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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MEEGAN VANDERBURGH, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it excluded evidence of the victim's toxicology results because there was no evidence the victim was impaired or that the victim's prior ingestion of drugs impacted the victim's conduct in the cross-walk preceding the collision?

2. Did the trial court err when it specifically refused to instruct the jury that the State had the burden of proving the absence of a superseding intervening cause beyond a reasonable doubt?

3. If contributory negligence is not a defense to vehicular homicide, did the trial court err when it did not instruct the jury on the defense proposed civil instructions related to comparative fault if those instructions were inaccurate and did not inform the jury of all the applicable law related to contributory negligence?

4. Did the trial court err when it suggested that the parties use 30 minutes each for closing arguments where defense counsel never objected to or asked for additional time for closing argument?

5. Did the trial court err when it denied defense counsel's request for a downward departure from the standard range sentence if the court considered the argument of counsel, supporting authority, the facts of the case and found that an exceptional sentence was not appropriate?

6. Should this Court review the defendant's equal protection claim if she has not argued or cited to authority that she received disparate treatment because of a membership in a class of similarly situated individuals, which is necessary when making an equal protection claim?

7. Is there a rational basis upon which to distinguish the burden of proof used to establish prior convictions that are used to prove an element of the crime of felony DUI and prior convictions that are used to prove a sentence enhancement to increase a defendant's standard range sentence for vehicular homicide?

II. STATEMENT OF THE CASE

The defendant, Meegan Vanderburgh, was charged by second amended information with vehicular homicide, which occurred on January 16, 2016, and included a two-year sentence enhancement because Vanderburgh had a prior alcohol related driving offense. CP 180-81. The defendant was found guilty by a jury and this appeal timely followed. CP 525.

Substantive facts.

On January 14, 2016, around 8:00 p.m., Daniel Nesdaahl was driving his Chevy pickup westbound on Sprague Avenue in Spokane, approaching the intersection with Farr Road. RP 218, 222-23, 301. In that area, Sprague Avenue had only one-way traffic, which was divided into five one-way

lanes, with a bike lane located near the curb line. RP 423. Farr Road had both northbound and southbound traffic, with two lanes for each direction of travel. RP 423, 523.

The traffic conditions were light at the time and the weather was dry and cold, with no snow on the ground. RP 223, 259-60, 280-81. Nesdahl was travelling the speed limit, which was posted at 35 miles per hour. RP 225, 571. As Nesdahl approached the intersection of Sprague and Farr Road, the traffic light was green for his lane of travel. RP 226. That intersection is a four-way stop, regulated with traffic lights, and was well-lit at the time of the collision. RP 226, 423, 576-77.

During the same time, John Branda¹ and Cheryl Camyn met at a bus stop and walked toward the Sprague - Farr intersection. RP 894-95. At that intersection, Branda pushed the signal for the “walk light,” as Camyn stood next to him; they waited to cross the street. RP 895. After the “walk light” turned for pedestrian traffic, Branda and Camyn proceeded together within the cross-walk lines. RP 892, 896-97.

As Nesdahl neared the intersection in the right-most lane of travel, he observed Branda and Camyn both wearing dark clothing, crossing

¹ Branda had smoked some marijuana on the day of the collision; however, he did not smoke any marijuana with Camyn. RP 901-02.

against the traffic pedestrian light,² walking northbound on Farr Road. RP 227, 229-30. Nesdahl recalled Branda and Camyn were in the cross-walk, just to the left of his pickup. RP 230. Nesdahl slowed his vehicle and came to a complete stop as Camyn³ was now in front of his vehicle. RP 230, 252. Within seconds, Nesdahl's vehicle was struck from behind by Vanderburgh's Subaru. RP 231, 234. Contemporaneously, Camyn was struck by Nesdahl's pickup and ended up beneath Nesdahl's pickup. RP 233, 281, 630. Afterward, Camyn was prone on the ground and in respiratory distress. RP 233, 281-282, 630.

Nesdahl's passenger, Tricia Raddas, testified that the traffic light was "green" for Nesdahl and westbound Sprague Avenue traffic; Branda and Camyn were walking in a "don't-walk" cross-walk; and *both* screamed to alert Nesdahl that they were in the cross-walk. RP 928, 932, 935. Nesdahl completed a full stop behind the pedestrian line, after slamming on his brakes to avoid the pedestrians. RP 933-34. Branda and Camyn walked side-by-side in the cross-walk. RP 935. As soon as Camyn walked in front of

² A normal cycle for a pedestrian walk signal is four seconds of a constant walk signal, followed by 18 seconds of the walk signal flashing, then a two-second constant red "don't walk" signal, and then a green light for opposing traffic; there is a total of 24 seconds for a pedestrian to proceed through a given cross-walk. RP 830. Statistically, individuals in Camyn's age group and gender move approximately five feet per second through an intersection. RP 831.

³ Camyn lagged several steps behind Branda in the crosswalk. RP 899.

Nesdahl's vehicle, Vanderburgh's vehicle struck the pickup. RP 928. Raddas estimated they were at a full stop for one minute or more before their vehicle was struck from behind – they “weren't stopped for very long.” RP 935-36.

Shortly before the collision, Elmer Feist was driving his pickup westbound on Sprague Avenue, approximately one-half block behind Nesdahl in the second lane from the curb. RP 255, 257-58, 260, 268. Feist observed the brake lights⁴ on Nesdahl's pickup and observed the Subaru “simultaneously” slam into the rear of Nesdahl's vehicle. RP 258, 274. The Subaru either bounced back or was driven in reverse for approximately one car length. RP 270. Feist did not see Branda or Camyn prior to the collision; however, Feist thought he saw a man running immediately after the collision. RP 267, 272. Feist had not consumed any alcohol or drugs before he witnessed the collision. RP 264. Aletha Green also observed the collision. RP 279-80. She had contact with the driver of the Subaru after the collision; Green smelled the odor of alcohol on Vanderburgh. RP 284-85.

Dwaine Barney was stopped for a red light on Farr Road at the intersection heading southbound. RP 322, 324-25, 327-28. Barney observed Branda and Camyn, approximately 10 to 12 feet into the street from the curb

⁴ Feist clarified on recross-examination that it was a sudden brake by Nesdahl and a rapid impact by the Subaru. RP 275.

line, “jaywalking”⁵ across the street within the cross-walk. RP 325, 327-29. Barney observed the pickup stopped, waiting for the pair to cross the street. RP 325. The male “scooted” in front of Nesdahl’s pickup, with Camyn trailing behind him. RP 326. Camyn looked backward, and had a panicked look. RP 326. The pickup was struck hard enough that it lurched forward. RP 326, 330. Barney did not see the Subaru prior to the collision. RP 329-30. An investigator measured the scene and determined that Camyn was 60 feet⁶ into the intersection when she was struck. RP 792, 830.

Spokane County Medical Examiner John Howard conducted an autopsy on Camyn. RP 630. Camyn presented both external and internal injuries, including a fractured skull. RP 631-33. Howard concluded that Camyn died because of blunt head, chest, abdominal and pelvic injuries. RP 634.

Spokane Police Officer John McGregor obtained surveillance video from Winco Foods, which captured the intersection during the collision. RP 290, 294-95. The video specifically showed the traffic light cycle⁷ for Farr Road and the collision. RP 295-96. The video caught Nesdahl’s pickup

⁵ Barney described the pedestrians as “taking their time” crossing the street. RP 325.

⁶ From curb to curb, the intersection measured 72 feet. RP 830.

⁷ The traffic lights at that intersection cycled through green, to amber, and then to red. RP 296-97.

stopped at the intersection; thereafter, the Subaru collided with the pickup, pushing it forward. RP 298; Ex. 116. After the light turned red for traffic on Farr Road, there was an eight second delay before the Subaru collided with the pickup. RP 320.

Spokane County Sheriff Deputy Todd Miller was assigned to the City of Spokane Valley traffic unit at the time of the collision. RP 416, 418. Miller had training and experience in impaired driving and was certified as a Drug Recognition Expert (DRE) since 2005.⁸ RP 418-19. Miller arrived on scene at approximately 8:23 p.m. RP 422. Miller had contact with Nesdaahl, who agreed to perform the field sobriety tests.⁹ RP 424, 433-34. Miller did not smell an odor of alcohol or marijuana from Nesdaahl. RP 435. Nesdaahl did not present any signs of impairment. RP 440. Notwithstanding, Nesdaahl consented to a voluntary blood draw. RP 440-41. A toxicology analysis later revealed that Nesdaahl had no alcohol or drugs in his blood at the time of the collision. RP 716.

