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WASHINGTON STATE COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

MEEGAN M. VANDERBURGH,

Appellant.

APPELLANT'S REPLY BRIEF

KEVIN J. CURTIS, WSBA #12085
WINSTON & CASHATT
1900 Bank of America Financial Center
601 West Riverside Avenue
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorneys for Appellant

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. LAW	1
1. The State ignores the evidence which established the relevancy of the toxicology report, and concedes that it relates to a causation question, which should have been one for the jury; the court's evolving rulings and failure to admit the report created confusion, and undermined the Defendant's ability to present a cogent defense.	1
2. Defendant's instructions accurately stated the law on the fault of a following driver, which unlike the authorities cited by the State, was necessary for the Defendant to properly argue her defense of lack of causation.	6
3. Closing argument was particularly important in relation to the issues with the complex jury instructions, and the State's claim that defense counsel agreed to an unreasonable limit, or that the Court did not cut off closing argument, is inaccurate.....	10
4. The effect of all the combined errors constitutes cumulative error.....	12
5. The parties agree that a trial court's failure to recognize and apply its discretion to determine a downward sentence departure is subject to review; the record here reflects that failure, and remand to properly instruct the court on the confines of that discretion is necessary.....	14
6. Ms. Vanderburgh's right to Equal Protection was violated, and the error was manifest.	15

a.	The Court should review the violation because the error is manifest in that it had practical and identifiable consequences at trial that increased Defendant’s sentence.....	15
b.	The State is violating Equal Protection because it is treating similarly situated defendants differently in terms of the standard of proof required for sentencing without a rational basis.	16
i.	The comparative classes are similarly situated because the prior convictions used for both to increase the sentence is the same, and the crime charged is similar.	16
ii.	There is no rational basis for the difference because the legislative purpose is the same for both statutes.	18
III.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
<u>City of Seattle v. Quezada</u> , 142 Wn. App. 43, 174 P.3d 129 (2007)), <u>rev'd on other grounds sub nom.</u> , 167 Wn.2d 451, 219 P.3d 686 (2009)	19
<u>State v. Berrier</u> , 110 Wn. App. 639, 41 P.3d 1198 (2002)	16,20
<u>State v. Brobak</u> , 47 Wn. App. 488, 736 P.2d 288, rev.den. (1972)	9,10
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956)	12
<u>State v. Crediford</u> , 130 Wn.2d 747, 927 P.2d 1129 (1996)	19
<u>State v. Griffin</u> , 126 Wn. App. 700, 109 P.3d 870 (2005)	19
<u>State v. Hursh</u> , 77 Wn. App. 242, 890 P.2d 1066 (1995)	8
<u>State v. Jacobsen</u> , 74 Wn.2d 36, 442 P.2d 629 (1968)	4
<u>State v. Langstead</u> , 155 Wn. App. 448, 228 P.3d 799 (2010)	17,18,19
<u>State v. Lamar</u> , 180 Wn.2d 576, 327 P.3d 46 (2014)	15
<u>State of McAllister</u> , 60 Wn. App. 654, 806 P.2d 772 (1991)	7
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1955)	15

<u>State v. Meekins,</u> 125 Wn. App. 390, 105 P.3d 420 (2005).....	5,7
<u>State v. Pascal,</u> 108 Wn.2d 125, 736 P.2d 1065 (1987).....	14
<u>State v. Roswell,</u> 165 Wn.2d 186, 196 P.3d 705 (2008).....	17,19
<u>State v. Roggenkamp,</u> 115 Wn. App. 927, 64 P.3d 92 (2003), aff.d 153 Wn.2d 614 (2005).....	8
<u>State v. Rushing,</u> 77 Wn. App. 356, 890 P.2d 1077 (1995).....	16
<u>State v. Weber,</u> 159 Wn.2d 252, 149 P.3d 646 (2006).....	12
<u>State v. Williams,</u> 156 Wn. App. 482, 234 P.3d 1174 (2010).....	17,19
<u>State v. Willis,</u> 37 Wn.2d 274, 223 P.2d 453 (1950).....	11

