

No. 358682

WASHINGTON STATE COURT OF APPEALS
DIVISION III

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

STATE OF WASHINGTON,

Respondent,

vs.

MEEGAN M. VANDERBURGH,

Appellant.

OPENING BRIEF OF APPELLANT

KEVIN J. CURTIS, WSBA #12085
NICHOLAS R. ULRICH, WSBA #50006
WINSTON & CASHATT
1900 Bank of America Financial Center
601 West Riverside Avenue
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorneys for Appellant

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A. ASSIGNMENTS OF ERROR

1. Ms. Vanderburgh assigns error to the denial of the admission of Ex. D113, Ms. Camyn's toxicology report and related testimony.
2. Ms. Vanderburgh assigns error to Court's Instruction No. 13.
3. Ms. Vanderburgh assigns error to the denial of Defendant's Proposed Jury Instructions No. D-17. CP at 393.
4. Ms. Vanderburgh assigns error to the denial of Defendant's Proposed Jury Instructions Nos. D-18, D-19, and D-20. CP at 395-7.
5. Ms. Vanderburgh assigns error to the court's limiting defense counsel's closing arguments to 30 minutes.
6. Ms. Vanderburgh assigns error to the denial of Ms. Vanderburgh's request for an exceptional sentence below the standard range.
7. Ms. Vanderburgh assigns error to the court's sentencing Ms. Vanderburgh to a two-year enhancement.

B. ISSUES

1. A defendant is constitutionally entitled to present relevant evidence unless the State shows the trial would be unfair absent the evidence. Here, Ms. Camyn was crossing the street against the light, at night, in dark closing, and was killed by a motor vehicle. Her toxicology report revealed a high concentration of methamphetamine along with the presence of other drugs. Did the trial court err in denying the admission of the toxicology evidence? (Assignments of Error 1)
2. Due process of law requires jury instructions that unambiguously assign the State the burden of disproving defenses that negate an element of the crime. A superseding cause negates the element of proximate cause for vehicular homicide. Did the trial court err in denying Ms. Vanderburgh's proposed jury instruction assigning the burden to the State to disprove a superseding cause? (Assignments of Error 2-3)
3. A defendant is entitled to jury instructions that accurately state the law and are necessary for her to argue her theory of the case. Here,

Ms. Vanderburgh requested standard civil jury instructions for traffic cases supporting her theory that she was not the cause of the collision and the pedestrian was either the sole cause or a superseding cause of the accident. Did the trial court err in denying the civil instructions? (Assignments of Error 4)

4. A trial court errs by inappropriately limiting the time for counsel to give closing arguments. Here, the trial court limited defense counsel's closing argument after a week-long vehicular homicide trial to thirty minutes by interrupting defense counsel's argument to tell him he could only speak for another five minutes. Did the trial court err? (Assignments of Error 5)

5. A defendant is entitled to a fair trial, and an appellate court will reverse where multiple errors cumulatively deprive the defendant of a fair trial. Here, the court committed four interrelated errors, involving evidence, jury instructions, and closing arguments. Do the errors cumulatively require reversal? (Assignments of Error 1-5).

6. The Sentencing Reform Act allows a judge to sentence a defendant below the standard range based on non-exclusive mitigating factors. Here, the State conceded the victim was a proximate cause of her own death. Did, the trial court err in concluding as a matter of law that an exceptional sentence was not available? (Assignment of Error 6)

7. Equal protection prevents the State from treating similarly situated people differently without a rational basis. Washington currently requires a "prior offense" in the DUI context to be submitted to the jury for determination beyond a reasonable doubt. Did the trial court violate Ms. Vanderburgh's right to equal protection when it found the existence of her prior without submitting it to the jury and only by a preponderance? (Assignment of Error 7).

C. STATEMENT OF THE CASE

In January of 2016, a tragic and unusual vehicular-pedestrian accident resulted in the death of Cheryl Camyn.

At around 8:00 p.m. on January 14, 2016, Cheryl Camyn, and John Branda were crossing the street at the east intersection of Sprague and Farr road in the Spokane Valley. RP at 218, 257, 323, 892. Sprague is a five-lane, one-way

road as it intersects Farr. RP at 229. They were crossing northbound *against* the traffic signal, at night, wearing dark clothing, and appeared to be unaware of and/or oblivious to the westbound traffic passing by them. RP at 228-229, 325.

Daniel Nesdahl was driving his pickup truck westbound on Sprague approaching Farr Road. RP at 240. He was driving approximately the speed limit of 35 miles per hour in the northernmost lane. RP at 225, 240. As he approached Farr Road, Mr. Nesdahl had a green light to continue west. RP at 250. Also in Mr. Nesdahl's truck was a passenger Tricia Raddas. RP at 239. Both Mr. Nesdahl and Ms. Raddas noticed the dark-clothed pedestrians in the street against the red light, and Ms. Raddas yelled for Mr. Nesdahl to stop the truck. RP at 228-229, 240, 324-5, 934. Ms. Raddas hollered stop. RP at 240. Faced with the pedestrians crossing the roadway against the signal, Mr. Nesdahl was forced to stop abruptly to avoid hitting them. RP at 235, 275, 784.¹

After nearly being hit by the truck, pedestrian Branda continued the remaining six feet to safety, getting out of the way of traffic. RP at 272, 326, 898-9, 998. Pedestrian Camyn, however, remained in the street. RP at 231, 326. In fact, she stopped directly in front of the truck on the left side of the front bumper

¹ At trial, Mr. Nesdahl could not remember if he had to slam on his brakes. RP at 235, 241, 243. He said, "I had to get stopped." RP at 242-3. Detective Welton at first concluded that the truck made "an abrupt stop" but then later changed his mind. RP at 784, 788-790. Whether this stop was abrupt was a dispute of fact. For instance, Ms. Raddas testified that they came "screeching to a halt." RP at 928. Another witness testified the truck came to an abrupt stop. RP at 266-7, 275. Another witness testified that the truck never came to a stop. RP at 327. The defense expert testified that the truck stopped and then started rolling forward at two miles per hour. RP at 988-9.

of Mr. Nesdahl's truck. RP at 232. Passenger Raddas indicated to the police that night that pedestrian Camyn was yelling profanities at the truck. RP at 944. She also remembered looking at Mr. Nesdahl, confused about why they were being screamed at. RP at 945.² Expert testimony revealed Ms. Camyn needed to walk only six feet to get to safety. RP at 998. The average pace of a person is 4.00 feet per second, so it would have taken a second and a half to cross to safety. See RP at 998.

Meanwhile, Meegan Vanderburgh had just turned onto Sprague and was behind Mr. Nesdahl's truck, heading westbound on Sprague in her 2002 Subaru Legacy. See RP at 264. When she saw the truck braking abruptly she braked, but was unable to completely stop in time and impacted the rear of Mr. Nesdahl's truck. RP at 986, 995. She hit the truck very soon after it came to a stop. RP at 258, 266-7. The defense accident reconstructionist estimated her speed at impact to be between 6 and 12 miles per hour, which is well below the 35 mile per hour speed limit on Sprague. RP at 988. The collision was at such a low speed that Ms. Vanderburgh's airbags did not deploy. RP at 849. The impact, however, was enough to push the truck forward, which in turn struck Ms. Camyn, who was still in front of the driver side of the truck. RP at 232-3, 326.

² While Ms. Raddas testified at trial that she did not recall the profanities, her prior statement to law enforcement was offered to contradict that testimony without objection or limitation. RP at 936-7, 944-5. "Because the prosecutor did not move to strike, the testimony remains part of the record for the jury to consider." State v. Fluker, No. 75060-7-I, 2018 WL 4211546 at *9 (Wash. Ct. App. Sept. 4, 2018)). Another witness also testified that he heard a scream. RP at 940.

Ms. Camyn later died. RP at 598. After her death, a toxicology report of Ms. Camyn's blood revealed methamphetamine, opioids, and benzodiazepines (tranquilizers) in her system at the time of the accident. Ex. D113. The toxicology report indicated a methamphetamine level of .17. Id. A typical prescribed dose of methamphetamine is .02 to .05, making this roughly four-times that dosage. RP at 651. In addition, Ms. Camyn ingested the drugs recently (within hours) and they were not administered by emergency or hospital providers for life saving purposes. RP at 617, 619. Ms. Camyn did not have any prescriptions for those controlled substances. See RP at 657, 762.

A later toxicology of Ms. Vanderburgh's blood revealed that she had a blood alcohol level of .13 and THC level of 1.8. RP at 686, 722. The blood-alcohol level placed her above the per se legal limit for driving under the influence (DUI), and the State charged Ms. Vanderburgh with vehicular homicide under RCW 46.61.520.³

Ms. Vanderburgh took her case to trial. Prior to trial commencing, the State moved in limine to exclude evidence of pedestrian Camyn's toxicology report and related testimony, and that she was on methamphetamine at the time of the she was crossing the street. CP at 136. The State argued that this evidence was irrelevant and more prejudicial than probative. See CP at 136-137. The State

³ At first, the State charged all three means of Vehicular Homicide, including reckless driving, and driving with a substantial disregard for the safety of others. CP at 4. Prior to trial, however, the State pared down the Information leaving just the DUI prong. CP at 122-4.

also moved in limine to exclude evidence or argument on a superseding cause. CP at 131-3. The State, however, later abandoned this latter argument, recognizing that it was appropriate for the trial court to instruct the jury with the superseding cause instruction. RP at 1051 (stating it was “well within the sound discretion of this court to decide to give that instruction”).

