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Court of Appeals
Division III
State of Washington

NO. 33884-3-III

**COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TABITHA ANN SANCHEZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. WAS SANCHEZ DENIED HER CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE COURT LIMITED CROSS-EXAMINATION CONCERNING OFFICERS' INTERPRETATIONS OF LEGAL QUESTIONS AND OTHER COLLATERAL ISSUES? (ASSIGNMENT OF ERROR No. 1)
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II. STATEMENT OF THE CASE

A. FACTS UNDERLYING CRIMINAL CHARGES

Shortly after 11:00 o'clock PM on November 25, 2014, Moses Lake Police Officer Kyle McCain (1RP 181) was behind a light blue Lincoln Navigator heading southbound¹ on Grape Drive, confirming the

¹ McCain testified he was westbound on Grape Drive. 1RP 189. As he testified, the jury was shown illustrative exhibit P2 (CP 119), an aerial photograph from Google Maps showing the route McCain and Sanchez took. 1RP 28. The map showed the jury that Grape Drive runs north/south, intersected by east/west running West Valley Drive.

suspended license status of its driver (1RP 189–90). McCain and the Navigator were stopped at a red light at the intersection of Grape and West Valley Road (Valley) (1RP 220) when a white car came from behind “out of nowhere” and flew past him at a high rate of speed. 1RP 190. It was raining, and McCain heard the car before he saw it. *Id.* The car ran the red light, losing control as the driver attempted a left turn onto Valley. *Id.* Tires screeching, the car slid sideways, momentum momentarily arrested as it hit a curb. *Id.*

McCain was in an unmarked patrol car equipped with emergency lights and siren. 1RP 235. His vehicle had internal lights across the top of the front and rear windows and external lights around the license plate and on the outside door mirrors. 1RP 236. It also had a spotlight. 1RP 266.

McCain activated his emergency lights, moved around the Navigator and followed the white car. 1RP 190. As both vehicles headed east on Valley, McCain could see a “blown out” rear passenger tire. 1RP 191. McCain estimated they were traveling 45 miles per hour, 10 miles over the speed limit. 1RP 192. McCain’s siren was on. *Id.* Eventually, the white car turned right from Valley onto Central Drive, losing traction, its rear end sliding into the inside lane. *Id.* McCain estimated the car was at a 45-degree angle to the curb before it straightened out. 1RP 242.

About 50 feet down Central, the white car turned back westbound onto Loop Drive, which runs parallel to Valley. *Id.* The car appeared to lose some control at an S-curve on Loop, almost hitting the curb again as the road straightened out and came back to intersect with Grape. 1RP 197. The car slowed but did not stop at a stop sign, then turned right, northbound, back onto Grape. *Id.* The car stopped for the light at the Grape-Valley intersection. 1RP 197–98. McCain stopped directly behind. 1RP 198. After five or ten seconds, the light turned green and the white car inched forward through the intersection. 1RP 224–25. McCain followed, both vehicles again reaching speeds between 40 and 45 miles per hour in a 35 mile per hour zone. 1RP 198. McCain could see the car's rear passenger tire was completely flat. 1RP 199.

McCain had followed some distance along Grape when the white vehicle turned left onto a side street, made a quick right turn, and stopped. 1RP 199. McCain prepared to execute a felony stop. 1RP 200. Corporal Gary Mansford, a patrol supervisor with the Grant County Sheriff's Office (2RP 22), arrived as the white car turned off of Grape and stopped. 2RP 25. He positioned his vehicle to the left of McCain. 2RP 25–26. McCain was about to exit his car when the white car took off again, heading up a hill and farther into the residential neighborhood. 1RP 200. He and Mansford followed. *Id.*

About that time, McCain learned the vehicle was registered to Tabitha Sanchez. 1RP 201. They were now traveling only ten or fifteen miles per hour. 1RP 214. Lit-up law enforcement vehicles followed the car up the hill as it turned right onto another street and finally stopped in front of a residence. 1RP 201. McCain could see the front passenger tire was also flat. 1RP 215. Sanchez' tires were flattened to the wheel metal. 2RP 28. The entire chase lasted 5 minutes 17 seconds. Ex. P1 (23:49:43–23:55:00).²

McCain recognized Sanchez as she exited the driver's door. 1RP 202. She calmly glanced toward the cluster of law enforcement vehicles behind her then turned and walked at a normal pace around the front of her car toward her house. Ex. P1 (23:55:00 – 23:55:05). She acted as if nothing was out of the ordinary. 1RP 202. Mansford caught up with Sanchez and took her to the ground. *Id.* McCain assisted, joined by a third officer. 1RP 202. Mansford smelled the odor of intoxicants coming from Sanchez. 2RP 28. Sanchez refused to pull her left hand and arm from under her body as McCain tried to handcuff her. *Id.* She did not respond to any of McCain's commands, including: "Show me your hand," "Pull your left hand out," and "Give me your left hand." 1RP 203. Sanchez complied

² State's Trial Exhibit 1 (P1) is a digital disc with a copy of McCain's in-car video of Sanchez' eluding and arrest. CP 119. The State played the video clip at trial as McCain narrated. 1RP 216–26. The State cites to the video as Ex. P1

only after McCain hit her ribcage area with his fist. 1RP 203–04. Two officers escorted Sanchez to McCain’s patrol car, each holding one of her arms. Ex. P1 (2:55:52–2:56:06).