Miller then contacted Vanderburgh at approximately 8:35 p.m. RP 442, 446. Vanderburgh moved slowly, had red, glassy eyes, and had an

⁸ The deputy's training was geared toward both alcohol and drug impairment. RP 417-420.

⁹ Nesdaahl was retired and occasionally drove a pilot car during his retirement. RP 217. Nesdaahl had a drink of alcohol around noon the day of the collision. RP 237. Nesdaahl had no issues with his sight. RP 236-38.

odor of alcohol on her breath. RP 442, 445. Vanderburgh claimed she had “one drink hours ago.”¹⁰ RP 446 Vanderburgh told Miller that she had been traveling at 15 to 20 miles per hour before the collision, a vehicle in front of her had slammed on its brakes, and she hit the car. RP 445. Vanderburgh also agreed to perform several roadside sobriety tests.¹¹ RP 449. Thereafter, Miller placed Vanderburgh under arrest and transported her to the hospital for a blood draw pursuant to a search warrant, which occurred at 10:03 p.m. RP 468-69, 472, 537-39. The resulting toxicology analysis revealed that Vanderburgh had a blood alcohol level of 0.13. RP 686. At that blood alcohol content level, an individual could not operate a motor vehicle safely. RP 709. Vanderburgh also had a tetrahydrocannabinol (THC) concentration level of 1.8 nanograms per millimeter in her blood. RP 722.

¹⁰ Vanderburgh told Miller that she had a “shifter” at the Monkey Bar. RP 446. The term is associated with an employee of a tavern or restaurant who gets a drink at the end of a shift. RP 447. A liquor board officer’s review of a video inside the establishment at 6:35 p.m., shortly before the collision, confirmed this statement. RP 754, 840.

¹¹ Regarding the horizontal gaze nystagmus test, Vanderburgh presented two of six factors that indicated intoxication; the lack of convergence test (ability to cross one’s eyes) indicated a level of intoxication either by drug or alcohol; the walk and turn test indicated four out of eight determinants that indicated intoxication; the one-leg stand presented three out of four indicators regarding intoxication. RP 453-56.

Spokane County Sheriff's Office Traffic Unit Detective Jeffrey Welton also responded to and investigated the collision.¹² RP 548, 567. Welton determined that Camyn was struck by the front bumper of Nesdahl's pickup. RP 738. During the investigation, Welton downloaded the diagnostic crash data (black box) from both vehicles involved in the collision.¹³ RP 740-43. Welton opined from the data that Nesdahl did not slam on his brakes prior to his complete stop at the intersection. RP 751. Nesdahl came to a stop and then was struck by Vanderburgh's vehicle, which propelled Nesdahl's vehicle into Camyn. RP 751-52, 783. Welton concluded that Nesdahl's driver's side front and rear wheels traveled over Camyn. RP 846-47. With an assumption that Vanderburgh traveled at the speed limit and was braking at the time of the collision, Welton estimated Vanderburgh's vehicle was travelling at approximately 13 to 14 miles per hour at the time of impact. RP 850, 863, 865.

Based upon the evidence, Welton concluded that:

It's my opinion that based on all the information from the -- the roadway tire marks -- or excuse me, the roadway marks, the position of the vehicles, the CDR data that we received, the video and witness statements, I believe Mr. Nesdahl was approaching the intersection at Farr Road and that he had a red light and that he was slowing for

¹² Welton was certified as a technical collision and reconstruction investigator. RP 819-20.

¹³ The Subaru did not have an imaging tool available at the time of the collision which would have allowed Welton to review the data for the defendant's vehicle. RP 826.

that red light. We know that based on some of his CDR data we know he's at eight miles an hour five seconds before this event occurred. I know it's a 35-mile-an-hour road, so it leads me to believe that he was braking for that light that we can see on North Farr. It was clearly green and at some point changed.

As Mr. Nesdahl approached that intersection, his light turned green. At about that same time, he was able to see Ms. Camyn and her partner in the cross-walk, in the roadway, which created a hazard for him. He was able to bring his vehicle to a stop for that hazard that was created for him in the road, and during that time that he was waiting for them to clear the intersection, he was struck from behind by Ms. Vanderburgh.

It's my opinion based on all of the data that [Vanderburgh] had plenty of time, as far as out to eight seconds, to see some sort of brake-light activity from Mr. Nesdahl's truck to warn her that there is something happening, and that [Vanderburgh is] approaching an intersection that has cross-walks, that has lights, that's in a highly-populated area.

RP 788-89.

Welton also found that Camyn was a "proximate cause" of the collision because she was in the cross-walk against a red light, her conduct in the cross-walk, and her "potential impairment." RP 772-73, 872, 880. The basis for Welton's opinion that Camyn was "potentially impaired" is not in the record. *See* RP 764-65. Welton noted that Camyn should not have been in the cross-walk at the time of the collision. RP 882. However, Welton believed that the defendant was also a proximate cause of the collision. RP 883.

Defense witness, David Wells, operated a "collision analysis business." RP 957. Wells had been previously employed by the King

County Sheriff's Office as a collision investigator. RP 961. After reviewing the crash data, Wells asserted that Vanderburgh applied her brakes and was actively braking prior to impact with the pickup. RP 980. However, Wells conceded on cross-examination that this claim was only theoretical. RP 1010-11. Wells further assumed that Vanderburgh's vehicle was traveling at a low-end speed of six to seven miles per hour with a maximum speed of 11 to 12 miles per hour.¹⁴ RP 987-88, 1012. Wells found that the pickup had been launched forward approximately 38.5 feet after impact by the defendant's car and Vanderburgh's Subaru traveled 29.5 feet after impact. RP 988. Wells alleged that Vanderburgh only had two to four seconds to react to Nesdahl's stopped vehicle. RP 993. Wells concluded that Vanderburgh's failure to react to the pickup's brake lights was not unreasonable under the circumstances. RP 995. Wells also alleged that Vanderburgh was not a proximate cause of the collision because Branda and Camyn exceeded a reasonable amount of time to cross the roadway; Wells hypothesized that it took Branda and Camyn 32 seconds to cross the road before they were in front Nesdahl's pickup. RP 998-99.

When specifically asked whether Vanderburgh's 0.13 blood alcohol intoxication level played a role in her reaction to Nesdahl's vehicle, Wells

¹⁴ During cross-examination, Wells stated that the defendant was going 9.66 miles-per-hour upon impact. RP 1012.

surprisingly stated, “It potentially could have factored in, but I don’t know to what specific degree her impairment was. So it -- I’m going to say it could have, but I don’t know for sure that it did.” RP 1016.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT PERMIT INTRODUCTION OF THE VICTIM’S TOXICOLOGY ANALYSIS.

The defendant argues the trial court abused its discretion when it refused defense counsel’s request to permit introduction of the results of Camyn’s toxicology analysis. In part, Vanderburgh argues, “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.” RP 17. There is no legal or factual support in the record for this assertion as discussed below.

1. Standard of review.

A trial court’s ruling on the admission of evidence is reviewed for a manifest abuse of discretion, with the appellate court affording great deference to the trial court’s ruling. *State v. French*, 157 Wn.2d 593, 605, 141 P.3d 54 (2006); *see also State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987). A court abuses its discretion when its decision is exercised on untenable grounds or for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). The trial court is in the best position to

evaluate the dynamics of a jury trial and the prejudicial effect of a piece of evidence. *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962). Accordingly, any error in admitting evidence is grounds for reversal only if, within reasonable probabilities, the error materially affected the outcome of the trial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961, 965 (1981).

Criminal defendants have a constitutional right to present a defense. U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 3, 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). This right is not absolute; it does not extend to irrelevant or inadmissible evidence. *Lord*, 161 Wn.2d at 301; *State v. Blair*, 3 Wn. App. 2d 343, 349, 415 P.3d 1232 (2018). “The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.” *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). In that context, the existence of a fact cannot rest upon a guess, speculation, or conjecture. *State v. Carter*, 5 Wn. App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972). When a defendant claims a trial court’s evidentiary rulings violate their right to present a defense, an appellate court undertakes a two-step review process: (1) review the individual evidentiary rulings for an abuse of discretion, and (2) consider de novo the constitutional question of whether the rulings

infringed the right. *State v. Clark*, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017); *see also State v. Arndt*, 194 Wn.2d 784, 797, 453 P.3d 696 (2019).