The trial court did not initially make a final ruling on the issue of the toxicology report and related testimony. See RP at 157-8. It preliminarily ruled that the toxicology report was of “limited relevance,” and “unduly prejudicial.” Id. The court ultimately reserved the issue, but instructed counsel not to mention it in opening. RP at 157. The court allowed the defense to question certain witnesses outside the presence of the jury on the issue of the toxicology evidence. See RP at 597-620 (questioning medical examiner); RP at 643-663 (questioning state toxicologist); RP at 759-777 (questioning Detective Welton).

Outside the presence of the jury, the medical examiner concluded that methamphetamine in her system indicated recent use. RP at 604. He also testified that methamphetamine can cause erratic behavior and impair judgment. Id. As to opiates, he described their general affect on the body: “slowed mentation, slow speech, sleepy behavior, not staying awake, not being alert.” RP at 605. He concluded that while it is hard to determine the exact effects on any one individual, a measurable level “would have some pharmacologic activity, meaning able to have some effect on an individual.” RP at 607. Finally, he

testified that the fact that the drugs came back in measurable amounts indicates that they were taken within hours on the same day. RP at 619.

After the court heard the testimony from the medical examiner, the court again heard argument on the toxicology evidence and again denied its admission. RP at 624.

The State toxicologist testified subsequently. She indicated that it is possible but rare to see methamphetamine used therapeutically. RP at 650. She indicated that therapeutic use levels for methamphetamine typically range from .02 to .05, but can be higher if a tolerance has built up. RP at 651. Finally, while allowing for the possibility of an odd tolerance, she testified that the .17 milligrams of methamphetamine in Ms. Camyn's blood is outside of the high end of the normal range. RP at 656. She concluded that in this situation it is more likely to be illicit use than medicinal use. RP at 656, 659. Finally, she testified that all three of these drugs together could produce "increased effects," including "sedation" and "extreme drowsiness." RP at 658 (including methamphetamine which has a "down side," with an effective "depressing effect," and stating that with all the drugs you could see a "really depressing effect"). In contrast, methamphetamine on its high side can cause erratic behavior, including overreaction and inappropriate aggression. See RP at 660.

After the State toxicologist's testimony, the court again concluded that the toxicology evidence was relevant but more prejudicial than probative, denying its admission. RP at 663-4.

Finally, the defense questioned Detective Welton outside the presence of the jury. RP at 759-764. Detective Welton was the detective on the case. See RP at 560-1. He considered Ms. Camyn's toxicology report in determining who he believed caused the collision. See RP at 759-61. He believed that she was a proximate cause of the collision partially because she was impaired by the methamphetamine. RP at 761, 764. His other reasons for concluding she was a proximate cause were her crossing against the red, and her conduct after the truck stopped. RP at 764.

After examination of Detective Welton outside the presence of the jury, the court concluded that defense counsel could ask him about Ms. Camyn's impairment and that he believed it contributed to her being the cause of the collision. RP at 772, 773, 774. The court, however, still excluded the toxicology report, which was the source of his belief about her impairment. See id.

The State resisted the court's conclusion. It argued that if the detective discussed impairment, but not the source of his belief, it would be "confusing to the jury." RP at 773. Still the court did not change its ruling. See RP at 774. Thus, defense counsel was able to elicit for the jury that Detective Welton

believed that Ms. Camyn was a proximate cause of the accident partially because of “her *potential* impairment.” RP at 880 (emphasis added).

The trial court even corrected Detective Welton’s testimony to ensure the word “potential” was used. When in front of the jury, defense counsel at first asked the detective about “her impairment” causing the accident, omitting the word “potential.” RP at 872-3. The detective agreed, but counsel for the State objected. RP at 872. The court sustained, stating *with the jury present*, “I think that mischaracterizes what I have in my notes with regard to the testimony,” referring to the detective’s prior testimony *out of the presence of the jury*. *Id.* Defense counsel then tried to clarify with the witness whether “that is correct or incorrect,” and was interrupted by the State and the court, instructing him to “clean it up.” *Id.* After an extensive sidebar, the defense rephrased saying “potential impairment” and the detective replied in the affirmative. RP at 880.

Thus, the only indication about impairment the jury heard was with the court’s correction to “potential impairment,” and the court allowed no explanation as to the source of that belief. *See* RP at 772-4, 872-80.

During the defense case-in-chief, Ms. Vanderburgh called her own expert, David Wells. RP at 986. He concluded that Ms. Vanderburgh’s Subaru was going 9.66 mph at time of impact and clearly slowing. RP at 986, 988-9. The truck was going two miles an hour and the driver had lifted his foot off the brake pedal. RP at 979. He testified that she had between two and four seconds to react

to the stopping truck. RP at 991. However, it takes 1.25 seconds for someone mentally to realize there is a hazard. RP at 996. It then takes a person .75 seconds physically to move their foot from the gas to the brake. RP at 996. While he ultimately concluded that it was possible to stop in that time, it was not unreasonable or uncharacteristic of a normal driver in those conditions not to be able to stop. RP at 995. He reasoned she reacted appropriately but “simply ran out of time” to stop. RP at 966. He ultimately concluded that she was not a proximate cause of the collision. RP at 997.

Ms. Vanderburgh submitted several proposed instructions. Among these was a modified superseding intervening cause instruction. This instruction (D-17) unambiguously placed with the State the burden of disproving a superseding cause:

The state has the burden of proving beyond a reasonable doubt both (1) that conduct by the defendant was a proximate cause and, (2) that the conduct of Cheryl Camyn or another did not constitute a superseding cause of the accident . . .

CP at 393. This instruction otherwise mirrored WPIC 90.08, the pattern superseding cause instruction. Compare WPIC 90.08, with CP at 393.

Ms. Vanderburgh also submitted three pattern civil instructions, dealing with traffic cases. These instructions (Defendant’s Proposed Jury Instructions, Nos. D-18, D-19, and D-20) are identical to WPI 70.01, 70.04, and 70.06, respectively. CP at 395-7. D-18 deals with the duty of “every person,” including

“a pedestrian” to exercise “ordinary care.” CP at 395. D-19 deals with the emergency exception to fault of a following driver: “It may be considered evidence of negligence if the following vehicle collides with the vehicle ahead, *in the absence of an emergency.*” CP at 396 (emphasis added). It also sets forth the standard for when an emergency excuses the presumption. See id. Finally, D-20 deals with the “the right” of “[e]very person using a public street” “to assume that other persons thereon use ordinary care and will obey the rules of the road.” CP at 397.

The trial court refused to instruct the jury on any of the above jury instructions, denying D-17, D-18, D-19, and D-20. See RP at 1034-51; CP at 507-523 (setting forth the court’s instructions). Ms. Vanderburgh took exception to the denial of the above instructions, and to the Court’s Instruction No. 13, which was based on the standard superseding cause instruction, but did not include the additional language on the State’s burden. RP at 1052-4; CP at 522.

Prior to closing arguments, the State asked the court its preference for the length of closing arguments. RP at 1058 (“[B]riefly before the jury comes in, does Your Honor have a preference how much time for closings [sic].”). The court responded: “I’m hoping that you can get done in half an hour”, which the State acknowledged. RP at 1058. Ms. Vanderburgh’s counsel was not a part of this exchange and made no acknowledgement on the record of any potential time restriction. See id.

During defense counsel's closing argument, however, the court interrupted defense counsel to enforce the 30-minute time restriction. RP at 1099 ("Five more minutes, Counsel."). The court did not similarly interrupt counsel for the State either in initial or rebuttal closing argument. See RP at 1070-84, 1104-08.

During its closing, the State used a PowerPoint presentation. CP at 467-92. The slides incorporated numerous of the jury instructions including the elements instruction. See id. On the final slide, the State presented the first paragraph of the superseding cause instruction, dealing with what is "not a defense":

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death, it is not a defense that the conduct of the deceased or another may also have been a proximate cause of the death.

CP at 492. The State did not include or reference the remaining portion of the superseding cause instruction during its initial argument. See CP at 492; RP at 1070-1084. Instead it stopped almost immediately after showing the "not a defense" paragraph. See id.

During its rebuttal argument, the State suggested to the jury that it *could decide* not to consider the superseding cause instruction:

Mr. Curtis also talked to you about Jury Instruction Number 13, the intervening superseding event. Now, *if you decide that that is an applicable jury instruction*, it talks about foreseeability.

RP at 1108.

Finally, the State conceded at numerous points during closing argument that Ms. Camyn was a proximate cause of her own death. RP at 1081, 1105.

Ultimately, the jury returned a verdict of guilty. RP at 1116.

