her statements to Luque, and the issuance of the search warrant for the blood draw. RP 51, 568; Ex. 2, p. 4; CP 2-3. Indeed, the prosecution relied on Ms. Johnson's statements to argue that the warrant application established probable cause. *See* State's Response to Mot. Suppress, filed 1/31/17, Supp. CP.

Ms. Johnson's statements should have been suppressed. *Birdsong*, 66 Wn.App. at 539–40. They should also have been excised from the search warrant application. *VanNess*, 186 Wn.App. at 165; *Ross*, 141 Wn.2d at 311–12.

The burden is on the State to show harmlessness beyond a reasonable doubt. *Watt*, 160 Wn.2d at 635. The State cannot make that showing here. Luque relied on Ms. Johnson's statements to obtain the search warrant for the blood draw. CP 164; Ex. 2, p. 4. The prosecutor summarized

her admission during his opening statement, introduced it into evidence through Luque's testimony, and discussed it at length in closing. RP 227, 568, 799-801, 852.

Ms. Johnson's conviction must be reversed and her statements suppressed. *Id.* Because the statements were included in the search warrant application, the blood test results must be suppressed as well. *Ibarra-Cisneros*, 172 Wn.2d at 885. The case must be remanded for dismissal (if the State lacks evidence to proceed) or a new trial without the unlawfully obtained evidence. *Id.*

C. The redacted search warrant application did not establish probable cause for a blood draw.

Under both the Fourth Amendment and art. I, §7, search warrants must be based on probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). Probable cause exists if the search warrant application sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Reeder*, 184 Wn.2d 805, 813 n. 6, 365 P.3d 1243 (2015).

An affidavit in support of a search warrant "must set forth the underlying circumstances specifically enough that the magistrate can independently judge the validity of [the officer's] conclusions." *Lyons*, 174

Wn.2d at 359. This requirement is based on a “fundamental principle: the determination of probable cause must be made by a magistrate based on the facts presented to the magistrate, instead of being made by police officers in the field.” *Id.*, at 360. Furthermore, probable cause must rest on “reasonably trustworthy” information. *State v. Byrd*, 178 Wn.2d 611, 626, 310 P.3d 793 (2013); *Afana*, 169 Wn.2d at 182; *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

To support a blood draw in a driving case, the affidavit must contain sufficient information to allow the issuing magistrate “to make an independent determination whether probable cause of driving under the influence of intoxicants existed.” *Youngs*, 199 Wn.App. at 485 (emphasis removed).

In this case, the affidavit in support of the blood draw warrant did not establish probable cause. This is so whether or not Ms. Johnson’s improperly obtained statements are considered.

Luque provided the following information: while driving, Ms. Johnson left a straight section of road and collided with a pedestrian. Ex. 2 p. 3. She explained that she’d driven off the side of the road while trying to retrieve a lit cigarette she’d dropped. She also said she’d used marijuana

and methamphetamine two days earlier. Ex. 2 p. 4.⁵⁹

Luque relayed no observations regarding Ms. Johnson's condition prior to treatment by medical staff.⁶⁰ After the accident, she'd been administered a "large amount of opiate based narcotics." Ex. 2 p. 4. She appeared depressed, her movements were slow, and her speech was "slow and delayed." Ex. 2 p. 4. Despite this, Luque described her as "alert, awake, and responsive." Ex. 2 p. 4. He relayed her vital signs, which he characterized as "elevated," in contrast to the "depressed" vitals expected for a person who'd been administered narcotics.⁶¹ Ex. 2 pp. 4-5. He noted that her pupils were "3.5 MM [sic] in dilation," and later said they were "additionally dilated when in comparison [sic] to what would be expected with the use of these narcotics." Ex. 2 p. 5.

Even when considered together, this information does not amount to probable cause to believe that Ms. Johnson was "under the influence of or affected by" drugs at the time of the accident. RCW 46.61.502. Luque

⁵⁹ As argued above, this information should have been excised from the warrant application. *VanNess*, 186 Wn.App. at 165; *Ross*, 141 Wn.2d at 311–12. The methamphetamine found in her purse was suppressed by the Court of Appeals and redacted from the search warrant application. CP 2; Ex. 2, p. 3.

⁶⁰ In fact, Deputy Gosch had seen no signs of impairment. RP 248, 259, 263-264. Luque did not provide this information to the issuing magistrate. Ex. 2. Luque did not reveal that he'd administered the HGN test and found no nystagmus. RP 48, 79-80, 83, 564, 610; Ex. 2. These were likely material omissions, and may have provided an additional basis to invalidate the warrant. *See, e.g., State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992).

⁶¹ Further, the blood test did not reveal the presence of opiates or other narcotics, suggesting their effects had dissipated by the time Luque observed Ms. Johnson. RP 445-446, 458-460.

did not (and could not) say that her ability to drive was impaired prior to the administration of a “large amount of opiate based narcotics” by medical staff. Ex. 2 p. 4.

Luque did not claim he’d administered the twelve-step DRE protocol required under *Baity*. In his warrant application, he did not claim special expertise in judging impairment from the combined effect of opiates and stimulants.⁶² Ex. 2. Nor did he suggest that he could untangle the shock and other effects of the accident and Ms. Johnson’s broken arm from the effects of the pain medication and any prior drug use. Ex. 2.

Luque’s affidavit did not establish probable cause, and the warrant authorizing the blood draw should not have issued. *Youngs*, 199 Wn.App. at 485. Ms. Johnson’s convictions must be reversed, the blood test results suppressed, and the case remanded for dismissal or a new trial without the improperly seized evidence. *Id.*; *Lyons*, 174 Wn.2d at 368.

