

FILED

JUN 10, 2016

Court of Appeals
Division III
State of Washington

No. 33884-3-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TABITHA SANCHEZ

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable Judge John Antosz

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Tabitha Sanchez was convicted of attempting to elude a pursuing police vehicle and driving while under the influence of drugs or alcohol. But her conviction should now be reversed and remanded for a new trial, because the defendant was denied her constitutional right to present a defense. Specifically, the court erred by denying her the opportunity to confront the State's testifying officers as to gaps in their investigation (that field sobriety and involuntary blood draw tests were not performed, when officers routinely perform these types of tests on persons taken into custody when they suspect the person drove under the influence).

The court further erred by failing to allow, and defense counsel was ineffective for failing to insist on, a defense of necessity. According to the defendant's offer of proof, Ms. Sanchez did not immediately stop her vehicle when signaled by the officer because she was trying to get away from a person the officer was preparing to pull over who had threatened her over an unpaid debt left by her murdered son. The court and parties erred by assuming that this defense could not be raised where the necessity to commit an unlawful act was due to threats of harm from another human being, as opposed to necessity due to the forces of nature.

Finally, the court erred by sentencing Ms. Sanchez based on an offender score of 9+ and to enhanced penalties for a fourth DUI when the State did not offer proof of any of the defendant's prior convictions.

Ms. Sanchez respectfully requests this matter be reversed and remanded for a new trial or, at a minimum, remanded for resentencing.

B. ASSIGNMENTS OF ERROR

1. The court erred by denying the defendant the opportunity to fully cross examine the testifying officers on gaps in their investigation, specifically, whether field sobriety and blood tests could have been performed to better establish whether Ms. Sanchez had or had not driven under the influence or recklessly.
2. The court erred and defense counsel was ineffective in determining that a defense of necessity was inapplicable in this case since Ms. Sanchez's necessity for eluding was not caused by physical forces of nature.
3. The court erred by sentencing Ms. Sanchez where the State never proved her prior convictions by a preponderance of the evidence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the defendant was denied her constitutional right to present a defense when she was limited during cross examination from asking questions that could have given the jury reason to doubt her guilt.

Issue 2: Whether this case should be retried, because defense counsel was ineffective for failing to pursue the defense of necessity as to Ms. Sanchez's charge of attempt to elude a pursuing police vehicle.

Issue 3: Whether Ms. Sanchez should be resentenced where the State failed to offer any evidence to prove her prior convictions.

D. STATEMENT OF THE CASE

During the night of November 25, 2014, Officer Kyle McCain was checking the registration of a Lincoln Navigator vehicle in Moses Lake when he saw a white vehicle drive past him through an intersection at a high rate of speed. (1RP¹ 188, 190-91, 244-45; 2RP 6, 23) The white vehicle attempted to turn, but slid sideways into the adjacent curb or gutter. (*Id.*; 1RP 233-34, 242; 2RP 19) The officer turned on the emergency lights of his car and followed the white vehicle, which had one or two blown tires on the passenger side, making it difficult to steer. (1RP 191-92, 199, 225, 235; 2RP 18, 27-28) The vehicle did not immediately stop, so the officer activated his siren and shined his spotlight at the driver. (*Id.*)

The vehicle continued driving through the streets of Moses Lake at five- to 10-miles-per-hour over the speed limit, rolled through one stop sign, and made a wide turn at another street. (1RP 193-200, 220-21, 223-25; Exhibits P1 and P2) Officer McCain called for backup, and Corporal Gary Mansford joined in pursuing the vehicle; meanwhile, officers learned the vehicle was registered to Tabitha Sanchez. (1RP 201; 2RP 25-26)

Ms. Sanchez eventually stopped in front of her residence, exited from the driver's side of the vehicle, and walked toward her home. (1RP

¹ "1RP" refers to the transcript of the first day of trial on October 7, 2015.
"2RP" refers to the transcript of the second day of trial on October 8, 2015.
"3RP" refers to the transcript of the sentencing hearing on October 26, 2015.