Sanchez smelled strongly enough of intoxicants that McCain asked her about it. 1RP 205. Her eyes were bloodshot and watery. 1RP 269. She denied having had anything to drink. 1RP 205. During her subsequent post-*Miranda*³ interrogation, Sanchez continued to deny drinking alcohol but said she had been taking two different types of cough medicine that day. 1RP 207. Sanchez told McCain her car had some brake and alignment problems. 1RP 226. The odor of intoxicants remained obvious throughout her interrogation. 1RP 270.

McCain took Sanchez to the Moses Lake Police Department to process her for driving under the influence (DUI). 1RP 205. She agreed to perform a breath test but did not produce sufficient air to render a reading during four separate attempts. 1RP 210. It appeared to McCain she was capable of providing an adequate sample and that she was toying with the machine. 1RP 211. McCain testified he designates a test “refused” when he can tell a subject is “messing with the machine” and fails to blow sufficient air to provide a sample after multiple opportunities. 1RP 283.

³ *Miranda v. Ariz.*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

He said he can tell when a subject is not trying to blow into the tube. 1RP 284. McCain designated Sanchez' efforts a refusal. *Id.* He found her intoxication "obvious." 1RP 215.

B. FACTS CONCERNING LIMITATION OF SANCHEZ' CROSS-EXAMINATION

During cross-examination, McCain said he did not make any observations concerning Sanchez' coordination. 1RP 250. He did not perform field sobriety tests (FSTs). 1RP 252. McCain testified he had never performed FSTs at the police station. 1RP 277. He said he does not ask anyone to perform field sobriety tests after arrest because "it would make them think they're being coerced to do the test." 1RP 272. He explained that a subject in handcuffs who has been escorted to a patrol car and driven to a police station would feel coerced into performing what is supposed to be a voluntary test, stating: "If it was me in that situation, I would feel I'd have to do them." 1RP 273.

McCain did not apply for a warrant for Sanchez' blood. 1RP 260. He believed Sanchez was intoxicated "[b]ased on her driving, her failing to stop, the odor of intoxicants coming from her person, [and] the observations of her eyes." 1RP 270.

Sanchez closely questioned McCain concerning why he administered the BAC—also a voluntary test—after Sanchez was in

custody if he considered post-arrest FSTs involuntary. 1RP 277. The court sustained the State's objection after clarifying Sanchez' question concerned the BAC. 1RP 278. Sanchez then asked whether a warning is read before asking a subject to perform the BAC. 1RP 278. McCain explained the Implied Consent Warning for Breath and confirmed a subject's right not to perform the test. *Id.* Questioning continued:

[DEFENSE] Q: "But you don't believe that if you ask them to provide a field sobriety test at the station they don't have that option [to refuse]?" 1RP 278.

[McCAIN] A:.. "They're voluntary and they have to be done before they're in custody." *Id.*

Q: "So your position is you cannot give field sobriety tests once you've taken someone into custody? 1RP 278-79.

A: "They would not be voluntary." 1RP 279.

Q: "Did you have her sign a waiver of her constitutional rights?" *Id.*

A: "I believe she signed it." *Id.*

Q: "Did you make her sign those?" *Id.*

The State objected to the relevance of this question. *Id.* Defense counsel responded: "We have a whole slew of items that are voluntary after being placed in custody at the station. I'm gonna ask him about each

of those from the report if the Court allows.” 1RP 279. The court sustained the State’s relevance objection. *Id.* The court denied the State’s motion to strike all of the previous testimony “about everything that the defendant did voluntarily but what the officer didn’t do because he believed it to be involuntary.” 1RP 280.

Defense counsel’s next question was: “So going back to -- to the interview, so you’re -- you’re trained to take breath samples that aren’t voluntary? You’re trained to get a warrant to do that; is that correct?” 1RP 280–81. The State objected to the questions as argumentative, as asking for a legal conclusion, and as relating to issues the court had already found irrelevant. 1RP 281. The court found the topic irrelevant and sustained the objection. *Id.*

Counsel asked one more time: “So you indicated on prior testimony that at no point did you make any observations of balance issues or slurred speech.” *Id.* The Court agreed with the State that the question had been asked and answered, but allowed Sanchez to ask it again. *Id.*

After excusing the jury for the day, the court made a record of the reasoning behind its rulings. 1RP 287. The court noted the final series of questions Sanchez asked during recross—questions about the ability to administer post-arrest FSTs and about not obtaining a warrant for Sanchez’ blood—were questions counsel had already asked during his

original cross-examination. 1RP 288. The court said they were not relevant in the first place because Sanchez' questions related to things McCain did not do and "there could be a complete universe of things that weren't done." *Id.* The court stated relevant evidence related to whether what had been done established impairment beyond a reasonable doubt. *Id.* "And there could be days upon days upon days of things that weren't done, and that's not relevant." *Id.* The court expressed its concern that Sanchez was opening a door and "this is a rough area for the court to tread through once you have a door being opened with inadmissible evidence." 1RP 289. The court pointed to additional questions Sanchez asked, questions asking McCain to compare and contrast the law on *Miranda* rights with his understanding of post-arrest FSTs:

Now we've really gone far afield from one step removed from the initial inadmissible evidence to another area of inadmissible evidence. And I don't think that's allowed. . . . And I thought it was appropriate just to rein it in as to this officer's mindset as to why he didn't [perform post-arrest FSTs] and leave it at that. Anything else would be collateral evidence on collateral evidence, and collateral evidence is not relevant evidence."

