

FILED
Feb 14, 2017
Court of Appeals
Division III
State of Washington

No. 34494-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

GLORIA MARIE MATHYER,

Appellant.

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

APPELLANT'S OPENING BRIEF

Sean M. Downs
Attorney for Appellant

GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....14

 1. Ms. Mathyer was denied her right to a fair trial by an impartial jury due to the court not replacing a biased juror.....14

 2. Ms. Mathyer’s right to counsel was violated when the State was allowed to inquire about statements Ms. Mathyer made to the defense expert.....18

 3. Ms. Mathyer’s convictions were based on insufficient evidence.....22

 a. There is no evidence that Ms. Mathyer’s blood sample was collected within two hours of driving.....23

 4. The court’s instruction to the jury was improper by including the *per se* prong of the offenses when there was not sufficient evidence to support it.....24

 a. Defense counsel’s proposal of the erroneous instructions constitutes deficient performance.....26

 5. No appellate costs are warranted in the event that Ms. Mathyer does not substantially prevail.....27

D. CONCLUSION.....28

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Dietz v. Doe, 131 Wn.2d 835, 935 P.2d 611 (1997).....19

In re Personal Restraint Petition of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001).....18

<i>Pappas v. Holloway</i> , 114 Wn.2d 198, 787 P.2d 30 (1990).....	19
<i>State ex rel. Sowers v. Olwell</i> , 64 Wn.2d 828, 394 P.2d 681 (1964).....	19
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997).....	24
<i>State v. Depaz</i> , 165 Wn.2d 842, 204 P.3d 217 (2009).....	16
<i>State v. Fire</i> , 145 Wn.2d 152, 34 P.3d 1218 (2001).....	14
<i>State v. Gentry</i> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	27
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	26
<i>State v. Mark</i> , 94 Wn.2d 520, 618 P.2d 73 (1980).....	24
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	20
<i>State v. Momah</i> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	14
<i>State v. Pawlyk</i> , 115 Wn.2d 457, 800 P.2d 338 (1990).....	20
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	24, 25
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005).....	22
<i>State v. White</i> , 81 Wn.2d 223, 500 P.2d 1242 (1972).....	26

Washington Court of Appeals Decisions

<i>State v. Chirinos</i> , 161 Wn. App. 844, 255 P.3d 809 (2011).....	14
<i>State v. Cho</i> , 108 Wn. App. 315, 30 P.3d 496 (2001).....	15, 16
<i>State v. Colquitt</i> , 133 Wn. App. 789, 137 P.3d 892 (2006).....	22
<i>State v. Early</i> , 70 Wn. App. 452, 853 P.2d 964 (1993).....	26
<i>State v. Fernandez</i> , 89 Wn. App. 292, 948 P.2d 872 (1997).....	24

<i>State v. Garza</i> , 99 Wn. App. 291, 994 P.3d 868 (2000).....	19, 20
<i>State v. Gonzales</i> , 111 Wn. App. 276, 45 P.3d 205 (2002).....	16, 18
<i>State v. Graham</i> , 78 Wn. App. 44, 896 P.2d 704 (1995).....	26
<i>State v. G.S.</i> , 104 Wn. App. 643, 17 P.3d 1221 (2001).....	22
<i>State v. Jorden</i> , 103 Wn. App. 221, 11 P.3d 866 (2000).....	16
<i>State v. Leavitt</i> , 49 Wn. App. 348, 743 P.2d 270 (1987).....	27
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	27
<i>State v. Stephenson</i> , 89 Wn. App. 217, 948 P.2d 1321 (1997).....	24
<i>State v. Tarica</i> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	26

United States Supreme Court Decisions

<i>Adams v. United States ex rel. McCann</i> , 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).....	18
<i>Chapman v. California</i> , 386 U.S. 18, 87 S.Ct. 824 17 L.Ed.2d 705 (1967).....	20
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	18
<i>In re Michael</i> , 326 U.S. 224 (1945).....	14
<i>In re Winship</i> , 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	22
<i>Irvin v. Dowd</i> , 366 U.S. 717, 722 (1961).....	14, 15
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).....	18
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	18, 20
<i>Reynolds v. United States</i> , 98 U.S. 145, 25 L.Ed. 244 (1878).....	15

United States Court of Appeals Decisions

Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991).....16
Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998).....15
Fields v. Woodford, 309 F.3d 1095 (9th Cir. 2002).....15
Shillinger v. Haworth, 70 F.3d 1132 (10th Cir. 1995).....19, 20
United States v. Gonzalez, 214 F.3d 1009 (9th Cir. 2000).....15