Evidence is relevant if it tends to make the existence of any fact consequential to the resolution of an action more or less probable than it would be without that evidence. ER 401. Relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense. *Rice*, 48 Wn. App. at 13. Facts tending to establish a party's theory of the case will generally be found relevant. *State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407 (1986), *overruled on other grounds*, *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."¹⁵ ER 403.

2. The trial court did not abuse its discretion.

In the present case, the defendant moved in limine to introduce evidence¹⁶ of the type of drug and Camyn's drug intoxication level, if any, at the time of the collision. The toxicology analysis revealed that Camyn had methamphetamine, an opiate (hydrocortisone), and benzodiazepine

¹⁵ "Almost all evidence is prejudicial ... [as] it is used to convince the trier of fact to reach one decision rather than another. However, 'unfair prejudice' is caused by evidence that is likely to arouse an emotional response rather than a rational decision among the jurors." *Rice*, 48 Wn. App. at 13 (citations omitted).

¹⁶ The medical examiner, toxicologist, and detective all testified outside the presence of the jury regarding Camyn's alleged intoxication level.

chlordiazepoxide (valium) in her system. Dr. Howard testified that the effects of methamphetamine and an opiate (hydrocortisone) are highly variable as to a particular individual's behavior. RP 603-04. The toxicology analysis revealed Camyn had .17 milligrams per liter of methamphetamine in her system at autopsy. RP 606-07. Howard stated this amount was a pharmacologically active level, meaning the drug was present in Camyn's system to some degree. RP 607. Howard remarked that, "[i]t would be speculation to say what this level meant for any one individual." RP 607. The same would be true for the hydrocortisone. RP 607. Howard concluded that, "[t]he effects of a combination of all three drugs [would be] highly variable. Certainly[,] they are all interacting with the nervous system to some degree, but again, I can't say with any certainty what the effect would be of the combination or any individual drug." RP 608.

Regarding the 0.17 level of methamphetamine in Camyn's system and what effect it might have had upon her, the toxicologist expressed:

It depends on the amount of drug that was consumed initially, the history of the subject with that drug. If they're a chronic user or if they have not used for a long time and this is strictly from a one-time use. And so those things factor in to you how much -- what the concentration rises to, what the peak concentration would be. And then based on that peak concentration, then you have that break down. And so I can't look at this number -- and I really couldn't even determine if facts were given to me about how much or when it was used to say -- to pinpoint where this concentration falls on the person's use timeline.

RP 655-56.

When asked whether the 0.17 amount of methamphetamine was outside the therapeutic level of .02 to .05 for the drug, the toxicologist remarked:

It's outside of the high end of that range, but again the literature has shown that in some instances, a therapeutic level has been seen up to .2. And so, for this person, if -- if this is the medication that they're on and maybe they've been, again, taking it for a long time and their dosage has had to increase, this level, just because it's outside of that therapeutic range, doesn't necessarily mean that they weren't taking it appropriately.

RP 656.

The toxicologist commented that both the level of valium and hydrocodone in Camyn's system were within the acceptable therapeutic ranges. RP 656-57. The toxicologist observed that a combination of the drugs could cause "a lot of sedation, drowsiness and poor balance. On the other side, if all these were prescribed to this individual and they were taking their medications as prescribed and they were being monitored and these were the levels appropriate for them, we might not see any of these effects." RP 658. Ultimately, the toxicologist *could not form any opinion* as to whether Camyn was impaired. RP 661-62.

Subsequently, after several rounds of argument outside the presence of the jury,¹⁷ the trial court ruled that:

¹⁷ See RP 156-57, 399-400, 624, 797.

As I indicated, having reviewed the testimony of [the toxicologist], the court's decision remains that any relevancy with regard to Ms. Camyn's toxicology report is at this point slim. But assuming that there is some relevancy, I still find that the prejudicial effect of such testimony would outweigh any probative value based on the testimony of [the toxicologist] that with regard to the individualized effects of such medications or drugs on an individual, her lack of ability to cite precisely or with any real clarity what the combined effect of all medications or drugs would have on any particular individual, let alone on this particular individual. So I'm not going to permit [the toxicologist] to testify or questions to be asked of her about those toxicology results.

RP 664. A while later, the trial court found that there was no evidence produced that there was a combination of drugs that would show Camyn was impaired when she was in the cross-walk, nor was there any expert testimony presented that Camyn presented any physiological symptoms caused by her alleged drug use, "such as such as poor peripheral or tunnel vision, slowed reaction time" and the like. RP 798.

The trial court had a tenable basis for excluding the victim's toxicology analysis. There was no evidence Camyn was intoxicated or that any alleged prior drug use affected her coordination, reaction time, her ability to make accurate decisions, or other physical or cognitive abilities immediately preceding the collision. Accordingly, whether Camryn used drugs prior to the collision is not a fact of consequence in this case.

Moreover, what, if any, drugs Camryn ingested prior to the collision did not make Vanderburgh's act of being under the influence and failing to

stop at the intersection more or less probable, nor was it a superseding, intervening event, nor was it the sole cause of the collision. Indeed, there can be more than one proximate cause which contributed to a collision. Our high court explained this premise in *State v. Jacobsen*, 74 Wn.2d 36, 37-38, 442 P.2d 629 (1968):

The fact that, in order for negligence of a party to be a proximate cause of an injury it must continue in an unbroken sequence until the injury occurs, does not mean that negligence of another, also contributing to the injury, will necessarily break the sequence. Assuming the defendant was speeding, as the jury found, that negligence continued up to the moment of collision, and the jury found, caused the accident. If the fact that the driver of the other vehicle failed to yield the right of way was also a contributing cause, that fact could not change the character of the defendant's act as a proximate cause of the collision. As the prosecutor correctly argued to the jury, the conduct of the other driver would be a concurring cause, not an intervening cause.

Id. at 37-38 (internal citations omitted).¹⁸

Notwithstanding, a defendant is permitted to introduce evidence of the victim's conduct when determining whether a defendant's conduct was a proximate cause of the collision, regardless of whether the victim's conduct constituted a contributing factor. *See State v. Meekins*, 125 Wn. App. 390, 397, 105 P.3d 420 (2005). A suspect driver's conduct is not the proximate cause if some other action was the sole cause of the harm. *Id.* at

¹⁸ *See also State v. Hardwick*, 74 Wn.2d 828, 447 P.2d 80 (1968); *State v. Engstrom*, 79 Wn.2d 469, 487 P.2d 205 (1971).

390. Notwithstanding, the same harm can have more than one proximate cause. *Id.* at 398-99.

3. Vanderburgh's right to present a defense was not infringed.

As to the second step of the analysis under *Clark*, the trial court's ruling did not unreasonably restrict Vanderburgh's to present a defense. Vanderburgh was able to argue her theory of the case and present evidence of Camyn's conduct preceding the collision. The record shows there was conflicting testimony in the record that Camyn may have been walking against the light, she may have lingered in the cross-walk, she may have stopped walking to alert Nasdahl of her presence in the cross-walk, and that she may have contributed to the collision. The defendant was only prevented from offering evidence that Camyn may have ingested drugs at some unknown time prior to her entry into the intersection. Certainly, evidence of Camyn's conduct (as opposed to her alleged prior ingestion of drugs) immediately before the collision was presented to the jury and that evidence was argued by the defense during their summation.¹⁹

¹⁹ *See e.g.*, RP 1088-90, 1096, 1099, (defense counsel argued that Camyn lingered in the cross-walk, stopped and yelled at Nesdahl, Camyn did not cross the street in a safe manner, she asked the jury to consider "the conduct of Ms. Camyn" in the cross-walk, Camyn assumed the risk of entering the intersection, Camyn stopped and did not cross the street, and the collision would not have resulted but for Camyn's conduct).

Lastly, the defendant failed to proffer any evidence that Camyn was under the influence, to any degree, at the time of the collision. In that regard, evidence of drug use on other occasions or drug addiction is generally inadmissible because it is impermissibly prejudicial. *See State v. Renneberg*, 83 Wn.2d 735, 737, 522 P.2d 835 (1974); *State v. Tigano*, 63 Wn. App. 336, 344-45, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992).²⁰ The trial court did not abuse its discretion when it found that even if Camyn potentially ingested drugs, it was highly prejudicial. Certainly, it was not probative of any issue at trial as there was no evidence Camyn was impaired at the time of the collision or that her ingestion of the drugs (at some unknown time) contributed to her conduct or to the collision. The trial court did not err.