Statutes and Court Rules

RAP 2.5	15
RAP 2.5(a)	15
RCW 2.5(a)(3)	15
RCW 9.68A.090(2)	17
RCW 9.94A.030	17
RCW 9.94A.090(1)	17
RCW 9.94A.533(7)	18
RCW 9.94A.535(1)	14
RCW 9.94A.555(2)	19
RCW 46.52.065	5
RCW 46.61.502	18,19
RCW 46.61.5055	18,19

I. INTRODUCTION

Appellant Vanderburgh submits the following reply in support of her appeal of her criminal conviction. The facts and evidence were provided in the initial appeal brief, and will be restated here only to the extent the State has incorrectly stated them or ignored their import.

II. LAW

- 1. The State ignores the substantial evidence which established the relevancy of the toxicology report and concedes that it relates to a causation question, which should have been one for the jury; the court's evolving rulings, limitations on defense counsel and failure to admit the report created confusion and undermined the Defendant's ability to present a cogent defense.**

The State ignores the heightened care with which a court must analyze the relevance and "prejudice" of evidence in a criminal case when considering its exclusion; it remains paramount that a defendant be entitled to present her defense, and when the issue is proximate cause, the weighing of that evidence should have been squarely in the jury's province. Here, the basis and the method by which the court excluded the deceased's toxicology report, while belatedly and confusingly allowing reference to, but no evidence of, "potential" impairment late in the case, was error.

First, the evidence from the State medical examiner, the State toxicologist, and the detective that investigated the accident, addressed the toxicology report sufficiently to make it admissible, and the State's assertion that there had to be

something more was not supported by any law, in addition to ignoring the evidence of conduct of impairment that did exist. The State argues that the evidence was insufficient to be admitted because witnesses did not testify as to the individual affect the levels of the illicit controlled substances (methamphetamine, an opiate, and valium) had *specifically* on Ms. Camyn, and thus her drug use was “not a fact of consequence” in the case, i.e., was irrelevant. Respondent’s Brief, p. 17. The trial court actually ruled the evidence was relevant, but that “any relevancy” of the drug use was outweighed by the prejudicial effect because the toxicologist could not “cite precisely or with any real clarity” the combined effect of all the illicit drugs on any particular individual, specifically Ms. Camyn. (RP 664). Either analysis is incorrect because the testimony presented from the witnesses outside the presence of the jury to assist the court with the issue of admissibility was that:

- There was no evidence that Ms. Camyn had any prescriptions for the drugs in her system, and that meth is “rarely used” therapeutically. (RP 650, 657, 762).
- The levels of drugs in Ms. Camyn’s system indicate ingestion “within hours”, or a “recent” ingestion prior to the accident. (RP 604, 619). (Not, as the State suggests, “at some unknown time.” (Respondent’s Brief, p. 19).
- The medical examiner testified that meth can cause erratic behavior and impair judgment, while opiates slow mentation, speech, and lead to not being alert; even a measurable level would have pharmacologic activity, “able to have some effect on an individual.” (RP 604-605, 607)
- The toxicologist testified that Ms. Camyn’s level of meth was over the high end of the “normal” range, and all three drugs taken together could produce increased effects, and meth levels alone on the high side can

cause erratic behavior, including overreaction and inappropriate aggression. (RP 658, 660).

- The detective investigating the accident considered Ms. Camyn's toxicology report in determining who he believed caused the collision, and thought she was a proximate cause because she was impaired by meth use, based on conduct that she had crossed against the red light, and her conduct in the crosswalk *after* the leading driver had stopped. (RP 764).
- Ms. Camyn's relevant conduct included walking in front of the vehicle after it had come to a stop and then screaming profanities at the driver and the passenger while staying in front of the vehicle (RP 14, 140).