1RP 290.

When Mansford testified the following day, Sanchez attempted to cross-examine him concerning proper procedures for field sobriety testing.

2RP 31. The State objected, the jury was excused, and defense counsel

explained the questioning was necessary to counter McCain's testimony concerning his belief he should not offer FSTs once a subject was in custody, asserting this incorrectly stated McCain's training. 2RP 32.

Because Mansfield's training included the same training manuals, Sanchez wanted to impeach McCain with Mansfield's expected testimony that the manuals teach FSTs may be performed after a subject's arrest. 2RP 32–33.

Observing the training manuals were “hearsay to begin with” the court reiterated that whether McCain believed post-arrest FSTs were coercive was “a collateral issue off of an irrelevant topic” taking the focus off the relevant issue of whether the State proved each element beyond a reasonable doubt. 2RP 33. “[I]t's impossible for the jury to make any kind of decision when they're getting opinions from law enforcement officers on what the law is. That's where we're devolving to The jury would have no idea what to do.” *Id.*

Reminding counsel the expression of a witness's legal opinion is generally not allowed, the court continued: “And now you're asking for a legal opinion from a field manual from a hearsay statement Besides being irrelevant and being a collateral issue, it just confuses the jury. Now they're hearing evidence from a field manual.” 2RP 34. Sanchez responded that failure to give FSTs to assess her balance and coordination went to the core issue of impairment and the court's ruling tied her hands

in presenting a defense. 2RP 37. The court disagreed, remarking Sanchez was free to argue lack of FST evidence. *Id.*

C. FACTS CONCERNING INEFFECTIVE ASSISTANCE OF COUNSEL
(NECESSITY DEFENSE)

The only evidence of Sanchez' post-arrest excuses for failing to stop, made after she admitted she knew McCain was lit-up behind her, is in McCain's initial incident report attached to the State's motion for an order finding probable cause. CP 11. Sanchez did not testify at any stage, nor did she produce other competent evidence supporting any of her reported assertions.

McCain reported that immediately following her arrest, while Sanchez was in his patrol vehicle, McCain read her *Miranda* warnings and Sanchez said she understood. CP 11. McCain asked Sanchez why she had failed to stop. *Id.* Sanchez told McCain a male driving a light blue Lincoln Navigator had shown up at her house demanding money owed him by her murdered son. *Id.* She said the male threatened to put a bullet in her head if she did not pay him the money. *Id.* McCain pointed out he was stopped behind the light blue Lincoln when she first flew past him into the intersection. *Id.* He asked her why she was driving in the direction of the Lincoln if the driver had threatened to kill her. *Id.* Sanchez said she did not see the Lincoln stopped in front of McCain and was trying to get to her

daughter's house to tell the daughter what happened. *Id.* McCain asked her why she did not stop once she recognized a police car was behind her with its emergency lights on. *Id.* Sanchez told him she was scared because "she had heard the police were involved with her son's murder and they were covering up the truth." *Id.* Sanchez provided a description of the threatening man but not a name. *Id.* She said he was from Mexico, that he had not brandished a weapon when he spoke with her and that she had not seen a gun. *Id.* The only evidence of these statements came from McCain's report, filed as part of the State's initial motion for a finding of probable cause. CP 11.

Sanchez did not testify at trial. Well in advance of trial, she filed a pre-trial Statement of Defendant to be Used at Trial. CP 38. The statement, in its entirety, was "The statements the defendant made to Officer McCain of the Moses Lake Police Department." *Id.* A few months later, the parties entered a written "Stipulation for the Admission of Defendant's Statements Pursuant to CrR 3.5" in which Sanchez stipulated to the voluntariness of everything she said to investigating officers. CP 50.

The State moved in limine to preclude defense examination of State's witnesses concerning Sanchez' out of court statements unless specifically admitted by the court following an offer of proof. 1RP 32. The State argued Sanchez' excuses for her failure to pull over—that a man in a

blue Lincoln Navigator threatened her and that the Moses Lake Police Department was involved in a cover-up of her son's shooting death—were inadmissible hearsay. CP 187. The State quoted *State v. Finch*,⁴ arguing “[I]f an out-of-court admission by a party is self-serving, and in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule.” CP 187.

The court agreed Sanchez' statements were hearsay and did not fall under the party-opponent admission exception, regardless of whether Sanchez testified. 1RP 32. Sanchez countered that if she could not elicit her statements through McCain's testimony, she would have to testify and expose herself to the State's cross-examination on her veracity. 1RP 33. The majority of Sanchez' prior felony convictions are crimes of dishonesty, admissible for impeachment. CP 125. The court granted the State's motion but reminded counsel limine rulings are “soft” and the statements might still come in through McCain if required by the rule of completeness or some other circumstance. 1RP 33–34.