At sentencing, the State sought to use Ms. Vanderburgh's 1996 conviction for first-degree negligent driving as a prior offense under RCW 46.61.5055 to support an enhancement under RCW 9.94A.533(7). CP at 561-66. Ms. Vanderburgh objected to the use of her prior offense as an enhancement because the existence of the prior was not submitted to the jury for a determination beyond a reasonable doubt. CP at 542-4 (arguing that it violated due process).

Ms. Vanderburgh also requested an exceptional sentence below the standard range. CP at 551-9. Ms. Vanderburgh argued that Ms. Camyn was an "initiator" of the accident. CP at 554-7 (quoting RCW 9.94A.535(1)(a)). Ms. Vanderburgh also argued that an exceptional sentence is available where the victim is also a proximate cause of her own harm, making the defendant necessarily less blameworthy. CP at 557-9.

The trial court rejected the request for an exceptional sentence. See Supp. RP at 50. The court did recognize that others could find themselves in Ms. Vanderburgh's position: "it came across my mind that there but for the grace of God go I and other that I know who have been behind the wheel." Supp. RP at 49. It also recognized that Ms. Vanderburgh suffered "tragically bad luck."

Supp. RP at 39. It concluded, however, that “bad luck is not a mitigating factor.” Id. Ultimately, the court felt that the law required it to impose a standard range sentence: “I believe that the law and the facts of this case *require* that the court impose a sentence within the standard range and *that the mitigating factors as laid out in the statute are not applicable in this case.*” Supp. RP at 39 (emphasis added).

The trial court ultimately sentenced Ms. Vanderburgh to the low-end of the standard range with a two-year enhancement for the prior negligent driving conviction. CP at 647-648. The total sentence was for 102 months confinement. CP at 649. At the defendant’s request and over the State’s objection, the trial court stayed the sentence pending appeal. CP at 635-6. It recognized that despite its best efforts, “there are potential appellate issues.” Supp. RP at 50.

Ms. Vanderburgh timely appealed. CP at 642.

D. ARGUMENT

I. The trial court committed reversible error by failing to admit the toxicology report and related evidence of the methamphetamine and other drugs in Ms. Camyn’s system.

The trial court erred in denying the admission of the toxicology evidence and related testimony. The defendant has a constitutional right to present relevant evidence. Here, the toxicology report of the pedestrian was relevant because it revealed that she had a large amount of methamphetamine in her system at the time of the accident as well as other drugs. The methamphetamine provided an

explanation for the pedestrian's odd behavior in crossing against the signal *and* remaining in the roadway after almost being hit by the truck to swear at the driver. The trial court erred by finding that the report was relevant but excluding it.

Generally, an appellate court reviews the admission of this evidence for abuse of discretion. State v. Smith, 106 Wn.2d 772, 779, 725 P.2d 951 (1986). A trial court abuses its discretion if its ruling is manifestly unreasonable, or it exercises discretion on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

However, some evidentiary errors can amount to constitutional violations of the defendant's right to present a defense. See State v. Duarte Vela, 200 Wn. App. 306, 317, 402 P.3d 281 (2017), review denied 190 Wn.2d 1005 (2018). In that situation, the appellate court reviews the constitutional error de novo. Id. Here, the trial court committed both evidentiary and constitutional error by excluding the toxicology report and related evidence.

a. The pedestrian's toxicology report and related testimony is relevant because it explains the pedestrian's conduct.

The fact that the pedestrian was impaired due to the methamphetamine and other drugs serves to explain the pedestrian's behavior both in failing to observe and apprehend the danger from oncoming traffic initially by being in the intersection against a red light, and secondly, in the unfortunate decision not to complete crossing the road after she was almost hit by the truck.

Relevant evidence is evidence that has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The relevancy bar is low, even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The test is whether the jury can infer from all the evidence the connection to an element of the charge or defense. See State v. Luvene, 127 Wn.2d 690, 708, 903 P.2d 960 (1995).

Here, the methamphetamine made it more likely that the pedestrian was the only cause of the accident, making it relevant. Detective Welton testified that he believed that the pedestrian was *a* cause of the accident and one of his reasons for that belief was that she was impaired. RP at 872. He specifically relied on the toxicology report in coming to that conclusion. See RP at 772-774. The jury, however, was prohibited from hearing *what* she was impaired by, and the *level* of methamphetamine and other drugs in her system, it only heard that she was “potentially impaired.” RP at 880. Further, testimony would have showed that methamphetamine is rarely used as a prescription drug, and that the level here reflects several times the standard prescribed dosage. RP at 651. While the toxicologist could not conclusively rule out the possibility of a medicinal use for this methamphetamine level, her testimony would have made it exceedingly unlikely. RP at 656, 659. Thus, had the jury been able to consider this evidence, a jury could have inferred that the pedestrian took the methamphetamine

recreationally, and that it likely affected her decision-making and reactions before and during the accident.⁴

The methamphetamine also made it more likely that the pedestrian was a superseding cause of her own death. That evidence would have showed that the pedestrian's behavior was consistent with her methamphetamine and other drug use, where she exhibited signs of bizarre behavior by remaining in the street, feet from safety, and swearing at the truck that stopped for her when the truck had the green light. See RP at 604, 658, 660 (testifying that methamphetamine can cause erratic behavior, overreaction, and aggression). After hearing this evidence, a rational jury could have reasonably believed the pedestrian would have lived but for her methamphetamine use, which likely caused the irrational decisions she made that night. Logically, if the jury reasonably believed the pedestrian would have lived but-for her methamphetamine use, then it would have had a reasonable doubt that Ms. Vanderburgh proximately caused Ms. Camyn's death.

b. The toxicology report cannot be excluded under ER 403.

Evidence Rule 403 allows the trial court to exclude otherwise admissible evidence where the probative value of the evidence is substantially outweighed by its unfair prejudice. The default and presumption under ER 403 is that *relevant evidence is admitted*. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15

⁴ No witness had any knowledge of prescriptions for these drugs. See RP at 657, 762.

(1999). Only if the probative value of the evidence is so low and the danger of unfair prejudice so high, that it “substantially outweighs” the probative value may the trial court preclude the evidence. ER 403. The party seeking the evidence exclusion has the burden of proving the prejudice. Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 618, 20 P.3d 496 (2001).

There is an even stricter standard when a criminal defendant is seeking to present evidence as part of his defense. “A defendant has the right to present relevant evidence, and if relevant, the burden is on the State to show the evidence is *so prejudicial* as to disrupt the fairness of the fact-finding process at trial.” State v. Cayetano-Jaimes, 190 Wn. App. 286, 297-8, 359 P.3d 286 (2015) (internal quotation marks and brackets omitted) (emphasis added). Further, “the ER 403 balancing of probative value versus unfair prejudice is *weighed differently* when the defense seeks to admit evidence that is central to its defense.” Duarte Vela, 200 Wn. App. at 320 (emphasis added). Excluding evidence under ER 403 that is highly probative of the defense is constitutional error. Id.

Here, the State did not meet its heavy burden of showing that the evidence would disrupt the fairness of the fact-finding process. The toxicology report was the key piece of evidence. It was the missing link that would have explained the pedestrian’s conduct, both in crossing the street against the light and in remaining steps away from safety after almost being hit by the truck to swear at the driver. It also allows the jury to understand the detective’s testimony that he thought the

pedestrian was a proximate cause of the accident partially because of her “potential” impairment. Without the toxicology report, the jury was left to wonder: what potential impairment? There was no evidence explaining the source of the detective’s belief. See RP at 872-80. The jury heard a mere suggestion that she was impaired without understanding the basis or the level of that impairment. See RP at 872.⁵ This evidence was not minimally relevant but highly relevant, and the State did not meet its burden of proving that the evidence would have made the trial fundamentally unfair. Thus, the refusal to allow the toxicology evidence amounted to constitutional error.

While drug habits of a victim can be prejudicial, the prejudice has to be appropriately balanced. Prior threats by the victim to kill the defendant and his family were found to be admissible in Duarte Vela, notwithstanding their potential prejudice. 200 Wn. App. at 320. There, the trial court denied the admission of the victim’s prior threats to kill the defendant’s family under ER 403. See id. This Court reversed, holding that the exclusion was improper under ER 403 and that the defendant was deprived of his constitutional right to present his self-defense claim. Id. Notably, testimony regarding an alleged victim’s past

⁵ The trial court exacerbated this error by commenting in front of the jury that the detective’s live testimony was incorrect regarding Ms. Camyn’s “impairment.” See RP at 872 (“I think that mischaracterizes what I have in my notes with regard to the testimony.”) It is of course inappropriate for the trial court to comment on the evidence. State v. Levy, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006). Here, the trial court inappropriately commented on the evidence because he was controlling the substance of testimony, forcing the jury to hear the word potential. However, this error is subsumed in the larger error of not admitting the toxicology and related testimony in the first place.

threats to kill the defendant and his family is far more prejudicial than the mere fact that the victim was a methamphetamine user. Notwithstanding any potential prejudice, the rule from Duarte Vela is clear: where the evidence is probative and central to the defense, it is constitutional error for the trial court to exclude it on ER 403 grounds. See id.

c. The trial court's failure to admit the toxicology report and related testimony was not harmless.