Washington State Constitution

Art. I, sec. 22.....18

United States Constitution

U.S. Const. Amend. VI.....18

Statutes

RCW 5.60.060.....19
RCW 46.61.502.....23
RCW 46.61.506.....23
RCW 46.61.520.....23
RCW 46.61.522.....23

Other Sources

5A K. Tegland, Wash.Prac., Evidence § 501.9 (5th ed. 2007).....19
WPIC 90.06.....25
WPIC 92.12.....25

A. ASSIGNMENTS OF ERROR

1. Ms. Mathyer was denied her right to a fair trial by an impartial jury due to the court not replacing a biased juror.
2. Ms. Mathyer's right to counsel was violated when the State was allowed to inquire about statements Ms. Mathyer made to the defense expert.
3. Ms. Mathyer's convictions were based on insufficient evidence.
4. The court's instruction to the jury was improper by including the *per se* prong of the offenses when there was not sufficient evidence to support it.
5. Ms. Mathyer's convictions were based on insufficient evidence.

B. STATEMENT OF THE CASE

Ms. Mathyer was charged by information of count one Vehicular Homicide regarding alleged victim James Stutzman, count two Vehicular Assault regarding alleged victim Cynthia Stutzman, and count three Driving While License Suspended in the Third Degree, regarding an incident alleged to have occurred on June 7, 2014. CP 341-343. Counts one and two alleged that Ms. Mathyer was under the influence, drove in a reckless manner, or disregarded the safety of others. CP 341-343. An

amended information was filed informing Ms. Mathyer of the twenty-four month sentencing enhancement provision for Vehicular Homicide, pursuant to RCW 46.61.520. CP 255-258. Before trial, Ms. Mathyer entered a guilty plea to the Driving While License Suspended charge. CP 176-193.

Trial commenced on June 7, 2016 and Trooper Connor Bruchman testified first for the State. RP 65-66. Trp. Bruchman indicated that he responded to a report of a car versus motorcycle collision on SR 153. RP 66. The trooper had been commissioned for approximately three months before this call. RP 85. The road conditions were clear and dry. RP 67. Trp. Bruchman observed the car's driver's door was bent, the windshield had spider-web cracks, and the rear passenger door was pushed into the backseat. RP 71. The registered owner of the car was Gloria Mathyer and the registered owner of the motorcycle was James Stutzman. RP 73, 84. Trp. Bruchman explained through scene photos that vehicle one was travelling southbound, went onto the shoulder slightly, and then went across the roadway and came to rest on the shoulder of the northbound lane. RP 75. The driver of the motorcycle was identified as James Stutzman. RP 77. Mr. Stutzman at that time was conscious, on the ground on his back, being attended to and interacting with emergency personnel. RP 77. The passenger on the motorcycle was identified as Cynthia

Stutzman and she was observed being wheeled into an ambulance. RP 78. Ms. Mathyer was identified as being associated with the car and she was seen lying on the ground next to the driver's side of the car. RP 78. Trp. Bruchman assisted emergency personnel place Ms. Mathyer in the ambulance. RP 79. Trp. Bruchman observed that Ms. Mathyer was struggling to stay awake. RP 79. A MedStar helicopter service was called to transport Mr. Stutzman, but he passed away before he got to the hospital. RP 80. Trp. Bruchman completed a workup form for both vehicles involved in the collision and he completed a collision report. RP 81, 84.

After Trp. Bruchman's testimony, Juror No. 2 indicated that she realized that she knew Trp. Jeffery Eifert personally after Trp. Bruchman mentioned his name in testimony. RP 90, 95. Juror No. 2 indicated that she had gone to church with Trp. Eifert frequently about one year prior. RP 90. She indicated to the court that she did not think there was any concern about her being fair and impartial in the case. RP 90. The jury was excused for the day and trial reconvened the following day. RP 92, 94. The bailiff disclosed to the court that Juror No. 2 asked "Is it biased if I believe everything that Jeff Eifert said?". RP 95. Juror No. 2 confirmed that was the question that she asked the bailiff. RP 98. She indicated that she attended the same church as Trp. Eifert for a year and knew him to

have integrity and would believe him. RP 98-99. Juror No. 2 wanted to know whether the court would consider it biased if she already considered him an honest and truthful witness. RP 99. Juror No. 2 further indicated that believed Trp. Eifert to be truthful, although anyone could be wrong. RP 99. She indicated that she believed she could hear all the evidence and put Trp. Eifert says in context. RP 99. Juror No. 2 did not directly answer the court's question of whether her relationship with Trp. Eifert would affect her ability to be fair and impartial. RP 99. The court further asked Juror No. 2 that if she was the defendant whether she would want herself on the jury with her feelings about Trp. Eifert. RP 99-100. Juror No. 2 responded that she believed so. RP 100. The court decided to keep Juror No. 2 on the jury. RP 100.