Yet, the court refused to admit the toxicology report based on lack of specific evidence of how the drug affected Ms. Camyn individually, without identifying any legal basis for such required testimony beyond that provided by the witnesses. There would never be testimony of how a combination of drugs affected each individual system, particularly when the individual is deceased; the evidence instead can only be what the levels of drugs were in the person's system, the effects that such drugs have on the human body, and the evidence of the conduct of the individual at issue consistent with a "drug's effects," all of which were present here. It cannot be unfairly prejudicial to admit the evidence of blood levels of an individual in a toxicology report of a drug known to have certain effects, along with the testimony of such effects being exhibited.¹ It is unclear

¹ In fact, the State argued the "potential" combined effect of the drugs and alcohol in **defendant's** system, based on her toxicological results, and referenced Ms. Vanderburgh's "impairment" nine times during closing and rebuttal. (RP 1106, 1069-1084, 1104-1110). Apparently the usual

what kind of additional evidence the court anticipated to render such evidence less “prejudicial,” and there is no law that creates such a burden before the evidence of drug use is admissible to establish a defense in a criminal case.

Moreover, the evidence created a relevant issue for the jury on proximate cause that thoroughly overrode any claim of “prejudice”—even the State’s authority cited on proximate cause recognizes the issue as one for the **fact finder**. See, State v. Jacobsen, 74 Wn.2d 36, 442 P.2d 629 (1968) (issue of whether there can be more than one proximate cause which contributed to the accident was one for the jury). Thus, the State’s conclusion that “what, if any², drugs Ms. Camyn ingested prior to the collision” was not a “superseding, intervening event, nor was it the sole cause of the collision,” and “there can be more than one proximate cause which contributed to a collision,” establishes the basis for admission of the toxicology report; the decision of “one” or “more than one” proximate cause and a superseding event is for the jury, **not** the State. See, Respondent’s Brief, pp. 17-18.

And as to that jury question, **all** material facts and circumstances must be assessed by the finder of fact when deciding whether a defendant’s conduct is a

effects of such toxicology results, as opposed to the individual effect, was appropriate and sufficient for the State’s evidence, but not the defense.

² The State’s reference to Ms. Camyn’s drug ingestion “**if any**” underscores the necessity and propriety of the admission of the toxicology report—the evidence was undisputed as to Ms. Camyn’s drug ingestion “recently” and “within hours” of the accident, and the State blocked such evidence, which enables them to continue to dispute what was admitted by their own experts — Ms. Camyn’s blood showed high levels of three different intoxicants.

proximate cause beyond a reasonable doubt of the accident at issue. See, State v. Meekins, 125 Wn. App. 390, 397, 105 P.3d 420 (2005) (while the State cites Meekins, it ignores the reference to “material facts and circumstances,” as issues to be presented to the jury, which was not done here.) The State also ignores the legislative mandate requiring testing for all drivers and pedestrians in a motor vehicle accident, which it specifically then established as admissible in any civil or criminal action where relevant. RCW 46.52.065.

Yet, while the State concedes the defense’s right to present evidence of Ms. Camyn’s conduct, it fails to admit that the toxicology report is a fact and circumstances surrounding that conduct, which the jury was entitled to consider. The State admits there was “conflicting testimony” as to whether Ms. Camyn crossed against the light, lingered in the crosswalk, and engaged in behavior with Mr. Nesdahl after he had stopped his vehicle. See, Respondent’s Brief, p. 19. This is exactly why it was vital to allow the defense to give the jury the toxicology report to support defendant’s factual position on the cause of the accident to refute the State’s assertion this was a mere “jaywalking” scenario. (RP 33, 361, 392-93, 623, 661).