B. A TRIAL COURT IS NOT REQUIRED TO SPECIFICALLY INSTRUCT THE JURY DURING A VEHICULAR HOMICIDE TRIAL THAT THE STATE HAS THE BURDEN OF PROVING THE ABSENCE OF A SUPERSEDING INTERVENING CAUSE BEYOND A REASONABLE DOUBT.

Vanderburgh argues that the trial court erred when it refused defense counsel's proposed instruction that the State had the burden to disprove the

²⁰ This is not a case where evidence of a witness's ability to observe is relevant, and it is necessary to impeach that witness with drug use at the time of the event or when a witness may be impaired on the witness stand. *See State v. Arredondo*, 188 Wn.2d 244, 269, 394 P.3d 348 (2017); *State v. Russell*, 125 Wn.2d 24, 83, 882 P.2d 747 (1994).

absence of a superseding intervening cause beyond a reasonable doubt. *See* Appellant's Br. at 22-28.

Standard of review.

When a defendant challenges the adequacy of a specific instruction informing the jury of the State's burden of proof, an appellate court reviews the challenged instruction de novo in the context of all other instructions given. *State v. Imokawa*, 194 Wn.2d 391, 396, 450 P.3d 159 (2019).

Jury instructions are sufficient when they allow the parties to argue their case theory, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010). A court's specific wording of jury instructions is reviewed for an abuse of discretion. *State v. Trout*, 125 Wn. App. 403, 416, 105 P.3d 69 (2005). Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). It is reversible error if the instructions relieve the State of that burden. *Id.*

In the present case, defense counsel proposed the following modified instruction,²¹ based in part on Washington Pattern Jury Instruction (WPIC) 90.08:

If you are satisfied beyond a reasonable doubt that the driving of *Ms. Vanderburgh* 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 *Ms. Vanderburgh*, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, *Ms. Vanderburgh'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 *Ms. Vanderburgh's* act or omission has been committed or begun.

However, if in the exercise of ordinary care, *Ms. Vanderburgh* should reasonably have anticipated the intervening cause, that cause does not supersede *Ms. Vanderburgh'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 *Ms. Vanderburgh* should have reasonably anticipated.

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 which resulted in the death that occurred in this case.

CP 393 (defense proposed instruction); *see also* CP 521 (court's instruction).

²¹ The modified portion of the standard WPIC instruction, WPIC 90.08, has been highlighted with the use of italics.

The defendant's claim was recently addressed by our high court in *Imokawa*. In that case, Imokawa's truck collided with another vehicle during a lane change, which then caused Imokawa's vehicle to travel into oncoming traffic striking another vehicle. 194 Wn.2d 391 at 392. Imokawa was charged with vehicular homicide and vehicular assault. *Id.* At trial, there was conflicting testimony as to how the collision occurred. *Id.* at 393. Imokawa claimed that actions taken by the first victim were an intervening superseding cause. *Id.* at 394-95. The trial court denied Imokawa's proposed instruction that the State must prove the absence of a superseding intervening cause beyond a reasonable doubt. *Id.* at 392-93.

The Supreme Court addressed whether a failure to specifically instruct the jury that the State had the burden of proving the absence of a superseding, intervening cause beyond a reasonable doubt violated due process. Imokawa argued that it violated due process because the court's instructions did not explicitly instruct the jury that the State must prove absence of a defense. *Id.* at 401. The Supreme Court disagreed, and held:

The trial court did not need to explicitly instruct the jury that the State has the burden to prove absence of superseding intervening cause because, as instructed, proximate cause and presence of a superseding intervening cause are mutually exclusive. This means proof of proximate cause beyond a reasonable doubt necessarily proves absence of a superseding intervening cause.

Id. at 402.

The Court concluded that where “the jury is instructed as to the statutory elements of a crime, that the State bears the burden of proving all elements beyond a reasonable doubt, and that the defendant has no burden of proof, the instructions as a whole are constitutionally adequate and do not violate due process.” *Id.* at 403-04.

Similar to *Imokawa* and in the present case, the court’s instructions were consistent with due process and contained the necessary statutory elements of vehicular homicide. The jury was instructed that the State had the burden to prove each of the elements²² beyond a reasonable doubt²³ and regarding the proximate cause and conduct of another of Camyn’s death.²⁴ The jury’s verdict establishes the State met its burden of proof, including that the defendant was a proximate cause of the collision and death of Camyn. Moreover, the defendant was able to fully argue her theory of the case. The trial court did not err in declining to specifically instruct the jury that the State had the burden of disproving a superseding intervening cause.

²² CP 522, RP 1066-67 (elements – WPIC 90.02); CP 518, RP 1065 (under the influence or affected by – WPIC 90.06).

²³ CP 511, RP 1062-63 (burden of proof and reasonable doubt – WPIC 4.01); CP 511, RP 1062-63 (the defendant has no burden).

²⁴ CP 517, RP 1064-65 (proximate cause – WPIC 90.07); CP 521, RP 1066 (conduct of another – WPIC 90.08).

Regarding Vanderburgh faulting the State for its suggested application of WPIC 90.08 (conduct of another) to the jury, there was no error. Specifically, the defendant complains about the State's selection of the jury's instructions as contained in its PowerPoint presentation²⁵ and part of the State's rebuttal argument,²⁶ which was not objected to:

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 reasonable foreseeability, and the part that that plays that you have -- that you have if you are going to consider that jury instruction and whether or not that fits -- or fits the fact of this case, it's the state's position that a pedestrian in a cross-walk at a busy intersection at approximately 8 o'clock at night is reasonably foreseeable. And as it is reasonably foreseeable cannot constitute a superseding event to relieve Ms. Vanderburgh from guilt.

RP 1108.

It was the State's theory of the case, as incorporated in its closing argument, that Camyn's actions preceding the crash did not constitute a superseding, intervening cause or that Camyn was not the sole cause of the collision. In that regard, defense counsel never objected to the State's emphasis of certain jury instructions, or portions of those instructions, during its closing and rebuttal arguments regarding the lack of evidence of

²⁵ See Appellant's Br. at 29. In fact, after having had the opportunity to review the State's PowerPoint presentation before closing argument, defense counsel had no objection to its use by the deputy prosecutor. RP 1054, 1057.

²⁶ See Appellant's Br. at 29-30.

a superseding, intervening cause.²⁷ A prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case. *Russell*, 125 Wn.2d at 87. Moreover, a prosecutor has wide latitude to comment on the evidence introduced at trial and to draw reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). The “mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.” *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009). Finally, Vanderburgh has not proffered any authority that a prosecutor cannot direct the jury’s attention to a particular instruction, or specific language within an instruction, and discuss the evidence, or lack thereof, regarding a particular instruction. There was no error.

²⁷ Although there is no allegation that the deputy prosecutor misrepresented the law during closing argument, even if there was such an allegation, when no objection is made to a prosecutor’s misstatement of law during closing argument, an appellate court will not reverse unless the misstatement was so flagrant and misleading that it could not have been corrected by a curative instruction. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). Even assuming the prosecutor committed misconduct, it did not rise to the level of severity required to meet the “flagrant and ill intentioned” standard necessary to grant any relief under the circumstances. *See Matter of Phelps*, 190 Wn.2d 155, 171, 410 P.3d 1142 (2018).

C. IT WAS PROPER FOR THE TRIAL COURT NOT TO INSTRUCT THE JURY WITH THE DEFENDANT'S PROPOSED INSTRUCTIONS D-18, D-19, AND D-20

Vanderburgh next faults the trial court for not instructing the jury with her proposed civil instructions:²⁸

PROPOSED INSTRUCTION D-18

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 danger and to exercise ordinary care to avoid a collision.

CP 395 (WPIC 70.01).

PROPOSED INSTRUCTION D-19

A statute provides that a driver shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon and the condition of the street or highway.

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 excused 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 396 (WPIC 70.04).

²⁸ Defense counsel took exception to the court not giving its proposed civil jury instructions D-18, D-19, and D-20. RP 1052-54.

PROPOSED INSTRUCTION D-20

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 397 (WPIC 70.06).

Standard of review.

A trial court's refusal to give a jury instruction is reviewed for abuse of discretion if it is based on a factual determination and de novo if it is based on a legal conclusion. *State v. Scherf*, 192 Wn.2d 350, 400, 429 P.3d 776 (2018). Jury instructions are improper if they do not permit the defendant to argue her theory of the case, if they mislead the jury, or if they do not properly inform the jury of the applicable law. *State v. Vander Houwen*, 163 Wn.2d 25, 29, 177 P.3d 93 (2008). A trial court is under no obligation to give inaccurate or misleading instructions. *State v. Crittenden*, 146 Wn. App. 361, 369, 189 P.3d 849 (2008). In addition, it is not error to refuse to give a specific instruction when a more general instruction adequately explains the law and allows each party to argue its theory of the case. *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011).