The additional evidence showing that the pedestrian was on methamphetamine and other drugs at the time of the accident could have affected the outcome of the case. A non-constitutional error is not harmless and requires reversal, if within reasonable probabilities, the error could have affected the outcome of the trial. See State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Constitutional errors require reversal unless the State establishes that the error did not affect the outcome of the case beyond a reasonable doubt. State v. Gulyo, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Evidentiary errors are usually considered non-constitutional, but not always. See, e.g., Duarte Vela, 200 Wn. App. at 321 (holding error in excluding evidence under ER 403 amounted to constitutional error because it affected defendant's right to present a defense). The test is how central the evidence is to the defense. See id.

As indicated, the trial court's denial of the methamphetamine evidence amounted to a constitutional error. It is fundamental to the defense that she was

on methamphetamine and other drugs, which explained her otherwise odd actions. Because the toxicology evidence would have allowed the jury to understand the victim's impairment, and see that she caused her own death, the trial court's error in excluding the proof that the pedestrian was on methamphetamine and other drugs was not harmless beyond a reasonable doubt.

Even under the more relaxed, non-constitutional standard, this error is not harmless. This evidence reasonably could have effected the outcome of the case. As indicated, it was the missing link that both explained *and made more likely* the pedestrian's odd behavior, which went directly to causation.

Indeed, there is a reason the Legislature has mandated the testing of all drivers *and pedestrians* who die in a motor vehicle accident. RCW 46.52.065. That statute specifically contemplates the results of these tests being used in a subsequent criminal or civil trial:

PROVIDED FURTHER, *that the results of these analyses may be admitted in evidence in any civil or criminal action where relevant and shall be made available to the parties to any such litigation on application to the court.*

Id. (emphasis added). Thus, the Legislature has recognized that the information is extremely useful to investigators trying to determine who caused the accident, and extremely useful to juries. Here, the detective specifically used the toxicology report of the pedestrian to conclude that her impairment was one factor in why the pedestrian was a cause of the accident. The trial court's failure to let the jury

consider the source of that belief affected the outcome of the case: the jury could have found reasonable doubt as to whether the pedestrian was the sole cause of the accident.

II. The trial court committed reversible error in issuing Instruction No. 13 and denying Defendant's Proposed Jury Instruction D-17 on superseding cause because the court's instructions fail to inform the jury of the State's burden of proof.

The Washington and United States constitutions both require the State to bear the burden of proving every element of a crime. It is reversible error if the jury instructions fail to convey unambiguously the State's burden of proof. Because a superseding cause necessarily negates proximate cause, which is an element of the crime, the State must bear the burden of disproving a superseding cause. Here, the instructions did not unambiguously place that burden with the State. The trial court erred in denying defense's proposed jury instruction D-17, which would have accurately stated the burden.

a. Due process of law requires the State to bear the burden of disproving a superseding cause.

Due process of law under the federal and state constitutions requires that the State prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Wash. Const. art. I, §3. A corollary to this fundamental rule is that the State cannot require the defendant to prove a defense that negates an element of the crime. State v. W.R., Jr., 181 Wn.2d 757, 765, 336

P.3d 1134 (2014) (“When a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant.”). The test is whether “the completed crime and the defense can coexist.” Id. In a vehicular homicide prosecution, proving a superseding intervening cause necessarily negates the causation element of the crime.

First, the elements of vehicular homicide include the element of causation. The statute makes it clear that defendant’s driving must have caused injury, which in turn causes death:

When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:

- (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
- (b) In a reckless manner; or
- (c) With disregard for the safety of others.

RCW 46.61.520 (emphasis added). This burden is also reflected in the jury instructions. WPIC 90.02, 11A Wash. Prac., Pattern Jury Instr. Crim. (4th Ed. 2016) (emphasis added); CP at 523 (referring to proximate cause).

Further, a superseding cause necessarily negates the causal connection of the crime. A superseding cause is “an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.” State v.

Meekins, 125 Wn. App. 390, 398, 105 P.3d 420 (2005) (citing Restatement (Second) of Torts, § 440). “[A] defendant’s conduct is *not a proximate cause* if some other cause is a . . . superseding cause.” Id. (emphasis added). Thus, the actions of the defendant cannot be a proximate cause while the act of another is a superseding cause.

Division II of this court has expressly held that a superseding cause negates the causation element of the crime requiring the State to bear the burden to disprove it. See State v. Imokawa, __ Wn. App. ___, 422 P.3d 502 (2018)⁶. Imokawa involved a vehicular homicide conviction where the defendant was driving aggressively in following and changing lanes. See id. at 505. He testified that the car he was passing on the right sped up and so when he changed lanes back he hit the vehicle. Id. The detective investigating the accident opined that the car did not speed up. Id. The trial court denied Imokawa’s request to modify the standard intervening superseding cause instruction to show that the State had the burden of disproving an intervening superseding cause. Id. at 506. Division II reversed Imokawa’s conviction, holding that “when a defendant adequately raises the existence of a superseding cause, as Imokawa did here, *the State bears the burden to prove the absence of a superseding cause beyond a reasonable doubt.*” Id. at 509 (emphasis added).

⁶ Imokawa is a recent opinion that was not available to the trial court.

Therefore, because proving a superseding cause negates the causation element, the State must bear the burden of disproving the existence of a superseding cause.

b. None of the instructions given by the court adequately conveyed the State's burden of disproving a superseding cause.

The defendant is entitled to instructions that unambiguously instructs the jury on the State's burden of proof. State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984)⁷. The court looks at the jury instructions as a whole, to determine if they unambiguously make it clear that the State bears the burden. Id. A specific instruction is preferable. Id. Here, the court instructed the jury with the standard pattern instructions. As Division II concluded in Imokawa, these instructions do not adequately place the burden of disproving an intervening and superseding cause on the State.

The two relevant instructions given by the trial court are Instruction No. 9 based off WPIC 90.07 (the proximate cause instruction), and Instruction No. 13 based on WPIC 90.08 (the superseding intervening cause instruction). CP at 518, 522. Neither instruction clarifies that the State bears the burden of disproving a superseding cause. The only instructions dealing with the State's burden are Instruction 3 (the reasonable doubt instruction) and Instruction 14 (the to-convict

⁷ Abrogated on other grounds by State v. Camara, 113 Wn.2d 631, 781 p.2d 483 (1989). Camara was in turn overruled by State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014).

instruction). CP at 512, 514. However, Instructions 3 and 14 are not sufficient in light of the confusion from Instruction 13.

Instruction No. 9, the proximate cause instruction, does not indicate that the State bears the burden of disproving a superseding cause. Rather, it merely defines proximate cause:

Instruction No. 9

To constitute vehicular homicide, there must be a causal connection between the death of a human being and the driving of a defendant so that the act done was a proximate cause of the resulting death.

The term “proximate cause” means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.

There may be more than one proximate cause of a death.

CP at 518. The instruction does not even reference a superseding cause, but instead refers to an “independent cause.” It also makes no reference of the State’s burden.

Similarly, Instruction No. 13 does not clarify the State’s burden. In fact, this instruction is confusing. Instead of establishing what is a superseding cause and the State’s burden, the instruction begins by referencing what is not a defense:

Instruction No. 13

If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death, *it is not a defense that the conduct of the deceased or another may also have been a proximate cause of the death.*

However, if a proximate cause of the death was a new independent intervening act of the deceased or another which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's act is superseded by the intervening cause and is not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act or omission has been committed or begun.

However, if in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original act and her act is a proximate cause. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonably anticipated.

CP at 522 (emphasis added). The instruction thus sandwiches a discussion of a superseding cause between a paragraph on what "is not a defense," and a paragraph on the foreseeability of the intervening cause. Instead of clarifying the law, the jury is left to conclude that it need not even reach the question of a superseding intervening cause *if it has already concluded that driver proximately caused the death*. Nowhere in the instruction is the State's burden conveyed. The jury instructions simply do not unambiguously convey the State's burden of proof.

Division II reached this exact conclusion in Imokawa. There the trial court instructed the jury on the same WPICs used in this case. Division II noted that the jury instruction on superseding cause was *ambiguous* because it suggested that the jury was "not to consider the existence of a superseding cause until after it had determined that the State provided proximate cause beyond a reasonable

doubt.” Imokawa, 422 P.3d at 509. The court also found fault with the structure of the superseding cause instruction because it suggested improperly that the burden was with *the defendant*:

And the emphasis in the jury instructions on what is not a defense or what is not a superseding cause *made it appear that a superseding cause has to be affirmatively proven by Imokawa* rather than the actual burden of the State to prove the absence of a superseding cause.

Id. (emphasis added). Ultimately, the court concluded that the instructions taken as a whole were ambiguous and violated due process. Id.

Here, Ms. Vanderburgh submitted proposed instruction D-17, which would have unambiguously clarified the burden of proof. That instruction added the following line to the standard WPIC:

The State has the burden of proving beyond a reasonable doubt both (1) that the conduct of the defendant was a proximate cause, and (2) that the conduct of [the pedestrian] or another did not constitute a superseding cause of the accident which resulted in the death that occurred in this case.

CP at 393 (Proposed Instruction D-17).