Moreover, contrary to the State’s argument, the chain of events surrounding the admission of Ms. Camyn’s “conduct” did not enable the defense to sufficiently argue its case. The defense was prohibited from presenting its primary theory in opening statement, and couldn’t introduce it to the jury through

the initial testimony of the detective, the toxicologist or the medical examiner. Eventually, the defense was allowed to question the detective (one of the last witnesses called by the State), but admonished by the court in the middle of the testimony to mention only “potential impairment,” with the court stating that was the evidence from “his notes.” (RP 872-873).³ This course of presentation could only have created confusion for the jury,⁴ with no evidence of what any witness meant by, or based an opinion on, “impairment,” let alone “potential impairment;” the odd placement of testimony, lack of opening statement, interruption of the testimony that was offered, and the same limitations on closing argument all combined to effectively discount any ability to present the key defense in a cogent manner, necessitating reversal.

2. Defendant's instructions accurately stated the law on the fault of a following driver, which unlike the authorities cited by the State, was necessary for the Defendant to properly argue her defense of lack of causation.

The civil jury instructions proposed were necessary to provide the defendant with her right to argue the theory of the case that included **both** the fact that she was not a proximate cause of the accident, and the pedestrian’s conduct was a superseding intervening cause. The State incorrectly intermingles the two

³ Neither the detective nor any other witness testified during the voir dire that there was “potential” impairment; the detective had testified Ms. Camyn’s behavior in the crosswalk could be connected to and was consistent with her consumption of the drugs. (RP 805-807).

⁴ Even the State expressed concern for jury confusion if the jury wasn't informed where the "potential impairment" was coming from. (Side bar, RP 773).

concepts, but under either theory, the defendant was denied her opportunity to establish she did not cause the death based on her conduct of driving, because Washington law recognizes that a following driver encountering an unforeseeable emergent event not of her own making does not violate the law.

While the State concedes that proximate cause is at issue, it then incorrectly asserts that the only “causal connection” that it needs to prove is the connection between the act of driving and the accident. Respondent’s Brief, p. 30.⁵ The jury here was deprived of the basis to determine whether Ms. Vanderburgh’s conduct was a proximate cause, which is a jury question, when they weren’t given the law that provides that an accident that occurs when an emergency is encountered (which a driver is not required to assume, nor foresee) that driver is not at fault for the consequences. Civil jury instructions in a criminal case are proper if they are relevant to whether the defendant was not a proximate cause. See, State v. Meekins, 125 Wn. App. 390, 105 P.3d 420 (2005).⁶

⁵ The State's argument continues to have as an assumption that vehicular homicide is a "strict liability" offense, with no necessity to establish the causation of bad driving, but the law instead requires that nexus. See, State v. McAllister, 60 Wn. App. 654, 658-59, 806 P.2d 772 (1991).

⁶ The State focuses its discussion of Meekins on whether evidence of a motorcyclist victim’s use of a helmet was relevant on causation, as opposed to the cause of the accident, i.e. the motorcyclist’s use of lights, or other driving conduct, which is the basis the court discussed causation and the civil instruction.

And unlike State v. Roggenkamp, 115 Wn. App. 927, 64 P.3d 92 (2003), aff.d 153 Wn.2d 614 (2005) or State v. Hursh, 77 Wn. App. 242, 890 P.2d 1066 (1995)—the issue here is whether the law was properly given to the jury to determine the issue of fact on proximate cause **before** the issue of superseding cause was reached. Causation of a "fault free" driver was not propounded or addressed in Roggenkamp or Hursh because the evidence was that they were exhibiting "bad"/illegal driving at the time of the accident. Here, evidence was provided to the jury on the facts of this accident—Ms. Vanderburgh was in lane 5 of a 5 lane road (closest to curb lane), approaching an intersection with a green light, when the vehicle in front of her had to make an emergency stop because there was a pedestrian in the roadway, at night, with dark clothing, who had stopped and was engaged in erratic behavior with the driver of the vehicle that Ms. Vanderburgh hit. The defense expert testified Ms. Vanderburgh's failure to avoid the collision under these circumstances was not unreasonable or uncharacteristic of a reasonably prudent driver in this situation. (RP 995-997). This relevant evidence properly was admitted; however the underlying relevant law on the duty or fault of a driver encountering such an emergency, was not given to the jury for the purpose of determining whether Ms. Vanderburgh proximately caused the death. This was error that prevented the defendant from adequately arguing her defense.