Proximate cause is "a cause which in direct sequence, unbroken by any new, independent cause, produces the event complained of and without which the injury would not have happened." *State v. McAllister*, 60 Wn.

App. 654, 660, 806 P.2d 772 (1991). A defendant is not responsible for a death resulting from his or her driving if the death was caused by a superseding intervening event. *See State v. Rivas*, 126 Wn.2d 443, 453, 896 P.2d 57 (1995). “An intervening cause is a force that operates to produce harm *after* the defendant has committed the act or omission.” *State v. Frahm*, 193 Wn.2d 590, 600, 444 P.3d 595 (2019) (emphasis in original); *State v. Roggenkamp*, 115 Wn. App. 927, 945, 64 P.3d 92 (2003), *aff’d*, 153 Wn.2d 614 (2005). “Intervening is used in a time sense; it refers to later events.” *State v. Souther*, 100 Wn. App. 701, 710, 998 P.2d 350 (2000). Only an intervening act not reasonably foreseeable is a superseding cause sufficient to relieve defendant from culpability. *Frahm*, 193 Wn.2d at 600.

For example, in *Roggenkamp*, the defendant was driving on a residential county road that was lined with driveways and mailboxes with a posted speed limit of 35 miles per hour. 115 Wn. App. at 931. Roggenkamp entered the oncoming traffic lane to pass another vehicle and reached a speed of about 70 miles per hour. *Id.* at 933. Roggenkamp testified that he was passing the other vehicle, still in the oncoming traffic lane, he saw Chilcoate’s vehicle turn from an intersection into the same lane in which he was traveling. *Id.* at 933. Roggenkamp immediately braked, sending his vehicle into a skid. *Id.* Yet another vehicle, driven by Carpenter, pulled out of the same intersection behind Chilcoate. *Id.* Roggenkamp was unable to

stop before he collided with Carpenter's vehicle. *Id.* The collision seriously injured three individuals in Carpenter's vehicle and killed another. *Id.* Carpenter had a blood alcohol content level of 0.13. *Id.* at 934.

Division One held that Carpenter's actions were not a superseding cause of the accident because Roggenkamp could foresee that vehicles would turn onto a rural residential road such as the one driven on by Roggenkamp. *Id.* at 946. Even though Roggenkamp was locked in a brake-skid at the time of the collision, the *Roggenkamp* court reasoned that his recklessness was ongoing at the time of Carpenter's act of pulling into the intersection, making Carpenter's action at most a concurring cause. *Id.* at 947. In affirming Division One, our Supreme Court was "entirely in agreement" with the court of appeals' decision and reasoning. 153 Wn.2d at 630-31.

The only causal connection the State needs to prove in a vehicular homicide case "is the connection between the act of driving and the accident." *Rivas*, 126 Wn.2d at 451; *State v. Lopez*, 93 Wn. App. 619, 624, 970 P.2d 765 (1999). A driver's conduct is not the proximate cause if some other action was the *sole* cause of the harm. *Meekins*, 125 Wn. App. at 397. A concurring cause is not a defense to vehicular homicide. *Roggenkamp*, 153 Wn.2d at 631; *see also State v. Neher*, 52 Wn. App. 298, 301, 759 P.2d

475 (1988), *aff'd*, 112 Wn.2d 347 (1989) (whether another is a contributing cause does not affect a defendant's culpability).

Accordingly, when the victim's conduct is at most a concurring cause of the injuries, evidence of that conduct is irrelevant in prosecutions for both vehicular assault and vehicular homicide. *Roggenkamp*, 153 Wn.2d at 631. For example, in *State v. Hursh*, the defendant was charged with vehicular assault for colliding with the victim's car while driving under the influence. 77 Wn. App. 242, 243, 890 P.2d 1066 (1995), *abrogated on other grounds*, *Roggenkamp*, 153 Wn.2d at 622. The victim was not wearing a seatbelt and suffered extensive injuries. *Id.* The trial court excluded evidence of the victim's failure to wear a seatbelt as irrelevant, which was affirmed on appeal. The court concluded that "[e]ven though [the victim's] failure to wear a seatbelt may have contributed to the seriousness of his injuries, that act did not cause the accident and was not the sole cause of [his] injuries." *Id.* at 245. The victim's failure to use a seatbelt could not relieve the defendant of criminal liability. *Id.*

Similarly, in *Meekins*, the court held that evidence that the motorcyclist victim was not wearing a helmet was irrelevant in a vehicular homicide case because the lack of the helmet could not have been a proximate cause without the defendant's driving also being a proximate

cause. 125 Wn. App. at 401. The evidence had no tendency to prove that the lack of helmet was the sole or superseding proximate cause. *Id.*

In the instant case, the trial court's decision to reject the defendant's three proposed civil instructions was based on applicable law and the facts of the case. Although a trial court should consider proposed instructions, a trial court is under no obligation to give inaccurate or misleading instructions. *Crittenden*, 146 Wn. App. at 369; *State v. Brobak*, 47 Wn. App. 488, 493, 736 P.2d 288, *review denied*, 108 Wn.2d 1034 (1987). In the instant case, Vanderburgh argues that the proposed instructions would have allowed her to argue her theory of the case. The defendant's suggested instructions were erroneous and incomplete.

In *Brobak*, 47 Wn. App. at 491, the defendant proposed using several standard civil jury instructions in a vehicular homicide trial, including: WPIC 70.01 (General Duty – Driver or Pedestrian),²⁹ which is the same as Vanderburgh's proposed instruction D-18; an instruction defining the emergency doctrine,³⁰ which is conceptually similar to Vanderburgh's proposed instruction D-19; and WPIC 70.06 (Right to Assume Others Will Obey Laws – Streets or Highways),³¹ which is the same

²⁹ *Id.* at 492 n.1.

³⁰ *Id.* at 492 n.3.

³¹ *Id.* at 492 n.1.

as Vanderburgh's proposed instruction D-20. The *Brobak* trial court chose not to use these instructions. In finding no error, Division Two held:

We agree with Brobak that the rules of the road may have a legitimate place in a vehicular homicide trial. Here, some evidence supported Brobak's theory that the victim may have violated some of the rules of the road. However, ... a trial court is not obliged to give jury instructions that are misleading. Although the proposed instructions were not misstatements of the law, they were misleading because they did not inform the jury about the legal effect of a pedestrian's violation of the rules of the road. Specifically, Brobak's proposed instructions were inadequate in that they failed to instruct the jury (1) that contributory negligence is not a defense to vehicular homicide; and (2) that in order to avoid criminal liability, a defendant must show that a victim's contributory negligence was a supervening cause, without which the accident would not have occurred. Although a proximate cause instruction was given to the jury, this instruction was insufficient to explain to the jury the legal effect of a pedestrian's violation of the rules of the road. Accordingly, we hold that Brobak's proposed instructions were properly rejected by the trial court.

47 Wn. App. at 493-94 (internal citation and footnote omitted). Division Two further held that since ordinary negligence³² of a defendant is not an issue in a vehicular homicide prosecution, an instruction regarding the emergency doctrine was irrelevant. *Id.* at 494.

Vanderburgh's proposed instructions D-18, D-19, and D-20 all suffer from the same infirmities recognized by the *Brobak* court, which the defendant fails to discuss or distinguish. In addition, Vanderburgh's

³² The court observed that "ordinary negligence" differs from definitions of "disregard for the safety of others" and "recklessness." *Id.* at 494.

proposed instructions were incomplete and inaccurate in that they failed to advise the jury that a pedestrian within a cross-walk has the right to assume all drivers approaching will yield the right of way to the pedestrian,³³ that a driver approaching a cross-walk has a duty of continuous observation,³⁴ that a driver approaching an intersection shall stop and remain stopped to allow a pedestrian to cross a roadway when the pedestrian is upon the roadway,³⁵ and that a person shall not drive a vehicle at a speed greater than is reasonable and prudent under the circumstances.³⁶

Lastly, the defendant's contention that rejection of these instructions prevented her from arguing her theory of the case is without merit. The court instructed the jury on proximate cause, the conduct of another, and stated that there may be more than one proximate cause. CP 517. Albeit a factual impossibility in this case, the jury was further instructed that even if the defendant was a proximate cause of the collision, "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

³³ See *Jung v. York*, 75 Wn.2d 195, 449 P.2d 409 (1969); WPIC 70.03.