D. The trial court adopted unsupported findings and erroneous conclusions.

Appellate courts review a trial court’s findings on a suppression motion under the substantial evidence standard. *Levy*, 156 Wn.2d at 733.

⁶² As Louis (the toxicologist) testified, the two categories of drugs are not true antagonists. RP 460. Luque insisted that they were. RP 579-580.

Conclusions of law are reviewed *de novo*. *Id.* The trial judge entered consolidated findings and conclusions in support of his decision denying Ms. Johnson's suppression motions and admitting her statements to Luque. CP 160. The findings and conclusions are unsupported and erroneous for the reasons set forth elsewhere in the brief.

In addition, Finding No. 24 is unsupported because Luque did not perform all the required tests on Ms. Johnson's eyes, and she would have been able to complete some of the physical tests had he asked her to. RP 78-82, 541, 594. Finding No. 26 is unsupported because Luque acknowledged that he may have spent as little as 10 minutes with Ms. Johnson. RP 62. Finding No. 28 is unsupported because Luque never claimed to know when the Fentanyl had been administered prior to his arrival. RP 39-40, 42, 68-71, 86, 433, 453, 546, 550-563, 585. The same is true for the first ½ mg of the Dilaudid administered; only .5 mg was administered "just" before he contacted her. RP 563.

Finding No. 29 is unsupported because Luque could not know the effects of the opiate painkillers without knowing what medication she had been administered in the field by paramedics, the precise timing of the Fentanyl and Dilaudid doses, and whether they were administered by tablet or intravenously, as argued elsewhere in this brief. Finding No. 30 is unsupported to the extent it implies that Luque's beliefs were supported by

science and the available information. Finding No. 31 is unsupported to the extent it implies that the warrant affidavit established probable cause.

The unsupported findings must be stricken. *See, e.g., City of Richland v. Wakefield*, 186 Wn.2d 596, 610, 380 P.3d 459 (2016) (“There is no evidence to support this finding of fact and, therefore, we strike it.”) The conviction must be reversed, the evidence suppressed, and the case remanded for dismissal or a new trial. *Lyons*, 174 Wn.2d at 368.

V. THE INFORMATION AND INSTRUCTIONS OMITTED ORDINARY NEGLIGENCE, AN ESSENTIAL ELEMENT OF VEHICULAR ASSAULT WHEN COMMITTED BY MEANS OF INTOXICATED DRIVING.

Strict liability offenses are disfavored. *State v. Bash*, 130 Wn.2d 594, 606, 925 P. 2d 978 (1996). Because of this, a criminal statute’s silence on the mental state required for conviction is not dispositive. *Bash*, 130 Wn.2d at 605. Instead, courts engage in a multistep process to determine if the legislature truly intended to create a strict liability offense. *Id.*, at 605-606.

Vehicular assault committed by means of intoxicated driving does not explicitly require proof of a mental element. RCW 46.61.522(1)(b).⁶³

⁶³ The other alternative means of committing the offense require proof of recklessness (subsection (1)(a)) or “disregard for the safety of others” (subsection (1)(c)), which is described as “an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term ‘negligence.’” *State v. Eike*, 72 Wn.2d 760, 765–66, 435 P.2d 680 (1967).

Prior to *Bash*, the Court of Appeals issued conflicting decisions regarding the mental state required for conviction of the intoxicated driving means of committing vehicular assault (and vehicular homicide.)⁶⁴ See *State v. Lovelace*, 77 Wn.App. 916, 919, 895 P.2d 10 (1995) (vehicular assault requires proof of ordinary negligence); *State v. Hursh*, 77 Wn.App. 242, 890 P.2d 1066 (1995)⁶⁵ (vehicular assault does not require proof of ordinary negligence); *State v. McAllister*, 60 Wn.App. 654, 659, 806 P.2d 772 (1991)⁶⁶ (vehicular homicide requires proof of ordinary negligence).

Proper analysis under *Bash* shows that vehicular assault requires proof of ordinary negligence. This element was omitted from the charging document and the court’s “to convict” instruction, requiring reversal of Ms. Johnson’s conviction.

- A. When committed by means of intoxicated driving, vehicular assault required proof of ordinary negligence.
 - 1. In the absence of express statutory language, courts use a multi-step process to determine the *mens rea* required for conviction of an offense.

In interpreting any statute, the court’s duty is to “discern and implement the legislature’s intent.” *State v. Williams*, 171 Wn.2d 474, 477,

⁶⁴ Like the statute criminalizing vehicular assault, the vehicular homicide statute also lacks an explicit *mens rea* requirement. RCW 46.61.520(1)(a).

⁶⁵ Abrogated on other grounds by *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005).

⁶⁶ Abrogated on other grounds by *Roggenkamp*, *supra*.

251 P.3d 877 (2011) (*Williams I*). Ordinarily, this is accomplished by examining a statute’s plain language. *Matter of Adoption of T.A.W.*, 186 Wn.2d 828, 840, 383 P.3d 492 (2016). However, because strict liability offenses are disfavored, a criminal statute’s failure to specify the mental state required for conviction does not end the inquiry. *Bash*, 130 Wn.2d at 605. Instead, courts analyze statutes under *Bash. Id.*, at 605-606.