Defense counsel then raised Sanchez' intention to seek the defense of necessity, stating “I believe that part of that necessity defense was the

⁴ 137 Wn.2d 792, 824, 975 P.2d 967, *cert. denied*, 538 U.S. 922, 120 S. Ct. 285, 145 L.Ed.2d 239 (1999).

fact that she felt threatened and that she did not feel safe to pull over in that location where that vehicle [the Navigator] was.” 1RP 34–35. Sanchez had told McCain she did not see the Navigator in front of him at the intersection. CP 11.

Defense counsel argued that precluding Sanchez from presenting her post-arrest statements through McCain’s testimony effectively denied her constitutional right to present a defense. 1RP 35. The State responded it was Sanchez’ obligation to produce sufficient evidence to support a necessity defense. *Id.* The court concluded a “very basic tenet of jurisprudence” required such evidence be subject to cross-examination and invited Sanchez to provide authority for the use of inadmissible evidence under these circumstances. 1RP 36. Sanchez did not provide authority.

Before the start of the second day of trial, the State asked the court whether the State would open the door to admission of Sanchez’ hearsay excuses by asking McCain about Sanchez’ admission she had seen his lights behind her as he tried to get her to stop. 2RP 5–7. The court confirmed the question would open the door and State did not ask the question. 2RP 7.

During the same second-day hearing, the State argued a necessity defense was available only if forces of nature caused the necessity, citing

*State v. Gallegos*⁵ (“pressure” of circumstances must come from the physical forces of nature, not from other human beings). 2RP 9. The trial court did not rule, and defense counsel did not respond. 2RP 9–16.

Later that day, during the final jury instruction conference, defense counsel said: “the Court can pull out the necessity [instruction]. I don’t think we have presented any evidence that the jury could consider for a necessity defense.” 2RP 50–51. The Court responded there would be no necessity instruction, citing both *Gallegos* and the fact “there was no evidence offered in that regard as to necessity.” 2RP 51.

In a separate jury instruction discussion instructions held before opening statements, Sanchez had asked the court to admit her excuses as excited utterances, asserting that being threatened was a startling, scary event, as was the presence of officers chasing her. 1RP 162. The court left the issue open, ruling Sanchez would have to make an offer of proof to determine whether her statements qualified. *Id.* Sanchez did not make an offer of proof.

D. FACTS CONCERNING SANCHEZ’ OFFENDER SCORE AND SENTENCING

The State presented a summary of Sanchez’ criminal history in paragraph 2.2 of the Judgment and Sentence. CP 125. For each of her prior

⁵ *State v. Gallegos*, 73 Wn. App. 644, 651. 871 P.2d 621 (1994)

convictions—eleven felonies and three DUIs—the State listed the crime, the date of the crime, the sentencing court, whether Sanchez was convicted as an adult or juvenile, and that each crime was nonviolent. Nine of Sanchez’ eleven prior felony convictions were from Grant County. *Id.* The other two were from Benton County. *Id.* Sanchez’s three prior DUI convictions were all from Grant County. *Id.* Sanchez’ standard range on the eluding charge was 22 to 29 months. CP 126. The State recommended 27 months on the eluding charge and a consecutive mandatory minimum sentence on the refusal-DUI. 3RP 8.

Defense counsel conceded: “Your Honor, my client doesn’t have a great history. The court is aware and the State has presented the client’s history to the Court, which is part of the reason why we are here.” 3RP 9. He repeated: “my client doesn’t have an excellent history, which the court can see” *Id.* Counsel then recited all the things Sanchez now had going for her at this new stage in her life. 1RP 10. He argued for concurrent sentences, urging the court to give some thought to her changed behavior. *Id.* He also argued her prior convictions would make her a candidate for a prison-based DOSA.⁶ 3RP 12–13. He explained: “She wouldn’t qualify for a home base[d] DOSA or a residential based

⁶ Prison-based drug offender sentencing alternative under RCW 9.94A.660.

DOSA. Based on the sentencing range, it would have to be a prison based DOSA, which I do believe she would qualify based on sentence.” 3RP 13.

Sanchez declined to speak before sentencing. 3RP 13. The court declined to order a DOSA and imposed 25 months on the eluding charge and a consecutive sentence on the DUI. 3RP 25–26. Sanchez then asked to address the court concerning her DOSA request, telling the court she wanted to see if she could qualify for the program so she could complete treatment in prison. 3RP 29–30. When the court again refused to order a DOSA, Sanchez said:

Why there 's other people that has more points than me[,] it's even on the radio, they have fourteen felonies, DUI, methamphetamine. [inaudible] from police officer going over a hundred miles an hour, different counties and they only get a year in prison and a year of probation? Why do my sentence has to be so harsh?

3RP 30 (emphasis added). Sanchez and her attorney signed the Judgment and Sentence containing the State’s summary of her criminal history. CP 136.