³⁴ See *Pudmaroff v. Allen*, 138 Wn.2d 55, 67, 977 P.2d 574 (1999); WPIC 70.03.01.

³⁵ RCW 46.61.235(1); WPIC 70.03.02.

³⁶ RCW 46.61.400; WPIC 70.05.

the intervening cause and is not a proximate cause of death.” CP 521, ¶ 2. Defense counsel was free to argue (and did) from the court’s instructions that Camyn’s alleged contributory negligence was a supervening cause without which Vanderburgh’s contributory negligence would not have caused the collision and death. CP 521. Consequently, there was no error.

D. THE DEFENDANT FAILS TO SHOW THAT HER COUNSEL OBJECTED TO THE TRIAL COURT’S PREFERENCE OF 30 MINUTES TO EACH SIDE FOR CLOSING ARGUMENT OR THAT HIS COUNSEL REQUESTED ADDITIONAL TIME FROM THE COURT.

Vanderburgh argues the trial court erred when it suggested both counsel take 30 minutes for closing argument. *See* Appellant’s Br. at 40-41.

Standard of review.

An appellate court reviews a trial court’s decision limiting the scope of closing argument for abuse of discretion. *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007). A trial court has wide discretion in determining the time allowable for argument. *State v. Willis*, 37 Wn.2d 274, 280, 223 P.2d 453 (1950). In *State v. Cecotti*, 31 Wn. App. 179, 183, 639 P.2d 243 (1982), the defendant argued that the trial court violated his Sixth Amendment rights by limiting his closing argument to 30 minutes. Division One disagreed, noting that the trial took less than three days and Cecotti did “not specifically identif[y] any issues he was not permitted to address” in

closing argument. *Id.* The court held the trial court did not abuse its discretion. *Id.*

Here, before closing argument, the State asked for the trial court's guidance regarding the length of closing arguments. RP 1057. The trial court responded, "I'm hoping that you can get done in half an hour." RP 1058. Defense counsel remained silent during that exchange. RP 1058. The trial court placed no limitation on the scope or length of counsels' closing arguments. The trial court merely suggested its preference for the time counsel should use during its summation. Moreover, defense counsel never lodged an objection or requested additional time; on appeal, Vanderburgh does not identify any issue or evidence left unaddressed in counsel's summation. Vanderburgh fails to establish the trial court abused its discretion.

E. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY.

The cumulative error doctrine permits reversal where the cumulative effect of repetitive errors compromises a person's right to a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Here, Vanderburgh does not prevail on any alleged error. There is no basis for this Court to apply the cumulative error doctrine. *See State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

F. THE TRIAL COURT DID NOT ERR WHEN IT CONSIDERED THE FACTS AND APPLICABLE LAW, AND DETERMINED THAT AN EXCEPTIONAL SENTENCE DOWNWARD WAS NOT WARRANTED.

Vanderburgh next appeals her standard range sentence. She claims the trial court erred when it found no basis to impose a downward departure based upon the defendant's claim that Camyn was the initiator of her own death or contributed to it. *See* Appellant's Br. at 45-49.

Standard of review.

With few exceptions, the defendant may not appeal a sentence within the standard range. RCW 9.94A.585(1); *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017); *State v. Friederich-Tibbets*, 123 Wn.2d 250, 252, 866 P.2d 1257 (1994). Review of the trial court's decision not to impose an exceptional sentence downward is limited to circumstances where "it refuses categorically to impose an exceptional sentence below the standard range ... or when it operates under the mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence." *McFarland*, 189 Wn.2d at 56. In these circumstances, a sentencing court abuses its discretion, and a reviewing court will reverse. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

If the sentencing court considered the facts and concluded that an exceptional sentence downward was factually or legally unsupported, the defendant may not appeal its ruling. *State v. Garcia-Martinez*, 88 Wn. App.

322, 330, 944 P.2d 1104 (1997). For example, in *State v. Cole*, 117 Wn. App. 870, 880-81, 73 P.3d 411 (2003), the defendant unsuccessfully requested a below-range sentence and then challenged the court's refusal to impose such a sentence. The *Cole* court held the defendant could not appeal from a standard range sentence where the sentencing court considered the claimed mitigating factors, heard extensive argument on the subject, and then exercised its discretion by denying the request. *Id.* at 881. Similarly, in *Garcia-Martinez*, the court held that a sentencing court who has considered the facts and concluded no basis exists for an exceptional sentence has exercised its discretion and the defendant may not appeal that ruling. 88 Wn. App. at 330.

At sentencing in the present case, the defense requested that the court impose a downward departure from the standard range based upon the mitigating circumstance that: “[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” *See* RP 29-34.³⁷ Ultimately, the trial court ruled:

I believe that the Washington State Sentencing Act puts the court and the courts in a very narrow window and requires certain sentences that include those that have been previously addressed by both sides in this case, a 78-month minimum and a 102-month maximum. In looking at the cases and in looking at the statute, I'm unable to find [a] mitigating factor in this case. I reviewed the cases

³⁷ Wilkins, RP 1/11/18.

addressing the initiation and/or willing participant, aggressor, and I just don't think that those cases equate to the facts in this case.

...

And so based on the evidence -- and, again, the evidence in this case includes the idea that Ms. Vanderburgh worked a shift at the Monkey Bar and sat down and had a "shifter," a drink at the end of her work shift, and then left. My recollection is somewhere in the hour of 6:30 and that this accident occurred around 8:03, at which time her blood alcohol was higher than one would expect from one drink followed by an hour and a half. And so I think that the conclusion is that -- or at least the -- an inference from those facts is that there may have been some other drinking between the departure from the Monkey Bar and the time of this accident, which the evidence indicated was she was leaving from her home. So it's quite possible that she went home.

I agree with the state that this conviction is not evidence of Ms. Vanderburgh being a bad person. Unfortunately it does indicate that there was a bad choice made and that combined with tragically bad luck involving not only the collision that she caused but the fact that Ms. Camyn was in front of Mr. Nesdaahl's truck.

Unfortunately bad luck is not a mitigating factor, as I see it, under the statute. And so 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. And so that's my decision with regard to mitigating factors.

RP 37-39.

RCW 9.94A.535 requires a substantial and compelling reason for an exceptional sentence downward. Under RCW 9.94A.535(1), a court may impose an exceptional sentence below the standard range if the court finds that mitigating circumstances are established by a preponderance of the evidence. Mitigating circumstances may be found if, "[t]o a significant

degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.” RCW 9.94A.535(1)(a). The “willing participant” factor is applicable where both the defendant and the victim engaged in the conduct that caused the offense to occur. *State v. Hinds*, 85 Wn. App. 474, 481, 936 P.2d 1135 (1997).

Hinds involved a prosecution for vehicular homicide based upon reckless driving behavior. Hinds was 18-years-old, had driven the victim’s car recklessly after drinking, resulting in the death of the victim, who was 44-years-old. *Id.* at 476. In addition to permitting Hinds to drive her car, the victim also had supplied alcohol to the defendant, an underage driver. *Id.* Division One concluded that the mitigating factor could apply to these facts if there was a link between the victim’s conduct and the defendant’s recklessness. *Id.* at 482. The court also restated the test as requiring a finding that “both the victim and the defendant caused the offense to occur.” *Id.* at 483. The court analogized to proximate causation and determined that if the victim’s “conduct was a but-for and legal cause of Hinds’s reckless driving, she significantly participated in the offense.” *Id.* at 483-84. The case was remanded for the trial judge to clarify whether there was causal link between the victim’s behavior and the defendant’s conduct. *Id.* at 487.

Here, the sentencing court considered and found the defendant’s argument unpersuasive that Camyn was a willing participant or an initiator

of her own death, based upon the court's review of the facts of the case and the law. In that regard, Camyn did not cause or contribute in any manner to the defendant's decisions to drink alcohol to the point of intoxication, to subsequently drive on a public street, or to follow Nesdahl's vehicle too closely at an unsafe speed, which prohibited any opportunity for Vanderburgh to safely stop at a controlled intersection for a foreseeable event (e.g., a pedestrian in the cross-walk). With that said, there is no link between Camyn's conduct and Vanderburgh's intoxication and recklessness. Accordingly, it cannot be reasonably concluded that Camyn *willingly* participated, to any degree, let alone *to a significant degree*, in the commission of the vehicular homicide or that Camyn initiated or participated in her own death. Such a claim is nonsensical. The trial court did not err when it rejected "victim participation" as a mitigating factor.