The State next called Paula Evans-Duncan to testify. RP 112. Ms. Duncan indicated that she witnessed the collision on SR 153 on June 7, 2014 at 5:00pm. RP 113-114. Ms. Duncan was following a motorcycle in her vehicle for about one to two miles, travelling northbound. RP 114, 116. The vehicles came to a curve in the road and slowed to forty-five miles per hour. RP 117. The vehicles travelled along a curve to the right and then began to travel along a curve to the left. RP 115, 117. Another car in the oncoming lane swerved into the northbound lane and in front of the motorcycle. RP 117-118. Ms. Duncan did not observe this car prior to

it coming into the oncoming lane. RP 125. The motorcycle's brake lights illuminated and then the motorcycle hit the side of the southbound car. RP 118. The car spun from the collision and travelled trunk-first into an embankment and the driver of the motorcycle and the motorcycle ended up in a ditch. RP 119. The car's driver's door came open upon impact. RP 119. Ms. Duncan contacted the motorcycle passenger and she appeared dazed. CP 121. The motorcycle passenger scooted to the side of the road. RP 122. Ms. Duncan observed the driver of the car and a man was helping to shade her because of the hot, direct sun. RP 122. Ms. Duncan observed the driver of the motorcycle and he appeared to be unconscious but breathing. RP 123.

Cynthia Stutzman testified that she was riding a motorcycle as a passenger with her husband James Stutzman driving. RP 130. Ms. Stutzman observed a car travelling southbound go on to the shoulder of the road on its right side and then overcorrected and crossed across the centerline in front of their motorcycle. RP 130-131. There was no time to react. RP 131. Ms. Stutzman woke up in the middle of the road with fractures to her pelvis. RP 131. She later determined that she had eight broken ribs. RP 132. Ms. Stutzman had to take a month and a half off due to her injuries. RP 134.

A video deposition of Victoria Buzzard was then played for the jury and a redacted copy of the transcript was provided for the jury to follow along with the audio. RP 142; CP 75-111. Ms. Buzzard testified that she worked as a paramedic for Aero Methow Rescue Service. CP 80. She responded to the collision scene on SR 153. CP 81. She attended to Mr. Stutzman, who had obvious significant injuries. CP 84-85. Mr. Stutzman was conscious and talking to Ms. Buzzard. CP 88-89. She observed that Mr. Stutzman's left foot was almost torn off, his left leg was deformed, and he had significant bleeding coming out of his right foot. CP 89. Mr. Stutzman was being prepared to be evacuated from the scene by helicopter. CP 95. Mr. Stutzman passed away at approximately 7:00pm due to cardiac arrest caused by trauma before he was evacuated. CP 98-99, 106.

Larry Higbee testified that he worked as a deputy coroner and took custody of Mr. Stutzman's body. RP 147. Mr. Higbee determined the cause of death to be from massive internal injuries. RP 149.

Theodore Shook testified that he was a trooper for the Washington State Patrol at the time of the incident. RP 151. He indicated that he was trained as a collision specialist. RP 152. Trp. Shook was dispatched to SR 153 and arrived on scene before any fire or other law enforcement personnel. RP 154, 159. Trp. Shook indicated that the tire marks indicated

that the car was rotating counter-clockwise as it was travelling northbound. RP 163-164. The effect of the motorcycle striking the car was that the car then rotated clockwise. RP 165. Trp. Shook testified that the seatbelt of the car was broken and that it appeared to have been previously fixed by sewing a third piece of seatbelt to the other two pieces. RP 176. The defense again noted its objection to this line of questioning. RP 176. Trp. Shook also determined that the driver of the car had travelled across the compartment of the car and struck the upper right part of the windshield. RP 178. Trp. Shook testified that based on a tire mark on the shoulder of the road, it appeared that some portion of the car was travelling over the fog line. RP 182.