First, where a statute’s plain language does not specify a mental element, courts examine legislative history. *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). Second, if the legislative history proves inconclusive, legislature intent is discerned from examination of eight factors (commonly known as the “*Bash* factors”). *Id.*, at 361-367 (citing *Bash*). These eight factors include

- 1) The background rules of the common law, and its conventional mens rea element.
- 2) Whether the crime can be characterized as a “public welfare” or regulatory offense created by the legislature.
- 3) The extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct.
- 4) The harshness of the penalty.
- 5) The seriousness of the harm to the public.
- 6) The ease or difficulty with which the defendant can ascertain the true facts underlying the offense.
- 7) The desirability of relieving the prosecution of difficult and time-consuming proof of fault where the legislature thinks it important to stamp out harmful conduct at all costs, even at the cost of convicting innocent-minded and blameless people.
- 8) The number of prosecutions to be expected.

Id., at 363. Courts examine these eight factors “in light of the principle that offenses with no mental element are generally disfavored.” *Id.*

As noted above, the vehicular assault statute does not specify the mental state required for conviction under the intoxication prong. RCW 46.61.522(1)(b). Nor does the statute explicitly impose strict liability. RCW 46.61.522(1)(b). Examination of the legislative history has proved unhelpful. *See State v. Burch*, 197 Wn.App. 382, 400-404, 389 P.3d 685 (2016), *review denied*, 188 Wn.2d 1006, 393 P.3d 356 (2017). Therefore, the mental state required for conviction must be determined by examining the *Bash* factors.

2. The *Bash* factors establish that vehicular assault is not a strict liability offense.

Six of the eight *Bash* factors suggest that the legislature did not intend to dispense with a *mens rea* requirement in vehicular assault cases committed by means of intoxicated driving. The two remaining factors are inconclusive. Each factor is addressed below.

- a. The common law and statutory antecedents of vehicular assault required proof of a culpable mental state.

The common law and prior statutory offenses suggest that vehicular assault, as well as vehicular homicide, are not strict liability crimes. *See Bash*, 130 Wn.2d at 605-606. There is no direct common law analogue for either offense. The closest common law antecedents are assault and

manslaughter, neither of which are founded upon strict liability. *See State v. Sample*, 52 Wn.App. 52, 55, 757 P.2d 539 (1988) (noting that negligent conduct would not constitute assault at common law); *State v. Norman*, 61 Wn.App. 16, 22-23, 808 P.2d 1159, 1162 (1991) (noting that common law manslaughter required more than ordinary negligence). This suggests that the legislature did not intend to impose strict liability.

b. Vehicular assault is not a public welfare or regulatory offense.

“Public welfare” or “regulatory” crimes are

“are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize.”

Bash, 130 Wn.2d at 607 (quoting *Morissette v. United States*, 342 U.S. 246, 255-56, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). Thus DUI is a public welfare offense (because the statute is regulatory and the offense creates only a risk of harm to person or property). *See, e.g., People v. Ellison*, 14 P.3d 1034, 1038 (Colo. 2000) (“Examples of strict liability public welfare offenses are speeding and driving under the influence.”)

By contrast, vehicular assault is not a public welfare offense, because, unlike DUI, it involves “direct or immediate injury to person or property.” *Bash*, 130 Wn.2d at 607 (quoting *Morissette*, 342 U.S. at 255-

56). Furthermore, it cannot be described as a regulatory offense. This suggests that the vehicular assault statute does not impose strict liability. *Anderson*, 141 Wn.2d at 363.

c. Strict liability would punish seemingly innocent conduct.

Imposing strict liability for these offenses “would encompass seemingly entirely innocent conduct.” *Bash*, 130 Wn.2d at 606. Absent a mental element, a person who drives perfectly after having consumed alcohol or drugs may be liable for vehicular assault (or vehicular homicide) if involved in an accident that results in injury or death, even when the other driver is clearly at fault. There are no published opinions exonerating intoxicated drivers involved in accidents despite perfect driving.

Because strict liability would result in serious felony charges for seemingly innocent conduct, this factor weighs in favor of a *mens rea* requirement for vehicular homicide and vehicular assault. *See, e.g., Anderson*, 141 Wn.2d at 363; *State v. Williams*, 158 Wn.2d 904, 911-914, 148 P.3d 993 (2006) (*Williams II*).

d. The penalty for vehicular assault is so harsh that strict liability is inappropriate.

The high penalty that attends conviction for vehicular assault (and vehicular homicide) suggests the legislature did not intend strict liability. *Anderson*, 141 Wn.2d at 364-365. Vehicular homicide is a Class A felony;

vehicular assault is a class B felony. RCW 46.61.520 (2); RCW 46.61.522(2). The legislature is unlikely to have imposed strict liability for an offense that carries a maximum of ten years in prison (vehicular assault), much less one that could result in a life sentence (vehicular homicide). *See Anderson*, 141 Wn.2d at 365 (“[T]he fact that the offense carries with it a maximum term of five years’ imprisonment... is clearly a factor that weighs in favor of a holding that this offense is not one of strict liability”); *Williams II*, 158 Wn.2d at 914 (noting that possibility of five-year penalty “weighs against strict liability.”)

- e. No significant deterrence would be achieved by allowing conviction without proof of ordinary negligence.

The only factor arguably weighing in favor of strict liability is the fifth *Bash* factor. Vehicular assault causes serious harm to the public. But, as in *Bash*, “[w]hether a strict liability standard would accomplish the goal of deterrence is doubtful.” *Bash*, 130 Wn.2d at 610.

Strict liability would at best increase the deterrent effect of each offense by an amount so minute as to be inconsequential. A person contemplating driving after drinking is unlikely to consider the possibility of conviction for vehicular homicide or vehicular assault. To the extent such a person thinks about the possibility of injury or death, she or he is most likely to be deterred by the possibility of causing or suffering such harm. An intox-

icated person thinking about driving is unlikely to know or care if either offense rests on strict liability or on proof of some culpable mental state. As in *Bash*, imposing strict liability would have little, if any, deterrent effect. *Id.*

- f. The difficulty of ascertaining the “true facts” in vehicular assault cases varies with the individual circumstances.