Regarding the defendant's argument that the trial court failed to consider that Camyn was "partially at fault" regarding her request for an exceptional sentence, that argument was not advanced in the trial court and is raised for the first time on review. *See* Appellant's Br. at 48-49. The defendant does not argue that this was a manifest error affecting a constitutional right that falls within the RAP 2.5(a)(3) exception to the general rule requiring preservation of issues for appeal. Accordingly, this court should decline to consider this argument. RAP 2.5(a); *State v.*

Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). If this Court does consider this assertion, it is without merit.

The Sentencing Reform Act lists several nonexclusive mitigating circumstances under RCW 9.94A.535(1), which the trial court can consider when determining whether to impose a downward departure. That list does not provide for contributory negligence of the victim in a vehicular homicide as a basis for a downward departure from the standard sentencing range. Moreover, the defendant provides no authority that contributory negligence can be considered as a substantial and compelling reason to order an exceptional sentence downward, especially since contributory negligence is not a defense to vehicular homicide. Moreover, even if Camyn was contributorily negligent, it does not reduce the jury's finding that the defendant was at least a proximate cause of Camyn's death. Therefore, whether the victim was contributorily negligent is irrelevant to the sentencing court's determination. The fact that an asserted mitigating circumstance may have been present does not obligate the trial court to impose a downward departure from the presumptive sentence. There was no error.

G. THIS COURT SHOULD NOT CONSIDER VANDERBURGH'S EQUAL PROTECTION ARGUMENT RAISED FOR THE FIRST TIME ON APPEAL.

Vanderburgh argues an equal protection violation exists between recidivists whose prior convictions are treated as an aggravator in terms of adding an enhancement to a standard range sentence for vehicular homicide and other recidivists for whom a prior conviction is used as an element of a crime to elevate it from a gross misdemeanor to a felony driving offense. She argues such a distinction is arbitrary. In effect, Vanderburgh argues for identical conduct – there is no rational basis for requiring the State to prove prior convictions to a jury when they are an element of the crime, but allowing judges to find prior convictions by a preponderance of the evidence when used as a sentence enhancement. This claim has no merit.

1. Standard of review.

An appellate court reviews an allegation of a constitutional violation de novo. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013).

a. Felony driving while under the influence.

Under RCW 46.61.502(6)(a), driving under the influence is elevated from a gross misdemeanor to a felony if the defendant has “three or more prior offenses within ten years as defined in RCW 46.61.5055.” Under this statute, the trial court initially determines the admissibility of the prior convictions, and a jury then decides whether the essential elements (prior

DUI or reduced offenses defined under RCW 46.61.5055) have been proved beyond a reasonable doubt. *See State v. Wu*, --Wn.2d--, 453 P.3d 975, 980 (2019).

b. Vehicular homicide.

Under RCW 9.94A.533(7), upon a conviction of vehicular homicide, an additional two years shall be added to the sentence for each prior offense,³⁸ as defined in RCW 46.61.5055 (DUI or reduced offenses).

RCW 9.94A.533(7) provides, in pertinent part:

An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

RCW 9.94A.533(7). The State must establish the defendant has a prior drug or alcohol related conviction, as defined in RCW 46.61.5055, by a preponderance of the evidence. *In re Adolph*, 170 Wn.2d 556, 569, 243 P.3d 540 (2010).

2. Failure to raise an equal protection claim in the trial court.

Under RAP 2.5(a), an appellate court may decline review of an unpreserved error unless the asserted error is *both* “manifest” and “truly of constitutional dimension.” *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756

³⁸ At sentencing in the present case, Vanderburgh had a prior charge of driving under the influence, RCW 46.61.502, which was reduced to first degree negligent driving. CP 633.

(2009), *as corrected* (Jan. 21, 2010). An error is of constitutional magnitude only if it deprives the defendant of an actual constitutional guaranty. *Id.* at 99. To prove manifest error, “[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). “[I]t is this showing of actual prejudice that makes the error ‘manifest’, allowing appellate review.” *Id.* (citing *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). Alleged constitutional errors are “treated specially because they often result in serious injustice to the accused.” *State v. Lamar*, 180 Wn.2d 576, 582, 327 P.3d 46 (2014).

The rule facilitates appellate review by ensuring that a complete record of the issues will be available and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he or she had no opportunity to address. *State v. Strine*, 176 Wn.2d 742, 749-50, 293 P.2d 1177 (2013). “[T]he exception is not intended as a method of securing a new trial whenever there is a constitutional issue that was not raised at trial.” *Lamar*, 180 Wn.2d at 582.

[T]o qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected his or her rights at trial. The defendant must make a plausible showing that the error resulted in actual prejudice,

which means that the claimed error had practical and identifiable consequences in the trial.

Id. at 583.

“[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *O’Hara*, 167 Wn.2d at 100. “If the trial court could not have foreseen the potential error,” the alleged error is not manifest. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012), *abrogated on other grounds by State v. Schierman*, 192 Wn.2d 577, 415 P.3d 1063 (2018).

A jury must determine any fact, other than the fact of a prior conviction, which increases the penalty beyond the standard range. *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). RCW 9.94A.500(1) requires the State to establish prior convictions at sentencing by a preponderance of the evidence. This burden has been approved by our Supreme Court in *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719, (1986), *amended*, 718 P.2d 796 (1986), where the Court held that the use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence. *See also State v. Crow*, 8 Wn. App. 2d 480, 438 P.3d 541, *review denied*, 193 Wn.2d 1038 (2019)

(this Court found the State has the burden to prove prior convictions at sentencing by a preponderance of the evidence); *State v. Olsen*, 180 Wn.2d 468, 473, 325 P.3d 187 (2014) (the existence of a prior conviction for sentencing purposes need not be presented to a jury and proved beyond a reasonable doubt); *see also State v. Wheeler*, 145 Wn.2d 116, 117, 34 P.3d 799 (2001), *cert. denied*, 535 U.S. 996 (2002).³⁹

By contrast, proof of the existence of prior convictions that elevates a DUI offense from a misdemeanor to a felony is an essential element that the State must prove beyond a reasonable doubt. *State v. Chambers*, 157 Wn. App. 465, 237 P.3d 352 (2010), *review denied*, 170 Wn.2d 1031 (2011). The different burdens of proof reflect the proper statutory and constitutional distinction between proof by a preponderance of the evidence for a prior DUI related conviction requiring a mandatory increase in a vehicular homicide sentence and the recognition that prior convictions, as an element of felony DUI, require the burden of proof to be beyond a reasonable doubt applicable in all criminal cases. These are different criminal proceedings affecting different classes of people who are not similarly situated (i.e., “[t]o establish a similar situation, there must be near

³⁹ The Washington Supreme Court “has repeatedly rejected” the argument that due process requires the fact of a prior conviction to be submitted to a jury and proved beyond reasonable doubt for sentencing purposes. *State v. Thieffault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007).

identical participation in the same set of criminal circumstances.” *State v. Rushing*, 77 Wn. App. 356, 359–60, 890 P.2d 1077 (1995) (internal quotations omitted). Where persons of different classes are treated differently, there is no equal protection violation. *Forbes v. Seattle*, 113 Wn.2d 929, 943, 785 P.2d 431 (1990); *Matter of Galvez*, 79 Wn. App. 655, 659, 904 P.2d 790 (1995).

Vanderburgh fails to cite to any authority that she was entitled to a “reasonable doubt” standard at sentencing. Since there is no requirement that the State establish a prior conviction at sentencing beyond a reasonable doubt, the trial court followed the proper constitutional and statutory procedures for determining Vanderburgh’s prior conviction for imposition of the enhancement after her vehicular homicide conviction. She cannot establish any error, let alone manifest constitutional error; nor is any alleged sentencing error practical and identifiable such that the trial court could have foreseen the alleged equal protection violation. This Court should decline review of Vanderburgh’s asserted equal protection violation argument raised for the first time on appeal.

3. Vanderburgh fails to argue or cite to any authority that she is similarly situated to those individuals charged with felony DUI, a necessary first step in an Equal Protection claim.

Under the Equal Protection Clause of the Fourteenth Amendment, as well as article I, section 12 of the Washington Constitution, persons

similarly situated with respect to the legitimate purpose of the law must receive like treatment. *See State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); *State v. Williams*, 156 Wn. App. 482, 496, 234 P.3d 1174 (2010), *review denied*, 170 Wn.2d 1011 (2010).