III. ARGUMENT

A. SANCHEZ WAS NOT DENIED HER CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE COURT LIMITED CROSS-EXAMINATION CONCERNING OFFICERS’ INTERPRETATIONS OF LEGAL QUESTIONS AND OTHER COLLATERAL ISSUES.

“Whether rooted in the compulsory process clause of the Sixth Amendment or the due process clause of the Fourteenth Amendment, the

United States Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense.” *State v. Lizarraga*, 191 Wn. App. 530, 551–52, 364 P.3d 810 (2015) (citing *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (internal quotation marks omitted)). Alleged violations of the confrontation clause are reviewed de novo. *State v. Chambers*, 134 Wn. App. 853, 858, 142 P.3d 668 (2006).

Sanchez was able to question McCain concerning his decisions not to perform post-arrest field sobriety tests and not to obtain a warrant for her blood. Sanchez elicited from McCain the fact that he had made no observations concerning her coordination, 1RP 250, and that he did not perform field sobriety tests. 1RP 252. She objected when McCain gave his reason for not having done so—his belief that administering FSTs to a suspect already in custody renders the voluntary test coercive and involuntary—arguing McCain’s stated reason was a legal conclusion. 1RP 272. The court allowed the State to explore McCain’s belief, finding Sanchez had opened the door. 1RP 272–73.

To support her assertion that the excluded evidence is critical to her defense, Sanchez mischaracterizes the both evidence and the law. She argues:

[i]f *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.

Br. of Appellant at 16 (emphasis added). McCain did not testify “that field sobriety tests are never performed after a person is taken into custody.” Br. of Appellant at 17. He did not claim his training manual prohibited post-arrest testing. McCain testified he, himself, did not administer post-arrest FSTs because he believed such tests “involuntary.” McCain admitted he did not observe slurred speech. 1RP 274. He also admitted he did not have a reason for failing to seek a warrant for Sanchez' blood, other than that he believed Sanchez was “obviously” intoxicated. 1RP 259–62; 1RP 275.

The court did not allow Sanchez to challenge McCain concerning the involuntariness of a post-arrest blood draw, finding the question called for a legal conclusion. 1RP 262. The court also found Sanchez' follow up question—whether McCain had ever obtained a blood draw warrant over a suspect's objection—irrelevant. 1RP 263.

The right to confront and cross-examine adverse witnesses is not absolute. “Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576, 580 (2010) (citing *State v. Gregory*, 158

Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006)). Relevant evidence has a tendency to make any fact at issue more or less probable than it would be without the evidence. ER 401. The underlying fact at issue here was whether Sanchez was under the influence alcohol or drugs as McCain chased her through Moses Lake. McCain's failure to administer FSTs was marginally relevant to the question of whether the State produced sufficient evidence of impairment. McCain's stated reason—his personal belief the tests would be coercive—was also marginally relevant. Sanchez cross-examined McCain on both those issues. However, McCain's reason for not administering FSTs was collateral to the question of Sanchez' impairment, as was Mansford's interpretation of his training manual. Evidence challenging McCain's belief was intended to invite the jury to speculate McCain was lying, that his true reason was his fear that FSTs and a blood test would show Sanchez was unimpaired. Courts properly exclude extrinsic impeachment evidence on collateral issues having indirect bearing on prejudice, motive, or bias. *State v. Roberts*, 26 Wn. App. 830, 834, 611 P.2d 1297 (1980). The trial court correctly restricted Sanchez' attempts to impeach McCain by engaging him in legal argument and by seeking a contrary legal opinion, based on hearsay, from an officer with a different agency.

Sanchez asserts she needed Mansford's testimony "in order to

impeach Officer McCain's statements that [FSTs] are never performed after an arrest." Br. of Appellant at 12. Sanchez again misstates McCain's testimony. McCain had testified only to his personal belief that post-arrest FSTs were not voluntary and his personal practice not to perform them at the police station. 1RP 272–73, 277. Noting the training manuals were hearsay, the court found anything going beyond McCain's mindset as to why he didn't perform post-arrest FSTs "would be collateral evidence on collateral evidence, and collateral evidence is not relevant evidence." 1RP 290.

The court also restricted this line on the grounds Mansford's testimony would confuse the jury. Observing that the expression of a witness's legal opinion is not generally allowed, the court said: "And now you're asking for a legal opinion from a field manual from a hearsay statement" 2RP 34. "Besides being irrelevant and being a collateral issue, it just confuses the jury. Now they're hearing evidence from a field manual." *Id.* A trial court may exclude relevant evidence when its probative value is outweighed by the danger of misleading the jury or confusing the issues. ER 403. The court properly avoided inviting the jury to conduct its own analysis of a legal question.⁷

⁷ The trial court was prescient. The nine justices of the Washington Supreme Court recently disagreed over whether post-arrest FSTs are warrantless searches or merely *Terry*-style seizures in *State v. Mecham*, ___ Wn.2d ___, 275 P.3d 604 (2016). In a

Finally, the trial court properly limited Sanchez' inquiry into all the things law enforcement did not do. The court identified the relevant issue as whether what *had* been done produced sufficient evidence of Sanchez' impairment. The court correctly concluded that examining a laundry list of possible activities—the “complete universe of things that weren't done”—was irrelevant, a waste of time, and risked confusing the jury on collateral issues.