202) The officers took Ms. Sanchez to the ground and arrested her, at which time they noticed an obvious odor of intoxicants coming from her breath. (1RP 202-03, 205-06, 215, 270, 275; 2RP 28) Officers also noticed Ms. Sanchez had bloodshot and watery eyes. (1RP 225, 269-70) Ms. Sanchez denied drinking alcohol or being drunk; she said she was sick and had previously drank cough syrup. (1RP 205, 207, 270)

During her arrest, according to defense counsel's offer of proof, Ms. Sanchez told an officer she did not immediately stop her vehicle, because "she had been threatened by the gentleman he was about to pull over in the blue...Lincoln Navigator – that he had threatened to kill her if she did not pay a debt that her murdered son had failed to pay... It was the vehicle that was in front of [the officer] at the stoplight and he was ready to pull over." 2RP 6. This evidence was never introduced to the jury.²

At jail, Ms. Sanchez agreed to perform a breath test and attempted to blow into a breathalyzer BAC machine, but she expressed physical difficulty with the BAC and did not blow the full 10 seconds that was required for the machine to register an alcohol reading. (1RP 207, 209-10, 274) The officer believed Ms. Sanchez was toying with the machine, but he acknowledged it was possible someone could be physically incapable

² This evidence was not introduced to the jury after the State argued that the defense of necessity did not apply because the necessity was caused by circumstances other than forces of nature. (2RP 6, 9) Defense counsel conceded the State's point, did not further seek to introduce the evidence or any other legal authorities, and withdrew his initially proposed defense of necessity instruction. (2RP 50-51)

of successfully blowing in the BAC machine if they had asthma, bronchitis or pneumonia, for example. (RP 210-11, 256-57, 285) The officer recorded the failure to provide a breath sample as a refusal and stopped the test after four unsuccessful attempts. (1RP 211; Exhibit P3)

Ms. Sanchez did not exhibit slurred speech or difficulties with balance, her dress was orderly, she had normal facial color, and she was cooperative with officers. (1RP 254-55; Exhibit D4) One officer acknowledged it was possible to have an odor of intoxicants and not be under the influence. (2RP 30)

After testifying about the above events, Officer McCain also testified on cross examination that field sobriety tests were not performed, later explaining that field sobriety tests could not be performed on someone involuntarily when they were already in custody. (1RP 251-52, 271-72, 280-81, 288-90) Defense counsel sought to cross examine the officer further on whether such tests could be performed and to elicit testimony from Corporal Mansford that field sobriety tests are actually performed on persons in custody, but the court sustained the State's objections to end this line of questioning. (1RP 278-81, 288-90; 2RP 32-37) The court explained such testimony was irrelevant since the question at trial was what evidence was introduced to prove guilt, rather than what evidence was not provided. (RP 32-37)

Following trial, the jury convicted Ms. Sanchez as charged with attempting to elude a pursuing officer and driving under the influence (with a special finding of refusing a breath test). (2RP 128; CP 1-3, 115-18) Ms. Sanchez was sentenced within the standard range based on a nine-plus offender score and three prior DUIs, calculated based on the prosecutor's oral declaration of the crimes listed on her judgment and sentence for this matter. (3RP 8-9, 26-29; CP 123-38) This appeal timely followed. (CP 145, 160-84)

E. ARGUMENT

Issue 1: Whether the defendant was denied her constitutional right to present a defense when she was limited during cross examination from asking questions that could have given the jury reason to doubt her guilt.

The trial court erroneously limited Ms. Sanchez in her cross examination of the State's witnesses. Ms. Sanchez's theory of the case was that there was not sufficient evidence to establish she was under the influence of drugs or alcohol or, relatedly, had driven recklessly (this defense, then, pertained to both the DUI and attempt to elude charges). Specifically, Ms. Sanchez sought to defend herself by pointing to weaknesses in the State's case against her during cross examination of the State's only two witnesses. That is, she attempted to confront the testifying officers as to why they did not perform field sobriety or involuntary blood draw tests, suggesting that this lack of evidence

supports her position that she was not under the influence of drugs or alcohol at the time of her arrest. Over the defendant's objection, the court stopped this line of questioning, finding it irrelevant. By doing so, Ms. Sanchez's constitutional rights to fully confront the witnesses against her and present a defense were violated, requiring a new trial in this matter.

Both the United States and Washington Constitutions guarantee the right to present a defense. U.S. Const. amend. VI; Wash. Const. art. I, §22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) ("The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions.") "At a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

A full and meaningful confrontation of the State's witnesses "helps assure the accuracy of the fact-finding process." *Darden*, 145 Wn.2d at 620 (internal citations omitted). The purpose of a meaningful cross-

examination of adverse witnesses is to “test the perception, memory, and credibility of witnesses.” *Id.* “Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question.” *Id.* “As such, the right to confront must be zealously guarded.” *Id.*

Generally, as a matter of constitutional due process of law, a trial court must allow a defendant to present her defense theory of the case, including through cross examination, so long as the law and evidence support it. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005); *Darden*, 145 Wn.2d at 620-21. “However, the right to cross-examine adverse witnesses is not absolute.” *Darden*, 145 Wn.2d at 620-21. “Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative.” *Id.* at 621 (citing *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)). Ultimately, “the [defendant’s] evidence must be of at least minimal relevance.” *Darden*, 145 Wn.2d at 622 (“There is no right, constitutional or otherwise, to have irrelevant evidence admitted.”)