Nicky Markey was called as a witness by the State as a records custodian at Three Rivers Hospital. RP 199. Ms. Markey identified radiology reports of Ms. Stutzman. RP 201. She also identified emergency department records of Ms. Mathyer. RP 202. The admission of these records were unobjected to by the defense. RP 202.

Trooper Lex Lindquist testified that he was a drug recognition expert and he was called to respond to the collision. RP 210. He arrived on scene at 7:56pm. Trp. Lindquist described the roadway at the collision site as a sweeping curve with super elevation and grade to the curve. RP 212.

Trp. Lindquist later travelled to Three Rivers Hospital and observed Trp. Eifert giving her a receipt for a blood draw taken of her. RP 214.

Sergeant Tony Hawley testified that he is a drug recognition expert and he responded to Three Rivers Hospital at approximately 8:55pm to contact Ms. Mathyer. RP 221-222. When he contact her, she was lying on a gurney with a neck brace on. RP 222. Sgt. Hawley noticed that Ms. Mathyer had bloodshot, watery eyes, and constricted pupils. RP 223. Constricted pupils could be an indicator of narcotic analgesics. RP 223. When asked if Ms. Mathyer had taken any medications, she responded that she had taken some ibuprofen. RP 224. Sgt. Hawley had been informed by hospital staff that Ms. Mathyer had been given four milligrams of morphine for pain. RP 226. Sgt. Hawley also noticed Ms. Mathyer had some slurred speech and seemed to have a dry mouth while talking, although these observations are not necessarily a sign of intoxication. RP 225. He also observed an odor of intoxicants in the room. RP 225.

Trp. Eifert testified that he responded to the scene of the collision. RP 232. He observed Ms. Mathyer lying on the ground with a neck brace on. RP 233. Trp. Eifert was later instructed to go to the hospital to try and ascertain whether any drugs or alcohol were involved with the driver of the car. RP 235. He made contact with Ms. Mathyer in her hospital room

and observed the smell of alcohol on her breath, that she had bloodshot and watery eyes, that her speech was slurred, and that she had lethargic movements. RP 236. Trp. Eifert acknowledged that these observations did not necessarily have to be related to signs of intoxication. RP 236. He was not able to do field sobriety tests due to the physical condition of Ms. Mathyer. RP 237. Trp. Eifert authored a search warrant for Ms. Mathyer's blood and received authorization telephonically. RP 238. Two vials of blood were drawn by nurse Chris Elder at 11:20pm and were labelled as evidence. RP 241, 244. Trp. Eifert gave Ms. Mathyer a receipt for the blood seizure, but she was unable to sign that due to her condition. RP 245.

Ms. Elder testified that Ms. Mathyer's blood alcohol level was at 0.22 at 7:50pm, as noted in her hospital medical records. RP 273. This testimony was unobjected to by the defense. RP 273. While drawing Ms. Mathyer's blood for law enforcement, Ms. Elder stated that she did not look for clots, she could not recall whether she inverted the vials after drawing blood and she did not know whether law enforcement protocols require inversion of the vials. RP 280.

David Temple testified that worked as an investigator for the Washington State Patrol regarding motor vehicle collisions. RP 251-254. Mr. Temple was contacted to observe a test of the ball joint on the left

front of a 1998 Honda. RP 255. The ball joint was tested to see if there was movement and it was discovered that the castle nut that held a portion of the lower control arm was loose. RP 256. Mr. Temple indicated that this would have pre-dated the collision. 256-257. Mr. Temple stated that looseness in the castle nut would be reflected in the steering lash. RP 259. He explained that the steering lash is the amount of movement needed to turn the steering wheel before it influences the tires. RP 257. State statute allows up to two inches of movement, and Mr. Temple observed one and a quarter inches of movement in the examined car. RP 257-258. He opined that the marks observed in the roadway were not the result of a defective ball joint. RP 261. Mr. Temple indicated that ball joint problems would result in uneven tread wear on the tires. RP 265-266. He stated that he did not observe that type of wear on the examined car, although he did not know when the tires were installed on that vehicle. RP 266, 268.