Under this factor, “[t]he harder to find out the truth, the more likely the legislature meant to require fault in not knowing.” *In re Jorge M.*, 23 Cal. 4th 866, 873, 4 P.3d 297, 301, 98 Cal. Rptr. 2d 466 (2000) (quoting 1 LaFave & Scott, *Substantive Criminal Law* (1986) §3.8(a), pp. 342–344). When applied to vehicular assault, this factor is “not particularly useful.” *Williams II*, 158 Wn.2d at 915. The *Williams II* court found this factor unhelpful in that case because the “true facts”—the characteristics of unlawful firearms—“may not be obvious, particular to one who is unfamiliar with firearms.” *Id.*, at 915.

In vehicular assault cases, the ease of ascertaining true facts is extremely variable. The characteristics of the driver and the circumstances of the case impact the ease of determining the “true facts.” For example, drivers who are new to alcohol, marijuana, or a lawfully prescribed drug may not fully understand how they will be affected. Changes in weight and body fat composition or the presence of food in the stomach could alter the “true facts.” Someone who consumes a small amount of alcohol or a weak strain of marijuana several hours before driving may have greater

difficulty predicting impairment than a person who drinks or smokes a strong intoxicant shortly before getting behind the wheel. Because of this variability, this factor is not especially helpful in determining the legislature's intent. As in *Williams II*, it does not contribute to the analysis. *Id.*

- g. Requiring proof of ordinary negligence is not overly burdensome in vehicular assault cases.

The legislature may be justified in dispensing with proof of fault where proving a culpable mental state will be “difficult and time-consuming.” *Bash*, 130 Wn.2d at 610. However, it is neither difficult nor time-consuming to prove ordinary negligence.

Ordinary negligence is the least culpable mental state known to law. It consists of “hundreds of minor oversights and inadvertences.” *State v. Ferguson*, 76 Wn.App. 560, 569, 886 P.2d 1164 (1995) (internal quotation marks and citation omitted). Although ordinary negligence is a state of mind, it can be shown through any number of physical acts, such as failing to signal a turn. *See, e.g., Smith v. Fourre*, 71 Wn.App. 304, 309, 858 P.2d 276 (1993); *W. Packing Co., Inc. v. Visser*, 11 Wn.App. 149, 156, 521 P.2d 939 (1974).

Furthermore, the legislature has tasked prosecutors with proving more culpable mental states in identical circumstances, where intoxicants are not involved. *See RCW 46.61.520(1)(a); RCW 46.61.522(1)(b)*. The legislature would not regard proof of ordinary negligence as a significant

obstacle to prosecution and conviction. Instead, the ordinary negligence standard relieves the State of the heavier burden it carries in cases that do not involve intoxicated driving. Accordingly, this factor weighs against strict liability. *Anderson*, 141 Wn.2d at 363.

- h. There are relatively very prosecutions for vehicular assault committed by means of intoxication.

In general, “the fewer expected prosecutions, the more likely intent is required.” *Id.*, at 365. The overall number of prosecutions for vehicular assault is relatively low. For FY 2016,⁶⁷ the number of vehicular assaults committed by *both* intoxicated driving *and* reckless driving⁶⁸ totaled 127.⁶⁹ See Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing*, p. 12 (2016).⁷⁰ This represents only 0.5% of the total number of felony convictions. Caseload Forecast Council (2016), p. 12.

The number is also significantly lower than the number of convictions for other serious felonies requiring proof of a culpable mental state

⁶⁷ The most recent year for which information is available.

⁶⁸ The Caseload Forecast Council summary did not separate the convictions for these alternate means. Caseload Forecast Council (2016), p. 12. In addition, there was also one conviction for attempted vehicular assault by means of intoxication or reckless driving. Caseload Forecast Council (2016), p. 12. There were nine convictions for vehicular assault by means of disregard for the safety of others

⁶⁹ There were only 22 vehicular homicides committed by means of intoxicated driving. Caseload Forecast Council (2016), p. 12.

⁷⁰ Available at http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2016.pdf (accessed January 26, 2017)

such as, for example, second-degree assault (626) third-degree assault (1,545), and second-degree burglary (1,077). Caseload Forecast Council (2016), p. 4. This makes it more likely that the legislature intended conviction to require proof of a culpable mental state. *Id.*, at 365.

B. The *Bash* factors, *McAllister*, and *Lovelace* require proof of ordinary negligence for conviction of vehicular assault.

Six of the eight *Bash* factors suggest that the legislature intended to retain a mental element for both vehicular homicide and vehicular assault when committed by means of intoxication. The remaining two are inconclusive. It is thus unlikely that the legislature “intended to jettison the normal requirement that mens rea be proved.” *Anderson*, 141 Wn.2d at 367. Under *Bash*, the statute should be interpreted to require proof of a culpable mental state. *Id.*

Furthermore, cases decided prior to *Bash* establish that ordinary negligence is the appropriate mental state for conviction of vehicular assault by means of intoxicated driving. *See Lovelace*, 77 Wn.App. at 919 (vehicular assault); *McAllister*, 60 Wn.App. at 659 (vehicular homicide).⁷¹ Neither *Lovelace* nor *McAllister* have been overruled regarding the “ordinary negligence” element.⁷²

⁷¹ *But see Hursh*, 77 Wn.App. at 245-247.