And contrary to the State's argument, State v. Brobak, 47 Wn. App. 488, 736 P.2d 288, rev.den. (1972) does not address nor eliminate this error. The court in Brobak actually recognized the civil rules of the road have a legitimate place in a vehicular homicide trial, but found that the proposed instructions were improper because they were offered to show a victim's contributory negligence, when the jury was not instructed contributory negligence was not a defense. However, here, the defense not only proposed the instruction to establish superseding cause, but also to establish that under the law, Ms. Vanderburgh was not at fault for the accident, and thus could not be a proximate cause. The combination of the proximate cause instruction with the civil "rules of the road" instruction proposed by the defense would have given the basis to argue lack of proximate cause, but without the underlying law, the jury was left to conclude that Ms. Vanderburgh had to be at fault as the following drive, and the proximate cause.

And as to the separate concept of "superseding intervening cause," under Brobak, the civil instructions on emergency doctrine were appropriate here. In Brobak, the court found that the civil jury instructions were misleading because they failed to instruct the jury that contributory negligence was not a defense that and that the victim's contributory negligence was a superseding cause, noting that a proximate cause instruction alone was not sufficient. Id. at 493. Here, the jury was instructed that the conduct of the deceased was not a defense (once they determined proximate cause) and were given the "superseding"/intervening

instructions. (CP 521) Once the superseding cause instruction was given, the additional underlying duties contained in the rules of the road would similarly have been necessary to explain the duties and establish the basis for the defense, and would have been "rules of the road" instructions the Brobak court would have found "legitimate."⁷ The combined instructions on causation properly avoided the Brobak court's concerns and thus were an appropriate and necessary statement of the law for the defense to fairly argue the theory.⁸

3. Closing argument was particularly important in relation to the issues with the complex jury instructions, and the State's claim that defense counsel agreed to an unreasonable limit, or that the Court did not cut off closing argument, is inaccurate.

The State claims that: (1) the trial court placed no limitation on the length of closing arguments, and (2) that defense counsel was "silent" when the trial court "hoped" the State would use only 30 minutes. The record establishes that neither are true.

First, defense counsel was not addressed by the trial court in its comments regarding closing argument, and it is unclear from the record whether counsel was even present during the exchange. The colloquy was during the time the jury was being brought in, and is a conversation solely between the prosecutor and the

⁷ The emergency instruction proposed in Brobak was not similar to the one proposed by the defense here; the civil instruction proposed here was based on the fault of a following driver rendering it necessary to the causation defenses.

⁸ The State for the first time argues there were additional rules of the road civil instructions that could have been given, but did not propose them at the time of trial, and there is no law that requires that every rule of the road must be given to insure accuracy.

court with no reference to any comments to or by defense counsel. The prosecutor asked the court on the *preference* for closing time, and the court solely addressed the prosecutor: "I'm hoping that **you** can get done in half an hour."(RP 1058) (emphasis added). The court and the prosecutor then continue to discuss the reservation of rebuttal time - - no comments are directed to defense counsel, and it is only after the record reflects that the jury is back that it appears defense counsel is addressed regarding an unrelated issue. There is no basis to assert that defense counsel was "silent" as opposed to unaware of and uninvolved in the exchange between the court and the State.

There is similarly no basis to claim that the court did not enforce the time limit, or that it was a "suggestion," the court cut off defense counsel in virtual mid-argument with the admonition that he had 5 minutes remaining. (RP 1099). With the complicated jury instructions and state of the law, this constricture violated Ms. Vanderburgh's right to a clear and cogent defense, and rose to the level of error in this circumstance. Even the "wide discretion" of the trial court to limit argument is subject to a claim of abuse when it imposes a 30 minute limit as noted in the case cited by the State, State v. Willis, 37 Wn.2d 274, 223 P.2d 453 (1950) (Court remanded for new trial on other grounds but noted "we are impressed with the contention of counsel for the appellant and are of the opinion that his allotted time for argument was too limited.")