The trial court's restrictions on Sanchez' cross examination did not deprive her of the constitutional right to confront McCain and to present her theory of the case.

B. REGARDLESS OF WHETHER THE COURT AND COUNSEL MISAPPREHENDED THE LEGAL JUSTIFICATION FOR A DEFENSE OF NECESSITY, COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PURSUE IT BECAUSE SANCHEZ' STATEMENTS TO MCCAIN WERE UNRELIABLE HEARSAY AND NOTHING IN THE ASSERTED FACTS, IF TAKEN AS TRUE, WOULD HAVE SUPPORTED “NECESSITY” WHEN SANCHEZ' HAD LEGAL ALTERNATIVES TO DRIVING DRUNK AND FLEEING LAW ENFORCEMENT.

Denial of a motion to admit out-of-court hearsay statements does not violate a defendant's constitutional right to present a defense.

plurality opinion, the four justices in the majority differed with four dissenting justices and a partial dissenter on the question of whether post-arrest FSTs are warrantless searches or *Terry*-style seizures. While the Court's conclusion and supporting analyses are irrelevant to the issues here, the fact that our highest court cannot agree on whether the results of post-arrest FSTs are admissible indicates McCain was correct to feel uneasy.

Lizarraga, 191 Wn. App. at 558. The rule excluding hearsay “‘is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact.’” *Id.* (citing *Chambers v. Miss.*, 410 U.S. 284, 298, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973)). “[A]llowing inadmissible hearsay testimony ‘places the [witness’s] version of the facts before the jury without subjecting the [witness] to cross-examination,’ depriving the State ‘of the benefit of testing the credibility of the statements’ and denying the jury ‘an objective basis for weighing the probative value of the evidence.’” *Id.* (quoting *Finch*, 137 Wn.2d at 825). A defendant’s right to present evidence “‘is subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *Id.* at 559. The trial court properly concluded Sanchez’ statements to McCain did not fall under any hearsay exception and were objectionable for not being subject to cross-examination.

1. *Sanchez’ post-arrest responses to McCain’s questions were not excited utterances.*

Sanchez asserts her post-arrest excuses for not pulling over were excited utterances. Br. of Appellant at 18, 22–23. The court made no such finding. Sanchez’ only offer of proof was her attorney’s statement at the limine hearing: “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 (court’s interruption omitted). The trial court ruled Sanchez would need “an offer of proof hearing as to whether it was an excited utterance.” *Id.* Sanchez wrongly asserts the court would have agreed her statements were excited utterances if her attorney had made the offer. Br. of Appellant at 22.

An appellate court reviews a trial court’s decision to admit or exclude a hearsay statement as an excited utterance for abuse of discretion. *State v. Ohlson*, 162 Wn.2d 1, 7-8, 168 P.3d 1273, 1275 (2007) (citing *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001); *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992)). The reviewing court will reverse the trial court’s decision only if it believes “no reasonable judge would have made the same ruling.” *Id.* (citing *Woods*, 143 Wn.2d at 595–96). Whether a statement qualifies as an excited utterance turns on “whether the statement was made while the declarant was still under the influence of the event to the extent that [her] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969). There is scant evidence in the record to support Sanchez’ assertion she was threatened by a man in a blue Lincoln Navigator and nothing about when the alleged incident occurred, or where. McCain included Sanchez’

statements in his initial incident report attached to the State's motion for an order finding probable cause. CP 11. He described a conversation in which Sanchez gave her excuses for failing to pull over then answered McCain's follow-up challenges to her logic. *Id.* At the limine hearing, defense counsel said only that Sanchez' statements "involve an allegation that the gentleman driving the blue vehicle that the officer was about to pull over threatened him [sic] with a gun and said that she owed on her son's debt now that he was dead and that she would have to pay in his stead." IRP 33. Counsel did not provide further details. *Id.* Sanchez told McCain she did not see the Navigator when she blew the stoplight at Grape and Valley (CP 11), indicating the threat occurred sometime before she decided to drive drunk, speed through a red light, and attempt to elude.

Sanchez made her excuses in the back of McCain's patrol car after affirming she understood her *Miranda* rights and was willing to speak. *Id.* Sanchez did not produce evidence concerning her statements, her feelings, or what was going on in her mind at the time she answered McCain's questions. There is, however, evidence of Sanchez' demeanor right before she made those statements—McCain's in-car camera video introduced as the State's first exhibit. Ex. P1 (23:55:00–23.55:05). The video shows Sanchez immediately after having been chased to her house and into her driveway by at least two law enforcement vehicles. *Id.* It shows her calmly

getting out of her car, glancing briefly and without expression at the vehicles behind her, then turning her back to the officers and walking unhurriedly around the front of her car, carrying her purse. *Id.* She was walking away as Mansford took her to the ground. *Id.* She was resistant and uncooperative while on the ground, refusing to pull her hand from under her body until McCain hit her in the ribs. 1RP 203–04. She appeared calm as two officers escorted her to McCain’s patrol car. Ex. P1 (2:55:52–2:56:06).