This Division should reach the same result as Division II and conclude that the instructions here violated due process by not unambiguously informing the jury of the State’s burden to disprove a superseding cause. The defendant’s jury instruction (D-17), properly and unambiguously informed the jury of its burden of proof. Thus, the trial court erred in denying that instruction.

c. The Court's error in failing to properly instruct on the burden of proof was not harmless where the State suggested directly and indirectly that the jury did not need to consider the superseding cause instruction.

Admitting evidence in violation of the constitution requires a stricter harmless error analysis. Constitutional error is presumed to be prejudicial and is harmless only if the State demonstrates beyond all reasonable doubt that the error had no effect on the jury's verdict. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Here, the State cannot meet that burden because the State suggested both explicitly and implicitly that the jury need not consider whether there was a superseding cause.

First the State's slideshow for closing argument suggested that the jury did not need to consider the entirety of the superseding cause instruction. The slideshow included text of various jury instructions. See CP at 467-92. For instance, the State's slideshow walked through all of the elements of the charge. See id. However, the slideshow stopped with the first paragraph of the superseding cause instruction:

More than one proximate cause

- If you are satisfied beyond a reasonable doubt that the driving of the defendant was a proximate cause of the death, it is not a defense that the conduct of the deceased or another may also have been a proximate cause of the death.

CP at 492. The implication was that the jury did not even need to read the rest of the instruction, they could stop with the first paragraph. This was the very concern of Division II in Imokawa.

In rebuttal closing, the State more directly stated that the jury did not need to consider this instruction. There the State addressed the instruction more directly, but simultaneously indicated the jury *could chose* to ignore it:

[Defense counsel] also talked to you about Jury Instruction Number 13, the intervening superseding event. Now, *if you decide that that is an applicable jury instruction*, it talks about reasonable foreseeability . . .

RP at 1108 (emphasis added). The implication from this argument and the State's slideshow is clear: the jury could simply "decide" that it did not need to consider this instruction at all. Id. Thus, the State both implicitly and expressly argued that the jury did not even need to *consider* a superseding cause. This position is directly adverse to the State's burden to disprove a superseding cause.

In addition, the facts here are not so one-sided that no rationale jury could find a superseding cause. It was undisputed the pedestrian was crossing against the light, at night, and wearing dark clothing. RP at 228-9, 240, 934. It is also undisputed that the pedestrian remained in the road, steps away from safety, after the truck was forced to stop for her. See RP at 988. Evidence suggested she did this to swear at the driver, as if it were his fault. RP at 944. The other pedestrian was easily able to get off the roadway. RP at 272, 326, 898-9. Further, the

defense expert testified that Ms. Vanderburgh properly reacted by braking but simply could not completely stop in time. RP at 965-6. He concluded that a reasonable person in that situation because of the emergency might not have been able to stop, and that she was not a proximate cause of the collision.⁸ Id. Thus, the pedestrians conduct by being in the road and causing the truck's emergency stop, and also remaining in the roadway in clear danger, could have been superseding causes of the vehicle-pedestrian collision.

The State even conceded below that it was not an abuse of discretion for the court to instruct the jury on a superseding cause on these facts, recognizing that the possibility of a superseding cause being present. RP at 1051 (stating it was "well within the sound discretion of this court to decide to give that instruction"). Thus, the State acknowledged that there was evidence by which a jury could consider a superseding cause. The error in not instructing on the burden of proof was not harmless.

Had the court properly instructed the jury on the burden of proof, the State would not have been able to suggest the jury simply ignore the instruction. Further, a properly-instructed, reasonable jury could have found a superseding cause on the facts here. Therefore, the State cannot meet its burden to establish

⁸ While the defense expert's testimony was challenged by the State, that simply makes it a jury determination. The court needs to remand so a *properly instructed jury* can consider the dispute. Imokawa, 422 P.3d at 510 ("Because Imokawa presented evidence that could establish a superseding cause and ultimately the issue was a question of credibility for the jury, we hold that the erroneous jury instructions were not harmless.").

that the court's failure to instruct on burden of proof for a superseding cause was harmless beyond a reasonable doubt.

III. The trial court committed reversible error in denying Defendant's Proposed Jury Instructions D-18, D-19 and D-20 based on the civil pattern instructions.

The trial court erred in failing to instruct the jury on the proffered civil instructions. This court has indicated that civil instructions can be relevant to criminal traffic cases. Ms. Vanderburgh sought admission of three civil pattern jury instructions that explained (1) the emergency exception for rear-end collisions, (2) a pedestrian's duty when on the roadway, and (3) the general assumption that a driver is entitled to proceed believing that other people on the road will follow the law. There can be no dispute that these standard instructions accurately state the law in Washington. Further, the instructions were necessary for Ms. Vanderburgh to argue her theory of the case because without them, there was no instruction informing the jury of these doctrines that speak to the pedestrian being the sole cause of the collision.

A defendant is entitled to jury instructions that accurately state the law and allow the defendant to argue her theory of the case. State v. Portrey, 102 Wn. App. 898, 902, 10 P.3d 481 (2000). It is reversible error for a court to refuse to give a proposed instruction that properly states the law and that evidence supports. State v. Ager, 128 Wn.2d 85, 94, 904 P.2d 715 (1995). The standard of review for failure to give a requested jury instruction depends on the nature of the

trial court's ruling: Where the trial court rules based on a factual dispute, the appellate court reviews for abuse of discretion, but where the trial court refuses to give an instruction based on a ruling of law, the court reviews the decision de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Here, the court should review the denial of civil instructions de novo. The trial court did not directly articulate its reasoning for denying the proposed instructions. See RP at 1034-1054. However, the arguments by the State against these instructions were all based on legal grounds. See CP at 413-15 (challenging the instructions as misstatements of the law and confusing). Therefore, this was a legal issue as presented to and decided by the trial court and should be reviewed the same; the review is de novo.

a. The civil pattern instructions accurately state the law.

There can be no credible argument that the submitted civil instructions do not accurately state the law in driving cases. As the State acknowledged below, the three proposed instructions are taken directly from the civil pattern instructions 70.01, 70.04, and 70.06. CP at 413. This Court has specifically held that WPI 70.01, 70.04, and 70.06 accurately state the law. Hammel v. Rife, 37 Wn. App. 577, 585, 682 P.2d 949 (1984); Tennant v. Roys, 44 Wn. App. 305, 310, 722 P.2d 848 (1986). In addition, while not all pattern instructions have been expressly adopted by our Supreme Court, the court has acknowledged that “pattern instructions generally have the advantage of thoughtful adoption” and

noting that they are approved by “a committee that includes judges, law professors, and practicing attorneys.” State v. Bennett, 161 Wn.2d 303, 307-8, 165 P.3d 1241 (2007). The instructions accurately state the law.

b. The civil pattern instructions are not confusing.

These instructions are also not confusing in light of the vehicular homicide case at issue. Vehicular homicide is a traffic case, and civil instructions on driving duties are relevant to traffic cases in civil *and criminal* settings. See State v. Brown, 258 Neb. 330, 340-2, 603 N.W.2d 419 (1999) (holding it was error for trial court to refuse to give instruction on rules of the road). The State’s primary argument below was that these instructions were confusing in light of the law that contributory negligence is not a defense to vehicular homicide. A close look at State v. Meekins belies this concern. 125 Wn. App. 390, 105 P.3d 420 (2005).

In Meekins, the State charged the defendant with vehicular homicide after he hit a motorcycle while turning left at an intersection with a blood alcohol level of .11. Id. at 392. The accident occurred at dusk and it was unclear if the motorcycle had its headlight on. Id. Neither a witness nor the defendant saw the light on the motorcycle on. Id. at 394-5. The trial court instructed the jury on contributory negligence, defined negligence, and instructed that contributory negligence is not a defense to vehicular homicide. Id. at 395. The court did not inform the jury by instruction that evidence of contributory negligence *can go*

toward whether the alleged victim was the sole cause of the accident. See id. at 395-6. Mr. Meekins appealed his conviction to Division II.

Division II reversed and remanded for a new trial. The court concluded that the instructions were faulty. By focusing on contributory negligence not being a defense, the instructions failed to convey that evidence of contributory negligence could also be relevant on the question of causation. Id. at 399. The court concluded that the trial court “misstated the rule that an alleged victim’s conduct can bear on proximate cause whether or not it is contributory negligence.” Id. at 400.

Admittedly, the issue in Meekins is somewhat distinct from the issue here. There the Court of Appeals reversed because the instructions *given* misled the jury, whereas here the court should reverse because of the *failure to give* instructions that would have clarified that a pedestrian can be at fault for an accident. The takeaway from Meekins, however, is that discussing contributory negligence *is not confusing to the jury* so long it is clear that *it can be relevant to whether the alleged victim was in fact the proximate cause of the collision*. See id. at 399-400 (citing State v. Judge, 100 Wn.2d 706, 718, 675 P.2d 219 (1984)).

Ultimately, these instructions would not have confused the jury. Another instruction specifically provided it was not a defense to vehicular homicide for another to have also proximately caused the collision. CP at 522. Thus, the jury could only use these instructions in determining if the conduct of the pedestrian

was the *sole* proximate cause. If there was still a concern about confusion, the remedy was to clarify again that evidence can only speak to causation.

c. The civil pattern instructions were necessary for Ms. Vanderburgh to argue her theory of the case that the pedestrian was either the sole cause of her own death.