4. The effect of all the combined errors constitutes cumulative error.

The State concedes that cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. See, State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The State simply concludes that there was no error here, and thus no basis to apply the cumulative error doctrine. (Respondent's brief, p. 36). However, in Weber, the appellant alleged that the prosecutor committed three instances of misconduct, and the State **conceded** to the misconduct, but the court found that each individual instance did not amount to prejudicial error. Weber, 159 Wn.2d at 273. Further, in that case, the appellant did "not indicate how these combined instances of misconduct affected the outcome of the trial." Id at 279.

Unlike Weber, and despite the State's conclusory statement there was no error here, the defendant has presented three specific instances of reversible error including: the court's refusal to admit evidence of drugs in the pedestrian's system, not instructing the jury on standards that would have provided the law on defendant's cause of the accident, and insufficient time during closing arguments being given to adequately argue and explain the complex law relating to causation in a vehicular homicide case with the unique facts presented. (Appellant's Brief, p. 42). Under the cumulative error doctrine, it is not simply a question of if each individual alleged error is sufficient to warrant reversal, but rather if the errors as

a whole do. Here, the errors built one upon the other, and were often made with the jury present, undermining and effectively preventing the defendant from being able to present her story in any cogent fashion.

For example, as to the toxicology report admissibility, the trial court prohibited any mention of the pedestrian's impairment or the toxicology report in opening, when the jury should have been informed by the theme of the defense of proximate/superseding cause by the pedestrian's conduct. The trial court thereafter allowed only reference to "potential impairment" of the pedestrian late into the case, and interrupted the questioning of the detective in the presence of the jury to limit the testimony to "potential" impairment as reflected in the court's notes from the voir dire of the witness, further confusing the jury since the underling evidence of what "impairment" was had been excluded. The trial court then excluded instructions on the fault of a following driver, which is at the heart of the defense, and limited the interrupted closing unnecessarily again cutting off defense counsel's ability to explain and present the complex concepts necessary to the defense. And in fact, the trial court had initially indicated the civil instructions would be used, and then changed his mind the morning the case went to the jury requiring significant changes in the defense's prepared closing argument. (RP 1035). Together, this error undermined defense counsel's presentation to and in front of the jury, and impeded the overall fair presentation of the defense. In this case, the cumulative errors effectively prevented the

defendant from being able to present her story, and to argue her defense, thus constituting reversible error.

5. The parties agree that a trial court's failure to recognize and apply its discretion to determine a downward sentence departure is subject to review; the record here reflects that failure, and remand to properly instruct the court on the confines of that discretion is necessary.

As outlined in Appellant's Opening Brief, the Sentencing Reform Act imbues the trial court with discretion in regard to mitigating the presumptive sentence range, based on factors distinguishing "blameworthiness." State v. Pascal, 108 Wn.2d 125, 136, 736 P.2d 1065 (1987). The list of mitigating factors is non-exclusive and illustrative. RCW 9.94A.535(1). The record here reflects the trial court's incorrect belief that it had a "narrow window," that mitigation did "not apply," and that a standard sentence was "required;" ultimately concluding that Ms. Vanderburgh's "bad luck" was not a mitigating factor. This does not reflect the actual exercise of discretion to analyze the facts and depart downward from the sentence outside the specifically illustrative bases. And while the facts of the occurrence here were not identical to the facts in other "initiator" "provoker" cases, it doesn't mean that such factors were inapplicable to these circumstances which the trial court was entitled to analyze. The court's failure to recognize its ability to exercise its discretion requires remand.

6. Ms. Vanderburgh’s right to Equal Protection was violated, and the error was manifest.

a. The Court should review the violation because the error is manifest in that it had practical and identifiable consequences at trial that increased Defendant’s sentence.