Sanchez had ample time to concoct excuses for driving drunk and eluding by the time McCain secured her in the back of his car. Her getaway attempt took 5 minutes 17 seconds. Ex. P1 (23:49:43–23. 55:00). It included taking off from a full stop in the middle of a street after at least two patrol cars had stopped behind her. 1RP 199–200. This decision allowed her to return to her own residence, two minutes away, before being arrested. 1RP 158; Ex. 1 (23.53.07 – 23.55.00). Once McCain started following her, she took the most direct route back to the safety of her own house.

Throughout her flight, Sanchez demonstrated the exercise of choice and judgment, inarguably poor judgment but judgment nonetheless. Had Sanchez made an offer of proof, the court would have properly concluded her statements were not excited utterances. Counsel wisely

chose not to risk exposure of her extensive criminal history for such unpersuasive testimony.

2. *Counsel was not ineffective for failing to pursue a necessity defense with insufficient evidence to protect Sanchez from exposure of her criminal history.*

Whether a defendant has been denied the right to effective assistance of counsel depends upon whether counsel made errors so serious the defendant was deprived of a fair trial. *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

- a. Counsel’s performance was strategically justified and not deficient.

A defendant claiming ineffective assistance of counsel must first rebut *Strickland’s* “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Here, the record shows counsel’s performance was objectively reasonable and included careful consideration of trial tactics and strategy.

- i. Washington law concerning the defense of necessity appears unsettled.

Sanchez’ points to Washington case law contradicting *Gallegos*’ bright line rule that the pressure of circumstances “must come from the physical forces of nature, not from other human beings, for a defendant to argue the necessity defense.” 73 Wn. App. at 650–51. She argues the court erred and counsel was ineffective for relying on *Gallegos* in the face of conflicting decisions. Br. of Appellant at 24–25. *Gallegos*, however, has not been repudiated and is still cited for the ruling at issue.⁸ Acceding to established law is not deficient performance. See, e.g., *In re Pers. Restraint of Theders*, 130 Wn. App. 422, 435, 123 P.3d 489 (2005) (counsel’s performance not deficient for failing to raise unsettled issues or issues already settled against appellant’s interest).

- ii. Keeping Sanchez off the witness stand was a legitimate strategic decision in light of her extensive criminal history.

More to the point, Sanchez failed to produce any evidence at trial supporting a necessity defense. Both counsel and the trial court specifically noted this failure when counsel withdrew Sanchez’ request for

⁸ Division One of the Court of Appeals cited *Gallegos*’ ruling and supporting rationale in an unpublished opinion dated January 19, 2016. *State v. Castillo*. 192 Wn. App. 1020 (2016).

the necessity instruction. 2RP 50–51. There was no evidence to support the instruction because Sanchez did not testify. *Id.*

Counsel’s advice to his client that she not testify was a legitimate trial strategy openly acknowledged. Counsel had argued when urging the court to allow Sanchez’ statements to come in through McCain that without McCain’s testimony Sanchez would have to expose herself to the State’s challenge to her veracity. 1RP 33. Much of Sanchez prior felony history would have been admissible for impeachment, giving the jury an undesirable glimpse into her extensive criminal history, history that includes convictions for burglary, theft, and possession of stolen property. CP 125. Depending on what she said on the stand, it was also possible Sanchez could have opened the door to evidence of her three prior DUI convictions. Counsel’s performance was not deficient for shielding his client from damaging impeachment.

- b. Regardless of whether counsel’s performance was deficient, Sanchez cannot show prejudice.

The nature of the evidence Sanchez hoped to introduce without testifying demonstrates Sanchez cannot prove prejudice regardless of whether counsel’s performance fell below an objective standard of reasonableness. Prejudice sufficient to find ineffective assistance is defined as “a reasonable probability that, but for counsel’s unprofessional

errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Sanchez cannot meet her burden to show the trial court would have allowed a necessity defense had it admitted her statements to McCain or had she testified to the same facts.

The necessity defense is available “when circumstances cause the accused to take unlawful action in order to avoid a greater injury.” *State v. Jeffrey*, 77 Wn. App. 222, 224, 889 P.2d 956 (1995) (citing *State v. Diana*, 24 Wn. App. 908, 913, 604 P.2d 1312 (1979)).

The defendant must prove by a preponderance of the evidence that: (1) he or she 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 the violation of the law, and (3) no legal alternative existed.

Jeffrey, 77 Wn. App. at 225. Necessity is not a defense when a legal alternative is available. *Id.* (citing *Diana*, 24 Wn. App. at 913–14; Wayne R. LaFare & Austin W. Scott, *CRIMINAL LAW* § 50, at 381-83 (1972)).

Sanchez’ asserted necessity was her desire to tell her daughter about the threat from the male in the Navigator. CP 11. She did not say she was fleeing the man in the Navigator, only that she was trying to get to her daughter’s house to tell her what had happened. *Id.* Sanchez told McCain the man in the Navigator did not display a gun, and she had not

seen the Navigator stopped in front of McCain at the intersection of Grape and Valley.⁹ *Id.*

Assuming, arguendo, Sanchez' story was true, there is no evidence Sanchez reasonably feared imminent harm. The threatening male left Sanchez after making his threat. It would be reasonable to conclude he intended give her some amount of time to scrape money together before carrying out his threat. There is no evidence that telling Sanchez' daughter about the incident would avoid or minimize the threat. The most glaring deficiency in Sanchez' argument is that even if telling the daughter would have averted an imminent disaster, the reasonable legal alternative to driving drunk was a telephone call. Sanchez could have asked her daughter to come to her house. She could have called a taxi.