⁷² The *Lovelace* court did not address *Hursh*, which was published just two months earlier. In *Hursh*, the Court of Appeals concluded that “RCW 46.61.522 cannot be construed to require

The legislature has not undermined *McAllister* and *Lovelace* with its subsequent amendments to the vehicular assault and vehicular homicide statutes. *See* Laws of 1991, Ch. 348 §1 (enacted two months after *McAllister* decision); Laws of 1996, Ch. 199 §§1, 8 (enacted 10 months after *Lovelace* decision); Laws of 1998, Ch. 211 §2; Laws of 2001, Ch. 300 §1. The legislature is presumed to be familiar with court decisions construing existing statutes. *State v. Johnson*, 188 Wn.2d 742, 761 n. 7, 399 P.3d 507 (2017).

The ordinary negligence standard makes sense in the overall statutory scheme. Sober drivers may be convicted upon proof of recklessness (RCW 46.61.520(1)(b), .522(1)(a)) or disregard for the safety of others (RCW 46.61.520(1)(c), .522(1)(c)).⁷³ Intoxicated drivers, by contrast, may be convicted in the absence of reckless conduct, disregard for the safety of others, or even criminal negligence.⁷⁴ Instead, the least blameworthy mental state (ordinary negligence) balances the increased culpability that accompanies the decision to drive after consuming alcohol or drugs.

a showing of negligent conduct as an element of vehicular assault.” *Hursh*, 77 Wn.App. at 246.

⁷³ Disregard for safety of others is “an aggravated kind of negligence” requiring “[s]ome evidence of the defendant’s conscious disregard” of danger.” *State v. Lopez*, 93 Wn.App. 619, 623, 970 P.2d 765 (1999).

⁷⁴ *See State v. Beel*, 32 Wn.App. 437, 444-445, 648 P.2d 443 (1982) (distinguishing between ordinary and criminal negligence).

The only case addressing the issue since *Bash* is *Burch, supra*. The *Burch* court correctly identified the framework for analysis and concluded that the *Bash* factors “point in different directions,” making analysis difficult. *Burch*, 197 Wn.App. at 399, 404. Despite this, the court erroneously concluded that vehicular assault is a strict liability crime when committed by means of intoxicated driving.⁷⁵ *Burch*, 197 Wn.App. at 407. This court should revisit *Burch* and reverse because it is both incorrect and harmful. *See, e.g., State v. W.R., Jr.*, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014) (courts will overrule a prior decision upon a clear showing that the rule it announced is “incorrect and harmful.”)

The *Burch* court correctly determined that factor four (harshness of the penalty) weighs against strict liability. *Burch*, 197 Wn.App. at 396-397, 404. However, the court used questionable logic to find factors one, two, seven, and eight inconclusive. *Id.*, at 393-399.

In the end, only three of the eight factors supported the *Burch* court’s decision to impose strict liability. *Id.*, 393-399, 404-407. The court’s conclusions as to those three are also suspect.

Factor one (common law antecedents). The Court of Appeals erroneously found this factor inconclusive.

⁷⁵ The *Burch* court reached the same conclusion regarding vehicular homicide.

Although it examined common law and statutory analogues to vehicular homicide, it failed to undertake any analysis of the antecedents of vehicular assault. *Id.*, at 393, 404. Furthermore, it found that vehicular homicide’s antecedents did “not significantly illuminate legislative intent in enacting the 1991 amendments.” *Id.*, at 393. But the vehicular assault statute was not amended in 1991.

Finally, neither the common law antecedent to vehicular assault (common law assault) nor any statutory precursors (for example, the felony assaults now outlined in RCW 9A.36.011 - RCW 9A.36.031 imposed strict liability). When considered “in light of the principle that offenses with no mental element are generally disfavored,” this factor suggests that the legislature did not intend to impose strict liability.⁷⁶ *Anderson*, 141 Wn.2d at 363.

Factor two (public welfare offense). The Court of Appeals’ conclusion that “this factor weighs in favor of neither position” appears to reflect a misunderstanding of the difference between public welfare offenses and traditional criminal offenses. Vehicular assault cannot be described as a public welfare offense. *See Morissette*, 342 U.S. at 250-263 (discussing the evolution of public welfare offenses and the rationale for finding a

⁷⁶ Had the legislature intended to do so, it could have explicitly stated its desire to relieve the state of its burden to prove a culpable mental state.

mental element even absent explicit statutory reference to a culpable mental state.)

Indeed, by including the word “assault” in the statute’s title, the legislature “borrow[ed] [a] term[] of art in which [is] accumulated the legal tradition and meaning of centuries of practice.” *Id.*, at 263. Legislators presumably knew and adopted “the cluster of ideas that were attached to [the word “assault”] in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” *Id.*

Like the dangerous dog statute at issue in *Bash*, RCW 46.61.522 does not create a strict liability offense. The *Burch* decision failed to properly analyze factor two.

Factor three (encompassing seemingly innocent conduct). The *Burch* court erroneously decided that this factor weighs in favor of strict liability. *Burch*, 197 Wn.App. at 396, 405-407.⁷⁷ The court relied on an example that does not support its decision.

According to the *Burch* court, a perfect driver—one who is not guilty of even ordinary negligence—could not be convicted of vehicular

⁷⁷ The court reached this conclusion by deciding that the legislature left intact the state’s obligation to prove proximate cause even though it removed the phrase “proximate cause” when it amended RCW 46.61.522 in 2001. *Id.*, at 405-407. This reasoning allowed the court to conclude that seemingly innocent conduct (i.e. idling at a stop sign while intoxicated) would not be criminalized by the statute. *Id.* In this case, jurors were instructed that proximate cause is an element of the offense. CP 140, 142, 144.

assault. *Id.*, at 394-396, 405-407. The court suggested that the State must prove “the defendant ‘actively participate[d] in the immediate physical impetus of harm.’” *Id.*, at 396 (quoting *State v. Bauer*, 180 Wn.2d 929, 940, 329 P.3d 67 (2014)).