Without the pattern instruction, it was impossible for the jury to understand the emergency exception for fault of a following driver, the fact that a pedestrian has a duty even in a crosswalk, and that a driver can rely on others following the law. All of these points allow the defense to argue that the pedestrian was the sole proximate cause.

The most significant of these instructions is Instruction D-19. This instruction outlines the emergency exception to the assumption that a following driver is at fault and the cause of a rear-end collision. The second paragraph states the emergency exception:

When one vehicle is following another vehicle, the primary duty of avoiding a collision rests upon the driver of the following vehicle. It may be considered evidence of negligence if the following vehicle collides with the vehicle ahead, *in the absence of an emergency*. The driver of the following vehicle is not necessarily excluded even in the event of an emergency. It is the duty of the driver of the following vehicle to keep such distance and maintain such observation of the vehicle ahead that the following vehicle is able to safely stop *if confronted by an emergency that is reasonably foreseeable from traffic conditions*.

CP at 396 (emphasis added). Here, the jury could have inappropriately assumed (because it was not instructed to the contrary) that Ms. Vanderburgh was the

cause of the collision merely because she was the following driver. The defense needed this instruction to show the jury that Washington recognizes that in an “emergency” there is an exception to that common presumption. Because the pedestrian was crossing the street against the signal at night, wearing dark clothing, and caused an abrupt stop from the truck in front of Ms. Vanderburgh, the defense could have reasonably argued that the pedestrian created an emergency. See, e.g., James v. Niebuhr, 63 Wn.2d 800, 389 P.2d 287 (1964) (holding that exception applied where lead driver unexpectedly and improperly stopped to yield right of way to driver wanting to enter roadway).

This instruction is not confusing merely because it uses the word “negligence” rather than fault or causation. The State will likely argue that negligence has no place in vehicular homicide cases, relying almost exclusively on State v. Burch, 17 Wn. App. 382, 389 P.3d 685 (2016). In Burch, Division I reasoned that vehicular homicide is a strict liability crime. However, that holding conflicts with this Division’s opinion in State v. McAllister, 60 Wn. App. 654, 658-9, 806 P.2d 772 (1991), abrogated on other grounds by State v. Roggenkamp, 154 Wn.2d 614, 106 P.3d 196 (2005). McAllister held that the State was *required to prove ordinary negligence* in order to establish vehicular homicide under the DUI prong. Id. at 658-660 (“[I]n addition to establishing intoxication, the State had to prove Mr. McAllister was driving in a negligent manner.”); see also Burch, 197 Wn. App. at 391 (discussing McAllister). No court has ever overruled

McAllister, nor has any court other than Burch held that vehicular homicide is a strict liability crime. See Burch, 197 Wn. App. at 392 (noting that the Supreme Court did not hold that vehicular homicide is a strict liability crime). While Ms. Vanderburgh does not directly raise the strict liability issue, to the extent the State objects to the jury instruction because it uses the word “negligence” rather than “causation” or “fault,” the court should be aware that McAllister remains good law in this Division and is in direct conflict with Burch.⁹

The defense also needed proposed instruction D-18 to show that a pedestrian can be at fault and thus the cause of a collision. That instruction provides that a pedestrian must use ordinary care:

It is the duty of every person using a public street or highway *whether a pedestrian* or a driver of a vehicle to exercise *ordinary care* to avoid placing himself or herself or others in a danger *and to exercise ordinary care to avoid a collision*.

CP at 395. This instruction was necessary to the defense for two reasons. First, it would have allowed the defense to argue that being in the intersection at night

⁹ In addition, even Burch recognized that vehicular homicide should not include innocent conduct in order to be a strict liability crime. See 197 Wn. App at 394-5. It held that the crime avoided prosecuting innocent conduct by way of its causation prong, noting where the driver is not the cause of the accident, he or she would not be criminally liable. See id. Thus, for Burch's reasoning to hold water, a following driver facing an emergency must also not be *the cause* of the accident, because the emergency exception makes the following driver's conduct “innocent.” Logic supports this conclusion: where a following driver strikes another driver without breach of a duty because of an emergency, it is *the emergency that causes the accident*, not the following driver. If this court reasons that the emergency exception does not speak to causation, then the court should also disagree with the reasoning of Burch because then vehicular homicide would be *punishing innocent conduct* of a following driver that reacted perfectly to an unforeseeable emergency but could not completely stop in time. Either way the instruction is appropriate.

against the light was not taking “ordinary care to avoid placing . . . herself . . . in danger,” which made the pedestrian ultimately the *sole* cause of the accident because everything that followed resulted directly from her being in the intersection against the light. It would also have allowed the defense to argue that Ms. Camyn, once aware that she was in danger (because of the abrupt stop of the truck), should have “exercised ordinary care to avoid [the] collision” by getting out of the street (as the other pedestrian did). In either case, the defense could have argued that her failure to do so made her the sole cause of her own death.

Finally, proposed instruction D-20 was necessary. That instruction informs the jury that a driver has a right to assume that others will obey the law:

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

CP at 397. As relevant to this case, Ms. Vanderburgh had the right to assume that no pedestrian was in the middle of an intersection when the light was green for vehicle traffic. She had “a right to proceed on [that] assumption” until she knew or should have known the contrary. CP at 397. The concept of when Ms. Vanderburgh should have known was central to the defense expert’s testimony that she was not the cause of the collision because of when she should have realized the situation in front of her. RP at 995-6. This instruction was thus essential to the jury understanding the significance of that testimony.

All of these instructions were necessary for Ms. Vanderburgh to argue her theory of the case that the pedestrian was the sole cause of the accident, and thus Ms. Vanderburgh was not a proximate cause.

d. The failure to give the instructions was not harmless because they would have allowed the jury to understand the fault of the pedestrian as the cause of the accident.

The standard for harmless error is set forth above. Here, the trial court's error in giving these instructions was not harmless because with the instructions there is a reasonable possibility that the outcome would have been different. Had the jury been instructed on the duty of a pedestrian, the emergency exception for following drivers, and a driver's ability to proceed with the assumption that others follow the law, the jury would have better understood that the impetus and sole cause of this accident stemmed from the pedestrians actions, not Ms. Vanderburgh's.

IV. The trial court erred by limiting closing argument after a week-long trial to thirty minutes.

Washington's Supreme Court long ago held that it is a violation of a defendant's constitutional right to present a defense for the trial court to limit closing argument after a lengthy trial. State v. Mayo, 42 Wash. 540, 85 P. 251 (1906). There the trial court limited closing arguments to one and a half hours per side. Id. at 548. The defendant challenged that limitation on appeal as an abuse of discretion and a violation of his constitutional rights. The court agreed:

To appear and defend in person and by counsel is a right guaranteed to one accused of crime by the Constitution of this state, as well as by the federal Constitution; *and it is not to be denied that a part of that right is the right to address the jury on the questions of fact the issues present for determination.* This right, too, has always been regarded as one of the greatest value, not only to the accused, but to the due administration of justice, and any limitation of it which has seemed to deprive the accused of a full and fair hearing has generally been held error entitling the defendant to a new trial.

Id. at 548-9 (emphasis added). The trial in Mayo took four days, involved over 20 witnesses, and the transcript was nearly 500 type written pages. Id. at 549. On those facts, our Supreme Court concluded that the “limitation of 1 ½ hours was too restrictive to allow a full and fair discussion of the facts of the case; *and hence was a violation of the defendant’s constitutional rights.*” Id. at 549 (emphasis added).

Here, Ms. Vanderburgh’s constitutional right was likewise violated. The trial court imposed an even greater time restriction, allowing only 30 minutes. RP at 1058. Ultimately, the court interrupted defense counsel to limit his closing to only five more minutes. RP at 1099.¹⁰ In this case, over 15 witnesses were examined, taking well over 500 type written transcript pages, and the trial spanned six days from opening statements to closing arguments. See RP at 2-5. These indicators are equally or more egregious than in Mayo, and the court

¹⁰ At first, the trial court’s limitation may have been read as a desire and not a restriction: “I’m *hoping* to get this done in half an hour.” RP at 1058 (emphasis added). However, the interrupting of defense counsel mid-argument made it clear that the time limit was not merely a desire, and he was in fact limiting argument to just 30 minutes. RP at 1099 (“Five more minutes, Counsel.”).

restricted closing argument to an hour less than what our Supreme Court reversed in Mayo. Thus, Mayo controls and this Court must reverse.

V. In the alternative, if the Court does not believe the above errors individually require reversal, then cumulatively they do.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when several trial errors cumulatively produce a fundamentally unfair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Cumulative error may require reversal even if the court would consider each error, standing alone, as harmless. State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006).

Here, the trial court committed four, interrelated errors that all prejudiced the defendant's right to a fair trial. First, the court erred in not admitting the evidence of the methamphetamine and other drugs in the pedestrian's system. Second, the trial court erred in not granting defense counsel's instruction clarifying the State's burden of proof on superseding cause. Third, the trial court erred in not instructing the jury on the standard civil instructions that supported the pedestrian being the sole cause of the accident. Fourth and finally, the trial court compounded these errors by not giving counsel sufficient time to conduct closing arguments.