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. “The threshold to admit relevant evidence is very low.” *Darden*, 145 Wn.2d at 622 (internal citations omitted). “Even

minimally relevant evidence is admissible.” *Id.* On the other hand, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Darden*, 145 Wn.2d at 625 (quoting ER 403).

In *Darden*, the trial court did not let the defendant cross examine a testifying officer as to his precise location during drug deals to challenge or discredit the vantage point from which the officer had made his observations. 145 Wn.2d at 618. The State sought to keep this surveillance location secret and argued the information about the specific location was not relevant. *Id.* But the Supreme Court held this information was relevant and remanded for a new trial. *Id.* at 628. In so holding, the Court noted the outcome of the State’s case rested on the testimony of the observing officer. *Id.* at 622. The Court agreed with the defendant that matters relating to the officer’s observations were relevant and should have been subject to a meaningful cross examination. *Id.* at 621-22. The Court reversed for a new trial, explaining, by “[p]recluding cross-examination on this point, the trial court effectively denied Darden the only means available to contest the charge against him.” *Id.* at 621, 626.

Claims that a constitutional right has been violated are reviewed de novo as questions of law. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015). A trial court’s decision to admit or exclude evidence is reviewed for abuse of discretion. *Id.* “A court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons. A court bases its decision on untenable grounds or reasons when the court applies the wrong legal standard or relies on unsupported facts.” *Id.* (internal citations omitted). “[A] court’s limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion.” *Darden*, 145 Wn.2d at 619 (internal citations omitted). “However, the more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.” *Id.*

Here, Ms. Sanchez was charged with attempt to elude a pursuing police vehicle and driving while under the influence. RCW 46.61.024(1) sets forth when a person is guilty of attempt to elude a police vehicle:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1).

A person is guilty of driving under the influence, in pertinent part, if the person drives a vehicle within this state while under the influence of or affected by intoxicating liquor and/or any drug. RCW 46.61.502(1)(c), (d).

In this case, the officers testified they noticed an obvious odor of intoxicants on Ms. Sanchez's breath, bloodshot and watery eyes, and issues with Ms. Sanchez's driving, suggesting she was under the influence and had driven recklessly. But Ms. Sanchez did not exhibit balance or speech difficulties, her dress was orderly, her facial color was normal, and she was cooperative with officers at jail. 1RP 254-55. Ms. Sanchez's theory of the case was that the jury had reason to doubt whether she had driven under the influence of drugs or alcohol, or driven recklessly.

To support her defense theory, Ms. Sanchez sought to cross examine and impeach the officers as to why field sobriety tests or an involuntary blood draw were not performed, suggesting officers would have performed field sobriety tests or an involuntary blood draw to support the State's case against her if she had really driven recklessly or under the influence.

Initially, the court allowed the defendant to elicit testimony from Officer McCain that he had not performed field sobriety tests. 1RP 251-

52.³ But then, after the officer claimed he did not perform these tests because they would have been involuntary since Ms. Sanchez was already arrested (1RP 272-73, 278), the court refused to allow further cross examination to impeach the accuracy or credibility of this statement (1RP 276, 278-279, 281).

The court also refused to allow cross examination on this subject matter with Corporal Mansford as to whether field sobriety and involuntary blood draw tests were performed in this case, and whether such tests were routinely performed on other DUI suspects after arrest, in order to impeach Officer McCain's statements that such tests are never performed after an arrest. 2RP 30-32. Defense counsel explained the need for this impeachment cross examination as follows:

[Corporal Mansford] is trained in the same field [as Officer McCain] sobriety testing with the same manuals. I would like to ask him, and at this point as an offer of proof, if those field sobriety training manuals allow somebody to be given field sobriety tests after they've been arrested. This may only be for impeachment purposes [of Officer McCain's testimony that field sobriety tests are never performed after someone is taken into custody].

...I believe that their training does indicate that they can do those at the station.

...just for the record. I believe that it is relevant. I believe that at no point did any officer make any observations of the balance issues and at no point was she given tests to that. As indicated

³ The court did not permit cross examination that the officer did not seek a search warrant to perform an involuntary blood draw, finding this evidence irrelevant. 1RP 262-63.

what we have here is smelled alcohol. So I think it's at the core issue of whether or not she was, in fact, affected by it, which I believe the State has to prove. I believe it's an element. And so I'm limited by not being able to present what I believe is a deficient element of the State's case, and I think that ties my hands in presenting a defense for my client.

2RP 31-32, 36, 37.