The Court of Appeals misrepresents this language as part of the holding of *Bauer*. In context, the quoted language reads “This court has found no Washington case upholding such liability, either, where the accused did not actively participate in the immediate physical impetus of harm.” *Id.*, at 940. The *Bauer* court did not hold that criminal liability can only stem from active participation in the immediate physical impetus of harm.⁷⁸

The Court of Appeals also assumed that a “second driver’s actions would be considered a superseding cause of the collision.” *Burch*, 197 Wn.App. at 396. In fact, “[a]n intervening cause only breaks the chain of causation if the intervening event is *so unexpected that it falls outside the realm of the reasonably foreseeable.*” *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 418, 150 P.3d 545 (2007) (emphasis added). Furthermore, the defendant’s conduct can be a proximate cause “if another cause

⁷⁸ Had it done so, the *Bauer* court would have eliminated a large number of criminal offenses and severely limited strict liability crimes.

is merely a concurrent cause.” *State v. Meekins*, 125 Wn.App. 390, 398, 105 P.3d 420 (2005).⁷⁹

If interpreted to impose strict liability, the statute encompasses seemingly innocent conduct under *Bash*. This factor weighs in favor of a *mens rea* requirement.

Factor five (potential for harm to the public). Although vehicular assault necessarily harms the public, this does not end the inquiry. Instead, the court must also determine “[w]hether a strict liability standard would accomplish the goal of deterrence.” *Bash*, 130 Wn.2d at 610. It is unlikely that an intoxicated person would refrain from driving solely based on the mental state required to prove vehicular assault.

Instead, for most drivers, it is probably the prospect of a DUI conviction that deters. DUI is a public welfare offense, and does not require a culpable mental state. But this does not mean that the deterrence posed by the vehicular assault statute will be affected by the *mens rea*.

A person who is under the influence and considering getting behind the wheel will most likely be ignorant and indifferent regarding the mental

⁷⁹ The Court of Appeals also (apparently) posited that intoxicated drivers cannot, as a matter of law, engage in “seemingly entirely innocent conduct,” because they are necessarily guilty of DUI. *Burch*, 197 Wn.App. at 396. This is a flawed reading of the phrase “seemingly innocent.” It should not exclude those who may commit a lesser or other related offense. *See Bash*, 130 Wn.2d at 606.

state required for conviction. The *Burch* court failed to meaningfully consider this factor. Had it considered the minimal difference in deterrent effect resulting from strict liability, it would not have so confidently concluded that this factor weighs against requiring a culpable mental state.

Although vehicular assault harms the public, strict liability will not significantly deter intoxicated driving. Instead, the public welfare offense of driving while under the influence poses an adequate deterrent effect. This factor is effectively neutral.

Factor six (difficulty of ascertaining true facts). The *Burch* court took an unrealistically simplistic approach to this factor, noting that “it is relatively easy for a defendant to ascertain facts surrounding his or her driving under the influence.” *Burch*, 197 Wn.App. at 398. This reductive approach oversimplifies the determination of true facts when it comes to drinking and driving.

As outlined above, many variables impact a person’s ability to accurately determine if consuming alcohol or drugs produces intoxication that reaches the level of legal impairment. A person new to alcohol, marijuana, a prescription drug, or even illicit drugs may be unable to gauge the effect of ingestion.

Size, body fat composition, the potency of the alcohol or drug consumed, the time since the person’s last meal, and the impaired person’s

ability to perceive will affect her or his ability to ascertain the true facts.

This factor weighs against strict liability.

Factor seven (difficulty of proving fault). The *Burch* court erroneously failed to give weight to this factor. *Id.*, at 399. Instead, it faulted the appellant for failing to adequately show that ordinary negligence “would be easy to prove in the context of a vehicular homicide or vehicular assault prosecution.” *Id.*, n. 3.

Presumably, showing negligence would be no harder in cases involving bodily injury or death than it would be in cases merely endangering another. The legislature has created a misdemeanor and a traffic infraction based on such behavior, suggesting that legislators did not view the requirement of proving fault to be difficult. RCW 46.61.5249; RCW 46.61.525. Indeed, in this case, the State would likely be able to persuade a jury that Ms. Johnson was negligent based on her statement regarding the dropped cigarette. RP 290.

Factor eight (number of prosecutions expected). The *Burch* court erroneously found this factor inconclusive.⁸⁰ Without citation to any authority, the court asserted that “the data contained [in the CFC reports]

⁸⁰ The court implied that it would be improper to consider the Caseload Forecast Council’s report. *Id.*, n. 3. But the Supreme Court has relied on CFC reports. *See, e.g., SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 601 n. 10, 229 P.3d 774 (2010). The *Burch* court’s concern appears misplaced.

do not show levels of prosecution low or high enough to be significantly probative of legislative intent.” *Id.*, at 399 n. 3. Furthermore, the court cited no authority for its approach (comparing the number of prosecutions for vehicular assault to the average number per felony crime).⁸¹ *Id.*

The number of prosecutions in 2016 is not so large as to suggest that strict liability must be imposed. *Anderson*, 141 Wn.2d at 365. As noted, vehicular assault sentences for both the reckless and intoxicated driving alternatives make up only .5% of felony dispositions.