Under RAP 2.5, in order for an error to be manifest and therefore reviewable in this case, there must be actual prejudice which requires the appellate to make a “plausible showing that the asserted error had practical and identifiable consequences.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Constitutional errors are “treated specially under RAP 2.5(a) because they often result in serious injustice . . . and may adversely affect public perceptions of fairness and integrity of judicial proceedings.” Id.

While the State claims there is no manifest error in this case,⁹ the error in fact had practical and identifiable consequences at trial in that but for the error, the State would have had to prove Ms. Vanderburgh’s prior convictions beyond a reasonable doubt to the jury. Here, the error is manifest in that it had practical and identifiable consequences: the violation is based on the differences in the burden for how to handle prior offenses for driving under the influence for defendants being charged with similar crimes.

⁹ A close examination of the State’s argument against manifest error reveals a misunderstanding of the proper question; the State is essentially arguing that there is no constitutional violation. See, State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014) (“The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional rights or for establishing lack of prejudice under a harmless error analysis . . . The purpose of the rule is different; RAP 2.5(a)(3) serves a gatekeeping function.”)

- b. The State is violating Equal Protection because it is treating similarly situated defendants differently in terms of the standard of proof required for sentencing without a rational basis.**

Contrary to the State's claim, defendants convicted of a felony DUI, and defendants charged under the DUI prong of vehicular homicide whose sentence is elevated are similarly situated because: both are being charged with a current crime based on DUI and their sentence is being elevated based on the same prior conviction. Moreover, the legislative purpose behind both criminal offenses is the same, and therefore there is no rational basis for the difference.

- i. The comparative classes are similarly situated because the prior convictions used for both to increase the sentence is the same, and the crime charged is similar.**

To establish a similar situation, there must be “near identical participation in the same set of criminal circumstances.” State v. Rushing, 77 Wn. App. 356, 358, 890 P.2d 1077 (1995). However, it is not necessary that the situation be precisely identical for two groups to be similarly situated. E.g., State v. Berrier, 110 Wn. App. 639, 649, 41 P.3d 1198 (2002) (individuals who illegally possess machine guns similarly situated with those who illegally possess shot guns).

Here, both defendants have the same type of prior DUI conviction (under the same statute) that is utilized to increase their possible sentence in their current charges relating to a similar alleged crime.¹⁰ See, Appellant's Brief at 50, 52-53.

The State's comparison to cases where defendants sentenced under the Persistent Offender Accountability Act (POAA) were compared to defendants with elevations of crimes charged based on prior convictions do not apply here to avoid the Equal Protection violation. See, Respondent's Brief at 53-55. A close reading of the cases cited reveals that one of the reasons why the court upheld the difference is that the defendants were not similarly situated, because the prior convictions utilized against defendants charged under the POAA were different than the prior convictions utilized to elevate a crime in those cases. Compare, RCW 9.68A.090(2) (listing prior offenses for elevating crimes under RCW 9.94A.090(1)), with RCW 9.94A.030 (defining prior offenses for POAA). See, State v. Williams, 156 Wn. App. 482, 496, 234 P.3d 1174 (2010); State v. Langstead, 155 Wn. App. 448, 455, 228 P.3d 799 (2010); State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008).

¹⁰ Indeed, Respondent seems to implicitly recognize the comparison but seems to allege these two are not similarly situated because under the former the State is currently required only to prove the prior DUI conviction by a preponderance while in the latter the State must prove such beyond a reasonable doubt. See, Respondent's Brief at 48-50. This difference is precisely the reason that the rules violate the Equal Protection clause.

Here, the *same* statute defining prior offense is utilized both for sentencing enchantment to vehicular homicide, and as an element of the crime for elevating a DUI to a felony. RCW 46.61.502 (using RCW 46.61.5055 to elevate DUI to felony); RCW 9.94A.533(7) (using RCW 46.61.5055 to enhance sentence for vehicular homicide). Therefore, unlike in the cases cited by Respondent, the State in this case is treating proof of the *same* prior offense for purposes of sentencing related to similar DUI related offenses differently.

ii. There is no rational basis for the difference because the legislative purpose is the same for both statutes.