Naiha Nuwayhid testified that she is a forensic toxicologist at the Washington State Patrol Toxicology Laboratory. RP 341. Ms. Nuwayhid explained that the vials used by the Washington State Patrol contain an enzyme poison to prevent the growth of microorganisms such as yeast. RP 345. The vials also contain anti-coagulants to prevent the blood from clotting. RP 345-346. It is recommended to mix the tube when the blood is drawn in order to prevent clotting or coagulation. RP 373. The measured

blood alcohol level was 0.10. RP 351. Ms. Nuwayhid indicated that using retrograde extrapolation, the blood alcohol level at 7:20pm would be between 0.14 and 0.18. RP 354. She also explained that a hospital blood draw uses different standards than the toxicology lab and their analysis does not go towards the legal standard of 0.08. RP 355. There was also methamphetamine detected in the blood at the level of 0.212 milligrams per liter. RP 364. She explained that the effects of methamphetamine are to initially stimulate alertness and the late effects are sleepiness and depression. RP 365-366.

Outside the presence of the jury, the parties discussed the potential testimony of defense expert Trevor Newbery. RP 283. The State intended to call Mr. Newbery as a witness to discuss his interview of Ms. Mathyer regarding her driving, her statements about what happened around the time of the collision, and her consumption of alcohol. RP 284, 300-301, 304-305. Defense counsel indicated that Mr. Newbery's company expressed concern about him testifying as a fact witness when he is retained by the defense. RP 285. The defense also specifically objected on relevance and hearsay grounds, but was overruled. RP 306. The defense was allowed to make a standing objection to the line of questioning regarding Ms. Mathyer's statements. RP 309-311.

The defense called Mr. Newbery to testify. RP 382. He was retained by the defense to do traffic accident reconstruction and to do a mechanical exam on the car. RP 390-391. Upon inspecting the car, he discovered that the left front suspension ball joint was very loose. RP 397. Mr. Newbery indicated that when he grabbed the steering wheel, there was excessive movement and there should not be that amount of movement. RP 397, 400. This defect indicates that the car may not be aligned and have difficulty going straight. RP 401. Mr. Newbery removed and opened the ball joint to reveal that there was an excessive gap between the ball joint stud and the lower control arm. RP 404-405. Based on that, Mr. Newbery opined that the steering would wander and go to the left of to the right, which would require constant corrections, and therefore was a contributing factor to the accident. RP 406-407. MR. Newbery also calculated the speed of the car at the time of impact at fifty five miles per hour and her speed before that at sixty miles per hour. RP 418, 434. The State questioned Mr. Newbery about his conversations with Ms. Mathyer. RP 427. Mr. Newbery responded that Ms. Mathyer told him that she stopped in the roadway for about five seconds and pulled her emergency brake as the car was off. RP 427. Ms. Mathyer also indicated to Mr. Newbery that a family member had put tires on the car about six months prior to the collision, that she had consumed alcohol prior to the collision,

and that even if she was not under the influence she would not have been able to control her car. RP 428-429. Mr. Newbery indicated that his opinions on this case are informed by the physical evidence, not what Ms. Mathyer told him. RP 433.

The State called Sergeant Kurt Adkinson on rebuttal. RP 449. Sgt. Adkinson testified that the coefficient of friction used by Mr. Newbery was lower than what is typically used. RP 452. Sgt. Adkinson believed that the speed of the car upon impact was seventy three miles per hour. RP 455.

The defense proposed Washington Pattern Jury Instruction 90.08 regarding intervening cause. CP 147. The State objected to that instruction and argued that the intervening cause instruction could only be used when the defendant's driving was not a proximate cause. RP 319. The court declined to submit that instruction to the jury. RP 467-468, 473-474.

The State argued in closing that Ms. Mathyer was above the *per se* level of 0.08 at the time of the collision. RP 507. There was no objection by the defense. RP 507.

The jury subsequently returned verdicts of guilty for Vehicular Homicide and Vehicular Assault, and made special findings that Ms. Mathyer was under the influence, driving in a reckless manner, and

disregarding the safety of others at the time of both offenses. CP 64, 59, 63; RP 533-538.

C. ARGUMENT

1. Ms. Mathyer was denied her right to a fair trial by an impartial jury due to the court not replacing a biased juror.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to trial by an impartial jury. *See, e.g., State v. Chirinos*, 161 Wn. App. 844, 848 n.3, 255 P.3d 809 (2011); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

The state constitutional provision does not provide greater protection than the federal constitutional provision. *State v. Fire*, 145 Wn.2d 152, 163, 34 P.3d 1218 (2001). The constitutional right to trial by an impartial jury “focuses on the defendant’s right to have unbiased jurors, whose prior knowledge of the case or their prejudice does not taint the entire venire and render the defendant’s trial unfair.” *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). “[A]n essential element of a fair trial is an impartial trier of fact - a jury capable of deciding the case based on the evidence before it.” *Id.* “The failure to accord an accused a fair hearing violates even the minimal standards of due process.” *Irvin v. Dowd*, 366 U.S. at 722.