Even if these errors individually do not warrant a new trial, collectively they effectively undercut Ms. Vanderburgh's ability to present her defense: that the pedestrian was either the sole cause or a superseding cause of the accident.

These errors made the trial unfair. This court should reverse and remand for a new trial.

VI. The trial court erred in concluding as a matter of law that an exceptional sentence below the standard range was not available on these facts.

Ms. Vanderburgh can appeal the trial court's denial of her standard range sentence because the trial court rejected her request for an exceptional sentence as a matter of law, failing to exercise discretion on her specific facts. In addition, the trial court's legal reasoning was error. An exceptional sentence below the standard range is legally available where, as here, the victim initiated the incident that ultimately resulted in her own harm. Further, an exceptional sentence is also available where the victim was a proximate cause of her own death, as the State conceded Ms. Camyn was here.

The Sentencing Reform Act (SRA) establishes standard range sentences based on the seriousness level of the crime committed combined with an indication of the defendant's criminal history through an offender score. RCW 9.94A.510. However, recognizing that not all crimes are the same, the SRA also allows the trial court to depart from the standard range based on aggravating and mitigating factors. RCW 9.94A.535. With regard to mitigating the sentence, the Legislature has recognized there will be "variations from the presumptive sentence range where factors exist which distinguish the *blameworthiness* of a particular defendant's conduct from that normally present in that crime." State v.

Pascal, 108 Wn.2d 125, 136, 736 P.2d 1065 (1987) (internal quotations omitted) (emphasis added). While the SRA through the standard range calculation gives the sentencing court structure, it “does not eliminate, discretionary decisions affecting sentences.” Id. at 139 (internal quotations omitted) (emphasis removed). Where the sentencing court finds “substantial and compelling” reasons to deviate from the standard range, it may do so. RCW 9.94A.535.

a. The trial court’s denial of Ms. Vanderburgh’s request for an exceptional sentence is appealable because the trial court did not exercise discretion, ruling instead as a matter of law.

A standard range sentence is normally not appealable as a matter of right. See State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). However, everyone has the right to request an exceptional sentence and have that sentence “*actually* considered.” Id. (emphasis added). In fact, a trial court must exercise discretion on whether to grant an exceptional sentence below the standard range. Id. Thus, where the trial court rules *as a matter of law* that an exceptional sentence is not available the review is effectively de novo with a remand to the trial court so that it can reconsider the question knowing it has discretion. See id. State v. Graham, 181 Wn.2d 878, 887, 337 P.3d 319 (2014) (remanding where the court held that it could not impose a sentence below standard range). Put another way, it is an abuse of discretion requiring remand for a trial court to fail to exercise its discretion. See Grayson, 154 Wn.2d at 342.

In State v. McFarland, 189 Wn.2d 47, 399 P.3d 1106 (2017), our Supreme Court considered and reversed a sentence where the trial court did not realize it had discretion. The trial court suggested that it did not have discretion in imposing almost twenty years on Ms. McFarland for the multiple unlawful possession of firearms and theft of firearms counts she was convicted of. See id. at 49-50, 58. The Supreme Court held that the trial court had discretion, and because it believed that it did not have discretion, remand was appropriate. Id. at 55-6. A similar result was reached in State v. Graham, 181 Wn.2d 878 (2014). There, the sentencing court said that its hands were “tied,” and it could not depart. Id. at 881. The Supreme Court reviewed the issue, concluded that a sentencing court could depart, and remanded for resentencing. Id. at 887.

Here, the trial court ruled as a matter of law, and did not exercise discretion in denying the exceptional sentence. When the court considered the exceptional sentence, it held that it could not mitigate:

I believe that the Washington State Sentencing Act puts the court and the courts in a *very narrow window* and requires certain sentences . . . In looking at the cases and in looking at the statute, *I'm unable to find mitigating factor [sic] in this case.*

RP at 38 (emphasis added).

The court made clear that his ruling was one of law: “I believe that the law and the facts of this case *require* that the court impose a sentence within the standard range *and that the mitigating factors as laid out in the statute are not*

applicable in this case.” Supp. RP at 39 (emphasis added). Finally, in summary, the court again concluded that the law would not allow him to deviate from the standard range: “I believe that the law of the State of Washington *requires* a sentence within the standard range.” Supp. RP at 50 (emphasis added). While the court noted that Ms. Vanderburgh suffered exceedingly bad luck, it simultaneously concluded that “back luck is not a mitigating factor.” Supp. RP at 39.

Under McFarland and Graham, because the court ruled below as a matter of law, believing it did not have discretion to depart from the standard range, the sentence is reviewable, requiring remand if an exceptional sentence is available.

b. The trial court erred in concluding that the mitigating factor of “initiator” does not apply to the pedestrian’s conduct here.

Here, the court could have concluded that the mitigating factor of “initiator” allowed the court to depart from the standard range.

The SRA provides a nonexclusive list of mitigating factors that the court can consider in granting an exceptional sentence. RCW 9.94A.535(1). The list is “illustrative only”; a sentencing court is not bound by it. Id. One of the enumerated factors deals with the victim’s involvement leading up to or in the commission of the crime and reads: “To a significant degree, the victim was an *initiator*, willing participant, aggressor, *or* provoker of the incident.” RCW 9.94A.535(1)(a) (emphasis added). Based on the facts of this incident,

Ms. Camyn's conduct satisfies this definition as it is undisputed she was an "initiator" of the incident.

There is not a great deal of case law, on the "initiator" aspect of this mitigating factor. What is available generally discusses the "willing participant" rather than "initiator." See, e.g., State v. Hinds, 85 Wn. App. 474, 936 P.2d 1135 (1997) (applying the willing participant factor to a vehicular homicide case). "Initiator" is not defined in the statute. See RCW 9.94A.535. Where the Legislature fails to define a statutory term, a court applies the term's plain meaning and can consult a dictionary. State v. Barnes, 189 Wn.2d 492, 495-96, 403 P.3d 72 (2017). "Initiator" comes from the verb "initiate," which Merriam-Webster's dictionary defines as, "to cause or facilitate the beginning of; set going." Initiate, Merriam-Webster.com, available at <https://www.merriam-webster.com> (Jan. 4, 2018). Thus, an "initiator" is a person who causes the beginning of something, or sets it going.

Here, the facts demonstrate that Ms. Camyn was an initiator because she "set going" the incident that evening. First, Ms. Camyn and the other pedestrian were crossing against the signal. RP at 228-229, 325. Also, Ms. Camyn and the other pedestrian were wearing dark clothing at night making it difficult for oncoming traffic to see them. Id. The dark clothing and crossing against the signal forced Mr. Nesdaahl to perform an abrupt stop at a green light. See RP at 266-7, 275. Mr. Nesdaahl's abrupt stop in turn forced Ms. Vanderburgh to brake

abruptly, but she was unable to stop completely in time and hit the back of Mr. Nesdahl's truck at a low speed. RP at 986, 988-9, 966. Thus, Ms. Camyn's behavior of crossing against the signal in dark clothing initiated the incident here by forcing Mr. Nesdahl's abrupt stop.

The trial court could have reasonably concluded that Ms. Camyn was the "initiator" of the incident, and erred as a matter of law in concluding that the mitigation was not possible under the "initiator" prong of RCW 9.94A.535(1)(a).

- c. **The trial court also erred in failing to recognize the alternative, that where the victim is partially at fault for her own harm, mitigation is appropriate.**

Tort principles also support mitigation in this case. If this initiator-willing-participant-aggressor-or-provoker mitigation factor stands for anything generally, it stands for the proposition that mitigation is appropriate when the victim has some culpability in his or her own harm. Notably, in Hinds, the court considered civil law principles in examining the question of whether the "willing participant" aspect of this factor was satisfied. See 85 Wn. App. at 482-83 (applying tort theories to the mitigating factor). In fact the court concluded, that "if [the victim's] conduct was a but-for and legal cause of [the defendant's] reckless driving, then she significantly participated in the offense." Id. at 483-84. Thus, Hinds supports the conclusion that where the victim had *some* fault in causing her own injuries, mitigation is available, regardless of whether it operates as a complete defense to the charge.

Here, there was no debate that Ms. Camyn was a proximate cause of her own injuries; the detective testified that she was, and the State was forced to concede as much as twice during closing arguments. RP at 872-73, 1081, 1105. Therefore, because Ms. Camyn was partially at fault for her own injuries, the lower court could have mitigated her sentence: Ms. Vanderburgh was less “blameworth[y]” than she would have been had the pedestrian borne no fault. Pascal, 108 Wn.2d at 136.

The trial court erred in determining that it could not mitigate where the pedestrian was substantially at fault for her own harm.

d. The lower court is unlikely to reach the same result if this Court remands with clarification on the trial court’s discretion.