Both parties agree that the applicable standard for the second step under an Equal Protection analysis in this case is a rational basis review. See, Appellant's Brief at 53; Respondent's Brief at 51. However, here, unlike the POAA used by the State, there is no difference in legislative purpose between the two groups of defendants; the law is treating two similarly situated defendants, who both have the same prior DUI convictions utilized to increase their sentence, differently without a rational basis for doing so because the policy behind the two laws is the same.

The difference between proof standards under the POAA and other statutes in cases cited by Respondent is based on difference in intent of the Legislature. See, State v. Langstead, 155 Wn. App. at 455-56. (Where two statutes are passed for difference legislative purposes, there is a rational basis in the law for difference in burden of proof for prior convictions in conviction and

sentencing). Indeed, the purpose of the POAA is “to protect public safety by putting the most dangerous criminals in prison, to reduce the number of serious repeat offenders, to provide simplified sentencing, and to restore the public trust in the criminal justice system.” State v. Williams, 156 Wn. App. at 498 [citing RCW 9.94A.555(2)]. Thus, under the POAA, when offenders that are convicted of certain crimes that have prior convictions receive an increased sentence, that crime only needs to be proven by preponderance because the legislature is seeking to protect the public from the repeat offender, while the elevation in charges that requires proof beyond a reasonable doubt is based on punishment of the alleged criminal. Williams, 156 Wn. App. at 498; State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Accordingly, the rational basis is based differences in legislative intent for protection of the public vs. punishment of the criminal. See, Langstead, 155 Wn. App. at 456.

Here, the legislative purpose behind the two applicable statutes regarding punishing driving under the influence is the same. The legislative purpose in RCW 46.61.502 is to penalize “the excessive consumption of intoxicants associated with the operation of a motor vehicle.” State v. Crediford, 130 Wn.2d 747, 754, 927 P.2d 1129 (1996). Similarly, the legislative purpose in enacting RCW 46.61.5055 is to penalize those convicted while driving under the influence. State v. Griffin, 126 Wn. App. 700, 706, 109 P.3d 870 (2005); City of Seattle v. Quezada, 142 Wn. App. 43, 48, 174 P.3d 129 (2007), rev'd on other grounds sub

nom., 167 Wn.2d 451, 219 P.3d 686 (2009). Accordingly, the intent behind both applicable statutes in this case is the same, and no rational basis for difference in sentencing where there is no difference in legislative purpose. See, Berrier, 110 Wn. App. at 649. This court should find there is a violation of Equal Protection rights because the State is treating proof of the *same* prior offense *differently* depending on whether the defendant is charged with a felony DUI, or a felony vehicular homicide under the DUI prong.

III. CONCLUSION

For the foregoing reasons, Ms. Vanderburgh's conviction and sentence should be reversed, and a new trial ordered.

DATED this 29th day of May, 2020.



KEVIN J. CURTIS, WSBA #12085
WINSTON & CASHATT, LAWYERS
Attorneys for Appellant
601 West Riverside Avenue, Suite 1900
Spokane, WA 99201
Telephone: (509) 838-6131
Fax: (509) 838-1416

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on May 29, 2020, I served the foregoing document on counsel for the State of Washington by causing a true and correct copy of said document to be delivered at the address shown below in the manner indicated:

Larry Steinmetz
Spokane County Prosecuting
Attorney's Office
1100 West Mallon
Spokane, WA 99260
LSteinmetz@spokanecounty.org

VIA REGULAR MAIL
HAND DELIVERED
BY FACSIMILE
VIA EMAIL

Attorney for Respondent

DATED at Spokane, Washington, on May 29, 2020.



Janel Martindale

WINSTON & CASHATT, LAWYERS

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