The United States Supreme Court has long recognized the pernicious effect that juror bias can have on the fairness of the proceedings. “The theory of the law is that a juror who has formed an opinion cannot be impartial.” *Reynolds v. United States*, 98 U.S. 145, 155, 25 L.Ed. 244 (1878). “[I]t is difficult to conceive of a more effective obstruction to the judicial process than a juror who has prejudged the case.” *In re Michael*, 326 U.S. 224, 228 (1945). “The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.” *Irvin v. Dowd*, 366 U.S. at 727. Thus, the bias or prejudice of even a single juror denies an accused person his right to a fair trial. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (*en banc*) (citation omitted).

Actual bias is “‘bias in fact’—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.” *United States v. Gonzalez*, 214 F.3d 1009, 1112 (9th Cir. 2000) (citation omitted). Actual bias is usually established by a juror’s express admission that she cannot be fair or impartial. Both actual and implied bias require a juror’s removal. *Fields v. Woodford*, 309 F.3d 1095, 1103 (9th Cir. 2002); *see also State v. Cho*, 108 Wn. App. 315, 328-29, 30 P.3d 496 (2001) (considering question of implied bias for the first time on appeal, and holding the issue “goes to the impartiality of the factfinder, a right

guaranteed by the Sixth Amendment and a touchstone of the constitutional guarantee of a fair trial”). Whether a juror’s bias may be implied from the circumstances is a question of law. “Doubts regarding bias must be resolved against the juror.” *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991); *Cho*, 108 Wn. App. at 330.

A trial court’s decision to excuse a juror is reviewed for abuse of discretion. *State v. Jorden*, 103 Wn. App. 221, 226, 11 P.3d 866 (2000). “A trial court abuses its discretion when it bases its decision on untenable grounds or reasons.” *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). The remedy for denial of the constitutional right to trial by an impartial jury is reversal. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002).

CrR 6.5, the criminal court rule governing alternate jurors, also protects the right to an impartial jury. *See Jorden*, 103 Wn. App. at 227 (acknowledging that CrR 6.5 “place[s] a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.”). The rule provides that “[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged and the clerk shall draw the name of an alternate who shall take the juror's place on the jury.” CrR 6.5.

In the instant case, after testimony had begun, Juror No. 2 informed the court that she personally knew one of the State's witnesses, Trp. Eifert, and specifically asked the court bailiff "Is it biased if I believe everything that Jeff Eifert said?". RP 95. Juror No. 2 attended church with Trp. Eifert for a year and knew him to have integrity and would believe him. 98-99. The court went through a colloquy with Juror No. 2 and at no point did she indicate that she could set aside her relationship with Trp. Eifert. She indicated that she would take his testimony in consideration with the other testimony, but she did not say that her relationship would not affect her view of how she would assess evidence presented by Trp. Eifert. In essence, Juror No. 2 acted as though Trp. Eifert was above reproach and that he could not be considered untruthful or dishonest based on her relationship with him. This is all the more problematic as Trp. Eifert was the State's main witness to testify regarding alleged observations of intoxication of Ms. Mathyer. Juror No. 2 had a clear actual bias that should have led to her being excused as a juror. The court had an obligation to replace Juror No. 2 with an alternate under CrR 6.5.

The trial court abused its discretion in failing to replace Juror No. 2 and as a result Ms. Mathyer was denied her right to a fair trial by an impartial jury. Therefore, her convictions must be reversed and remanded

for a new trial. *See Gonzales*, 111 Wn. App. at 282 (setting forth this remedy for a constitutional violation).

2. Ms. Mathyer’s right to counsel was violated when the State was allowed to inquire about statements Ms. Mathyer made to the defense expert.

A criminal defendant has the constitutional right to the effective assistance of counsel in a criminal proceeding. *Gideon v. Wainwright*, 372 U.S. 335, 344-45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55, 77 L.Ed. 158 (1932); U.S. Const. Amend. VI; Art. I, sec. 22. “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). The effectuation of this right imposes a duty to fully investigate known potential defenses, and where necessary, to retain qualified experts to assist in the preparation of that defense. *See, e.g., In re Personal Restraint Petition of Brett*, 142 Wn.2d 868, 880, 16 P.3d 601 (2001) (counsel ineffective for failing to investigate and retain experts for potential mental defense).