The court disagreed with defense counsel and held the sought-after evidence to be irrelevant. But the court erred in denying Ms. Sanchez the opportunity to cross examine and impeach the State's witnesses on why field sobriety and an involuntary blood draw were not performed. The evidence was at least minimally relevant since it supported the defendant's theory that there were gaps in the investigation, which gave the jury reason to doubt elements of the crime, including whether Ms. Sanchez was under the influence or driving recklessly; the sought-after evidence would have helped disprove the State's case against Ms. Sanchez.

The court applied an incorrect standard when deciding this evidence was irrelevant, therein abusing its discretion by making a decision based on untenable grounds or reasons. The court indicated that the issue at trial was not whether certain investigations had *not* been done, but whether the State had met its burden of proof. The court described its reasoning as follows in pertinent part:

Questions that [defense counsel] brought up on his first cross examination about the ability to administer a field sobriety test and not obtaining a warrant... they weren't relevant in the first place,

that it didn't matter that he could have obtained a warrant. It wasn't relevant. It wasn't relevant that he could have administered field sobriety tests. These are all negatives, if you will, things that he didn't do. And there could be a complete universe of things that weren't done. And instead what's relevant is what was done and does that establish beyond a reasonable doubt that there was an impairment. And there could be days upon days upon days of things that weren't done, and that's not relevant. What's relevant is what the State can prove, what it's done...

So to be more specific in this situation, the questions that were asked that I didn't think were admissible were whether or not the officer administered field sobriety tests and what they were and whether he obtained a warrant and could he have....

So I think we were dealing with topics in the first place that were inadmissible because they weren't relevant, and then the questions asked by defense counsel on recross were even one step removed from that. And I thought it was appropriate just to rein it in as to this officer's mindset as to why he didn't and leave it at that. Anything else would be collateral evidence on collateral evidence, and collateral evidence is not even relevant evidence.

1RP 288-90 (emphasis added).

After defense counsel attempted to pursue the same line of questioning with Corporal Mansford (that field sobriety tests were not performed when officers could have performed them), the court further explained its ruling as follows:

I think, again, as I discussed at the end of yesterday, we're dealing with collateral issues of irrelevant evidence. In other words, I think the evidence is irrelevant to begin with, and this is a collateral issue off of an irrelevant topic. As I discussed, what you're bringing up is what was not done by officers; field sobriety tests or obtaining a warrant, or a blood test. I think you could go on for days for things that weren't done. You could say "Why didn't they get a search warrant for the car and look into the car to see if there was any alcohol? Why didn't they check all the local

stores to see if any alcohol was purchased by her, and why didn't they do that? When they went into the car if they were looking for alcohol, why didn't they use a stronger flashlight?" I think it all takes the focus off the issue, which is has the State proven each of the elements beyond a reasonable doubt. This gets into the world of things that weren't done, which is not relevant. What the jury has to concentrate on is what was done and does that satisfy beyond a reasonable doubt that the driver or the Defendant was impaired. And so I think we're back to that same discussion that we had at the end of the day that we're dealing with collateral evidence of irrelevant topics.

... The question before us is: Has the State proven that the Defendant was driving while impaired. And we're off into these side issues that whether they're true or not do not make that issue more or less likely.

2RP 33-34 (emphasis added).

The standard adopted by the trial court was not the proper consideration for deciding whether to permit the defendant to cross examine the State's witnesses, impeach their testimony, and present the jury with the defendant's theory of the case. Unlike on appeal where a court reviews the evidence in the State's favor to determine whether the State satisfied its burden, and does not consider evidence that may have swayed the jury to have doubt since the jury is charged with weighing that evidence,⁴ the question at trial on what evidence should be admitted is much different. Evidence is relevant not simply where it proves the State's case, as the trial court suggested above, but where it tends to disprove the State's alleged facts as well. The officers' testimony

⁴ *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

regarding field sobriety tests not being performed, including impeachment that such tests are routinely performed by officers after a person is taken into custody, was relevant to disprove the State's case and give the jury reason to doubt the thoroughness of the investigation against Ms. Sanchez. If officers chose not to perform field sobriety tests on Ms. Sanchez, even though officers routinely perform such tests after an arrest when they suspect a person is under the influence, this information would have given the jury reason to doubt the officers' opinions that Ms. Sanchez appeared to be under the influence of drugs or alcohol.

Officer McCain and Corporal Mansford were essential witnesses to the State's case (they were the only witnesses), and the defendant had the constitutional right to challenge the State's evidence with cross examination that would have given the jury reason to doubt proof of the alleged crimes. *Darden*, 145 Wn.2d at 619 (the "more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.") Because the threshold is so low for admitting relevant evidence, and defendants are given such wide latitude to cross examine the State's witnesses and present defense theories to the jury, the evidence challenged above should have been admitted.