This court should revisit *Burch*. The court’s decision to impose strict liability in that case is incorrect for the reasons just outlined. It is harmful because it allows conviction for vehicular assault without proof of an essential element. Because it is both incorrect and harmful, it should be reversed. *W.R., Jr.*, 181 Wn.2d at 768.

C. The omission of ordinary negligence from the Information and from the court’s instructions requires reversal of Ms. Johnson’s conviction.

1. The Information was deficient and failed to charge a crime.

⁸¹ In addition, an error in appellant’s brief lead the *Burch* court to misstate the number of sentences imposed for vehicular homicide in 2014 and 2015, citing instead the number of offenders sentenced to prison terms. *Id.*, n. 3. The correct numbers were 113 (2015) and 103 (2014). See Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing*, p. 12 (2015) (available at http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2015.pdf, accessed 10/23/17) and Caseload Forecast Council, *Statistical Summary of Adult Felony Sentencing*, p. 12 (2014) (available at file:///C:/Users/Manek's%20Home%20Office/Downloads/Adult_Stat_Sum_FY2014.pdf, accessed 10/23/17).

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Pittman*, 185 Wn.App. 614, 619, 341 P.3d 1024 (2015). Such a challenge may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When the challenge comes after a verdict, the reviewing court construes the document liberally. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A reviewing court must determine if the necessary facts appear or can be found by fair construction in the charging document. *Id.* at 162. If the Information is deficient, the court must presume prejudice and reverse. *Id.* at 163.

Here, the second amended Information did not allege ordinary negligence. Second Amended Information, filed 4/22/15, Supp. CP. Nor can that element be implied from a fair construction of the charging document. Because of this, the Information did not charge a crime. Ms. Johnson's conviction must be reversed and the vehicular assault charge dismissed without prejudice. *Id.*

2. The instructions omitted an essential element.

A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the court's elements instruction as a complete statement of the law. Any conviction

based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (*Smith I*). This is so even if other instructions supply the missing element. *Id.*; *Lorenz*, 152 Wn.2d 22 at 31; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Furthermore, due process prohibits a trial judge from instructing jurors in a manner that relieves the State of its burden of proof. U.S. Const. Amend. XIV; *Aumick*, 126 Wn.2d at 429. Furthermore, jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kylllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). If a jury can construe a court’s instructions to allow conviction without proof of an element, any resulting conviction violates due process. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

Here, the court’s “to convict” instruction did not require proof of ordinary negligence. CP 144. Furthermore, the instructions as a whole did not make the relevant legal standard manifestly clear to the average juror. CP 131-147; *Kylllo*, 166 Wn.2d at 864.

The conviction violated due process. *Smith I*, 131 Wn.2d at 263. It must be reversed and the case remanded for a new trial with proper instructions. *Id.*

VI. PROSECUTORIAL MISCONDUCT AND RELATED ERRORS REQUIRE REVERSAL.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, §22. If defense counsel objects, a conviction must be reversed whenever there is a substantial likelihood that the impropriety affected the jury’s verdict. *Id.* The objection need not be raised contemporaneously, but may be made in a post-trial motion.⁸² *Burke*, 163 Wn.2d at 210–11.

Furthermore, misconduct that is flagrant and ill-intentioned requires reversal even absent an objection at trial.⁸³ *Id.*; *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976, 985 (2015), *cert. denied*, 135 S.Ct. 2844, 192 L.Ed. 2d 876 (2015) (*Walker II*).

Prosecutorial misconduct may require reversal even where ample evidence supports the jury’s verdict. *Id.*, at 711-12. The focus of the reviewing court’s inquiry “must be on the misconduct and its impact, not on the evidence that was properly admitted.” *Id.*

⁸² Here, defense counsel erroneously believed that some of his objections came too late because they were not contemporaneous. RP 885; CP 158-159.

⁸³ Prosecutorial misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the misconduct. *Glasmann*, 175 Wn.2d at 707.

A conviction must be reversed based on evidentiary error if there is a reasonable probability the error affected the outcome. *Everybodytalksabout*, 145 Wn.2d at 468–69.

A. The prosecutor committed misconduct by introducing an improper judicial comment into evidence.

As noted above, the prosecutor prompted Luque to testify that he “authored” a search warrant because he believed Ms. Johnson was “impaired.” RP 576. The prosecutor went on to clarify that a search warrant is “run by the judge and a judge has approved it.” RP 627. This was an improper judicial comment, as argued elsewhere in this brief. *Jackman*, 156 Wn.2d at 743-745.

It was also prosecutorial misconduct. The State’s attorney could have made the same point—that a warrant is more likely than consent to survive a defense challenge to the admission of evidence—without the judicial comment.

Such testimony (without the judicial comment) may have been a fair response to defense counsel’s cross examination of Luque regarding his failure to draw blood based on Ms. Johnson’s consent. However, counsel had “no power to ‘open the door’ to prosecutorial misconduct.” *State v. Jones*, 144 Wn.App. 284, 295, 183 P.3d 307 (2008).

The misconduct was flagrant, ill-intentioned, and highly prejudicial. It gave the State an unfair advantage: a stamp of judicial approval regarding the primary contested issue at trial. Even absent a defense objection, the error requires reversal. *Glasmann*, 175 Wn.2d at 703-704.

B. The trial court erred by allowing the prosecutor to commit misconduct by introducing testimony that Carey will require a new prosthetic every two years at an uninsured cost of \$90,000.

Despite the warnings provided by defense counsel's objections, the prosecutor introduced irrelevant and prejudicial evidence calculated to inflame passions. RP 702, 722-723. The evidence regarding the uninsured cost of replacement prosthetics was irrelevant under ER 401 and ER 402. The mother's testimony was also cumulative and unfairly prejudicial under ER 403. A medical professional and Carey himself had already testified to the extent of the injuries. RP 492-510, 688-700.