A “prosecutor’s intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant.” *State v. Garza*, 99 Wn. App. 291, 299, 994 P.3d 868 (2000) (citing *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995)). In Washington, the attorney-client privilege is codified in RCW 5.60.060(2), which reads:

An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

RCW 5.60.060(2).

The attorney-client privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery. *Dietz v. Doe*, 131 Wn.2d 835, 842, 935 P.2d 611 (1997) (citing *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 832, 394 P.2d 681 (1964); *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990)). The privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication. *Dietz*, 131 Wn.2d at 842 (citing *Pappas*, 114 Wn.2d at 203). The attorney-client privilege operates independently of the work product rule and vice versa. 5A K. Tegland, Wash.Prac., Evidence § 501.9, at 145 (5th ed. 2007).

“The work product doctrine protects from discovery an attorney’s work product, so that attorneys can ‘work with a certain degree of privacy and plan strategy without undue interference.’” *State v. Pawlyk*, 115 Wn.2d 457, 475, 800 P.2d 338 (1990). In the criminal law context, the work product doctrine applies to the “‘research [,] records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies.’” *Pawlyk*, 115 Wn.2d at 477 (quoting CrR 4.7(f)(1)). The *Pawlyk* Court specifically found the reference to “investigating ... agencies” to be “broad enough to include defense work product,” as well as prosecution work product. *Id.*

Where a violation of the right to counsel is found, reversal is required, and prejudice is presumed. *See Garza*, 99 Wn. App. at 299-300; *Shillinger*, 70 F.3d at 1134 (finding where the State purposely intrudes into the attorney-client relationship, the “[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.”) (citing *Strickland*, 466 U.S. at 692). Constitutional errors that “affect substantial rights” cannot be considered harmless. *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In the event that this court finds that this issue is raised for the first time on appeal, this court should nevertheless review the issue because it is a

manifest error affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). This error affects the attorney-client privilege, which is “truly of constitutional magnitude” and there is actual prejudice, as discussed below. *Id.*

In the instant case, Mr. Newbery was retained by the defense to do an accident reconstruction and to inspect Ms. Mathyer’s car and Mr. Stutzman’s motorcycle. Mr. Newbery came to his conclusions regarding how fast he believed Ms. Mathyer’s vehicle was travelling and the conditions of the defective ball joint based on his inspection of the car, his review of police reports, and his review of photographs. His opinion did not rely on anything that Ms. Mathyer told him about what she believed happened. The State was impermissibly allowed to invade the attorney-client privilege and violate the work product doctrine by questioning Mr. Newbery about statements that Ms. Mathyer made to him. This violation is further compounded due to the fact that Ms. Mathyer chose not to testify and she also did not make any statements to law enforcement. Ms. Mathyer was prejudiced because her statements to Mr. Newbery allowed the jury to believe there was consciousness of guilt due to her statements that were contradicted by the defense’s own expert.

Because the testimony of Mr. Newbery regarding statements that Ms. Mathyer made to him violated her constitutional and statutory rights, prejudice is presumed and reversal is required.

3. Ms. Mathyer's convictions were based on insufficient evidence.

In a criminal prosecution, due process requires the state to prove every element of the charged crime beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005) (citing *In re Winship*, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Because this is a constitutional requirement, a challenge to the sufficiency of the evidence may be raised for the first time on appeal. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006). Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements beyond a reasonable doubt. A reviewing court draws all reasonable inferences in favor of the state. *State v. G.S.*, 104 Wn. App. 643, 651, 17 P.3d 1221 (2001). If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required; retrial following reversal for insufficient evidence is unequivocally prohibited and dismissal is the remedy. *Smith*, 155 Wn.2d at 504-505.

a. There is no evidence that Ms. Mathyer's blood sample was collected within two hours of driving.

Both Vehicular Assault and Vehicular Homicide require proof that the defendant operated a motor vehicle “[w]hile under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502...”. RCW 46.61.522(1)(b); RCW 46.61.520(1)(a). One means of proving intoxication involves showing that “the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person’s breath or blood made under RCW 46.61.506.” RCW 46.41.502(1)(a).