The challenged evidence would not have been cumulative of other evidence presented. While defense counsel was able to elicit testimony that the field sobriety tests were never performed, he was not able to elicit similar testimony regarding the lack of an involuntary blood draw. Also, defense counsel was never able to impeach Officer McCain's statements that field sobriety tests are never performed after a person is taken into custody.

In order to find the challenged questions inadmissible, the court would have to assume the truth of the officer's statements, which is not the proper standard. *See Darden*, 145 Wn.2d at 624-26. The question is not whether the impeachment evidence is irrelevant because the officer had already testified that field sobriety tests are not performed on someone in custody. Instead, the pertinent question at trial was: assuming that Officer McCain did testify falsely, and that officers do routinely perform field sobriety tests after an arrest, would this information give the jury reason to doubt the officer's credibility and the thoroughness of his investigation into determining whether Ms. Sanchez was indeed under the influence? Because the answer to this question is an affirmative, the cross examination and impeachment testimony should have been permitted.

The right to confront the State's witnesses must be zealously guarded, especially where the defendant does not testify or present any

witnesses and her entire case rests on impeaching those witnesses and attacking the credibility or weight of the State's proof. By "[p]recluding cross-examination on this point, the trial court effectively denied [the defendant] the only means available to contest the charge against [her]." *See Darden*, 145 Wn.2d at 621, 626. Ms. Sanchez respectfully requests this matter be reversed and remanded for a new trial so she can experience her constitutionally protected right to fully confront the State's witnesses against her and present her defense.

Issue 2: Whether this case should be retried, because defense counsel was ineffective for failing to pursue the defense of necessity as to Ms. Sanchez's charge of attempt to elude a pursuing police vehicle.

Ms. Sanchez sought to admit statements she had made to an officer during her arrest regarding the reason she did not stop her vehicle when signaled by the officer. Specifically, she sought to admit her excited utterance statement that she did not stop her vehicle because she had been threatened by a man in the other vehicle the officer was preparing to pull over. 2RP 6. Defense counsel made an offer of proof regarding this evidence, but counsel's performance was then ineffective when he made an erroneous concession that this defense of necessity could not be raised since the necessity was not caused by a force of nature. Defense counsel was ineffective for failing to present the supporting evidence, legal

authorities and argument that would have supported the necessity defense in this case.

To demonstrate ineffective assistance of counsel, a defendant must prove counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The alleged deficiency cannot be attributed to a legitimate strategic or tactical decision by trial counsel. *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The competency of counsel is based on the entire record, and there is a strong presumption that counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

As introduced above, both the United States and Washington Constitutions guarantee the right to present a defense. U.S. Const. amend. VI; Wash. Const. art. I, §22; *Hudlow*, 99 Wn.2d at 14. Moreover, “[e]ach side in a case is entitled to instructions embodying its theory of the case if the evidence supports that theory.” *State v. Parker*, 127 Wn. App. 352, 354, 110 P.3d 1152 (2005) (internal citations omitted).

The defense of necessity may excuse otherwise unlawful conduct where the defendant proves the following by a preponderance of the evidence:

(1) he or she reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, and (3) no legal alternative existed.

State v. Gallegos, 73 Wn. App. 644, 651, 871 P.2d 621 (1994) (citing *State v. Diana*, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979)).

The practitioners and court in this case appeared to believe that no necessity defense could be introduced where the defendant's actions were caused by another human being, as opposed to the necessity stemming from physical forces of nature. 2RP 9, 50-51. There appear to be conflicting authorities in this State as to whether the defense of necessity can be raised where the necessity is not related to physical forces of nature, but due to the actions of another human being. *See e.g. Gallegos*, 73 Wn. App. 644 (Division I) (defense of necessity only available where pressure to defendant to commit crime is brought on "by forces of nature," rather than a friend's need of aid); *State v. Turner*, 42 Wn. App. 242, 247, 711 P.2d 353 (Div. II 1985) (quoting W. LaFave & A. Scott, *Criminal Law* § 50, at 381 (1972) ("With the defense of necessity, the pressure must come from the physical forces of nature ... rather than from other human beings.") *But see State v. Niemczyk*, 31 Wn. App. 803, 644 P.2d 759 (Div.

II, 1982) (defense of necessity may be available where defendant escaped from prison in order to avoid sexual assault); *Diana*, 24 Wn. App. at 913 (Div. III) (medical necessity is valid defense to possession of marijuana); *State v. Parker*, 127 Wn. App. at 354-55 (Div. II) (citing *State v. Jeffrey*, 77 Wn. App. 222, 226, 889 P.2d 956 (1995) (Div. III) (defense of necessity as to unlawful possession of a firearm may be available where defendant can show he reasonably believed he was under an unlawful and present threat of death or serious bodily injury, without necessarily requiring the threat be from forces of nature).