Sanchez was not denied her constitutional right to effective assistance of counsel. Counsel wisely chose to forego a losing argument and keep his client off the stand when the outcome was all but guaranteed to turn against her.

⁹ Sanchez also told McCain she was afraid to pull over after recognizing the police were behind her with emergency lights activated because, having heard the police were involved in her son's murder and an ensuing cover up, she was scared. CP 11. Trial counsel did not refer to this excuse when arguing Sanchez' statements should come in through McCain's testimony. 2RP 5-6. Appellate counsel did not refer to this statement when arguing the admissibility of Sanchez' hearsay statements to McCain. Br. of Appellant at 23.

C. SANCHEZ IS NOT ENTITLED TO RESENTENCING BECAUSE SHE AND HER ATTORNEY AFFIRMATIVELY ACKNOWLEDGED THE ACCURACY OF THE STATE’S SUMMARY OF HER CRIMINAL HISTORY.

Sanchez garnered nine of her eleven prior felony convictions and all three of her prior DUIs in Grant County. CP 125. The other two felonies occurred in nearby Benton County, one in 1992 and one in 2010. *Id.* The State’s summary listed each crime, the date of the crime, the sentencing court, whether Sanchez was convicted as an adult or juvenile, and that each crime was nonviolent. *Id.* Sanchez does not contest the accuracy of the State’s summary of her criminal history, only the sufficiency of the supporting evidence. Br. of Appellant at 27. The State agrees that under *State v. Hunley*, resentencing would be required had Sanchez and her attorney not affirmatively acknowledged the history summary during the sentencing hearing. 175 Wn.2d 901, 909, 287 P.3d 584 (2012).

Sanchez focused her sentencing arguments on reasons supporting her contested request for concurrent sentences and a prison-based DOSA. 3RP 9. To that end, counsel acknowledged her dismal record, saying: “Your Honor, my client doesn’t have a great history. The court is aware and the State has presented the client’s history to the Court, which is part of the reason why we are here.” 3RP 9. Counsel later repeated: “my client

doesn't have an excellent history, which the court can see" *Id.*
Counsel argued Sanchez' prior convictions made her a likely DOSA
candidate. 3RP 12–13.

While mere failure to object to the State's asserted criminal history
is not an affirmative acknowledgment, *State v. Mendoza*, 165 Wn.2d 913,
922, 205 P.3d 113 (2009), counsel here did more than merely fail to
object. He twice directed the court's attention to the State's summary to
support Sanchez' DOSA argument. His affirmative acknowledgment was
unequivocal and central to Sanchez' assertion that she and the community
would benefit from a prison-based DOSA. The State was entitled to rely
on counsel's acknowledgment at sentencing. *State v. Bergstrom*, 162
Wn.2d 87, 96, 169 P.3d 816 (2007).

Sanchez, herself, acknowledged her history, protesting: "Why
there's other people that has more points than me[,] it's even on the radio,
they have fourteen felonies . . . and they only get a year in prison and a
year of probation? Why do my sentence has to be so harsh?" 3RP 30
(emphasis added).

Sanchez' acknowledged criminal history was critical to her DOSA
request. While the better practice at sentencing would have been for the
State to have submitted certified copies of Sanchez' sentencing

documents, her acknowledgment of the accuracy of the State's summary eliminates the necessity of resentencing.

IV. CONCLUSION

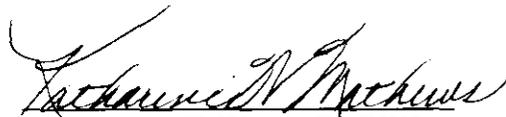
The trial court did not violate Sanchez constitutional right to present a defense when it limited cross-examination on collateral matters, including the witnesses' legal opinions. Counsel's strategic decision not to expose Sanchez to devastating impeachment through her criminal record was not deficient performance. Even if it were, Sanchez cannot show prejudice because her evidence did not support a necessity defense. Resentencing is not required because Sanchez and her attorney affirmatively acknowledged her criminal history.

This court should affirm Sanchez' convictions and sentence.

DATED this 6th day of September 2016.

Respectfully submitted,

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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

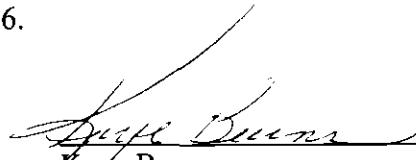
STATE OF WASHINGTON,)	
)	
Respondent,)	No. 33884-3-III
)	
v.)	
)	
TABITHA ANNSANCHEZ,)	DECLARATION OF SERVICE
)	
Appellant.)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kristina M. Nichols
Wa.Appeals@gmail.com

Dated: September 6, 2016.


Kaye Burns