The court should have excluded the evidence under ER 402 and ER 403. Alternatively, the court should have placed tighter limits on the scope of her testimony. RP 702-704. The admission of the evidence requires reversal because there is a reasonable probability that it materially affected the outcome. *Everybodytalksabout*, 145 Wn.2d at 468-69.

In addition, the prosecutor committed misconduct by introducing the evidence. The prosecutor had ample notice regarding defense coun-

sel's objections, and must have known he was treading on dangerous territory. Instead of exercising restraint, the prosecutor forced defense counsel to interrupt the emotional testimony with an objection, and then plowed ahead anyway. RP 722-723. The misconduct requires reversal. *Glasmann*, 175 Wn.2d at 703-704.

- C. The prosecutor committed misconduct by suggesting that juries can presume guilt prior to deliberations.

Prosecutorial misconduct during argument can be particularly prejudicial. There is a risk that jurors will lend it special weight because of the prestige associated with the prosecutor's office, and because jurors presume that the State has superior fact-finding capabilities. *Glasmann*, 175 Wn.2d at 706.

Here, the prosecutor began his closing argument by declaring that "every time we have a criminal trial... there's one reason why everyone is gathered[:] it is because of the actions and the choices of the defendant." RP 789. Defense counsel objected when the jury was absent and sought a mistrial. RP 818. Counsel also filed and argued a post-trial motion for a new trial. CP 156-159; RP 885.

The prosecutor's comment improperly suggested that a defendant can be presumed guilty. This is misconduct. *See State v. Evans*, 163 Wn.App. 635, 642-48, 260 P.3d 934 (2011). It was especially prejudicial

because it was the first thing the prosecutor said in closing, and because he went on to tie his misconduct to Ms. Johnson by asserting that “we all have been here this week, because of the actions and the choices of the defendant.” RP 790.

There is a substantial likelihood that the impropriety affected the jury’s verdict. Accordingly, Ms. Johnson’s conviction must be reversed.

D. Whether considered individually or cumulatively, the prosecutor’s misconduct requires reversal.

When assessing prosecutorial misconduct, reviewing courts examine its cumulative effect. *Glasmann*, 175 Wn.2d at 707-12. Here, the prosecutor committed several instances of misconduct. The State’s attorney improperly introduced evidence suggesting a judge agreed Ms. Johnson was “impaired” and emotional testimony that was irrelevant, cumulative, and designed to inflame the jury’s passions. The prosecutor also improperly undermined the presumption of innocence by implying that all prosecutions stem from an accused person’s choices and actions.

Individually, each instance of misconduct requires reversal. Cumulatively, there can be no doubt that Ms. Johnson was denied a fair trial. Accordingly, her conviction must be reversed and the case remanded for a new trial. *Id.*

- E. If the prosecutor’s misconduct and the associated errors are not preserved for review, Ms. Johnson was deprived of the effective assistance of counsel.

An accused person has a constitutional right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel’s performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*⁸⁴

Failure to object to prosecutorial misconduct is objectively unreasonable under most circumstances: “At a minimum, an attorney... should request a bench conference... where he or she can lodge an appropriate objection.” *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005). An objection at sidebar will preserve the error for judicial review under a standard that is more favorable than the flagrant and ill-intentioned standard applied where no objection is made. *Glasmann*, 175 Wn.2d ta 704.

Here, defense counsel objected to some, but not all, of the prosecutor’s misconduct. *Hodge*, 426 F.3d at 386. Counsel should have objected when the prosecutor improperly introduced a judicial comment. RP 576,

⁸⁴ Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Id.*; RAP 2.5(a).

627. In addition, if his objections (and post-trial motions) regarding Chumley's testimony and the prosecutor's closing are insufficient, he should have objected at the moment the misconduct occurred. At a minimum, defense counsel should have asked for a sidebar, objected, and sought a mistrial outside the presence of the jury. *Id.*

There is a reasonable possibility that the prosecutor's misconduct influenced some jurors. *Kyllo*, 166 Wn.2d at 862. Accordingly, Ms. Johnson's convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Ms. Johnson's conviction must be reversed. Her statements and the blood test results must be suppressed. The case must be remanded for dismissal, or in the alternative, a new trial.

Respectfully submitted on October 25, 2017,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Shaun Johnson
27304 NE Hathaway Road.
Camas, WA 98607

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
cntypa.generaldelivery@clark.wa.gov
rachael.probstfeld@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 25, 2017.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

October 25, 2017 - 4:48 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50064-7
Appellate Court Case Title: State of Washington, Respondent v. Shaun C. Johnson, Appellant
Superior Court Case Number: 13-1-01964-7

The following documents have been uploaded:

- 1-500647_Briefs_20171025162513D2566419_4742.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 500647 State v Shaun Johnson Opening Brief.pdf
- 1-500647_Designation_of_Clerks_Papers_20171025162513D2566419_4610.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was 500647 State v Shaun Johnson Supp Designation of Clerks Papers.pdf
- 1-500647_Motion_20171025162513D2566419_8803.pdf
This File Contains:
Motion 1 - Other
The Original File Name was 500647 State v Shaun Johnson Motion for Overlength Brief.pdf

A copy of the uploaded files will be sent to:

- CntyPA.GeneralDelivery@clark.wa.gov
- rachael.probstfeld@clark.wa.gov

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com

Address:

PO BOX 6490

OLYMPIA, WA, 98507-6490

Phone: 360-339-4870

Note: The Filing Id is 20171025162513D2566419