The official comments to WPIC 18.02 add to the confusion regarding the applicability of a defense of necessity, stating, “Where the pressure upon the defendant comes from another human being, instead of from the physical forces of nature, the jury should be instructed on the defense of duress rather than the defense of necessity. 11 Wash. Prac., Pattern Instr. Crim. WPIC 18.02 (3d Ed) (comment citing *State v. Turner*, 42 Wn. App. 242). However, the defense of duress is only available where the actor participated in the crime due to the threat or use of force from another person if the defendant refused to participate in the specific crime. RCW 9A.16.060(1)(a); *Turner*, 42 Wn. App. 242 (defense of duress proper where defendant was forced to deliver drugs to prison to avoid assaults against her husband and son); *Niemczyk*, 31 Wn. App. 803

(duress defense not available in case of escape from prison to avoid sexual assault; the defendant was not threatened with harm if he did not participate in the crime of escape).⁵

Here, as a threshold matter, the trial court initially held that any of the defendant's statements to the officer were hearsay and did not fit within the "statement of a party opponent" exception to hearsay since they were being offered by the defendant rather than against the defendant.

1RP 160. Defense counsel argued Ms. Sanchez's statements to the officer fit within the excited utterance hearsay exception, because, "It was, according to my client, a startling, scary event, being threatened in that manner. And- and then you have the...presence of officers chasing you."

1RP 162. The court reserved ruling on the hearsay issue and indicated that an offer of proof was necessary to determine if Ms. Sanchez's statement was indeed an excited utterance. *Id.*

There was no further discussion of the "excited utterance" hearsay exception, because the parties and court later agreed the defense of necessity did not apply in this case, which is the reason the evidence would have been offered by Ms. Sanchez. Had the court reached the hearsay part of this issue, the evidence would have been admissible based on the excited utterance exception. *State v. Pavlik*, 165 Wn. App. 645,

⁵ The duress defense was seemingly inapplicable in this case, since there was no indication that the man in the Lincoln Navigator threatened harm if Ms. Sanchez refused to participate in the underlying crime of attempt to elude a pursuing police vehicle.

653-54, 268 P.3d 986 (2011) (allowing admission of even “self-serving” hearsay statements if made as an excited utterance pursuant to ER 803(a)(2). That is, the excited utterance statement must relate to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition).

Ms. Sanchez’s out of court statement to the officer was admissible based on defense counsel’s offer of proof that her statement was made while the defendant was experiencing a startling and scary event immediately prior to and during the time she was signaled to stop by officers, stemming from her fleeing from the person in the Lincoln Navigator who had threatened her and was seeking money claimed owed to him by Ms. Sanchez’s murdered son. Had the court reached the hearsay issue in this case, Ms. Sanchez’s statement to the officer during her arrest about the reason she did not stop would have been admissible as an excited utterance.

Unfortunately, the court never reached the hearsay issue, because the parties and court determined that Ms. Sanchez could not raise a defense of necessity. Prior to this determination, defense counsel had made the following offer of proof describing the testimony the defendant sought to introduce:

[Ms. Sanchez] had been threatened by the gentleman [Officer McCain] was about to pull over in the blue...Lincoln Navigator –

that he had threatened to kill her if she did not pay a debt that her murdered son had failed to pay... It was the vehicle that was in front of [Officer McCain] at the stoplight and he was ready to pull over.

2RP 6. Defense counsel initially argued the above proffered evidence supported Ms. Sanchez's planned defense of necessity. 2RP 5.

The State argued the defense of necessity (for which defense counsel initially proposed a jury instruction, 2RP 8, 15) could not be raised in this case because Ms. Sanchez's "necessity" was not caused by "physical forces of nature." 2RP 9 (citing *State v. Gallegos*, 73 Wn. App. at 651). The court and defense counsel acknowledged the *Gallegos* authority, and defense counsel did not pursue the introduction of evidence on this issue any further. 2RP 50-51. Defense counsel also withdrew the proposed instruction on the defense of necessity. 2RP 50-51.

Defense counsel did not provide effective assistance for Ms. Sanchez when he neglected to advocate for a necessity defense where the "circumstances" called for it. Counsel accepted at face value the prosecutor's representation that a defense of necessity is only available where brought on by the forces of nature, as opposed to a necessity created by threats from another human that therein induce the defendant to commit an otherwise unlawful act. Besides physical forces of nature, other "circumstances" may also support a defense of necessity, including

where the defendant committed a crime in order to flee from the threat harm. *Niemczyk*, 31 Wn. App. 803.