Here, the trial court was sympathetic to Ms. Vanderburgh’s situation. In an unusual statement, the judge indicated that but for the grace of God, he or others he knew could have been in the same situation. Supp. RP at 39. He recognized that Ms. Vanderburgh suffered “tragically bad luck.” Supp. RP at 39. The court simply concluded that bad luck was not a mitigating factor.¹¹ Ultimately, the court sentenced her to the low-end of the standard range, giving her the lowest sentence the court thought possible. CP at 647-8. It also released

¹¹ This is incorrect: while bad luck is not expressly listed as a mitigating factor the court could consider it because the list is illustrative. See RCW 9.94A.535(1) (listing nonexclusive mitigating factors). As indicated, the test is one of blameworthiness. Pascal, 108 Wn.2d at 136.

her pending appeal, recognizing “there are potential appellate issues.” Supp. RP at 50. The statements of the trial court suggest that it would issue an exceptional sentence after an appropriate ruling by this court. Under McFarland and Graham, this requires remand.

The court should review the issuance of Ms. Vanderburgh’s exceptional sentence. It should hold as a matter of law that the trial court did have discretion to depart in these circumstances under either of the two analyses above, and remand for the trial court to reconsider its sentence.

VII. The trial court violated Ms. Vanderburgh’s right to equal protection in sentencing her to an enhancement without submitting the fact underlying the enhancement to the jury.

Equal protection under the Fourteenth Amendment prevents a state from treating individuals differently without a rational basis. Though Ms. Vanderburgh did not challenge the enhancement on equal protection grounds below, it is reviewable as a manifest error affecting a constitutional right. Here, Washington treats “prior offense[s]” for driving under the influence differently depending on whether the “prior offense” is being used to enhance a sentence under RCW 46.61.5055 or being used to elevate a DUI to a felony, which is also sometimes called an “enhancement.” See State v. Allen, 2018 WL 4087435, No. 35214-5-III, slip op. at *1, *3-4 (Wash. Ct. App. Aug. 28, 2018). This is an arbitrary distinction that does not survive rational basis.

a. This issue is properly before the court as a manifest constitutional error.

Generally under RAP 2.5, an “appellate court may refuse to review any claim of error which was not raised in the trial court.” However, RAP 2.5(a) allows a defendant to raise for the first time on appeal, a “manifest error affecting a constitutional right.” Because Ms. Vanderburgh challenges the enhancement on equal protection grounds, her challenge involves a constitutional right.

Thus, the only question is whether this is a *manifest* error. “A constitutional error is manifest if the appellant can show actual prejudice, i.e., there must be a plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.” State v. Gordon, 172 Wn. 2d 671, 676, 260 P.3d 884, (2011) (internal quotations omitted). An error is not manifest if the facts necessary to the adjudication are not in the record. State v. Koss, 181 Wn.2d 493, 503, 344 P.3d 1042 (2014).

The error is also manifest. It has “practical and identifiable consequences”: the enhancement must run consecutively and be served in total confinement. Finally, because Ms. Vanderburgh challenged the sentence below on due process grounds the facts necessary to the constitutional inquiry are in the record.

b. Washington improperly treats defendants with prior offenses under RCW 46.61.5055 differently depending on whether that conviction authorizes proof for a felony DUI or for an enhancement to vehicular homicide.

Washington uses “prior offense[s]” for driving under the influence related crimes in numerous contexts. See RCW 46.61.502, .504, .5055; 9.94A.533(7). However, Washington treats the requirement of proof in those different contexts differently, depending on whether they are an enhancement, imposing an additional sentence to a felony charge, or are used to elevate driving under the influence (DUI) to a felony.

RCW 46.61.502 defines a “prior offense.” RCW 46.61.5055(14)(a). The list of what constitutes a “prior offense” is long. See id. As relevant here, it includes a prior conviction for negligent driving in the first degree, if it was originally charged as a DUI. RCW 46.61.5055(14)(a)(xii) (referencing RCW 46.61.5249).

In one context, the statute defining “prior offense” is used to elevate a DUI to a felony. In RCW 46.61.502, a person is guilty of a “class B felony” if “the person has three or more *prior offenses* within ten years *as defined by RCW 46.61.5055.*” (Emphasis added). Where prior offenses are used to elevate a DUI to a felony, the proof must be to the jury beyond a reasonable doubt. State v. Chambers, 157 Wn. App. 465, 475, 157 Wn. App. 465 (2010) (“Proof of the existence of the prior offenses that elevate a crime from a misdemeanor to a

felony is an essential element that the State must establish beyond a reasonable doubt.”).

In another context, the *same* statute defining “prior offense” is used for a sentencing enhancement to vehicular homicide:

An additional two years shall be added to the standard range for vehicular homicide committed while under the influence of intoxicating liquor or any drug . . . for each *prior offense as defined by RCW 46.61.5055*.

RCW 9.94A.533(7) (emphasis added). However, in the two-year-enhancement context, the proof can go to the judge on a preponderance basis. See State v. Holgren, 106 Wn. App. 477, 482, 23 P.3d 1132 (2001).

Therefore, the State is treating proof of the same “prior offense” under RCW 46.61.5055 differently depending on whether the defendant is charged with felony DUI or felony vehicular homicide under the DUI prong.

c. No rational basis supports the classification here because in both scenarios the prior offenses are identical and serve to increase the sentence imposed.

The test for an equal protection violation involving physical liberty is rational basis. State v. Coria, 120 Wn.2d 156, 171, 839 P.2d 890 (1992). While rational basis is the lowest level of scrutiny, it is still a substantive requirement for laws; “it is not toothless.” Mathews v. De Castro, 429 U.S. 181, 185, 97 S. Ct. 431, 40 L. Ed. 2d 389 (1976) (internal quotation marks omitted). The *classification* created in the law must be rationally related to a legitimate

government purpose. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). If the classification fails to advance a legitimate government purpose, then the clarification fails and the law is unconstitutional. See id. A classification does not survive rational basis review if it is arbitrary. Id. at 446.

Here, the classification is arbitrary. In both scenarios above, the effect of the prior is elevating the punishment for the present violation. See State v. Case, 187 Wn.2d 85, 96-7, 384 P.3d 1140 (2016) (Madsen, J., concurring). It does this in one case by adding two years to the sentence, and in the other by increasing the crime from a misdemeanor to a felony. Further, both situations require proof of the exact same thing: a “prior offense” under RCW 46.61.5055. In other words, both defendants are proving *the same thing for the same purpose*. Any argument for why the proof need not be to the jury for one case can easily be flipped on its head and apply the other way. See, e.g., Case, 187 Wn.2d at 96-7 (Madsen, J., concurring) (stating in a similar context that priors elevating a crime from a misdemeanor to a felony should not be submitted to the jury but instead found by the judge by a preponderance of the evidence). Because the State could just as easily have required proof to the jury of the prior for the enhancement a not the priors for a felony, the classification is arbitrary.

Because the classification here is arbitrary, it does not survive rational basis review and violates equal protection. The court should remand for

resentencing with instructions to strike the enhancement or in the case of reversal with instructions to submit existence of the prior to the jury.

E. CONCLUSION

For the foregoing reasons, the court should reverse and remand for a new trial. In the alternative, the court should remand for resentencing, with instructions to strike the enhancement and that an exceptional sentence is available in the sentencing court's discretion.

DATED this 17th day of September, 2018.



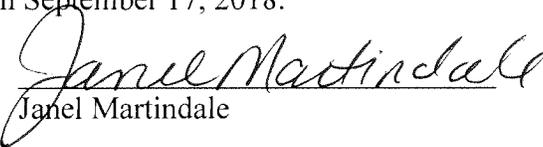
KEVIN J. CURTIS, WSBA #12085
NICHOLAS R. ULRICH, WSBA #50006
WINSTON & CASHATT, LAWYERS
601 West Riverside Avenue, Suite 1900
Spokane, WA 99201
Telephone: (509) 838-6131
Fax: (509) 838-1416
Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington as follows: That on September 17, 2018, 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:

Katherine A. McNulty Richard D. Whaley Spokane County Prosecuting Attorney's Office 1100 West Mallon Spokane, WA 99260 kmcnulty@spokanecounty.org rdwhaley@spokanecounty.org Attorneys for Plaintiff	VIA REGULAR MAIL <input type="checkbox"/> HAND DELIVERED <input checked="" type="checkbox"/> BY FACSIMILE <input type="checkbox"/> VIA EMAIL <input type="checkbox"/>
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DATED at Spokane, Washington, on September 17, 2018.


Janel Martindale

RECEIVED
SEP 17 2018
Prosecuting Attorney
Spokane County, WA

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

FILED

STATE OF WASHINGTON,

No. 358682

SEP 17 2018

Respondent,

DECLARATION OF SERVICE

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

vs.

MEEGAN M. VANDERBURGH,

Appellant.

Janel Martindale declares under penalty of perjury under the laws of the State of Washington as follows: I am a paralegal at Winston & Cashatt, Lawyers. On September 17, 2018, I served the OPENING BRIEF OF APPELLANT on the above-named appellant by mailing a true and correct copy of said document to her at the following address: Meegan M. Vanderburgh, 103 N. Sunderland Road, Spokane Valley, WA 99206.

DATED at Spokane, Washington, on September 17, 2018.


Janel Martindale

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DATED at Spokane, Washington, on September 17, 2018.



Janel Martindale