Vanderburgh fails to provide any argument or citation to authority that she is similarly situated to defendants convicted of felony DUI. Applying equal protection principles, a defendant claiming a violation of equal protection must first establish that he or she “is similarly situated with another defendant by virtue of near identical participation in the same set of criminal circumstances, then the defendant will have established a class of which he or she is a member. Only after membership in such a class is established will equal protection scrutiny be invoked.” *State v. Handley*, 115 Wn.2d 275, 290, 796 P.2d 1266 (1990);⁴⁰ *see also State v. Veazie*, 123 Wn. App. 392, 403, 98 P.3d 100 (2004) (this Court rejected an equal protection claim because the defendant failed to argue he was a member of a class who was treated differently).

Vanderburgh’s equal protection claim is not properly before this Court because she fails to present any argument or authorities regarding her

⁴⁰ In *Handley*, the court declined to reach the defendant’s equal protection claim because he failed to establish that he and his codefendant were similarly situated and treated differently. *Id.* at 291-92.

class or membership status as it relates to those individuals charged with felony DUI, which is the first step necessary when analyzing an equal protection claim. Consequently, Vanderburgh fails to show that a constitutional violation occurred. As stated by our high court: “Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: ‘naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.’” *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082, 1084 (1992) (internal quotations modified).

Furthermore RAP 10.3(a)(6) directs each party to supply in their briefing, “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” This Court does not consider “conclusory arguments that are unsupported by citation to authority.” *Brownfield v. City of Yakima*, 178 Wn. App. 850, 875-76, 316 P.3d 520 (2014); *see also Matter of D.J.S.*, -- Wn. App. 2d --, 456 P.3d 820, 842 (2020) (“[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration”). By her lack of citation to authority or reasoned argument, Vanderburgh fails to establish she is similarly situated to a class of individuals who committed felony DUI.

4. Even if this Court determines that Vanderburgh is in the same class of individuals charged with felony DUI, her equal protection claim still fails.

Vanderburgh argues there is an arbitrary legislative classification regarding the treatment of prior convictions. Even if Vanderburgh made an argument that she was in a class of offenders similarly situated to those offenders charged with felony DUI, her claim would still fail. Recidivist criminals are not a suspect class. *Manussier*, 129 Wn.2d at 673. Moreover, “[w]hen a physical liberty interest alone is involved in a statutory classification,” an appellate court applies the rational basis test. *Id.* at 673. Under that test, “a legislative classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” *In re Det. of Turay*, 139 Wn.2d 379, 410, 986 P.2d 790 (1999), *as amended on denial of reconsideration* (Dec. 22, 1999) (internal quotations omitted). The burden is on the party challenging the classification to show that it is purely arbitrary. *State v. Thorne*, 129 Wn.2d 736, 771, 921 P.2d 514 (1996),⁴¹ *abrogated on other grounds, Blakely*, 542 U.S. 296 (2004).

⁴¹ In a headnote in her brief, Vanderburgh transiently claims a jury rather than a court should have determined “the fact underlying the enhancement to the jury.” See Appellant’s Br. at 50. Our Supreme Court has rejected the argument that a sentencing enhancement based upon recidivism must be proved by a jury beyond a reasonable doubt. *State v. Smith*, 150 Wn.2d 135, 143, 75 P.3d 934 (2003); *Wheeler*, 145 Wn.2d at 123-24. The question of whether a conviction is a “prior offense” for purposes of the vehicular homicide sentencing enhancement should be similarly analyzed and rejected.

It is within the legislature's discretion to define what facts constitute elements of the crime or a sentencing enhancement; it is also within the legislature's prerogative to define "past crimes as sentencing factors rather than elements of a charge." *Thorne*, 129 Wn.2d at 780. Consequently, the legislature has discretion to decide what the public interest demands and what methods are necessary to promote that interest. *Id.* at 771. The imposition of greater punishment based on the nature of the crime and on the recidivist nature of the perpetrator is recognized as a legitimate sentencing principle. *See, e.g., Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

A statute is presumed constitutional unless it appears unconstitutional beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 306-07, 745 P.2d 479 (1987). The party challenging the constitutionality of the statute has the burden to prove it is unconstitutional. *State v. Shawn P.*, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993). "Whenever possible, it is the duty of th[e] court to construe a statute so as to uphold its constitutionality." *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985). In that regard, "[t]he Legislature has extremely broad, almost plenary authority to define crimes." *State v. Danis*, 64 Wn. App. 814, 820, 826 P.2d 1096 (1992). Lastly, a mere demonstration of inequality is not enough; the Constitution

does not require identical treatment. *See McQueary v. Blodgett*, 924 F.2d 829, 834-35 (9th Cir. 1991).

Regarding Vanderburgh's argument, it is analogous to the same arguments that have been rejected under the Persistent Offender Accountability Act (POAA). Courts have routinely held that there is a rational basis to distinguish between a recidivist charged with a serious felony and a person whose conduct is felonious only because of a prior conviction for a similar offense. For instance, in *Williams*, 156 Wn. App. 482, the defendant was convicted of two counts of first degree rape and one count of second degree assault with sexual motivation. *Id.* at 482. The defendant was sentenced to life imprisonment as a persistent offender because he had a prior rape conviction. *Id.* at 487. On appeal, the defendant argued that his equal protection rights were violated because the POAA allows the State to prove the existence of prior convictions to a judge by a preponderance of the evidence, while in cases where prior convictions are considered an "element" of a crime, those convictions must be proven to a jury beyond a reasonable doubt. *Id.* at 496. The defendant contended "there is no rational basis for classifying a prior crime as an element to be proved beyond a reasonable doubt in some circumstances and as an 'aggravator' to be proved with a preponderance of the evidence in other circumstances." *Id.* at 497. Relying on our Supreme Court's rejection of similar arguments

under the POAA and “a long history of similar distinctions for prior convictions,” this Court found that “proof of [the defendant’s] prior convictions by a preponderance of the evidence is not entirely irrelevant to the purpose of the persistent offender statutes. [The defendant’s] sentence is rationally related to the purpose of the POAA, and is not, then a violation of equal protection.” *Id.* at 498.

Similarly, in *State v. Langstead*, 155 Wn. App. 448, 456-57, 228 P.3d 799, *review denied*, 170 Wn.2d 1009 (2010), Division One addressed essentially the same argument asserted by Vanderburgh. The court of appeals rejected the defendant’s equal protection argument, distinguishing between offenders who engage in minor criminal misconduct more than once and offenders with a criminal record of more than two felonies. *Id.* at 456. The court recognized a rational distinction between recidivists whose conduct is inherently culpable enough to incur a felony sanction and persons whose conduct is felonious only when preceded by prior convictions of the same or a similar nature. *Id.* at 456-57. The court concluded that the sentencing scheme which permitted the state to prove the existence of prior convictions for purposes of the POAA to a judge under a preponderance of the evidence standard rather than to a jury under a beyond a reasonable doubt standard did not violate the Equal Protection Clause. *See also State v. McKague*, 159 Wn. App. 489, 517-19, 246 P.3d 558, *aff’d but criticized on*

other grounds, 172 Wn.2d 802 (2011) (Division Two) (the State has a rational basis for treating prior convictions under the POAA differently than prior convictions that are elements of a crime, and that having the trial court determine the existence of strike offenses does not violate equal protection).

Even if Vanderburgh could establish she was in the same class as those individuals charged with a felony DUI, she would fail to establish an equal protection violation. There are reasonable grounds for distinguishing between those class of offenders who are charged with a felony based solely upon prior alcohol or related offenses, where the burden of proof is beyond a reasonable doubt, and those different class of offenders whose sentence is enhanced because of a prior alcohol or drug related conviction, where our high court has consistently held the burden of proof is a preponderance of the evidence. Vanderburgh fails to demonstrate beyond a reasonable doubt that the burden of proof assigned to establish a prior conviction for a sentence enhancement after a vehicular homicide conviction is arbitrary. There is no error.

IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 17 day of March, 2020.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

MEEGAN VANDERBURGH,

Appellant.

NO. 35868-2-III

CERTIFICATE OF
SERVICE

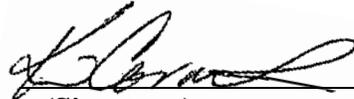
I certify under penalty of perjury under the laws of the State of Washington, that on March 17, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

March 17, 2020 - 8:41 AM

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