The parties and trial court below mistakenly read *Gallegos* too narrowly, overlooking the language of the case that “the necessity defense is available to a defendant when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from a violation of the law.” *Gallegos*, 73 Wn. App. at 650 (emphasis added); *Diana*, 24 Wn. App. at 913.

Even if *Gallegos, supra*, stands for the questionable proposition that a defense of necessity must be preceded by forces of nature, as opposed to a person committing an unlawful act in order to avoid a threat of harm, there was other significant authority that could and should have been cited to the trial court to support the defendant’s proffered necessity defense. *See e.g., Niemczyk*, 31 Wn. App. 803 (defense of necessity may be available where defendant escaped from prison to avoid sexual assault); *Diana*, 24 Wn. App. at 913 (Div. III) (medical necessity is valid defense to possession of marijuana); *State v. Parker*, 127 Wn. App. at 354-55 and *State v. Jeffrey*, 77 Wn. App. at 226 (defense of necessity may be available where crime was committed because defendant reasonably believed he

was under an unlawful and present threat of death or serious bodily injury).

Ultimately, defense counsel's performance fell below a reasonable standard, since he did not cite the above line of authorities to the trial court that would have supported a defense of necessity being presented, even absent a physical force of nature that caused the defendant to act. No other defense was presented on Ms. Sanchez's behalf, other than cross examination that attempted to convince the jury to doubt whether Ms. Sanchez was under the influence or had driven recklessly. The necessity defense would have been the focal point in the defendant's theory of the case, giving her a complete defense to her attempt to elude charge. It would have explained any erratic driving when Ms. Sanchez initially drove through the intersection next to the Lincoln Navigator at a high rate of speed and into the curb or gutter (which happened before she was ever signaled to stop by the officer). The necessity defense would have explained why Ms. Sanchez did not stop when first signaled by the officer who had just left from investigating the Lincoln Navigator. The necessity defense would have explained why Ms. Sanchez drove the rest of the way to the safety of her own home, barely over the speed limit and with relatively minor traffic infractions.

Ms. Sanchez respectfully requests this case be reversed and remanded so she may have her day in court. There is at least a reasonable probability that the outcome of this trial on the attempt to elude charge would have been different if the jury had heard the evidence on Ms. Sanchez's necessity defense. Ms. Sanchez asks that a jury be given the opportunity to hear her defense of necessity, a defense she was constitutionally entitled to present through the aid of effective assistance of legal counsel.

Issue 3: Whether Ms. Sanchez should be resentenced where the State failed to offer any evidence to prove her prior convictions.

The State failed to offer any evidence to prove Ms. Sanchez's prior convictions, and Ms. Sanchez never acknowledged her prior convictions on the record. This was essential to determining her offender score, along with determining the penalties for her DUI gross misdemeanor. This matter should be remanded for resentencing.

The Sentencing Reform Act guides sentencing for felonies, including Ms. Sanchez's class C felony of attempting to elude a pursuing police vehicle. RCW 9.94A.010; RCW 46.46.024; RCW 9.94A.525(11). "A defendant's offender score, together with the seriousness level of his current offense, dictates the standard sentence range used in determining his sentence." *State v. Zamudio*, 192 Wn. App. 503, 507, 368 P.3d 222 (2016) (citing RCW 9.94A.530(1)). "To calculate the offender score, the

court relies on its determination of the defendant's criminal history, which the Sentencing Reform Act (SRA), chapter 9.94A RCW, defines as 'the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.'" *Id.* (quoting RCW 9.94A.030(11)). "Prior convictions result in offender score "points" in accordance with rules provided by RCW 9.94A.525." *Id.*

"In determining the proper offender score, the court 'may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.'" *Zamudio*, 192 Wn. App. at 508 (quoting *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012) (quoting RCW 9.94A.530(2)). The "State bears the burden of proving prior convictions by a preponderance of evidence." *State v. Blunt*, 118 Wn. App. 1, 7, 71 P.3d 657 (2003) (citing *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994)); *Hunley*, 175 Wn.2d at 909-10. "To meet this burden, the State must first produce 'evidence of some kind' bearing 'minimum indicia of reliability' that supports 'the alleged criminal history.'" *Id.* at 7-8 (quoting *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999)).

The State's burden for proving prior convictions is not overly difficult to meet:

The burden to prove prior convictions at sentencing rests firmly with the State. While the burden is not overly difficult to meet,

constitutional due process requires at least some evidence of the alleged convictions. A prosecutor's bare allegations are not evidence, whether asserted orally or in a written document. The State in this case could have established Hunley's prior convictions through certified copies of the judgment and sentences or other comparable documents. Our constitution does not allow us to relieve the State of its failure to do so simply because Hunley failed to object. In other words, it violates due process to base a criminal defendant's sentence on the prosecutor's bare assertions or allegations of prior convictions. And it violates due process to treat the defendant's failure to object to such assertions or allegations as an acknowledgment of the criminal history. The Court of Appeals held RCW 9.94A.500(1) and .530(2) cannot change this, and they are unconstitutional insofar as they attempt to do so.