In the instant case, the evidentiary blood draw was done well after two hours since Ms. Mathyer last drove a motor vehicle. The collision was testified to have occurred at 5:00pm and the blood was drawn at 11:20pm, six hours later. RP 113-114, 241, 244. Even when taken in a light most favorable to the State, it is clear that the State did not prove beyond a reasonable doubt that Ms. Mathyer’s blood alcohol concentration was 0.08 or more within two hours of driving. It is impossible to determine whether the jury’s general verdicts were based on a determination that Ms. Mathyer was “affected by” alcohol, or on a belief that her blood alcohol was greater than .08 within two hours of driving. This is compounded by

the fact that the State argued in closing that Ms. Mathyer was above the 0.08 *per se* limit. RP 507.

Because of this, the conviction must be reversed. Furthermore, since the evidence was insufficient to establish that Ms. Mathyer had an alcohol concentration of 0.08 or higher within two hours of driving, she may not be retried on that theory. *See, e.g., State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997); *State v. Stephenson*, 89 Wn. App. 217, 226, 948 P.2d 1321 (1997).

4. The court’s instruction to the jury was improper by including the *per se* prong of the offenses when there was not sufficient evidence to support it.

This court reviews alleged errors of law in jury instructions *de novo*. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518, U.S. 1026 (1996). Jury instructions are to be read as a whole, and each one is read in the context of all others given. *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Jury instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case. *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). “It is reversible error to instruct the jury in a manner that would relieve the State (of its) burden” to prove “every essential element of a

criminal offense beyond a reasonable doubt.” *State v. Pirtle*, 127 Wn.2d at 656.

In the instant case, the court included jury instructions that defined “under the influence” for the charges of Vehicular Assault and Vehicular Homicide as having “sufficient alcohol in his or her body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable analysis of the person’s blood”. CP 16. This instruction is based on WPIC 90.06. However, this pattern instruction makes clear that bracketed material should not be included if there is insufficient evidence for it. Moreover, if the court instructs the jury on an alcohol concentration of 0.08, then the court must also instruct the jury as to the definition of alcohol concentration (WPIC 92.12). *See* Comments to WPIC 90.06. The court did not instruct the jury as to the definition of alcohol concentration. There was insufficient evidence that the evidentiary blood draw took place within two hours of driving and therefore the jury should have never been instructed on the *per se* prong of the statute. This is rendered all the more confusing by the court not even defining what an alcohol concentration is and by the State arguing in closing that Ms. Mathyer was above a 0.08.

Given the above, Jury Instruction 13 was misleading to the jury and should not have been submitted. Accordingly, the convictions must be reversed and remanded for a new trial.

a. Defense counsel's proposal of the erroneous instructions constitutes deficient performance.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990). Additionally, while the invited error doctrine precludes review of error caused by the defendant, *See State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same

doctrine does not act as a bar to review a claim of ineffective assistance of counsel. *State v. Gentry*, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995). To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn. App. at 359.

In the instant case, defense counsel proposed the erroneous "under the influence" instruction. CP 153. The record does not show any tactical or strategic reason why counsel would propose this instruction. Ms. Mathyer was prejudiced by this instruction as it allowed the jury to convict her under the *per se* prong of the statute even though there was clear evidence that the evidentiary blood draw was conducted well outside of the two hours after driving requirement. Given the foregoing, defense counsel's performance was deficient and the appellant should be allowed to raise this issue on appeal for the first time.

5. No appellate costs are warranted in the event that Ms. Mathyer does not substantially prevail.

In the event that Ms. Mathyer does not prevail in her appeal, she asks that no costs of appeal be authorized under RAP 14. *See State v.*

Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). Ms. Mathyer was indigent and entitled to court-appointed counsel at trial and on appeal.

D. CONCLUSION

Given the foregoing, Ms. Mathyer respectfully requests this court to reverse her convictions and remand for a new trial.

DATED this 13th day of February, 2017.

Respectfully submitted,

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com

CERTIFICATE OF SERVICE

I, Sean M. Downs, a person over 18 years of age, served the Okanogan County Prosecuting Attorney a true and correct copy of the document to which this certification is affixed, on February 13, 2017 to email addresses ksloan@co.okanogan.wa.us and sfield@co.okanogan.wa.us. Service was made by email pursuant to the Respondent's consent. I also served Appellant, Gloria Marie Mathyer, a

true and correct copy of the document to which this certification is affixed on February 13, 2017 via first class mail postage prepaid to Washington Corrections Center for Women, 9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

s/ Sean M. Downs
Sean M. Downs, WSBA #39856
Attorney for Appellant
GRECCO DOWNS, PLLC
500 W 8th Street, Suite 55
Vancouver, WA 98660
(360) 707-7040
sean@greccodowns.com