State v. Hunley, 175 Wn.2d at 915 (internal quotations omitted) (emphases added).

“Sentencing information or facts are ‘admitted[or] acknowledged ... at the time of sentencing’ for this purpose if they are *affirmatively* admitted or acknowledged; the mere failure to object to a prosecutor’s assertions of criminal history does not constitute such an acknowledgment.” *Zamudio*, 192 Wn. App. at 508 (quoting *State v. Mendoza*, 165 Wash.2d 913, 922, 205 P.3d 113 (2009) (quoting former RCW 9.94A.530(2) (2005))). Relying on the defendant’s silence in these circumstances would “obviate the plain requirements of the SRA...[and] result in an unconstitutional shifting of the burden of proof to the defendant.” *Hunley*, 175 Wn.2d at 912.

Here, the prosecutor verbally informed the trial court as follows: “With her felony score at 9+ she’s looking at a standard range of twenty two to twenty nine months.” 3RP 8. Ms. Sanchez’s alleged criminal history was listed on the judgment and sentence for this underlying offense (CP 125), but the prosecutor never introduced any certified judgments or sentences, or other comparable documents of record,⁶ in order to prove Ms. Sanchez’s prior criminal history. CP 125; *see* CP 1-185 and 3RP 6-32. Moreover, Ms. Sanchez never affirmatively acknowledged the alleged criminal history as listed on her felony judgment and sentence for this case. *Id.* The State failed to meet its burden of proof to establish Ms. Sanchez had a “9+” offender score.

As to Ms. Sanchez’s conviction of driving under the influence, the enhanced penalties for a gross misdemeanor where a defendant has two or three prior offenses are set forth in RCW 46.61.5055(3)(b). The prosecutor verbally informed the court that Ms. Sanchez had three prior DUIs, which ostensibly subjected her to enhanced mandatory minimum penalties stated in RCW 46.61.5055(3)(b). 3RP 9. However, the State never met its burden of proving these priors. Absent an affirmative acknowledgement by the defendant of these facts and information

⁶ While “the best method of proving a prior conviction is by the production of a certified copy of the judgment...”, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history.” *In re Adolph*, 170 Wn.2d 556, 568, 243 P.3d 540 (2010); *Hunley*, 175 Wn.2d at 910 (quoting *Ford*, 137 Wn.2d at 480-81); *Blunt*, 118 Wn. App. at 8, fn.8 (citing *Cabrera*, 73 Wn. App. at 168).

introduced for the purposes of this DUI sentencing, Ms. Sanchez's criminal history must be proved by a preponderance of the evidence in order to enhance her mandatory minimum DUI penalties. *Mendoza*, 165 Wn.2d at 928-29. A prosecutor's summary of the defendant's criminal history, without more, is insufficient to satisfy due process. *Hunley*, 175 Wn.2d at 915. A defendant's failure to object to the prosecutor's declaration of criminal history is not sufficient to support a finding that the defendant has a prior DUI. *See Hunley*, 175 Wn.2d at 913-14; *Mendoza*, 165 Wn.2d at 928-29.

Ms. Sanchez respectfully requests this Court remand for resentencing, requiring the State to prove her prior convictions for both the felony and DUI convictions. *State v. Jones*, 182 Wn.2d 1, 3, 8, 10-11, 338 P.3d 278 (2014) (citing RCW 9.94A.530(2)); *Hunley*, 175 Wn.2d at 915-16 (citing *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003) (setting forth this remedy)).

F. **CONCLUSION**

Based on the foregoing, Ms. Sanchez respectfully requests that her convictions be reversed and the matter remanded for a new trial so that she has the opportunity to present a full defense. Alternatively, Ms. Sanchez requests that this matter be remanded for resentencing so that the State is held to its burden of proving her prior criminal history.

Respectfully submitted this 10th day of June, 2016.

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918

Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 33884-3-III
vs.) Grant County No. 14-1-00781-0
)
TABITHA ANN SANCHEZ) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 10, 2016, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Tabitha Sanchez, DOC No. 991176
Washington Corrections Center for Women
9601 Bujacich Rd NW
Gig Harbor, WA 98332

Having obtained prior permission, I also served the following by email using Division III's e-service feature: Garth Louis Dano at kburns@grantcountywa.gov.

Dated this 10th day of June, 2016.

/s/ Kristina M. Nichols
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